ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 56. SKIMMERS

1 TAC §§56.1 - 56.6

The Office of the Attorney General ("OAG") adopts new rules, §§56.1 - 56.6, relating to best practices for motor fuel merchants to prevent, detect, and report the installation of payment card skimmers on their motor fuel dispensers. Sections 56.1 - 56.6 are adopted without changes to the proposed text published in the November 6, 2020, issue of the *Texas Register* (45 TexReg 7801). The rules will not be republished and are effective April 1, 2021.

BACKGROUND AND REASONED JUSTIFICATION

The OAG adopts these rules in order to implement §1 of H.B. 2945 enacted in 2019 by the 86th Regular Session of the Texas Legislature. Specifically, §1 of H.B. 2945, created a new Chapter 607 of the Texas Bus. & Com. Code related to payment card skimmers on motor fuel dispensers. Chapter 607, which took effect September 1, 2019, requires motor fuel merchants to implement procedures to prevent, detect, and report the installation of skimmers on their unattended motor fuel dispensers. The statute further directs the OAG to adopt rules to establish practices for merchants to use to comply with those provisions. In accordance with §607.052 of the Texas Bus. & Com. Code, in drafting the rules, the OAG considered emerging technology, compliance costs to merchants, and any impact the policies and procedures may have on consumers.

Section 56.1 incorporates definitions from Chapter 607 of Texas Bus. & Com. Code and adds definitions for other terms used in the rules. The definitions are intended to add clarity and specificity to the requirements of the rules.

Section 56.2 requires motor fuel merchants to implement and maintain written policies and procedures for complying with the rules and to properly train employees to ensure they understand and will comply with those policies and procedures. Subsection (a) requires any merchant that has a fuel dispenser with an unattended payment terminal to implement and maintain written policies and procedures, consistent with the mandates of Chapter 607 of the Texas Bus. & Com. Code. The rule requires the policies and procedures to include a plan of action that the merchant will follow upon the discovery of a skimmer. Subsection (b) requires merchants to conduct training for those employees who are involved in any capacity in the merchant's fuel operations to ensure that they understand the policies and procedures as well as how to comply with them. The rule also requires merchants to include in the training background information regarding skimmers and the harm that such skimmers can cause to both customers and to the merchant. Understanding the harms posed by skimmers will help employees to understand the importance of complying with the merchant's policies and procedures. The rule also requires training on recognizing suspicious activity and warning signs so employees can effectively prevent and detect skimmers.

Section 56.3 sets out required practices for all merchants that have a motor fuel dispenser with an unattended payment terminal. Paragraph (1) requires merchants to implement and maintain the policies, procedures, and training detailed in §56.2. Paragraph (2) requires merchants to affix to or install on each door or panel that provides access to an interior portion of the dispenser from which the payment terminal or any electronic component of the payment terminal may be accessed, a lock requiring a key unique to the merchant's place of business. One characteristic that makes fuel dispensers attractive to criminals is that they have historically been manufactured and installed to be accessible with a universal key. Criminals can therefore open many motor fuel dispensers using just a few keys. The rule requires merchants to utilize locks with unique keys, while providing merchants the flexibility to use the same key on all dispensers at the same business location. A merchant that has multiple business locations, however, must use a different key for each location, in part to ensure that if a key is compromised at one location, it would not affect the security of dispensers at other locations.

Paragraph (3) of §56.3 requires merchants to maintain a log of all persons who do work on the forecourt. Requiring all persons who are working on the forecourt to check in with the merchant and sign a maintenance log will allow employees to quickly recognize when unauthorized persons are accessing the fuel dispensers.

Paragraph (4) of §56.3 requires merchants to use tamper-evident security labels to secure every opening that provides access to an interior portion of a dispenser from which a payment terminal or any electronic component of a payment terminal may be accessed. Using tamper-evident security labels will allow merchants, as well as consumers, to see when the pump has been opened without authorization. The rule requires merchants to use numbered security labels so that the merchant can confirm that the number on the security label on the dispenser matches the number on the label that the merchant put on the dispenser.

Paragraph (5) of §56.3 requires merchants to conduct a thorough inspection of the exterior of each fuel dispenser at least once per day. During this inspection, merchants are required to conduct a visual inspection of the dispenser, looking for signs that a skimmer has been installed. Today, most skimmers are installed inside the pump and are not visible from the outside. Merchants are therefore required to look for signs that the dis-

penser has been opened, including scratches, pry marks, drilled holes, and other signs that the dispenser has been tampered with. In addition, as it becomes harder to get into the dispenser, and as the technology inside the dispenser gets harder to compromise, it is likely that criminals will revert to placing skimmers on the outside of the dispenser. Therefore, regardless of how diligent a merchant is and how well they protect the inside of the dispenser, it remains vital that the merchant continue to inspect the exterior of the dispenser for skimmers, shimmers, deep-insert skimmers, overlay skimmers, and other items that may have been installed on the exterior of the dispenser. It is also critical that every time the merchant does an inspection, the merchant inspects the tamper-evident security labels, if used, to confirm that the number on the label matches the merchant's log and that the label has not been cut or tampered with.

Criminals sometimes resort to extreme measures to access fuel dispensers. For example, there have been reports that criminals have drilled a hole in a dispenser door to install a skimmer and then covered the hole with a sticker or a leaflet holder. The rule therefore requires merchants to maintain a photograph of its dispensers that employees can review and compare to the dispenser the employee is inspecting. The rule provides merchants discretion regarding how and where to maintain the photograph. Some may choose to print out the photograph and post it on a bulletin board behind the counter, while others may keep a copy in their written policies and procedures, and others may maintain the photograph electronically. The rule gives merchants the flexibility to determine the best way to maintain the photograph, so long as the photograph is easily accessible to employees conducting the dispenser inspections. Moreover, to the extent that all dispensers are substantially similar in appearance (e.g., have the same stickers, leaflets, etc. in essentially the same position on each dispenser), the merchant only needs to maintain a photograph of a single dispenser.

Many experts recommend inspections even more frequently than daily, such as three times a day or every shift change. More frequent inspections allow for faster detection of skimmers. In addition, some criminals install skimmers for less than 24 hours, in order to avoid detection. Nevertheless, in order to limit the burden on small businesses and to give merchants sufficient flexibility, the rule only requires that merchants conduct such inspections at least once per day. The OAG encourages merchants to conduct inspections more frequently than once per day. The OAG cautions, however, that the quality of the inspections is more important than the quantity. The OAG believes that less frequent, but more thorough inspections are more likely to detect skimmers than inspections that are performed frequently, but less thoroughly.

Paragraph (5) of §56.3 further requires merchants to maintain a log of all inspections, documenting the date and time of the inspection as well as the name of the person who conducted the inspection. Although not required by the rule, the OAG recommends that inspections be conducted by different employees at least periodically. For example, if a merchant conducts more than one inspection per day, it is recommended that the inspections be conducted by at least two different employees. If a merchant only conducts inspections once a day, it is recommended that no single employee conduct inspections on consecutive days. This will help limit the likelihood that an employee will become careless in the inspection process and will help limit the risk that the person conducting the inspections is complicit with persons installing skimmers. However, because some small businesses may have a limited number of employees, the rule does not require that the inspections be conducted by multiple employees.

If an inspection reveals anything suspicious, signs that a dispenser has been opened or tampered with, or evidence that a skimmer has been installed in or on a dispenser, subparagraph (5)(F) of §56.3 requires the merchant to disable the dispenser and to take appropriate steps to ensure that customers do not try to use the payment terminal that may include a skimmer. The merchant must keep the dispenser disabled until it has been manually inspected by a person trained in the identification and detection of skimmers. As with the dispenser's exterior, the rule requires the merchant to maintain a photograph of the interior of its dispenser that the person conducting an inspection may use to help determine whether any foreign object has been installed. And as with the photograph of the exterior, the rule provides merchants with discretion regarding how the merchant will maintain the photograph of the interior and only requires one photograph for all substantially similar dispensers.

In order to minimize the impact of the rule on small businesses in remote areas of the state, where it may be difficult or expensive to have a service technician travel to the merchant's place of business, the rule gives merchants discretion regarding how to comply with the rule. The manual inspection may be conducted by a service technician or an employee, so long as the person has been trained in the detection of skimmers. Moreover, the rule does not specify how, where, or by whom such training must occur. The training does not have to be a formal class. It could be sufficient to have a service technician or experienced law enforcement officer come to the merchant's place of business and train employees on how to identify and detect skimmers on the merchant's own dispensers. It may be sufficient thereafter for experienced employees to train new employees.

In addition, paragraph (7) provides that if shutting down a dispenser would cause a merchant hardship or substantially disrupt the merchant's business, the merchant need not completely shut down the dispenser, but can instead disable the payment terminal and take steps to prevent consumers from trying to use the payment terminal. The OAG has provided this flexibility to accommodate small businesses that may have a small number of dispensers. Instead of completely disabling the dispenser, resulting in lost business and potentially negatively impacting consumers, the merchant may cover the payment card slot and direct customers to pay inside the merchant's place of business.

Paragraph (6) of §56.3 requires merchants to monitor its dispensers and payment terminals for high levels of invalid payment card read errors, dispenser offline messages, or other indications of problems accepting payment cards at the pump. These could be signs that a skimmer has been installed on the dispenser. The merchant may also be contacted by a card brand, a payment processor, a financial institution, a law enforcement officer, or a representative of the Center, informing the merchant that the merchant's place of business appears to be a common point of purchase for fraudulent activity. If the merchant detects suspicious activity or if the merchant is notified by someone else that it may be a common point of purchase for fraudulent activity, the rule requires the merchant to take reasonable steps to investigate whether a skimmer has been installed on one of its motor fuel dispensers. If a merchant receives or observes credible evidence that a skimmer has been installed on a dispenser, the merchant must disable the affected dispenser until a person trained in the detection of skimmers has conducted a manual inspection of the dispenser. Just as under subparagraph (5)(F),

paragraph (6) gives the merchant discretion regarding whether to have the dispenser inspected by a service technician or an employee who has been trained in the identification and detection of skimmers. Paragraph (7) also gives the merchant the ability to just disable the payment terminal and have customers pay inside if shutting down the dispenser would cause a hardship or substantially disrupt the merchant's business. Paragraph (8) requires the merchant to maintain a log of all inspections conducted pursuant to subparagraph (5)(F) or paragraph (6).

Section 56.4 sets out practices a merchant must follow if the merchant's place of business meets the criteria to be a medium-risk place of business. Under the rule, whether a merchant's place of business is considered a medium-risk place of business is determined on a sliding scale based on the number of dispensers the merchant's place of business has and the number of skimmer breaches it has suffered in a 24-month period. For locations with ten or fewer dispensers, the merchant's place of business is considered a medium-risk place of business if it has suffered a skimmer breach on more than two separate occasions in a 24-month period. For locations with eleven to twenty dispensers, the merchant's place of business is considered a medium-risk place of business if it has suffered a skimmer breach on more than four separate occasions in a 24-month period. For locations with more than twenty dispensers, the merchant's place of business is considered a medium-risk place of business if it has suffered a skimmer breach on more than seven separate occasions in a 24-month period.

Paragraph (1) of §56.4 requires merchants whose place of business meets the criteria for a medium-risk place of business to implement a program to electronically monitor their dispensers at that place of business. The merchant must implement the electronic monitoring program as soon as practical, but not later than ninety days after the date on which the place of business meets the definition of a medium-risk place of business. In particular, the merchant must install on each dispenser an electronic monitoring device that will detect when the dispenser is opened without authorization, immediately disabling the dispenser and either sounding an audible alarm or sending a notification to the merchant. If the device sounds an audible alarm, the alarm must continue to emit an audible alert at least every 30 seconds until the merchant deactivates the alarm. If the device sends a notification, the notification must be sent to the merchant's owner, an executive of the merchant, or to a supervisor that the owner or executive has designated. This requirement ensures that notification goes to someone with sufficient authority to implement an appropriate response. However, this requirement does not exclude the possibility that notification could also be sent to a cashier or other employee. The rule also requires that the electronic monitoring device create a log of every event that occurs on the dispenser. For example, the device must log every time that it is armed or disarmed and every time that it is triggered. The merchant must monitor the log for suspicious behavior, like the alarm being disarmed at inappropriate times. After the device has been triggered and the dispenser disabled, the dispenser must remain inoperable until it has been inspected by a person properly trained in the identification and detection of skimmers. The rule gives the merchant discretion to have the inspection conducted by a service technician or an employee, so long as the inspector is trained in the identification and detection of skimmers.

Pursuant to §56.4, merchants whose place of business is a medium-risk place of business are required to install electronic monitoring devices only on dispensers that are not EMV compliant. Instead of installing electronic monitoring devices on its dispensers, a merchant may decide to upgrade the payment terminals on its dispensers to be EMV compliant.

A merchant who installs an electronic monitoring device or upgrades to EMV compliant dispensers is not required to use tamper-evident security labels pursuant to paragraph (4) of §56.3.

For merchants whose place of business is a medium-risk place of business, paragraph (2) of §56.4 requires the merchant to have the interior of each dispenser inspected by a person trained in the identification and detection of skimmers at least once a month. Paragraph (3) requires the merchant to maintain a log of all inspections required by §56.4 and to retain such logs for a minimum of 12 months.

Section 56.5 sets out the practices a merchant must follow if the place of business meets the criteria to be a high-risk place of business. Under the rule, whether a merchant's place of business is considered a high-risk place of business is determined on a sliding scale based on the number of dispensers the merchant's place of business has and the number of skimmer breaches it has suffered in a 24-month period. For locations with ten or fewer dispensers, the merchant's place of business is considered a high-risk place of business if it has suffered a skimmer breach on more than four separate occasions in a 24-month period. For locations with eleven to twenty dispensers, the merchant's place of business is considered a high-risk place of business if it has suffered a skimmer breach on more than seven separate occasions in a 24-month period. For locations with more than twenty dispensers, the merchant's place of business is considered a high-risk place of business if it has suffered a skimmer breach on more than eleven separate occasions in a 24-month period.

Paragraph (1) of §56.5 requires merchants whose place of business meets the criteria for a high-risk place of business to install, no later than 90 days after it meets such criteria, and maintain high resolution video cameras. The cameras must be positioned in such a way that they will capture both images of license plates of vehicles entering and exiting the dispenser area, and images of persons pumping gas at the dispenser. The rule requires all such images to be captured at a minimum resolution of 60 pixels per foot. Requiring a minimum resolution of 60 pixels per foot is likely to ensure that the images are of sufficient clarity to provide beneficial evidence in related law enforcement investigations. In order to ensure that this video footage is available for any relevant law enforcement matter, the rule requires merchants to retain the video footage for 31 days. In addition to providing valuable evidence, the mere presence of the video cameras will provide a strong deterrence against the installation of skimmers.

Paragraph (2) of §56.5 requires merchants whose place of business meets the criteria for a high-risk place of business to install compliant lighting no later than 90 days after it meets such criteria and to maintain the lighting on the forecourt. In particular, the rule requires merchants to install lighting around the dispensers and under any canopy such that the minimum horizontal illuminance at grade level is 10 footcandles. Although this is a very modest level of required lighting, it should serve the purposes of the rule, which include providing enough light for video surveillance cameras and to provide enough light so that persons accessing fuel dispensers can be clearly seen by others, including other vehicles passing by. For marketing and promotional reasons, many, if not most, merchants already maintain lighting that meets the minimum required by the rule.

Section 56.6 sets out practices that a merchant who discovers a skimmer on one of its dispensers must take. The rule prohibits the merchant from touching the skimmer in order to avoid compromising or contaminating any physical evidence that a criminal may have left. The merchant is required to immediately disable both sides of the fuel dispenser, notify law enforcement, and take steps to protect the dispenser from tampering until law enforcement arrives. The merchant is also required to notify the Department within 24 hours. The rule also requires the merchant to run a receipt for the last dispenser transaction on the compromised dispenser, and to preserve all video surveillance and logs related to the compromised dispenser. The rule also requires the merchant to cooperate with law enforcement, the Department, and the Center in the investigation of the skimmer, including allowing access to the dispenser so that the skimmer may be removed. Recognizing that disabling the dispenser for an extended period could adversely affect the merchant, especially merchants that qualify as small businesses and micro-businesses, the rule provides the merchant discretion to remove the skimmer itself if neither law enforcement nor the Department has contacted the merchant within 24 hours of the merchant's notification to the Department. If the merchant removes the skimmer, the rule requires that the merchant take certain steps to maintain the integrity of the evidence. This includes wearing gloves to remove the skimmer, bagging the skimmer, and securing the skimmer for later pick-up by law enforcement.

SUMMARY OF COMMENTS AND AGENCY RESPONSES

The public comment period on the proposed rules began on November 6, 2020, and ended on December 7, 2020. During this period, the OAG received comments from one party, the Texas Food and Fuel Association ("TFFA"). TFFA's comments thanked the OAG for the opportunity to comment, recognized improvements in the training requirements and other aspects of the rule in comparison to a previously published proposed rule, and expressed the belief that more needs to be done in the next legislative session to address outstanding issues. The comments did not explicitly support or oppose the rule, or any portion of the rule, and did not suggest any changes to the rule. The OAG does not make any changes to the rule in response to the comment.

STATUTORY AUTHORITY

The rules are adopted pursuant to Texas Bus. & Com. Code §607.052, which requires the OAG to adopt rules that establish reasonable policies and procedures that identify best practices for merchants to use to comply with Texas Bus. & Com. Code §607.051.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2020.

TRD-202005612
Austin Kinghorn
General Counsel
Office of the Attorney General
Effective date: April 1, 2021
Proposal publication date: November 6, 2020
For further information, please call: (512) 475-3210

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TITLE 7. BANKING AND SECURITIES

PART 4. DEPARTMENT OF SAVINGS AND MORTGAGE LENDING

CHAPTER 79. RESIDENTIAL MORTGAGE LOAN SERVICERS

SUBCHAPTER A. REGISTRATION

7 TAC §79.1, §79.2

The Finance Commission of Texas (commission), on behalf of the Department of Savings and Mortgage Lending (department), adopts amendments to existing rules at Title 7, Texas Administrative Code (TAC), Part 4, Chapter 79, Subchapter A, §79.1 and §79.2, without changes to the text published in the September 4, 2020, issue of the *Texas Register* (45 TexReg 6197). The rules will not be republished.

Explanation of and Justification for the Rules

The rules under 7 TAC Chapter 79 implement Finance Code Chapter 158, Residential Mortgage Loan Servicers. The rule amendments were identified during the department's periodic review of Chapter 79, conducted pursuant to Government Code §2001.039. The rule amendments make changes to modernize and update the rules including: adding and replacing existing language to improve clarity and readability; removing unnecessary provisions; updating terminology; and eliminating a form published by rule.

Summary of Public Comments

Publication of the department's proposal to amend 7 TAC §79.1 and §79.2 recited a deadline of 30 days to receive public comments, or October 4, 2020. A public hearing in accordance with Government Code §2001.029 was not required. No public comments were received.

Statutory Authority

The rule amendments are adopted under the authority of Finance Code §158.003 which authorizes the commission to adopt rules necessary for the purposes of or to ensure compliance with Finance Code Chapter 158.

Adoption of the rule amendments affects the statutes contained in Finance Code Chapter 158.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2020.

TRD-202005611
Iain A. Berry
Associate General Counsel
Department of Savings and Mortgage Lending
Effective date: January 7, 2021
Proposal publication date: September 4, 2020
For further information, please call: (512) 475-1535

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CHAPTER 80. TEXAS RESIDENTIAL MORTGAGE LOAN COMPANIES

The Finance Commission of Texas (commission), on behalf of the Department of Savings and Mortgage Lending (department), adopts amendments to existing rules at Title 7, Texas Administrative Code (TAC), Part 4, Chapter 80, Subchapter A, §80.1 and §80.2; Subchapter C, §§80.200, 80.202 - 80.206; and Subchapter D, §80.300 and §80.301. The commission's proposal for the amendments was published in the September 25, 2020, issue of the *Texas Register* (45 TexReg 6637). Amended §80.2 is adopted with substantive changes to the published text and is republished to reflect such changes. Sections 80.200, 80.202 - 80.204, 80.206, and 80.300 are further republished to adopt minor, non-substantive changes to add TAC references and correct minor errors in grammar. The substantive changes to amended §80.2 regulate no new parties and affect no new subjects of regulation. As a result, the rule will not be republished as a proposed rule for comment. The remaining sections affected by the proposal, §§80.1, 80.205, and 80.301, are adopted without changes to the text as published in the *Texas Register* and will not be republished.

Explanation of and Justification for the Rules

The rules under 7 TAC Chapter 80 implement Finance Code, Chapter 156, Residential Mortgage Loan Companies (Chapter 156). The adopted rules were identified during the department's periodic review of 7 TAC Chapter 80, conducted pursuant to Government Code, §2001.039.

Definition of a Residential Mortgage Loan Originator Changes

The adopted rules add several new definitions to §80.2 related to the definition of a residential mortgage loan originator. The adopted rules add a new definition for "originator," to adopt by reference the statutory definition for residential mortgage loan originator in Chapter 156, allowing for use of that shortened term throughout the rules, improving readability and reducing word count. The adopted rules add a definition for the phrase "takes a residential loan application," as used in Finance Code, §156.002(14), for purposes of determining when an individual is acting as a residential mortgage loan originator. The adopted rules add a definition for the term "application" to further define and clarify when an individual has received information constituting a residential mortgage loan application for that same purpose. The adopted rules also add a definition for the phrase "offers or negotiates the terms of a residential mortgage loan," as used in Finance Code, §156.002(14) for purposes of determining when an individual is acting as a residential mortgage loan originator. The adopted rules add a definition for "compensation" for that same purpose.

Other Definitions Changes

The adopted rules make other changes to the definitions section in §80.2. The adopted rules eliminate the existing definition for "one-to-four family residential real property," the subject matter of which is generally replaced by adding two new definitions for "dwelling" and "residential real estate," terms which are used in Finance Code, Chapter 156. The adopted rules also eliminate the existing definition for "criminal offense," used in evaluating an individual's fitness and eligibility to be licensed by the department as a residential mortgage loan originator, as being unnecessary in the rules chapter pertaining to mortgage companies. The adopted rules also add the following new definitions: "mortgage applicant," "mortgage company," "person," and "social media site."

Required Disclosures and Advertising Changes

The adopted rules make changes to the disclosures a mortgage company or its sponsored originator are required to make, as provided by §80.200. The adopted rules limit existing disclosure requirements by eliminating the requirement for a licensed mortgage company to post disclosures at its physical office. Existing requirements for posting disclosures on a website are clarified to expressly include a social media site of the mortgage company. The adopted rules impose a new requirement to disclose Nationwide Mortgage Licensing System and Registry (NMLS) identification information on all correspondence from a mortgage company or sponsored originator. The adopted rules also limit existing disclosure requirements in connection with a mortgage company's physical office, as provided by §80.206, by eliminating the requirement that a mortgage company post its hours of operation at each physical office. The adopted rules make changes to the advertising requirements imposed on mortgage companies by rule, contained in §80.203. The adopted rules limit existing advertising requirements by eliminating the requirement that a mortgage company recite the address of its physical office in Texas when making an advertisement. The adopted rules further alter requirements for advertising including by: clarifying an existing requirement that advertisements on social media sites are subject to the rules; limiting existing advertising requirements by allowing a mortgage company to promote its website address on certain promotional items deemed by rule not to constitute an advertisement; clarifying that signs on the premises of a mortgage company are not subject to the advertising requirements; and clarifying that a mortgage company may advertise directly, and need not advertise by and through an originator sponsored by the mortgage company.

Duties and Responsibilities Changes

The adopted rules make changes to the duties and responsibilities imposed on licensed mortgage companies by rule, contained in §80.202. The provisions of existing subsection (a) are eliminated and replaced with language causing each discrete act contained in the paragraphed list under subsection (a) to be deemed a violation of the prohibition against a mortgage company engaging in fraudulent and dishonest dealings pursuant to Tex. Fin. Code §156.303(a)(3). The prohibition against disparaging a source of income for a mortgage loan, contained in existing subsection (b), paragraph (3), is clarified to include the more likely and harmful scenario where the source of funds is inflated to secure loan approval. The provisions of existing subsection (b) are eliminated and replaced with language causing each discrete act contained in the paragraphed list under subsection (b) to be deemed a violation of the prohibition against a mortgage company engaging in improper dealings pursuant to Tex. Fin. Code §156.303(a)(3). Existing subsection (b), paragraph (3), which prohibits a mortgage company from representing to a mortgage applicant that a fee payable to the mortgage company operates as a discount point for the transaction, is clarified to prohibit any similar representation that such fee confers a financial benefit on the mortgage applicant, except in the limited circumstances set forth in the subparagraphs under existing subsection (b), paragraph (3). The provisions of existing subsection (b), paragraph (3), subparagraph (D), requiring a mortgage company to respond accurately to a question about the scope and nature of its services and any costs, are eliminated and the subject matter replaced with a new subsection (b), paragraph

(4), requiring a mortgage company to respond within a reasonable time to questions from a mortgage applicant. A new subsection (d) is added to offer additional guidance on the existing requirement barring the splitting of origination fees with a mortgage applicant except in the narrow circumstances elucidated by the Consumer Financial Protection Bureau (CFPB) in Regulation X. In order to aid enforcement and prevent evasion of the requirement by those individuals who are acting in the dual capacity of an originator sponsored by the mortgage company and a real estate broker or sales agent licensed under Occupations Code, Chapter 1101, the adopted rules create a rebuttable presumption that a rebate or other transfer to the mortgage applicant made after closing is derived from his or her role as originator (a violation), and, conversely, not derived from his or her role as real estate broker or sales agent.

Books and Recordkeeping Changes

The adopted rules make various changes to the requirements for a mortgage company and its sponsored originator to keep books and records, contained in §80.204. The adopted rules clarify the existing requirement that a mortgage company or its sponsored originator maintain a copy of the mortgage loan application signed by both the originator and the mortgage applicant. The adopted rules also expand an existing requirement directing a mortgage company to maintain a log of its mortgage transactions. The adopted rule requires that such log describe the purpose for the loan and the owner's intended occupancy of the real estate securing the mortgage loan. The adopted rules also impose a new requirement to maintain records establishing the physical office of the mortgage company, and other more minor such changes.

Other Modernization and Update Changes.

The adopted rules make changes to modernize and update the rules including: adding and replacing language for clarity and to improve readability; removing unnecessary or duplicative provisions; and updating terminology.

Summary of Public Comments

Publication of the commission's proposal for the rule amendments recited a deadline of 30 days to receive public comments, or October 25, 2020. A public hearing in accordance with Government Code §2001.029 was not required. No comments were received.

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §80.1, §80.2

Statutory Authority

The adopted rules are adopted under the authority of Finance Code §156.102, which authorizes the commission to adopt rules necessary for the intent of or to ensure compliance with Finance Code, Chapter 156, and as required to carry out the intentions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (federal SAFE Act).

The adopted rules affect the statutes contained in Finance Code Chapter 156.

§80.2. Definitions.

As used in this chapter, and in the Commissioner's administration and enforcement of Finance Code, Chapter 156, the following terms have the meanings indicated:

(1) "Application," as used in Tex. Fin. Code §156.002(14) and paragraph (20) of this section means a request, in any form, for an offer (or a response to a solicitation for an offer) of residential mortgage loan terms, and the information about the mortgage applicant that is customary or necessary in a decision on whether to make such an offer, including, but not limited to, a mortgage applicant's name, income, social security number to obtain a credit report, property address, an estimate of the value of the real estate, and/or the mortgage loan amount.

(2) "Branch office," as used in Tex. Fin. Code §156.2041(a)(4), means any office that is separate and distinct from the mortgage company's principal place of business of record with NMLS, whether located in Texas or not, which conducts mortgage business on residential real estate located in Texas.

(3) "Commissioner" means the Savings and Mortgage Lending Commissioner appointed under Finance Code, Chapter 13.

(4) "Commissioner's designee" means an employee of the Department performing his or her assigned duties or such other person as the Commissioner may designate in writing. A Commissioner's designee is deemed to be the Commissioner's authorized "personnel or representative" as such term is used in Finance Code, Chapter 156.

(5) "Compensation" includes salaries, bonuses, commissions, and any financial or similar incentive.

(6) "Control person" means an individual that directly or indirectly exercises control over a mortgage company. Control is defined by the power, directly or indirectly, to direct the management or policies of a mortgage company, whether through ownership of securities, by contract, or otherwise. Control person includes any person that:

(A) is a director, general partner or executive officer;

(B) directly or indirectly has the right to vote 10% or more of a class of a voting security or has the power to sell or direct the sale of 10% or more of a class of voting securities;

(C) in the case of an LLC, is a managing member; or

(D) in the case of a partnership, has the right to receive upon dissolution, or had contributed, 10% or more of the partnership's capital assets.

(7) "Department" means the Department of Savings and Mortgage Lending.

(8) "Dwelling" means a residential structure that contains one to four units and is attached to residential real estate. The term includes an individual condominium unit, cooperative unit, or manufactured home, if it is used as a residence.

(9) "Mortgage applicant" has the meaning assigned by Tex. Fin. Code §156.002 and includes a person who contacts a mortgage company or its sponsored originator in response to a solicitation to obtain a residential mortgage loan, and a person who has not completed or started completing a formal loan application on the appropriate form (e.g., Fannie Mae's Form 1003 Uniform Residential Loan Application), but has submitted financial information constituting an application, as provided by paragraph (1) of this section.

(10) "Mortgage company" means, for the purposes of this chapter, a "residential mortgage loan company" as that term is defined by Tex. Fin. Code §156.002.

(11) "Nationwide Mortgage Licensing System and Registry" or "NMLS" has the meaning assigned by Tex. Fin. Code §156.002.

(12) "Offers or negotiates the terms of a residential mortgage loan," as used in Tex. Fin. Code §156.002(14), means, among other things, when an individual:

(A) arranges or assists a mortgage applicant or prospective mortgage applicant in obtaining or applying to obtain, or otherwise secures an extension of consumer credit for another person, in connection with obtaining or applying to obtain a residential mortgage loan;

(B) presents for consideration by a mortgage applicant or prospective mortgage applicant particular residential mortgage loan terms (including rates, fees and other costs); or

(C) communicates directly or indirectly with a mortgage applicant or prospective mortgage applicant for the purpose of reaching a mutual understanding about particular residential mortgage loan terms.

(13) "Originator" has the meaning assigned by Tex. Fin. Code §156.002 in defining "residential mortgage loan originator." Paragraphs (12) and (20) of this section do not affect the applicability of such statutory definition. Individuals who are specifically excluded under such statutory definition, as provided by Tex. Fin. Code §180.002(19)(B), are excluded under this definition and for purposes of this chapter. Persons who are exempt from licensure as provided by Tex. Fin. Code §180.003 are exempt for purposes of this chapter, except as otherwise provided by Tex. Fin. Code §180.051.

(14) "Person" means an individual, corporation, company, limited liability company, partnership or association.

(15) "Physical Office" means an actual office where the business of mortgage lending and/or the business of taking or soliciting residential mortgage loan applications is conducted.

(16) "Qualifying Individual" or "Qualified Individual" has the meaning assigned by Tex. Fin. Code §156.002 in defining "qualifying individual." Additionally, the license held by the Qualifying Individual must be held in a status which authorizes them to conduct regulated activities, and the individual sponsored of record in NMLS by the mortgage company for which they are the Qualifying Individual.

(17) "Residential Mortgage Loan" has the meaning assigned by Tex. Fin. Code §180.002 and includes new loans and renewals, extensions, modifications, and rearrangements of such loans. The term does not include a loan which is secured by a structure that is suitable for occupancy as a dwelling, but is used for a commercial purpose such as a professional office, salon, or other non-residential use, and is not used as a residence.

(18) "Residential real estate" has the meaning assigned by Tex. Fin. Code §156.002 and includes both improved or unimproved real estate or any portion of or interest in such real estate on which a dwelling is or will be constructed or situated.

(19) "Social media site" means any digital platform accessible by a mortgage applicant or prospective mortgage applicant where the mortgage company or sponsored originator does not typically own the hosting platform but otherwise exerts editorial control or influence over the content within their account, profile, or other space on the digital platform, from which the mortgage company or sponsored originator posts commercial messages or other content designed to solicit business.

(20) "Takes a residential mortgage loan application," as used in Tex. Fin. Code §156.002(14) in defining "residential mortgage loan originator", means when an individual receives a residential mortgage loan application for the purpose of facilitating a decision on whether to extend an offer of residential mortgage loan terms to a mortgage applicant or prospective mortgage applicant, whether the application is received directly or indirectly from the mortgage applicant or prospective mortgage applicant, and regardless of whether or not a particular lender has been identified or selected.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. DUTIES AND RESPONSIBILITIES

7 TAC §§80.200, 80.202 - 80.206

Statutory Authority

The adopted rules are adopted under the authority of Finance Code §156.102, which authorizes the commission to adopt rules necessary for the intent of or to ensure compliance with Finance Code, Chapter 156, and as required to carry out the intentions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (federal SAFE Act).

The adopted rules affect the statutes contained in Finance Code Chapter 156.

§80.200. Required Disclosures.

(a) Specific Notice to Applicant. A mortgage company or its sponsored originator must provide the following notice to a residential mortgage loan applicant with an initial application for a residential mortgage loan, and the mortgage company must maintain in its records evidence of the timely delivery of such disclosure:
Figure: 7 TAC §80.200(a) (No change.)

(b) Posted Notice on Mortgage Company Websites and Social Media Sites. A mortgage company or its sponsored originator must post in conspicuous fashion the following notice on each website and social media site of the mortgage company or sponsored originator that is accessible by a mortgage applicant or prospective mortgage applicant and either used to conduct residential mortgage loan origination business by the mortgage company or sponsored originator, or from which the mortgage company or sponsored originator advertises to solicit such business, as provided by §80.203 of this title (relating to Advertising):
Figure: 7 TAC §80.200(b) (No change.)

(c) Disclosures in Correspondence. A mortgage company must provide the following information on all correspondence sent to a mortgage applicant:

(1) the name of the mortgage company, followed by the mortgage company's NMLS identification number; and

(2) if the correspondence is from a sponsored originator, the name of the sponsored originator, followed by the sponsored originator's NMLS identification number.

(d) The determination of what constitutes a mortgage application for purposes of triggering the notice required by subsection (a) of this section will be made in accordance with applicable federal law determining what constitutes an application for purposes of the Truth in

Lending Act, as implemented and defined by the Consumer Financial Protection Bureau in Regulation Z (12 C.F.R. §1026.2).

(e) The notice required by subsection (b) of this section is deemed to be conspicuously posted on a website when it is displayed on the initial or home page of the website (typically the base-level domain name) or is otherwise contained in a linked page with the link to such page prominently displayed on such initial or home page. The notice required by subsection (b) of this section is deemed to be conspicuously posted on a social media site when it is readily apparent or easily accessible to the mortgage applicant or prospective mortgage applicant upon visiting the home page, profile page, account page, or similar, on such social media site, without the necessity to review various historical content posted by the mortgage company or sponsored originator in order to derive the information required by the notice, which may include an interactive link to the information with such link prominently displayed on such home page, profile page, account page, or similar.

§80.202. Prohibition on False, Misleading, or Deceptive Practices and Improper Dealings.

(a) False, Misleading or Deceptive Practices. The following conduct by a mortgage company or its sponsored originator constitutes fraudulent and dishonest dealings for purposes of Tex. Fin. Code §156.303(a)(3):

(1) knowingly misrepresenting the mortgage company's or its sponsored originator's relationship to a mortgage applicant or any other party to an actual or proposed residential mortgage loan transaction;

(2) knowingly misrepresenting or understating any cost, fee, interest rate, or other expense in connection with a mortgage applicant's applying for or obtaining a residential mortgage loan;

(3) knowingly overstating, inflating, altering, amending, or disparaging any source or potential source of residential mortgage loan funds in a manner which disregards the truth or makes any knowing and material misstatement or omission;

(4) knowingly participating in or permitting the submission of false or misleading information of a material nature to any person in connection with a decision by that person whether or not to make or acquire a residential mortgage loan;

(5) as provided for by the Real Estate Settlement Procedures Act and Regulation X, brokering, arranging, or making a residential mortgage loan in which the mortgage company retains fees or receives other compensation for services which are not actually performed or where the fees or other compensation received bear no reasonable relationship to the value of services actually performed;

(6) recommending or encouraging default or delinquency or continuation of an existing default or delinquency by a mortgage applicant on any existing indebtedness prior to closing a residential mortgage loan which refinances all or a portion of such existing indebtedness;

(7) altering any document produced or issued by the Department, unless otherwise permitted by statute or a rule of the Department; or

(8) engaging in any other practice which the Commissioner, by published interpretation, has determined to be false, misleading, or deceptive.

(b) Improper Dealings. The following conduct by a mortgage company or its sponsored originator constitutes improper dealings for purposes of Tex. Fin. Code §156.303(a)(3):

(1) acting negligently in performing an act for which a person is required under Finance Code, Chapter 156 to hold a license;

(2) violating any provision of a local, State of Texas, or federal, constitution, statute, rule, ordinance, regulation, or final court decision that governs the same activity, transaction, or subject matter that is governed by the provisions of Finance Code, Chapter 156 or this chapter including, but not limited to, the following:

(A) Real Estate Settlement Procedures Act (12 U.S.C. §2601 *et seq.*);

(B) Regulation X (12 C.F.R. §1024 *et seq.*);

(C) Consumer Credit Protection Act, Truth in Lending Act (15 U.S.C. §1601 *et seq.*);

(D) Regulation Z (12 C.F.R. §1026 *et seq.*);

(E) Equal Credit Opportunity Act (15 U.S.C. §1691 *et seq.*);

(F) Regulation B; (12 C.F.R. §1002 *et seq.*); and

(G) Texas Constitution, Article XVI, §50;

(3) representing to a mortgage applicant that a charge or fee which is payable to the mortgage company or its sponsored originator is a "discount point" or otherwise confers a financial benefit on the mortgage applicant unless the loan closes and:

(A) the mortgage company is the lender in the transaction. For purposes of this paragraph, the mortgage company is deemed to be the lender if the mortgage company or sponsored originator, is the payee as evidenced on the face of the note or other written evidence of indebtedness; or

(B) the mortgage company is not the lender, but demonstrates by clear and convincing evidence that the lender has charged or collected discount point(s) or other fees which the mortgage company actually paid to the lender on behalf of the mortgage applicant, to buy down the interest rate on a residential mortgage loan; and

(4) failing to accurately respond within a reasonable time period to reasonable questions from a mortgage applicant concerning the scope and nature of the mortgage company's services and any costs.

(c) Related Transactions. A mortgage company engages in fraudulent and deceptive dealings for purposes of Tex. Fin. Code §156.303(a)(3) when, in connection with the origination of a residential mortgage loan:

(1) the mortgage company or sponsored originator offers other goods or services to a consumer in a separate but related transaction and the mortgage company or sponsored originator engages in a false misleading or deceptive practice in the related transaction; or

(2) the mortgage company or sponsored originator affiliates with another person that provides goods or services to a consumer in a separate but related transaction, and the affiliated person performs false, misleading or deceptive acts, and the mortgage company or sponsored originator to the mortgage transaction knew or should have known of the false, misleading or deceptive acts of the affiliated person and failed to take appropriate steps to prevent or limit such false, misleading or deceptive acts.

(d) Sharing or Splitting Origination Fees with the Mortgage Applicant. A mortgage company and its sponsored originator must not offer or agree to share or split any residential mortgage loan origination fees with a mortgage applicant, rebate all or part of an origination fee to a mortgage applicant, reduce their established compensation to benefit a mortgage applicant, or otherwise provide money, a cash equivalent, or

anything of value to a mortgage applicant in connection with providing mortgage loan origination services unless otherwise allowable as provided by Regulation X. A sponsored originator acting in the dual capacity of an originator and real estate broker or sales agent licensed under Occupations Code, Chapter 1101 may rebate their fees legitimately earned and derived from their real estate brokerage or sales agent services to the extent allowable under applicable law governing real estate brokers or sales agents; provided, the payment or other transfer described herein occurs as a part of closing and is properly reflected in the closing disclosure for the transaction. If a payment or other transfer described herein by a mortgage company or sponsored originator acting in the dual capacity of an originator and real estate broker or sales agent occurs after closing, a rebuttable presumption exists that the payment or transfer is derived from the sponsored originator's fees for mortgage origination services, and constitutes an improper sharing or splitting of fees with the mortgage applicant. The rebuttable presumption created by this subsection may only be overcome by clear and convincing evidence established by the mortgage company or sponsored originator that the payment or transfer is instead derived from fees for real estate brokerage or sales agent services. A violation of this subsection (d) is deemed to constitute improper dealings for purposes of Tex. Fin. Code §156.303(a)(3).

§80.203. Advertising.

(a) A mortgage company or sponsored originator that advertises rates, terms, or conditions must comply with the disclosure requirements of Regulation Z.

(b) Any advertisement of residential mortgage loans or for residential mortgage loan origination services which is offered by or through a mortgage company or sponsored originator must conform to the following requirements:

(1) a mortgage company or sponsored originator may only advertise for such products and terms as are actually available and, if availability is subject to any material requirements or limitations, the advertisement must specify those requirements or limitations;

(2) except as provided in subsections (c) and (d) of this section the advertisement must contain:

(A) the name of the mortgage company followed by the mortgage company's NMLS identification number; and

(B) the name of the sponsored originator followed by the sponsored originator's NMLS identification number;

(3) an advertisement must not make any statement or omit relevant information, the result of which is to present a misleading or deceptive representation to consumers; and

(4) an advertisement must comply with applicable state and federal disclosure requirements.

(c) For purposes of this section, an advertisement means a commercial message in any medium that promotes directly or indirectly, a residential mortgage loan transaction or is otherwise designed to solicit residential mortgage loan origination business for the mortgage company or sponsored originator. This includes "flyers," business cards, or other handouts, and commercial messages delivered by and through a social media site. However, the requirements of subsection (b)(2) of this section do not apply to:

(1) any advertisement which indirectly promotes a residential mortgage loan transaction and which contains only the name of the mortgage company or sponsored originator and not any contact information with the exception of a website address, such as on cups, pens or pencils, shirts or other clothing (including company uniforms and sponsored youth league jerseys), or other promotional items of nominal value;

(2) any rate sheet, pricing sheet, or similar proprietary information provided to realtors, builders, and other commercial entities that is not intended for distribution to consumers; or

(3) signs located on or adjacent to the mortgage company's physical office.

(d) Advertising Directly by a Mortgage Company. The provisions of subsection (b) of this section notwithstanding, a mortgage company may advertise directly to the public and not by and through a sponsored originator, and the requirements of subsection (b)(2)(B) of this section do not apply to such advertisements. An advertisement posted, promoted, disseminated, distributed, delivered, or otherwise made by an originator sponsored by the mortgage company will not be considered an advertisement made directly by a mortgage company for purposes of this subsection.

§80.204. Books and Records.

(a) Maintenance of Records, Generally. In order to assure that each licensee will have all records necessary to enable the Commissioner or the Commissioner's designee to investigate complaints and discharge their responsibilities under Finance Code, Chapter 156 and this chapter, each mortgage company or sponsored originator must maintain records as set forth in this section. The particular format of records to be maintained is not specified. However, they must be accurate, complete, current, legible, readily accessible, and readily sortable. Records maintained for other purposes, such as compliance with other state and federal laws, will be deemed to satisfy these requirements if they include the same information.

(b) Mortgage Application Records. Each mortgage company or sponsored originator is required to maintain, at the location specified in their official record on file with the Department, the following books and records:

(1) Residential Mortgage Loan File. For each residential mortgage loan application received, the mortgage company must create and maintain a residential mortgage loan file containing, at a minimum:

(A) a copy of the initial residential mortgage loan application (including any attachments, supplements, or addenda thereto), signed and dated by each mortgage loan applicant and the sponsored originator;

(B) a copy of the signed closing statement or integrated closing disclosure, documentation of the timely denial, or other documentation evidencing the disposition of the application for a residential mortgage loan;

(C) a copy of the disclosure statement required by Tex. Fin. Code §156.004 and §80.200(a) of this title (relating to Required Disclosures), signed and dated by each mortgage applicant and the sponsored originator;

(D) a copy of each item of correspondence, all evidence of any contractual agreement or understanding (including, but not limited to, any interest rate locks or loan commitments), and all notes and memoranda of conversations or meetings with any mortgage applicant or any other party in connection with that residential mortgage loan application or its ultimate disposition;

(E) a copy of the notice to mortgage applicants required by Tex. Fin. Code §343.105;

(F) a copy of both the initial Good Faith Estimate and the initial Good Faith Estimate fee itemization worksheet, if applicable; and

(G) a copy of the initial integrated loan estimate disclosure, if applicable.

(2) Mortgage Transaction Log. A mortgage transaction log, maintained on a current basis (which means that all entries must be made within no more than seven days from the date on which the matters they relate to occurred), setting forth, at a minimum:

(A) the name and contact information of each mortgage applicant;

(B) the date of the initial residential mortgage loan application;

(C) a description of the purpose for the loan (e.g., purchase, refinance, construction, etc.);

(D) a description of the owner's intended occupancy of the subject real estate (e.g., primary residence, secondary residence, investment property (no occupancy), etc.);

(E) a description of the disposition of the application for a residential mortgage loan;

(F) the identity of the person who initially funded and/or acquired the residential mortgage loan; and

(G) the full name of the originator and his or her NMLS identification number.

(3) General Business Records. General business records include:

(A) all checkbooks, check registers, bank statements, deposit slips, withdrawal slips, and cancelled checks (or copies thereof) relating to the residential mortgage loan origination business;

(B) complete records (including invoices and supporting documentation) for all expenses and fees paid on behalf of a mortgage applicant, including a record of the date and amount of all such payments actually made by each mortgage applicant;

(C) copies of all federal tax withholding forms, reports of income for federal taxation, and evidence of payments to all mortgage company employees, independent contractors and all others compensated by such mortgage company in connection with the residential mortgage loan origination business;

(D) copies of all written complaints or inquiries (or summaries of any verbal complaints or inquiries) along with any and all correspondence, notes, responses, and documentation relating thereto and the disposition thereof;

(E) copies of all contractual agreements or understandings with third parties in any way relating to a residential mortgage loan transaction including, but not limited to, any delegations of underwriting authority, any agreements for pricing of goods or services, investor contracts, or employment agreements;

(F) copies of all reports of audits, examinations, inspections, reviews, investigations, or other similar matters performed by any third party, including any regulatory or supervisory authorities; and

(G) copies of all advertisements in the medium (e.g., recorded audio, video, and print) in which they were published or distributed.

(4) Records Establishing Physical Office. A mortgage company must create and maintain records establishing its physical office including:

(A) records reflecting the names and contact information for persons serving as staff for the mortgage company assisting customers at the physical office; and

(B) records reflecting the mortgage company's right to access the physical office and conduct business of the mortgage company at such office (e.g., a lease agreement or deed).

(c) A mortgage company and/or sponsored originator must maintain such other books and records as may be required to evidence compliance with applicable state and federal laws and regulations including, but not limited to: the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and the Truth in Lending Act.

(d) A mortgage company and/or sponsored originator must maintain such other books and records as the Commissioner or the Commissioner's designee may from time to time specify in writing.

(e) Production of Records; Disciplinary Action. All books and records required by this section must be maintained in good order and must be produced for the Commissioner or the Commissioner's designee upon request. Failure to produce such books and records upon request, after a reasonable time for compliance, may result in disciplinary action including, but not limited to, suspension or revocation of a license.

(f) Records Retention Period. All books and records required by this section must be maintained for three years or such longer period(s) as may be required by applicable state and/or federal laws and regulations.

(g) Records Retention After Dissolution. Within 10 days of terminating operations, a mortgage company must provide the Department with written notice of where the required records will be maintained for the prescribed periods. If such records are transferred to another mortgage company licensed by the Department, the transferee must provide the Department with written notice within 10 days after receiving such records.

§80.206. Physical Office.

(a) A physical office must:

(1) have a physical or street address. A post office box or other similar designation will not suffice;

(2) be accessible to the general public as a place of business and must hold itself open on a regular basis; and

(3) have at least one staff member present to assist customers during the hours in which the physical office is open.

(b) Records Establishing Physical Office. A mortgage company must create and maintain records establishing the mortgage company's physical office, as provided by §80.204 of this title (relating to Books and Records).

(c) The Physical Office need not be the location where required records are maintained; however, the location where such records are maintained must be accessible to the Commissioner or the Commissioner's designee for inspection during normal business hours.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. COMPLIANCE AND ENFORCEMENT

7 TAC §80.300, §80.301

Statutory Authority

The adopted rules are adopted under the authority of Finance Code §156.102, which authorizes the commission to adopt rules necessary for the intent of or to ensure compliance with Finance Code, Chapter 156, and as required to carry out the intentions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (federal SAFE Act).

The adopted rules affect the statutes contained in Finance Code Chapter 156.

§80.300. Examinations.

(a) The Commissioner, or the Commissioner's designee(s), will conduct periodic examinations of a mortgage company or sponsored originator as the Commissioner deems necessary.

(b) Notice of Examination. Except when the Department determines that giving advance notice would impair the examination, the Department will give the qualifying individual of the mortgage company advance notice of each examination. Such notice will be sent to the qualifying individual's mailing address or email address of record with NMLS and will specify the date on which the Department's examiners are scheduled to begin the examination. Failure to actually receive the notice will not be grounds for delay or postponement of the examination. The notice will include a list of the documents and records the mortgage company or sponsored originator must make available to facilitate the examination.

(c) Examinations will be conducted to determine compliance with Finance Code, Chapter 156 and this chapter, and will specifically address whether:

(1) all persons conducting residential mortgage loan origination activities are properly licensed and sponsored by the mortgage company in NMLS;

(2) all locations at which such activities are conducted are properly licensed and registered with NMLS;

(3) all required books and records are being maintained in accordance with §80.204 of this title (relating to Books and Records);

(4) legal and regulatory requirements applicable to the mortgage company and its originators are being properly followed; and

(5) other matters as the Commissioner may deem necessary or advisable to carry out the purposes of Finance Code, Chapter 156.

(d) The examiners will review a sample of residential mortgage loan files identified by the examiners and randomly selected from the mortgage company's mortgage transaction log. The examiner may expand the number of files to be reviewed if, in his or her discretion, conditions warrant.

(e) The examiners may require a mortgage company, at its own cost, to make copies of loan files or such other books and records as the examiners deem appropriate for the preparation of or inclusion in the examination report.

(f) Confidentiality. The work papers, compilations, findings, reports, summaries, and other materials, in whatever form, relating to an examination conducted under this section, will be maintained as confidential except as required or expressly permitted by law.

(g) Failure to Cooperate; Disciplinary Action. Failure of a mortgage company or a sponsored originator to cooperate with the examination or failure to grant the examiners access to books, records, documents, operations, and facilities may result in disciplinary action including, but not limited to, imposition of an administrative penalty.

(h) Reimbursement for Costs. When the Department must travel outside of Texas to conduct an examination of a mortgage company or a sponsored originator because the required records are maintained at a location outside of Texas, the mortgage company or sponsored originator will be required to reimburse the Department for the actual costs incurred by the Department in connection with such travel including, but not limited to, transportation, lodging, meals, communications, courier service and any other reasonably related costs.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 81. MORTGAGE BANKERS AND RESIDENTIAL MORTGAGE LOAN ORIGINATORS

The Finance Commission of Texas (commission), on behalf of the Department of Savings and Mortgage Lending (department), adopts amendments to existing rules at Title 7, Texas Administrative Code (TAC), Part 4, Chapter 81, Subchapter A, §§81.1 - 81.3; Subchapter C, §§81.200, 81.202 - 81.206; and Subchapter D, §81.300 and §81.301. The commission's proposal for the amendments was published in the September 25, 2020 issue of the *Texas Register* (45 TexReg 6649). Amended §81.2 is adopted with changes to the published text and is republished to reflect such changes. The changes to amended §81.2 regulate no new parties and affect no new subjects of regulation. As a result, the rule will not be republished as a proposed rule for comment. The other rule amendments in the proposal are adopted without changes to the text as published in the *Texas Register.* These rules will not be republished.

Explanation of and Justification for the Rules

The rules under 7 TAC Chapter 81 implement Finance Code Chapter 156, Mortgage Bankers and Residential Mortgage Loan

Originators (Chapter 157), and Chapter 180, Residential Mortgage Loan Originators (Texas SAFE Act), with respect to persons regulated under Chapter 157. The adopted rules were identified during the department's periodic review of 7 TAC Chapter 81, conducted pursuant to Government Code, §2001.039.

Definition of a Residential Mortgage Loan Originator Changes

The adopted rules add several new definitions to §81.2 related to the definition of a residential mortgage loan originator. The adopted rules eliminate the existing definition for "residential mortgage loan originator," the subject matter of which is replaced by adding a new definition for "originator," to adopt by reference the statutory definition for residential mortgage loan originator in Chapter 157 and the Texas SAFE Act, allowing for use of that shortened term throughout the rules, improving readability and reducing word count. The adopted rules add a definition for the phrase "takes a residential loan application," as used in Finance Code, §157.002(6) and §180.002(19) for purposes of determining when an individual is acting as a residential mortgage loan originator. The adopted rules add a definition for the term "application" to further define and clarify when an individual has received information constituting a residential mortgage loan application for that same purpose. The adopted rules also add a definition for the phrase "offers or negotiates the terms of a residential mortgage loan," as used in Finance Code, §157.002(6) and §180.002(19) for purposes of determining when an individual is acting as a residential mortgage loan originator. The adopted rules add a definition for "compensation" for that same purpose.

Other Definitions Changes

The adopted rules make other changes to the definitions section in §81.2. The adopted rules add the following new definitions: "dwelling," "mortgage applicant," "mortgage company," "Nationwide Mortgage Licensing System and Registry," "Recovery Fund," "residential real estate," and "social media site."

Required Disclosures and Advertising Changes

The adopted rules make changes to the disclosures a mortgage banker or originator is required to make, as provided by §81.200. The adopted rules limit existing disclosure requirements by eliminating the requirement for a mortgage banker or originator to post disclosures at a physical office. Existing requirements for posting disclosures on a website are clarified to expressly include a social media site of the mortgage banker or originator. The adopted rules impose a new requirement to disclose Nationwide Mortgage Licensing System and Registry (NMLS) identification information on all correspondence from an originator. The adopted rules also limit existing requirements in connection with a mortgage banker's physical office, as provided by 7 TAC §81.206, by eliminating the requirement that a mortgage banker post its hours of operation at such physical office. The adopted rules make changes to the advertising requirements imposed on mortgage bankers and originators by rule, contained in §81.203. The adopted rules limit existing advertising requirements by eliminating the requirement that a mortgage banker or its sponsored originator recite the mortgage banker's address when making an advertisement. The adopted rules further alter requirements for advertising including by: clarifying an existing requirement that advertisements on social media sites are subject to the rules; limiting existing advertising requirements by allowing a mortgage banker or originator to promote a website address on certain promotional items deemed by rule not to constitute an advertisement; clarifying that signs on the premises of a mortgage banker or originator are not subject to the advertising requirements; and clarifying that a mortgage banker may advertise directly, and need not advertise by and through an originator sponsored by the mortgage banker.

Duties and Responsibilities Changes

The adopted rules make changes to the duties and responsibilities imposed on mortgage bankers and originators by rule, contained in §81.202. The provisions of existing subsection (a) are eliminated and replaced with language causing each discrete act contained in the paragraphed list under subsection (a) to be deemed a violation of the prohibition against a mortgage banker or originator engaging in fraudulent and dishonest dealings pursuant to Tex. Fin. Code §157.009(d) and §157.024(a)(3), deceptive practices for purposes of Tex. Fin. Code §180.153(2), and a scheme to defraud a person for purposes of Tex. Fin. Code §180.153(1). The prohibition against disparaging a source of income for a mortgage loan, contained in existing subsection (a), paragraph (3), is clarified to include the more likely and harmful scenario where the source of funds is inflated to secure loan approval. The provisions of existing subsection (b) are eliminated and replaced with language causing each discrete act contained in the paragraphed list under subsection (b) to be deemed a violation of the prohibition against a mortgage banker or originator engaging in improper dealings pursuant to Tex. Fin. Code §157.009(d) and § 157.024(a)(3), and unfair practices for purposes of Tex. Fin. Code §180.153(2). Existing subsection (b), paragraph (3), which prohibits a mortgage banker or originator from representing to a mortgage applicant that a fee payable to the mortgage banker or originator operates as a discount point for the transaction, is clarified to prohibit any similar representation that such fee confers a financial benefit on the mortgage applicant, except in the limited circumstances set forth in the subparagraphs under existing subsection (b), paragraph (3). The provisions of existing subsection (d), requiring an originator to respond accurately to a question about the scope and nature of his or her services, are eliminated and the subject matter replaced with a new subsection (b), paragraph (4), requiring a mortgage banker or originator to respond within a reasonable time to reasonable questions from a mortgage applicant. New provisions are inserted in subsection (d) to offer additional guidance on the existing requirement barring the splitting of origination fees with a mortgage applicant except in the narrow circumstances elucidated by the Consumer Financial Protection Bureau (CFPB) in Regulation X. In order to aid enforcement and prevent evasion of the requirement by those individuals who are acting in the dual capacity of an originator and a real estate broker or sales agent licensed under Occupations Code, Chapter 1101, the adopted rules create a rebuttable presumption that a rebate or other transfer to the mortgage applicant made after closing is derived from his or her role as originator (a violation), and conversely, not derived from his or her role as real estate broker or sales agent.

Books and Recordkeeping Changes

The adopted rules make various changes to the requirements for a mortgage banker or originator to keep books and records, contained in §81.204. The adopted rules clarify the existing requirement that a mortgage banker or originator maintain a copy of the mortgage loan application signed by both the originator and the mortgage applicant. The adopted rules also expand existing requirements that a mortgage banker or originator maintain a log of mortgage transactions including by requiring that such

log describe the purpose for the loan and the owner's intended occupancy of the real estate securing the mortgage loan.

Other Modernization and Update Changes.

The adopted rules make changes to modernize and update the rules including: adding and replacing language for clarity and to improve readability; removing unnecessary or duplicative provisions; and updating terminology.

Summary of Public Comments

Publication of the commission's proposal for the rule amendments recited a deadline of 30 days to receive public comments, or October 25, 2020. A public hearing in accordance with Government Code §2001.029 was not required. No comments were received.

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §§81.1 - 81.3

Statutory Authority

The adopted rules are adopted under the authority of Finance Code §157.0023 and §180.004, which authorizes the commission to adopt rules necessary to implement or fulfill the purposes of Chapter 157 and the Texas SAFE Act, and as required to carry out the intentions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (federal SAFE Act).

The adopted rules affect the statutes contained in Finance Code, Chapter 157 and Chapter 180.

§81.2. Definitions.

As used in this chapter, and in the Commissioner's administration and enforcement of Finance Code, Chapter 157 and Chapter 180, the following terms have the meanings indicated:

(1) "Application," as used in Tex. Fin. Code §§157.002(6) and 180.002(19), and paragraph (19) of this section means a request, in any form, for an offer (or a response to a solicitation for an offer) of residential mortgage loan terms, and the information about the mortgage applicant that is customary or necessary in a decision on whether to make such an offer, including, but not limited to, a mortgage applicant's name, income, social security number to obtain a credit report, property address, an estimate of the value of the real estate, and/or the mortgage loan amount.

(2) "Commissioner" means the Savings and Mortgage Lending Commissioner appointed under Finance Code, Chapter 13.

(3) "Commissioner's designee" means an employee of the Department performing his or her assigned duties or such other person as the Commissioner may designate in writing. A Commissioner's designee is deemed to be the Commissioner's authorized "personnel or representative" as such term is used in Finance Code, Chapter 157.

(4) "Criminal Offense" means any violation of any state or federal criminal statute which:

(A) involves theft, misappropriation, or misapplication, of monies or goods in any amount;

(B) involves the falsification of records, perjury, or other similar criminal offenses indicating dishonesty;

(C) involves the solicitation of, the giving of, or the taking of bribes, kickbacks, or other illegal compensation;

(D) involves deceiving the public by means of swindling, false advertising or the like;

(E) involves acts of moral turpitude and violation of duties owed to the public including, but not limited to, the unlawful manufacture, distribution, or trafficking in a controlled substance, dangerous drug, or marijuana;

(F) involves acts of violence or use of a deadly weapon;

(G) when considered with other violations committed over a period of time appears to establish a pattern of disregard for, a lack of respect for, or apparent inability to follow, the criminal law; or

(H) involves any other crime which the Commissioner determines has a reasonable relationship to whether a person is fit to serve as an originator in a manner consistent with the purposes of Finance Code, Chapter 157 and the best interest of the State of Texas and its residents.

(5) "Compensation" includes salaries, bonuses, commissions, and any financial or similar incentive.

(6) "Department" means the Department of Savings and Mortgage Lending.

(7) "Dwelling" means a residential structure that contains one to four units and is attached to residential real estate. The term includes an individual condominium unit, cooperative unit, or manufactured home, if it is used as a residence.

(8) "Mortgage applicant" means an applicant for a residential mortgage loan or a person who is solicited (or contacts a mortgage banker or originator in response to a solicitation) to obtain a residential mortgage loan, and includes a person who has not completed or started completing a formal loan application on the appropriate form (e.g., Fannie Mae's Form 1003 Uniform Residential Loan Application), but has submitted financial information constituting an application, as provided by paragraph (1) of this section.

(9) "Mortgage banker" has the meaning assigned by Tex. Fin. Code §157.002.

(10) "Mortgage company" means, for the purposes of this chapter, a "residential mortgage loan company" as that term is defined by Tex. Fin. Code §157.002.

(11) "Nationwide Mortgage Licensing System and Registry" or "NMLS" has the meaning assigned by Tex. Fin. Code §157.002 and §180.002.

(12) "Offers or negotiates the terms of a residential mortgage loan," as used in Tex. Fin. Code §157.002(6) and §180.002(19) means, among other things, when an individual:

(A) arranges or assists a mortgage applicant or prospective mortgage applicant in obtaining or applying to obtain, or otherwise secures an extension of consumer credit for another person, in connection with obtaining or applying to obtain a residential mortgage loan;

(B) presents for consideration by a mortgage applicant or prospective mortgage applicant particular residential mortgage loan terms (including rates, fees and other costs); or

(C) communicates directly or indirectly with a mortgage applicant or prospective mortgage applicant for the purpose of reaching a mutual understanding about particular residential mortgage loan terms.

(13) "Originator" has the meaning assigned by Tex. Fin. Code §157.002 and §180.002 in defining "residential mortgage loan originator." Paragraphs (12) and (19) of this section do not affect the applicability of such statutory definition. Individuals who are specifically excluded under such statutory definition, as provided by Tex. Fin. Code §180.002(19)(B), are excluded under this definition and for

purposes of this chapter. Persons who are exempt from licensure as provided by Tex. Fin. Code §180.003 are exempt for purposes of this chapter, except as otherwise provided by Tex. Fin. Code §180.051.

(14) "Physical office" means an actual office where the business of mortgage lending and/or the business of taking or soliciting residential mortgage loan applications is conducted.

(15) "Recovery Fund" means the fund administered and maintained by the Commissioner for the recovery of actual damages by persons aggrieved by a licensed residential mortgage loan originator, established pursuant to Tex. Fin. Code §13.016.

(16) "Residential mortgage loan" has the meaning assigned by Tex. Fin. Code §157.002 and §180.002 and includes new loans and renewals, extensions, modifications, and rearrangements of such loans. The term does not include a loan which is secured by a structure that is suitable for occupancy as a dwelling, but is used for a commercial purpose such as a professional office, salon, or other non-residential use, and is not used as a residence.

(17) "Residential real estate" has the meaning assigned by Tex. Fin. Code §180.002 and includes both improved or unimproved real estate or any portion of or interest in such real estate on which a dwelling is or will be constructed or situated.

(18) "Social media site" means any digital platform accessible by a mortgage applicant or prospective mortgage applicant where the mortgage banker or sponsored originator does not typically own the hosting platform but otherwise exerts editorial control or influence over the content within their account, profile, or other space on the digital platform, from which the mortgage banker or sponsored originator posts commercial messages or other content designed to solicit business.

(19) "Takes a residential mortgage loan application," as used in Tex. Fin. Code §157.002(6) and §180.002(19) in defining "residential mortgage loan originator" means when an individual receives a residential mortgage loan application for the purpose of facilitating a decision on whether to extend an offer of residential mortgage loan terms to a mortgage applicant or prospective mortgage applicant, whether the application is received directly or indirectly from the mortgage applicant or prospective mortgage applicant, and regardless of whether or not a particular lender has been identified or selected.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 14, 2020.

TRD-202005490
Iain A. Berry
Associate General Counsel
Department of Savings and Mortgage Lending
Effective date: January 3, 2021
Proposal publication date: September 25, 2020
For further information, please call: (512) 475-1535

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SUBCHAPTER C. DUTIES AND RESPONSIBILITIES

7 TAC §§81.200, 81.202 - 81.206

Statutory Authority

The adopted rules are adopted under the authority of Finance Code §157.0023 and §180.004, which authorizes the commission to adopt rules necessary to implement or fulfill the purposes of Chapter 157 and the Texas SAFE Act, and as required to carry out the intentions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (federal SAFE Act).

The adopted rules affect the statutes contained in Finance Code Chapter 157, and Chapter 180.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. COMPLIANCE AND ENFORCEMENT

7 TAC §81.300, §81.301

Statutory Authority

The adopted rules are adopted under the authority of Finance Code §157.0023 and §180.004, which authorizes the commission to adopt rules necessary to implement or fulfill the purposes of Chapter 157 and the Texas SAFE Act, and as required to carry out the intentions of the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (federal SAFE Act).

The adopted rules affect the statutes contained in Finance Code Chapter 157, and Chapter 180.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY
SUBCHAPTER EE. ACCREDITATION STATUS, STANDARDS, AND SANCTIONS
DIVISION 1. STATUS, STANDARDS, AND SANCTIONS

19 TAC §97.1071

The Texas Education Agency (TEA) adopts an amendment to §97.1071, concerning special program performance. The amendment is adopted without changes to the proposed text as published in the October 2, 2020 issue of the *Texas Register* (45 TexReg 6866) and will not be republished. The adopted amendment clarifies existing statutory provisions; reflects changes to the Texas Education Code (TEC) related to compliance monitoring, reading diagnosis, and dyslexia and related disorders by Senate Bill (SB) 2075, 86th Texas Legislature, 2019; and updates terminology and cross references.

REASONED JUSTIFICATION: Section 97.1071 defines the procedures for special program monitoring and requirements a school district must engage in with TEA based on a determined level of performance derived from certain data sources.

The adopted amendment adds new subsection (a) to clarify and update language related to the commissioner's authority to conduct random, targeted, or cyclical reviews authorized under TEC, §39.056, either remotely or on-site to ensure compliance with and supports for improvement with applicable state and federal requirements for certain special populations of students. In addition, it clarifies authority for application of intensive or special investigations authorized under TEC, §39.057, for certain special populations of students.

New subsection (b) is added to apply the general supervision and monitoring activities under subsection (a) to compliance with statutory requirements for dyslexia and related disorders. This addition clarifies TEA's authority and aligns the rule with TEC, §28.006, as amended by SB 2075, 86th Texas Legislature, 2019; TEC, §38.003; and the State Board of Education's rule related to dyslexia and related disorders in 19 TAC §74.28. SB 2075, 86th Texas Legislature, 2019, amended TEC, §28.006, which relates to diagnosis of student reading development and comprehension. New TEC, §28.006(g-2), was added to require school districts to notify certain parents or guardians of a program providing students with reading disabilities the ability to borrow audiobooks free of charge. In addition, new TEC, §28.006(l), was added to require TEA to adopt rules to develop procedures designed to allow TEA to effectively audit, monitor, and periodically conduct site visits to ensure compliance with the requirements of TEC, §28.006; identify problems in complying; and develop reasonable and appropriate remedial strategies to address noncompliance.

Amended subsections (c)-(i) remove references to a specific data system, the Intervention Stage and Activity Manager (ISAM), and update the reference to 19 TAC §97.1005, which has been renamed from Performance Based Monitoring Analysis System to Results Driven Accountability (RDA). The adopted amendment updates terminology contained within the RDA and resulting monitoring activities. These changes clarify the agency's requirements and activities when monitoring special populations of students under the authority of TEC, §§39.056-39.058.

In addition, the section name is updated to "Special Program Performance; Monitoring, Review, and Supports" to clarify the contents of the rule and align with TEA's current systems and naming conventions.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began October 2, 2020, and ended November 2, 2020. Public hearings on the proposal were held on October 14 and 15, 2020. Following is a summary of the public comment received and the corresponding agency response.

Comment: The Texas School for the Blind and Visually Impaired expressed concerns regarding the inclusion of students who are blind or visually impaired and who have dyslexia for comparison of the district's performance relative to regulation under proposed subsection (c)(2). The superintendent commented that this population of students should not be compared with all students who have dyslexia but instead with other comparable populations.

Response: The agency disagrees with eliminating certain populations of students from performance analysis based on a particular disability. States are bound under the Individual with Disabilities Education Act (IDEA), specifically under 34 Code of Federal Regulations, §300.600, to include monitoring activities with primary focus on (1) improving educational results and functional outcomes for all children with disabilities; (2) ensuring public agencies meet the program requirements under the IDEA with emphasis on requirements that are most closely related to improving educational results for children with disabilities; and (3) using quantifiable indicators and such qualitative indicators as are needed to adequately measure performance in established priority areas.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §7.028, which establishes compliance monitoring limitations with exceptions noted in particular for requirements in TEC, §28.006 and §38.003; TEC, §28.006, as amended by Senate Bill 2075, 86th Texas Legislature, 2019, which requires the commissioner to establish procedures by rule for monitoring compliance and provision of support to districts for complying with statutory requirements in the section; TEC, §38.003, which requires the commissioner to establish procedures by rule for monitoring compliance and provision of support to districts for complying with statutory requirements in the section; and TEC, §§39.056-39.058, which define and establish conduct of monitoring reviews and special accreditation investigations and require the commissioner to establish procedures by rule for complying with statutory requirements in the sections.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§7.028; 28.006, as amended by Senate Bill 2075, 86th Texas Legislature, 2019; 38.003, and 39.056-39.058.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 16, 2020.

TRD-202005564

Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: January 5, 2021
Proposal publication date: October 2, 2020
For further information, please call: (512) 475-1497

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 97. COMMUNICABLE DISEASES
SUBCHAPTER A. CONTROL OF COMMUNICABLE DISEASES

25 TAC §97.3, §97.4

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts amendments to §97.3, concerning What Condition to Report and What Isolates to Report or Submit, and §97.4, concerning When and How to Report a Condition or Isolate. The amendments to §97.3 and §97.4 are adopted without changes to the proposed text as published in the September 11, 2020, issue of the *Texas Register* (45 TexReg 6315), and therefore will not be republished.

BACKGROUND AND JUSTIFICATION

The amendments clarify the conditions and diseases that must be reported; clarify the minimal reportable information requirements for the conditions and diseases; and adjust the list of reportable diseases to include diseases and conditions of concern to public health. The amendments comply with guidance from the Centers for Disease Control and Prevention regarding surveillance for reportable conditions and allow DSHS to conduct more relevant and efficient disease surveillance.

The amendments comply with Texas Health and Safety Code, Chapter 81, which requires DSHS to identify each communicable disease or health condition which is reportable under the chapter. The adoption also complies with Texas Government Code, §2001.039, which requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Texas Government Code, Chapter 2001 (Administrative Procedure Act). Sections 97.3 and 97.4 have been reviewed and DSHS has determined that the rules should continue to exist because rules on this subject are needed.

COMMENTS

The 31-day comment period ended October 12, 2020.

During this period, DSHS did not receive any comments regarding the proposed rules.

Due to a publishing error by the *Texas Register,* the proposed text in 25 TAC §97.3(a)(4) was published incorrectly. The text should be published as follows:

"*Staphylococcus aureus* with a vancomycin MIC greater than 2 µg/mL;"

A correction of error is published in the "IN ADDITION SECTION" in this same issue of the *Texas Register* to correct the rule text.

STATUTORY AUTHORITY

The amendments are authorized by Texas Health and Safety Code, §81.004, which authorizes rules necessary for the effective administration of the Communicable Disease Prevention and Control Act; and §81.041, which requires a rule to prescribe criteria that constitute exposure to reportable diseases; and are adopted under Texas Government Code, §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system, including by DSHS. Under Texas Health and Safety Code, Chapter 1001, the DSHS Commissioner is authorized to assist the Executive Commissioner in the development of rules relating to the matters within DSHS jurisdiction. Review of the rules implement Texas Government Code, §2001.039.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 16, 2020.

TRD-202005581
Barbara L. Klein
General Counsel
Department of State Health Services
Effective date: January 5, 2021
Proposal publication date: September 11, 2020
For further information, please call: (512) 776-7729

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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
DIVISION 3. LOSS FUNDING, INCLUDING CATASTROPHE RESERVE TRUST FUND, FINANCING ARRANGEMENTS, AND PUBLIC SECURITIES

28 TAC §§5.4102, 5.4114, 5.4133, 5.4134, 5.4141, 5.4142, 5.4160 - 5.4162, 5.4164, 5.4167, 5.4171

The Commissioner of Insurance adopts amendments to §§5.4102, 5.4114, 5.4133, 5.4134, 5.4141, 5.4142, 5.4161, 5.4162, 5.4164, 5.4167, and 5.4171 and adopts new §5.4160. The amendments and new section relate to Texas Windstorm Insurance Association (association) loss funding. This adoption implements provisions in House Bill 1900, 86th Legislature, 2019 (HB 1900).

The Texas Department of Insurance (TDI) adopts §§5.4114, 5.4134, 5.4141, 5.4142, 5.4164, and 5.4171 without changes to the proposed text as published in the June 19, 2020, issue of the *Texas Register* (45 TexReg 4138). These rules will not

be republished. Sections 5.4102, 5.4133, 5.4160 - 5.4162, and 5.4167 are adopted with changes to the proposed text; these changes are described in the Reasoned Justification. The rules with changes will be republished.

REASONED JUSTIFICATION. The association is the insurer of last resort for windstorm and hail insurance in a Commissioner-designated area along the Texas coast. The association provides windstorm and hail insurance coverage to those who are unable to get that coverage in the private market.

By statute, the association must pay its losses (policyholder claims) and operating expenses from net premium and other revenue. If net premium and other revenue are not enough, the association must pay losses and operating expenses from the catastrophe reserve trust fund (CRTF), which is an account maintained by the Texas Comptroller. The CRTF is funded mainly from the association's yearly profits. Losses and operating expenses for a catastrophe year that are greater than the association's net premium and other revenue for that year and amounts in the CRTF must be paid with proceeds of alternating classes of public securities and member insurer assessments.

Amendments to §§5.4102, 5.4114, 5.4133, 5.4134, 5.4141, 5.4142, 5.4161, 5.4162, 5.4164, 5.4167, and 5.4171 and the adoption of new §5.4160 are necessary to implement the loss funding provisions in HB 1900. HB 1900 amended Insurance Code §2210.453 (which addresses the association's reinsurance funding) and Insurance Code §2210.071 and §2210.0715 (which address excess loss payment and payment from reserves and the CRTF).

The amendments to Insurance Code §2210.453 require that the association, with Commissioner approval, assess its member insurers to pay for any reinsurance it purchases in excess of the association's statutory minimum funding level. By statute, the association must maintain total available loss funding in an amount not less than the association's probable maximum loss for a catastrophe year with a one-in-100-year probability. Member assessments to pay for reinsurance under HB 1900 are distinct from member assessments to pay losses and would not affect the association's ability to make loss assessments.

Former §5.4114(e) allowed a CRTF disbursement to allow the association to buy reinsurance in an amount that enables the association to exceed its statutory minimum funding level. Because Insurance Code §2210.453 now requires members to pay this amount, TDI has deleted this provision.

Adopted §5.4160 requires the association to discuss determining its one-in-100-year probable maximum loss for the year at the association's first regular board meeting each year. Following the discussion at this meeting, the association must determine its one-in-100-year probable maximum loss for the year and disclose it to the Commissioner not later than April 1. The association must disclose its method for determining its one-in-100-year probable maximum loss at the same time.

HB 1900 does not specify how the association must determine its one-in-100-year probable maximum loss or how transparent its method must be. Adopted §5.4160 requires the association to have a public discussion at its board meeting and to disclose information about its method so that anyone interested can see how the association determined its one-in-100-year probable maximum loss. The determination and information must be disclosed each year, regardless of whether the association requests a reinsurance assessment.

Under adopted §5.4160, if the association decides to buy reinsurance that exceeds its one-in-100-year probable maximum loss, it must get a quote for reinsurance that equals the one-in-100-year probable maximum loss. The association must disclose this quote to the board along with the total deposit premiums for all reinsurance for the year. The quote and the total deposit premiums must be disclosed not later than the board's second regular meeting of the year, which is usually in early May.

Members will be able to estimate the amount of reinsurance premium applicable to coverage that exceeds the one-in-100-year probable maximum loss and for which they will be assessed. Typically, the association begins to negotiate for reinsurance in April, with contracts running from June 1 to May 31 of the following year. The deadlines for the association to provide its one-in-100-year probable maximum loss, as well as the quote and the total deposit premiums, have been adopted based on this schedule.

Under adopted §5.4162, the association notifies each member of the amounts of net direct premiums the member wrote in Texas during the preceding calendar year and of net direct premiums of wind and hail insurance the member voluntarily wrote in the catastrophe area during the preceding calendar year. The association typically sends this notice to members in the late summer. Members have 30 days to appeal the amounts in the notice.

The association also notifies each member what its percentage of participation in an assessment will be, if there is an assessment during the current calendar year. The association typically sends the percentage of participation notice to members in the fall. Members have 30 days to appeal the percentage of participation in the notice.

Adopted §5.4162 requires that the notice of net direct premiums and voluntary wind and hail premiums and the notice of participation percentage inform members that the participation percentage will be used for reinsurance assessments, if there are any during the current calendar year.

Adopted §5.4160 requires the association to issue any reinsurance assessment by the later of either 120 days after the date the association receives the data that TDI provides under §5.4162(f) of this title for that year, or December 1 of that year. Under §5.4162(f), TDI gives the association each member company's net direct premiums and the aggregate net direct premiums of all member companies written during the preceding calendar year, as reported by member companies to TDI. Statute exempts some companies from reporting premium to TDI. The association obtains data for the exempted companies from other sources, such as the Surplus Lines Stamping Office of Texas. The 120-day alternate deadline in adopted §5.4160 falls on the 120th day after the date the association receives the data TDI provides, not the date the association receives data from other sources.

There are three considerations in setting the deadline by which the association must issue any reinsurance assessment.

The first consideration is the risk that the association will need to adjust the assessment or issue refunds to members. The association pays an initial deposit premium in periodic installments. The deposit premium is based on the association's estimated exposure for that year's hurricane season. The association's final premium, based on its actual exposure during hurricane season, is not known until the end of October. Issuing a reinsurance assessment only after the final premium is known avoids the risk

that the association will need to adjust the assessment or issue refunds to members.

Second, because the association must disclose its one-in-100-year probable maximum loss for the year by April 1, issuing a reinsurance assessment by the later of December 1 or 120 days after the date the association receives the data TDI provides under §5.4162(f) allows time for any appeal of the association's determination of its one-in-100-year probable maximum loss.

Third, under §5.4111 and Insurance Code §2210.452, the association must deposit its net gain from operations for each calendar year in the CRTF. Net gain from operations includes reinsurance premiums not paid or payable from member assessments. Each of the two possible deadlines in the adopted rule require the association to determine the reinsurance premiums not paid or payable from member assessments early enough to include that amount in the net gain from operations from the same year.

As proposed, §5.4160 required the association to issue any reinsurance assessment for the year not later than December 1. Adopted §5.4160 contains two possible deadlines because of comments on the proposed rule.

The adopted rules also implement HB 1900's amendments to Insurance Code §2210.071, on payment of excess losses, and §2210.0715, on payment from reserves and the CRTF.

To ensure that it is clear that net premium earned in one catastrophe year can be pledged to repay public securities issued in prior catastrophe years, this adoption amends the rules on the class 1 public security trust fund and the class 2 and class 3 public security trust funds, in §5.4141 and §5.4142, respectively. More specifically, amended Insurance Code §2210.071 prohibits the association from paying one catastrophe year's losses with premium earned in a later year. The amendments clarify that net premium can be pledged to repay class 1, class 2, and class 3 payment obligations, even if those obligations are for public securities issued or disbursed to pay for losses resulting from an event that occurred in a prior year.

To harmonize the amendments to Insurance Code §2210.0715 with §2210.608, on use of public security proceeds, this adoption amends the rules on public security proceeds.

Finally, in this adoption TDI removes the requirement that each member insurer give the association a copy of its Exhibit of Premiums and Losses ("Statutory Page 14") from its Texas Property and Casualty Annual Statement. The information on Statutory Page 14 is accessible through the National Association of Insurance Commissioners (NAIC) and is published annually on TDI's website.

Adopted §§5.4102, 5.4160, and 5.4167 contain nonsubstantive revisions from the proposed text for style or nomenclature purposes.

Section 5.4102. Definitions. Section 5.4102 is the definition section for Division 3. Adopted §5.4102(39), defining "other revenue," differs from the proposed text. In response to comments, new text is added at the end of the definition to clarify what investment income the association may count as other revenue when determining excess losses and when determining whether net premium and other revenue are sufficient to pay for public securities.

An amendment to §5.4102(4), defining "association surcharge percentage," corrects a reference to the Administrative Code, changing §5.4127 to §5.4126.

An amendment to §5.4102(10), defining "catastrophic event," conforms the rule with definitions in Insurance Code §2210.602(1-b). The amendment adds the qualifier "during a calendar year" to the definition.

An amendment to §5.4102(32), defining "net gain from operations," implements amendments to Insurance Code §2210.071 and §2210.453. The amendments clarify that the association cannot include losses incurred in prior catastrophe years in its calculation of net gain from operations. Additionally, the amendments conform the rule to Insurance Code §2210.453, requiring members to pay reinsurance premiums applicable to the reinsurance coverage that exceeds the association's one-in-100-year probable maximum loss.

An amendment to §5.4102(34), defining "net premium," implements amendments to Insurance Code §2210.071. The amendment to §5.4102(34) works in conjunction with the amendments to §5.4141 and §5.4142, which contain the rules on the class 1 public security trust fund and the class 2 and class 3 public security trust funds. The sentence "Following the issuance of public securities, net premium may be pledged for the payment of class 1, class 2, and class 3 payment obligations" is removed from the definition and an equivalent sentence is added to §5.4141 and §5.4142. Because it is a substantive rule, the sentence is more appropriate in those sections than in a definition and is more visible there.

An amendment adds new §5.4102(37) to define "one-in-100-year probable maximum loss" as the minimum funding level required by Insurance Code §2210.453(b). Defining the term implements the amendments to Insurance Code §2210.453. Subsequent paragraphs in §5.4102 are renumbered as appropriate to reflect the new paragraph.

The amendments to the definition of "other revenue" (currently §5.4102(38), renumbered as §5.4102(39)) implement the amendments to Insurance Code §2210.453 by excluding reinsurance assessments from other revenue. The amendments implement the amendments to Insurance Code §2210.071 by excluding income on funds held by the Texas Treasury Safekeeping Trust Company from other revenue. The amendments also clarify what income may be counted as other revenue when determining whether net premium and other revenue are sufficient to pay for public securities under Insurance Code §§2210.612, 2210.613, and 2210.6131. These amendments clarify which funds the association can pledge to repay public securities.

Section 5.4114. Disbursements from the Catastrophe Reserve Trust Fund. Section 5.4114 describes the procedures for disbursing funds from the CRTF. Current §5.4114(e) allows a CRTF disbursement to buy reinsurance in an amount that enables the association to exceed its one-in-100-year probable maximum loss. Because Insurance Code §2210.453 now requires members to pay for reinsurance coverage that exceeds this amount, TDI has removed subsection (e). The subsections that follow subsection (e) are redesignated as appropriate to reflect this change, and a reference to current subsection (g) in subsection (a)(4) is changed to reference redesignated subsection (f).

Section 5.4133. Public Security Proceeds. Amendments to §5.4133 clarify how HB 1900's amendments to Insurance Code §2210.0715 harmonize with Insurance Code §2210.608(b). The amendments to §2210.0715 prohibit including the proceeds of public securities issued for one catastrophe year with reserves available for a subsequent catastrophe year. Section

2210.608(b) allows "proceeds remaining after the purposes for which the public securities were issued are satisfied" to be used to pay for outstanding public securities or administrative expenses. Then, any remaining proceeds must be put in the CRTF.

The amendments to §5.4133 add new subsections (e) and (f). These subsections describe how public security proceeds may be used during the catastrophe year for which they are issued or disbursed and during subsequent years. The amendments ensure that the proceeds put in the CRTF (which may be used to pay for losses in later catastrophe years) are not confused with the reserves referenced in Insurance Code §2210.0715 (which may not be used to pay for losses in later catastrophe years).

As a result of comments, adopted §5.4133(e) and (f) contain nonsubstantive revisions to clarify when and for what purpose the association can use public security proceeds.

Section 5.4134. Excess Public Security Proceeds. Amendments to §5.4134 clarify that Insurance Code §2210.608(b) describes the permissive uses of excess public security proceeds remaining after the purposes for which the public securities were issued or disbursed are satisfied. The amendments add subsection (b) to the Insurance Code citation and insert the words "or disbursed."

Section 5.4141. Class 1 Public Security Trust Fund. The amendment to §5.4141 implements amendments to Insurance Code §2210.071(b). This amendment works in conjunction with the amendment to §5.4102(34), which defines "net premium." The sentence "Following the issuance of public securities, net premium may be pledged for the payment of class 1, class 2, and class 3 payment obligations" is removed from the definition and an equivalent sentence is added to §5.4141 as new subsection (e). It clarifies that net premium can be pledged to repay class 1 payment obligations, even if those obligations are for public securities issued to pay for losses from a catastrophic event that occurred in a prior year.

Section 5.4142. Class 2 and Class 3 Public Security Trust Funds. The amendment to §5.4142 implements amendments to Insurance Code §2210.071(b). This amendment works in conjunction with the amendment to §5.4102(34), which defines "net premium." The sentence "Following the issuance of public securities, net premium may be pledged for the payment of class 1, class 2, and class 3 payment obligations" is removed from the definition and an equivalent sentence is added to §5.4142 as new subsection (e). It clarifies that net premium can be pledged to repay class 2 and class 3 payment obligations, even if those obligations are for public securities issued to pay for losses from a catastrophic event that occurred in a prior year.

Section 5.4160. Member Assessments to Pay for Reinsurance in Excess of the Association's Statutory Minimum Funding Level. New §5.4160 describes the procedures for assessing members for reinsurance or alternative risk financing mechanisms. New §5.4160 implements new subsections (d) and (e) in Insurance Code §2210.453, requiring members to pay for any reinsurance coverage that exceeds the association's one-in-100-year probable maximum loss. This section also describes the deadlines the association must meet during each year.

Adopted §5.4160(c) differs from the proposed text. The association must disclose its one-in-100-year probable maximum loss for the calendar year and the method for determining that loss after the first regular board meeting of the calendar year, but not later than April 1 of each year. The proposed text required this disclosure "on the day after the effective date of this section, and not later than April 1 of each subsequent year." Because the section will go into effect in early January 2021, requiring the disclosure the day after the effective date may not give the association enough time to determine its one-in-100-year probable maximum loss for 2021.

Adopted §5.4160 contains other changes from the proposed text, which are the result of comments. The adopted text contains two possible deadlines for the association to issue any assessment to pay for excess reinsurance coverage. The adopted text also contains a corrected citation to Insurance Code §2210.453(c)--instead of to §2251.453(c). Conforming changes reflect changes to the title of §5.4161. Finally, language emphasizing that member assessments for reinsurance are only for reinsurance coverage in excess of the statutory minimum funding level is added to the adopted text. A citation to Insurance Code §2210.453(d)--instead of simply to §2210.453--is added for the same reason.

The association must discuss with the board its methodology for determining its one-in-100-year probable maximum loss for the calendar year at the first regular board meeting in the calendar year, but before April 1. The association must also disclose to the Commissioner its one-in-100-year probable maximum loss for the calendar year and the method for determining that loss after the first regular board meeting of the calendar year, but not later than April 1 of each year

If the association elects to purchase reinsurance or alternative risk financing mechanisms that provide coverage in excess of its one-in-100-year probable maximum loss, then the association must also get a quote for reinsurance that equals the one-in-100-year probable maximum loss.

The association must provide the quote to the board by the second regular board meeting in the calendar year, typically in early May. At the same time, the association must also provide the total deposit premiums for all reinsurance for the year. These requirements allow members to estimate the amount of reinsurance premium for coverage that exceeds the association's one-in-100-year probable maximum loss and that they will be assessed for.

The association must issue any assessment by the later of either 120 days after the date the association receives the data that TDI provides under §5.4162(f) of this title for that year, or December 1 of that year.

Adopted §5.4160 also requires that the association include, in any request to the Commissioner to approve an assessment, the portion of the reinsurance premium that provides coverage above its one-in-100-year probable maximum loss. In other words, the association's request must provide the amount of the reinsurance assessment it wants to make. The association must also provide the methodology it used to calculate that amount.

Adopted §5.4160 requires the association to make the request within a reasonable time after its reinsurance costs for the year are known. This requirement is intended to ensure that the request can be approved in time for the association to issue the assessment by the deadline.

Additionally, adopted §5.4160 uses the term "alternative risk financing mechanisms" as used in Insurance Code §2210.453(a) and §2210.453(d) rather than "other financial arrangements" as used in Insurance Code §2210.612(e) and §2210.072(d), because alternative risk financing mechanisms are used in the con-

text of reinsurance and are alternative ways for the association to transfer risk out of the association. Conversely, other financial arrangements include other types of borrowing--including public securities--which do not transfer risk out of the association.

Section 5.4161. Member Assessments Other than Assessments for Reinsurance in Excess of the Association's Statutory Minimum Funding Level. In response to comments, the title of adopted §5.4161 is changed from "Member Assessments to Pay Claims," the title in the proposed text.

The amendment to §5.4161 deletes the current text of subsection (j). A provision similar to current subsection (j) is incorporated in new §5.4160 as subsection (f). Current subsection (j) lists sections on member assessments that are part of the association's plan of operation and that control over any conflicting provisions in §5.4001. Because new §5.4160 is now the first section on member assessments, the provision included in current §5.4161(j) is more appropriate in §5.4160.

Section 5.4161's heading, "Member Assessments," is also amended to add the words "to Pay Claims." This amendment clarifies that §5.4161 specifies the requirements for assessments for claims, while §5.4160 specifies requirements for assessments to pay for reinsurance coverage.

In addition, current subsections (f) - (i) are redesignated as (e) - (h) to correct an error in the previous rule text; before this amendment the rule text did not contain a subsection (e).

Finally, new subsection (i) is added, stating that "]he association may use the proceeds from assessments only for losses and expenses resulting from the catastrophe year for which the assessments were made." This provision conforms the rule to HB 1900's amendments to Insurance Code §2210.0715.

Section 5.4162. Amount of Assessment. Section 5.4162 addresses the procedure for determining the amount a member is required to pay when participating in an assessment. Adopted 5.4162 differs from the proposed text in that subsection (a) references the revised titles of §5.4160 and §5.4161. Subsection (a)(2) is revised from the proposed version by removing the words "class of" from the phrase "gave rise to the class of assessments." The words "class of" were appropriate when the paragraph discussed public securities but are unnecessary now that the paragraph discusses assessments. Finally, as a result of comments, language emphasizing that member assessments for reinsurance are only for reinsurance coverage in excess of the statutory minimum funding level is added to subsection (i).

Section 5.4162(a) is amended to add a citation to new §5.4160.

Section 5.4162(a)(1) is amended to conform with HB 3496, 85th Legislature, 2017. The amendment removes the paragraph's last sentence, which states that the anniversary date of an insurer's membership in the association is the date the insurer became an authorized property insurer in Texas.

Section 5.4162(b) is amended to include nonsubstantive stylistic edits, and the citation to 28 TAC §5.4001 is amended to be more specific by revising it to include a reference to "(a)(2)(N)."

Subsection (c) is amended to separate it into subsection (c) and a new subsection (d), to aid in readability. The subsections that follow are redesignated as appropriate.

Subsection (d) is redesignated as subsection (e) and is subdivided into paragraphs to aid in readability.

Subsection (e) is broken into three new subsections, which are designated as subsections (f), (g), and (h). Additionally, new subsubsection (g) is divided into paragraphs with nonsubstantive rewording.

Subsection (h) specifies that the association must take action under the subsection "within a reasonable period of time after sending the notice described in subsection (g)."

An amendment adds new subsection (i), which requires that the association's notice of net direct premiums and voluntary wind and hail premiums and notice of participation percentage must inform members that the participation percentage will be used for reinsurance assessments, if there are any during the current calendar year. The association typically sends the notice of net direct premiums and voluntary wind and hail premiums in late summer. The notice of participation percentage is typically sent in the fall.

The amendment removes subsection (f) of the previous text, which required that each member insurer give the association a copy of its Exhibit of Premiums and Losses (Statutory Page 14) from its Texas Property and Casualty Annual Statement. This requirement is no longer necessary, as members already file their annual statements electronically with the NAIC. TDI has access to the information through the NAIC and in practice already provides it to the association and publishes it annually on TDI's website. Removing this requirement reduces the burden on the association and its members.

Section 5.4164. Payment of Assessment. Section 5.4164 requires members to pay their share of any assessment not later than the 30th day after receiving their notice of assessment. Section 5.4164 is amended to remove exceptions to the requirement, because they are no longer relevant. The exceptions cite other association rules that were repealed to implement Senate Bill 900, 84th Legislature, 2015, which changed the association's funding structure.

Section 5.4167. Inability to Pay Assessment by Reason of Insolvency. Amendments to §5.4167 conform the section to the amendments to Insurance Code §2210.071 and §2210.0715. The language "in the event it is necessary to obtain additional funds to provide for operating expenses and losses in the year the insurer is declared impaired" is replaced with "in the event an assessment is necessary in the year the insurer is declared impaired." An assessment may be necessary to cover operating expenses and losses from a year other than the year the assessment was made.

Section 5.4171. Premium Surcharge Requirements. Amendments to §5.4171 conform the rule to Insurance Code §221.001(c), in accordance with HB 3496. The amendment revises subsection (e) to clarify that §5.4171 and other sections apply to farm mutual insurance companies that are acting as fronting insurers.

In addition to the specific amendments previously noted, the adopted amendments include nonsubstantive editorial and formatting changes to conform the sections to the agency's current style and to improve the rules' clarity. These changes include the following: Punctuation is revised in places for clarity and grammatical accuracy. The word "Commissioner" is capitalized whenever it appears lowercase, and the word "association" is made lowercase where it is capitalized, unless it begins a sentence. The word "division" is changed to "title" where the word appears in citations to Texas Administrative Code sections. The word

"shall" is replaced with "must" or "will" as appropriate to fit the context of the provision and to add clarity.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: the American Property and Casualty Insurance Association; counsel for the Allstate Group, ASI Lloyds Insurance Company, the United Fire Group, and Acuity, A Mutual Insurance Company; the Coastal Windstorm Insurance Coalition; the Insurance Council of Texas; the National Association of Mutual Insurance Companies; and the association submitted comments in support of the proposal with changes.

Comment on §5.4102

Comment: A commenter suggests adding the definition of "catastrophe year" found in Insurance Code §2210.003(3-b) to proposed §5.4102.

Agency Response: All the definitions in Insurance Code §2210.003, including the definition of "catastrophe year," apply to the rules adopted under Chapter 2210, which is the association's governing statute. To avoid redundancy, TDI rules generally do not repeat statutes unless doing so improves clarity or is necessary to provide context.

Comment on §5.4102(34)

Comment: A commenter cautions against deleting the sentence "Following the issuance of public securities, net premium may be pledged for the payment of class 1, class 2, and class 3 payment obligations" from the definition of "net premium" in §5.4102(34). The commenter expresses concern that removing the sentence will make it more difficult to issue public securities.

Agency Response: TDI did not propose removing the language from the rules. The language allowing net premium to be pledged for the payment of public security obligations appears in the proposed and adopted amendments to §5.4141 and §5.4142. As discussed in the proposal's explanation section and in the summaries of the proposed amendments to §§5.4102, 5.4141, and 5.4142, the language was moved from the definitions to the sections on the public security trust funds. As a substantive rule, the language is more appropriate in the sections on public security trust funds than in a definition.

Comment on §5.4102(39)

Comment: A commenter asks that the proposed new sentence in the definition of "other revenue" be clarified to avoid confusion as to whether the association can pledge future investment income to repay public securities. The proposed sentence states that other revenue does not include income on funds held by the Texas Treasury Safekeeping Trust Company (trust company).

Agency Response: TDI agrees to make a revision in response to this comment. As adopted, §5.4102(39) has been changed to include the following text at the end of the definition:

"For the purpose of Insurance Code Section 2210.071, other revenue does not include investment income on any trust company account. For the purpose of Insurance Code §2210.612, other revenue does not include investment income on the CRTF, the class 2 trust fund, or the class 3 trust fund. For the purpose of Insurance Code §2210.613, other revenue does not include investment income on the CRTF, the class 1 trust fund, or the class 3 trust fund. For the purpose of Insurance Code §2210.6131, other revenue does not include investment income on the CRTF, the class 1 trust fund, or the class 2 trust fund."

The additional text referencing §2210.071 clarifies that no investment income from any of the association's trust company-held accounts may be counted as "other revenue" when determining whether the association has sustained excess losses in a particular catastrophe year. The additional text referencing §§2210.612, 2210.613, and 2210.6131 clarifies which account's investment income may be counted as "other revenue" when determining whether net premium and other revenue are sufficient to pay each section's class of public securities.

Comments on §5.4133(f)

Comment: A commenter asks whether proposed §5.4133(f) permits the association to use the proceeds of public securities issued before a catastrophic event only during the calendar year for which the proceeds are disbursed.

Agency Response: No. The association may use the proceeds of pre-event public securities during years other than the catastrophe year the proceeds are disbursed for. But the purposes for which the association may use those proceeds are limited by Insurance Code §2210.0715 and §2210.608. Proposed and adopted §5.4133(f) state what those limits are during the catastrophe year for which the proceeds of pre-event public securities are disbursed and during subsequent years.

Section §5.4133(f)(1) states the purposes for which, during the catastrophe year for which the proceeds are disbursed, the association may use the proceeds of pre-event public securities.

Section 5.4133(f)(2) states the purposes for which, during subsequent years, the association may use the proceeds of pre-event public securities.

Section 5.4133(f)(3) states the purposes for which the association may use excess proceeds, which remain after all losses and expenses from the catastrophe year for which the proceeds are disbursed are paid.

Section 5.4133(e) sets the same use requirements as §5.4133(f), but subsection (e) addresses the proceeds of public securities that are issued after a catastrophic event.

Comment: A commenter states that the proceeds of public securities issued before a catastrophic event may end up being disbursed in years after the catastrophic event.

Agency Response: TDI agrees. This is why §5.4133(f) refers to the catastrophe year *for which* proceeds of pre-event public securities are disbursed, rather than the year in which they are disbursed.

Comment: A commenter states that the proceeds of public securities issued before a catastrophic event may be used to pay for the items listed in Insurance Code §2210.608(a) and (c), regardless of whether the items result from a catastrophic event.

Agency Response: TDI disagrees with the comment. Insurance Code §2210.608 must be read in context with Insurance Code §2210.0715. Section 2210.0715(a) requires the association to pay losses for a catastrophe year that exceed premium and other revenue for that year from the association's reserves and from the CRTF. Section 2210.0715(b) prohibits the proceeds of public securities issued before or as a result of a catastrophe year from "being included in the reserves available for a subsequent catastrophe year for purposes of this section."

The three paragraphs in §5.4133(f) harmonize Insurance Code §2210.0715 and §2210.608.

When pre-event public security proceeds are disbursed for a catastrophe year, it is because the association's losses and expenses exceed its premium and other revenue for that catastrophe year and CRTF funds available before that catastrophe year. So, during the catastrophe year for which the proceeds are disbursed, there are no restrictions on how the association may use the proceeds.

After that catastrophe year, however, unrestricted use of the proceeds for any of the purposes listed in §2210.608(a) and (c) would conflict with §2210.0715(b). For example, using proceeds disbursed for catastrophe year 2017 to pay for losses from events that occurred in 2018 would bring §2210.608(a)(1) into conflict with §2210.0715(b). So, during the years after 2017, proceeds disbursed for catastrophe year 2017 may only be used to pay for losses and expenses resulting from catastrophe year 2017.

Any excess proceeds that remain after losses and expenses for the catastrophe year for which they were disbursed are paid may be used in accordance with Insurance Code §2210.608(b).

Harmonizing §2210.0715 and §2210.608 ensures that public security proceeds are spent according to the funding structure in Insurance Code Chapter 2210.

Comment: A commenter asks whether the statutory maximum of $500 million in public securities issued before a catastrophic event will always be available and asks what will happen if the association needs part but not all of the proceeds.

Agency Response: Insurance Code §2210.072 provides that not more than $500 million in class one public securities may be issued, in the aggregate, at any one time. Regardless of the amount issued, an amount less than that may be disbursed if necessary.

Comment on §5.4133(e) and (f)

Comment: A commenter states that proposed §5.4133(e) and (f) could be misread to prohibit the association from using public security proceeds during the catastrophe year for which the proceeds were disbursed or issued and allow the association to use only public security proceeds after that catastrophe year has ended. The commenter suggests revising the section to prevent this misreading.

Agency Response: TDI appreciates the suggestion. In response to this comment, subsections (e) and (f) of §5.4133 have been adopted with nonsubstantive changes from the proposed text to clarify when and for what purpose the association may use public security proceeds.

Comments on §5.4160

Comment: A commenter suggests changing the title and subsection (a) of proposed §5.4160 to say that Insurance Code §2210.453 requires that the association assess its member insurers to pay for any reinsurance it purchases in excess of the association's statutory minimum funding level. The commenter expresses concern that without this change, §5.4160 could be misconstrued to require that member insurers be assessed for all reinsurance the association purchases.

Agency Response: TDI agrees with the comment. As proposed, §5.4160 referenced Insurance Code §2210.453. However, the title of adopted §5.4160 and subsection (a) of the section restate §2210.453's provision that the association must assess its members to pay the cost of reinsurance or alternative risk transfer mechanisms in excess of the association's statutory minimum funding level. As adopted, subsections (a) and (i) of §5.4160 are also modified from the proposed text to reference subsection (d) of Insurance Code §2210.453.

Comment: A commenter writes that the proposed rules allow the association to select an excessive one-in-100-year probable maximum loss.

The commenter recommends requiring the association to determine its one-in-100-year probable maximum loss through the year 2021 by using one model, the long-term model developed by hurricane modeling firm Risk Management Solutions, Inc. (RMS), provided that the Florida Commission on Hurricane Loss Projection Methodology (FCHLPM) approves the model for Florida rate filings.

The commenter states that the interests of the association's reinsurance broker and the association's member insurers are aligned, because both want the association to set the highest possible probable maximum loss.

The commenter states that the uncertainty of hurricane modeling enables the association and its reinsurance broker to make assumptions that benefit member insurers at the expense of policyholders.

The commenter expects that requiring the association to use the single RMS model will lower the association's probable maximum loss, thus keeping the association's rates affordable, which is especially important during difficult economic times. The commenter states that, unlike the association's reinsurance broker, RMS has no financial interest in how much reinsurance the association buys.

Agency Response: TDI disagrees with the recommendation.

Having the association, after public discussion, determine its one-in-100-year probable maximum loss provides more transparency and flexibility than setting a model via rules.

The adopted rules require the association to discuss determining its one-in-100-year probable maximum loss for the year at the year's first regular board meeting. Information on hurricane models, policy data inputs, user-selected assumptions, each model's one-in-100-year probable maximum loss, any blending or averaging of hurricane models, and any adjustments to the model outputs must be made public.

Adopted §5.4160(c) and (d) state that the association must determine the one-in-100-year probable maximum loss for the year after the board meeting and public discussion. The goal of the public discussion and information requirements is to produce the best estimate of the association's one-in-100-year probable maximum loss. In contrast, the commenter urges that the association be required to use the single RMS model to produce a lower probable maximum loss. Selecting a model because it is expected to produce a preferred probable maximum loss defeats the legislature's intent in setting the one-in-100-year probable maximum loss as the association's minimum funding level.

The commenter states that the association's reinsurance broker has a financial interest in the amount of reinsurance the association purchases. This is correct in that the broker receives a flat fee for gross ceded premium up to a certain amount and then a percentage for gross ceded premium above that amount. However, the association can go directly to one or more companies that provide hurricane modeling rather than seeking those services through its reinsurance broker. The association can do this

regardless of whether the rules compel it to use one particular model.

Comment: A commenter writes that allowing the association to count loss adjustment expenses in calculating its one-in-100-year probable maximum loss may violate Texas law and recommends that the rules prohibit the association from doing so. The commenter recommends that the association assess its member insurers to pay its loss adjustment expenses.

To support the argument that including loss adjustment expenses in the association's one-in-100-year probable maximum loss may violate Texas law, the commenter points out that the association's statute refers to the minimum amount the association must have in "total available loss funding," and that loss adjustment expenses are not insured losses under the association policies.

Agency Response: TDI disagrees with the recommendation. Statutes, rules, and actuarial considerations point toward including loss adjustment expenses in the one-in-100-year probable maximum loss calculation.

Although Insurance Code Chapter 2210 does not define "loss," the definition of "losses," in §5.4102, relating to Definitions, includes "adjustment expenses, litigation expenses, and other claims expenses." These three items have been included in the definition since TDI adopted §5.4102 in 2011. In 2015, SB 900 amended Insurance Code §2210.453(b) to specify the amount the association must have in "total available loss funding" without defining "loss" or "losses." The fact that the legislature did not define loss or losses in SB 900 is noteworthy.

The commenter is correct that association policies do not identify loss adjustment expenses as insured losses. But the policies do not place the association's loss adjustment expenses on the policyholder either. The policies do not reference loss adjustment expenses, except to repeat the requirement under Insurance Code §2210.574 that a claimant and the association are responsible in equal shares for paying any costs of an appraisal.

From an actuarial perspective, it is appropriate to include loss adjustment expenses in the one-in-100-year probable maximum loss calculation for the purpose of making reinsurance purchasing decisions because the association's reinsurance contracts provide coverage for loss adjustment expenses.

Comment: Under Insurance Code §2210.3511, the association must make its rate adequacy analysis publicly available before the board of directors votes on whether to file with TDI the proposed rates based on that analysis. Among other requirements, the analysis must include all hurricane model output data "in a searchable electronic format that allows for efficient analysis and is sufficiently detailed to allow the historical experience in this state to be compared to results produced by the model."

To comply with this requirement, a commenter makes two recommendations.

First, that "TWIA's hurricane modelers" be required to provide a table with frequency, intensity, and landfall data for modeled storms so that the modeled storms can be compared with actual Texas hurricane experience.

Second, the commenter recommends requiring the hurricane modelers to estimate losses for recent hurricanes that landed on the Texas coast, so that the modelers' estimates can be compared with actual losses from the same hurricanes.

Agency Response: TDI disagrees with the recommendations. The recommendations are outside the scope of the rule proposal because they address Insurance Code §2210.3511, concerning public access to rate adequacy analysis, rather than implementing §2210.071, concerning payment of excess losses; §2210.0715, concerning payment from reserves and trust fund; or §2210.453, concerning reinsurance and alternative risk financing mechanisms.

Additionally, Insurance Code Chapter 2210 does not give TDI authority to impose the suggested requirements on hurricane modeling firms.

Comment: A commenter suggests that proposed §5.4160 be changed to either eliminate or extend the deadline for any assessment under Insurance Code §2210.453. As proposed, §5.4160(a)(2) required the association, if assessing its members for the cost of excess reinsurance, to make the assessment not later than December 1 of the year the assessment is issued.

The commenter states that the time between October 31, when the association knows its final reinsurance premium for the year, and December 1 is insufficient for the association to compute each member's participation percentage. The commenter suggests that if the association's deadline to make an excess reinsurance assessment is not eliminated, it be not later than 180 days after TDI provides the data needed to calculate participation percentages.

Agency Response: TDI agrees with the comment and has adopted the text with changes to the proposed text to address the concern raised by the commenter.

TDI typically sends the association data necessary to calculate participation percentages for the preceding calendar year in late summer. The association obtains the remainder of the necessary data from the Surplus Lines Stamping Office of Texas. The association typically sends the notice of participation percentage to members in the fall. However, delays in data reporting may prevent the association from being able to calculate participation percentages and assess by December 1.

To ensure the association has enough time to calculate each member's percentage of participation, adopted §5.4160(a)(2) is changed from the proposed version to require the association to issue any assessment the later of either 120 days after the date the association receives the data that TDI provides under §5.4162(f) of this title for that year, or December 1 of that year. A deadline for the assessment is necessary to ensure that the association will be able to determine the reinsurance premiums not paid or payable from member assessments early enough to include that amount in the net gain from operations for the same year.

Comments on §5.4160(f)

Comment: A commenter writes that proposed new §5.4160(f) should not refer to Insurance Code §2251.453(c) but should instead refer to Insurance Code §2210.453(c).

Agency Response: TDI agrees and has changed the text as proposed. As adopted, §5.4160(f) is corrected to refer to Insurance Code §2210.453(c).

Comment: A commenter suggests changing proposed new §5.4160(f) to require the association to get multiple premium quotes, "if available," for the amount of reinsurance coverage that is necessary to enable the association to fund to its statutorily required minimum and for any amount of reinsurance coverage the association chooses to purchase that will provide

funding above that minimum. The commenter states that this will provide transparency and ensure that the association tries to get the best possible price on coverage.

Agency Response: TDI disagrees with the comment.

The purpose of §5.4160(f) is to enable member insurers to estimate the amount of an excess reinsurance assessment by subtracting the quote for coverage at the one-in-100-year probable maximum loss level from the total deposit premiums for coverage at the level the association has decided to purchase. Subsection (f) enables only an estimate because the quote is not the same as a firm order term and because the amount of the total deposit premiums will be adjusted according to the association's actual coverage during hurricane season. However, having an estimate in May will enable members to plan for a reinsurance assessment in the last quarter of the year.

The commenter's requested change does not appear to be necessary. Under the HB 1900 amendments, the association is still responsible for paying for reinsurance coverage up to and including its one-in-100-year probable maximum loss. The association still has an incentive to obtain the best price possible on reinsurance. An independent review of the association's overall rate level and rate structure by Willis Towers Watson, an actuarial consulting firm, has provided guidance on how the association can lower the amount it spends on reinsurance by adding secondary risk characteristics on its insured properties to the modeling data.

Comment on §5.4161

Comment: A commenter suggests changing the title of proposed §5.4161 from "Member Assessments to Pay Claims" to "Member Assessments Other than Assessments for Excess Reinsurance" to better describe the purposes of the assessments. The commenter also recommends conforming changes to subsection (a) of proposed §5.4162

Agency Response: TDI agrees with the comment. The title of §5.4161 as adopted has been changed from the proposed text to be "Member Assessments Other than Assessments for Reinsurance in Excess of the Association's Statutory Minimum Funding Level." Conforming changes are made to §5.4160(j) and §5.4162(a).

Comment on §5.4161(i)

Comment: A commenter states that new subsection (i) in §5.4161 is unnecessary. New §5.4161(i) states that the association "may use the proceeds from assessments only for losses and expenses resulting from the catastrophe year for which the assessments were made." The commenter states that the new language is not necessary to conform the rule to HB 1900's amendments to Insurance Code §2210.0715. The commenter states that §2210.0715 does not refer to how assessments can be used.

Agency Response: TDI disagrees with the comment. HB 1900 amended Insurance Code §2210.0715 by adding "or assessments made" to subsection (b) of the section. This amendment prohibits assessment proceeds obtained to pay for a prior catastrophe year's losses from being counted as part of the reserves with which the association may pay losses resulting from subsequent catastrophe years. In other words, the amendment ties assessment proceeds, like public security proceeds, to the catastrophe year for which they were obtained.

TDI proposed new §5.4161(i) after reviewing and agreeing with a comment the National Association of Mutual Insurance Companies (NAMIC) made on the informal working draft of §5.4161 and the other loss funding rules. NAMIC pointed out that HB 1900 placed limitations on the use of both public security proceeds and member assessments and suggested amending rule provisions relating to assessments accordingly.

Comment on §5.4162(b)

Comment: Section 5.4162 provides that a member insurer's percentage of participation in an assessment is based on the insurer's net direct premium and other data from the calendar year before the year the assessment is made, regardless of when the catastrophe that necessitated the assessment took place.

Three commenters suggest changing §5.4162(b) to provide that a member insurer's percentage of participation should be determined based on the insurer's data during the calendar year that precedes the catastrophe year for which the assessments are made.

The commenters offer legal and policy arguments for changing the year on which the assessment is based.

The legal arguments are that §5.4162(b) is inconsistent with and has been superseded by current Insurance Code provisions and conflicts with the association's plan of operation. In particular, the commenters discuss:

- Insurance Code §2210.003(3-b), which defines "catastrophe year" as a calendar year in which insured losses occur, regardless of when paid,

- Insurance Code §2210.052(a), under which each member participates in the association's losses according to the proportion the member's net direct premiums during the preceding calendar year bear to all members' aggregate net direct premiums, and

- Insurance Code §2210.0725, concerning when losses in a catastrophe year can be paid with assessments, and requiring that each insurer's share of the assessment be determined "in the manner used to determine each insurer's participation in the association for the year under Section 2210.052."

The policy arguments are that basing participation on data from the year preceding the catastrophe year that necessitated the assessment is fair and predictable, because for all assessments arising from a particular catastrophe year, a member's percentage of participation will be the same. The commenters argue that changing §5.4162(b) will benefit consumers by removing members' incentive to limit assessment exposure by lowering or not growing their market share in Texas after a catastrophic year; members' exposure will already be set. Similarly, potential entrants to the Texas market will not be deterred from offering insurance to Texas consumers after a catastrophic year. Finally, basing the percentage of participation on data from the preceding calendar year is consistent with property insurance practice. The commenters argue that, in contrast, basing the percentage of participation on data from the calendar year before the year in which the assessment is made treats member insurers as though they were offering claims-made coverage for liability losses.

Agency Response: The proposal for the adopted rules did not address the provisions that prescribe the base year for assessment participation, so amending the rules as commenters would like would require a new rule proposal. In referring to §5.4162(b), one of the commenters requesting the change states that the "notice of proposed changes only proposes stylistic and non-

substantive changes to this subsection." Without the necessary notice, interested parties do not have the opportunity to participate in the rulemaking in the meaningful and informed manner the law requires. TDI does not believe it advisable to delay implementation of the changes made in this rulemaking in order to make the changes suggested by the commenter. Because these issues are beyond the scope of this rule proposal and adoption, TDI declines to address the commenters' legal arguments or policy considerations in this adoption order.

While TDI cannot make the suggested changes here, TDI intends to address this issue in a future rulemaking.

Comment on §5.4162(g) and (h)

Comment: A commenter suggests defining the "reasonable time" within which the association must notify member insurers about net direct premiums, voluntary writing in the catastrophe area, and percentage of participation. The commenter also suggests removing the requirement that the association send the notifications by certified mail.

Agency Response: TDI declines the suggestion. The length of a "reasonable time" may vary somewhat between subsections (g) and (h), depending on circumstances. For example, errors in the data the association has received may affect the time it takes the association to determine the percentage of participation. Defining "reasonable time" runs the risk of replacing one necessarily flexible standard with another standard that is equally flexible but more verbose. At this time, there is no evidence that a definition would bring any benefits.

Requiring the association to send the notifications by certified mail creates a record that can be used to determine whether the association complied with subsections (g) and (h).

STATUTORY AUTHORITY. The Commissioner adopts new §5.4160 and amended §§5.4102, 5.4114, 5.4133, 5.4134, 5.4141, 5,4142, 5.4161, 5.4162, 5.4164, 5.4167, and 5.4171 under Insurance Code §§2210.008, 2210.151, 2210.152, 2210.452, and 36.001.

Insurance Code §2210.008 provides that the Commissioner may adopt rules as reasonable and necessary to implement Chapter 2210.

Insurance Code §2210.151 provides that the Commissioner adopt the association's plan of operation by rule.

Insurance Code §2210.152 provides that the plan of operation must include a plan for the equitable assessment of association members, procedures for obtaining and repaying amounts under any financial instruments authorized under Chapter 2210, and other provisions considered necessary by TDI to implement the purposes of Chapter 2210.

Insurance Code §2210.452 requires the Commissioner to adopt rules governing association payments to the CRTF and disbursements from the CRTF.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

§5.4102. Definitions.

The following words and terms when used in this division will have the following meanings unless the context clearly indicates otherwise:

(1) Association--Texas Windstorm Insurance Association.

(2) Association program--The funding of any or all of the purposes authorized to be funded with the public securities under Insurance Code Chapter 2210, Subchapter M.

(3) Association surcharge--Premium surcharges on policyholders of association policies under Insurance Code §§2210.612, 2210.613, or 2210.6131.

(4) Association surcharge percentage--The percentage amount determined by the Commissioner under §5.4126(c) or (d) of this title (relating to Determination of the Association Surcharge Percentage).

(5) Authorized representative of the department--Any officer or employee of the department empowered to execute instructions and take other necessary actions on behalf of the department as designated in writing by the Commissioner.

(6) Authorized representative of the trust company--Any officer or employee of the comptroller or the trust company who is designated in writing by the comptroller as an authorized representative.

(7) Budgeted operating expenses--All operating expenses as budgeted for and approved by the association's board of directors, excluding expenses related to catastrophic losses.

(8) Catastrophe area--A municipality, a part of a municipality, a county, or a part of a county designated by the Commissioner under Insurance Code §2210.005.

(9) CRTF--Catastrophe Reserve Trust Fund. A statutorily created trust fund established with the trust company under Insurance Code Chapter 2210, Subchapter J.

(10) Catastrophic event--An occurrence or a series of occurrences in a catastrophe area during a calendar year resulting in insured losses and operating expenses of the association in excess of premium and other revenue of the association.

(11) Catastrophic losses--Losses resulting from a catastrophic event.

(12) Class 1 payment obligation--The contractual amount of net premium and other revenue and association surcharges that the association must deposit in the class 1 public security trust fund at specified periods for the payment of class 1 public security obligations, public security administrative expenses, and contractual coverage amount as required by class 1 public security agreements.

(13) Class 2 payment obligation--The contractual amount of net premium and other revenue and either association surcharges or contingent surcharges that the association must deposit in the class 2 public security trust fund, or in the case of contingent surcharges, the premium surcharge trust fund, at specified periods for the payment of class 2 public security obligations, public security administrative expenses, and contractual coverage amount as required by class 2 public security agreements.

(14) Class 3 payment obligation--The contractual amount of net premium and other revenue and either association surcharges or contingent surcharges that the association must deposit in the class 3 public security trust fund, or in the case of contingent surcharges, the premium surcharge trust fund, at specified periods for the payment of class 3 public security obligations, public security administrative expenses, and contractual coverage amount as required by class 3 public security agreements.

(15) Class 1 public securities--A debt instrument or other public security that TPFA may issue as authorized under Insurance Code §2210.072 and Insurance Code Chapter 2210, Subchapter M.

(16) Class 2 public securities--A debt instrument or other public security that TPFA may issue as authorized under Insurance Code §2210.073 and Insurance Code Chapter 2210, Subchapter M.

(17) Class 3 public securities--A debt instrument or other public security that TPFA may issue as authorized under Insurance Code §2210.0741 and Insurance Code Chapter 2210, Subchapter M.

(18) Commercial paper notes--A debt instrument that the association may issue as a financing arrangement or that TPFA may issue as any class of public security.

(19) Commissioner--The Commissioner of Insurance.

(20) Comptroller--The Comptroller of the State of Texas.

(21) Contingent surcharge--Premium surcharges on policyholders of policies that cover insured property that is located in a catastrophe area and that may be necessary as provided under Insurance Code §2210.6132.

(22) Contractual coverage amount--Minimum amount over scheduled debt service that the association is required to deposit in the applicable public security trust fund or premium surcharge trust fund, as security for the payment of debt service on the public securities, administrative expenses on public securities, or other payments the association must pay in connection with public securities.

(23) Credit agreement--An agreement described by Government Code Chapter 1371 that TPFA may enter into as authorized under Insurance Code Chapter 2210, Subchapter M.

(24) Department--The Texas Department of Insurance.

(25) Earned premium--That portion of gross premium that the association has earned because of the portion of time during which the insurance policy has been in effect.

(26) Financing arrangement--An agreement between the association and any market source under which the market source makes interest-bearing loans or provides other financial instruments to the association to enable the association to pay losses or obtain public securities under Insurance Code §2210.072.

(27) Gross premium--The amount of premium the association receives, less premium returned to policyholders for canceled or reduced policies.

(28) Insured property--Real property, or tangible or intangible personal property including automobiles, covered under an insurance policy issued by an insurer. Insured property includes motorcycles, recreational vehicles, and all other vehicles eligible for coverage under a private passenger automobile or commercial automobile policy.

(29) Investment income--Income from the investment of funds.

(30) Letter of instruction--The Commissioner's or authorized department representative's signed written authorization and direction to an authorized representative of the trust company.

(31) Losses--Amounts paid or expected to be paid on association insurance policy claims, including adjustment expenses, litigation expenses, other claims expenses, and other amounts that are incurred in resolving a claim for indemnification under an association insurance policy.

(32) Net gain from operations--Net income reported during a calendar year equal to the amount of all earned premium, other revenue of the association, and distributions of excess net premium and other revenue from the class 1, class 2, and class 3 public security trust funds that are in excess of: current catastrophe year incurred losses; operating expenses; reinsurance premium not paid or payable from member assessments; current year financial arrangement obligations; current year net premium payment obligations; and current year public security administrative expenses.

(33) Net investment income--Investment income less associated fees and expenses charged by the trust company, or others, for managing or investing the assets.

(34) Net premium--Gross premium less unearned premium.

(35) Net premium payment obligations--Public security obligations that are paid in whole or in part from net premium and other revenue for public securities repayable under Insurance Code §§2210.612, 2210.613, and 2210.6131. The term does not include public security obligations or the portion of public security obligations that are paid from association surcharges.

(36) Net revenues--Net premium plus other revenue, less scheduled policy claims, less budgeted operating expenses, less net premium payment obligations for that calendar year, less amounts necessary to fund or replenish any reserve fund required by a public security agreement.

(37) One-in-100-year probable maximum loss--The minimum funding level required by Insurance Code §2210.453(b).

(38) Operating reserve fund--Association or trust company held fund for the payment of budgeted scheduled policy claims and budgeted operating expenses.

(39) Other revenue--Revenue of the association from any source other than premium. Other revenue includes net investment income on association assets. Other revenue does not include premium surcharges collected under Insurance Code §§2210.259, 2210.612, 2210.613, 2210.6131, or 2210.6132 or member assessments collected under Insurance Code §§2210.0725, 2210.074, 2210.0742, or 2210.453 and interest income on those amounts. For the purpose of Insurance Code Section 2210.071, other revenue does not include investment income on any trust company account. For the purpose of Insurance Code §2210.612, other revenue does not include investment income on the CRTF, the class 2 trust fund, or the class 3 trust fund. For the purpose of Insurance Code §2210.613, other revenue does not include investment income on the CRTF, the class 1 trust fund, or the class 3 trust fund. For the purpose of Insurance Code §2210.6131, other revenue does not include investment income on the CRTF, the class 1 trust fund, or the class 2 trust fund.

(40) Plan of operation--The association's plan of operation as adopted by the Commissioner under Insurance Code §2210.151 and §2210.152.

(41) Premium--Amounts received in consideration for the issuance of association insurance coverage. The term does not include premium surcharges collected by the association under Insurance Code §§2210.259, 2210.612, 2210.613, 2210.6131, or 2210.6132.

(42) Premium surcharge trust fund(s)--The dedicated trust fund or funds established by TPFA and held by the trust company in which the association or insurers must deposit contingent surcharges. TPFA may establish separate trust funds or separate accounts for class 2 and class 3 contingent surcharges.

(43) Public securities--Collective reference to class 1 public securities, class 2 public securities, and class 3 public securities.

(44) Public security administrative expenses--Expenses incurred by the association, TPFA, or TPFA consultants to administer

public securities issued under Insurance Code Chapter 2210, including fees for credit enhancement, paying agents, trustees, attorneys, and other professional services.

(45) Public security obligations--The principal of a public security and any premium and interest on a public security issued under Insurance Code Chapter 2210, Subchapter M, together with any amount owed under a related credit agreement.

(46) Scheduled policy claims--That portion of the association's earned premium and other revenue expected to be paid in connection with the disposition of losses that do not result from a catastrophic event.

(47) Trust company--The Texas Treasury Safekeeping Trust Company managed by the comptroller under Government Code §404.101, et seq.

(48) Trust company representative--Any individual employed by the trust company who is designated by the trust company as its authorized representative for purposes of any agreement related to the CRTF or the public securities.

(49) TPFA--The Texas Public Finance Authority.

(50) Unearned premium--That portion of gross premium that has been collected in advance for insurance that the association has not yet earned because of the unexpired portion of the time for which the insurance policy has been in effect.

§5.4133. Public Security Proceeds.

(a) As necessary, the association must make written requests to TPFA for the disbursement of public security proceeds for the association program, including

(1) for the payment of incurred claims and operating expenses of the association, or

(2) other amounts as authorized in Insurance Code §2210.608.

(b) The association's written request must specify:

(1) the amount of the request; and

(2) the purpose of the request.

(c) To facilitate timely payment of losses, the association may request funds to be disbursed to the association before the settlement of incurred claims.

(d) The association must account for the receipt and use of public security proceeds separately from all other sources of funds. The association may hold public security proceeds in the manner authorized by the association's plan of operation or as required by agreement with TPFA.

(e) The proceeds of public securities issued after a catastrophic event may be used:

(1) for any purpose authorized in Insurance Code §2210.608(a), during the catastrophe year for which the public securities were issued;

(2) only to pay for losses and expenses resulting from the catastrophe year for which the public securities were issued, during subsequent years; and

(3) after all losses and expenses resulting from the catastrophe year for which the public securities were issued are paid, only in accordance with Insurance Code §2210.608(b) and §5.4134 of this title (relating to Excess Public Security Proceeds).

(f) The proceeds of public securities issued before a catastrophic event may be used:

(1) for any purpose authorized in Insurance Code §2210.608(a) and (c), during the catastrophe year for which the proceeds were disbursed;

(2) only to pay for losses and expenses resulting from the catastrophe year for which the proceeds were disbursed, during subsequent years; and

(3) after all losses and expenses resulting from the catastrophe year for which the proceeds were disbursed are paid, only in accordance with Insurance Code §2210.608(b) and §5.4134 of this title.

§5.4160. Member Assessments to Pay for Reinsurance in Excess of the Association's Statutory Minimum Funding Level.

(a) The association, with the Commissioner's approval, must assess members as provided by Insurance Code §2210.453(d) to pay for the cost of any reinsurance coverage or alternative risk transfer mechanisms it purchases in excess of the statutory minimum funding level. If, in a calendar year, the association must assess its members under Insurance Code §2210.453(d),

(1) then the association must request the Commissioner's approval within a reasonable time after it knows its total reinsurance costs for that calendar year; and

(2) must issue the assessment by the later of either:

(A) 120 days after the date the association receives the data that TDI provides under §5.4162(f) of this title for that year; or

(B) December 1 of that year.

(b) At the first regular board meeting in each calendar year, but before April 1, the association must discuss with the board its methodology for determining its one-in-100-year probable maximum loss for the calendar year. In discussing its methodology, the association must provide the information described in subsection (d) of this section and make that information available to its members and the public.

(c) After the board meeting described in subsection (b) of this section, but not later than April 1 of each year, the association must disclose to the Commissioner its one-in-100-year probable maximum loss for the calendar year and the association's method for determining that probable maximum loss.

(d) In disclosing its method for determining its one-in-100-year probable maximum loss, the association must include:

(1) the hurricane model or models it relied on, including the model vendors, the model names, and the versions of each model;

(2) the in-force date and the total amount of direct exposures in force for the policy data used as the input for each hurricane model the association relied on;

(3) all user-selected hurricane model input assumptions used with each hurricane model the association relied on;

(4) the one-in-100-year probable maximum loss model output produced by each hurricane model the association relied on;

(5) if the association relied on more than one hurricane model, the methodology the association used to blend or average the hurricane model outputs, including all weighting factors used; and

(6) any adjustments the association or another party made to the one-in-100-year probable maximum loss model outputs or the blended or averaged output, including any adjustments to include loss adjustment expenses.

(e) The department will post the information disclosed under subsections (c) and (d) of this section on its website.

(f) If, in a year, the association elects to purchase coverage for reinsurance or alternative risk transfer mechanisms in excess of the one-in-100-year probable maximum loss, then the association must also obtain a quote for coverage that provides funding equal to the one in 100-year probable maximum loss. The premium quote must assume the minimum required attachment point described in Insurance Code §2210.453(c).

(g) No later than the second regular board meeting of the calendar year, the association must provide each of the following to its board and make this information available to its members and the public:

(1) the reinsurance or alternative risk transfer mechanism premium quote required under subsection (f) of this section; and

(2) the total deposit premiums for all reinsurance or alternative risk transfer mechanism coverage for the year.

(h) If, at the time of the second regular board meeting of the calendar year, deposit premiums described in subsection (g) of this section are not known, then the association must provide its best estimate of those premiums to the board and make the estimate available to its members. As soon as the association knows the deposit premiums described in subsection (g) of this section, the association must provide them to the board and make them available to its members.

(i) In its request to the Commissioner to approve an assessment under Insurance Code §2210.453(d), the association must submit the following information:

(1) the portion of the association's reinsurance premium that provides coverage for losses or loss adjustment expenses above the association's one-in-100-year probable maximum loss; and

(2) the methodology the association used to calculate the amount described in paragraph (1) of this subsection.

(j) This section and §§5.4161 - 5.4167 of this title (relating to Member Assessments Other than for Reinsurance in Excess of the Association's Statutory Minimum Funding Level; Amount of Assessment; Notice of Assessment; Payment of Assessment; Failure to Pay Assessment; Contest After Payment of Assessment; and Inability to Pay Assessment by Reason of Insolvency, respectively) are a part of the association's plan of operation and will control over any conflicting provision in §5.4001 of this title (relating to Plan of Operation).

(k) Sections 5.4162 - 5.4167 of this title apply both to member assessments under this section and under §5.4161 of this title.

§5.4161. Member Assessments Other than Assessments for Reinsurance in Excess of the Association's Statutory Minimum Funding Level.

(a) The association, with the approval of the Commissioner, must assess members as provided by Insurance Code Chapter 2210.

(b) The association must provide, in the aggregate for the catastrophe year, the following information when requesting the Commissioner to approve a class 1, class 2, or class 3 assessment under Insurance Code §§2210.0725, 2210.074, or 2210.0742, as applicable:

(1) the association's best estimate of the amount of losses expected to be paid as a result of the event, or series of events, that caused the need for the assessment requested;

(2) the amount of losses paid, or expected to be paid, from premium and other revenue of the association;

(3) the amount of losses paid, or expected to be paid, from available reserves of the association and available amounts in the CRTF;

(4) the amount of losses paid, or expected to be paid, from the proceeds of class 1 public securities issued, or expected to be issued;

(5) the amount of class 1 assessments previously approved and the amount of class 1 assessments now requested;

(6) in the case of a request to approve a class 2 or class 3 assessment, the amount of losses paid, or expected to be paid, from the proceeds of class 2 public securities issued, or expected to be issued;

(7) in the case of a request to approve a class 2 or class 3 assessment, the amount of class 2 assessments previously approved and the amount of class 2 assessments now requested;

(8) in the case of a request to approve a class 3 assessment, the amount of losses paid, or expected to be paid, from the proceeds of class 3 public securities issued, or expected to be issued;

(9) in the case of a request to approve a class 3 assessment, the amount of class 3 assessments previously approved and the amount of class 3 assessments now requested.

(c) If all or any portion of the authorized principal amount of class 1 public securities requested under §5.4124 or §5.4125 of this title (relating to Issuance of Class 1 Public Securities before a Catastrophic Event and Issuance of Public Securities after a Catastrophic Event) cannot be issued based on the factors described in §5.4135 of this title (relating to Marketable Public Securities; the Amount of Class 1 Public Securities that Cannot be Issued; Market Conditions and Requirements; and Cost-Benefit Analysis), the association may request and the Commissioner may approve the imposition of class 1 assessments as provided in this section.

(d) In its request to the Commissioner to approve the imposition of assessments under subsection (c) of this section, the association must submit the following information:

(1) the information required by subsection (b) of this section;

(2) information based on the analyses described in §5.4135 of this title;

(3) the amount of class 1 public securities that can be issued;

(4) the amount of class 1 public securities that cannot be issued; and

(5) the specific reasons, market conditions, and requirements that prevent TPFA from issuing all or any portion of the authorized principal amount of class 1 public securities. The association may rely on information and advice provided by TPFA, TPFA consultants, TPFA legal counsel, and third parties retained by the association for this purpose.

(e) The association must request the issuance of the statutorily authorized principal amount of class 1 public securities before the association may request the Commissioner approve a class 1 assessment under Insurance Code §2210.0725.

(f) The association must request the issuance of the statutorily authorized principal amount of class 2 public securities before the association may request the Commissioner approve a class 2 assessment under Insurance Code §2210.074.

(g) The association must request the issuance of the statutorily authorized principal amount of class 3 public securities before the as-

sociation may request the Commissioner approve a class 3 assessment under Insurance Code §2210.0742.

(h) If the Commissioner approves the imposition of assessments under subsection (c) of this section, any class 2 and class 3 public securities must be issued as provided by Insurance Code Chapter 2210 and these rules.

(i) The association may use the proceeds from assessments only for losses and expenses resulting from the catastrophe year for which the assessments were made.

§5.4162. Amount of Assessment.

(a) The association must determine which members of the association must participate in any assessment under §5.4160 and §5.4161 of this title (relating to Member Assessments to Pay for Reinsurance In Excess of the Association's Statutory Minimum Funding Level and Member Assessments Other than Assessments for Reinsurance in Excess of the Association's Statutory Minimum Funding Level).

(1) The association may not include in the assessment an insurer that became a member of the association after September 1, 2009, and that had not previously been a member of the association, until after the second anniversary of the date on which the insurer first becomes a member of the association.

(2) The association must include in the assessment an insurer described under paragraph (1) of this subsection after the second anniversary of the date on which the insurer first becomes a member of the association without regard as to whether the catastrophic event that gave rise to the assessments occurred prior to the second anniversary of the date on which the insurer first became a member of the association.

(3) The association may not include in the assessment formula the net direct premium of an affiliate insurer engaged in the business of surplus lines insurance as described in the Insurance Code §2210.052(c) that a federal agency or court of competent jurisdiction determines to be exempt from the assessment formula under Insurance Code Chapter 2210.

(b) Each member company's percentage of participation must be computed on a calendar year basis for the year in which the assessment is made. The percentage of participation is not based on the year in which the catastrophic event occurred, except for an assessment made during that year. Net direct premiums must be determined as provided under §5.4001(a)(2)(N) of this title (relating to Plan of Operation).

(c) The participating members of the association must participate in insured losses and operating expenses of the association, in excess of premium and other revenue, in the proportions required by Insurance Code §2210.052 and as depicted in subsection (e) of this section. A participating member is entitled to receive credit for insurance voluntarily written in the catastrophe area, as provided in Insurance Code §2210.052.

(d) If at the time of an assessment the department has not furnished to the association information necessary to compute a member's participation during the preceding calendar year, then each member's participation must be based upon information furnished to the association from the last calendar year for which such information is available. When the association receives the necessary information from the department, the association must reassess or refund to each participating member the amounts necessary to properly reflect the member's participation.

(e) The Figure: 28 TAC §5.4162(e) graphically depicts the Texas Windstorm Insurance Association Procedure For Calculating Member Assessment Percentages Including Credit For Voluntary Writings. All premiums are for the most recent preceding calendar year ending December 31, as furnished by the department.
Figure: 28 TAC §5.4162(e)

(1) Column 1(a): Statewide net direct premiums for extended coverage and other allied lines. Column 1(b): Statewide net direct premiums for extended coverage and other allied lines portion of the multiple peril line. Column 1(c): Statewide net direct premiums for homeowners and farm and ranch owners.

(2) Column 2: The sum of the statewide net direct premiums at 90% of the extended coverage and other allied lines, and 50% of the homeowners and farm and ranch owner's, or such percentage as may be determined in accordance with §5.4001(a)(2)(N)(i)(III) of this chapter (90% of Column 1(a) plus 90% of Column 1(b) plus 50% of Column 1(c)).

(3) Column 3: Each company's percentage of the net direct premiums as described in Column 2, which is the basis for indicating normal required participation in the association prior to credits for voluntary writings in the designated areas.

(4) Column 4: Total windstorm and hail premiums in the designated areas (association premiums plus voluntary premiums).

(5) Column 5: Normal company quota of total windstorm and hail premiums (Column 3 x Column 4).

(6) Column 6: Each company's voluntary writings in the designated areas multiplied by the same percentages as shown in Column 2. Note: Maximum credit must be limited to company's normal quota.

(7) Column 7: Each company's maximum possible allocation after applying credits for voluntary writings (Column 5 minus Column 6). Negative allocation to be shown as zero.

(8) Column 8: Percentage participation of each member company in the association, prior to application of offset. Note: The offset figure measures the excess premiums developed by the maximum credit in Column 6.

(9) Column 9: Percentage participation of each member company in the association.

(f) The department will furnish to the association the amount of net direct premiums of each member company written on property in this state and the aggregate net direct premiums written on property in this state by all member companies during the preceding calendar year as reported by member companies to the department.

(g) Within a reasonable time after receiving the information described in subsection (f) of this section from the department, the association must notify each member company, in writing, by certified mail, of the following:

(1) the amount of net direct premiums the member company wrote on property in this state during the preceding calendar year;

(2) the amount of net direct premiums of similar insurance the member company voluntarily wrote in the catastrophe area during the preceding calendar year; and

(3) that the notice and contents are an act, ruling, or decision of the association and that the member company to whom the notice is given is entitled to appeal it not later than the 30th day after the date shown on the notice in accordance with Insurance Code §2210.551.

(h) Within a reasonable period of time after sending the notice described in subsection (g) of this section, the association must determine the percentage of participation for each member company in the manner provided in this section and must notify each member company of its percentage of participation, in writing, by certified mail. The notice must state that the notice and contents are an act, ruling, or decision of the association insofar as the mathematical determination of the percentage of participation is concerned and that the member company to whom the notice is given is entitled to appeal not later than the 30th day after the date shown on the notice in accordance with Insurance Code §2210.551.

(i) In the notices required under subsections (g) and (h) of this section, the association must disclose to its members that the resulting participation percentages will be used for any assessments for reinsurance in excess of the association's statutory minimum funding level for the calendar year that may be required under Insurance Code §2210.453(d).

§5.4167. Inability to Pay Assessment by Reason of Insolvency.

In the event a member of the association is placed in temporary or permanent receivership under order of a court of competent jurisdiction based on a finding of insolvency, and such member has been designated an impaired insurer by the Commissioner, and in the event an assessment is necessary in the year the insurer is declared impaired, the aggregate net amount not recovered from such insolvent insurer must be reallocated among the remaining members of the association in accordance with the method of determining participation as determined in the plan of operation.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 17, 2020.

TRD-202005609
James Person
General Counsel
Texas Department of Insurance
Effective date: January 6, 2021
Proposal publication date: June 19, 2020
For further information, please call: (512) 676-6584

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 17. TAX RELIEF FOR PROPERTY USED FOR ENVIRONMENTAL PROTECTION

30 TAC §17.14, §17.17

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §17.14 and §17.17.

The amendments to §17.14 and §17.17 are adopted *without changes* to the proposal as published in the July 31, 2020, issue of the *Texas Register* (45 TexReg 5303) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The rulemaking amends the provisions in Chapter 17 to update the requirements of the Tax Relief for Pollution Control Property Program based on the recommendations and advice of the Tax Relief for Pollution Control Property Advisory Committee (committee), and other changes identified by the commission. On December 13, 2018, the committee submitted these recommendations to the TCEQ as part of the triennial review of the Tier I Table located in §17.14(a) and the Expedited Review List (ERL or k-list) included as part of §17.17(b). Subsequently, in a letter dated December 9, 2019, the committee advised the commission on how to determine use percentages for heat recovery steam generator (HRSG) property applications. HRSGs are typically used in the production of electricity, allowing a power plant to increase production efficiency by using waste heat from combustion to generate steam that drives a steam turbine to produce additional electricity. The commission solicited advice from the committee in response to the May 3, 2019 opinions by the Texas Supreme Court in *Brazos Electric Power Cooperative v. Texas Commission on Environmental Quality, 576 S.W.3d 374 (Tex. 2019)* and *Texas Commission on Environmental Quality v. Brazos Valley Energy LLC, 582.W.3d 277 (Tex. 2019)* concerning HRSG use determinations.

The commission is required by §17.14(b) to review, and update as necessary, the items on the Tier I Table included in §17.14(a) at least once every three years. The commission is also required by Texas Tax Code, §11.31(l) to review, and update as necessary, the items on the ERL at least once every three years. The committee evaluated the Tier II and Tier III applications submitted from 2014 through 2018 that received positive use determinations (PUD) to determine whether the pollution control property, if any, had been demonstrated consistently to be wholly used as pollution control property in the same manner on each application for any given property. The committee determined that 11 types of pollution control property currently submitted as Tier II property should instead be considered Tier I property in the Tier I Table and no longer require a Tier II application. This rulemaking fulfills the requirements for the commission to review and update the property included on the ERL and Tier I Table in Chapter 17 at least once every three years.

This adopted rulemaking amends Chapter 17 to resolve outstanding issues stemming from the Texas Supreme Court's May 3, 2019 opinions regarding lawsuits filed after the commission upheld 21 negative use determinations (NUDs) for HRSGs at power plants, in addition to addressing changes related to the triennial review of the ERL and Tier I Table. HRSGs are included on the property listed at Texas Tax Code, §11.31(k), and in §17.17(b) as the ERL. Property on the k-list consists of facilities, devices, or methods for the control of air, water, or land pollution for which an application may be submitted to the TCEQ requesting a use determination for an ad valorem tax exemption.

Applications for use determinations may be submitted under Tier I, Tier II, Tier III, and, previously, Tier IV status. With the adopted rule revisions, a Tier I application may be submitted for property used at the percentage described on the Tier I Table, and used for pollution control in accordance with the description listed in the Tier I Table for that property type. A Tier II application may be submitted for property that is not listed on the Tier I Table but is used wholly for the control of air, water, and/or land pollution but is not located on the Tier I Table. A Tier III application must be submitted for property that is used partially for pollution

control and that is used in a manner that is different from the description on the Tier I Table. For Tier III applications, a cost analysis procedure (CAP) is used to determine the proportion of the property used for pollution control purposes. Tier IV applications were previously submitted for property listed on the k-list and included the applicants' proposed method for calculating a use percentage. Tier IV applications were eliminated in a rulemaking adopted by the commission on November 18, 2010 (35 TexReg 10964) to implement the uniformity requirements added to Texas Tax Code, §11.31 with the passage of House Bill (HB) 3206 and HB 3544, 81st Texas Legislature, 2009.

The Tier III CAP methodology compares the property containing pollution control features to similar property without those pollution control features and accounts for the value of any marketable product produced by the property. The Tier III review methodology ensures the inputs for all applications submitted within the Tier III level are reviewed consistently and that use determinations are issued based on calculations of the actual use percentage for each individual case. However, if the commission has sufficient information to establish partial use percentages appropriate to all property within a category of equipment, the commission may add it to the Tier I Table with the associated partial use percentage.

In 2008, 2009, and 2012, Tier III and Tier IV applications were submitted to the TCEQ Tax Relief for Pollution Control Property Program requesting PUDs for HRSGs and associated equipment at Texas power plants. The TCEQ executive director issued NUDs for the HRSG applications submitted, and 17 appeals were filed. At the September 24, 2014, Commissioners' Agenda, the commission affirmed the executive director's NUDs and denied all 17 of the appeals. In response, 12 lawsuits were filed. The lawsuits were consolidated for trial and divided into two groups based on the type of application submitted, either Tier III or Tier IV. The district court upheld the TCEQ's determinations for both groups, but the rulings were appealed. The appellate court hearing the Tier III group affirmed the TCEQ's reading of Texas Tax Code, §11.31 and its NUDs. The appellate court hearing the Tier IV group disagreed with the TCEQ's arguments concerning the k-list and found that the TCEQ abused its discretion in issuing NUDs for the HRSGs. Petitions for Review were filed with the Texas Supreme Court for both cases.

The Texas Supreme Court held that the TCEQ abused its discretion in issuing NUDs and remanded the cases to the commission for further proceedings consistent with its findings. The Texas Supreme Court found that Texas Tax Code, §11.31 entitles a person to an exemption from ad valorem taxation for property that the person owns and that is used, in whole or in part, to control pollution. The Texas Supreme Court also found that for property on the k-list, the executive director's sole responsibility is to determine what proportion of the property is purely productive and what proportion is for pollution control. However, the executive director may not determine that the pollution control proportion is zero or negative. Finally, the Texas Supreme Court also found that the TCEQ, through rulemaking, may remove an item "from the list if the commission finds compelling evidence to support the conclusion that the item does not provide pollution control benefits." The commission has not found compelling evidence to support removal of HRSGs from the k-list; therefore, the commission must find that HRSGs qualify, at least in part, as pollution control property. The Texas Supreme Court did not identify the method to determine use percentages for HRSGs nor did the Texas Supreme Court address the CAP formula or its application.

To examine these issues and the Texas Supreme Court's findings as they relate to future HRSG applications, the commission solicited advice from the committee. In a letter dated July 19, 2019, the TCEQ asked the committee to analyze three questions in its review of the issues: 1) whether the current CAP is adequate to determine use percentages for HRSGs; 2) if the CAP is inadequate, what is an appropriate method for determining use percentages for HRSGs; and 3) whether HRSGs should be removed from the ERL. In a response letter dated December 9, 2019, the committee submitted its formal majority report and recommendation.

This rulemaking implements the committee's December 9, 2019 recommendation concerning HRSGs and its December 13, 2018 recommendations regarding the Tier I Table and ERL, except when deviation from these recommendations is needed to ensure the rule appropriately and consistently describes pollution control property eligible for a PUD under the Tax Relief for Pollution Control Property Program. In addition, the commission adopts amendments, as necessary, that were not specifically recommended by the committee but that remain consistent with its advice and to accommodate the addition of HRSGs to the Tier I Table. Non-substantive revisions are adopted to the sections open to address Chapter 17 Tier I Table and associated changes.

In a concurrent rulemaking, the commission adopts amendments to the provisions in 30 Texas Administrative Code (TAC) Chapter 18, Voter-Approval Tax Rate Relief for Pollution Control Requirements, to mirror the adopted changes in Chapter 17.

Section by Section Discussion

The amendments to Chapter 17 are intended to make the rules consistent with the committee's recommendations provided to the commission, except where explicitly discussed. The committee recommended, and the commission adopts, adding specific pollution control property to the Tier I Table in §17.14(a). Under the current rules, §17.14(a) requires an applicant to submit a Tier III application for any of the proposed property additions if the property is used for pollution control purposes at a percentage different than what is listed on the table or, at the request of the executive director, if the equipment is not being used in a standard manner. These existing criteria in §17.14(a) were not proposed for revision. Any of the property adopted for inclusion in the Tier I Table will need to continue to adhere to these existing requirements.

§17.14, Tier I Pollution Control Property

The adopted changes to §17.14 include amending the rule language to allow items listed on the Tier I Table with partial use percentages to be eligible for a Tier I application and to add additional property to the Tier I Table. Each property item in the Tier I Table currently has a table number, the media, property name, property description, and use percentage. The adopted additions to the Tier I Table also include this same information.

The adopted amendments to §17.14(a) clarify that a Tier III application is still required if a marketable product is recovered from property listed in the Tier I Table unless that property is designated with a partial use percentage on the Tier I Table. This revision is necessary because current subsection (a) directs an applicant to file a Tier III application if a marketable product is recovered from the property listed in the Tier I Table, without exception. Because HRSGs may generate a marketable product, which was considered during the calculation of the appropriate use percentage and is accounted for in the 65% partial use de-

termination adopted in this rulemaking, the eligibility description is amended to indicate property items listed on the Tier I Table with a partial use percentage may nevertheless be eligible for Tier I applications.

The commission adopts amendments to the first sentence of the introductory paragraph to the Tier I Table in §17.14(a) to require a Tier I application for the property listed in the table, whether it is used wholly or partly for pollution control purposes. An option to apply for a higher use determination percentage as a Tier III application for a HRSG is not available unless the HRSG is used differently than the Tier I Table description. A Tier III application may be submitted only if the HRSG is not used as a boiler designed to capture waste heat from combustion turbine exhaust for the generation of steam while reducing unit-output based emissions. The existing requirement in subsection (a) designates that a Tier I application is required for property used wholly, or 100%, as pollution control property. However, the adopted amendment to the Tier I Table includes HRSGs at a partial use percentage of 65%. Therefore, Tier I applications for HRSGs will now be appropriate. The commission further amends the rule by adding an exception for HRSGs listed as a partial use percentage to the description of the Tier I Table contents. This adopted revision accommodates the addition of HRSGs to the Tier I Table, which currently only contains property used wholly as pollution control. The table is expanded to include HRSGs as the only piece of property eligible for a Tier I PUD at a partial use percentage. Although all the other property currently listed in the Tier I Table must be used wholly for pollution control property to be eligible for filing as a Tier I application, the commission previously listed property with partial use percentages on the Tier I Table. The property was subsequently removed because the usage of such property could not be definitively verified as representative of standard use based on the information available at the time about the uses of the property. However, for this adopted rulemaking, the committee reviewed current data and determined 65% reasonably represents the proportion of HRSGs used as pollution control when HRSGs are used in a standard manner. The commission agrees with the committee's determination that 65% reasonably represents the proportion of an HRSG used for pollution control.

The commission adopts item numbers A-90, A-91, A-116 through A-120, A-190, S-29, M-23 and M-24, all at 100% pollution control property. Items A-90, A-91, A-116 through A-120, A-190, and M-23 are added as the committee recommended. The commission agrees with the committee's recommendations to revise §17.14(a) and add Dry Low-NO_x Emissions Systems; Lean-Burn Portions of Reciprocating Engines; Fixed Storage Tank Roofs; Submerged Fill Pipes; Dual Mechanical Pump Seals; Seal-less Pumps; Airless Paint Spray Guns; and Remote Controlled Block Valves to the Tier I Table because they are used wholly for pollution control purposes. These items are described in the adopted rule language and are not further discussed in the Section by Section Discussion of this preamble.

For each of the items added to the Tier I Table with adoption of this rulemaking, the committee based its recommendation that this property should be Tier I level property on historical Tier II application submittals that demonstrated the property was consistently used wholly for pollution control, as discussed in the Background and Summary of the Factual Basis for the Adopted Rule portion of this preamble. The item numbers designate air pollution control equipment, indicated by the letter "A," solid waste management pollution control equipment, indicated by the letter "S," and miscellaneous pollution control equipment, indicated by the letter "M," as recommended by the committee in its December 2018 formal majority report. The committee's recommendation to add the property to the Tier I Table was based on its review and analysis of Tier II applications submitted from 2014 through 2018 that consistently received a PUD of 100% each time an applicant requested a use determination for such property. Although the item numbers are added to the Tier I Table at 100% pollution control property, an applicant is still required under §17.14(a) and §17.17(a) to submit a Tier III application if such property has productive benefit or is not used as described in the table.

The commission adopts the amendment to add item number A-92 to the Tier I Table for HRSGs. The property item is listed as a boiler designed to capture waste heat from combustion turbine exhaust for the generation of steam while reducing unit output-based emissions and a partial use determination of 65%. To arrive at the 65% partial use percentage, the committee evaluated data provided in the 2019 Gas Turbine World Handbook and calculated the average of both the environmental benefit and the productive benefit of a combined-cycle plant operating an HRSG versus a similar simple-cycle plant without an HRSG. For the environmental benefit estimate, the committee considered the best available control technology (BACT) emission limit for a combined-cycle facility of 2 parts per million (ppm) and for a simple-cycle facility of 5 ppm to determine the decrease in nitrogen oxides (NO_x) emissions between two types of facilities on a pound per megawatt-hour basis. To determine the production benefit, the committee calculated both the average increase in plant output and average improvement in heat rate attributable to combine-cycle operation (due to the HRSG) when compared to simple-cycle operation. The committee averaged the percentage results for the environmental benefit and the nonproductive use to derive an environmental use of 65%. The commission agrees with the approach recommended by the committee to derive a 65% PUD for an HRSG.

The commission adopts amendments to the Tier I Table in §17.14(a) to add item S-29 for reclamation equipment. The property description excludes commercial reclamation equipment from eligibility as Tier I property. Commercial reclamation equipment is equipment owned and rentable by companies that provide reclamation services. The committee did not identify the explicit exclusion of commercial reclamation equipment in its recommendation. However, the commission adopts the exclusion to clarify that the construction equipment used for commercial land reclamation purposes, from which the environmental benefit is derived from the use or characteristics of the good or service produced or provided, will not be entitled to a PUD under the Tax Relief for Pollution Control Property Program. Equipment used for such purposes are prohibited by the provisions in §17.6(1)(A) and (B) and Texas Tax Code, §11.31(a).

The commission adopts amended Tier I Table in §17.14(a) to add item M-24 for nondestructive pipeline testing to the Tier I Table. The commission revised the committee's recommended proposed property description to clarify the property that is intended to be eligible, and property intended to be ineligible, as Tier I Table property. The committee recommended expenditures such as radiography as the Tier I Table description. Instead, the commission adopts that expenditures used for nondestructive pipeline testing are explicitly included, but expenditures used for non-pollution control purposes are explicitly excluded. The explicit inclusion of nondestructive pipeline testing as part of the property description is necessary to state the item

that is intended to be covered as the Tier I property rather than only providing an example of the property. The explicit exclusion of expenditures for non-pollution control purposes maintains consistency with requirements in §17.4(a) requiring that eligible property meet or exceed environmental requirements for pollution control.

§17.17, Partial Determinations

The commission adopts amended §17.17(a) to add language that clarifies what property requires a Tier III application. The adopted revisions state that a Tier III application requesting a partial determination must be submitted for all property that is either not used as described in the Tier I Table located in §17.14(a), or does not fully satisfy the requirements for a 100% PUD under Chapter 17. For example, HRSG applications are required to be Tier III applications if the HRSG is used differently than described in the proposed Tier I Table. This adopted change was not recommended by the committee explicitly but is captured in the committee's acknowledgement that revisions other than those specifically contained in the December 2019 letter may be needed to accomplish the goal of the adopted rulemaking. The commission's adopted amendment to §17.17(a) will ensure that if the use of any of the property added to the Tier I Table in §17.14(a) deviates from the pollution control property description within the table, the environmental use is appropriately considered and accounted for as was intended in the program's design.

The adopted amendment to §17.17(a) differs from the proposed changes to §18.30 in the concurrent rulemaking because the existing rule language in each is not the same; however, the intent of both adopted revisions is the same.

The commission adopts the amendment to the ERL in §17.17(b) to revise the description for HRSGs, listed as item number B-8. The committee recommended describing an HRSG in the §17.14(a) Tier I Table as a boiler designed to capture waste heat from combustion turbine exhaust for the generation of steam while reducing unit output-based emissions. Although the committee did not recommend any changes to the existing ERL, the commission adopts the amendment to replace the existing HRSG description in the ERL in §17.17(b) with the committee's recommended HRSG description. This adopted change streamlines the description of HRSG and specifies the property intended to qualify as an HRSG under the Chapter 17 rules. The adopted change to the ERL was not explicitly recommended by the committee but remains consistent with its advice. This adopted amendment to the ERL is not intended to change the type of property currently covered under the Tax Relief for Pollution Control Property Program. The adopted change to the HRSG description in the Chapter 17, §17.17(b) ERL is also adopted in the Chapter 18, §18.26 ERL to maintain consistency between the Chapters 17 and 18 programs.

Final Regulatory Impact Determination

The commission reviewed the rulemaking adoption in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rules do not meet the definition of a "Major environmental rule." Under Texas Government Code, §2001.0225, 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. Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking amends the Tax Relief for Pollution Control Property rules. Because the adopted rules are not specifically intended to protect the environment or reduce risks to human health from environmental exposure but to implement a tax relief program, this rulemaking is not a major environmental rule and does not meet any of the four applicability requirements. These rules will not result in any new environmental requirements and should not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007, does not apply to these adopted amendments. Enforcement of these adopted rules will be neither a statutory nor constitutional taking of private real property. Specifically, the adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not burden, restrict, or limit the owner's rights to property or reduce its value by 25% or more beyond which will otherwise exist in the absence of the adopted regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rulemaking is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The comment period closed on August 31, 2020. The commission received comments from Luminant Generation Company, LLC (Luminant). Comments were also received from six members of the Tax Relief for Pollution Control Property Advisory Committee, all of whom comprised the minority vote of the committee's December 2019 recommendation (six committee members).

Response to Comments

Comment

Luminant and six committee members commented that they support the addition of 11 types of pollution control property to the Tier I Table at 100%. In addition, Luminant commented it sup-

ported the proposed rules addressing HRSGs. Luminant also commented that the addition of HRSGs to the Tier I Table at 65% ensures consistency in future use determinations and adds certainty for taxing authorities and eligible equipment owners. Luminant further supported the TCEQ's approach of seeking advice from the committee on the issue of HRSGs.

Response

The commission appreciates the support. No changes were made in response to this comment.

Comment

Six committee members commented that the approach formally recommended by the committee resulting in a 65% use determination for HRSGs overstates pollution benefit, discounts the production benefit, and does not take into account gross pollution that results from increased production. The commenters noted that a 65% use determination for HRSGs was based on an approach that averaged a combined cycle gas plant efficiency of 75% pollution benefit with an approximate 50% production benefit using a less refined calculation that once refined, should have resulted in a 61% use percentage. The commenters preferred an approach that estimated production benefit using a revised CAP and then concluded that the remainder of the equipment use be attributed to pollution control. The commenters added that a simplified CAP would result in a 47% partial use determination percentage. The commenters stated a more refined CAP that took into account production efficiency would lead to a positive use percentage of 36% - 51% and requested the rule be revised accordingly. The commenters stated that use of a revised CAP allows HRSGs to be treated in accordance with the Texas Supreme Court's decisions.

Response

The 65% use determination for HRSGs accounts for the pollution control benefit and the production benefit based on information available about the overall reduction in output-based NO_x emissions attributable to the use of an HRSG and the increase in efficiency using an HRSG would have at a facility. With other factors being equal, a combined-cycle facility will have lower total NO_x emissions compared to a simple-cycle facility generating the same amount of electricity because some of the electricity generated by the combined-cycle facility is coming from the heat recovered to generate steam.

The data used to calculate the 61% versus the 65% use determination were identical except that the 61% use percentage excluded data about combined-cycle gas plants with a capacity of less than 45 megawatts and data for facilities that transmit electricity at a frequency of approximately 50 hertz. The committee's formal recommendation did not provide a reason for including these data in the calculation to arrive at 65%, and neither was one provided during the committee's meetings discussing how to address HRSG use percentages. However, HRSGs that exist at such facilities are not precluded from qualifying for a PUD if used as described on the Tier I Table, so it is reasonable to include the data in the calculation.

To arrive at a 65% use determination for HRSGs, the portion of the HRSG attributable to pollution control use was first calculated by determining a pollution control benefit comparing emissions (based on BACT limits) for similar electrical output for simple-cycle facilities (2 ppm of NO_x) versus combined-cycle facilities (5 ppm of NO_x). This calculation resulted in a pollution control benefit of 71%. Then, the productive benefit of HRSGs was determined by comparing efficiency gains for simple-cycle facilities versus combined-cycle facilities. The productive benefit of HRSGs was calculated as 41%. Assuming combined productive and pollution control benefits equal 100%, this leaves 59% of the HRSG attributable to pollution control use. The average of the two pollution control benefit percentages, 71% and 59%, results in a use determination of 65% for HRSGs. The use of an average results in both factors, productive and pollution control, being fairly represented.

While alternative approaches to determining the use percentage for HRSGs may also be appropriate, an alternative with specific details, including a revised CAP, was not presented to or evaluated by the commission. The commission agrees with the reasoning presented by the committee to support the 65% positive use determination percentage. No changes were made in response to this comment.

Comment

Six committee members commented that the tax relief program has historically determined use percentages based on cost and production, not pollution reduction, when there is a production benefit from the pollution control property. The commenters stated that the approach used to calculate a 65% use determination for HRSGs is an inconsistent and inequitable approach that treats different kinds of pollution control property differently and that this deviation may violate the governing statute's mandating equitable treatment of property.

Response

The commission disagrees that the HRSG use determination approach violates the statutory provision regarding uniform treatment. The commission's rules implement and are consistent with Texas Tax Code, §11.31(g) and (g-1). The statute requires that the rules must be sufficiently specific to ensure that determinations are equal and uniform; that the rules must allow for determinations that distinguish the proportion of the property that is used to control pollution from the proportion of the property that is used for production; and that the standards and methods established in the rules be uniformly applied to all applications for determinations. The commission evaluates each application based on the contents of the application. The adopted 65% use determination for HRSGs does not interfere with the application of the rules in Chapters 17 and 18 and the program practices as required in the statutory requirement. HRSGs were determined to be used for pollution control at 65% when used as described on the Tier I Table. The commission maintains that the program rules and practices remain consistent with the statutory requirement.

The tax relief program bases use determinations on how each type of pollution control property is used. For property used partially for pollution control purposes and partially for other purposes, the CAP at §17.17(c) has been used to determine what proportion of property is attributable to pollution control to arrive at a use determination percentage for that particular property. The CAP uses cost and marketable product value as a proxy to determine the portion of the property attributable to production. Since cost and marketable product value are generally available for all property, even when information about both pollution control and production benefits is unavailable, the commission previously determined the CAP to be a generally appropriate method to distinguish the proportion of property used partly for pollution control purposes.

However, applying the CAP to HRSGs has sometimes produced inconsistent and even illogical results, such as higher use determination percentages for inefficient use or non-use of HRSGs and lower use determinations for more efficient or greater use of HRSGs. Such results do not accurately reflect the portion of the a HRSG that is attributable to pollution control. For HRSGs, it is not clear what values would be used for variables used in the CAP that would result in representative use percentages. The commission previously required the cost of boilers that would be capable of generating an equivalent amount of steam as the HRSG, to be used for the capital cost old variable because given the current CAP, it is not clear what costs should be used for the capital cost old variable in the CAP for HRSGs. The production capacity factor (PCF) in the CAP is also problematic when applied to HRSGs. The PCF is calculated by dividing the capacity of the existing equipment or process by the capacity of the new equipment or process. For HRSGs there is no existing equipment, so the PCF would be zero. This does not allow the CAP to account for the productive value of HRSGs. This practice resulted in negative use percentages, which the Texas Supreme Court in *Brazos Electric Power Cooperative v. Texas Commission on Environmental Quality*, 576 S.W.3d 374 (Tex. 2019) and *Texas Commission on Environmental Quality v. Brazos Valley Energy LLC*, 582.W.3d 277 (Tex. 2019) found to be inconsistent with the statute. The Texas Supreme Court found that the commission erred in issuing NUDs for HRSGs because HRSGs are included on the list of pollution control property at Texas Tax Code, §11.31(k). Since the CAP resulted in negative use percentages for HRSGs, which the Texas Supreme Court ruled is not allowable, a different method became necessary to distinguish the percentage of the property used for productive purposes from the percentage used for pollution control purposes.

The commission considered the committee's determination that the current Tier III rules in §17.17(c) using the CAP to establish a partial percentage for a HRSG are not adequate. Because the CAP does not appropriately account for the productive value of HRSGs, the committee discussed alternative approaches to resolve the issue of determining use percentages for HRSGs. Including HRSGs on the Tier I Table is appropriate because the Tier I Table is intended to list the property that the ED determined is used for pollution control at the percentage listed in the table based on standard use of the property. The 65% use percentage for a HRSG was derived by calculating both the average increase in plant output and average improvement in heat rate attributable to combine-cycle operation (due to the HRSG) when compared to simple-cycle operation. The committee averaged the percentage results for the environmental benefit and the nonproductive use to derive an environmental use of 65%. Finally, adding HRSGs to the Tier I Table at a fixed percentage allows certainty for applicants and appraisal districts while complying with the Texas Supreme Court's findings.

The commission agrees with the committee that the methodology used for calculating the use determination of 65% for HRSGs is appropriate to represent the pollution control use of an HRSG when HRSGs are used as described on the table. No changes were made in response to this comment.

Comment

Six committee members commented that the approach resulting in the 65% use determination for HRSGs may lead to reduced tax revenues by declaring all property that is part of a change made to reduce and/or eliminate pollution as pollution control property, even when related to production equipment. This could result in lower tax revenues for local government and shift taxes from industrial users to residential and consumer property taxpayers. This is of particular concern in areas where there are concentrations of combined-cycle gas plants.

Response

The commission is mindful of the potential property tax revenue impacts associated with the amendments to these rules. The tax exemption process under the Tax Relief for Pollution Control Property Program requires the TCEQ to review the application to determine if the property described qualifies as pollution control property. Texas Tax Code, §11.31 does not authorize the commission to consider, and the commission does not consider, the dollar value of tax exemptions received by applicants. The statute requires the agency to issue a use determination that a piece of property is used wholly or partly to control air, water, or land pollution. Following the TCEQ's review, the applicant files an exemption request with the appropriate appraisal district. Appraisal districts determine the value of the property after the executive director's final decision on whether the equipment is used wholly or partly to control air, water, or land pollution. The valuation of pollution control property and consideration of tax revenue is outside the scope of the commission's review under Chapter 17. No changes were made in response to these comments.

Comment

Six committee members commented that they agreed with other members of the committee who voted with the majority of the committee that HRSGs have production and pollution control benefits and the pollution control benefits were greater than 0% and less than 100%; that HRSGs could be included on the Tier I Table at a partial use percentage if an appropriate method to calculating the partial use percentage could be determined; that applicants could seek other use percentages for HRSGs on a different tier of application; that the percentage on the Tier I Table would include only HRSGs and no other equipment; and with the data sources used in the calculation that resulted in 65% use determination are appropriate.

Response

The commission agrees with most of the commenters' statements regarding the issues addressed in committee's formal recommendation. However, the commission notes that there are two issues that were discussed in the committee meetings but that were not addressed in the committee's formal recommendation letter. The first is regarding applicants seeking alternative use percentages for HRSGs using a different tier level application. The second is regarding equipment other than HRSGs that could be included in use determinations.

Regarding the application Tier for a HRSG, a Tier I application must be submitted for an HRSG that is used as described in the Tier I Table description for the HRSG. An option to apply for a higher use determination percentage is not available unless the HRSG is used differently than the Tier I Table description. In other words, a Tier III application may be submitted only if the HRSG is not used as a boiler designed to capture waste heat from combustion turbine exhaust for the generation of steam while reducing unit output-based emissions. By including HRSGs on the Tier I Table, the commission has established the use percentage of the property when used as described on the table and expects applications for HRSGs to be filed as Tier I applications when the property is used as described on the table.

The commission's adopted language to §17.17(a) ensures that if the use of any of the property added to the Tier I Table in §17.14(a) deviates from the pollution control property description within the table, the environmental use is appropriately considered and accounted for as intended in the program's design by using the CAP under §17.17 instead of the designated use percentage as provided in the Tier I Table. A Tier III application requesting a partial determination must be submitted for all property that is either not used as described on the Tier I Table located in §17.14(a) or does not fully satisfy the requirements for a 100% PUD. For all property for which a partial use determination is sought, the CAP described at §17.17(c) must be used.

Regarding the commenters' statements on equipment other than HRSGs, or ancillary equipment, as part of the proposed rule and consistent with the committee's formal recommendation, the Tier I Table item for HRSGs did not specify that item eligibility was limited to HRSGs. The commission acknowledges that property in a Tier I Table item could require ancillary equipment. This is property that is necessary for the installation or operation of the property listed on the Tier I Table and that would not be installed but for the installation or use of the property on the Tier I Table. However, not all equipment included as ancillary equipment on a Tier I application is considered as such under the Tax Relief Program, and each application received requesting tax exemption for an HRSG would be evaluated in the same manner as is done for other property use determination applications. Applications that include ancillary equipment must demonstrate that the equipment is actually ancillary to the HRSG depending on the circumstances under which the property is used. The use percentage for any ancillary equipment included in a Tier I application will be the same percentage as is listed for a HRSG on the Tier I Table. This approach of addressing ancillary equipment is consistent with previous use determinations issued for other Tier I Table items and would not differ for HRSGs as a Tier I Table item. No changes were made in response to this comment.

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, which authorizes the commission to perform any acts authorized by the TWC or other laws that are necessary and convenient to the exercise of its jurisdiction and powers; and TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC. The rules are also adopted under Texas Tax Code, §11.31, which authorizes the commission to adopt rules to implement the Pollution Control Property Tax Exemption.

The adopted amendments implement Texas Tax Code, §11.31.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2020.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2678

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CHAPTER 18. ROLLBACK RELIEF FOR POLLUTION CONTROL REQUIREMENTS

30 TAC §§18.25, 18.26, 18.30

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§18.25, 18.26, and 18.30.

The amendments to §§18.25, 18.26, and 18.30 are adopted *without changes* to the proposal as published in the July 31, 2020, issue of the *Texas Register* (45 TexReg 5308) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This adopted rulemaking implements Senate Bill (SB) 2, Section 44, 86th Texas Legislature, 2019, which requires revising the title of Chapter 18 from "Rollback Relief for Pollution Control Requirements" to" Voter-Approval Tax Rate Relief for Pollution Control Requirements."

The adopted rulemaking amends the provisions in Chapter 18 to mirror the changes adopted in the concurrent rulemaking adoption to amend 30 Texas Administrative Code (TAC) Chapter 17. The TCEQ adopts amendments to Chapter 17 to update requirements for the Tax Relief for Pollution Control Property Program based on formal recommendations and advice submitted to the commission by the Tax Relief for Pollution Control Property Advisory Committee (committee), and other changes identified by the TCEQ. The committee does not provide advice on the Voter-Approval Tax Rate Relief for Pollution Control Program, but the TCEQ adopts amendments to Chapter 18 to keep the rules for the two programs consistent.

The committee submitted a set of recommendations in a letter dated December 13, 2018 as part of a triennial review of the Tier I Table at §17.14(a) and the Expedited Review List (ERL or k-list) at §17.17(b). Subsequently, in a letter dated December 9, 2019, the committee advised the commission on how to determine use percentages for heat recovery steam generator (HRSG) property applications. The commission solicited this advice in response to the May 3, 2019 opinions of the Texas Supreme Court in *Brazos Electric Power Cooperative v. Texas Commission on Environmental Quality, 576 S.W.3d 374 (Tex. 2019)* and *Texas Commission on Environmental Quality v. Brazos Valley Energy LLC, 582.W.3d 277 (Tex. 2019)* concerning HRSG use determinations under Chapter 17 and Texas Tax Code, §11.31.

HRSGs are typically used in the production of electricity, allowing a power plant to increase production efficiency by using waste heat from combustion to generate steam that drives a steam turbine to produce additional electricity. The revisions adopted to address HRSGs in this rulemaking are based on adopted amendments to Chapter 17 intended to resolve outstanding issues stemming from the Texas Supreme Court's May 3, 2019 opinions regarding lawsuits filed after the commission upheld 21 negative use determinations (NUDs) for HRSGs at power plants. Because HRSGs are included on the property listed at Texas Tax Code, §11.31(k), and in §17.17(b) as the ERL, an applicant may submit an application to the TCEQ requesting a use determination for an ad valorem tax exemption. Applications were submitted in 2008, 2009, and 2012, to the Chapter 17, Tax Relief for Pollution Control Program requesting Positive Use Determinations (PUD) for HRSGs and associated equipment at Texas

power plants. The TCEQ executive director issued NUDs for the HRSG applications submitted, and 17 appeals were filed. At the September 24, 2014, Commissioners' Agenda, the commission affirmed the executive director's NUDs and denied all 17 of the appeals. In response, 12 lawsuits were filed. The lawsuits were consolidated for trial and divided into two groups based on the tier of application submitted, either Tier III or Tier IV. The district court upheld the TCEQ's determinations for both groups, but the rulings were appealed. The appellate court hearing the Tier III group affirmed the TCEQ's reading of Texas Tax Code, §11.31 and its NUDs. The appellate court hearing the Tier IV group disagreed with the TCEQ's arguments concerning the k-list and found that the TCEQ abused its discretion in issuing NUDs for the HRSGs. Petitions for Review were filed with the Texas Supreme Court for both cases.

The Texas Supreme Court held that the TCEQ abused its discretion in issuing NUDs and remanded the cases to the commission for further proceedings consistent with its findings. The Texas Supreme Court found that Texas Tax Code, §11.31 entitles a person to an exemption from ad valorem taxation for property that the person owns and that is used, in whole or in part, to control pollution. The Texas Supreme Court also found that for property on the k-list, the executive director's sole responsibility is to determine what proportion of the property is purely productive and what proportion is for pollution control. However, the executive director may not determine that the pollution control proportion is zero or negative. Finally, the Texas Supreme Court also found that the TCEQ, through rulemaking, may remove an item "from the list if the commission finds compelling evidence to support the conclusion that the item does not provide pollution control benefits." The commission has not found compelling evidence to support removal of HRSGs from the k-list; therefore, the commission must find that HRSGs qualify, at least in part, as pollution control property. The Texas Supreme Court did not identify the method to determine use percentages for HRSGs, nor did the Texas Supreme Court address the cost analysis procedure (CAP) formula or its application.

To examine these issues and the Texas Supreme Court's findings as they relate to future HRSG applications, the commission solicited advice from the committee. In a letter dated July 19, 2019, the TCEQ asked the committee to analyze three questions in its review of the issues: 1) whether the current CAP is adequate to determine use percentages for HRSGs; 2) if the CAP is inadequate, what is an appropriate method for determining use percentages for HRSGs; and 3) whether HRSGs should be removed from the ERL. In a response letter dated December 9, 2019, the committee submitted its formal majority report and recommendation.

This rulemaking addresses the committee's December 9, 2019 recommendation concerning HRSGs and its December 13, 2018 recommendations regarding the Chapter 17 Tier I Table and ERL, except when deviation from these recommendations is needed to ensure the rule appropriately and consistently describes pollution control property eligible for a PUD under the Chapter 17 Tax Relief for Pollution Control Property Program. Because the Tier I Table and ERL in Chapter 18 are the same as in Chapter 17, the changes related to the committee's recommendations are consistent with those adopted in the associated Chapter 17 rulemaking.

Additionally, the commission adopts amendments to Chapter 18 to incorporate property additions to the Tier I Table for property determined by the committee to consistently be used as 100% pollution control in each application submitted for such property between 2014 and 2018 to the Chapter 17 Tax Relief for Pollution Control Property Program. The committee evaluated the Tier II and Tier III applications that received PUDs as part of the triennial review required by Texas Tax Code, §11.31(l) for Chapter 17 and determined that 11 types of pollution control property currently submitted as Tier II property are now considered Tier I property in the Tier I Table. Under Chapter 18, an application submitted for a PUD for property not on the Tier I Table in §18.25(a) and that is used in a manner different from the description on the Tier I Table will be submitted as a Tier II application consistent with §18.26, requiring the applicant to propose a reasonable method for calculating a partial determination.

Because Chapter 18 is not in the committee's scope of review, it did not consider the ERL in Texas Tax Code, §26.045(f), codified in §18.26, or the Tier I Table in §18.25(a). Both Chapter 18 tables are identical to the ERL in §17.17(a) and the Tier I Table in §17.14(a), respectively. The committee did not recommend any changes for the ERL in §17.17(a). However, the commission adopts changes to the ERL in §17.17(a) to establish consistency with the HRSG description adopted in the Tier I Table in §17.14(a); therefore, these same changes are adopted to the ERL in §18.26. In the associated rule project for Chapter 17, several changes are also adopted to the Tier I Table in §17.14(a) based on the committee's recommendations; therefore, the commission adopts corresponding changes to the Tier I Table in §18.25(a). The adopted changes afford applicants applying under the Chapter 18 rules the same opportunities to receive PUDs for property proposed to be submitted as Tier I property as applicants applying under the Chapter 17 rules.

In addition, the commission adopts amendments, as necessary, that were not specifically recommended by the committee but that remain consistent with its advice and to accommodate the addition of HRSGs to the Tier I Table. Non-substantive revisions are adopted to the sections open to address Chapter 18 Tier I Table and associated changes.

The TCEQ is required to review, and update as necessary, the items in the Tier I Table in §18.25(a) every three years per §18.25(b). Likewise, the TCEQ is required to review, and update as necessary, the items in the ERL in §18.26 every three years per Texas Tax Code, §26.045(g). This rulemaking fulfills the requirements for the commission to review, and update as necessary, the property included on the ERL and Tier I Table in Chapter 18 at least once every three years.

Section by Section Discussion

The commission adopts the amendment to the title of Chapter 18 from "Rollback Relief for Pollution Control Requirements" to "Voter-Approval Tax Rate Relief for Pollution Control Requirements" to implement SB 2, Section 44. Aside from the revision to change the title of Chapter 18, as required by SB 2, Section 44, the adopted revisions to Chapter 18 are consistent with those for Chapter 17 in the associated rulemaking. Those revisions are adopted based on the recommendations from the committee, except where explicitly discussed. This adopted rulemaking adds specific pollution control property to the Tier I Table in §18.25(a). Under the current rules, §18.25(a) requires applicants to submit a Tier II application for any of the adopted property additions if the property is used for pollution control purposes at a percentage different than what is listed on the table or, at the request of the executive director, if the equipment is not being used in a standard manner. These existing criteria in §18.25(a) were not proposed for revision. Any of the property adopted for inclusion

in the Tier I Table will need to continue to adhere to these existing requirements.

§18.25, Tier I Eligible Equipment

Adopted §18.25 includes amending the rule language to allow items listed on the Tier I Table located in §18.25(a) with partial use percentages to be eligible for a Tier I application and to add additional property to the Tier I Table. Each property item in the Tier I Table currently has a table number, the media, property name, property description, and use percentage. The adopted additions to the Tier I Table also include this same information.

The adopted amendment to §18.25(a) clarifies that a Tier II application is still required if a marketable product is recovered from property listed in the Tier I Table, unless that property is designated with a partial use percentage on the Tier I Table. This revision is necessary because subsection (a) currently directs an applicant to file a Tier II application if a marketable product is recovered from the property listed in the Tier I Table, without exception. Because HRSGs may generate a marketable product, which was considered during the calculation of the appropriate use percentage and is accounted for in the 65% partial use determination adopted in this rulemaking, the eligibility description is amended to indicate property items listed on the Tier I Table with a partial use percentage may nevertheless be eligible for Tier I applications.

The commission adopts the amendment to the first sentence of the introductory paragraph to the Tier I Table in §18.25(a) to require a Tier I application for the property listed in the Tier I Table whether it is used wholly or partly for pollution control purposes. An option to apply for a higher use determination percentage is not available unless the HRSG is used differently than the Tier I Table description. A Tier II application may be submitted only if the HRSG is not used as a boiler designed to capture waste heat from combustion turbine exhaust for the generation of steam while reducing unit-output based emissions. The existing requirement in subsection (a) designates that a Tier I application is required for property used wholly, or 100%, as pollution control property. However, the adopted amendment to the Tier I Table includes HRSGs at a partial use percentage of 65%. Therefore, under the adopted rule, Tier I applications for HRSGs will be appropriate. The commission further adds an exception for HRSGs listed as a partial use percentage to the description of the Tier I Table contents. This adopted revision accommodates the addition of HRSGs to the Tier I Table, which currently only contains property used wholly as pollution control. The table will be expanded to include HRSGs as the only piece of property eligible for a Tier I PUD at a partial use percentage. Although all the other property currently listed in the Tier I Table must be used wholly for pollution control property to be eligible for filing as a Tier I application, the commission previously listed property with partial use percentages on the Tier I Table. The property was subsequently removed because the usage of such property could not be definitively verified as representative of standard use based on the information available about the uses of the property at the time. However, for this adopted rulemaking, the committee reviewed current data and determined 65% reasonably represents the proportion of HRSGs used as pollution control when HRSGs are used in a standard manner.

The commission adopts item numbers A-90, A-91, A-116 through A-120, A-190, S-29, M-23 and M-24 for addition to the Tier I Table in §18.25(a), all at 100% pollution control property based on the recommendations of the advisory committee concerning the Tier I Table of Chapter 17. Items A-90, A-91, A-116 through A-120, A-190, and M-23 are added as the committee recommended. The commission agrees with the committee's recommendations to revise the Tier I Table and add Dry Low-NO_x Emissions Systems; Lean-Burn Portions of Reciprocating Engines; Fixed Storage Tank Roofs; Submerged Fill Pipes; Dual Mechanical Pump Seals; Seal-less Pumps; Airless Paint Spray Guns; and Remote Controlled Block Valves to the Tier I Table because they are used wholly for control purposes. These items are described in the adopted rule language and are not further discussed in the Section by Section Discussion section of this preamble.

For each of the items added to the Tier I Table with adoption of this rulemaking, the committee based its recommendation that this property should be Tier I level property on historical Tier II application submittals, under the Tax Relief for Pollution Control Property Program in Chapter 17, that demonstrated the property was consistently used wholly for pollution control, as discussed in the Background and Summary of Factual Basis for the Adopted Rules section of this preamble. The item numbers will designate air pollution control equipment, indicated by the letter "A," solid waste management pollution control equipment, indicated by the letter "S," and miscellaneous pollution control equipment, indicated by the letter "M," as recommended by the committee in its December 2018 formal majority report. The committee's recommendation to add the property to the Tier I Table was based on its review and analysis of Tier II applications submitted from 2014 through 2018 that consistently received a PUD of 100% each time an applicant requested a use determination for such property. Although the item numbers are added to the Tier I Table at 100% pollution control property, an applicant is still required under §18.25(a) to submit a Tier II application if such property has productive benefit or is not used as described in the table.

The commission adopts the amendment to the Tier I Table to add item number A-92 for HRSGs. The property item is listed as a boiler designed to capture waste heat from combustion turbine exhaust for the generation of steam while reducing unit output-based emissions with a partial use determination of 65%. To arrive at the 65% partial use percentage, the committee evaluated data provided in the 2019 Gas Turbine World Handbook and calculated the average of both the environmental benefit and the productive benefit of a combined-cycle plant operating an HRSG versus a similar simple-cycle plant without an HRSG. For the environmental benefit estimate, the committee considered the best available control technology (BACT) emission limit for a combined-cycle facility of 2 parts per million (ppm) and for a simple-cycle facility of 5 ppm to determine the decrease in nitrogen oxides (NO_x) emissions between two types of facilities on a pound per megawatt-hour basis. To determine the production benefit, the committee calculated both the average increase in plant output and average improvement in heat rate attributable to combine-cycle operation (due to the HRSG) when compared to simple-cycle operation. The committee averaged the percentage results for the environmental benefit and the nonproductive use to derive an environmental use of 65%. The commission agrees with the reasoning provided by the committee in support of the derivation of the 65% partial use determination for HRSGs.

The commission adopts the amendment to the Tier I Table in §18.25(a) to add item S-29 for reclamation equipment. The adopted property description excludes commercial reclamation equipment from eligibility as Tier I property. Commercial reclamation equipment is equipment owned and rentable by companies that provide reclamation services. The committee

did not identify the explicit exclusion of commercial reclamation equipment in its recommendation. However, the commission adopts this exclusion to clarify that the construction equipment used for commercial land reclamation purposes will not qualify for exemption from taxation because the Voter-Approval Tax Rate Relief for Pollution Control Requirements Program only applies to political subdivisions required to meet the requirements of a TCEQ-issued permit, as specified in §18.5(a). The type of company performing commercial reclamation services will not be expected to meet the specified Chapter 18 applicability.

The commission adopts the amendment the Tier I Table in §18.25(a) to add item M-24 for nondestructive pipeline testing to the Tier I Table. The commission adopts a change to the committee's recommended proposed property description to clarify the property that is intended to be eligible, and property that is intended to be ineligible, as Tier I Table property. The committee recommended expenditures such as radiography as the Tier I Table description. Instead, the commission adopts amendments to the rule so that expenditures used for nondestructive pipeline testing are explicitly included, but expenditures used for non-pollution control purposes are explicitly excluded. The explicit inclusion of nondestructive pipeline testing as part of the adopted property description is necessary to state the item that is intended to be covered as the Tier I property rather than only providing an example of the property, as recommended by the committee. The explicit exclusion of expenditures for non-pollution control purposes maintains consistency with requirements in §18.5(a) requiring that the pollution control property wholly or partly meet the requirements of a TCEQ-issued permit.

§18.26, Expedited Review List

The commission adopts the ERL in §18.26 to revise the description for HRSGs, listed as item number B-8. The committee recommended describing an HRSG in the §17.14(a) Tier I Table as a boiler designed to capture waste heat from combustion turbine exhaust for the generation of steam while reducing unit output-based emissions. Although the committee did not recommend any changes to the existing Chapter 17, §17.17(b) ERL, the commission adopts the amendment to the rule to replace the existing HRSG description in the §18.26 ERL with the committee's recommended HRSG description. This adopted change streamlines the description of HRSG and specifies the property intended to qualify as an HRSG under the Chapter 18 rules. The adopted change to the ERL was not explicitly recommended by the committee but remains consistent with its advice. This adopted amendment to the ERL is not intended to change the type of property currently covered under the Voter-Approval Tax Rate Relief for Pollution Control Requirements Program. The adopted change to the HRSG description in the Chapter 17, §17.17(b) ERL is also adopted to the Chapter 18, §18.26 ERL to uphold consistency between the Chapters 17 and 18 programs.

§18.30, Partial Determinations

The commission adopts the amendment to §18.30 to add language that clarifies the property for which a partial determination is not required. This revision is necessary in light of the inclusion of HRSGs with a partial use percentage in the §18.25(a) Tier I Table. The amended language provides an exception for property that is on the Tier I Table located in §18.25(a) at a specified partial use percentage from having to request a partial determination. Existing language directing applicants to apply for a partial determination for property that is in the ERL in §18.26 or that is not wholly used for pollution control remains unchanged. This adopted revision is intended to ensure property already determined to have a partial use environmental benefit listed on the Tier I Table do not have to apply for a partial use determination. This adopted revision does not affect any property other than HRSGs at this time since all other property adopted for inclusion in the Tier I Table is associated with a 100% positive use.

The adopted amendment to §18.30 differs from the adopted change to §17.17(a) because the existing rule language is not the same; however, the intent of both revisions is the same.

Final Regulatory Impact Determination

The commission reviewed the rulemaking adoption in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rules do not meet the definition of a "Major environmental rule." Under Texas Government Code, §2001.0225, 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. Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule which 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law. The rulemaking adoption implements a Voter-Approval Tax Rate Relief for Pollution Control Requirements Program as described in Texas Tax Code, §26.045 and the Background and Summary of the Factual Basis for the Adopted Rules and Section by Section Discussion sections of this preamble. Because the adopted rules are not specifically intended to protect the environment or reduce risks to human health from environmental exposure but to implement a tax rate adjustment program, this rulemaking is not a major environmental rule and does not meet any of the four applicability requirements. This rulemaking adoption will not result in any new environmental requirements and should not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the rulemaking adoption and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The commission's assessment indicates Texas Government Code, Chapter 2007, does not apply to these adopted rules because this action creates a program which is available only to political subdivisions as described in Texas Tax Code, §26.045 and the Section by Section Discussion sections of this preamble. Promulgation and enforcement of these adopted rules will be neither a statutory nor constitutional taking of private real property. Specifically, the adopted rulemaking does not affect a landowner's rights in private real property because this rulemaking action does not burden, restrict, nor limit the owner's rights to property or reduce

its value by 25% or more beyond which will otherwise exist in the absence of the adopted regulations.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rulemaking is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The comment period closed on August 31, 2020. No comments were received on the proposed revisions to Chapter 18.

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, which authorizes the commission to perform any acts authorized by the TWC or other law which are necessary and convenient to the exercise of its jurisdiction and powers; and §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC. The amended sections are also adopted under Texas Tax Code, §26.045, which authorizes that the voter-approval tax rate for a political subdivision of this state be increased by the rate that, if applied to the total current value, would impose an amount of taxes equal to the amount the political subdivision will spend out of its maintenance and operation funds under Texas Tax Code, §26.012(16) to pay for a facility, device, or method for the control of air, water, or land pollution that is necessary to meet the requirements of a permit issued by the commission.

The adopted amendments implement Texas Tax Code, §26.045.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2020.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2678

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CHAPTER 39. PUBLIC NOTICE
SUBCHAPTER H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.403

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts an amendment to §39.403, concerning Applicability. The amendment to §39.403 is adopted *without change* to the proposal as published in the August 14, 2020, issue of the *Texas Register* (45 TexReg 5596) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking streamlines the regulation for pre-injection units (PIUs) associated with injection wells by removing redundant requirements for registering or permitting PIUs under 30 Texas Administrative Code (TAC) Chapter 331. PIUs are above-ground waste management units associated with an injection well and can include equipment and structures such as tanks, surface impoundments, filters, pumps, and piping used for storage and processing of waste prior to injection into an injection well.

The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells is inconsistent with the regulation of the same types of units under the TCEQ solid waste management program. PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells must be authorized by a permit or registration. The same types of units used to store or process industrial nonhazardous, noncommercial waste not disposed in an injection well do not require authorization by a permit or registration. The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are also inconsistent with the United States Environmental Protection Agency's (EPA) Underground Injection Control (UIC) Program. The EPA does not regulate nonhazardous PIUs under the UIC Program.

Additionally, PIUs managing waste generated from *in situ* mining of uranium are redundantly regulated under TCEQ's radioactive substance rules. PIUs that store or process waste generated from *in situ* mining of uranium disposed in an injection well must be authorized by an injection well permit. The design, construction, operation and closure of these PIUs is also regulated under the radioactive material license.

Consistent with other commission rules and EPA regulations, this rulemaking amends and repeals rules for PIUs associated with nonhazardous, noncommercial injection wells to remove the requirements to permit or register PIUs under Chapter 331 and will result in a streamlined UIC permit application process.

Although the permitting and registration requirements for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells will be amended and repealed, the PIUs will still be regulated under either the TCEQ solid waste regulations or the TCEQ radioactive substance regulations. Owners of PIUs used to store or process industrial solid waste must still comply with the notification requirements in 30 TAC §335.6. Owners of PIUs used to store or process waste generated from *in situ* mining of uranium must still comply with the radioactive materials licensing requirements of 30 TAC Chapter 336.

As part of this rulemaking, the commission is also adopting corresponding revisions to 30 TAC Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 331, Underground Injection Control.

Section Discussion

The commission adopts various stylistic, non-substantive changes, such as grammatical corrections. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§39.403, Applicability

The commission adopts amended §39.403 by deleting §39.403(c)(6) and renumbering the subsequent paragraph accordingly. Because the commission is eliminating the provisions in §331.17 that address the registration of PIUs, the reference in current §39.403(c)(6) to PIU registrations is no longer necessary. This amendment of §39.403 will improve the ease of use of this rule by removing the reference to a type of authorization that will no longer be required in commission rules. No substantive changes to public notice requirements are made by this amendment.

Final Regulatory Impact Determination

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendment to §39.403 is procedural in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it 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. Rather, this rulemaking removes a reference to an authorization that will no longer be available so that there is no confusion regarding the applicable rules for public notice for certain permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The adopted amendment to §39.403 does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but is authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated this rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendment of §39.403 does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The adopted rule does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rule adoption will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor would it affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The comment period closed on September 15, 2020. The commission received no public comments on this rulemaking.

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is adopted under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
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CHAPTER 50. ACTION ON APPLICATIONS AND OTHER AUTHORIZATIONS

SUBCHAPTER F. ACTION BY THE COMMISSION

30 TAC §50.113

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts an amendment to §50.113.

The amendment to §50.113 is adopted *without change* to the proposal as published in the August 14, 2020, issue of the *Texas Register* (45 TexReg 5599) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking streamlines the regulation for pre-injection units (PIUs) associated with injection wells by removing redundant requirements for registering or permitting PIUs under 30 Texas Administrative Code (TAC) Chapter 331. PIUs are above-ground waste management units associated with an injection well and can include equipment and structures such as tanks, surface impoundments, filters, pumps, and piping used for storage and processing of waste prior to injection into an injection well.

The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells is inconsistent with the regulation of the same types of units under the TCEQ solid waste management program. PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells must be authorized by a permit or registration. The same types of units used to store or process industrial nonhazardous, noncommercial waste not disposed in an injection well do not require authorization by a permit or registration. The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are also inconsistent with the United States Environmental Protection Agency's (EPA) Underground Injection Control (UIC) Program. The EPA does not regulate nonhazardous PIUs under the UIC Program.

Additionally, PIUs managing waste generated from *in situ* mining of uranium are redundantly regulated under TCEQ's radioactive substance rules. PIUs that store or process waste generated from *in situ* mining of uranium disposed in an injection well must be authorized by an injection well permit. The design, construction, operation and closure of these PIUs is also regulated under the radioactive material license.

Consistent with other commission rules and EPA regulations, this rulemaking will amend and repeal rules for PIUs associated with nonhazardous, noncommercial injection wells to remove the requirements to permit or register PIUs under Chapter 331 and will result in a streamlined UIC permit application process.

Although the permitting and registration requirements for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are adopted to be amended and repealed, the PIUs will still be regulated under either the TCEQ solid waste regulations or the TCEQ radioactive substance regulations. Owners of PIUs used to store or process industrial solid waste must still comply with the notification requirements in 30 TAC §335.6. Owners of PIUs used to store or process waste generated from *in situ* mining of uranium must still comply with the radioactive materials licensing requirements of 30 TAC Chapter 336.

As part of this rulemaking, the commission is also adopting corresponding revisions to 30 TAC Chapter 39, Public Notice; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 331, Underground Injection Control.

Section Discussion

The commission adopts various stylistic, non-substantive changes, such as grammatical corrections. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§50.113, Applicability and Action on Application

The commission adopts amended §50.113 by deleting §50.113(d)(7) and renumbering subsequent paragraphs accordingly. Because the commission is eliminating the provisions in §331.17 that address the registration of PIUs, the reference in current §50.113(d)(7) to PIU registrations is no longer necessary. This amendment of §50.113 will improve the ease of use of this applicability rule by removing the reference to a type of authorization that will no longer be required in commission rules. No substantive changes to public participation requirements are made by this amendment.

Final Regulatory Impact Determination

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendment to §50.113 is procedural in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it 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. Rather, this rulemaking removes a reference to an authorization that will no longer be available so that there is no confusion regarding the applicable rules for commission action on certain permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The adopted amendment to §50.113 does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but is authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public

comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated this rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendment of §50.113 does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The adopted rule does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rule adoption will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor would it affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The comment period closed on September 15, 2020. The commission received no public comments on this rulemaking.

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is adopted under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 55. REQUESTS FOR RECONSIDERATION AND CONTESTED CASE HEARINGS; PUBLIC COMMENT

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §55.101 and §55.201.

The amendments to §55.101 and §55.201 are adopted *without change* to the proposal as published in the August 14, 2020, issue of the *Texas Register* (45 TexReg 5602) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking streamlines the regulation for pre-injection units (PIUs) associated with injection wells by removing redundant requirements for registering or permitting PIUs under 30 Texas Administrative Code (TAC) Chapter 331. PIUs are above-ground waste management units associated with an injection well and can include equipment and structures such as tanks, surface impoundments, filters, pumps, and piping used for storage and processing of waste prior to injection into an injection well.

The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells is inconsistent with the regulation of the same types of units under the TCEQ solid waste management program. PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells must be authorized by a permit or registration. The same types of units used to store or process industrial nonhazardous, noncommercial waste not disposed in an injection well do not require authorization by a permit or registration. The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are also inconsistent with the United States Environmental Protection Agency's (EPA) Underground Injection Control (UIC) Program. The EPA does not regulate nonhazardous PIUs under the UIC Program.

Additionally, PIUs managing waste generated from *in situ* mining of uranium are redundantly regulated under TCEQ's radioactive substance rules. PIUs that store or process waste generated from *in situ* mining of uranium disposed in an injection well must be authorized by an injection well permit. The design, construction, operation and closure of these PIUs is also regulated under the radioactive material license.

Consistent with other commission rules and EPA regulations, this rulemaking amends and repeals rules for PIUs associated with nonhazardous, noncommercial injection wells to remove the requirements to permit or register PIUs under Chapter 331 and will result in a streamlined UIC permit application process.

Although the permitting and registration requirements for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are adopted to be amended and repealed, the PIUs will still be regulated under either the TCEQ

solid waste regulations or the TCEQ radioactive substance regulations. Owners of PIUs used to store or process industrial solid waste must still comply with the notification requirements in 30 TAC §335.6. Owners of PIUs used to store or process waste generated from *in situ* mining of uranium must still comply with the radioactive materials licensing requirements of 30 TAC Chapter 336.

As part of this rulemaking adoption, the commission is also adopting corresponding revisions to 30 TAC Chapter 39, Public Notice; Chapter 50, Action on Applications and Other Authorizations; and Chapter 331, Underground Injection Control.

Section by Section Discussion

The commission adopts various stylistic, non-substantive changes, such as grammatical corrections. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§55.101, Applicability

The commission adopts amended §55.101 by deleting §55.101(g)(11) and renumbering subsequent paragraphs accordingly. Because the commission is eliminating the provisions in §331.17 that address the registration of PIUs, the reference in current §55.101(g)(11) to PIU registrations is no longer necessary. This amendment of §55.101 will improve the ease of use of this applicability rule by removing the reference to a type of authorization that will no longer be required in commission rules. No substantive changes to public participations requirements are made by this amendment.

§55.201, Requests for Reconsideration or Contested Case Hearing

The commission adopts amended §55.201 by deleting §55.201(i)(8) and renumbering subsequent paragraphs accordingly. Because the commission is eliminating the provisions in §331.17 that address the registration of PIUs, the reference in current §55.201(i)(8) to PIU registrations is no longer necessary. This amendment of §55.201 will improve the ease of use of this rule which identifies types of commission authorization that are not subject to a right to a contested case hearing by removing the reference to PIU registrations that will no longer be required in commission rules. No substantive changes to public notice requirements are made by this rulemaking.

Final Regulatory Impact Determination

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments to §55.101 and §55.201 are procedural in nature and are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do they 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. Rather, this rulemaking removes references to an authorization that will no longer be available so that there is no confusion regarding the applicable rules for public participation for certain permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The adopted amendments to §55.101 and §55.201 do not exceed an express requirement of state law or a requirement of a delegation agreement and were not developed solely under the general powers of the agency but are authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated this rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendments of §55.101 and §55.201 do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The rulemaking does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rule adoption will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor would it affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the rulemaking is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The comment period closed on September 15, 2020. The commission received no public comments on this rulemaking.

SUBCHAPTER D. APPLICABILITY AND DEFINITIONS

30 TAC §55.101

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties

and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is adopted under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
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SUBCHAPTER F. REQUESTS FOR RECONSIDERATION OR CONTESTED CASE

30 TAC §55.201

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is adopted under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 331. UNDERGROUND INJECTION CONTROL

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§331.2, 331.5, 331.7, 331.47, 331.64, and 331.121, and the repeal of §331.17 and §331.18.

The amendments to §§331.2, 331.5, 331.7, 331.47, 331.64, and 331.121, and the repeal of §331.17 and §331.18 are adopted *without changes* to the proposal as published in the August 14, 2020, issue of the *Texas Register* (45 TexReg 5607) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking streamlines the regulation for pre-injection units (PIUs) associated with injection wells by removing redundant requirements for registering or permitting PIUs under 30 Texas Administrative Code (TAC) Chapter 331. PIUs are above-ground waste management units associated with an injection well and can include equipment and structures such as tanks, surface impoundments, filters, pumps, and piping used for storage and processing of waste prior to injection into an injection well.

The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells is inconsistent with the regulation of the same types of units under the TCEQ solid waste management program. PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells must be authorized by a permit or registration. The same types of units used to store or process industrial nonhazardous, noncommercial waste not disposed in an injection well do not require authorization by a permit or registration. The regulation of PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are also inconsistent with the United States Environmental Protection Agency's (EPA) Underground Injection Control (UIC) Program. The EPA does not regulate nonhazardous PIUs under the UIC Program.

Additionally, PIUs managing waste generated from *in situ* mining of uranium are redundantly regulated under TCEQ's radioactive substance rules. PIUs that store or process waste generated from *in situ* mining of uranium disposed in an injection well must be authorized by an injection well permit. The design, construction, operation and closure of these PIUs is also regulated under the radioactive material license.

Consistent with other commission rules and EPA regulations, this rulemaking amends and repeals rules for PIUs associated with nonhazardous, noncommercial injection wells to remove the requirements to permit or register PIUs under Chapter 331 and results in a streamlined UIC permit application process.

Although the permitting and registration requirements for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells are adopted to be amended and repealed, the PIUs will still be regulated under either the TCEQ solid waste regulations or the TCEQ radioactive substance regulations. Owners of PIUs used to store or process industrial solid waste must still comply with the notification requirements in 30 TAC §335.6. Owners of PIUs used to store or process waste generated from *in situ* mining of uranium must still comply with the radioactive materials licensing requirements of 30 TAC Chapter 336, Radioactive Substance Rules.

As part of this rulemaking, the commission is also adopting corresponding revisions to 30 TAC Chapter 39, Public Notice; Chapter 50, Action on Applications and Other Authorizations; and Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment.

Section by Section Discussion

The commission adopts various stylistic, non-substantive changes, such as grammatical corrections or cross-references. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§331.2, Definitions

The commission adopts amended §331.2(2)(D) to remove the text "pre-injection units for processing or storage of waste" from the definition of "Activity" and re-letter the subsequent subparagraph accordingly. Section 331.7(a) requires all injection wells and activities to be authorized by an individual permit. This adopted amendment removes PIUs from the definition of "Activity", thus removing PIUs from the requirement to be authorized by an individual permit.

§331.5, Prevention of Pollution

The commission adopts amended §331.5(c) to remove the text "which are required to be authorized by permit or registration under §331.7(d) of this title (relating to Permit Required)." This amendment removes the text referencing the requirement for PIUs to be authorized by permit or registration. The amendment does not remove the requirement for PIUs to be designed, constructed, operated, maintained, monitored, and closed in a manner that prevents pollution.

§331.7, Permit Required

The commission adopts amended §331.7(a) to correct a cross-reference as a result of the adopted removal of §331.7(d).

The commission adopts amended §331.7 by removing subsection (d) and re-lettering subsequent subsections accordingly. This amendment removes the requirement for PIUs associated with nonhazardous, noncommercial Class I and Class V injection wells to be authorized by a permit or registration.

§331.17, Pre-injection Units Registration

The commission adopts the repeal of §331.17. This repeal removes the approval guidelines, registration procedures, and design criteria for registration of PIUs associated with Class I and Class V nonhazardous, noncommercial injection wells.

§331.18, Registration Application, Processing, Notice, Comment, Motion to Overturn

The commission adopts the repeal of §331.18. This repeal removes the application requirements, processing requirements, notice requirements, major and minor amendment requirements, and public comment and motion to overturn requirements for registration of PIUs associated with Class I and Class V nonhazardous, noncommercial injection wells.

§331.47, Pond Lining

The commission adopts amended §331.47(a) to remove the text "Except as provided in subsection (b) of this section, all", and "as approved by the executive director or as required by permits." The commission amends §331.47(a) by removing the reference to subsection (b). This amendment also removes the reference to executive director approval or permitting of the liner for ponds and surface impoundments. This amendment does not remove the requirement for ponds or surface impoundments to be lined with clay or an artificial liner.

The commission adopts amended §331.47 by removing subsection (b). This amendment removes the requirement for surface impoundments managing nonhazardous, noncommercial Class 1 industrial waste associated with Class I and Class V nonhazardous, noncommercial injection wells to meet the design standards in 30 TAC Chapter 217, Design Criteria for Domestic Wastewater Systems. The design standards for domestic wastewater systems are not applicable to surface impoundments managing nonhazardous, noncommercial Class 1 industrial waste and are not consistent with the standards for surface impoundments and ponds in Chapter 331 and 30 TAC Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste.

§331.64, Monitoring and Testing Requirements

The commission adopts amended §331.64(g)(1) and (3) to update incorrect cross-references.

§331.121, Class I Wells

The commission adopts amended §331.121(a)(2) to update a cross-reference as a result of the adopted removal of §331.121(a)(2)(R).

The commission adopts amended §331.121(a)(2)(K) to remove the text "and Pre-injection units, except that pre-injection units registered under the provisions of §331.17 of this title (relating to Pre-injection Units Registration) shall be considered under that section." This amendment removes the requirement for the commission to consider the engineering drawings of PIUs before issuing a Class I injection well permit.

The commission adopts amended §331.121(a)(2)(Q) to remove the text "under this chapter." This amendment removes the reference to PIU authorizations under Chapter 331. PIUs are regulated under Chapter 335 and Chapter 336.

The commission adopts amended §331.121 by removing subsection (a)(2)(R). This amendment removes the requirement for the commission to consider information demonstrating PIU compliance with the design criteria in Chapter 217.

Final Regulatory Impact Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "Major environmental rule" as defined in that

statute. A "Major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking removes registration requirements for PIUs and are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it 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. Existing requirements for the management of solid waste in Chapter 335 or management of by-product material in Chapter 336 are not changed by this rulemaking.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The adopted rules do not exceed an express requirement of state law or a requirement of a delegation agreement as there are no express requirements for the registration of PIUs. These rules were not developed solely under the general powers of the agency but are authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated this rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The rulemaking does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. The rulemaking removes requirements for the registration of PIUs. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The rulemaking does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rule adoption will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor would it affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the rulemaking is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The comment period closed on September 15, 2020. The commission received no public comments on this rulemaking.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§331.2, 331.5, 331.7

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendments are adopted under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2020.

TRD-202005617
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: January 7, 2021
Proposal publication date: August 14, 2020
For further information, please call: (512) 239-2678

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30 TAC §331.17, §331.18

Statutory Authority

The repeals are adopted under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the repeals are adopted under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the

commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. GENERAL STANDARDS AND METHODS

30 TAC §331.47

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is adopted under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. STANDARDS FOR CLASS I WELLS OTHER THAN SALT CAVERN SOLID WASTE DISPOSAL WELLS

30 TAC §331.64

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is adopted under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2678

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SUBCHAPTER G. CONSIDERATION PRIOR TO PERMIT ISSUANCE

30 TAC §331.121

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), Chapter 5, Subchapter M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. Additionally, the amendment is adopted under Texas Health and Safety Code (THSC),

§361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; and THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste.

The rulemaking implements TWC, Chapter 5, Subchapter M, TWC, §§5.013, 5.102, 5.013, 5.122, 26.011, and 27.019, and THSC, §361.024.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2678

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 802. INTEGRITY OF THE TEXAS WORKFORCE SYSTEM

SUBCHAPTER J. LOCAL WORKFORCE DEVELOPMENT AREA APPEALS

40 TAC §802.170

The Texas Workforce Commission (TWC) adopts the following new subchapter to Chapter 802, relating to the Integrity of the Texas Workforce System, without changes, as published in the October 9, 2020, issue of the *Texas Register* (45 TexReg 7209). The rule will not be republished.

Subchapter J. Local Workforce Development Area Appeals, §802.170

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the Chapter 802 rule amendment is to add Subchapter J, relating to appeals of denial of local workforce development area (workforce area) certifications. Subchapter J has been added to this chapter to retain the rule related to workforce area appeals from repealed Chapter 841, Subchapter E. This new subchapter is consistent with and implements the Workforce Innovation and Opportunity Act (WIOA) §106(b)(5).

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER J. LOCAL WORKFORCE DEVELOPMENT AREA APPEALS

Consistent with WIOA §106(b)(5), TWC adopts new Subchapter J as follows:

§802.170. Appeal of Denial of Local Workforce Development Area Certification.

New §802.170 states that all appeals of denial of workforce area certification shall be referred to the Texas Workforce Investment Council.

TWC hereby certifies that the rule has been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART III. PUBLIC COMMENT

The public comment period closed on November 9, 2020. No comments were received.

PART IV.

STATUTORY AUTHORITY

The rule is adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide the TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 15, 2020.

TRD-202005522
Dawn Cronin
Director, Workforce Program Policy
Texas Workforce Commission
Effective date: January 4, 2021
Proposal publication date: October 9, 2020
For further information, please call: (512) 689-9855

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CHAPTER 840. WIOA ELIGIBLE TRAINING PROVIDERS

The Texas Workforce Commission (TWC) adopts new Chapter 840, relating to Workforce Innovation and Opportunity Act (WIOA) Eligible Training Providers, comprising the following subchapters:

Subchapter A. General Provisions, §840.1 and §840.2

Subchapter B. Training Provider Eligibility, §840.10 and §840.11

Subchapter C. Training Program Eligibility, §§840.20 - 840.23

Subchapter D. Annual Reporting, §840.30 and §840.31

Subchapter E. Statewide Eligible Training Provider List, §§840.40 - 840.42

Subchapter F. Adverse Actions, §§840.50 - 840.55

Subchapter G. State and Local Flexibility, §§840.60 - 840.64

New §§840.1, 840..2, 840.10, 840.11, 840.21 - 840.23, 840.30, 840.31, 840.40 - 840.42, 840.50 - 840.55, and 840.60 - 840.63 are adopted without changes to the proposed text as published in the October 9, 2020, issue of the *Texas Register* (45 TexReg 7211). These rules will not be republished. New §840.20 and

§840.64 are adopted with changes to the proposed text as published. These rules will be republished.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the new Chapter 840 rules is to develop rules to establish the Eligible Training Provider (ETP) system, statewide ETP List (ETPL), and WIOA training services delivered by TWC and its 28 Local Workforce Development Board (Board) partners. Current TWC rules in Chapter 841, Subchapter C, regarding Training Provider Certification, support a previous training delivery model authorized by the Workforce Investment Act (WIA), which was repealed by Congress with the passage of WIOA. Therefore, new Chapter 840 is adopted to reflect this updated service delivery model. New Chapter 840 will contain all rules for the ETP system, authorized under WIOA. The rules in Chapter 841, Subchapter C, which are concurrently being repealed.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS

TWC adopts new Subchapter A, General Provisions, as follows:

§840.1. Short Title and Purpose

New §840.1 identifies statutes and regulations that determine the ETP system provisions.

§840.2. Definitions

New §840.2 relates to the definitions needed to make administration of the ETP system consistent with federal regulations at 20 CFR Part 677, Subpart E and Part 680. The rule also includes references to definitions in Texas Labor Code, Chapter 301 and Texas Government Code, Chapter 2308.

SUBCHAPTER B. TRAINING PROVIDER ELIGIBILITY

TWC adopts new Subchapter B, Training Provider Eligibility, as follows:

§840.10. Appropriate Licensure

New §840.10 identifies general licensure requirements for eligible training providers in the state. The section also references Texas Education Code, Chapter 61, which governs higher education institutions in Texas and Texas Education Code, Chapter 132, which governs proprietary schools. US Department of Labor (DOL)-approved Registered Apprenticeship Programs (RAPs) are exempt from licensure under §840.10.

§840.11. Eligibility of Training Providers

New §840.11 identifies the requirement that training providers must provide training services. Training services defined by Chapter 840 are consistent with the non-exhaustive list provided in 20 CFR §680.200. The section also identifies that providers must submit information required by TWC. The section identifies that such information shall be reviewed by Boards and TWC to determine provider eligibility.

SUBCHAPTER C. TRAINING PROGRAM ELIGIBILITY

TWC adopts new Subchapter C, Training Program Eligibility, as follows:

§840.20. Initial Eligibility Consideration

New §840.20 relates to the process of eligibility for programs that have not previously been included on the statewide ETPL. The section identifies the requirement to submit eligibility criteria and performance information as determined by TWC. The section specifies that initial eligibility criteria for programs include connections to statewide target occupations and local business partnerships. The section reserves the right of TWC to develop additional criteria for such determination. The section also identifies that TWC's three-member Commission (Commission) may set minimum performance targets for programs related to initial eligibility determination. The section specifies that initial eligibility shall last no longer than 12 months and be followed by continued eligibility determination for programs.

§840.21. Continued Eligibility Consideration

New §840.21 relates to the process of eligibility determination for programs following the period of initial eligibility. The section identifies that the continued eligibility determination process follows initial eligibility and previous continued eligibility determinations. The section specifies that continued eligibility criteria include those elements used for initial eligibility and such additional criteria listed in 20 CFR §680.460. The section reserves the right of TWC to develop additional criteria for such determination.

§840.22. Registered Apprenticeship Programs

New §840.22 specifies information that RAPs are required to provide in order to be included on the statewide ETPL. The section identifies the exemption of RAPs from eligibility determinations described by Chapter 840, Subchapter C.

§840.23. Additional Eligibility Requirements

New §840.23 identifies the right of TWC to develop additional requirements for inclusion on the statewide ETPL. The section identifies that such additional requirements shall be applied to programs during the eligibility determination following their development.

SUBCHAPTER D. ANNUAL REPORTING

TWC adopts new Subchapter D, Annual Reporting, as follows:

§840.30. Annual Performance Reporting Requirement

New §840.30 identifies the requirement of training programs to report performance information to TWC annually. The section specifies student-level information required of programs. The section also identifies how TWC will use such information to reduce the reporting burden on programs by using existing connections between TWC systems to calculate employment-related performance indicators required by WIOA §116(d)(4). The section retains the right of TWC to develop additional requirements for annual reporting.

§840.31. Notification of Annual Reporting Requirement

New §840.31 identifies the responsibilities of TWC related to the methodology and timeline of annual reporting for providers. The section describes provisions under which providers may request an exemption from, or extension of, the annual reporting deadline from TWC. The section includes information on the removal of programs for failure to meet annual reporting timeline.

SUBCHAPTER E. STATEWIDE ELIGIBLE TRAINING PROVIDER LIST

TWC adopts new Subchapter E, Statewide Eligible Training Provider List, as follows:

§840.40. Statewide ETPL

New §840.40 clarifies which programs are included on the statewide ETPL. The section relates to the inclusion of avail-

able general and performance information for programs on the statewide ETPL. The section clarifies that information that may reveal personally identifiable information (PII) for individual students shall not be included.

§840.41. Distribution of the Statewide ETPL

New §840.41 identifies TWC's responsibility to ensure that the public and workforce partners have access to the statewide ETPL. The statewide ETPL will be maintained on TWC's website and will be updated not less than monthly to ensure that recent information is available to Texans.

§840.42. Removal from the Statewide ETPL

New §840.42 relates generally to voluntary and involuntary removal of programs from the statewide ETPL. The section identifies that providers may at any time request that TWC remove programs from the statewide ETPL. The section identifies that providers may at any time request that TWC reintroduce such previously and voluntarily removed programs on the statewide ETPL. Additionally, the section identifies that programs may be removed involuntarily, or for cause, for reasons described in Chapter 840, Subchapter F. This section identifies that previously removed programs must meet continued eligibility requirements in order to be reintroduced on the statewide ETPL.

SUBCHAPTER F. ADVERSE ACTIONS

TWC adopts new Subchapter F, Adverse Actions, as follows:

§840.50. Eligibility Actions

New §840.50 identifies eligibility-related removal of programs from the statewide ETPL. The section reserves the ability of TWC or Boards to consider new information provided and accordingly alter eligibility determinations. The section also clarifies that RAPs may be removed under §840.50 only when such programs are deregistered by DOL's apprenticeship office.

§840.51. Reporting Actions

New §840.51 clarifies that programs that do not submit required annual performance reports to TWC shall be removed from the statewide ETPL for not less than two years. The section identifies that removal of programs for failure to report shall occur immediately following the conclusion of the reporting period. The section does not apply to RAPs.

§840.52. Performance Actions

New §840.52 identifies the right of TWC to remove or place on a temporary performance improvement plan (PIP) a program that fails to meet performance targets set by the Commission. The section clarifies that program removal will immediately follow the conclusion of the reporting period or unsuccessful completion of the PIP. The section does not apply to RAPs.

§840.53. WIOA Violations

New §840.53 identifies the requirement that eligible training providers must comply with all nondiscrimination requirements of WIOA §188. TWC shall require all providers to acknowledge compliance with these nondiscrimination protections before approval of initial eligibility and during annual reporting. Additionally, the section requires that providers must comply with all requirements of Chapter 840. TWC or the Board may determine whether a provider has violated provisions of WIOA or of Chapter 840. Such violation shall be considered a substantial violation of the rules in Chapter 840. Removal under §840.53 shall occur for not less than two years. TWC may require repayment of funds received by a provider under Chapter 840 during such period of substantial violation.

§840.54. Continuation of Students in Removed Programs

New §840.54 identifies the allowance of Boards to continue students enrolled in programs before removal from the statewide ETPL in cases not including WIOA violations.

§840.55. Right of Appeal

New §840.55 clarifies that ETPs have the right to appeal adverse actions, up to and including removal from the statewide ETPL, in accordance with TWC's Chapter 823 Integrated Complaint, Hearings, and Appeals rules.

SUBCHAPTER G. STATE AND LOCAL FLEXIBILITY

TWC adopts new Subchapter G, State and Local Flexibility, as follows:

§840.60. Determining Target Occupations

New §840.60 identifies the process used by Boards to develop local target occupation lists. Also known as Board target occupation lists, these lists must be developed with local labor market information and may be informed by businesses and individuals in the Board's local workforce development area (workforce area).

§840.61. Individual Training Accounts

New §840.61 identifies the process used by Boards to pay for training programs included on the ETPL, or locally approved out-of-state programs through Individual Training Accounts (ITAs). The section clarifies that ITA funds, which are defined by §840.2, are limited to required training costs paid directly to the ETP. Boards may apply limitations to ITAs.

§840.62. Training Contracts

New §840.62 identifies training programs that may be funded for WIOA Adult and Dislocated Worker Program participants through contracts rather than ITAs. WIA allowed for a limited set of such exceptions to the ITA system for these participants, including on-the-job training, customized training, insufficient number of providers, and program of demonstrated effectiveness serving individuals with barriers. The section identifies the additional ITA exceptions allowed under WIOA, including incumbent worker training, cohort training, pay-for-performance contracts, and all exceptions allowed by WIA.

§840.63. Local Training Program Information

New §840.63 states that Boards may supplement information on the statewide ETPL for local programs. The section clarifies that such additional information shall not supplant the statewide ETPL for participants. Both this information and the statewide ETPL must be provided to the public. The local information shall not limit consumer choice nor shall it restrict participant access to RAPs.

§840.64. Out-of-State Training Programs

New §840.64 states that TWC will not include on the statewide ETPL any training program for which the provider does not have a physical location in Texas. Additionally, the section clarifies that Boards may develop local policies to allow ITA funding of such out-of-state programs under limited circumstances. Limitations require that out-of-state programs meet any Commission-established minimum performance standards, align with local Board target occupations, or those of another Texas location

allowable by the Board, and such programs must be included on another state's or US territory's ETPL at the time of student enrollment and must be approved for ITA eligibility by the Agency's executive director.

TWC hereby certifies that the rules have been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART III. PUBLIC COMMENT

The public comment period closed on November 9, 2020. Comments were received from Alamo Workforce Development Board and West Central Texas Workforce Development Board.

§840.2. Definitions

COMMENT: The West Central Texas Workforce Development Board requested an explanation of the address of record email requirement in §840.2(1). The Board asked if the provider is required to create a new email address. The Board also asked what will happen if a provider does not create an address of record.

RESPONSE: The ETP system requires regular interaction between providers, local Boards, and TWC staff. Requiring a distribution list as the email address of record is meant to ensure that important updates or requests for information will be communicated effectively. To become an ETP, schools must enter a valid email address that meets this requirement. If an ETP does not maintain compliance with the address of record requirement, important notices may not be received or not timely received. Provider failure to meet reporting deadlines or other requirements because of delays related to address of record maintenance may result in programs being removed from the ETPL. No changes were made in response to this comment.

§840.10. Appropriate Licensure

COMMENT: The West Central Texas Workforce Development Board asked how providers described in §840.2(11)(C) meet the licensure requirement in §840.10.

RESPONSE: The training providers specified in §840.2(11)(C) provide training programs except those provided by higher education programs that lead to recognized postsecondary credentials or RAPs. Training providers, except RAPs, must be licensed to provide training, or exempted from such licensure, in Texas. For training programs provided by entities that are not named in Texas Education Code, §61.003, licensure or exemption must be provided in accordance with Texas Education Code Chapter 132 and 40 TAC Chapter 807 (Career Schools and Colleges) prior to approval as an ETP. No changes were made in response to this comment.

§840.20. Initial Eligibility Consideration

COMMENT: The West Central Texas Workforce Development Board requested clarification on the requirement in §840.20(b)(2) and asked if a letter of support may come from any employer in Texas, or if it must come from a business located within a specific local workforce development area (workforce area). The Board stated that allowing employers outside a workforce area to endorse a local program of training conflicts with WIOA's goal to "strategically engage local employers with area training providers."

RESPONSE: TWC requires that providers' training programs demonstrate a partnership with businesses. This requirement promotes the inclusion of quality programs that lead to industry-recognized skills on the ETPL. This partnership may be demonstrated by an employer-based advisory committee or through a letter of support from a business. Workforce areas do not always align with Metropolitan Statistical Areas. As such, Boards are encouraged to consider commuting patterns and individuals' willingness to relocate within Texas when determining a program's connection to target occupations for participant training. TWC provides this same consideration to training programs for its business partnerships. Local training providers may have strong partnerships with businesses located outside the workforce area where their campuses are located. Programs delivered online may benefit employers anywhere in Texas. In response to the comment, §840.20(b)(2) is revised to replace "the workforce area" with "Texas."

§840.61. Individual Training Accounts

COMMENT: The West Central Texas Workforce Development Board asked if §840.61 precludes a Board from writing ITAs for program costs exceeding those listed on the ETPL when verified with the provider prior to finalizing the ITA.

RESPONSE: TWC recognizes that providers may change program costs at any time, and that updates to these costs on the ETPL may cause delays in a Board's ability to fund training for participants. Except for locally requested and TWC-approved out-of-state programs, ITAs may be created only for programs included on the statewide ETPL. Training program information on the ETPL, including program costs, must be kept current by providers and Boards. Boards must not create an ITA for a training program when the amount exceeds the total required cost published on the statewide ETPL. TWC recommends that Boards regularly review costs with local providers to ensure that adequate time is allowed to process updates to the ETPL. No changes were made in response to this comment.

COMMENT: The West Central Texas Workforce Development Board also asked if §840.61 precludes a Board from amending an ITA for program cost increases that occur after an ITA is written, even after the program cost has been updated on the ETPL.

RESPONSE: Section 840.61(c) explains that the amount of the ITA may not exceed the ETPL-listed total training cost at the time of student enrollment. Nothing in §840.61 disallows a Board from making amendments to an ITA following the creation of a voucher, but prior to student enrollment. No changes were made in response to this comment.

§840.64. Out-of-State Training Programs

COMMENT: The Alamo Workforce Development Board requested clarification on §840.64(b)(5), which requires that out-of-state providers and programs meet eligibility requirements included in Chapter 840, Subchapters B and C.

RESPONSE: Subchapter B requires providers to submit information as required by TWC, including evidence of licensure in accordance with Texas law. Texas Education Code, Chapter 61 defines the role of the Texas Higher Education Coordinating Board, which does not regulate out-of-state entities. RAPs are exempt from licensure by WIOA ETP rules. Texas Education Code, Chapter 132 relates specifically to career schools. Texas Education Code, §132.001(1)(B) exempts from consideration as a career school or college a school or educational institution that:

--is physically located in another state;

--is legally authorized by the state of its physical location to offer postsecondary education and to award degrees;

--is accredited by a regional or national accrediting organization recognized by the US Secretary of Education under the Higher Education Act of 1965 (20 USC §§1001 et seq.); and

--offers in this state only postsecondary distance or correspondence programs of instruction.

Except for sponsors of a registered apprenticeship program and those entities exempted by Texas Education Code, §132.001(1)(B), out-of-state training providers shall comply with TWC Career Schools and Colleges licensure rules in 40 TAC Chapter 807.

Subchapter C relates to initial and continued eligibility considerations for program inclusion on the statewide ETPL.

After review, TWC recognizes that provider licensure, performance outcomes, connection to target occupations, and business partnerships best ensure program quality for out-of-state programs. Target occupation connection is addressed in §840.64(b)(2). In response to this comment, §840.64(b)(2) is revised to remove the reference to program eligibility requirements established in Chapter 840, Subchapter C and the following requirements are added to §840.64(b):

--The training program has an existing partnership with a local employer in the workforce area, as documented by a letter of support or existence of an employer advisory committee; and

--The training program provides performance information, in such a manner as determined by the Agency, that demonstrates the program meets or exceeds any Commission-established minimum performance standards.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §840.1. §840.2

STATUTORY AUTHORITY

The new rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The new rules implement the requirements set out in WIOA §§116, 122, and 134; 20 CFR Part 680, Subpart D; and 20 CFR §681.550.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Dawn Cronin
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For further information, please call: (512) 689-9855

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SUBCHAPTER B. TRAINING PROVIDER ELIGIBILITY

40 TAC §840.10, §840.11

The new rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The new rules implement the requirements set out in WIOA §§116, 122, and 134; 20 CFR Part 680, Subpart D; and 20 CFR §681.550.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. TRAINING PROGRAM ELIGIBILITY

40 TAC §§840.20 - 840.23

The new rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The new rules implement the requirements set out in WIOA §§116, 122, and 134; 20 CFR Part 680, Subpart D; and 20 CFR §681.550.

§840.20. Initial Eligibility Consideration.

(a) All training programs that have not previously been determined eligible for the statewide ETPL shall submit such eligibility criteria and performance information required by the Agency. This information shall be submitted in a manner determined by the Agency.

(b) Eligibility criteria shall include:

(1) a connection to statewide targeted occupations;

(2) a partnership with businesses in Texas, in accordance with Agency guidance; and

(3) other criteria required by the Commission.

(c) Performance information shall include such requirements as determined necessary by the Agency.

(d) The Agency may exempt a program from the performance information requirement for initial eligibility determination. Such exemption may be applied when a program has not been connected to any students or when such connection is of insufficient duration to calculate performance.

(e) The Commission may determine minimum performance targets for initial eligibility for the statewide ETPL.

(f) Boards and the Agency shall review program eligibility criteria and aggregated performance information submitted by training programs in order to determine eligibility.

(g) Training programs determined eligible under this subchapter shall be approved for inclusion on the statewide ETPL for up to 12 months following approval by the Agency.

(h) Following the initial eligibility period, training programs shall be subject to continued eligibility determination.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. ANNUAL REPORTING

40 TAC §840.30, §840.31

The new rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The new rules implement the requirements set out in WIOA §§116, 122, and 134; 20 CFR Part 680, Subpart D; and 20 CFR §681.550.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. STATEWIDE ELIGIBLE TRAINING PROVIDER LIST

40 TAC §§840.40 - 840.42

The new rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The new rules implement the requirements set out in WIOA §§116, 122, and 134; 20 CFR Part 680, Subpart D; and 20 CFR §681.550.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. ADVERSE ACTIONS

40 TAC §§840.50 - 840.55

The new rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The new rules implement the requirements set out in WIOA §§116, 122, and 134; 20 CFR Part 680, Subpart D; and 20 CFR §681.550.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. STATE AND LOCAL FLEXIBILITY

40 TAC §§840.60 - 840.64

The new rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The new rules implement the requirements set out in WIOA §§116, 122, and 134; 20 CFR Part 680, Subpart D; and 20 CFR §681.550.

§840.64. Out-of-State Training Programs.

(a) The Agency shall not include out-of-state providers without any physical training locations in Texas on the statewide ETPL.

(b) The Agency may allow Boards to fund out-of-state programs through ITAs when the following conditions are met:

(1) The training program is included on an ETPL in another state or US territory at the time of student enrollment;

(2) The training program is aligned with a local target occupation, or target occupation in an area to which the participant is willing to commute or relocate, provided that such location is in Texas;

(3) The training program provides performance information, in such a manner as determined by the Agency, that demonstrates the program meets or exceeds any Commission-established minimum performance standards;

(4) The training program has an existing partnership with a local employer in the workforce area, as documented by a letter of support or existence of an employer advisory committee;

(5) The Board has submitted such required information for the out-of-state program in such manner determined by the Agency;

(6) The Agency executive director has reviewed and approved the out-of-state program for ITA eligibility;

(7) The out-of-state provider and related programs meet ETP eligibility requirements in accordance with Subchapter B of this chapter (relating to Training Provider Eligibility);

(8) Other conditions as required by the Agency; and

(9) Board policy exists that sufficiently addresses such requirements described in this section.

(c) A Board may fund out-of-state training programs through training contracts in accordance with §840.61 of this subchapter (relating to Individual Training Accounts).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 841. WORKFORCE INVESTMENT ACT

The Texas Workforce Commission (TWC) adopts the repeal of Chapter 841 in its entirety, relating to the Workforce Investment Act, without changes, as published in the October 9, 2020, issue of the *Texas Register* (45 TexReg 7221). The repeals will not be republished.

Subchapter A. General Provisions, §841.1 and §841.2

Subchapter B. One-Stop Service Delivery Network, §841.11

Subchapter C. Eligible Training Provider Certification System, §§841.31 - 841.47

Subchapter E. State Level Hearing, §841.94

Subchapter F. WIA Nondiscrimination and Equal Opportunity, §§841.201 - 841.215

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted repeal of Chapter 841 is to eliminate rules that are specific to implementation of the Workforce Investment Act (WIA) and to update and maintain, in new and existing chapters, elements of Chapter 841 that remain relevant to agency operations.

In 2014, Congress repealed WIA and replaced it with the Workforce Innovation and Opportunity Act (WIOA). WIOA eliminated and significantly modified many of WIA's statutory and regulatory provisions, thereby rendering Chapter 841 obsolete.

However, three subchapters remain relevant under WIOA, and will be updated and retained in agency rule as follows:

--Subchapter C is adopted as new Chapter 840, WIOA Eligible Training Providers;

--Subchapter E is incorporated into Chapter 802, Integrity of the Texas Workforce System, as new Subchapter J, Local Workforce Development Area Appeals; and

--Subchapter F is adopted as new Chapter 842, WIOA Nondiscrimination and Equal Opportunity.

TWC hereby certifies that the chapter repeal has been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART II. PUBLIC COMMENT

The public comment period closed on November 9, 2020. No comments were received.

PART III.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §841.1, §841.2

STATUTORY AUTHORITY

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The repeals affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. ONE-STOP SERVICE DELIVERY NETWORK

40 TAC §841.11

The repeal is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The repeal affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. ELIGIBLE TRAINING PROVIDER CERTIFICATION SYSTEM

40 TAC §§841.31 - 841.47

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The repeals affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. STATE LEVEL HEARING

40 TAC §841.94

The repeal is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The repeal affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. WIA NONDISCRIMINATION AND EQUAL OPPORTUNITY

40 TAC §§841.201 - 841.215

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The repeals affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 842. WIOA NONDISCRIMINATION AND EQUAL OPPORTUNITY

SUBCHAPTER A. WIOA NONDISCRIMINATION AND EQUAL OPPORTUNITY

40 TAC §§842.1 - 842.15

The Texas Workforce Commission (TWC) adopts new Chapter 842, relating to WIOA Nondiscrimination and Equal Opportunity, comprising the following subchapter, without changes to the text as published in the October 9, 2020, issue of the *Texas Register* (45 TexReg 7223):

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the new Chapter 842 rules is to retain and update the nondiscrimination and equal opportunity rules contained in Chapter 841, Subchapter F, which are concurrently being repealed. Chapter 841 included multiple rules pertaining to the

federal Workforce Investment Act (WIA), which was repealed and replaced by the Workforce Innovation and Opportunity Act (WIOA) in 2014. New Chapter 842 establishes nondiscrimination and equal opportunity as a distinct chapter of TWC rules and updates the repealed rules to comply with current federal statute and regulations and TWC rules.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. WIOA NONDISCRIMINATION AND EQUAL OPPORTUNITY

TWC adopts new Subchapter A, WIOA Nondiscrimination and Equal Opportunity, as follows:

§842.1. Scope and Purpose

New §842.1 replaces repealed §841.201 and updates provisions to change the term "Agency's Methods of Administration" to "Agency's Nondiscrimination Plan," and align citations with current federal statutes and regulations and TWC rules.

§842.2. Definitions

New §842.2 replaces repealed §841.202 and updates provisions to add a definition for "Babel notice," change the term "MOA" (Methods of Administration) to "NDP" (Nondiscrimination Plan), and align the remaining definitions with current federal statutes and regulations.

§842.3. Assurances

New §842.3 replaces repealed §841.203 and updates provisions to align citations with current federal regulations.

§842.4. EO Officers

New §842.4 replaces repealed §841.204 and updates provisions to change the term "Agency EO Officer" to "State-Level EO Officer" to align with language in 29 CFR §38.28(a), specify under §842.4(b)(2) that monitoring is to occur annually, add that EO Officers will provide equal opportunity and nondiscrimination education to recipients, and align citations with current federal statutes and regulations.

§842.5. Notice and Communication

New §842.5 replaces repealed §841.205 and updates provisions to add WIOA notice and communication requirements, including a "Babel notice," tagline compliance, add specific requirements for posting the notice, and update citations to align with current federal regulations.

§842.6. Data and Information Collection and Maintenance

New §842.6 replaces repealed §841.206 and updates provisions to specify that the recipient shall notify the State-Level EO Officer and align citations with current federal regulations.

§842.7. Affirmative Outreach

New §842.7 replaces repealed §841.207 and updates provisions to ensure that recipients provide "equal" access rather than "universal" access to WIOA Title I programs, expand the list of protected groups in accordance with 29 CFR §38.40, and update citations to align with current federal regulations.

§842.8. Filing Complaints of Discrimination

New §842.8 replaces repealed §841.208 and updates provisions to change the term "Agency EO Officer" to "EO Officer" in sections regarding complaint processing, because Local Workforce Development Board (Board) EO Officers may now conduct complaint investigations. The new section also updates the mailing address of the State-Level EO Officer, adds electronic and hand delivery as acceptable means to submit written complaints, and updates citations to align with current federal regulations.

§842.9. Notice of Receipt of Complaint of Discrimination

New §842.9 replaces repealed §841.209 and updates provisions to change the term "Agency EO Officer" to "EO Officer," as discussed in the explanation of new §842.4 and §842.8.

§842.10. Jurisdiction of Complaints of Discrimination

New §842.10 replaces repealed §841.210 and updates provisions to change the term "Agency EO Officer" to "EO Officer," as discussed in the explanation of new §842.4 and §842.8 and update citations to align with current federal statutes and regulations.

§842.11. Acceptance of Complaints of Discrimination

New §842.11 replaces repealed §841.211 and updates provisions to change "Agency EO Officer" to "EO Officer," as discussed in the explanation of new §842.4 and §842.8, include that Boards--not just TWC--may investigate or reject complaints, and update citations to align with current federal regulations.

§842.12. Alternative Dispute Resolution of Complaint of Discrimination

New §842.12 replaces repealed §841.212 and updates provisions to specify that the alternative dispute resolution (ADR) process shall be completed within 40 days from the date of the initial written notice, change the time that Boards must file with TWC a copy of the ADR process from 30 days of reaching the determination to 10 days, and update citations to align with current federal regulations.

§842.13. Processing of Accepted Complaints of Discrimination

New §842.13 replaces repealed §841.213 and updates provisions to change the term "Agency EO Officer" to "EO Officer," as discussed in the explanation of new §842.4 and §842.8.

§842.14. Corrective Actions and Remedies

New §842.14 replaces repealed §841.214 and updates provisions to transfer imposition of corrective and remedial action from TWC to the Boards, distinguish between State-Level and Board EO Officers, and update citations to align with current federal regulations.

§842.15. Sanctions

New §842.15 replaces repealed §841.215 and updates provisions to clarify language and update citations to align with current Texas Administrative Code.

TWC hereby certifies that the rule has been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART III. PUBLIC COMMENT

The public comment period closed on November 9, 2020. No comments were received.

STATUTORY AUTHORITY

The new rules are adopted under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The new rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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