

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 1. OFFICE OF THE GOVERNOR

CHAPTER 3. CRIMINAL JUSTICE DIVISION

SUBCHAPTER H. TEXAS CRIME STOPPERS PROGRAM

The Texas Crime Stoppers Council (Council) adopts the repeal of 1 TAC §3.9010 and §3.9013 and amendments to 1 TAC §§3.9000, 3.9005 - 3.9007, 3.9011, 3.9015, 3.9017, 3.9019, 3.9021, and 3.9025, concerning the functions of the Council under Chapter 414 of the Texas Government Code. §§3.9000, 3.9005, 3.9011, 3.9015, 3.9017, 3.9019, 3.9021, and 3.9025 are adopted with changes to the proposed text as published in the January 3, 2020, issue of the *Texas Register* (45 TexReg 17) and will be republished. Section 3.9006 and §3.9007 are adopted without changes to the proposed text as published in the January 3, 2020, issue of the *Texas Register* (45 TexReg 17). The rules will not be republished.

REASONED JUSTIFICATION

The Council is responsible for encouraging, advising, and assisting in the creation of crime stoppers organizations (organizations) and the implementation of their programs, as well as fostering the detection of crime and carrying out other duties described in Chapter 414 of the Texas Government Code. The primary purpose of the proposed amendments to the existing rules is to update policies and procedures to provide a smoother operating framework for the Council and certified organizations. The proposed amendments, as well as the new rule, are also in response to statutory revisions to the Texas Government Code enacted by the 86th Legislature, Regular Session, in House Bill 3316 (HB 3316).

The Council's rules at 1 TAC §3.9000 govern the process by which organizations are certified or given continued certification by the Council. The rule was amended to update references to the Texas Code of Criminal Procedure reflecting changes to statute. The rule was amended to better reflect statutory language that the Council must certify an organization that meets statutory requirements and that certifications must be for two years. The rule was amended to allow the Council to take action on an application for certification prior to the expiration of the certification because the Council sometimes goes months without holding regular meetings. The rule was amended to move certified organizations' financial reporting responsibilities into the annual reporting cycle to make reporting more practical for the organizations and to reduce administrative burden. The rule was amended to allow certified organizations more time to fulfill their training requirements to ease the burden of compliance. The rule was amended to allow the Council to specify further infor-

mation to be collected in applications for certification and afford the director of the Council the ability to ask for follow-up information to clarify issues raised by the submission of initial materials so that the Council can be best informed in making certification decisions.

The Council's rules at 1 TAC §3.9005 were amended to update statutory references and to give the Council more practical tools in administering decertification in response to current administrative inefficiencies.

The Council's rules at 1 TAC §3.9006 and §3.9007 were amended to update statutory references and better reflect the duties of the Council and certified organizations established in statute.

The Council's rules at 1 TAC §3.9011 were amended to clean up language and merge reporting requirements from the repealed §3.9010 and §3.9013 to give flexibility and efficiency to the Council in administering certified organizations' reporting to the Council. The rules were amended to clarify that the Council only requires financial reporting involving funds authorized by the Council's certification and necessary to fulfill the Council's statutory duties. The rules were amended to clarify that the Council may add information requirements to the reporting, and that the director of the Council may request follow-up information from initial submissions by organizations to gain clarity and efficiency in reporting. The rules were amended to add records retention references and update procedures for reporting in response to stakeholder concerns. The rules were updated to include requirements that certified organizations update the Council on changes in key personnel in response to difficulties the Council has experienced in maintaining up-to-date contact information.

The Council's rules at 1 TAC §3.9015 were amended to create a corrective action plan process to assist certified organizations in addressing issues identified in reviews by the Criminal Justice Division.

The Council's rules at 1 TAC §§3.9017, 3.9019, and 3.9021 were amended to remove financial reporting from certification processes and allow more time for certified organizations to complete training requirements to reduce the administrative burden on certified organizations. They were also amended to specify that the Council may request further information during the certification process, and that the director of the Council may request clarifying information to address questions raised by initial submissions during the certification process.

The Council's rules at 1 TAC §3.9025 were created to address updates to the Texas Government Code enacted by HB 3316. The Legislature removed the formula for excess funds from statute and directed the Council to issue rules regarding excess funds. The new rule establishes the formula for determining the

amount of excess funds and offers more detailed guidance to organizations in the eligible and ineligible uses of excess funds.

SUMMARY OF COMMENTS AND COUNCIL RESPONSES

The Council accepted public comment on the proposals between January 3, 2020 and February 3, 2020. Comments regarding the proposals were accepted in writing and e-mail. A public hearing on the amendments was held at the offices of the Office of the Governor on January 28, 2020, at 1:00 p.m.

The Council received written comments or testimony from Williamson County Crime Stoppers (comments but not in opposition or support as a whole), New Braunfels Comal County Crime Stoppers (comments but not in opposition or support as a whole), Texas Association for Crime Stoppers (comments and opposed to immediate adoption as drafted), Crime Stoppers of Houston (comments but not in opposition or support as a whole), Robertson County Crime Stoppers (comments but not in opposition or support as a whole), Crime Stoppers of Southeast Texas (comments but not in opposition or support as a whole), Trinity County Crime Stoppers (comments but not in opposition or support as a whole), Lamar and Red River County Crime Stoppers (comments and opposition to immediate adoption), and six individuals, one of which who was opposed, some of which supported some provisions and opposed others, and some of which submitted comments.

Comments: The Texas Association for Crime Stoppers (TACS), Crime Stoppers of Southeast Texas, Trinity County Crime Stoppers, and individuals commented on the proposed "catch-all" clause in §3.9000(d)(8) that allows the Council or the director of the Council to request further information in the application for certification for private organizations, and the similar provisions in certification processes that are proposed in §3.9000(e)(7) (initial certification of public organizations), §3.9000(f)(6) (continuing certification of certified organizations), §3.9017(3)(L) (mergers of certified organizations), §3.9019(3)(N) (mergers of non-certified organizations to certified organizations), and §3.9021(a)(3)(K). Commenters said that, if the intent of the "catch-all" provision for further requested information is to avoid putting certification requirements in the TAC, then the TAC should include a requirement that the Council adopt a standard format for all applications and approve any changes, which would allow the Council to change the application process without applying a different standard to organizations on an application-by-application basis. Without such a provision, the rule could be used to apply different standards to different organizations and abused.

Response: Council and staff acknowledge these concerns and agree that additions to certification applications are best done through a Council vote. However, it is important for the director to have the ability to ask follow-up questions regarding concerns or discrepancies in the materials submitted to Council in certification applications in order to offer recommendations for certification to Council. The format of the application is also not specifically at issue in the concerns raised by commenters, so Council and staff do not support having the Council vote on the format of these forms, only the information to be specified within them. Council and staff also support specifying the type of information that can be requested by the Council, limiting it to the information Council needs to carry out its statutory responsibilities.

Council modifies §3.9000(d)(8) and §3.9000(e)(7) as shown below:

Additional information specified by a vote of the Council for inclusion in the application for certification that is necessary for the Council to make the determination for certification required by §414.011(a) of the Texas Government Code or to fulfill its duties under §414.005 of the Texas Government Code. The director of the Council may request further information needed to clarify a question raised in the examination of the materials submitted as part of the application.

Council similarly modifies §3.9000(f)(6), §3.9017(3)(L), §3.9019(3)(N), and §3.9021(a)(3)(K) as shown below:

Additional information specified by a vote of the Council for inclusion in the Application for Continuing Certification that is necessary for the Council to make the determination for certification required by §414.011(a) of the Texas Government Code or to fulfill its duties under §414.005 of the Texas Government Code. The director of the Council may request further information needed to clarify a question raised in the examination of the materials submitted as part of the application.

Comments: TACS commented that because the proposed rules would require training requirements be fulfilled during a current certification period and the application for continuing certification is due 180 days before certification expires, an organization would be required to fulfill their training requirements in an approximately 18-month window, versus the 12 months under current rules and the 24-month certification period.

One commenter objected to having applications due 6 months before an organization's certification expires and wondered whether it really took that long to process applications.

Response: Council and staff note the discrepancy between the 18-month training window and the 24-month certification period. The 6-month deadline proposed in the draft rule exists because Council sometimes does not meet for up to four or five months at a time and this deadline gives enough time not just for staff to process applications and clear up any discrepancies in applications, but also for Council to meet without any certifications expiring. However, Council will allow organizations to specify a date at which they would complete their training after an application is due (but before certification expires), thus allowing organizations to more completely take advantage of their 24-month certification period to complete their training requirements. In response to general comments expressing concern about administrative burden, Council will require that organizations submit only the date and location of their training, instead of "proof", because staff has training records on-file.

Council modifies §3.9000(d)(2), which governs initial certifications for private organizations, as shown below:

(2) The dates and locations that the following persons completed a training course provided by the Criminal Justice Division of the Office of the Governor (CJD) and the Council, or their designee, within the year prior to submission of the organization's application for certification:

- (A) one member of the organization's board of directors, and
- (B) one of the organization's law enforcement/civilian coordinators; and
- (C) the executive director of the organization (if applicable);

Council similarly modifies §3.9000(e)(1), which governs initial certifications for public organizations, as shown below:

(1) The dates and locations that one of the organization's law enforcement/civilian coordinators completed a training course provided by CJD and the Council, or their designee, within the year prior to submission of the organization's application for certification;

Council modifies §3.9000(f)(5) (renumbered as §3.9000(f)(3) due to other modifications) as shown below:

(3) the dates and locations that the following persons completed, or plan to complete, a training course provided by CJD and the Council, or their designee, after the date of issuance or the effective date, as applicable, of the current certification:

(A) one member of a private, nonprofit organization's board of directors (if applicable);

(B) one of the organization's law enforcement/civilian coordinators; and

(C) the executive director of a private, nonprofit organization (if applicable); and

Council similarly extends the period by which training requirements can be met for organizations that are merging or expanding their territory, which is a form of continued certification. Council amends §3.9017(3)(H) (renumbered as §3.9017(3)(F)), §3.9019(3)(J) (renumbered as §3.9019(3)(H)), and §3.9021(a)(3)(G) (renumbered as §3.9021(a)(3)(E)) to allow training requirements to be met in the prior 24 months, rather than 12 months.

Comments: TACS, Crime Stoppers of Southeast Texas, Trinity County Crime Stoppers, and others commented that organizations are concerned over the proposed rule's inclusion of all accounts containing funds from Council-authorized, public sources in the required financial reporting, including the interest on those funds. TACS commented that this would include organizations' operating accounts, which it said the Council does not need access to, and that the proposed requirement could result in organizations creating two operations accounts - one with public funds and one with privately-raised funds.

One commenter said that the Attorney General is the appropriate authority to oversee administrative/operating accounts, not the Council. Commenters expressed concern over the administrative burden of reporting for operating accounts and that this was an intrusion by the Council into local affairs.

TACS noted that organizations are required by law to maintain financial reports for all accounts on-hand for three years for public inspection and questioned the need to file them with a government agency. TACS commented that if the Council wished to obtain reports for these accounts, they should publish schedules for records retention and procedures for updating the reports so Council records will not conflict with records obtained locally.

TACS, Crime Stoppers of Southeast Texas, Trinity County Crime Stoppers, and individual commenters said that requiring organizations to submit year-to-date financial information at the time of applications for continuing certification created an administrative burden and was not helpful to the Council in making a determination on certification. One commenter questioned why these year-to-date reports should be applied to already certified organizations seeking to merge or expand territory. One commenter thought the financial reporting at the time of certification was duplicative of that included in the annual Probation Fee and Repayment reports.

One commenter said the "catch-all" provision allowing the Council or the director of the Council to specify any further financial information was "open ended and is subject to abuse."

Response: Council and staff agree with the concerns raised about the administrative burden and usefulness of year-to-date financial reporting at the time of the various certification processes, and will move the financial reporting for certified organizations to the annual reports. This is done in part by clarifying the existing rules regarding probation fee and reward repayment reporting to specify which types of records will be included.

Accordingly, Council strikes the following existing TAC rules (and rennumbers the rules accordingly) on financial reporting for certified organizations at time of continuing certification, merger, and expansion of territory: §3.9000(f)(1), §3.9000(f)(2), §3.9017(3)(E), §3.9017(3)(G), §3.9017(3)(I), §3.9019(3)(E), §3.9019(3)(I), §3.9019(3)(K), §3.9021(a)(3)(D), §3.9021(a)(3)(F), §3.9021(a)(3)(F) and §3.9021(a)(3)(H).

Council consolidates these financial reporting requirements in the Probation Fee and Repayment Report (PFRR). Council and staff support narrowing the scope of financial reporting from what is laid out in the current continuing certification application rules, which are open-ended and state they should cover "financial statements covering the two-year certification period on a form prescribed by the Council." This could be interpreted as including funds that are not drawn from probation fees or reward repayments, and Council and staff do not support financial reporting that extends beyond these public funds.

Council accordingly amends §3.9011(b)(5) as follows:

(5) A Probation Fee and Repayment Report for the prior calendar year. This report must include statements for all financial accounts containing funds originally obtained from repayments of rewards under Articles 37.073 and 42.152, Code of Criminal Procedure, or payments from a defendant under Chapter 42A of the Texas Code of Criminal Procedure, and documentation from the relevant courts or government agencies stating the amount of probation fees disbursed to the organization.

Council will also limit the ability to add items to the annual reporting to only the information necessary for Council to fulfill its statutory duties, but will allow the director to ask follow-up questions regarding issues raised during the submission of initial materials. Council also appreciates the comments about records retention and procedures for amending submissions, and will place the authority for those procedures with the director, since they are administrative in nature and records retention is also subject to state law and the policies of the Office of the Governor.

Council also amends §3.9011(b)(6) as follows:

(6) The Council will prescribe the specific or additional information to be included in reporting under this subsection that is necessary for the Council to make the determination for certification required by §414.011(a) of the Texas Government Code or to fulfill its duties under §414.005 of the Texas Government Code. The director of the Council may request further information needed to clarify a question raised in the examination of the materials submitted as part of the reporting under this subsection. The director of the Council will follow the records retention policies of the Office of the Governor and will publish procedures for organizations to submit updates or corrections to submitted information.

Finally, Council and staff respectfully disagree with the assertion that Council does not need to concern itself with administra-

tive/operating accounts. State law prescribes the allowed purpose of these public funds, and explicitly charges the Council with certifying that those funds "will be spent to further the crime prevention purposes of the organization." State law thus charges the Council with oversight of the administrative/operating funds that are drawn from probation fees and rewards repayments. It is possible that tracking such funds may result in some organizations maintaining separate accounts for privately-raised administrative funds.

Comments: TACS, Crime Stoppers of Southeast Texas, Trinity County Crime Stoppers, and others commented on the proposed rule allowing Council to consider and take action on an incomplete Application for Continuing Certification, as long as the organization meets the certification requirements under state law. They commented that this could create an "unlevel playing field" where organizations are judged using different criteria.

Response: State law does not allow an organization's certification to be extended, and requires organizations who are decertified to liquidate public funds within 60 days. Council and staff's intent was to provide a "safety net" for organizations who, due to extraordinary circumstances, were not able to complete their application and would under state law become decertified and be forced to liquidate their funds.

Accordingly, Council modifies §3.9000(i) as below to make that intent more clear:

(i) If an organization's certification is set to expire before the next anticipated Council meeting, subjecting the organization to the liquidation requirements of §414.010(c), Texas Government Code, and the Council determines that extraordinary circumstances have prevented an organization from submitting a completed Application for Continuing Certification, the Council may consider and take action to renew the organization's certification if it determines that the organization meets the certification requirements described in §414.011, Texas Government Code.

Staff also believes that some of these situations could be avoided by providing for continuing certification with adequate notice of the required application. Accordingly, Council modifies the rules by creating §3.9000(j) as below:

(j) The director of the Council will notify certified organizations of their requirements for continuing certification no less than 90 days prior to the deadline to submit the Application for Continuing Certification under subsection (f).

Comments: One commenter said the proposed §3.9011(c), which requires an organization to notify the director of the Council within 30 days if there is a change to the composition of its executive board, its law enforcement coordinator, or its executive director (if applicable) was unnecessary and the Council could take harsher measures if an organization did not respond to communications.

Response: Staff has had difficulty in maintaining up-to-date contact information for organizations, which has resulted in substantial administrative difficulties in assisting organizations in complying with state law and rules. The proposed rules do not cover the entire board, but only those board members or staff who are critical to the functioning of the organization. As such, Council and staff believe it is important to maintain current contact information for such critical personnel.

Comments: One person commented on the proposed §3.9011(d), stating that the current implementation of statistical reports was problematic.

Response: Staff has already addressed some of the technical issues raised by the comment, and believes any remaining issues are best addressed outside of the TAC.

Comments: Commenters stated that the proposed §3.9015(6), which establishes procedures for corrective action plans and ties them to decertification, places too much authority in the hands of the director of the Council and that the Council should have final say.

Response: Council and staff agree that it is not appropriate to link decertification to corrective action plans, which are meant to assist organizations in maintaining compliance with state law and rules, not punish organizations.

Council modifies §3.9015 as follows:

(6) The director of the Council may create a corrective action plan for a noncompliant organization to assist the organization in coming back into compliance, which must specify the actions to be taken by the organization and the time the organization has to complete them.

Council also modifies §3.9005(h), which has a similar provision for corrective action plans, as follows:

(h) The director of the Council may determine that a certified crime stoppers organization is at risk of no longer meeting the certification requirements or duties described in §3.9000 of this chapter. If the director of the Council makes such a determination, the director of the Council may create a corrective action plan to assist the organization in meeting those requirements or duties, including specifying the actions necessary to meet those requirements or duties and the time the organization has to complete them. If the organization no longer meets the certification requirements or duties described in §3.9000 of this chapter, the director of the Council must notify the Council.

Comments: TACS, Lamar and Red River Crime Stoppers, Williamson County Crime Stoppers, Crime Stoppers of Houston, Crime Stoppers of Southeast Texas, Trinity County Crime Stoppers, and individuals commented that the proposed rules for excess funds in §3.9025(d)(4), which state that it is not a valid use of excess funds when an organization "unnecessarily retains such excess funds for an extended period of time," was ambiguous and needed definition. TACS also commented that it could be read in combination with other sections to require excess funds to be turned over to CJD. Williamson County Crime Stoppers requested more guidance on how excess funds could be legally used. Another commenter supported the changes to the listed allowed uses of excess funds.

Response: Council and staff did not intend the proposed rules to facilitate the confiscation of excess funds. While it would still be a good practice for organizations to use large amounts of excess funds rather than holding on to them for an extended period of time, Council and staff do not support the confiscation of such funds. Council and staff hope the new rules offer substantially more guidance than state law did prior to the changes in 2019, and offer assistance to any organization with questions in that regard.

Council therefore removes §3.9025(d)(4) from the proposed rules and renumbers accordingly.

Comments: Individuals, Crime Stoppers of Southeast Texas, and Trinity County Crime Stoppers commented that they believed the Council had failed to record the December 16, 2019, meeting according to state law and requested the Council hold

a public hearing to discuss the proposed rule changes prior to taking further action. One commenter questioned how a public hearing for the rules held on January 28, 2020, can be a public hearing if the Council was not in attendance.

Response: The Office of the Governor substantially complied with state law regarding the recording of meetings. The hearing on January 28, 2020, was held by agency staff, with summaries of oral comments and the full text of written comments provided to the Council.

Comments: One commenter expressed disappointment in the process of revising the rules and the content of some of the rules, though they thought a good job was done on the majority of the changes. Some commenters complimented the rules and thought they were good improvements.

One commenter said the process seemed hasty at times and questioned whether it was the Council or staff who were guiding the process. Some commenters requested that the Council postpone action until all parties could come to the table and negotiate.

Response: The Texas Crime Stoppers Council is organized within the Office of the Governor. It is the role of the director of the Council and staff to assist the Council in all its duties, including rulemaking. The rulemaking process has involved discussion at multiple Council meetings as early as May 2019. Feedback was solicited and discussed via email and in-person at Council meetings, on multiple occasions over the space of ten months.

1 TAC §§3.9000, 3.9005 - 3.9007, 3.9011, 3.9015, 3.9017, 3.9019, 3.9021, 3.9025

STATUTORY AUTHORITY

The amendments and new rule are adopted under Texas Government Code §414.006, which provides that the Council may adopt rules to carry out its functions under that chapter.

Cross Reference to Statute: Chapter 414, Texas Government Code, as amended by House Bill 3316, 86th Legislature, Regular Session.

§3.9000. Certification.

(a) The Texas Crime Stoppers Council (Council) shall, on application by a crime stoppers organization as defined by §414.001(2) of the Texas Government Code (organization), determine whether the organization meets the requirements to be certified to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A of the Texas Code of Criminal Procedure.

(b) The Council shall certify a crime stoppers organization to receive those repayments or payments if, considering the organization, continuity, leadership, community support, and general conduct of the organization, the Council determines that the repayments or payments will be spent to further the crime prevention purposes of the organization.

(c) Certification is valid for two years from the date of issuance or, if applicable, the effective date of continued certification. The Council may take action on a crime stoppers organization's Application for Continuing Certification prior to the expiration of the organization's current certification, and specify the effective date of the continued certification, provided that the effective date is no later than the expiration date of the current certification. If a crime stoppers organization's certification expires, the organization is not eligible to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A of the Texas Code of Criminal Procedure, until the organization obtains certification.

(d) A private, nonprofit crime stoppers organization must submit the following information to the director of the Council in order to obtain initial certification:

(1) Documentation from the Internal Revenue Service granting the organization tax-exempt status;

(2) The dates and locations that the following persons completed a training course provided by the Criminal Justice Division of the Office of the Governor (CJD) and the Council, or their designee, within the year prior to submission of the organization's application for certification:

(A) one member of the organization's board of directors; and

(B) one of the organization's law enforcement/civilian coordinators; and

(C) the executive director of the organization (if applicable);

(3) A completed and signed Conditions of Certification Form;

(4) The name, mailing address, email address, telephone number, occupation, and board position of each member of the organization's board of directors;

(5) The name, mailing address, email address, and telephone number of each of the organization's law enforcement/civilian coordinators;

(6) The name, mailing address, email address, telephone number, and occupation of the executive director (if applicable);

(7) The description of the geographic territory or jurisdiction to which the organization desires to provide services; and

(8) Additional information specified by a vote of the Council for inclusion in the application for certification that is necessary for the Council to make the determination for certification required by §414.011(a) of the Texas Government Code or to fulfill its duties under §414.005 of the Texas Government Code. The director of the Council may request further information needed to clarify a question raised in the examination of the materials submitted as part of the application.

(e) A public crime stoppers organization must submit the following information to the director of the Council in order to obtain initial certification:

(1) Proof that one of the organization's law enforcement/civilian coordinators completed a training course provided by CJD and the Council, or their designee, within the year prior to submission of the organization's application for certification;

(2) A completed and signed Conditions of Certification Form;

(3) The name, mailing address, email address, telephone number, occupation, and board position of each member of the organization's governing board;

(4) The name, mailing address, email address, and telephone number of each of the organization's law enforcement/civilian coordinators;

(5) The name, mailing address, email address, telephone number, and occupation of the organization's executive director (if applicable);

(6) The description of the geographic territory or jurisdiction to which the organization desires to provide services; and

(7) Additional information specified by a vote of the Council for inclusion in the application for certification that is necessary for the Council to make the determination for certification required by §414.011(a) of the Texas Government Code or to fulfill its duties under §414.005 of the Texas Government Code. The director of the Council may request further information needed to clarify a question raised in the examination of the materials submitted as part of the application.

(f) If the organization is currently certified by the Council, the organization must submit the documentation described in subsection (d) or (e) of this section, as applicable, with the exception of the training documentation required by subsections (d)(2) and (e)(1), and the following additional information as part of its Application for Continuing Certification, in each case no more than 240 days and no less than 180 days prior to the expiration of the current certification:

(1) any Crime Stoppers Program Annual Reports that have not been submitted to the director of the Council as required by §3.9011 of this chapter;

(2) any Statistical Reports that have not been submitted to the director of the Council or the Council's designee as required by §3.9011 of this chapter;

(3) the dates and locations that the following persons completed, or plan to complete, a training course provided by CJD and the Council, or their designee, after the date of issuance or the effective date, as applicable, of the current certification:

(A) one member of a private, nonprofit organization's board of directors (if applicable);

(B) one of the organization's law enforcement/civilian coordinators; and

(C) the executive director of a private, nonprofit organization (if applicable); and

(4) additional information specified by a vote of the Council for inclusion in the Application for Continuing Certification that is necessary for the Council to make the determination for certification required by §414.011(a) of the Texas Government Code or to fulfill its duties under §414.005 of the Texas Government Code. The director of the Council may request further information needed to clarify a question raised in the examination of the materials submitted as part of the application.

(g) Certification awarded to an organization is awarded only as to the specific geographic territory or jurisdiction described in the certification award.

(h) Decisions regarding the certification of crime stoppers organizations shall be made by the Council.

(i) If an organization's certification is set to expire before the next anticipated Council meeting, subjecting the organization to the liquidation requirements of §414.010(c), Texas Government Code, and the Council determines that extraordinary circumstances have prevented an organization from submitting a completed Application for Continuing Certification, the Council may consider and take action to renew the organization's certification if it determines that the organization meets the certification requirements described in §414.011, Texas Government Code.

(j) The director of the Council will notify certified organizations of their requirements for continuing certification no less than 90 days prior to the deadline to submit the Application for Continuing Certification under subsection (f) of this section.

§3.9005. Decertification.

(a) During the two-year certification period, the Council shall decertify a crime stoppers organization if it determines that the organization no longer meets the certification requirements described in §3.9000(b) of this chapter, which may result from a violation of state law, federal law, or Subchapter H of this chapter.

(b) If a crime stoppers organization is decertified by the Council, the organization is not eligible to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A of the Texas Code of Criminal Procedure.

(c) The Council, or the Chairman of the Council, shall send written notification to the crime stoppers organization no later than 45 calendar days prior to the meeting at which the Council will consider the decertification of the organization. The written notification shall include the following:

(1) Reasons why the organization may no longer meet the certification requirements described in §3.9000(b) of this chapter; and

(2) The date, time, and location of the meeting at which the Council will consider the decertification of the organization.

(d) The crime stoppers organization shall submit a written response, which shall include an explanation and specific reasons why the organization believes that it should not be decertified. The written response must be received by the director of the Council at least 10 calendar days prior to the meeting at which the Council will consider the decertification of the organization.

(e) The Council shall render a decision regarding the decertification of the crime stoppers organization and shall notify the organization in writing of its decision.

(f) If a crime stoppers organization is decertified, the director of the Council shall notify the state comptroller, and the relevant courts, county auditors and community supervision and corrections departments in the organization's region, that the organization is decertified and is not eligible to receive repayments of rewards under Articles 37.073 and 42.152 of the Texas Code of Criminal Procedure, or payments from a defendant under Chapter 42A of the Texas Code of Criminal Procedure.

(g) Not later than the 60th day after the date of decertification of the organization, the decertified organization shall forward all unexpended money received pursuant to §414.010 of the Texas Government Code to the state comptroller.

(h) The director of the Council may determine that a certified crime stoppers organization is at risk of no longer meeting the certification requirements or duties described in §3.9000 of this chapter. If the director of the Council makes such a determination, the director of the Council may create a corrective action plan to assist the organization in meeting those requirements or duties, including specifying the actions necessary to meet those requirements or duties and the time the organization has to complete them. If the organization no longer meets the certification requirements or duties described in §3.9000 of this chapter, the director of the Council must notify the Council.

§3.9011. Crime Stoppers Program Reporting.

(a) A crime stoppers organization that is certified by the Council must submit to the director of the Council a Crime Stoppers Program Annual Report no later than January 31 of each calendar year.

(b) A Crime Stoppers Program Annual Report must include the following information:

(1) The name, mailing address, email address, and telephone number of the crime stoppers organization, and the internet address of any website operated by the organization;

(2) The name, mailing address, email address, telephone number, occupation, and board position of each member of the organization's governing board;

(3) The name, mailing address, email address, telephone number, and occupation of the organization's executive director (if applicable);

(4) The name, mailing address, email address, and telephone number of each of the organization's law enforcement/civilian coordinators;

(5) A Probation Fee and Repayment Report for the prior calendar year. This report must include statements for all financial accounts containing funds originally obtained from repayments of rewards under Articles 37.073 and 42.152, Code of Criminal Procedure, or payments from a defendant under Chapter 42A of the Texas Code of Criminal Procedure, and documentation from the relevant courts or government agencies stating the amount of probation fees disbursed to the organization; and

(6) The Council will prescribe the specific or additional information to be included in reporting under this subsection that is necessary for the Council to make the determination for certification required by §414.011(a) of the Texas Government Code or to fulfill its duties under §414.005 of the Texas Government Code. The director of the Council may request further information needed to clarify a question raised in the examination of the materials submitted as part of the reporting under this subsection. The director of the Council will follow the records retention policies of the Office of the Governor and will publish a schedule by which the Criminal Justice Division will retain records and will publish procedures for organizations to submit updates or corrections to submitted information.

(c) A crime stoppers organization that is certified by the Council must submit to the director of the Council an information update form prescribed by the director of the Council or the Council within 30 days if the organization has a change in the composition of its executive board or its executive director (if applicable) or law enforcement coordinator.

(d) A crime stoppers organization that is certified by the Council shall submit to the director of the Council, or the Council's designee, a Statistical Report on a form prescribed by the Council no later than January 31 and July 31 of each calendar year.

§3.9015. Review.

By accepting certification, a crime stoppers organization agrees to the following conditions of review:

(1) CJD will review the activities of a crime stoppers organization that is certified by the Council as necessary to ensure that the organization's finances and programs further the crime prevention purposes of the organization in compliance with the laws and rules governing crime stoppers organizations.

(2) CJD may perform a desk review or an on-site review at the organization's location. In addition, CJD may request that the organization submit relevant information to CJD to support any review.

(3) After a review, the organization shall be notified in writing of any noncompliance identified by CJD in the form of a preliminary report.

(4) The organization shall respond to the preliminary report within a time frame specified by CJD.

(5) The organization's response shall become part of the final report, which shall be submitted to the organization and the director of the Council.

(6) The director of the Council may create a corrective action plan for a noncompliant organization to assist the organization in coming back into compliance, which must specify the actions to be taken by the organization and the time the organization has to complete them.

(7) Any noncompliance, including an organization's failure to provide adequate documentation upon request, may serve as grounds for decertification or non-renewal of certification of the organization by the Council.

§3.9017. Mergers of Certified Organizations.

If a certified crime stoppers organization agrees with another certified crime stoppers organization to merge and form a multi-county or multi-jurisdictional (e.g., county and city) organization, the merged organization must apply for continuing certification, and the following procedures must be followed:

(1) The certified crime stoppers organizations that want to merge must have contiguous borders.

(2) The merging organizations must choose a name for the merged organization unless both organizations agree to operate under the name of one of the existing organizations.

(3) The merged organization must file the following documents with the director of the Council requesting certification under a new name (if applicable) and with the expanded geographic territory or jurisdiction:

(A) All required Texas Secretary of State, Texas Comptroller, and United States Internal Revenue Service (IRS) required forms and documentation for mergers and dissolutions, as applicable, or as specified by the director of the Council;

(B) IRS compliance documents for dissolution of a 501(c)(3) non-profit corporation and a 501(c)(3) letter authorizing the organization to operate under the new name (if applicable);

(C) Texas Secretary of State compliance documents for 501(c)(3) non-profit corporations, as applicable, or as specified by the director of the Council;

(D) Application for Continuing Certification under the new name (if applicable) and with an expanded geographic territory or jurisdiction;

(E) Copy of board of directors membership list of the merged organization, to include contact information for board members, the law enforcement coordinator, and the executive director (if applicable);

(F) The dates and locations that at least one board member (if applicable), the law enforcement coordinator, and an executive director (if applicable) received training as authorized by the Council within the 24-month period preceding the merger;

(G) Copies of the minutes of the boards of directors meetings of both certified crime stoppers organizations in which the boards voted to merge their organizations;

(H) Copy of a cooperative agreement or memorandum of understanding (MOU) between the merged organizations regarding the merger and a copy of each organization's minutes of the board of

directors for the meeting where the agreement or MOU is approved; and

(I) Additional information specified by a vote of the Council for inclusion in the application for continuing certification that is necessary for the Council to make the determination for certification required by §414.011(a) of the Texas Government Code or to fulfill its duties under §414.005 of the Texas Government Code. The director of the Council may request further information needed to clarify a question raised in the examination of the materials submitted as part of the application.

(4) If the director of the Council determines that the merged organization meets all requirements within paragraphs (1) - (3) of this section, the merged organization will be presented to the Council for determination as to whether the merged organization meets the requirements for certification at the Council's next regularly scheduled meeting.

(5) Once the Council grants certification, the merged organization may merge or consolidate the separate rewards accounts of both organizations. The merged organization will also be eligible to apply to the relevant CSCDs to receive court fees under the provisions of Articles 37.073 and 42.152 and Chapter 42A, Texas Code of Criminal Procedure.

(6) The merged organization's "Excess Funds Accounts," as described in §414.010(d) of the Texas Government Code, may only be comprised of those funds that were previously in each individual organization's "Excess Funds Accounts."

(7) The certification is valid for a period of two years.

§3.9019. *Mergers of Non-certified Organizations to Certified Organizations.*

If a certified crime stoppers organization agrees with a non-certified crime stoppers organization to merge and form a multi-county or multi-jurisdictional (e.g., county and city) organization, the merged organization must apply for continuing certification, and the following procedures must be followed:

(1) The certified crime stoppers organization that wants to merge with a non-certified 501(c)(3) crime stoppers organization must have contiguous borders.

(2) The merging organizations must choose a name for the merged organization unless both organizations agree to operate under the name of one of the existing organizations.

(3) The merged organization must file the following documents with the director of the Council requesting certification under a new name (if applicable) and with the expanded geographic territory or jurisdiction:

(A) All required Texas Secretary of State, Texas Comptroller, and United States Internal Revenue Service (IRS) required forms and documentation for mergers and dissolutions, as applicable, or as specified by the director of the Council;

(B) IRS compliance documents for dissolution of a 501(c)(3) non-profit corporation and a 501(c)(3) letter authorizing the organization to operate under the new name (if applicable);

(C) Texas Secretary of State compliance documents for 501(c)(3) non-profit corporations, as applicable, or as specified by the director of the Council;

(D) Application for Continuing Certification under the new name (if applicable) and with an expanded geographic territory or jurisdiction;

(E) Copies of financial reviews of all bank accounts held by the non-certified 501(c)(3) crime stoppers organization;

(F) If the financial review establishes that at any time the non-certified 501(c)(3) crime stoppers organization was certified by the Council and received court fees under Articles 37.073 and 42.152 and Chapter 42A, Texas Code of Criminal Procedure, and failed to return all court fees to the state comptroller within 60 days following the loss of certification, as required by §414.010(c), Texas Government Code, a copy of the check for the outstanding court fees, made payable to the Office of the Comptroller, or other satisfactory proof, must be submitted with the application for certification;

(G) Copy of board of directors membership list of the merged organization, to include contact information for board members, the law enforcement coordinator, and executive director (if applicable);

(H) The dates and locations that at least one board member (if applicable), the law enforcement coordinator, and an executive director (if applicable) received training as authorized by the Council within the 24-month period preceding the merger;

(I) Copies of the minutes of the boards of directors meetings of the certified crime stoppers organization and the non-certified 501(c)(3) crime stoppers organization in which the boards voted to merge their organizations;

(J) Copy of a cooperative agreement or memorandum of understanding (MOU) between the merged organizations regarding the merger and a copy of each organization's minutes of the board of directors for the meeting where the agreement or MOU is approved; and

(K) Additional information specified by a vote of the Council for inclusion in the application for continuing certification that is necessary for the Council to make the determination for certification required by §414.011(a) of the Texas Government Code or to fulfill its duties under §414.005 of the Texas Government Code. The director of the Council may request further information needed to clarify a question raised in the examination of the materials submitted as part of the application.

(4) If the director of the Council determines that the merged organization meets all requirements of this section, the merged organization will be presented to the Council for determination as to whether the merged organization meets the requirements for certification at the Council's next regularly scheduled meeting.

(5) Once the Council grants certification, the merged organization may merge or consolidate the separate rewards accounts of the merged organizations. The merged organization also will be eligible to apply to the relevant CSCDs to receive court fees under the provisions of Articles 37.073 and 42.152 and Chapter 42A, Texas Code of Criminal Procedure.

(6) The merged organization's "Excess Funds Accounts," as described in §414.010(d) of the Texas Government Code, may only be comprised of those funds that were previously in each individual organization's "Excess Funds Accounts."

(7) The certification is valid for a period of two years.

§3.9021. *Addition of Geographic Territories or Jurisdictions to Certified Organizations.*

(a) If a geographic territory or jurisdiction wants to join an existing certified crime stoppers organization, the organization must apply for continuing certification, and the following procedures must be followed:

(1) The geographic territory or jurisdiction seeking to join the organization must share contiguous borders with the certified crime stoppers organization;

(2) The certified crime stoppers organization and the geographical entity that is requesting to join the crime stoppers organization must choose a new name for the organization unless both parties agree to operate under the name of the existing organization;

(3) The certified crime stoppers organization must file the following documents with the director of the Council requesting certification under a new name (if applicable) and with an expanded geographic territory or jurisdiction:

(A) United States Internal Revenue Service (IRS) letter for a 501(c)(3) corporation authorizing the organization to operate under a new name, if applicable;

(B) Texas Secretary of State letter for a 501(c)(3) corporation authorizing the organization to operate under a new name (if applicable);

(C) Application for Continuing Certification under the new name (if applicable) and with an expanded geographic territory or jurisdiction;

(D) Copy of board of directors membership list for the organization, to include contact information for board members, the law enforcement coordinator, and executive director (if applicable);

(E) The dates and locations that at least one board member (if applicable), the law enforcement coordinator, and an executive director (if applicable) received training as authorized by the Council within the 24-month period preceding the new Application for Continuing Certification;

(F) Copy of the minutes of the board of directors meeting of the certified crime stoppers organization in which the board voted to add the new geographical entity to the territory or jurisdiction served by the crime stoppers organization;

(G) Written documentation from a law enforcement agency serving the geographic territory or jurisdiction showing an interest in joining an existing crime stoppers organization; and

(H) Additional information specified by a vote of the Council for inclusion in the application for continued certification that is necessary for the Council to make the determination for certification required by §414.011(a) of the Texas Government Code or to fulfill its duties under §414.005 of the Texas Government Code. The director of the Council may request further information needed to clarify a question raised in the examination of the materials submitted as part of the application.

(4) If the director of the Council determines that the newly expanded organization meets all requirements listed in paragraphs (1) - (3) of this subsection, the expanded organization will be presented to the Council for determination as to whether the expanded organization meets the requirements for certification at the Council's next regularly scheduled meeting.

(5) Once the Council grants certification, the organization will be eligible to apply to the CSCDs in the newly acquired geographic territory or jurisdiction to receive court fees under the provisions of Articles 37.073 and 42.152 and Chapter 42A, Texas Code of Criminal Procedure.

(6) The certification is valid for a period of two years.

(b) If a certified or non-certified organization serves the geographic area to which a certified organization is attempting to expand,

the expanding organization must send written notice to the Council and to the organization serving the geographic area to which it intends to expand of its intent to serve that area.

§3.9025. *Excess Funds.*

(a) A certified crime stoppers organization may establish Excess Funds Accounts in accordance with §414.010(d) of the Texas Government Code. At the conclusion of each fiscal year, if the total amount of funds in the organization's rewards accounts exceeds three times the average annual amount of funds used by the organization to pay rewards during each of the three preceding fiscal years, the organization may deposit such excess amount into its Excess Funds Accounts.

(b) The Excess Funds Accounts may only be used for expenditures for law enforcement or public safety purposes directly related to crime stoppers or juvenile justice, which means:

(1) Costs incurred in providing training to crime stoppers volunteers, staff, or law enforcement coordinators and travel costs necessary to complete that training;

(2) Costs associated with supporting volunteers, staff, or law enforcement coordinators in performing crime stoppers operations;

(3) Juvenile delinquency prevention or intervention programs;

(4) Promotional or marketing costs encouraging utilization of crime stoppers tip lines or recruiting volunteers for crime stoppers organizations; and

(5) Transfers to the crime stoppers assistance account in the general revenue fund or to other certified crime stoppers organizations, provided that the transferring certified crime stoppers organization ensures the receiving certified crime stoppers organization uses such funds for law enforcement or public safety purposes as described in this subsection.

(c) Pursuant to §414.010(d) of the Texas Government Code, a certified crime stoppers organization that deposits funds in an Excess Funds Account may use any interest earned on the funds in such account to pay costs incurred in administering the organization.

(d) Among other uses, a certified crime stoppers organization is not considered to be using its excess funds for a law enforcement or public safety purpose related to crime stoppers or juvenile justice if:

(1) It uses such excess funds to pay the salary or compensation of any public employee;

(2) It uses such excess funds for law enforcement equipment not directly related to crime stoppers or juvenile delinquency prevention or intervention purposes;

(3) It pays or reimburses for travel or per diem costs that exceed those allowed for state officials or employees with its excess funds; or

(4) It uses such excess funds for a purpose or in a manner prohibited by federal or state law.

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

Filed with the Office of the Secretary of State on March 6, 2020.
TRD-202001015

Margie Fernandez-Prew
Director, Crime Stoppers Council
Office of the Governor
Effective date: March 26, 2020
Proposal publication date: January 3, 2020
For further information, please call: (512) 463-1919



1 TAC §3.9010, §3.9013

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §414.006, which provides that the Council may adopt rules to carry out its functions under that chapter.

Cross Reference to Statute: Chapter 414, Texas Government Code, as amended by House Bill 3316, 86th Legislature, Regular Session.

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 March 6, 2020.

TRD-202001016

Margie Fernandez-Prew
Director, Crime Stoppers Council
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER A. BOARD OF TRUSTEES

RELATIONSHIP

19 TAC §61.1, §61.2

The State Board of Education (SBOE) adopts amendments to §61.1 and §61.2, concerning school district boards of trustees. The amendment to §61.1 is adopted with changes to the proposed text as published in the December 20, 2019 issue of the *Texas Register* (44 TexReg 7799) and will be republished. The amendment to §61.2 is adopted without changes to the proposed text as published in the December 20, 2019 issue of the *Texas Register* (44 TexReg 7799) and will not be republished. The adopted amendment to §61.1 reflects changes made by House Bill (HB) 3 and HB 403, 86th Texas Legislature, 2019, to the SBOE's duty to provide training courses for independent school district trustees. The adopted amendment to §61.2 addresses the required number of nominees for trustee candidates for military reservation districts.

REASONED JUSTIFICATION: Texas Education Code (TEC), §11.159, Member Training and Orientation, requires the SBOE to provide a training course for school board trustees. Section 61.1, Continuing Education for School Board Members, addresses this statutory requirement. School board trustee training under current SBOE rule includes a local school district

orientation session, a basic orientation to the TEC, an annual team-building session with the local school board and the superintendent, specified hours of continuing education based on identified needs, and training on evaluating student academic performance.

HB 403, 86th Texas Legislature, 2019, amended TEC, §11.159, to include a requirement for trustees to receive training regarding sexual abuse, human trafficking, and other maltreatment of children. The amendment to §61.1 implements this requirement in new subsection (b)(7).

HB 3, 86th Texas Legislature, 2019, added TEC, §11.185 and §11.186, to require each district board of trustees to adopt proficiency plans and annual goals for early childhood literacy, mathematics proficiency, and college, career, and military readiness. The annual goals should be for the subsequent five years to reach quantifiable goals. These plans are to be reviewed each year by the board of trustees and posted on the website of each district and campus. The amendment to §61.1 implements this requirement in new subsection (b)(6).

In addition, §61.1 was amended as follows.

The text of subsection (b)(1)-(6) was reformatted for clarity using language that currently exists in the rule and, in some instances, making non-substantive changes.

New subsection (b)(1)(E) specifies that the orientation for school board members must include information on the open meetings training required by Texas Government Code, §551.005; the public information training required by Texas Government Code, §552.012; and the cybersecurity training required by Texas Government Code, §2054.5191. This requirement ensures that school board members are aware of additional training required by statute.

At adoption, language was added to subsection (b)(2) to allow the basic orientation to the TEC and relevant legal obligations to be fulfilled through online instruction. The education service center (ESC) shall determine the clock hours of training credit to be awarded for successful completion of an online course, and the ESC must also provide verification of completion.

As proposed, the required provider for the team-building training specified in new subsection (b)(4) would have been changed from a registered provider to an authorized provider. However, in response to public comment, a change was made at adoption to maintain that the team-building session may be provided by an ESC or a registered provider.

Language was added in new subsections (c) and (d) to clarify the distinction between a registered and an authorized training provider.

Technical edits were made throughout §61.1 to conform with the reorganization of the rule.

Finally, new subsection (m) was added at adoption to specify a May 1, 2020 implementation date for the amendment to §61.1.

TEC, §11.352, grants the SBOE the authority to appoint a board of three or five trustees for each military reservation district. Enlisted personnel and officers may be appointed to the school board, but a majority of the trustees must be civilians. The trustees are selected from a list of people provided by the commanding officer of the military reservation. Section 61.2, Nomination of Trustees for Military Reservation School Districts and Boys Ranch Independent School District, addresses this statutory requirement.

The amendment to §61.2 changes the minimum number of military-district trustee nominations from three to one. This change allows for greater flexibility and local control by making an allowance for specific circumstances for each military reservation district and for the discretion of the commanding officer.

Other technical edits were also made to §61.2.

The SBOE approved the proposed amendments for first reading and filing authorization at its November 15, 2019 meeting and for second reading and final adoption at its January 31, 2020 meeting.

In accordance with TEC, §7.102(f), the SBOE approved the amendments for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2020-2021 school year. The earlier effective date will allow school board trustees to take updated training before the beginning of the 2020-2021 school year. The effective date is 20 days after filing as adopted with the Texas Register.

SUMMARY OF COMMENTS AND RESPONSES: The public comment period on the proposal began December 20, 2019, and ended January 24, 2020. The SBOE also provided an opportunity for registered oral and written comments at its January 2020 meeting in accordance with the SBOE board operating policies and procedures. Following is a summary of the public comments received and corresponding responses.

Comment: Tenet Leadership, LLC commented in support of §61.1. However, the commenter stated that the rule, as proposed, restricts highly qualified Texas Education Agency (TEA)-certified coaches, authorized providers, and registered providers from providing school board orientation training. The commenter suggested that §61.1(b)(2)(E) be amended to read, "The orientation shall be provided by an ESC or other TEA registered or authorized provider."

Response: The SBOE disagrees. Given that one of the statutorily mandated powers and duties of TEA is to administer and monitor compliance with legally required education programs, and further given that ESCs are extensions of TEA, this change is inappropriate.

Comment: Texas Association of School Boards (TASB) commented that the proposed change to §61.1(b)(4) to require providers of the team-building training to be authorized instead of registered is not called for by legislation, would create an undue burden on the system, expand TEA's authority over local school boards, and reduce options for how local school boards meet their annual teambuilding requirement.

Response: The SBOE agrees that the team-building session may be provided by an ESC or a registered provider. At adoption, §61.1(b)(4)(F) was amended to read, "The team-building session shall be provided by an ESC or a registered provider as described in subsection (c) of this section."

Comment: TASB commented that removing the online training option for trustees' completion of training on evaluating student academic performance would be a mistake, as the proposed change would limit options and increase the time and cost to complete the requirement every two years.

Response: The SBOE disagrees. The content of the evaluating student academic performance training in §61.1(b)(6) includes the assessment and accountability systems, setting student outcome goals required by House Bill 3, 86th Texas Legislature, 2019, and monitoring progress toward these goals. School

systems use different tools to monitor student outcomes and inform decision-making, and no two school systems have the same challenges. Effective training in these areas, therefore, requires a unique, customized approach. The complex nature of administering public education and the diversity of the more than 1,200 school systems in Texas makes a preset, homogeneous, one-size-fits-all online training inappropriate. Virtual trainings that offer real-time interaction with an individual leading the training may be appropriate to eliminate the online challenges.

Comment: One individual commented in support of §61.1 as proposed, emphasizing the importance of face-to-face training.

Response: The SBOE agrees.

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §11.159, as amended by House Bill (HB) 403, 86th Texas Legislature, 2019, which requires the State Board of Education (SBOE) to provide a training course for school board trustees, including one hour of training every two years, on identifying and reporting potential victims of sexual abuse, human trafficking, and other maltreatment of children; TEC, §11.185 and §11.186, as added by HB 3, 86th Texas Legislature, 2019, which requires each district board of trustees to adopt proficiency plans and annual goals for early childhood literacy, mathematics proficiency, and college, career, and military readiness; and TEC, §11.352, which grants the SBOE the authority to appoint a board of three or five trustees for each military reservation district.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§11.159, 11.185, 11.186, and 11.352.

§61.1. Continuing Education for School Board Members.

(a) Under the Texas Education Code (TEC), §11.159, the State Board of Education (SBOE) shall adopt a framework for governance leadership to be used in structuring continuing education for school board members. The framework shall be posted to the Texas Education Agency (TEA) website and shall be distributed annually by the president of each board of trustees to all current board members and the superintendent.

(b) The continuing education required under the TEC, §11.159, applies to each member of an independent school district board of trustees.

(1) Each school board member of an independent school district shall complete a local district orientation.

(A) The purpose of the local orientation is to familiarize new board members with local board policies and procedures and district goals and priorities.

(B) A candidate for school board may complete the training up to one year before he or she is elected or appointed. A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(C) The orientation shall be at least three hours in length.

(D) The orientation shall address local district practices in the following, in addition to topics chosen by the local district:

- (i) curriculum and instruction;
- (ii) business and finance operations;

- (iii) district operations;
- (iv) superintendent evaluation; and
- (v) board member roles and responsibilities.

(E) Each board member should be made aware of the continuing education requirements of this section and those of the following:

- (i) open meetings act in Texas Government Code, §551.005;
- (ii) public information act in Texas Government Code, §552.012; and
- (iii) cybersecurity in Texas Government Code, §2054.5191.

(F) The orientation shall be open to any board member who chooses to attend.

(2) Each school board member of an independent school district shall complete a basic orientation to the TEC and relevant legal obligations.

(A) The orientation shall have special, but not exclusive, emphasis on statutory provisions related to governing Texas school districts.

(B) A candidate for school board may complete the training up to one year before he or she is elected or appointed. A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(C) The orientation shall be at least three hours in length.

(D) Topics shall include, but not be limited to, the TEC, Chapter 26 (Parental Rights and Responsibilities), and the TEC, §28.004 (Local School Health Advisory Council and Health Education Instruction).

(E) The orientation shall be provided by a regional education service center (ESC).

(F) The orientation shall be open to any board member who chooses to attend.

(G) The continuing education may be fulfilled through online instruction, provided that the training incorporates interactive activities that assess learning and provide feedback to the learner and offers an opportunity for interaction with the instructor.

(H) The ESC shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (h) of this section.

(3) After each session of the Texas Legislature, including each regular session and called session related to education, each school board member shall complete an update to the basic orientation to the TEC.

(A) The update session shall be of sufficient length to familiarize board members with major changes in statute and other relevant legal developments related to school governance.

(B) The update shall be provided by an ESC or a registered provider, as defined by subsection (c) of this section.

(C) A board member who has attended an ESC basic orientation session described in paragraph (2) of this subsection that incorporated the most recent legislative changes is not required to attend an update.

(D) The continuing education may be fulfilled through online instruction, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor.

(E) The ESC or registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (h) of this section.

(4) The entire board shall participate with their superintendent in a team-building session.

(A) The purpose of the team-building session is to enhance the effectiveness of the board-superintendent team and to assess the continuing education needs of the board-superintendent team.

(B) The session shall be held annually.

(C) The session shall be at least three hours in length.

(D) The session shall include a review of the roles, rights, and responsibilities of a local board as outlined in the framework for governance leadership described in subsection (a) of this section.

(E) The assessment of needs shall be based on the framework for governance leadership described in subsection (a) of this section and shall be used to plan continuing education activities for the year for the governance leadership team.

(F) The team-building session shall be provided by an ESC or a registered provider as described in subsection (c) of this section.

(G) The superintendent's participation in team-building sessions as part of the continuing education for board members shall represent one component of the superintendent's ongoing professional development.

(5) In addition to the continuing education requirements in paragraphs (1) through (4) of this subsection, each board member shall complete additional continuing education based on the framework for governance leadership described in subsection (a) of this section.

(A) The purpose of continuing education is to address the continuing education needs referenced in paragraph (4) of this subsection.

(B) The continuing education shall be completed annually.

(C) In a board member's first year of service, he or she shall complete at least ten hours of continuing education in fulfillment of assessed needs.

(D) Following a board member's first year of service, he or she shall complete at least five hours of continuing education annually in fulfillment of assessed needs.

(E) A board president shall complete continuing education related to leadership duties of a board president as some portion of the annual requirement.

(F) At least 50% of the continuing education shall be designed and delivered by persons not employed or affiliated with the board member's local school district. No more than one hour of the

required continuing education that is delivered by the local district may utilize self-instructional materials.

(G) The continuing education shall be provided by an ESC or a registered provider, as defined by subsection (c) of this section.

(H) The continuing education may be fulfilled through online instruction, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor.

(I) The ESC or registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (h) of this section.

(6) Each school board member shall complete continuing education on evaluating student academic performance and setting individual campus goals for early childhood literacy and mathematics and college, career, and military readiness.

(A) The purpose of the training on evaluating student academic performance is to provide research-based information to board members that is designed to support the oversight role of the board of trustees outlined in the TEC, §11.1515.

(B) The purpose of the continuing education on setting individual campus goals for early childhood literacy and mathematics and college, career, and military readiness is to facilitate boards meeting the requirements of TEC, §11.185 and §11.186.

(C) A candidate for school board may complete the training up to one year before he or she is elected or appointed. A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(D) The continuing education shall be completed every two years.

(E) The training shall be at least three hours in length.

(F) The continuing education required by this subsection shall include, at a minimum:

(i) instruction in school board behaviors correlated with improved student outcomes with emphasis on:

(I) setting specific, quantifiable student outcome goals; and

(II) adopting plans to improve early literacy and numeracy and college, career, and military readiness for applicable student groups evaluated in the Closing the Gaps domain of the state accountability system established under TEC, Chapter 39;

(ii) instruction in progress monitoring practices to improve student outcomes; and

(iii) instruction in state accountability with emphasis on the Texas Essential Knowledge and Skills, state assessment instruments administered under the TEC, Chapter 39, and the state accountability system established under the TEC, Chapter 39.

(G) The continuing education shall be provided by an authorized provider as defined by subsection (d) of this section.

(H) If the training is attended by an entire school board and its superintendent, includes a review of local school district data on student achievement, and otherwise meets the requirements of subsec-

tion (b)(4) of this section, the training may serve to meet a school board member's obligation to complete training under subsection (b)(4) and (6) of this section, as long as the training complies with the Texas Open Meetings Act.

(7) Each board member shall complete continuing education on identifying and reporting potential victims of sexual abuse, human trafficking, and other maltreatment of children in accordance with TEC, §11.159(c)(2).

(A) A candidate for school board may complete the training up to one year before he or she is elected or appointed. A newly elected or appointed school board member who did not complete this training in the year preceding his or her election or appointment must complete the training within 120 calendar days after election or appointment.

(B) The training shall be completed every two years.

(C) The training shall be at least one hour in length.

(D) The training must familiarize board members with the requirements of TEC, §38.004 and §38.0041, and §61.1051 of this title (relating to Reporting Child Abuse or Neglect, Including Trafficking of a Child).

(E) The training required by this subsection shall include, at a minimum:

(i) instruction in best practices of identifying potential victims of child abuse, human trafficking, and other maltreatment of children;

(ii) instruction in legal requirements to report potential victims of child abuse, human trafficking, and other maltreatment of children; and

(iii) instruction in resources and organizations that help support victims and prevent child abuse, human trafficking, and other maltreatment of children.

(F) The training sessions shall be provided by a registered provider as defined by subsection (c) of this section.

(G) This training may be completed online, provided that the training is designed and offered by a registered provider, incorporates interactive activities that assess learning and provide feedback to the learner, and offers an opportunity for interaction with the instructor.

(H) The registered provider shall determine the clock hours of training credit to be awarded for successful completion of an online course and shall provide verification of completion as required in subsection (h) of this section.

(c) For the purposes of this section, a registered provider has demonstrated proficiency in the content required for a specific training. A private or professional organization, school district, government agency, college/university, or private consultant shall register with the TEA to provide the board member continuing education required in subsection (b)(3), (5), and (7) of this section.

(1) The registration process shall include documentation of the provider's training and/or expertise in the activities and areas covered in the framework for governance leadership.

(2) An updated registration shall be required of a provider of continuing education every three years.

(3) A school district that provides continuing education exclusively for its own board members is not required to register.

(4) An ESC is not required to register under this subsection.

(d) An authorized provider meets all the requirements of a registered provider and has demonstrated proficiency in the content required in subsection (b)(4) and (6) of this section. Proficiency may be demonstrated by completing a TEA-approved train-the-trainer course that includes evaluation on the topics and following a review of the provider's qualifications and course design, or through other means as determined by the commissioner.

(1) A private or professional organization, school district, government agency, college/university, or private consultant may be authorized by TEA to provide the board member training required in subsection (b)(4) and (6) of this section.

(2) An ESC shall be authorized by TEA to provide the board member training required in subsection (b)(4) and (6) of this section.

(3) The authorization process shall include documentation of the provider's training and/or expertise in the activities and areas covered in the framework for governance leadership.

(4) An updated authorization shall be required of a provider of training every three years.

(e) No continuing education shall take place during a school board meeting unless that meeting is called expressly for the delivery of board member continuing education. However, continuing education may take place prior to or after a legally called board meeting in accordance with the provisions of the Texas Government Code, §551.001(4).

(f) An ESC board member continuing education program shall be open to any interested person, including a current or prospective board member. A district is not responsible for any costs associated with individuals who are not current board members.

(g) A registration fee shall be determined by ESCs to cover the costs of providing continuing education programs offered by ESCs.

(h) For each training described in this section, the provider of continuing education shall provide verification of completion of board member continuing education to the individual participant and to the participant's school district. The verification must include the provider's authorization or registration number.

(i) To the extent possible, the entire board shall participate in continuing education programs together.

(j) At the last regular meeting of the board of trustees before an election of trustees, the current president of each local board of trustees shall announce the name of each board member who has completed the required continuing education, who has exceeded the required hours of continuing education, and who is deficient in meeting the required continuing education as of the anniversary of the date of each board member's election or appointment to the board or two-year anniversary of his or her previous training, as applicable. The announcement shall state that completing the required continuing education is a basic obligation and expectation of any sitting board member under SBOE rule. The minutes of the last regular board meeting before an election of trustees must reflect whether each trustee has met or is deficient in meeting the training required for the trustee as of the first anniversary of the date of the trustee's election or appointment or two-year anniversary of his or her previous training, as applicable. The president shall cause the minutes of the local board to reflect the announcement and, if the minutes reflect that a trustee is deficient in training as of the anniversary of his or her joining the board, the district shall post the minutes on the district's Internet website within 10 business days of the meeting and maintain the posting until the trustee meets the requirements.

(k) Annually, the SBOE shall commend those local board-superintendent teams that complete at least eight hours of the continuing

education specified in subsection (b)(4) and (5) of this section as an entire board-superintendent team.

(l) Annually, the SBOE shall commend local board-superintendent teams that effectively implement the commissioner's trustee improvement and evaluation tool developed under the TEC, §11.182, or any other tool approved by the commissioner.

(m) This section will be implemented May 1, 2020. This section as it read prior to adoption by the SBOE at its January 2020 meeting controls continuing education for school board members until May 1, 2020.

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 March 4, 2020.

TRD-202000993

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: March 24, 2020

Proposal publication date: December 20, 2019

For further information, please call: (512) 475-1497



SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1034

The Texas Education Agency (TEA) adopts an amendment to §61.1034, concerning the new instructional facility allotment. The amendment is adopted without changes to the proposed text as published in the November 29, 2019 issue of the *Texas Register* (44 TexReg 7284) and will not be republished. The adopted amendment modifies the rule to reflect changes made by House Bill (HB) 3, 86th Texas Legislature, 2019, to increase the allotment.

REASONED JUSTIFICATION: Texas Education Code (TEC), §42.158, enacted by Senate Bill 4, 76th Texas Legislature, 1999, created the New Instructional Facility Allotment (NIFA) for public school districts. The legislature did not provide funding under this allotment for the 2011-2012 through 2014-2015 school years. However, funding has been made available for the 2015-2016 through 2020-2021 school years. The NIFA is provided for operational expenses associated with the opening of a new instructional facility and is available to all public school districts and open-enrollment charter schools that meet the requirements of the statute and rule.

Former TEC, §42.158, was transferred to TEC, §48.152, by HB 3, 86th Texas Legislature, 2019. HB 3 increased funding for NIFA. The adopted amendment to 19 TAC §61.1034 is a conforming amendment that updates the rule to implement the increase in the maximum amount appropriated for allotments from \$25 million to \$100 million in a school year. The adopted amendment updates language related to NIFA distributions in subsection (e), including reference to excess local revenue provisions under TEC, §48.257. The adopted amendment also updates the authorizing statutory reference, changing TEC, §42.158, to §48.152.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began November 29, 2019, and ended December 30, 2019. No public comments were received.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §48.004, as transferred, redesignated, and amended by House Bill (HB) 3, 86th Texas Legislature, 2019, which authorizes the commissioner of education to adopt rules as necessary to implement and administer the Foundation School Program; TEC, §48.152, as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019, which requires the commissioner to reduce each district's allotment under this section in the manner provided by TEC, §48.266(f), if the total amount of allotments to which districts are entitled under this section for a school year exceeds the amount appropriated under this subsection; and TEC, §48.266(f), as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019, which describes how the commissioner will reduce allotments if entitlements exceed the amounts appropriated.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§48.004, 48.152, and 48.266(f), as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019.

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 March 3, 2020.

TRD-202000962

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: March 23, 2020

Proposal publication date: November 29, 2019

For further information, please call: (512) 475-1497



CHAPTER 66. STATE ADOPTION AND DISTRIBUTION OF INSTRUCTIONAL MATERIALS

SUBCHAPTER B. STATE ADOPTION OF INSTRUCTIONAL MATERIALS

19 TAC §§66.27, 66.28, 66.30, 66.36, 66.39, 66.41 - 66.43, 66.63, 66.66, 66.67, 66.72, 66.75, 66.76, 66.81

The State Board of Education (SBOE) adopts amendments to §§66.27, 66.28, 66.30, 66.36, 66.39, 66.41-66.43, 66.63, 66.66, 66.67, 66.72, 66.75, and 66.81 and new §66.76, concerning the state adoption of instructional materials. The amendments to §§66.27, 66.28, 66.39, 66.66, 66.67, 66.75 and new §66.76 are adopted with changes to the proposed text as published in the October 4, 2019 issue of the *Texas Register* (44 TexReg 5699) and will be republished. The amendments to §§66.30, 66.36, 66.41-66.43, 66.63, 66.72, and 66.81 are adopted without changes to the proposed text as published in the October 4, 2019 issue of the *Texas Register* (44 TexReg 5699) and will not be republished. The adopted rule actions update rules related to state review and adoption of instructional materials.

REASONED JUSTIFICATION: Rules in 19 TAC Chapter 66, Subchapter B, address the adoption of instructional materials, covering topics such as proclamation, public notice, and schedule for adopting instructional materials; requirements for publisher participation; procedures for handling of samples and public access to samples; public comment on instructional materials; adding content during panel review and during the public comment period; and updates to adopted instructional materials.

The adopted revisions to the instructional materials rules update language to clarify the process for publisher participation in the review and adoption process, ensure that the adoption of prekindergarten materials and their alignment to the Texas Prekindergarten Guidelines (TPG) are appropriately included in the rules, and authorize a process for updating of Texas Essential Knowledge and Skills (TEKS) alignment for adopted materials. The adopted rule actions include amending existing rules and adding a new rule that addresses new editions of adopted instructional materials separate from the existing rule on updates to adopted instructional materials. The adopted rule actions also include technical edits throughout.

The following changes were made since approved for first reading.

Technical edits were made to §§66.28(d)(7), 66.39(a), 66.66(e), 66.67(f), and 66.76(c).

In response to public comment, reference to the TPG was added throughout the rules each time a reference was made to the TEKS.

In response to public comment, new §66.27(i) was added to change the requirements for meeting the TPG. The new subsection specifies that a proclamation for prekindergarten materials shall require the instructional materials to cover end-of-year outcomes at least twice in the teacher materials and as deemed developmentally appropriate in the student materials. The new subsection also requires the coverage to include both an opportunity for the teacher to teach and the student to practice or demonstrate the knowledge or skill.

In response to public comment, language was added to §66.39(g) to clarify the requirements regarding the final samples of prekindergarten materials that are required for education service centers.

During the second reading of the revisions in November 2019, the Committee of the Full Board discussed amending §66.28(d)(7) to prevent publishers of prekindergarten materials participating in *Proclamation 2021* from being burdened with the costs associated with the requirement to supply samples to any requesting school district in the same format of the products to be provided to schools upon ordering. The vote taken by the SBOE indicated that the change should be made to subsection (d)(2), but to comply with the expressed intent of the SBOE, the related amendment should have been made to subsection (d)(7). At its January 31, 2020 meeting, the SBOE took a one-time procedural action to correct the amendment to reinstate the sentence "Samples of submitted prekindergarten materials must match the format of the products to be provided to schools upon ordering" in subsection (d)(2) and remove the sentence "Samples of adopted prekindergarten materials must match the format of the products to be provided to schools upon ordering" from subsection (d)(7).

The SBOE approved the proposed revisions for first reading and filing authorization at its September 13, 2019 meeting and for second reading and final adoption at its November 15, 2019 meeting. In addition, a one-time procedural action was taken at the January 31, 2020 meeting to correct an error in §66.28.

In accordance with TEC, §7.102(f), the SBOE approved the amendment for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2020-2021 school year. The earlier effective date is necessary so that rule changes can be applied to *Proclamation 2020* products and the *Proclamation 2021* process and to ensure districts have the most current information regarding alignment of instructional materials to the TEKS. The effective date is 20 days after filing as adopted with the Texas Register.

SUMMARY OF COMMENTS AND RESPONSES: The public comment period on the proposal began October 4, 2019, and ended November 8, 2019. The SBOE also provided an opportunity for registered oral and written comments at its November 2019 meeting in accordance with the SBOE board operating policies and procedures. Following is a summary of the public comments received and the corresponding responses.

Comment: An individual commented that it is cost-prohibitive to require full sets of prekindergarten systems to be sent to any district that requests them.

Response: The SBOE agrees and has modified the requirement in §66.28(d)(7) to include only an electronic sample of each product for school districts.

Comment: An individual commented that the TPG should be included in the rules each time the rules mention the TEKS.

Response: The SBOE agrees and has included a reference to the TPG throughout the rules each time the TEKS are referenced.

Comment: Three individuals commented that the rules should more clearly indicate that prekindergarten materials do not need to be submitted electronically.

Response: The SBOE agrees and has indicated in §66.28(d)(2) that prekindergarten materials are not to be submitted electronically.

Comment: Two individuals commented that the rules should more clearly define *student materials* as that term relates to prekindergarten products.

Response: The SBOE disagrees and has determined that definitions are better addressed in individual proclamations and related question and answer documents.

STATUTORY AUTHORITY. The amendments and new rule are adopted under Texas Education Code (TEC), §31.002, which defines open education resource instructional material; TEC, §31.003, which authorizes the State Board of Education (SBOE) to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials; TEC, §31.023, which requires the SBOE to adopt a list of instructional materials that meet applicable physical specifications, contain material covering at least half of the applicable Texas Essential Knowledge and Skills (TEKS) in the student version and in the teacher version, are suitable for the subject and grade level for which the instructional material was submitted, and have been reviewed by academic experts in the subject and grade level for which the instructional material was submitted; TEC, §31.035, which allows the SBOE to adopt supplemental instructional

materials that are not on the adopted list if the material covers one or more primary focal points or topics of a subject in the required curriculum, is not designed to serve as the only instructional material for the course, meets applicable physical specifications, is free from factual errors, is suitable for the subject and grade level for which the instructional material was submitted, and has been reviewed by academic experts in the subject and grade level for which the instructional material was submitted. The statute requires the SBOE to identify the TEKS that are covered by the supplemental instructional material and requires the material to comply with the review and adoption cycle provisions; and House Bill 3526, Section 5, 85th Texas Legislature, Regular Session, 2017, which changes the name of the instructional materials allotment to the technology and instructional materials allotment.

CROSS REFERENCE TO STATUTE. The amendments and new rule implement Texas Education Code, §§31.002, 31.003, 31.023, 31.035, and House Bill 3526, Section 5, 85th Texas Legislature, Regular Session, 2017.

§66.27. *Proclamation, Public Notice, and Schedule for Adopting Instructional Materials.*

(a) Texas Education Code (TEC), §31.002, defines instructional materials as content that conveys the essential knowledge and skills of a subject in the public-school curriculum through a medium or a combination of media for conveying information to a student. The term includes a book; supplementary materials; a combination of a book, workbook, and supplementary materials; computer software; magnetic media; DVD; CD-ROM; computer courseware; online services; or an electronic medium or other means of conveying information to the student or otherwise contributing to the learning process through electronic means, including open education resource instructional material.

(b) Upon the adoption of revised Texas essential knowledge and skills (TEKS) or Texas Prekindergarten Guidelines (TPG), the State Board of Education (SBOE) shall conduct an investigation to determine the extent of the revisions and whether revisions have created a need for new instructional materials.

(c) The SBOE shall issue a proclamation calling for instructional materials according to the review and adoption cycle adopted by the SBOE if the investigation required in subsection (b) of this section results in the determination that a proclamation is necessary. The proclamation shall serve as notice to all publishers and to the public that bids to furnish new materials to the state are being invited and shall call for:

(1) new instructional materials aligned to all of the TEKS for a specific subject and grade level or course(s) or to the TPG and to TEC, §28.002(h), as it relates to that specific subject in understanding the importance of patriotism and functioning productively in a free-enterprise society with appreciation for the basic democratic values of our state and national heritage;

(2) supplemental material aligned to new or expanded TEKS for a specific subject and grade level or course(s) or to new or expanded TPG and to TEC, §28.002(h), as it relates to that specific subject in understanding the importance of patriotism and functioning productively in a free-enterprise society with appreciation for the basic democratic values of our state and national heritage;

(3) new information demonstrating alignment of current instructional materials to the revised TEKS for a specific subject and grade level or course(s) or the revised TPG and to TEC, §28.002(h), as it relates to that specific subject in understanding the importance of patriotism and functioning productively in a free-enterprise society

with appreciation for the basic democratic values of our state and national heritage; or

(4) any combination of the calls described by paragraphs (1)-(3) of this subsection.

(d) The essential knowledge and skills adopted in this title effective in the year in which instructional materials are intended to be made available in classrooms are the SBOE's official rule governing essential knowledge and skills that shall be used to evaluate instructional materials submitted for consideration under the corresponding proclamation.

(e) The essential knowledge and skills that will be used to evaluate instructional materials submitted for consideration under a proclamation and a copy of each proclamation issued by the SBOE may be accessed from the Texas Education Agency website and are available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

(f) Proclamations calling for supplemental materials or new information only shall be issued at least 12 months before the scheduled adoption of instructional materials. Proclamations that include a call for complete new materials to cover all of the TEKS or TPG shall be issued at least 18 months before the scheduled adoption of the new instructional materials.

(g) Each proclamation shall contain the following:

(1) information about and reference to essential knowledge and skills in each subject for which bids are being invited;

(2) the requirement that a publisher of adopted instructional materials for a grade level other than prekindergarten must submit an electronic pre-adoption sample of the instructional materials as required by the TEC, §31.027(a) and (b), and may not submit a print sample copy;

(3) the requirement that electronic samples include a word search feature;

(4) the requirement that publishers file with the Texas Education Agency (TEA) print samples, electronic samples in an open file format or closed format, or galley proofs for use by state review panels;

(5) the student enrollment of the courses or grade levels called for, to the extent that it is available, for the school year prior to the year in which the proclamation is issued;

(6) specifications for providing computerized files to produce braille versions of adopted instructional materials;

(7) specifications for ensuring that electronic instructional materials are fully accessible to students with disabilities;

(8) a schedule of adoption procedures; and

(9) an option for the submission of open education resource instructional materials that are available for use by the state without charge on the same basis as instructional materials offered for sale.

(h) The proclamation shall require the instructional materials submissions to cover:

(1) content essential knowledge and skills for the subject area and grade level or course for which the materials are intended:

(A) at least once in the student text narrative; and

(B) once in an end-of-section review exercise, an end-of-chapter activity, or a unit test; and

(2) process essential knowledge and skills:

(A) at least once in the student text narrative and once in an end-of-section review exercise, an end-of-chapter activity, or a unit test; or

(B) twice in an end-of-section review exercise, an end-of-chapter activity, or a unit test.

(i) A proclamation for prekindergarten materials shall require the instructional materials submissions to cover the end-of-year outcomes at least twice in the teacher materials and as deemed developmentally appropriate in the student materials. The coverage must include both an opportunity for the teacher to teach and the student to practice or demonstrate the knowledge or skill.

(j) A draft copy of the proclamation shall be provided to each member of the SBOE and posted on the TEA website, and the TEA shall solicit input regarding the draft proclamation prior to its scheduled adoption by the SBOE. Any revisions recommended as a result of input from publishers shall be presented to the SBOE along with the subsequent draft of the proclamation.

(k) If the SBOE determines that good cause as defined by the SBOE exists, the SBOE may adopt an emergency, supplementary, or revised proclamation without complying with the timelines and other requirements of this section.

(l) The SBOE may issue a proclamation for instructional materials eligible for midcycle review. The midcycle adoption process shall follow the same procedures as the regular adoption except to the extent specified in this subsection.

(1) The midcycle proclamation shall include a fee not to exceed \$10,000 for each program or system of instructional materials intended for a certain subject area and grade level or course submitted for midcycle review. Publishers participating in the midcycle review process are responsible for all expenses incurred by their participation.

(2) A publisher that intends to offer instructional materials for midcycle review shall commit to provide the instructional materials to school districts in the manner specified by the publisher. The manner in which instructional materials are provided may include:

(A) providing the instructional materials to any district in a regional education service center area identified by the publisher; or

(B) providing a certain maximum number of instructional materials specified by the publisher.

(3) The publisher of instructional materials submitted for midcycle review shall enter into a contract with the SBOE for a term that ends at the same time as any contract entered into by the SBOE for instructional materials for the same subject and grade level.

(4) The publisher of instructional materials submitted for midcycle review is not required to provide samples to education service centers or school districts as specified in the TEC, §31.027.

(5) The publisher of instructional materials submitted for midcycle review shall make available one electronic examination copy of each submitted instructional materials product, including materials intended for teacher use and ancillaries, to each SBOE member upon that member's request, beginning on the date in the adoption schedule when publishers file their samples at the TEA. The state does not guarantee return of these SBOE-requested materials.

§66.28. *Requirements for Publisher Participation.*

(a) A publisher with adopted materials shall comply with product standards and specifications.

(1) Hard copy instructional materials adopted by the State Board of Education (SBOE) shall comply with the standards in the latest edition of Manufacturing Standards and Specifications for Textbooks approved by the National Advisory Commission on Textbook Specifications, as applicable. A publisher shall file a statement certifying instructional materials submitted for consideration will meet applicable product standards and specifications if adopted. Each statement must be made in a format designated by the commissioner of education, signed by a company official, and filed on or before the deadline specified in the schedule of adoption procedures in each proclamation. If the commissioner determines that good cause exists, the commissioner may approve an exception for a specific portion or portions of this requirement.

(2) A publisher that offers electronic instructional materials must provide a report for each electronic component that verifies that the components follow the Web Content Accessibility Guidelines (WCAG) identified in the proclamation and technical standards required by the Federal Rehabilitation Act, Section 508. The report must be prepared by an independent third party and be based on an audit testing a random sampling of each different type of electronic component as outlined in each proclamation. If applicable, the number of pages to be audited to meet the requirements in the proclamation shall be determined by the publisher.

(3) A publisher that provides access to materials to students with disabilities through an alternate format shall include a link to that material on the entrance page of the main product.

(4) Materials delivered online shall meet minimum web-based standards.

(5) If, during the contract period, the commissioner determines that any adopted instructional materials have faulty manufacturing characteristics or are made of inferior materials, the materials shall be replaced by the publisher without cost to the state.

(6) If, during the contract period, the commissioner determines that any publisher's adopted instructional materials do not comply with the WCAG standards identified in the proclamation or the technical standards required by the Federal Rehabilitation Act, Section 508, the publisher's instructional materials contract may be presented to the SBOE for termination.

(7) A publisher of adopted instructional materials shall make available samples that meet the requirements of this subsection to an SBOE member upon that member's request, beginning on the date the publishers are required to submit their final samples to the Texas Education Agency (TEA).

(b) Publishers participating in the adoption process are responsible for all expenses incurred by their participation.

(c) A publisher that intends to offer instructional materials for adoption shall submit a statement of intent to bid on or before the date specified in the schedule of adoption procedures.

(1) The statement of intent to bid shall be submitted in a format designated by the commissioner.

(2) A publisher shall indicate in the statement of intent to bid the percentage of Texas essential knowledge and skills or Texas Prekindergarten Guidelines that the publisher believes are sufficiently covered in each instructional materials submission.

(3) A publisher shall specify hardware and system requirements needed to review any item included in an instructional materials submission.

(4) Additions to a publisher's statement of intent to bid shall not be accepted after the deadline for filing statements of intent to bid, except as allowed in the schedule of adoption procedures included in a proclamation.

(5) A publisher that intends to offer instructional materials for midcycle review shall submit a statement of intent to bid and price information on or before the date specified in the schedule of adoption procedures under midcycle review. The statement of intent to bid must:

(A) specify the manner in which instructional materials will be provided to school districts as specified in §66.27(k)(2) of this title (relating to Proclamation, Public Notice, and Schedule for Adopting Instructional Materials); and

(B) include payment of the fee for review of instructional materials submitted for midcycle review.

(d) A publisher that intends to offer instructional materials for review shall comply with the following requirements for providing pre-adoption samples.

(1) Complete electronic samples of student and teacher components of instructional materials shall be provided to the TEA and the 20 regional education service centers (ESCs) on or before the date specified in the schedule of adoption procedures in a proclamation. Samples submitted for review shall be complete versions of the final product and must include all content intended to be in the final product, not just the content identified in the correlations. Samples of electronic products must be fully functional for review purposes and meet any other specifications identified in the proclamation. The original sample submission must remain unchanged through the entire review and adoption process, though updated samples can be added to the publisher's submission. These samples are copyrighted by the publisher and are not to be downloaded for use in classrooms or for any purpose other than public review.

(2) A publisher of prekindergarten materials is not required to submit electronic samples of submitted prekindergarten instructional materials. Samples of submitted prekindergarten materials must match the format of the products to be provided to schools upon ordering.

(3) Electronic samples must be free of sales or marketing materials.

(4) These samples shall be made available electronically for public review. Publishers of instructional content accessed electronically shall provide all necessary information, such as locator and login information and passwords, required to ensure public access to their programs throughout the review period.

(5) If the commissioner determines that good cause exists, the commissioner may extend the deadline for filing samples with ESCs. At its discretion, the SBOE may remove from consideration any materials proposed for adoption that were not properly supplied to the ESCs, the TEA, or SBOE members.

(6) A publisher shall provide a complete description of all student and teacher components of an instructional materials submission.

(7) On request of a school district, a publisher shall provide an electronic sample of submitted instructional materials and may also provide print sample copies.

(8) One sample copy of each student and teacher component of an instructional materials submission shall be provided for each member of the appropriate state review panel in accordance with instructions provided by the TEA. Samples for review must be as free from factual and editorial error as possible and reflect the quality of the

final product intended to go into classrooms. Publishers have the option to provide reviewers with print samples, electronic samples in an open file format or closed format, or galley proofs. An electronic sample of print instructional materials must be offered in a format that simulates the print or "view only" version and that does not contain links to external sources. To ensure that the evaluations of state review panel members are limited to student and teacher components submitted for adoption, publishers shall not provide ancillary materials or descriptions of ancillary materials to state review panel members. The state does not guarantee return of sample instructional materials.

(9) The TEA, ESCs, and participating publishing companies shall work together to ensure that hardware or special equipment necessary for review of any item included in a student and/or teacher component of an instructional materials submission is available in each ESC. Participating publishers may be required to lend such hardware or special equipment to any member of a state review panel who does not have access to the necessary hardware or special equipment.

(10) Electronic samples must allow for multiple, simultaneous user access and be equipped with a word-search feature.

(e) The TEA may request additional samples if they are needed.

(f) A publisher that intends to offer instructional materials for adoption shall comply with the following bid requirements.

(1) Publishers shall file official bids with the commissioner according to the schedule of adoption procedures and in a manner designated by the commissioner.

(2) The official bid filed by a publisher shall include separate prices for each item included in an instructional materials submission. A publisher shall guarantee that individual items included in the student and/or teacher component are available for local purchase at the individual prices listed for the entire contract period.

(3) A publisher may submit supplemental bids with new package options or lower prices for existing packages or components according to the schedule of adoption procedures included in the proclamation if the publisher filed an initial bid for that course or grade level by the deadline in the schedule of adoption procedures. Supplemental bids may not be submitted for prices higher than were provided in the initial bids.

(g) Each instructional material or ancillary material that is offered as part of a bundle must also be available for purchase individually.

(h) A publisher that intends to offer instructional materials for adoption shall comply with the following additional requirements.

(1) A publisher shall submit to the TEA a signed affidavit including the following:

(A) certification that each individual whose name is listed as an author or contributor of the instructional materials contributed to the development of the instructional materials;

(B) a general description of each author's or contributor's involvement in the development of the instructional materials; and

(C) certification that all corrections required by the commissioner and SBOE have been made.

(2) Student materials offered for possible adoption may include consumable components in subjects and grade levels in which consumable materials are not specifically called for in the proclamation. In such cases, publishers must meet the following conditions.

(A) The per student price of the materials must include the cost of replacement copies of consumable student components for the full term of the adoption and contract, including any extensions of the contract terms, but for no more than 12 years. The offer must be set forth in the publisher's official bid.

(B) The publisher's official bid shall contain a clear explanation of the terms of the sale, including the publisher's agreement to supply consumable student materials for the duration of the contract and extensions as noted in subparagraph (A) of this paragraph.

(C) The publisher and the school district shall determine the manner in which consumable student materials are supplied beyond the initial order year.

(i) A publisher may not submit instructional materials for review that have been authored or contributed to by a current employee of the TEA.

(j) A publisher or author may not solicit input, directly or indirectly, on new or revised content from a member of the state review panel for a product the panelist reviewed while the product is being considered or even after the product has been adopted or rejected.

(k) On or before the deadline established in the schedule of adoption procedures, publishers shall submit correlations of instructional materials submitted for review with essential knowledge and skills required by the proclamation. Correlations shall be provided for materials designed for student use and materials designed for teacher use and must identify evidence of each student expectation addressed in the ways specified in §66.27(h) of this title. Correlations shall be submitted in a format designated by the commissioner.

(l) A publisher shall provide a list of all corrections required to be made to each student and teacher component of an instructional materials submission to bring them into compliance with applicable laws, rules, or the proclamation. The list must be in a format designated by the commissioner and filed on or before the deadline specified in the schedule of adoption procedures. If no corrections are necessary, the publisher shall file a statement to that effect in a format designated by the commissioner on or before the deadline in the schedule for submitting the list of corrections.

(m) On or before the deadline for submitting lists of corrections, publishers shall submit certification that all instructional materials have been edited for accuracy, content, and compliance with requirements of the proclamation.

(n) One complete electronic sample copy in an open file format or closed format of each student and teacher component of adopted instructional materials that incorporate all corrections required by the SBOE shall be filed with the commissioner on or before the date specified in the schedule of adoption procedures. The complete sample copies filed with the TEA must be representative of the final program.

(o) A publisher who intends to offer instructional materials for adoption shall comply with additional requirements included in a proclamation related to submission of instructional materials for adoption.

§66.39. Regional Education Service Centers: Procedures for Handling Samples; Public Access to Samples.

(a) Each regional education service center (ESC) executive director shall designate one person to supervise all access to samples of instructional materials.

(b) On or before the date specified in the schedule of adoption procedures, each ESC representative shall notify the commissioner of education of all irregularities in electronic samples in a manner design-

nated by the commissioner. The appropriate publisher shall be notified of any sample irregularities reported by the ESCs.

(c) One electronic sample of all instructional materials under consideration for adoption shall be retained in each ESC for review by interested persons. The review sample must remain available until the ESC receives the electronic final adopted product sample on the date specified in the schedule of adoption procedures.

(d) Appropriate information, such as locator and login information and passwords, shall be made available by the ESCs to ensure public access to Internet-based instructional content throughout the review or contract period, as appropriate.

(e) Regional ESCs shall ensure reasonable public access to sample instructional materials, including access outside of normal working hours that shall be scheduled by appointment.

(f) On or before the date specified in the schedule of adoption procedures, each ESC shall publicize the date on which sample instructional materials will be available for review and shall notify all school districts in the region of the schedule.

(g) One electronic final sample of all instructional materials adopted by the State Board of Education shall be retained in each ESC for the entire adoption period for review by interested persons. Samples of adopted prekindergarten materials must match the format of the products to be provided to schools upon ordering.

§66.66. Consideration and Adoption of Instructional Materials by the State Board of Education.

(a) The State Board of Education (SBOE) shall either adopt or reject each submitted instructional material in accordance with the Texas Education Code (TEC), §31.024.

(b) The SBOE shall adopt instructional materials in accordance with the TEC, §31.023. Instructional materials may be adopted only if:

(1) they meet at least 50% of the Texas essential knowledge and skills (TEKS) or Texas Prekindergarten Guidelines (TPG) when the SBOE calls for materials as specified in §66.27(c)(1) of this title (relating to Proclamation, Public Notice, and Schedule for Adopting Instructional Materials) or meet requirements of the proclamation when the SBOE calls for materials as specified in §66.27(c)(2) or (3) of this title for the subject and grade level or course(s) in materials designed for student use and materials designed for teacher use. In determining the percentage of the TEKS or TPG covered by instructional materials, each student expectation shall count as an independent element of the TEKS or TPG;

(2) the publisher has agreed to ensure that they meet the established physical specifications adopted by the SBOE prior to making materials available for use in districts;

(3) the publisher has agreed to ensure that they follow the Web Content Accessibility Guidelines (WCAG) and technical specifications of the Federal Rehabilitation Act, Section 508, as specified in the proclamation;

(4) they are free from factual errors, including significant grammatical or punctuation errors that have been determined to impede student learning or that make the product of a quality not acceptable in Texas public schools, or the publisher has agreed to correct any identified factual errors or grammatical or punctuation errors that have been determined to impede student learning, prior to making them available for use in districts and charter schools;

(5) they are deemed to be suitable for the subject area and grade level;

(6) they have been reviewed by academic experts in the subject and grade level; and

(7) they receive approval by majority vote of the SBOE.

(c) No instructional material may be adopted that contains content that clearly conflicts with the stated purpose of the TEC, §28.002(h).

(d) Instructional materials submitted for review may be rejected by majority vote of the SBOE in accordance with the TEC, §31.024.

(e) Instructional materials the board determines that, based on the initial review, contain extensive errors and make a product of a quality not acceptable in Texas public schools are not determined to be free from factual errors.

(f) A publisher may withdraw from the adoption process at any time prior to execution of a contract with the SBOE for any reason by providing notification in writing to the commissioner of education. Notification of withdrawal is final and irrevocable.

(g) The commissioner may remove materials from the adopted list if the publisher fails to meet deadlines established in the schedule of adoption procedures.

§66.67. Adoption of Open Education Resource Instructional Materials.

(a) "Open education resource instructional material" means teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that allows for free use, reuse, modification, and sharing with others, including full courses, course materials, modules, textbooks, streaming videos, tests, software, and any other tools, materials, or techniques used to support access to knowledge.

(b) The State Board of Education (SBOE) shall place open education resource instructional materials submitted for a secondary-level course on the adopted list if the instructional materials meet the criteria outlined in subsections (c) and (d) of this section.

(c) Open education resource instructional materials referenced in this section must be:

(1) submitted by an eligible institution, defined as a public institution of higher education that is designated as a research university or emerging research university under the Texas Higher Education Coordinating Board's accountability system, or a private university located in Texas that is a member of the Association of American Universities, or a public technical institute, as defined by the TEC, §61.003;

(2) intended for a secondary-level course; and

(3) written, compiled, or edited primarily by faculty of an eligible institution that specializes in the subject area of the instructional materials.

(d) To submit open education resource instructional materials, an eligible institution must:

(1) certify by the board of regents, or corresponding governing body, or president of the university, or by an individual authorized by one of these entities, that the instructional materials qualify for placement on the adopted list based on the extent to which the instructional materials cover the essential knowledge and skills identified under the TEC, §28.002;

(2) identify each contributing author;

(3) provide certification by the appropriate academic department of the submitting institution that the instructional materials are accurate; and

(4) certify that:

(A) for instructional materials for a senior-level course, a student who successfully completes a course based on the instructional materials will be prepared, without remediation, for entry into the eligible institution's freshman-level course in that subject; or

(B) for instructional materials for a junior-level and senior-level course, a student who successfully completes the junior-level course based on the instructional materials will be prepared for entry into the senior-level course.

(e) All information and certifications required by subsection (d) of this section shall be provided in a format designated by the commissioner of education.

(f) A publisher that offers open education resource instructional materials must provide a report for each electronic component that verifies that the component substantially follows Web Content Accessibility Guidelines (WCAG) and technical standards required by the Federal Rehabilitation Act, Section 508, as applicable. Specific standards that must be met will be specified in each proclamation.

(g) Before placing open education resource instructional materials submitted under subsection (b) of this section on the adopted list, the SBOE shall direct the Texas Education Agency (TEA) to post the materials on the TEA website for 60 days to allow for public comment and the SBOE shall hold a public hearing on the instructional materials. Public comment shall be provided to members of the SBOE and posted on the TEA website within five working days of its receipt.

(h) Not later than the 90th day after the date open education resource instructional materials are submitted as provided by the TEC, §31.0241, the SBOE may review the instructional materials. The SBOE:

(1) may request an independent review that follows the same process used in §66.36 of this title (relating to State Review Panels: Training, Duties, and Conduct) to confirm the content meets the criteria for placement on the adopted list based on the extent to which the instructional materials cover the essential knowledge and skills. The SBOE shall notify the submitting institution of any discrepancy in alignment with essential knowledge and skills;

(2) shall post with the list adopted under the TEC, §31.023, comments made by the SBOE regarding the open education resource instructional materials placed on the list; and

(3) shall distribute SBOE comments to school districts.

§66.75. Updates to Adopted Instructional Materials.

(a) A publisher may submit a request to the commissioner of education for approval to update content in state-adopted instructional materials. A publisher requesting approval of a content update shall provide a written request in a manner designated by the commissioner that includes an explanation of the reason for the update. This requirement includes electronic instructional materials and Internet products for which all users receive the same updates. The request must be accompanied by an electronic sample of the proposed updates. Proposed changes shall be posted on the Texas Education Agency (TEA) website for a minimum of seven calendar days prior to approval.

(b) A publisher that requests to update content in state-adopted instructional materials must comply with the following additional requirements:

(1) provide that there will be no additional cost to the state;

(2) certify in writing that the new material meets the applicable essential knowledge and skills and is free from factual errors; and

(3) certify that the updates do not affect the product's coverage of Texas Education Code (TEC), §28.002(h), as it relates to that specific subject and grade level or course(s), understanding the importance of patriotism and functioning productively in a free-enterprise society with appreciation for the basic democratic values of our state and national heritage.

(c) With prior commissioner approval, publishers may, at any time, make changes that do not affect the product's Texas essential knowledge and skills (TEKS) or Texas Prekindergarten Guidelines (TPG) coverage or its coverage of Texas Education Code, §28.002(h).

(1) Requests for approval of updates to content that was not used in determining the product's eligibility for adoption must be submitted to the commissioner prior to their introduction into state-adopted instructional materials to confirm that the changes do not affect TEKS or TPG coverage or coverage of TEC, §28.002(h).

(2) Responses from the commissioner to update requests shall be provided within 30 days after receipt of the request. If no action has been taken by the end of the 30 days, the request is deemed approved.

(d) All requests for updates involving content used in determining the product's eligibility for adoption must be approved by the State Board of Education (SBOE) prior to their introduction into state-adopted instructional materials. Requests must be submitted in a format designated by the commissioner and must include correlations to applicable student expectations. This requirement includes electronic instructional materials and Internet products for which all users receive the same updates. Proposed changes shall be posted on the TEA website for a minimum of seven calendar days prior to approval. The SBOE may assess penalties as allowed by law against publishers that fail to obtain approval for updates to such content in state-adopted instructional materials prior to delivery of the materials to school districts.

(e) Publishers must agree to supply the previous version of state-adopted instructional materials to school districts that choose to continue using the previous version during the duration of the original contract. This subsection does not apply to electronic instructional materials.

(f) A publisher of instructional materials may provide alternative formats for use by school districts if:

(1) the content is identical to SBOE-approved content;

(2) the alternative formats include the identical revisions and updates as the original product; and

(3) the cost to the state and school is equal to or less than the cost of the original product.

(g) Alternative formats may be developed and introduced at any time during the adoption cycle in conformance with the procedures for adoption of other state-adopted materials.

(h) Publishers must notify the commissioner in writing if they are providing SBOE-approved products in alternative formats.

(i) Publishers are responsible for informing districts of the availability of the alternative formats and for accurate fulfillment of orders for them.

(j) The commissioner may add alternative formats of SBOE-approved products to the list of adopted products available to school districts.

(k) Publishers of SBOE-adopted instructional materials may, at any time, without seeking approval from the SBOE or the commissioner, make technical enhancements or improvements that do not add or change content, provided the enhancements do not change the technical requirements for districts to continue to be able to access the materials in the same manner as originally submitted.

(l) The commissioner may provide an opportunity for publishers to submit updated content and new correlations to that content to update the product's official TEKS or TPG coverage percentage. The commissioner shall post an annual schedule of review procedures on the agency website to provide publishers with adequate notice of review timelines. The updated content shall be reviewed by state review panels during the next available state review panel meeting in accordance with the annual schedule of review procedures. Following the review, the commissioner shall provide a report to the SBOE that includes the following:

(1) the findings of the review panels regarding the TEKS or TPG coverage as provided in the updated content; and

(2) alleged factual errors in the updated content identified by state review panels.

(m) The SBOE shall either accept or reject each updated TEKS or TPG coverage percentage and errors report in accordance with §66.66 of this title (relating to Consideration and Adoption of Instructional Materials by the State Board of Education). An updated TEKS alignment determination is considered final, pursuant to TEC, §31.023(a-1).

§66.76. *New Editions of Adopted Instructional Materials.*

(a) A publisher may submit a request to the commissioner of education for approval to substitute a new edition of state-adopted instructional materials. A publisher requesting approval of a new edition shall provide a written request in a manner designated by the commissioner that includes an explanation of the reason for the substitution. The request must be accompanied by an electronic sample and a correlation document that meets all the requirements of the correlation document provided for the initial review. This requirement includes electronic instructional materials and Internet products for which all users receive the same updates. Proposed changes shall be made available for public review on the Texas Education Agency (TEA) website for a minimum of 60 calendar days prior to approval.

(b) A publisher that requests to substitute a new edition of state-adopted instructional materials must comply with the following additional requirements:

(1) provide that there will be no additional cost to the state;

(2) certify in writing that the new material meets the applicable Texas essential knowledge and skills (TEKS) or Texas Prekindergarten Guidelines (TPG) and is free from factual errors; and

(3) certify that the updates in the new edition do not affect the product's coverage of Texas Education Code (TEC), §28.002(h), as it relates to that specific subject and grade level or course(s), understanding the importance of patriotism and functioning productively in a free-enterprise society with appreciation for the basic democratic values of our state and national heritage.

(c) With prior commissioner approval, publishers may, at any time, substitute a new edition if the changes made to the new edition do not affect the product's TEKS coverage or its coverage of TEC, §28.002(h).

(1) Substitution requests to content that was not used in determining the product's eligibility for adoption must be submitted to the

commissioner to confirm the changes do not affect TEKS coverage or coverage of TEC, §28.002(h).

(2) Responses from the commissioner to update requests shall be provided within 60 days after receipt of the request. If no action has been taken by the end of the 60 days, the request is deemed approved.

(3) Proposed changes shall be posted on the TEA website for a minimum of 60 days prior to approval.

(d) All requests for updates involving content used in determining the product's eligibility for adoption must be approved by the State Board of Education (SBOE) prior to their introduction into state-adopted instructional materials. Requests must be submitted in a format designated by the commissioner and must include correlations to applicable student expectations. The SBOE may assess penalties as allowed by law against publishers that fail to obtain approval for updates to such content in state-adopted instructional materials prior to delivery of the materials to school districts.

(e) Publishers must agree to supply the previous version of state-adopted instructional materials to school districts that choose to continue using the previous version during the duration of the original contract. This subsection does not apply to electronic instructional materials.

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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Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

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For further information, please call: (512) 475-1497



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 40. EPINEPHRINE AUTO- INJECTOR AND ANAPHYLAXIS POLICIES

SUBCHAPTER A. EPINEPHRINE AUTO-INJECTOR POLICIES IN INSTITUTIONS OF HIGHER EDUCATION

25 TAC §§40.1 - 40.8

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts new §§40.1 - 40.8, concerning Epinephrine Auto-Injector Policies in Institutions of Higher Education.

New §40.1 is adopted with changes to the proposed text as published in the November 29, 2019, issue of the *Texas Register* (44 TexReg 7313) and will be republished. New §§40.2 - 40.8 are adopted without changes and therefore will not be republished.

BACKGROUND AND JUSTIFICATION

The new sections are necessary to implement Senate Bill (S.B.) 1367, 85th Legislature, Regular Session, 2017, and House Bill (H.B.) 476 and H.B. 4260, 86th Legislature, Regular Session, 2019. S.B. 1367 added Texas Education Code, Chapter 51, Subchapter Y-1, which requires the adoption of rules for the maintenance, administration, and disposal of epinephrine auto-injectors in institutions of higher education that voluntarily adopt epinephrine auto-injector policies. H.B. 476 amended §51.882 of the Texas Education Code to require institutions of higher education that adopt a policy to submit the policy to DSHS. DSHS will maintain a record of the most recent policy and will make the information available upon request. H.B. 4260 added §773.0145 to the Texas Health and Safety Code, which authorizes private or independent institutions of higher education to adopt and implement epinephrine auto-injector policies. H.B. 4260 also allows a physician or person who has been delegated prescriptive authority under Chapter 157, Texas Occupations Code, to prescribe epinephrine auto-injectors in the name of an entity.

The new rules set the minimum standards for institutions of higher education to follow when adopting an epinephrine auto-injector policy, based on recommendations of the DSHS Stock Epinephrine Advisory Committee. An institution of higher education that voluntarily adopts an unassigned epinephrine auto-injector policy must stock at least one unassigned adult epinephrine auto-injector pack on each campus and conduct individual campus assessments to determine if additional epinephrine auto-injectors are needed. The new rules allow flexibility so that institutions of higher education may develop policies that address issues specific to each campus, including campus geography and student population size. Personnel and volunteers that are trained to administer unassigned epinephrine auto-injectors may administer an epinephrine auto-injector to a person suspected of experiencing anaphylaxis, including students, personnel, volunteers, and visitors. Public institutions of higher education that adopt epinephrine auto-injector policies are required to report the administration of an epinephrine auto-injector to DSHS within 10 business days.

COMMENTS

The 31-day comment period ended December 30, 2019.

During this period, DSHS received one comment from the Texas Medical Association regarding the proposed rules. A summary of the comment relating to the rules and DSHS's response follows.

Comment: One commenter stated that S.B. 1367 addressed prescriptions of epinephrine auto-injectors at public institutions of higher education and limited these prescriptions to only those issued by a physician. H.B. 4260 addressed private or independent institutions of higher education and allowed prescriptions issued by a "person who has been delegated prescriptive authority." The commenter suggested that the definition of "Authorized healthcare provider" as it appeared in §40.3(2) be revised to read "(a) for a public institution of higher education as defined in Texas Education Code §61.003(8), a physician, as defined in Texas Education Code, §51.881; (b) for a to [sic] private or independent institution of higher education as defined in Texas Education Code §61.003(15), a physician, as defined above, or person who has been delegated prescriptive authority by a physician under Texas Occupations Code, Chapter 157 as described in Texas Health and Safety Code, §773.0145."

Response: DSHS declines to make the suggested change. DSHS reviewed the statutes at issue and noted that Texas Occupations Code §157.001 allows physicians to delegate certain medical acts to non-physicians. Given that prescribing epinephrine auto-injectors is an act that may be delegated by a physician and that the language of Texas Education Code §51.885(c) makes room for such delegation or supervision by a physician, it is appropriate to read Texas Education Code, Chapter 51, Subchapter Y-1 as permitting the prescription of epinephrine auto-injectors by physicians as well as those who have been delegated prescriptive authority by a physician.

Due to a staff comment, §40.1 was revised to clarify the use of "that" in place of "who" when referring to the institutions of higher education.

STATUTORY AUTHORITY

The new sections are authorized by Texas Education Code, Chapter 51, Subchapter Y-1, which authorizes DSHS to adopt rules with advice from the DSHS Stock Epinephrine Advisory Committee regarding the maintenance, administration, and disposal of an epinephrine auto-injector on the campus of an institution of higher education subject to a local policy being adopted. The new sections are authorized by Texas Health and Safety Code, §773.0145, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules regarding the maintenance, administration, and disposal of an epinephrine auto-injector by a private or independent institution of higher education subject to a local policy being adopted. The new sections are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

§40.1. Purpose.

The purpose of this subchapter is to establish minimum standards for administering, maintaining, and disposing of epinephrine auto-injectors for an institution of higher education that adopts unassigned epinephrine auto-injector policies. These standards are implemented under Texas Education Code, Chapter 51, Subchapter Y-1 and Texas Health and Safety Code, Chapter 773, Subchapter A.

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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Barbara L. Klein

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Department of State Health Services

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For further information, please call: (512) 776-7279

PART 7. TEXAS MEDICAL DISCLOSURE PANEL

CHAPTER 601. INFORMED CONSENT

25 TAC §601.9

The Texas Medical Disclosure Panel (panel) adopts an amendment to §601.9 concerning informed consent of patients. The amendment to §601.9 is adopted with changes to the proposed text as published in the November 1, 2019, issue of the *Texas Register* (44 TexReg 6500). The rule will be republished.

BACKGROUND AND JUSTIFICATION

These amendments are in accordance with the Texas Civil Practice and Remedies Code, §74.102, which requires the panel to determine which risks and hazards related to medical care and surgical procedures must be disclosed by health care providers or physicians to their patients or persons authorized to consent for their patients and to establish the general form and substance of such disclosure. Section 601.9 contains the Disclosure and Consent Form for Anesthesia and/or Perioperative Pain Management (Analgesia).

SECTION-BY-SECTION SUMMARY

Amendments to §601.9 replace references to the "Department of State Health Services" with references to the "Health and Human Services Commission."

Amendments to §601.9 also modify the disclosure and consent form in English and Spanish for anesthesia and/or perioperative pain management (analgesia) to ensure the physician delegating, supervising or performing the anesthetic will be privileged with the rebuttable presumption intended.

PUBLIC COMMENT

The 31-day comment period ended December 2, 2019.

During this period, the panel received comments regarding the proposed rules from three commenters: Texas Association of Nurse Anesthetists, Texas Hospital Association, and the Texas Society of Anesthesiologists.

Comment: One commenter requested the credentials of the physician be required to be included on the consent form, but was otherwise supportive of the changes.

Response: The panel disagreed with the request and no changes were made as a result of the comment.

Comments: Two commenters were concerned that the proposed changes to the form will interfere with the delegation and supervision authority by physicians.

Response: The panel disagreed with the commenters, but did revise language on the form to provide additional clarity.

STATUTORY AUTHORITY

The amendment is authorized under the Texas Civil Practice and Remedies Code, §74.102, which provides the Texas Medical Disclosure Panel with the authority to prepare lists of medical treatments and surgical procedures that do and do not require disclosure by physicians and health care providers of the possible risks and hazards, and to prepare the form(s) for the treatments and procedures which do require disclosure.

§601.9. Disclosure and Consent Form for Anesthesia and/or Perioperative Pain Management (Analgesia).

The Texas Medical Disclosure Panel adopts the following form which shall be used to provide informed consent to a patient or person authorized to consent for the patient of the possible risks and hazards involved in anesthesia and/or perioperative pain management (analgesia). Providers shall have the form available in both English and Span-

ish language versions. Both versions are available from the Health and Human Services Commission.

(1) English form.

Figure: 25 TAC §601.9(1)

(2) Spanish form.

Figure: 25 TAC §601.9(2)

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 March 9, 2020.

TRD-202001037

Noah Appel, M.D.

Chairman

Texas Medical Disclosure Board

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For further information, please call: (512) 776-6972



TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

The Commissioner of Insurance adopts new 28 TAC §5.4012 and amendments to §5.4011 and §§5.4601, 5.4603, 5.4621, 5.4622, and 5.4642, concerning windstorm building codes for structures insured by the Texas Windstorm Insurance Association (TWIA). The new and amended sections implement Insurance Code §2210.251(b) and §2210.252, which give the Commissioner authority to adopt windstorm building codes. The sections are also updated to reflect that the Texas Board of Professional Engineers is now the Texas Board of Professional Engineers and Land Surveyors.

The new section and amendments are adopted with changes to the proposed text published in the November 1, 2019, issue of the *Texas Register* (44 TexReg 6501). TDI adopts §§5.4621, 5.4622, and 5.4642 without changes to the proposed text. TDI revised §§5.4011, 5.4012, 5.4601, and 5.4603 from the proposed text in response to public comments. TDI revised §§5.4011, 5.4012, 5.4601, and 5.4603 to change the effective date of the new building codes from January 1, 2020, to April 1, 2020. TDI revised §5.4012 to require that structures in the catastrophe area be constructed in accordance with the wind provisions in the 2018 *International Building Code (IBC)* and *International Residential Code (IRC)*.

Section 5.4011 and §5.4603 were also changed from the proposed text to conform to agency style and update addresses and to change a form's effective date, respectively.

REASONED JUSTIFICATION.

Section 5.4011. Amendments to §5.4011 are necessary to specify that the 2006 editions of the *IBC* and the *IRC* with Texas

Revisions will not apply to construction begun on or after April 1, 2020. The *IRC* specifies building code standards for residential structures and the *IBC* specifies building code standards for other structures, including commercial buildings and government buildings. The proposal would have applied the 2018 *IBC* and *IRC* beginning January 1, 2020; in response to comment, the 2018 codes will apply beginning April 1, 2020. The 2006 *IBC* and *IRC* with Texas Revisions will apply to construction begun on or after January 1, 2008, and before April 1, 2020. Section 5.4011 was also changed from the proposed text to conform to agency style and to update contact information.

Section 5.4012. New §5.4012 adopts the 2018 editions of the *IBC* and the *IRC*. Under the rule, the 2018 editions apply to structures constructed, repaired, or added to on or after April 1, 2020. For construction to be eligible for windstorm coverage through TWIA, the construction must comply with the windstorm building code adopted by the Commissioner for the year in which the construction began. The International Code Council (ICC) publishes revised building codes every three years. Adopting newer editions of the building codes is periodically necessary to ensure that new construction incorporates advances in technology and greater understanding of wind engineering.

Adopted subsection (b) of §5.4012 provides an exemption from §5.4012(a) for repairs, alterations, and additions necessary for the preservation, restoration, rehabilitation, or continued use of a historic structure. Subsection (b)(1) - (3) defines the attributes that make a structure a historic structure. These subsections are consistent with previously adopted building code requirements.

Proposed §5.4012 contained specified wind speeds for each risk category in each of the three zones in the catastrophe area (Seaward, Inland I, and Inland II), which are delineated in §5.4008(a) - (c) of this title. In response to comment, adopted §5.4012 does not contain these specified wind speeds. Instead of determining wind speed based on which zone a structure is in, appointed qualified inspectors and engineers must determine wind speed by using the 2018 *IBC* or one of the five building code standards referenced in the 2018 *IRC*.

The proposal would have applied the 2018 *IBC* and *IRC* beginning January 1, 2020; in response to comment, the 2018 codes will apply beginning April 1, 2020.

Section 5.4601. The adopted amendment to §5.4601 will update the definition of "windstorm building code standards" to include the 2018 editions in new §5.4012. The proposed amendment to §5.4601 also reflects that the Texas Board of Professional Engineers is now the Texas Board of Professional Engineers and Land Surveyors.

In response to comment, TDI is changing the date for compliance with the new codes from January 1, 2020, to April 1, 2020 in the definition of "Windstorm building code standards."

Section 5.4603. The adopted amendment to §5.4603, which lists windstorm inspection forms, conforms that section to the new building codes. TDI also adopts nonsubstantive amendments to the names of some forms to improve consistency. In response to comment, TDI is changing the date for compliance with the new codes from January 1, 2020, to April 1, 2020.

Section 5.4603 was also changed from the proposed text to change the effective date of the Field Form, the WPI-7, used by TDI-employed inspectors. The form was changed to conform to the new building code adoption. The information captured in the WPI-7 is unchanged and is listed in §5.4608.

Sections 5.4621, 5.4622, and 5.4642. The adopted amendments to §§5.4621, 5.4622, and 5.4642 update references to windstorm inspection forms consistent with the amendments to §5.4603.

In addition, the adopted amendments update references to the Texas Board of Professional Engineers and Land Surveyors and make nonsubstantive capitalization and punctuation changes to conform the sections to the agency's current style.

TDI received comments on an informal draft of this rule, which was posted on TDI's website on January 18, 2019. TDI considered those comments when drafting the proposal.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: TDI received eight written comments. Commenters in support of the proposal were: two individuals, the ICC, and the South-Central Partnership for Energy Efficiency as a Resource. Commenters in support of the proposal with changes were: one individual, the Lone Star Chapter of the Sierra Club, Oldcastle BuildingEnvelope Inc., and the Texas Association of Builders.

Comments in support: Four commenters support adopting the 2018 editions of the *IBC* and the *IRC*.

Agency Response: TDI appreciates the support.

Comments on effective date: Two commenters questioned the proposed January 1, 2020 effective date.

Agency response: In response to comment, TDI is changing the date for compliance with the 2018 editions of the *IBC* and the *IRC* from January 1, 2020, to April 1, 2020.

Comment on product evaluations: One commenter asked about updating product evaluations on TDI's website regarding the products' compliance with the 2018 *IBC* and *IRC*.

Agency Response: TDI does not intend to reexamine existing product evaluations for compliance with the 2018 *IBC* and *IRC*. Product evaluations on TDI's website will remain there.

Building product manufacturers that have submitted product testing data and drawings to TDI for TDI to evaluate for compliance with the 2006 *IBC* and *IRC* may resubmit data and drawings for evaluation for compliance with the 2018 codes.

The product evaluations are not necessary for a structure to comply with the windstorm building code. An engineer certifying a structure may review a manufacturer's data and drawings to determine whether using the product is consistent with what the windstorm code requires for that structure.

Comment: One commenter supports adopting the 2018 *IBC* and *IRC* building codes, but requests that TDI specifically exclude the 2018 *International Existing Building Code (IEBC)* from the adoption. The commenter states that some engineering companies working for insurance companies and local governments have argued that the *IEBC* applies to the repair of existing buildings.

Agency Response: TDI declines to make the change. TDI adopts the 2018 editions of the *IBC* and *IRC*, both of which reference the *IEBC*.

Section 101.4.7 of the 2018 *IBC* states that "The provisions of the *International Existing Building Code* shall apply to matters governing the repair, alteration, change of occupancy, addition to and relocation of existing buildings."

Section R110.2 of the 2018 *IRC* requires applying the *IEBC* to construction that changes the character or use of an existing structure. In addition, the *IRC* requires wind design in certain areas, and Section R301.2.1.1 requires an engineer to choose from among five standards for wind design. One of those five standards, the *IBC*, requires applying the *IEBC*.

Carving the *IEBC* out from the adopted *IRC* would revise the *IRC* and limit engineers' options for complying with the wind design provisions in the *IRC*. TDI is adopting the 2018 *IBC* and *IRC* without revisions.

Comment: One commenter suggests TDI adopt the 2015 *IBC* and *IRC* because many jurisdictions have adopted these already. The commenter suggests that the rule allow for the 2015 *IBC* and *IRC* in addition to the 2018 *IBC* and *IRC*.

Agency Response: TDI declines to make the change. It is reasonable to adopt the most recent editions of the *IBC* and *IRC* and adopting a single year's editions will reduce confusion. Adopting the 2018 editions ensures that the codes adopted include the most recent advances in technology and greater understanding of wind engineering. However, TDI notes that in many instances the changes from the current 2006 editions of the *IBC* and *IRC* to either the 2015 or 2018 editions will be similar.

In addition, adopting the 2018 editions complies with federal recommendations and enables Texas to qualify for federal funds. The FEMA Harvey Mitigation report recommends that TDI adopt the 2018 *IBC* and *IRC* codes. The Federal Bipartisan Budget Act of 2018 included the Federal Cost Share Reform Incentive, which encourages states to adopt the latest building codes among other incentives. The Federal Cost Share Reform Incentive allows post-disaster federal cost-share with states to increase from 75 percent to 85 percent on a sliding scale based on several factors, including the adoption and enforcement of the latest building codes. By adopting the 2018 editions of the codes, Texas can qualify for more assistance from the federal government in post-disaster recovery funding. For these reasons, TDI adopts the 2018 *IBC* and *IRC* codes for the windstorm inspection program.

Comment: One commenter suggests that in §5.4012, the reference to "three-second gust wind speed" be changed to "ultimate design wind speed" as used by the 2018 *IBC* and *IRC* codes.

Agency Response: In response to another comment, TDI has removed the text in §5.4012 that refers to "three second-gust wind speed." However, the term will continue to appear on the forms TDI makes available to appointed qualified inspectors and engineers. The term is still appropriate because it is used in the 2016 edition of the *American Society of Civil Engineers Minimum Design Loads and Associated Criteria for Buildings and Other Structures*, which is referenced in the 2018 *IBC* and *IRC*.

Comment: One commenter requests that §5.4012, which applies to construction begun on or after April 1, 2020, be rewritten so that the Seaward, Inland I, and Inland II zones do not each require a single wind speed for each risk category in the zone. The commenter states that as proposed, §5.4012 revises the 2018 *IRC*'s wind speed requirements. The commenter states that the wind speeds in proposed §5.4012 would trigger the requirement for windborne debris protection in areas where the 2018 *IRC* would not, and vice versa.

Agency Response: TDI has made the suggested change to §5.4012. Structures in the catastrophe area must be constructed in accordance with the wind provisions in the 2018

IBC and *IRC*. Appointed qualified inspectors and engineers must use the applicable wind speed according to the *IBC* or *IRC* at each site. Web resources and software applications are available to determine the applicable wind speed based on the longitude and latitude or address of a construction site.

DIVISION 1. PLAN OF OPERATION

28 TAC §5.4011, §5.4012

STATUTORY AUTHORITY. TDI adopts amended §5.4011 and new §5.4012 under Insurance Code §§2210.008, 2210.251, 2210.252, and 36.001.

Insurance Code §2210.008(b) authorizes the Commissioner to adopt reasonable and necessary rules to implement Insurance Code Chapter 2210.

Insurance Code §2210.251(b) states that for geographic areas specified by the Commissioner, the Commissioner must adopt by rule the 2003 *International Residential Code* and may adopt subsequent editions of that code and amendments to that code.

Insurance Code §2210.252 provides that the Commissioner by rule may adopt an edition of the *International Residential Code* and a supplement published by the International Code Council or an amendment to that code.

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.

§5.4011. *Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After January 1, 2008, and before April 1, 2020.*

(a) To be eligible for catastrophe property insurance, structures located in the designated catastrophe areas specified in §5.4008 of this title (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After September 1, 1998, and before February 1, 2003) and which are constructed, repaired, or to which additions are made on and after January 1, 2008, and before April 1, 2020, must comply with the 2006 Editions of the International Residential Code and the International Building Code, as each is revised by the 2006 Texas Revisions, and all of which are adopted by reference to be effective January 1, 2008. The codes are published by and available from the International Code Council, Publications, 4051 West Flossmoor Road, Country Club Hills, Illinois, 60478-5795, (Telephone: 888-422-7233), and the 2006 Texas Revisions to the 2006 Edition of the International Residential Code and the 2006 Texas Revisions to the 2006 Edition of the International Building Code are available from the Windstorm Inspections Section of the Inspections Division, Texas Department of Insurance, 333 Guadalupe, P.O. Box 149104, MC 104-INS, Austin, Texas, 78714-9104 and on the Texas Department of Insurance website at www.tdi.texas.gov. The following wind speed requirements must apply:

(1) Areas seaward of the intracoastal canal. To be eligible for catastrophe property insurance, structures located in designated catastrophe areas which are seaward of the intracoastal canal and constructed, repaired, or to which additions are made on or after January 1, 2008, and before April 1, 2020, must be designed and constructed to resist a 3-second gust of 130 miles per hour.

(2) Areas inland of the intracoastal canal and within approximately 25 miles of the Texas coastline and east of the specified boundary line and certain areas in Harris County. To be eligible for catastrophe property insurance, structures located in designated catas-

trophe areas specified in §5.4008(b)(2)(A) and (B) of this title (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After September 1, 1998, and before February 1, 2003) and constructed, repaired, or to which additions are made on or after January 1, 2008, and before April 1, 2020, must be designed and constructed to resist a 3-second gust of 120 miles per hour.

(3) Areas inland and west of the specified boundary line. To be eligible for catastrophe property insurance, structures located in designated catastrophe areas specified in §5.4008(c) of this title (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After September 1, 1998, and before February 1, 2003) and constructed, repaired, or to which additions are made on or after January 1, 2008, and before April 1, 2020, must be designed and constructed to resist a 3-second gust of 110 miles per hour.

(b) Repairs, alterations and additions necessary for the preservation, restoration, rehabilitation or continued use of a historic structure may be made without conformance to the requirements of subsection (a) of this section. In order for a historic structure to be exempted, at least one of the following conditions must be met:

(1) The structure is listed or is eligible for listing on the National Register of Historic places.

(2) The structure is a Recorded Texas Historic Landmark (RTHL).

(3) The structure has been specifically designated by official action of a legally constituted municipal or county authority as having special historical or architectural significance, is at least 50 years old and is subject to the municipal or county requirements relative to construction, alteration, or repair of the structure, in order to maintain its historical designation.

§5.4012. *Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired, or to Which Additions Are Made on or after April 1, 2020.*

(a) To be eligible for catastrophe property insurance, structures located in the designated catastrophe areas specified in paragraphs (1), (2), and (3) of this subsection that are constructed, repaired, or to which additions are made on or after April 1, 2020, must comply with the 2018 editions of the *International Residential Code* and the *International Building Code*, which are adopted by reference and applicable beginning April 1, 2020. The codes are published by and available from the International Code Council at iccsafe.org or by calling toll-free 1-888-422-7233. The designated catastrophe areas are:

(1) Areas seaward of the intracoastal canal;

(2) Areas inland of the intracoastal canal and within approximately 25 miles of the Texas coastline and east of the specified boundary line and certain areas in Harris County as described in §5.4008(b)(2)(A) and (B) of this title; and

(3) Areas inland and west of the specified boundary line as described in §5.4008(c) of this title.

(b) Repairs, alterations, and additions necessary for the preservation, restoration, rehabilitation, or continued use of a historic structure may be made without conformance to the requirements of subsection (a) of this section. For a historic structure to be exempted, at least one of the following conditions must apply to the structure:

(1) The structure is listed or is eligible for listing on the National Register of Historic Places.

(2) The structure is a Recorded Texas Historic Landmark by the Texas Historical Commission.

(3) The structure has been designated by official action of a legally constituted municipal or county authority as having special historical or architectural significance, is at least 50 years old, and is subject to the municipal or county requirements relative to construction, alteration, or repair of the structure to maintain its historical designation.

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 March 9, 2020.

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James Person

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



DIVISION 7. INSPECTIONS FOR WINDSTORM AND HAIL INSURANCE

28 TAC §§5.4601, 5.4603, 5.4621, 5.4622, 5.4642

STATUTORY AUTHORITY. TDI adopts amended §§5.4601, 5.4603, 5.4621, 5.4622, and 5.4642 under Insurance Code §§2210.008, 2210.251, 2210.2515, 2210.252, and 36.001.

Insurance Code §2210.008(b) authorizes the Commissioner to adopt reasonable and necessary rules to implement Insurance Code Chapter 2210.

Insurance Code §2210.251(b) states that for geographic areas specified by the Commissioner, the Commissioner must adopt by rule the 2003 *International Residential Code* and may adopt subsequent editions of that code and amendments to that code.

Insurance Code §2210.2515 gives TDI the authority to prescribe forms on which a person may apply for a certificate of compliance.

Insurance Code §2210.252 provides that the Commissioner by rule may adopt an edition of the *International Residential Code* and a supplement published by the International Code Council or an amendment to that code.

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.

§5.4601. *Definitions.*

The following definitions apply to this subchapter:

(1) Applicant--A person who submits a new or renewal application for appointment as an appointed qualified inspector.

(2) Appointed qualified inspector--An engineer licensed by the Texas Board of Professional Engineers and appointed by TDI as a qualified inspector under Insurance Code §2210.254(a)(2).

(3) Appointed qualified inspector number--A number TDI assigns to each appointed qualified inspector.

(4) Constructed or construction--The act of building or erecting a structure or repairing (including reroofing), altering, remodeling, or enlarging an existing structure.

(5) Completed improvement--

(A) An improvement in which the original transfer of title from the builder to the initial owner of the improvement has occurred; or

(B) if a transfer under subparagraph (A) of this paragraph is not contemplated, an improvement that is substantially completed.

(6) Improvement--The construction of or repair (including reroofing), alteration, remodeling, or enlargement of a structure to which the plan of operation applies.

(7) Ongoing improvement--

(A) An improvement in which the original transfer of title from the builder to the initial owner of the improvement has not occurred; or

(B) if a transfer under subparagraph (A) of this paragraph is not contemplated, an improvement that is not substantially completed.

(8) Substantially completed--An improvement for which the final framing stage, including attachment of component and cladding items and installation of windborne debris protection, has been completed. If the improvement's windborne debris protection consists of wood structural panels, all the panels must be present at the improvement's location but need not be installed.

(9) TDI inspector--A qualified inspector authorized under Insurance Code §2210.254(a)(1) and employed by TDI.

(10) TDI--The Texas Department of Insurance.

(11) Texas Board of Professional Engineers and Land Surveyors, Texas Board of Professional Engineers, or TBPE--House Bill 1523, 86th Legislature, Regular Session, 2019, abolished the Texas Board of Professional Land Surveying and transferred its functions to the renamed Texas Board of Professional Engineers and Land Surveyors, effective September 1, 2019. All references to the Texas Board of Professional Engineers or the TBPE in this division are references to the Texas Board of Professional Engineers and Land Surveyors.

(12) Association--The Texas Windstorm Insurance Association.

(13) Windstorm building code standards--The requirements for building construction in §§5.4007 - 5.4012 of this title (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made Prior to September 1, 1998; Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After September 1, 1998, and before February 1, 2003; Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After February 1, 2003 and before January 1, 2005; Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After January 1, 2005, and before January 1, 2008; Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After January 1, 2008, and before April 1, 2020; and Applicable Building Code Standards in Designated Catastrophe Areas for Structures Con-

structed, Repaired, or to Which Additions Are Made on or after April 1, 2020; respectively).

§5.4603. *Windstorm Inspection Forms.*

(a) Inspection Verification, Form WPI-2-BC-6. TDI adopts by reference the Inspection Verification, Form WPI-2-BC-6, effective January 1, 2017, for use in windstorm inspection, for structures constructed, repaired, or to which additions are made on and after January 1, 2008, and before April 1, 2020.

(b) Application, inspection, and renewal forms. TDI will make available the following forms on its website:

(1) Application for Appointment as a Qualified Inspector, Form AQI-1, effective January 1, 2017;

(2) Renewal Application for Appointment as a Qualified Inspector, Form AQI-R, effective January 1, 2017;

(3) Application for Certificate of Compliance for Ongoing Improvement, Form WPI-1, January 1, 2017;

(4) Application Form for Certificate of Compliance (WPI-8) for Completed Improvement, effective April 1, 2020; and

(5) Inspection Verification, Form WPI-2, effective April 1, 2020, for structures constructed, repaired, or to which additions are made on and after April 1, 2020.

(c) TDI inspection and certification forms. When appropriate, TDI will issue the following forms:

(1) Field Form, Form WPI-7, effective April 1, 2020; and

(2) Certificate of Compliance for Ongoing Improvement, Form WPI-8, effective January 1, 2017.

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

Filed with the Office of the Secretary of State on March 9, 2020.

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James Person

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



CHAPTER 9. TITLE INSURANCE

SUBCHAPTER C. TEXAS TITLE INSURANCE STATISTICAL PLAN

28 TAC §9.401

The Commissioner of Insurance adopts an amendment to 28 TAC §9.401, relating to the Texas Title Insurance Statistical Plan (Statistical Plan). This rule adoption ensures that the Statistical Plan can record all the necessary business transactions in the title industry to set title insurance rates, as required by Insurance Code §2703.153. The amendment is adopted with changes to the proposed text as published in the December 6, 2019, issue of the *Texas Register* (44 TexReg 7486). The rule will be republished. TDI has changed the proposed effective date of January 1, 2020, to April 1, 2020.

REASONED JUSTIFICATION. TDI amends §9.401 to address changes made to title insurance rate rules on June 11, 2019, by Commissioner's Order No. 2019-5980. The Order adopted revisions proposed by the Texas Land Title Association (TLTA) to the rates and rate rules in the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

TDI must amend the Statistical Plan to add codes that track the changes to the rate rules made by Commissioner's Order No. 2019-5980. These new codes will enable title insurance agents and companies to accurately report data as a result of the new rate rules. This data is used by the Commissioner to set future title insurance rates. Insurance Code §2703.153(h) requires that any change to the Statistical Plan be established in a rulemaking hearing under Government Code Chapter 2001, Subchapter B. TDI held a hearing in Docket No. 2828 on December 19, 2019, that was attended by representatives of the TLTA. There were no comments at the hearing.

Commissioner's Order No. 2019-5980 amended Rate Rule R-5, *Simultaneous Issuance of Owner's and Loan Policies*; and Rate Rule R-8, *Mortgagee Policy, on a Loan to Take Up, Renew, Extend or Satisfy an Existing Lien(s)*. Because the Statistical Plan does not have the appropriate codes for these changes, this adoption is necessary to add them and ensure that the Statistical Plan meets the data collection standards required by Insurance Code §2703.153.

The change to Rate Rule R-5 allowed cash purchasers of property valued at \$5 million or more to have up to 90 days to finance the property and not have to pay the full basic rate for the loan policy. Although a simultaneous rate credit existed before, the rule did not allow 90 days to obtain the credit. The Statistical Plan will now have code number 3211 for tracking this transaction. The change to Rate Rule R-8 extends the number of years a discount is available to a consumer who renews a loan policy from seven to eight years after the original policy was issued. The Statistical Plan will now have code number 4008 to account for these renewals.

As proposed, the revision to §9.401 included an effective date of January 1, 2020, for the adoption by reference of the rules in the Texas Title Insurance Statistical Plan. However, because the date included in the proposal has passed, TDI has revised the amendment to §9.401 to make the adoption by reference effective April 1, 2020.

SUMMARY OF COMMENTS. TDI did not receive any comments on the proposed amendment.

STATUTORY AUTHORITY. TDI adopts the amendment to 28 TAC §9.401 under Insurance Code §2703.153 and §36.001.

Insurance Code §2703.153 requires title insurance companies and agents to submit data to TDI for use in fixing premium rates, and it provides that the Commissioner must regularly evaluate the collected information to determine whether additional or different information is needed. The contents of the statistical report used to collect data, including amendments to the report, must be established in a rulemaking hearing under Government Code, Chapter 2001, Subchapter B.

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.

§9.401. *Texas Title Insurance Statistical Plan.*

The Texas Department of Insurance adopts by reference the rules in the Texas Title Insurance Statistical Plan as amended effective April 1, 2020. This document is published by and is available from the Texas Department of Insurance, Mail Code 105-5D, P.O. Box 149014, Austin, Texas 78714-9104. This document is also available on the TDI website at www.tdi.texas.gov.

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 March 5, 2020.

TRD-202001001

James Person

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§115.10, 115.111, 115.112, 115.119, and 115.421.

Section 115.111 and §115.119 are adopted *with changes* to the proposed text as published in the September 27, 2019, issues of the *Texas Register* (44 TexReg 5564) and will be republished. Sections 115.10, 115.112, and 115.421 are adopted *without changes* to the proposed text and will not be republished.

The amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

The Federal Clean Air Act (FCAA) requires states to submit plans to demonstrate attainment of the National Ambient Air Quality Standards (NAAQS) for ozone nonattainment areas with a classification of moderate or higher. The Dallas-Fort Worth (DFW) 2008 eight-hour ozone nonattainment area, consisting of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties, was classified as a moderate nonattainment area for the 2008 eight-hour ozone NAAQS of 0.075 parts per million with a July 20, 2018 attainment date. Based on 2017 monitoring data, the DFW area did not attain the 2008 eight-hour ozone NAAQS and did not qualify for a one-year attainment date extension in accordance with the FCAA, §181(a)(5). On August 23, 2019, the EPA published final notice reclassifying the DFW and Houston-Galveston-Brazoria (HGB) nonattainment areas from moderate to serious for the 2008 eight-hour ozone NAAQS, effective September 23, 2019 (84 FR 44238, August 23, 2019).

With the final reclassification to serious nonattainment, the state is required to submit a SIP revision to fulfill the volatile organic compounds (VOC) reasonably available control technology (RACT) requirements mandated by FCAA, §172(c)(1) and §182(b)(2). Although the eight-county HGB area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties) was also reclassified to serious nonattainment for the 2008 eight-hour ozone NAAQS, the commission determined that RACT is in place for all emission source categories in the HGB area; therefore, there are no changes in this adopted rulemaking that affect RACT in the HGB area.

The EPA's *Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements; Final Rule*, published in the *Federal Register* on March 6, 2015, (80 FR 12264), specifies an attainment date of July 20, 2021, for serious nonattainment areas. FCAA, §172(c)(1) requires the state to submit a SIP revision that incorporates all reasonably available control measures, including RACT, for sources of relevant pollutants. FCAA, §182(b)(2) requires the state to submit a SIP revision that implements RACT for all emission sources addressed in Control Techniques Guideline (CTG) and all non-CTG major sources of VOC, including emission sources covered in an Alternative Control Technology (ACT) document. The EPA defines RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53761, September 17, 1979).

Depending on the classification of an area designated nonattainment for a NAAQS, the major source threshold that determines what sources are subject to RACT requirements varies. Under the 1997 eight-hour ozone NAAQS, the DFW area consisted of nine counties (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties) and was classified as a serious nonattainment area. The EPA's implementation rule for the 2008 eight-hour ozone NAAQS requires retaining the most stringent major source emission threshold for sources in an area to prevent backsliding (80 FR 12264). For this reason, the major source emission threshold for those nine counties remains at the level required for serious nonattainment areas, which is actual VOC emissions or the potential to emit (PTE) VOC emissions of 50 tons per year (tpy). Wise County was not part of the DFW 1997 eight-hour ozone NAAQS nonattainment area but was included as part of the DFW 2008 eight-hour ozone NAAQS nonattainment area; therefore, the major source threshold for Wise County was based on a classification of moderate nonattainment under the 2008 standard, which is actual VOC emissions or the PTE VOC emissions of 100 tpy. With the reclassification of the DFW area to serious nonattainment under the 2008 eight-hour ozone NAAQS, the major source emission threshold for all 10 counties, including Wise County, is actual VOC emissions or the PTE of 50 tpy of VOC emissions. The adopted rulemaking implements RACT in Wise County to reflect this change in the threshold for major sources in Wise County.

The adopted rulemaking revises Chapter 115, Subchapter B, Division 1, Storage of Volatile Organic Compounds, to implement VOC RACT for major source fixed roof oil and condensate storage tanks in Wise County. A previous DFW VOC RACT rulemaking (Rule Project Number 2013-048-115-AI, 40 TexReg 3907, June 19, 2015) addressed CTG RACT for this source category. The adopted revisions address major source storage tanks in Wise County by requiring fixed roof oil and condensate tanks with at least 50 tpy of uncontrolled actual VOC emissions from

flashed gasses to operate a control device achieving at least 95% efficiency. In addition, these newly affected storage tanks are required to comply with associated inspection, repair, testing, and recordkeeping requirements. The commission anticipates most potentially affected tank batteries to have controls. Insignificant emissions reductions are anticipated from this rulemaking. RACT requirements must be complied with by no later than the attainment date for the DFW serious nonattainment area, July 20, 2021. The adopted amendments ensure that FCAA VOC RACT is in place for the DFW area. The commission invited comment on the technological and economic feasibility of the proposed RACT rule revisions in Chapter 115, Subchapter B, Division 1. One comment was received from EPA regarding RACT for VOC storage tanks in the HGB area. The comment is addressed in the Response to Comments section of this preamble.

The commission is not adopting amendments to implement RACT for other emission source categories based on a determination, after analyzing the point source emissions inventory, Title V permits, new source review permits, and central registry databases, that there would be no other affected sources that would meet the rule applicability or that would be affected by the rule requirements. As part of this rulemaking, the commission is adopting technical revisions intended to correct inadvertent errors in Chapter 115, Subchapter E, Division 2, Surface Coating Processes, made during a previous RACT rulemaking (Rule Project Number 2013-048-115-AI), to ensure consistency with the agency's intent. The adopted technical corrections to §115.421 clarify the language used in the emission specifications tables for surface coating processes. Non-substantive revisions are also adopted as part of this rulemaking that remove obsolete language within the sections of the chapter that are open for this rulemaking. The commission has determined that the adopted revisions do not negatively affect the status of the state's progress towards attainment with the ozone NAAQS, do not interfere with control measures, and do not prevent reasonable further progress toward attainment of the ozone NAAQS, as required in FCAA, §110(l).

Section by Section Discussion

Although the purpose of this rulemaking is to implement RACT for the DFW 2008 eight-hour ozone nonattainment area, the commission is also revising portions of the rules to make technical corrections to surface coating emission specifications. These technical corrections clarify the rules to be consistent with the agency's original intent. The specific changes are discussed in greater detail in this Section by Section Discussion in the corresponding portions related to the affected rule sections. The commission requested comment on any instance in which the technical corrections would not achieve the commission's intended original intent of the rule, but none were received pertaining to this matter

Subchapter A, Definitions

§115.10, Definitions

The adopted rulemaking amends §115.10(10) to remove obsolete language concerning Wise County's inclusion in the list of attainment counties. The language indicating that, beginning January 1, 2017, Wise County would no longer be considered a covered attainment county is no longer necessary since that date has passed and Wise County is included in the definition for the DFW area in §115.10(11). The commission also adopts removal from the §115.10(10) definition the language concerning Wise County's nonattainment designation for the

2008 eight-hour ozone NAAQS no longer being legally effective upon the commission publishing notice in the *Texas Register*. The litigation concerning Wise County's attainment status is complete, and Wise County remains designated nonattainment for the 2008 eight-hour ozone NAAQS. The removal of this language allows for greater clarity in the definitions and removes any doubt concerning the nonattainment status of Wise County.

The adopted rulemaking amends §115.10(11)(C) to remove obsolete language concerning the removal of Wise County from the definition of the DFW area. Wise County is a part of the DFW area and is included in the definition of the area along with Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties. The commission adopts the removal of the language in paragraph (11)(C) stating that Wise County is no longer included in the definition of the DFW area upon publication in the *Texas Register* by the commission that the nonattainment designation for the 2008 eight-hour ozone NAAQS for Wise County is no longer legally effective. As with the language in paragraph (10), the litigation concerning Wise County's attainment status is complete, and the commission adopts the removal of this language.

Subchapter B, General Volatile Organic Compound Sources

Division 1, Storage of Volatile Organic Compounds

The adopted rulemaking amends Chapter 115, Subchapter B, Division 1, to implement RACT requirements for the DFW area under the 2008 eight-hour ozone NAAQS. These adopted amendments lower the major source threshold for Wise County to 50 tpy of uncontrolled flash emissions for fixed roof oil and condensate storage tanks to be consistent with the major source threshold for a serious nonattainment area. The other counties in the DFW area are currently subject to a 50 tpy major source threshold due to a serious nonattainment classification under the 1997 eight-hour ozone NAAQS. The adopted rulemaking updates exemptions, control requirements, and compliance schedules in Subchapter B, Division 1 as well as makes any necessary edits and corrections to outdated or incorrect language. Although no changes are adopted for the inspection and repair requirements in §115.114, the requirements in §115.114(a)(5) reference the flash gas provisions in §115.112(e) and apply to the storage tanks newly affected by this adopted rulemaking.

§115.111, Exemptions

The commission adopts the amended exemptions under §115.111(a)(13) to change the condensate throughput limit required for an exemption for a storage tank or tank battery in Wise County storing condensate prior to custody transfer. If an owner or operator qualifies for this exemption, routing flashed gasses to a vapor control system for fixed roof tanks or aggregate of tanks in a tank battery is not required. The throughput limit required for an exemption is lowered from 6,000 barrels (252,000 gallons) to 3,000 barrels (126,000 gallons) of condensate throughput per year on a rolling 12-month basis beginning July 20, 2021, the date specified in §115.119(f) of the compliance schedule. The adopted amendment to this rule also states that, on or after July 20, 2021, the owner or operator of a storage tank or tank battery that exceeds the new 3,000-barrel throughput limit may be exempt from the requirements in §115.112(e)(4)(C)(ii). This exemption may be granted only if the owner or operator demonstrates, using the test methods found in §115.117, that the uncontrolled VOC emissions are less than 50 tpy on a rolling 12-month basis. The amendment to this exemption is needed to reflect the new major source threshold

for sources required to implement RACT in Wise County. This new limit ensures that RACT is in place for storage tanks storing condensate in Wise County consistent with the RACT requirements for the other nine DFW area counties covered under the exemption in subsection (a)(10). The commission adopts changes to the proposal for this section by removing the proposed language within §115.111(a)(12) and including it in adopted §115.111(a)(13) for better clarity.

§115.112, Control Requirements

The commission adopts the amended control requirements under §115.112(e)(4)(C) and (5)(C). This amendment is needed to update the control requirements for VOC storage tanks to implement RACT in Wise County as part of the DFW serious ozone nonattainment area. The other nine counties in the DFW area are currently subject to major source RACT requirements due to a previous serious nonattainment classification under the 1997 eight-hour ozone NAAQS. This adopted amendment establishes a new, lower major source threshold for fixed roof oil and condensate VOC storage tanks in Wise County and ensures RACT is in place, as required under FCAA, §182(b).

The adopted amendment to §115.112(e)(4)(C) creates clauses (i) and (ii). The adopted clauses accommodate the transition from the current threshold of 6,000 barrels (252,000 gallons) per year on a rolling 12-month basis to the new threshold of 3,000 barrels (126,000 gallons) per year on a rolling 12-month basis on July 20, 2021. The addition of §115.112(e)(4)(C)(i) maintains the current standard for fixed roof tanks storing condensate and requires that flashed gases be routed to a vapor control system if the condensate throughput of an individual tank or the aggregate of tanks in a tank battery exceeds 6,000 barrels per year on a rolling 12-month basis. This clause applies only until the proposed July 20, 2021 compliance deadline, which is found under §115.119(f) in the compliance schedules and is the deadline for the RACT requirements adopted in this rulemaking. Accordingly, the addition of §115.112(e)(4)(C)(ii) sets the new standard for fixed roof tanks storing condensate and requires that flashed gases be routed to a vapor control system if the condensate throughput of an individual tank or the aggregate of tanks in a tank battery exceeds 3,000 barrels per year on a rolling 12-month basis. This clause applies beginning on the date specified in §115.119(f), or July 20, 2021, and ensures RACT is in place for major sources in Wise County. The commission is using 6,000 barrels and 3,000 barrels per year thresholds because this equates to 100 tons and 50 tons of VOC emissions per year, respectively, using the 33.3 pound per barrel emission factor.

The adopted amendment to §115.112(e)(5)(C) creates clauses (i) and (ii). The clauses accommodate the transition from the current threshold of 100 tpy condensate throughput per year on a rolling 12-month basis to the new threshold of 50 tpy condensate on a rolling 12-month basis on July 20, 2021. Specifically, §115.112(e)(5)(C)(i) indicates that, for a fixed roof storage tank storing oil or condensate, flashed gases must be routed to a vapor control system if the uncontrolled VOC emissions from an individual storage tank, from the aggregate of storage tanks in a tank battery, or from the aggregate of the storage tanks at a pipeline breakout station equal or exceed 100 tpy on a rolling 12-month basis. This clause applies only until the July 20, 2021 compliance deadline, which is found in the compliance schedules under adopted §115.119(f) and is the deadline for the RACT requirements adopted in this rulemaking. Section 115.112(e)(5)(C)(ii) indicates that, for a fixed roof storage tank

storing oil or condensate, flashed gases must be routed to a vapor control system if the uncontrolled VOC emissions from an individual storage tank, from the aggregate of storage tanks in a tank battery, or from the aggregate of the storage tanks at a pipeline breakout station equal or exceed 50 tpy. This adopted clause applies beginning on the date specified in adopted §115.119(f), or July 20, 2021, and ensures RACT is in place for major sources in Wise County.

§115.119, Compliance Schedules

The commission is amending compliance schedules found in existing §115.119(f) for Wise County. This adopted amendment specifies that in Wise County, the owner or operator of each VOC storage tank is required to be in compliance with the division by January 1, 2017, which was the compliance date associated with the previous RACT rulemaking (Rule Project Number 2013-048-115-AI). Adopted subsection (f) further specifies that owners or operators must comply with the updated exemption in §115.111(a)(13) and updated control requirements in §115.112(e)(4)(C)(ii) and (5)(C)(ii) no later than July 20, 2021, which is the attainment date for the DFW serious nonattainment area. The commission adopts changes to the proposed rule language for this section in order to comply with corrections made to §115.111. In addition, the proposed changes to subsection (f) included incorrect cross references to the two new provisions in §115.112. The commission adopts corrections to the proposed rule language to correctly reference §115.112(e)(4)(C)(ii) and (5)(C)(ii).

Subchapter E, Solvent-Using Processes

Division 2, Surface Coating Processes

§115.421, Emission Specifications

The commission adopts the amended table in §115.421(8)(A), to add the phrase "Minus Water and Exempt Solvent" to the "Coating Type" column heading, making this concept applicable to each of the surface coating types listed for regulation. The commission also adopts the amended table in §115.421(8)(A) to correct an inadvertent error made to the emission limits applicable to the surface coating of miscellaneous metal parts and products during a previous Chapter 115 VOC RACT rulemaking (Rule Project Number 2013-048-115-AI). As a result of that rulemaking, the contents of §115.421 were significantly reformatted to improve readability and enhance the clarity of that rule. Part of the reformat was transferring the four miscellaneous metal parts and products surface coating emission limits from a list to a table. The accompanying preamble discussion indicated that only changes to formatting were made and that no substantive changes to the requirements for this coating category were intended to be made. Prior to this adopted format change, determining compliance with the coating emission limits was on a pounds of VOC per gallon of coating, minus water and exempt solvent, basis. The adopted change adds the text "Minus Water and Exempt Solvent" to ensure the intent of this rule requirement is upheld. The existing miscellaneous metal parts and products emission specifications apply to affected surface coatiers in the Beaumont-Port Arthur area, El Paso area, and Gregg, Nueces, and Victoria Counties, and in limited situations in the DFW and HGB areas. Most miscellaneous metal parts and products surface coatiers in the DFW and HGB areas affected by the Chapter 115 rules are subject to the rules in Chapter 115, Subchapter E, Division 5. Because this change is to correct a previous error, no practical or RACT impact is expected to result from this rule clarification.

The commission adopts amendments to the table in §115.421(12), to remove the phrase "Minus Water and Exempt Solvent" from the heading of the "Coating Type" column and place it beside each of the coating types listed, except for the wipe-down solutions category. Similar to the miscellaneous metal parts and products surface coating requirements, the commission adopts the amended table in §115.421(12) to correct an inadvertent error made to the vehicle refinishing wipe-down solution emission specification made during a previous Chapter 115 VOC RACT rulemaking (Rule Project Number 2013-048-115-AI). Part of the reformat was transferring all the vehicle refinishing surface coating emission limits from a list to a table. The accompanying preamble discussion indicated that only changes to formatting would be made and that no substantive changes to the requirements for this coating category were intended to be made. Prior to this adopted format change, determining compliance with the wipe-down solution emission limit was on a pound of VOC per gallon of solution basis, evidenced by the omission of "excluding water and exempt solvent." While all the other surface coating types regulated under the vehicle refinishing category are calculated without the inclusion of water and exempt solvent, wipe-down solutions should be calculated with water and exempt solvent included. However, the table currently requires compliance on a pound of VOC per gallon of solution basis, excluding water and exempt solvent. The adopted change adds the text "minus water and exempt solvent" to all coating categories listed in the table except the wipe-down solution category to ensure the intent of this particular rule requirement is upheld. The existing vehicle refinishing emission specifications apply to affected surface coatiers in the HGB and El Paso areas in addition to the DFW area. Because this change corrects a previous error, no practical or RACT impact is expected to result from this rule clarification.

Final Regulatory Impact Analysis Determination

The commission reviewed the amendments in light of the Regulatory Impact Analysis (RIA) requirements of Texas Government Code, §2001.0225, and determined that the amendments do not meet the definition of a "Major environmental rule" as defined in that statute, and in addition, if they did meet the definition, would not be subject to the requirement to prepare an RIA.

A "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted rulemaking is to revise Chapter 115, Subchapter B, Division 1, to update the approved RACT requirements in the DFW 2008 eight-hour ozone nonattainment area. These adopted requirements lower the major source threshold for Wise County to 50 tpy of actual uncontrolled flash emissions for fixed roof oil and condensate storage tanks to be consistent with the major source threshold for a serious nonattainment area. Generally, the commission expects the requirements to place minimal burden on affected owners and operators and that the compliance date provides an adequate amount of time for these owners and operators to make all necessary installations and adjustments for compliance purposes.

The commission also adopts changes to two tables in Chapter 115, Subchapter E, Division 2, to correct inadvertent errors made to the emission limits applicable to the surface coating of mis-

cellaneous metal parts and products and to vehicle refinishing wipe-down solution emission specifications. These errors were made during a previous Chapter 115 VOC RACT rulemaking (Rule Project Number 2013-048-115-AI). During that rulemaking, the contents of these tables were significantly reformatted to improve readability and enhance the clarity of the rule. The accompanying preamble discussion indicated that only changes to formatting were being made and that no substantive changes to the requirements for these categories were intended to be made. The changes adopted with this rulemaking ensure the intent of the rule requirement is upheld. These emission specifications apply to affected surface coaters in the Beaumont-Port Arthur area, El Paso area, and Gregg, Nueces, and Victoria Counties and in limited situations in the DFW and HGB areas. Because this change is to correct a previous error, no practical or RACT impact is expected to result from this rule clarification.

As discussed in the Fiscal Note: Costs to State and Local Government section of the proposed preamble, the adopted rulemaking is not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards on the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Additionally, this rulemaking does not meet any of the four applicability criteria for requiring an RIA for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking updates RACT requirements for crude oil and condensate storage tanks in the DFW area and corrects errors in two tables for requirements for specific surface coating types and wipe-down solution types listed for regulation in the tables.

The FCAA requires states to submit plans to demonstrate attainment of the NAAQS for nonattainment areas with a classification of moderate or higher. The DFW 2008 eight-hour ozone moderate nonattainment area failed to attain the 2008 standard by the July 20, 2018 attainment date for moderate areas and did not qualify for a one-year attainment date extension in accordance with the FCAA, §181(a)(5). On August 23, 2019, the EPA published final notice reclassifying the DFW and HGB nonattainment areas from moderate to serious for the 2008 eight-hour ozone NAAQS, effective September 23, 2019 (84 FR 44238, August 23, 2019). With the final reclassification to serious nonattainment, the state is required to submit a SIP revision to fulfill the VOC RACT requirements mandated by FCAA, §172(c)(1) and §182(b)(2). This includes a SIP revision that implements RACT for all emission sources addressed in a CTG and all non-CTG major sources of VOC, including emission sources covered in an ACT document.

Depending on the classification of an area designated nonattainment for an ozone NAAQS, the major source threshold that determines what sources are subject to RACT requirements varies. The EPA's implementation rule for the 2008 eight-hour ozone

NAAQS requires retaining the most stringent major source emission threshold level for sources in an area to prevent backsliding (80 FR 12264). For these reasons, the nine DFW area counties that were designated nonattainment under the 1997 eight-hour ozone NAAQS and classified as serious (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties) retain the major source emission threshold of a PTE of 50 tpy of VOC. Wise County, which was first designated nonattainment under the 2008 eight-hour ozone NAAQS, is currently subject to a major source threshold for moderate nonattainment areas, or actual VOC emissions or a PTE of 100 tpy of VOC. With the reclassification of the 10-county DFW 2008 eight-hour ozone NAAQS nonattainment area from moderate to serious, the major source emission threshold for Wise County lowered to the actual VOC emissions or the PTE of 50 tpy of VOC. This adopted rulemaking implements RACT in Wise County to reflect this change in the major source threshold for Wise County.

The adopted rulemaking revises Chapter 115, Subchapter B, Division 1, to implement VOC RACT for major source fixed roof oil and condensate storage tanks in Wise County. A previous DFW VOC RACT rulemaking (Rule Project Number 2013-048-115-AI) addressed CTG RACT for this source category. This adopted rulemaking addresses major source storage tanks in Wise County by requiring fixed roof oil and condensate tanks with at least 50 tpy of actual uncontrolled VOC emissions from flashed gasses to operate a control device achieving at least 95% efficiency. In addition, these newly affected storage tanks are required to comply with associated inspection, repair, testing, and recordkeeping requirements. Compliance with RACT requirements must be achieved by no later than July 20, 2021. The adopted rule amendments ensure that the FCAA mandates for VOC RACT are in place for all counties in the DFW eight-hour ozone nonattainment area for the 2008 eight-hour ozone NAAQS.

The adopted rulemaking implements the requirements of 42 United States Code (USC), §7410, that states adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC, §7410, generally does not require specific programs, methods, or reductions in order to meet the standards, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as, schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. The adopted rulemaking revises rules in Chapter 115, Subchapter B, Division 1, to update the approved RACT requirements for major source crude oil and condensate storage tanks in the DFW 2008 eight-hour ozone nonattainment area and correct previous errors in two tables for

requirements for specific surface coating types and wipe-down solution types listed for regulation in the tables.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by Senate Bill 633 (SB 633 or bill) during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct an RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633, concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted adopted rulemaking from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts rulemaking to revise the SIP. The legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every rulemaking to revise the SIP would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rulemaking that is extraordinary in nature. While the rulemaking included in the SIP will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rulemakings adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rulemaking since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rulemaking challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the adopted rulemaking is to update the approved RACT requirements for major source crude oil and condensate storage tanks in the DFW 2008 eight-hour ozone nonattainment area and correct previous errors in two tables for requirements for specific surface coating types and wipe-down solution types listed for regulation in the tables. The adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this adopted rulemaking. Therefore, this adopted rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because it does not meet the definition of a "Major environmental rule;" it also does not meet any of the four applicability criteria for a major environmental rule.

The commission invited public comment regarding the draft RIA determination during the public comment period. No oral or written comments were received regarding the RIA determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. For nonattainment areas classified as moderate and above, FCAA, §172(c)(1) and §182(b)(2), requires the state to submit a SIP revision that implements RACT for all major stationary sources of VOC. The specific purpose of the adopted rulemaking is to revise rules in Chapter 115, Subchapter B, Division 1, to update the approved RACT requirements for major source crude oil and condensate storage tanks in the DFW 2008 eight-hour ozone nonattainment area based on a serious classification. The adopted rulemaking also corrects errors made in a previous rulemaking to two tables in Chapter 115, Subchapter E, Division 2. This adopted rulemaking clarifies requirements for specific surface coating types and wipe-down solution types listed for regulation. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007, does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007, does not apply to this adopted rulemaking because this is an action that is taken in response to a real and substantial threat to public health and safety; is designed to significantly advance the health and safety purpose; and does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The adopted rulemaking fulfills the FCAA requirement to implement RACT in nonattainment areas. These revisions will result in VOC emission reductions in ozone nonattainment areas that may contribute to the timely attainment of the ozone standard and reduced public exposure to VOC. Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13).

For these reasons, Texas Government Code, Chapter 2007, does not apply to this adopted rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking will not affect any coastal natural resource areas because the rules only affect counties outside the CMP area and is, therefore, consistent with CMP goals and policies.

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

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 115 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 115 requirements.

Public Comment

The commission offered a public hearing in Houston on October 14, 2019, and in Arlington on October 17, 2019. The comment period closed on October 28, 2019. The commission received comments from EPA on this rulemaking. The commission also received comments pertaining to DFW and HGB RACT that were submitted only for the proposed DFW 2008 Ozone Serious AD SIP (2019-078-SIP-NR) and the proposed HGB 2008 Ozone Serious AD SIP (2019-078-SIP-NR). Those comments and the commission's responses can be found in the response to comment for those SIP Projects.

Response to Comments

Comment

The EPA supported removing the language that includes Wise County in the list of counties under the "Covered attainment counties" definition in §115.10(10) as well as the language that excludes Wise County from the "Dallas-Fort Worth area" definition in §115.10(11)(C).

Response

The commission appreciates the support for the proposed changes to Chapter 115. No changes were made in response to this comment.

Comment

The EPA recommended removing the phrase "except in Wise County" from §§115.122(a)(3)(B); 115.420(a)(9), (10) - (15); 115.427(9); and 115.440(b)(8)(A) and (C) to make those rules applicable to sources in Wise County or providing a justification for the exceptions in each instance. The EPA also commented that Wise County is not included in the listing of affected counties for the Industrial Wastewater rules in §115.149 and recommended providing an acceptable justification.

Response

The VOC RACT analysis conducted for Wise County did not result in identification of potentially affected sources covered by the rules the EPA specified. The commission has provided a negative declaration for these CTG emission source categories in Appendix F of the DFW Serious Classification Attainment Demonstration SIP revision, that was proposed concurrently with this rulemaking. The commission did not open the rules referenced in the EPA's comment as part of this rulemaking project and is, therefore, prohibited from making any changes to those sections at adoption. The TCEQ may conduct reviews, as appropriate, of VOC emissions sources in Wise County to determine if the rules in Chapter 115 need to be revised to implement RACT in the future. No changes were made in response to this comment.

Comment

The EPA recommended eliminating language that would remove Wise County from applicability to the rules in §§115.129(g), 115.219(g), 115.239(e), 115.359(e), 115.419(f), 115.429(f), 115.449(i), 115.459(d), 115.469(d), 115.479(d), and 115.519(e) upon notice in the *Texas Register* that the Wise County nonattainment designation under the 2008 eight-hour ozone NAAQS is no longer legally effective.

Response

The suggested changes are beyond the scope of this rulemaking. The commission did not propose any changes to the sections cited by the EPA and is prohibited from making changes to those sections at adoption. The referenced language was included due to litigation related to Wise County's attainment status under the 2008 eight-hour ozone NAAQS, which is now resolved. Similar language is removed in this adopted rulemaking from sections that were opened for this rule project, but the commission did not open sections solely to remove this obsolete language. The referenced language may be removed from affected sections of Chapter 115 when those sections are opened in a future rulemaking. No changes were made in response to this comment.

Comment

The EPA recommended removing language in §115.440(b)(8)(C) that identifies 100 tpy of VOC as the major source threshold. Similarly, the EPA recommended altering the minor printing source definition in §115.440(b)(9)(C) to include Wise County in the applicability of the rule.

Response

The commission did not open the rules referenced in the EPA's comment as part of this rulemaking project and is, therefore, prohibited from making any changes to those sections at adoption. The terms major printing source and minor printing source in §115.440(b) were incorporated in the rule during a previous rulemaking for purposes other than applicability for major source RACT. During the 2010 rulemaking (36 TexReg 8897) to implement 2006 Offset Lithographic and Letterpress Printing CTG RACT recommendations, the commission adopted RACT for this category for sources with at least three tpy of VOC emissions, as recommended in the 2006 CTG. Prior to the 2010 rulemaking, the offset lithographic printing rules in 30 TAC Chapter 115, Subchapter E, Division 4, were originally adopted in 1993 (18 TexReg 8538) to be consistent with the 1993 draft Offset Lithographic Printing CTG (EPA-453/D-95-001) and applied only to major sources. In the 2006 CTG, one of the VOC limits recommended was less stringent than the VOC limit for the same

solution recommendation in the 1993 draft CTG, and for that reason, adopted in the Chapter 115 rules. Therefore, the commission retained the more stringent limit in the existing rules at the time of rulemaking to incorporate the 2006 CTG recommendations to prevent backsliding for major printing sources that were already subject to the rules. Similarly, there were different exemptions recommended in the 2006 CTG and the commission used the major and minor printing sources in §115.441 to ensure that the newer exemptions were not applied to sources subject to the Chapter 115 offset lithographic printing rule prior to the 2010 rulemaking. Although formatted in a way that creates a separation in rule applicability, all offset lithographic printers subject to the rule, regardless of whether defined as a major or minor printing source, must comply with VOC emission limits that are at least as stringent as the 2006 CTG. Furthermore, the commission did not identify any offset lithographic printers at or above 50 tpy of VOC emissions, the major source threshold for the DFW area under the 2008 eight-hour ozone NAAQS, as part of the Wise County VOC RACT analysis. The commission contends that RACT is satisfied for the offset lithographic emission source category. The commission makes no changes in response to this comment.

SUBCHAPTER A. DEFINITIONS

30 TAC §115.10

Statutory Authority

The amended section is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The amended section is also adopted under the Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amended section implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021 and FCAA, 42 USC, §§7401 *et seq.*

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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For further information, please call: (512) 239-6812

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SUBCHAPTER B. GENERAL VOLATILE ORGANIC COMPOUND SOURCES DIVISION 1. STORAGE OF VOLATILE ORGANIC COMPOUNDS

30 TAC §§115.111, 115.112, 115.119

Statutory Authority

The amended sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The amended sections are also adopted under the Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amended sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021 and FCAA, 42 USC, §§7401 *et seq.*

§115.111. Exemptions.

(a) The following exemptions apply in the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions),

except as noted in paragraphs (2), (4), (6), (7), and (9) - (11) of this subsection.

(1) Except as provided in §115.118 of this title (relating to Recordkeeping Requirements), a storage tank storing volatile organic compounds (VOC) with a true vapor pressure less than 1.5 pounds per square inch absolute (psia) is exempt from the requirements of this division.

(2) A storage tank with storage capacity less than 210,000 gallons storing crude oil or condensate prior to custody transfer in the Beaumont-Port Arthur or El Paso areas is exempt from the requirements of this division. This exemption no longer applies in the Dallas-Fort Worth area beginning March 1, 2013.

(3) A storage tank with a storage capacity less than 25,000 gallons located at a motor vehicle fuel dispensing facility is exempt from the requirements of this division.

(4) A welded storage tank in the Beaumont-Port Arthur, El Paso, and Houston-Galveston-Brazoria areas with a mechanical shoe primary seal that has a secondary seal from the top of the shoe seal to the tank wall (a shoe-mounted secondary seal) is exempt from the requirement for retrofitting with a rim-mounted secondary seal if the shoe-mounted secondary seal was installed or scheduled for installation before August 22, 1980.

(5) An external floating roof storage tank storing waxy, high pour point crude oils is exempt from any secondary seal requirements of §115.112(a), (d), and (e) of this title (relating to Control Requirements).

(6) A welded storage tank in the Beaumont-Port Arthur, El Paso, and Houston-Galveston-Brazoria areas storing VOC with a true vapor pressure less than 4.0 psia is exempt from any external floating roof secondary seal requirement if any of the following types of primary seals were installed before August 22, 1980:

- (A) a mechanical shoe seal;
- (B) a liquid-mounted foam seal; or
- (C) a liquid-mounted liquid filled type seal.

(7) A welded storage tank in the Beaumont-Port Arthur, El Paso, and Houston-Galveston-Brazoria areas storing crude oil with a true vapor pressure equal to or greater than 4.0 psia and less than 6.0 psia is exempt from any external floating roof secondary seal requirement if any of the following types of primary seals were installed before December 10, 1982:

- (A) a mechanical shoe seal;
- (B) a liquid-mounted foam seal; or
- (C) a liquid-mounted liquid filled type seal.

(8) A storage tank with storage capacity less than or equal to 1,000 gallons is exempt from the requirements of this division.

(9) In the Houston-Galveston-Brazoria area, a storage tank or tank battery storing condensate, as defined in §101.1 of this title (relating to Definitions), prior to custody transfer with a condensate throughput exceeding 1,500 barrels (63,000 gallons) per year on a rolling 12-month basis is exempt from the requirement in §115.112(d)(4) or (e)(4)(A) of this title, to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117 of this title (relating to Approved Test Methods), that uncontrolled VOC emissions from the individual storage tank, or from the aggregate of storage tanks in a tank battery, are less than 25 tons per year on a rolling 12-month basis.

(10) In the Dallas-Fort Worth area, except Wise County, a storage tank or tank battery storing condensate prior to custody transfer with a condensate throughput exceeding 3,000 barrels (126,000 gallons) per year on a rolling 12-month basis is exempt from the requirement in §115.112(e)(4)(B)(i) of this title, to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117 of this title, that uncontrolled VOC emissions from the individual storage tank, or from the aggregate of storage tanks in a tank battery, are less than 50 tons per year on a rolling 12-month basis. This exemption no longer applies 15 months after the date the commission publishes notice in the *Texas Register* as specified in §115.119(b)(1)(C) of this title (relating to Compliance Schedules) that the Dallas-Fort Worth area has been reclassified as a severe nonattainment area for the 1997 Eight-Hour Ozone National Ambient Air Quality Standard.

(11) In the Dallas-Fort Worth area, except in Wise County, on or after the date specified in §115.119(b)(1)(C) of this title, a storage tank or tank battery storing condensate prior to custody transfer with a condensate throughput exceeding 1,500 barrels (63,000 gallons) per year on a rolling 12-month basis is exempt from the requirement in §115.112(e)(4)(B)(ii) of this title, to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117 of this title, that uncontrolled VOC emissions from the individual storage tank, or from the aggregate of storage tanks in a tank battery, are less than 25 tons per year on a rolling 12-month basis.

(12) In Wise County, prior to July 20, 2021, a storage tank or tank battery storing condensate prior to custody transfer with a condensate throughput exceeding 6,000 barrels (252,000 gallons) per year on a rolling 12-month basis is exempt from the requirement in §115.112(e)(4)(C) of this title, to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117 of this title, that uncontrolled VOC emissions from the individual storage tank, or from the aggregate of storage tanks in a tank battery, are less than 100 tons per year on a rolling 12-month basis.

(13) In Wise County, on or after July 20, 2021, a storage tank or tank battery storing condensate prior to custody transfer with a condensate throughput exceeding 3,000 barrels (126,000 gallons) per year on a rolling 12-month basis is exempt from the requirement in §115.112(e)(4)(C) of this title, to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117 of this title, that uncontrolled VOC emissions from the individual storage tank, or from the aggregate of storage tanks in a tank battery, are less than 50 tons per year on a rolling 12-month basis.

(b) The following exemptions apply in Gregg, Nueces, and Victoria Counties.

(1) Except as provided in §115.118 of this title, a storage tank storing VOC with a true vapor pressure less than 1.5 psia is exempt from the requirements of this division.

(2) A storage tank with storage capacity less than 210,000 gallons storing crude oil or condensate prior to custody transfer is exempt from the requirements of this division.

(3) A storage tank with storage capacity less than 25,000 gallons located at a motor vehicle fuel dispensing facility is exempt from the requirements of this division.

(4) A welded storage tank with a mechanical shoe primary seal that has a secondary seal from the top of the shoe seal to the tank wall (a shoe-mounted secondary seal) is exempt from the requirement for retrofitting with a rim-mounted secondary seal if the shoe-mounted secondary seal was installed or scheduled for installation before August 22, 1980.

(5) An external floating roof storage tank storing waxy, high pour point crude oils is exempt from any secondary seal requirements of §115.112(b) of this title.

(6) A welded storage tank storing VOC with a true vapor pressure less than 4.0 psia is exempt from any external secondary seal requirement if any of the following types of primary seals were installed before August 22, 1980:

- (A) a mechanical shoe seal;
- (B) a liquid-mounted foam seal; or
- (C) a liquid-mounted liquid filled type seal.

(7) A welded storage tank storing crude oil with a true vapor pressure equal to or greater than 4.0 psia and less than 6.0 psia is exempt from any external secondary seal requirement if any of the following types of primary seals were installed before December 10, 1982:

- (A) a mechanical shoe seal;
- (B) a liquid-mounted foam seal; or
- (C) a liquid-mounted liquid filled type seal.

(8) A storage tank with storage capacity less than or equal to 1,000 gallons is exempt from the requirements of this division.

(c) The following exemptions apply in Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties.

(1) A storage tank storing VOC with a true vapor pressure less than 1.5 psia is exempt from the requirements of this division.

(2) Slotted guidepoles installed in a floating roof storage tank are exempt from the provisions of §115.112(c) of this title.

(3) A storage tank with storage capacity between 1,000 gallons and 25,000 gallons is exempt from the requirements of §115.112(c)(1) of this title if construction began before May 12, 1973.

(4) A storage tank with storage capacity less than or equal to 420,000 gallons is exempt from the requirements of §115.112(c)(3) of this title.

(5) A storage tank with storage capacity less than or equal to 1,000 gallons is exempt from the requirements of this division.

§115.119. Compliance Schedules.

(a) In Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, the compliance date has passed and the owner or operator of each storage tank in which any volatile organic compounds (VOC) are placed, stored, or held shall continue to comply with this division except as follows.

(1) The affected owner or operator shall comply with the requirements of §§115.112(d); 115.115(a)(1), (2), (3)(A), and (4); 115.117; and 115.118(a) of this title (relating to Control Requirements; Monitoring Requirements; Approved Test Methods; and Recordkeeping Requirements, respectively) no later than January 1, 2009. Section 115.112(d) of this title no longer applies in the Houston-Galveston-Brazoria area beginning March 1, 2013. Prior to March 1, 2013, the owner or operator of a storage tank subject to §115.112(d) of this title shall continue to comply with §115.112(d) of this title until compliance has been demonstrated with the requirements of §115.112(e)(1) - (6) of this title. Section 115.112(e)(3)(A)(i) of this title no longer applies beginning July 20, 2018.

(A) If compliance with these requirements would require emptying and degassing of the storage tank, compliance is not

required until the next time the storage tank is emptied and degassed but no later than January 1, 2017.

(B) The owner or operator of each storage tank with a storage capacity less than 210,000 gallons storing crude oil and condensate prior to custody transfer shall comply with the requirements of this division no later than January 1, 2009, regardless if compliance with these requirements would require emptying and degassing of the storage tank.

(2) The affected owner or operator shall comply with §§115.112(e)(1) - (6), 115.115(a)(3)(B), (5), and (6), and 115.116 of this title (relating to Testing Requirements) as soon as practicable, but no later than March 1, 2013. Section 115.112(e)(3)(A)(i) of this title no longer applies beginning July 20, 2018. Prior to July 20, 2018, the owner or operator of a storage tank subject to §115.112(e)(3)(A)(i) of this title shall continue to comply with §115.112(e)(3)(A)(i) of this title until compliance has been demonstrated with the requirements of §115.112(e)(3)(A)(ii) of this title. After July 20, 2018, the owner or operator of a storage tank is subject to §115.112(e)(3)(A)(ii) of this title.

(A) If compliance with these requirements would require emptying and degassing of the storage tank, compliance is not required until the next time the storage tank is emptied and degassed but no later than January 1, 2017.

(B) The owner or operator of each storage tank with a storage capacity less than 210,000 gallons storing crude oil and condensate prior to custody transfer shall comply with these requirements no later than March 1, 2013, regardless if compliance with these requirements would require emptying and degassing of the storage tank.

(3) The affected owner or operator shall comply with §§115.112(e)(3)(A)(ii), 115.112(e)(7), 115.118(a)(6)(D) and (E), and 115.114(a)(5) of this title (relating to Inspection and Repair Requirements) as soon as practicable, but no later than July 20, 2018.

(b) In Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties, the owner or operator of each storage tank in which any VOC is placed, stored, or held was required to be in compliance with this division on or before March 1, 2009, and shall continue to comply with this division, except as follows.

(1) The affected owner or operator shall comply with §§115.112(e), 115.115(a)(3)(B), (5), and (6), 115.116, and 115.118(a)(6) of this title as soon as practicable, but no later than March 1, 2013.

(A) If compliance with §115.112(e) of this title would require emptying and degassing of the storage tank, compliance is not required until the next time the storage tank is emptied and degassed but no later than December 1, 2021.

(B) The owner or operator of a storage tank with a storage capacity less than 210,000 gallons storing crude oil and condensate prior to custody transfer shall comply with these requirements no later than March 1, 2013, regardless if compliance with these requirements would require emptying and degassing of the storage tank.

(C) As soon as practicable but no later than 15 months after the commission publishes notice in the *Texas Register* that the Dallas-Fort Worth area, except Wise County, has been reclassified as a severe nonattainment area for the 1997 Eight-Hour Ozone National Ambient Air Quality Standard the owner or operator of a storage tank storing crude oil or condensate prior to custody transfer or at a pipeline breakout station is required to be in compliance with the control requirements in §115.112(e)(4)(B)(ii) and (5)(B)(ii) of this title except as specified in §115.111(a)(11) of this title (relating to Exemptions).

(2) The owner or operator is no longer required to comply with §115.112(a) of this title beginning March 1, 2013.

(3) The affected owner or operator in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties shall comply with §§115.112(e)(7), 115.114(a)(5), and 115.118(a)(6)(D) and (E) of this title as soon as practicable, but no later than January 1, 2017.

(c) In Hardin, Jefferson, and Orange Counties, the owner or operator of each storage tank in which any VOC is placed, stored, or held was required to be in compliance with this division by March 7, 1997, and shall continue to comply with this division, except that compliance with §115.115(a)(3)(B), (5), and (6), and §115.116 of this title is required as soon as practicable, but no later than March 1, 2013.

(d) In El Paso County, the owner or operator of each storage tank in which any VOC is placed, stored, or held was required to be in compliance with this division by January 1, 1996, and shall continue to comply with this division, except that compliance with §115.115(a)(3)(B), (5), and (6), and §115.116 of this title is required as soon as practicable, but no later than March 1, 2013.

(e) In Aransas, Bexar, Calhoun, Gregg, Matagorda, Nueces, San Patricio, Travis, and Victoria Counties, the owner or operator of each storage tank in which any VOC is placed, stored, or held was required to be in compliance with this division by July 31, 1993, and shall continue to comply with this division, except that compliance with §115.116(b) of this title is required as soon as practicable, but no later than March 1, 2013.

(f) In Wise County, the owner or operator of each storage tank in which any VOC is placed, stored, or held was required to be in compliance with this division by January 1, 2017, and shall continue to comply with this division, except that compliance with §115.111(a)(13) and §115.112(e)(4)(C)(ii) and (5)(C)(ii) of this title is required as soon as practicable, but no later than July 20, 2021.

(g) The owner or operator of each storage tank in which any VOC is placed, stored, or held that becomes subject to this division on or after the date specified in subsections (a) - (f) of this section, shall comply with the requirements in this division no later than 60 days after becoming subject.

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. SOLVENT-USING PROCESSES
DIVISION 2. SURFACE COATING PROCESSES
30 TAC §115.421
Statutory Authority

The amended section is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The amended section is also adopted under the Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit SIP revisions that specify the manner in which the National Ambient Air Quality Standard will be achieved and maintained within each air quality control region of the state.

The amended section implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021 and FCAA, 42 USC, §§7401 *et seq.*

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 117. CONTROL OF AIR POLLUTION FROM NITROGEN COMPOUNDS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§117.10, 117.403, 117.8000, and 117.9030. The commission withdraws the amendment to §117.400.

The amendments to §117.403 and §117.9030 are adopted *with changes* to the proposed text as published in the September 27, 2019, issue of the *Texas Register* (44 TexReg 5582) and, therefore, will be republished. The amendments to §117.10 and

§117.8000 are adopted *without changes* to the proposed text and, therefore, will not be republished.

The adopted amendments will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

The Federal Clean Air Act (FCAA) requires states to submit plans to demonstrate attainment of the National Ambient Air Quality Standards (NAAQS) for nonattainment areas designated with a classification of moderate or higher. The Dallas-Fort Worth (DFW) 2008 eight-hour ozone nonattainment area, consisting of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties, was classified as a moderate nonattainment area for the 2008 eight-hour ozone NAAQS of 0.075 parts per million (ppm) with a July 20, 2018 attainment deadline. Based on 2017 monitoring data, the DFW area did not attain the 2008 eight-hour ozone NAAQS and did not qualify for a one-year attainment date extension in accordance with FCAA, §181(a)(5). On August 23, 2019, the EPA published final notice reclassifying the DFW and Houston-Galveston-Brazoria (HGB) nonattainment areas from moderate to serious for the 2008 eight-hour ozone NAAQS, effective September 23, 2019 (84 FR 44238, August 23, 2019).

With the final reclassification to serious nonattainment, the state is required to submit a SIP revision to fulfill the nitrogen oxides (NO_x) reasonably available control technology (RACT) requirements mandated by FCAA, §172(c)(1) and §182(f). Although the eight-county HGB area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties) was also reclassified to serious nonattainment for the 2008 eight-hour ozone NAAQS, the commission determined that RACT is in place for all emission source categories in the HGB area; therefore, there are no changes adopted in this rulemaking that affect the HGB area.

The EPA's *Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements*; Final Rule, published in the *Federal Register* on March 6, 2015 (80 FR 12264), specifies an attainment date of July 20, 2021 for serious nonattainment areas. FCAA, §172(c)(1) requires the state to submit a SIP revision that incorporates all reasonably available control measures, including RACT, for sources of relevant pollutants. FCAA, §182(f) requires the state to submit a SIP revision that implements RACT for all major sources of NO_x. The EPA defines RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53761, September 17, 1979).

Depending on the classification of an area designated nonattainment for a NAAQS, the major source threshold that determines what sources are subject to RACT requirements varies. Under the 1997 eight-hour ozone NAAQS, the DFW area consisted of nine counties (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties) and was classified as a serious nonattainment area. The EPA's implementation rule for the 2008 eight-hour ozone NAAQS requires retaining the most stringent major source emission threshold for sources in an area to prevent backsliding (80 FR 12264). For this reason, the major source emission threshold for those nine counties remains at the level required for serious nonattainment areas, which is

actual NO_x emissions or the potential to emit (PTE) of 50 tons per year (tpy) of NO_x. Wise County was not part of the DFW 1997 eight-hour ozone NAAQS nonattainment area but was included as part of the DFW 2008 eight-hour ozone NAAQS nonattainment area; therefore, the major source threshold for Wise County was based on a classification of moderate under the 2008 standard, which is actual NO_x emissions or the PTE of 100 tpy of NO_x. With reclassification of the DFW area to serious nonattainment under the 2008 eight-hour ozone NAAQS, the major source emission threshold for all 10 counties, including Wise County, is actual NO_x emissions or the PTE of 50 tpy of NO_x emissions. This adopted rulemaking implements RACT in Wise County to reflect this change in the major source threshold for Wise County. The emission reduction requirements from this adopted rulemaking will result in reductions in ozone precursors in Wise County. The compliance date for implementing control requirements and emission reductions for the DFW area is July 20, 2021, the attainment date for serious nonattainment areas under the 2008 eight-hour ozone NAAQS.

The adopted rulemaking revises Chapter 117 to implement RACT for all major sources of NO_x in the DFW area as required by FCAA, §172(c)(1) and §182(f). The commission previously adopted Chapter 117 RACT rules for sources in the DFW area as part of the SIP revision adopted May 23, 2007 (Rule Project Number 2006-034-117-EN) for the 1997 eight-hour ozone standard, and the EPA approved these rules on December 3, 2008 (73 FR 73562). The commission adopted Chapter 117 RACT rules for sources in the DFW area as part of a SIP revision adopted June 3, 2015 (Rule Project Number 2013-049-117-AI) for the 2008 eight-hour ozone standard for the moderate nonattainment area, and the EPA approved these rules on September 22, 2017 (82 FR 44320).

The commission adopts amendments to the following sections associated with the DFW 2008 eight-hour ozone RACT rulemaking: Subchapter A, Definitions, §117.10; Subchapter B, Combustion Control at Major Industrial, Commercial, and Institutional Sources in Ozone Nonattainment Areas, Division 4, Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources, §117.403; Subchapter G, General Monitoring and Testing Requirements, Division 1, Compliance Stack Testing and Report Requirements, §117.8000; and Subchapter H, Administrative Provisions, Division 1, Compliance Schedules, §117.9030.

The commission adopts clarifications and minor revisions that will affect sources in other areas covered by Chapter 117, including adopted changes to stack testing provisions for compliance flexibility for stationary reciprocating internal combustion engines and clarifying the restriction on operating hours for exempt stationary diesel and dual-fuel engines located at major sources of NO_x in the nine-county DFW area, excluding Wise County. These adopted changes are discussed in detail in the Section by Section Discussion section of this preamble.

The commission adopts amendments to Chapter 117, Subchapter B, Division 4 to change the requirements for major industrial, commercial, or institutional (ICI) sources of NO_x in Wise County to address NO_x RACT requirements for serious nonattainment areas. Adopted revisions to Chapter 117, Subchapter B, Division 4 will require some owners or operators of major ICI sources of NO_x in Wise County to reduce NO_x emissions from certain stationary sources and source categories to satisfy RACT requirements. Identical to the definition of a major source in the other nine DFW-area counties, a major source of NO_x in Wise County

is any stationary source or group of sources located within a contiguous area and under common control that emits or has a PTE equal to or greater than 50 tpy of NO_x. As a result of this adopted rulemaking, newly identified process heaters and stationary internal combustion gas-fired engines will be subject to existing controls in Wise County. The proposed rulemaking would have extended rule applicability to incinerators in Wise County. The commission initially relied upon an existing exemption for incinerators, based on the maximum rated capacity of the unit, applicable to industrial units located at NO_x major sources in the other nine counties of the DFW area. Because all incinerators identified in the 2017 point source emissions inventory (EI) at major sources of NO_x in Wise County would otherwise qualify under this exemption, the commission determined including incinerators as applicable units at major sources of NO_x in Wise County to be unnecessary. In this adopted rulemaking, incinerators are removed from the list of applicable units under §117.400(b). The associated proposed exemption for incinerators based on maximum rated capacity is unnecessary and is also removed from the proposed language under §117.403(b). The change between rule proposal and adoption is also intended to eliminate any possible confusion since the commission did not propose any emission specifications for incinerators. Flares were also proposed as exempt units since this unit category was also identified in a similar manner to incinerators. However, with the removal of incinerators from the list of applicable units, the exemption for flares is no longer necessary and is also removed from the proposed language under §117.403(b).

Adopted revisions to Chapter 117, Subchapter B, Division 4 will also extend applicability of existing monitoring, testing, record-keeping, and reporting requirements associated with Chapter 117, Subchapter B, Division 4 to the affected sources located in Wise County. These requirements are necessary to ensure compliance with existing emission specifications and to ensure that NO_x emission reductions are achieved from the units that become subject to the requirements of Chapter 117, Subchapter B, Division 4.

The commission revised the proposed rule language for compliance schedules to address the major source status change for Wise County, for units located at NO_x major sources in Wise County, and to address wood-fired boilers located at NO_x major sources in the 10-county DFW 2008 eight-hour ozone nonattainment area. The adopted changes to the proposed rule language are intended to more clearly indicate that the 2021 compliance schedule is only intended for sources that are made subject to the Chapter 117 rules as a result of the major source threshold in Wise County being reduced from 100 tpy to 50 tpy of NO_x. Specific discussion associated with the adopted emission specifications and other requirements in the adopted revisions to Chapter 117, Subchapter B, Division 4 are provided in the Section by Section Discussion section of this preamble.

The commission estimates that this adopted rulemaking will result in a 0.26 tons per day reduction of NO_x from major ICI sources in Wise County. In the RACT rules adopted for the May 23, 2007 DFW SIP revision, the state fulfilled NO_x RACT requirements for the nine-county DFW 1997 eight-hour ozone serious nonattainment area through adoption of emissions specifications in §117.410. In the RACT rules adopted for the June 3, 2015 DFW SIP revision, the state fulfilled NO_x RACT requirements for the 10-county DFW 2008 eight-hour ozone moderate nonattainment area through adoption of RACT emissions specifications for Wise County in §117.405. With this adopted rulemaking, the commission implements and fulfills

NO_x RACT requirements for major sources of NO_x in Wise County with actual NO_x emissions or a PTE of 50 tpy of NO_x.

Section by Section Discussion

In addition to the adopted amendments associated with implementing RACT for the DFW area and specific minor clarifications and corrections discussed in greater detail in this section, the adopted rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes include appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally are not specifically discussed in this preamble.

Subchapter A: Definitions

§117.10, Definitions

The commission amends the definition of "Major source" in §117.10(29). Adopted changes include revision to §117.10(29)(B) to remove all references to county names and insert a reference to the term "Dallas-Fort Worth eight-hour ozone nonattainment area" to reflect the change in classification status for Wise County and the deletion of existing §117.10(29)(C). The applicability threshold for Wise County is now the same as that for the other nine counties included in the DFW ozone nonattainment area, and separating Wise County from the other nine DFW area counties is no longer necessary. Adopted changes also include re-lettering existing §117.10(29)(D) and (E) to §117.10(29)(C) and (D) to accommodate the deletion of existing §117.10(29)(C). No substantive changes are intended to be made to existing subparagraphs (D) and (E).

Subchapter B: Combustion Control at Major Industrial, Commercial, and Institutional Sources in Ozone Nonattainment Areas

Division 4: Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources

To address RACT requirements for major sources of NO_x located in Wise County at the new 50 tpy major source threshold, the commission has determined that the existing rule provisions of Subchapter B, Division 4 satisfy RACT requirements for major sources of NO_x in Wise County at the new 50 tpy major source threshold. The commission had proposed changes to the existing rule provisions of Subchapter B, Division 4 that included amending rules applicable to any major stationary source of NO_x in Wise County that emits or has a PTE of 50 tpy of NO_x. Despite the proposed changes to rule language for incinerators as applicable units and associated proposed exemptions for incinerators and flares, the commission has since determined that no changes to the applicability rule language of Subchapter B, Division 4 are necessary. The commission also adopts technical corrections to exemption provisions for units located at major ICI stationary sources in the nine counties of the DFW 2008 eight-hour ozone nonattainment area, excluding Wise County, i.e. Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

§117.400, Applicability

The commission withdraws the proposed amendment to §117.400.

The amendment was initially proposed to clarify which units types located in specific counties in the DFW 2008 eight-hour ozone nonattainment area would be subject to the proposed revisions of Subchapter B, Division 4. The commission pro-

posed to add five incinerators that were identified in the 2017 point source EI as potentially affected sources. However, when compared to an existing exemption for incinerators at major sources of NO_x in the other nine counties of the DFW area, based on maximum rated capacity of the unit, these incinerators will qualify for this exemption. Furthermore, because the commission did not also propose any emission specifications for such incinerators, it is no longer necessary to list incinerators as applicable units in §117.400 for Wise County.

§117.403, Exemptions

The commission adopts revisions to §117.403 to clarify exemption criteria for units that are exempt from specified requirements of Subchapter B, Division 4. The commission is not changing the current list of exempt unit types, sizes, or uses in existing §117.403(a) for units located in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, or Tarrant County. However, as part of this rulemaking, the commission adopts technical revisions intended to correct inadvertent errors in existing §117.403(a), made during a previous rulemaking adopted May 23, 2007 (Rule Project Number 2006-034-117-EN), to ensure consistency with the agency's intent. This rulemaking requires new and existing stationary diesel and dual-fuel engines claimed exempt under existing §117.403(a) to comply with the operating hours restriction requirements of existing §117.410(f) by adding a rule reference to §117.410(f) in §117.403(a). This clarification is adopted to be consistent with existing recordkeeping requirements in §117.445(f)(9) that are already referenced in §117.403(a) and that relate to the operating requirements in §117.410(f).

Existing §117.410(f) prohibits any person from starting or operating any stationary diesel or dual-fuel engine in any of the nine DFW area counties, which excludes Wise County, for testing or maintenance of the engine itself between the hours of 6:00 a.m. and noon, except for specific manufacturer's recommended testing requiring a run of over 18 consecutive hours; to verify reliability of emergency equipment (e.g., emergency generators or pumps) immediately after unforeseen repairs; or firewater pumps for emergency response training conducted from April 1 through October 31. When this rule was adopted for the nine-county area as part of a May 23, 2007 rulemaking under the 1997 eight-hour ozone NAAQS, the provision was identical to a requirement implemented for the HGB ozone nonattainment area. The requirement delays starting or operation of these engines for testing or maintenance until after noon to help reduce NO_x emissions and limit ozone formation. Owners or operators of these engines are required under existing §117.445(f)(9) to maintain records of each time the engine is operated for testing and maintenance, including: dates of operation; start and end times of operation; identification of the engine; and total hours of operation for each month and for the most recent 12 consecutive months. Existing §117.403(a) already references the recordkeeping requirements of §117.445(f)(9) but does not currently reference the actual operating restrictions of §117.410(f). This adopted change is a technical correction to add the operating restrictions reference for engines located at major sources of NO_x in the nine DFW area counties (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties).

Based on 2017 point source EI data, the commission identified 40 stationary diesel and dual-fuel engines located in the nine counties for which the owner or operator may currently claim exemption under existing §117.403(a), specifically as backup, standby, firewater pump, or emergency engines and generators.

The operating restrictions under §117.410(f) will apply to stationary diesel and dual-fuel engines located at NO_x major sources in the nine-county DFW area, excluding Wise County, that are claimed exempt and will prohibit their operation for testing or maintenance between 6:00 a.m. and noon, similar to the existing requirements for exempt units located at major and minor sources of NO_x in the HGB area and at minor sources of NO_x in the nine counties for the DFW area. For such units typically used in emergency situations or designated as low-use engines, the commission does not expect this adopted requirement to interfere with or restrict the normal operation of these engines. The commission has stated this in prior rulemaking actions concerning these provisions in Chapter 117 (26 TexReg 8110 and 32 TexReg 3206). The commission does not expect non-exempt units to be affected because these engines should already be complying with the operating restrictions and maintaining appropriate records.

The commission had proposed revisions to §117.403(b) for units located at NO_x major sources located in Wise County to include a new exemption for flares, as proposed §117.403(b)(6), and a new exemption for incinerators with a maximum rated capacity less than 40 million British thermal units per hour (MMBtu/hr), as proposed §117.403(b)(7), respectively. The commission identified five incinerators in the 2017 point source EI at major sources of NO_x in Wise County that will qualify for exemption based on heat input, when their heat input is compared to an existing exemption for incinerators applicable to units located at major ICI sources of NO_x in the other nine counties of the DFW area in Subchapter B, Division 4. The existing exemption for incinerators applicable in the other nine counties of the DFW area is based on a maximum rated capacity for incinerators less than 40 MMBtu/hr. Because the commission has determined it is no longer necessary to list incinerators as applicable units for major sources of NO_x in Wise County, the associated proposed exemption for incinerators based on maximum rated capacity is also unnecessary, and this proposed change is not adopted. With the removal of incinerators from the list of applicable units, the proposed exemption for flares is no longer necessary and is therefore also not adopted.

The commission identified 17 stationary diesel-fired engines in the 2017 point source EI located at major sources of NO_x in Wise County. All 17 units were reported to the commission by regulated entities as emergency backup diesel engines and generators. An existing exemption in §117.403(b)(3) exempts all stationary, diesel, reciprocating internal combustion engines located at NO_x major sources in Wise County. Because the commission did not identify a stationary diesel engine used for any other purpose other than for emergency backup situations, the commission is not currently adopting emission specifications for this category of equipment located in Wise County. These engines will continue to be exempt from the requirements in Subchapter B, Division 4.

Subchapter G: General Monitoring and Testing Requirements

Division 1: Compliance Stack Testing and Report Requirements

§117.8000, Stack Testing Requirements

The commission adopts §117.8000(f)(1) - (4) to specify the requirements of using an alternate test method when performing emissions testing on stationary internal combustion engines. Stack testing provisions for emissions testing of NO_x and carbon monoxide (CO) under Chapter 117 currently specify certain EPA-approved compliance reference test methods. Adopted

§117.8000(f) will allow owners or operators of stationary internal combustion engines that trigger the stack testing requirements of Subchapter G, Division 1 to use American Society for Testing and Materials (ASTM) Method D6348-03 to measure the emissions of NO_x and CO from stationary internal combustion engines in lieu of the EPA Reference Test Methods 7E or 20 for NO_x, and 10, 10A, or 10B for CO, as currently specified in existing §117.8000(c), when demonstrating compliance with an applicable emission standard under Chapter 117. All other applicable requirements for emissions testing in existing §117.8000(c) will continue to apply. For example, if the owner or operator is required to test for oxygen or ammonia emissions, the owner or operator will be required to continue to use the EPA reference test methods for oxygen or ammonia as specified in §117.8000(c). Adopted §117.8000(f)(1) specifies that the owner or operator electing to use ASTM Method D6348-03 shall notify the appropriate regional office and any local air pollution control agency having jurisdiction in writing at least 15 days prior to the date that the emissions performance test occurs. The commission also adopts in §117.8000(f)(2) that the analyte spiking procedure of Annex A5 to ASTM Method D6348-03 must be performed using NO_x calibration gas standards certified for total NO_x. The owner or operator electing to use ASTM Method D6348-03 to determine NO_x emissions from an engine may use any gas combination as long as it is a certified EPA protocol gas. The term "Nitrogen oxides (NO_x)" is defined in existing §117.10(34). This allows owners or operators to use nitric oxide, nitrogen dioxide, or any combination thereof so long as the components of the certified calibration gas do not interfere with the gas being detected.

To ensure strict adherence to all requirements of ASTM Method D6348-03 and associated Annexes A1 through A8 to ASTM Method D6348-03, the commission adopts §117.8000(f)(3) to require owners or operators electing to use the ASTM method to document in the compliance stack report required by existing §117.8010 that the owner or operator followed all such requirements, including all quality assurance and quality control procedures of all eight annexes. These adopted requirements are in addition to the existing requirements of §117.8010 that the test report must contain the information specified in existing §117.8010.

The commission adopts §117.8000(f)(4) to specify that minor modifications to ASTM Method D6348-03 are allowed for owners or operators electing to use the ASTM method as long as those minor modifications meet the conditions of existing §117.8000(d)(1) and (2).

The commission adopts these changes in an effort to afford compliance flexibility to owners or operators of stationary engines triggering emissions performance testing under Chapter 117. The EPA has already approved the use of ASTM Method D6348-03 for stationary compression-ignited and spark-ignited internal combustion engines under 40 Code of Federal Regulations Part 60, Subparts IIII and JJJJ, respectively. Because the commission is unaware of the EPA approving the use of ASTM Method D6348-03 for emission unit types other than for stationary internal combustion engines, the commission is not adopting use of ASTM Method D6348-03 for any other emission unit type covered by Chapter 117.

Subchapter H: Administrative Provisions

Division 1: Compliance Schedules

§117.9030, Compliance Schedule for Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources

To more clearly indicate that the 2021 compliance schedule is only intended for sources that are made subject to the Chapter 117 rules as a result of the major source threshold being reduced from 100 tpy to 50 tpy of NO_x, the commission adopts changes to the proposed rule language for §117.9030(a)(1). The commission adopts changes to the compliance schedule for major sources of NO_x located in the 10-county DFW 2008 eight-hour ozone nonattainment area in existing §117.9030(a) for units subject to the emission specification of §117.405(a). The commission also adopts changes to the compliance schedule for major sources of NO_x located in Wise County in existing §117.9030(a) for units subject to the emission specifications of §117.405(b). Adopted §117.9030(a)(1)(A) preserves prior compliance deadlines for submittal of the initial control plan and all other requirements of Chapter 117, Subchapter B, Division 4 for units subject to the emission specification of §117.405(a), and located in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, or Tarrant Counties, or located at a source in Wise County that emits or has the PTE equal to or greater than 100 tpy of NO_x. For these units at these sources, the commission moves the requirements of existing §117.9030(a)(1)(A) to adopted §117.9030(a)(1)(A)(i). Additionally, the requirements of existing §117.9030(a)(1)(B) are moved to adopted §117.9030(a)(1)(A)(ii). For any unit that became subject to the emission specification of §117.405(a) after the compliance date of January 1, 2017, but was not the result of the major source threshold being reduced to 50 tpy in Wise County, the commission is making clear in adopted §117.9030(a)(1)(A)(iii) the owner or operator of these units shall demonstrate compliance with all the applicable requirements of Chapter 117, Subchapter B, Division 4 as soon as practicable, but no later than 60 days after the unit becomes subject. Adopted subparagraph (A)(iii) preserves existing rule requirements for units that become newly subject to the existing rules.

Adopted §117.9030(a)(1)(B) also preserves prior compliance deadlines for submittal of the initial and final control plan and all other requirements of Chapter 117, Subchapter B, Division 4 for units subject to the emission specifications of §117.405(b) and located at sources in Wise County that emit or have the PTE equal to or greater than 100 tpy of NO_x. For these units at these sources, the commission moves the requirements of existing §117.9030(a)(1)(A) to adopted §117.9030(a)(1)(B)(i). The requirements of existing §117.9030(a)(1)(B) are moved to adopted §117.9030(a)(1)(B)(ii). For any unit that became subject to the emission specifications of §117.405(b) after the compliance date of January 1, 2017, but was not the result of the major source threshold being reduced to 50 tpy in Wise County, the commission is making clear in adopted §117.9030(a)(1)(B)(iii) the owner or operator of these units shall demonstrate compliance with all the applicable requirements of Chapter 117, Subchapter B, Division 4 as soon as practicable, but no later than 60 days after the unit becomes subject. Adopted subparagraph (B)(iii) preserves existing rule requirements for units that become newly subject to the existing rules.

Finally, for those sources of NO_x in Wise County that are made subject to the Chapter 117 rules due to the change in the NO_x major source threshold for Wise County, the commission adopts §117.9030(a)(1)(C) as the compliance schedule for units subject to the emission specifications of §117.405 located at sources in Wise County that emit or have the PTE equal to or greater than 50 tpy of NO_x but less than 100 tpy

of NO_x. Adopted §117.9030(a)(1)(C)(i) specifies that owners or operators will be required to submit the initial control plan required by existing §117.450 no later than January 15, 2021. Adopted §117.9030(a)(1)(C)(ii) requires the owner or operator to demonstrate compliance with all other requirements of adopted Chapter 117, Subchapter B, Division 4 no later than July 20, 2021, which is also the deadline for submittal of the final control plan required by existing §117.452. For units that become subject to the emission specifications of §117.405 located at sources in Wise County that emit or have the PTE equal to or greater than 50 tpy but less than 100 tpy of NO_x after the compliance deadline of July 20, 2021, owners or operators of these units will be required to demonstrate compliance with all the applicable requirements of adopted Chapter 117, Subchapter B, Division 4 as soon as practicable, but no later than 60 days after becoming subject as specified in existing §117.9030(a)(2). For example, new units placed into service after July 20, 2021 will be required to comply within 60 days after startup of the unit. Existing units previously exempt from the rule but no longer qualifying for that exemption after July 20, 2021 will be required to comply with the adopted rule no later than 60 days after the unit no longer qualifies for the exemption. These adopted changes to the proposed rules are intended to provide greater clarity and address the major source status change for Wise County for units located at NO_x major source in Wise County and to address wood-fired boilers located at NO_x major sources in the 10-county DFW 2008 eight-hour ozone nonattainment area. They are not intended to change the existing requirements for those units that had a rule compliance deadline of January 1, 2017. Existing §117.9030(a)(1)(A) and (B) are removed.

The commission adopts removal of existing §117.9030(a)(3) since it is no longer necessary to include language concerning the removal of rule compliance requirements in Wise County upon *Texas Register* publication that Wise County's nonattainment designation for the 2008 eight-hour ozone NAAQS is no longer legally effective. The litigation concerning Wise County's attainment status is complete, and Wise County remains designated nonattainment for the 2008 eight-hour ozone NAAQS.

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "Major environmental rule" as defined in that statute, and in addition, if the rulemaking did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the adopted amendments is to revise Chapter 117 to implement RACT for all major sources of NO_x in the DFW area as required by FCAA, §172(c)(1) and §182(f). The adopted rulemaking implements RACT in Wise County to reflect the change in the major source threshold for Wise County to serious for the 2008 eight-hour ozone NAAQS. The adopted rulemaking requires owners or operators of affected sources to comply with the emission standards, conduct initial emissions testing or continuous emissions monitoring to demonstrate compliance, install and operate a totalizing fuel flow meter, perform quarterly

and periodic annual emissions compliance testing on stationary engines, submit compliance reports to the TCEQ, and maintain the appropriate records demonstrating compliance with the adopted rules, including but not limited to fuel usage, produced emissions, emissions-related control system maintenance, and emissions performance testing. The adopted rulemaking also updates allowed emission test methods for engines.

As discussed in the Fiscal Note: Costs to State and Local Government section of the proposed preamble, the adopted amendments are not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards on the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Additionally, these amendments do not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. These adopted amendments implement NO_x RACT in Wise County to reflect the change in the major source threshold for Wise County, as required by the EPA's change in designation of the DFW 2008 eight-hour ozone nonattainment area to serious nonattainment, and update allowed emission test methods for engines.

The FCAA requires states to submit plans to demonstrate attainment of the NAAQS for ozone nonattainment areas designated with a classification of moderate or higher. The DFW 2008 eight-hour ozone nonattainment area, consisting of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise Counties, is currently classified as a serious nonattainment area for the 2008 eight-hour ozone NAAQS of 0.075 ppm with a July 20, 2021 attainment date. The EPA signed the final reclassification notice to reclassify the DFW area from moderate to serious on August 7, 2019. With the final reclassification to serious nonattainment, the state is required to submit a SIP revision to fulfill the NO_x RACT requirements mandated by FCAA, §172(c)(1) and §182(f).

Depending on the classification of an area designated nonattainment for the ozone standard, the major source threshold that determines what sources are subject to RACT requirements varies. Under the 1997 eight-hour ozone NAAQS, the DFW area consisted of nine counties (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties) and was classified as a serious nonattainment area. The EPA's implementation rule for the 2008 eight-hour ozone NAAQS requires retaining the most stringent major source emission threshold for sources in an area to prevent backsliding (80 FR 12264). For this reason, the major source emission threshold remains at the serious classification level, which is actual NO_x emissions or the PTE of 50 tpy of NO_x. The major source threshold for Wise County, which was not part of the DFW 1997 eight-hour ozone NAAQS nonattainment area but was included as part of the DFW 2008 eight-hour ozone NAAQS nonattainment area, is based on a

classification of moderate under the 2008 standard, or actual NO_x emissions or the PTE of 100 tpy of NO_x. With the reclassification of DFW as a serious nonattainment area under the 2008 eight-hour ozone NAAQS, the major source emission threshold for Wise County is actual NO_x emissions or the PTE of 50 tpy of NO_x emissions. This adopted rulemaking implements RACT in Wise County to reflect this change in the major source threshold for Wise County.

The adopted rulemaking revises Chapter 117 to implement NO_x RACT in Wise County, lowering the major source threshold to actual NO_x emissions or the PTE of 50 tpy of NO_x and requiring owners or operators of affected sources to comply with the emission standards, conduct initial emissions testing or continuous emissions monitoring to demonstrate compliance, install and operate a totalizing fuel flow meter, perform quarterly and periodic annual emissions compliance testing on stationary engines, submit compliance reports to the TCEQ, and maintain the appropriate records demonstrating compliance with the adopted rules, including but not limited to fuel usage, produced emissions, emissions-related control system maintenance, and emissions performance testing. The adopted rulemaking also updates allowed emission test methods for engines.

The adopted rulemaking implements the requirements of 42 United States Code (USC), §7410 that states adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. The adopted rulemaking revises Chapter 117 to implement NO_x RACT in Wise County to reflect the change in the major source threshold for Wise County to actual NO_x emissions or the PTE of 50 tpy of NO_x and updates allowed emission test methods for engines.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that

"based on an assessment of rules adopted by the agency in the past, it is not anticipated that SB 633 will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of SB 633 was not large. This conclusion was based, in part, on the criteria set forth in SB 633 that exempted adopted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts rules into the SIP. The legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every rule adopted into the SIP would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rules included in the SIP will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*); *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the adopted rulemaking is to revise Chapter 117 to implement NO_x RACT in Wise County to reflect the change in the major source threshold to actual NO_x emissions or the PTE of 50 tpy of NO_x for Wise County and update allowed emission test methods for engines. The adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this adopted rulemaking. Therefore, this adopted rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because it does not meet the definition of a "Major environmental rule;" it also does not meet any of the four applicability criteria for a major environmental rule.

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

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the adopted rulemaking is to implement RACT for all NO_x emission sources in the DFW 2008 eight-hour ozone NAAQS nonattainment area, as required by FCAA, §172(c)(1) and §182(f). The adopted rulemaking revises Chapter 117 to implement NO_x RACT in Wise County to reflect the change in the major source threshold to 50 tpy of NO_x for Wise County and updates allowed emission test methods for engines. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The adopted amendments fulfill the FCAA requirement to implement RACT in nonattainment areas. These revisions will result in NO_x emission reductions in ozone nonattainment areas that may contribute to the timely attainment of the 2008 eight-hour ozone NAAQS and reduce public exposure to NO_x. Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking will not affect any coastal natural resource

areas because the rules only affect counties outside the CMP area and is, therefore, consistent with CMP goals and policies.

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

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 117 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 117 requirements.

Public Comment

The commission offered a public hearing in Houston on October 14, 2019 and a public hearing in Arlington on October 17, 2019. The comment period closed on October 28, 2019. The commission did not receive any written or oral comments on this Chapter 117 NO_x RACT rulemaking. Any comments received on the DFW and HGB attainment demonstration SIP revisions (Non-Rule Project Nos. 2019-077-SIP-NR and 2019-078-SIP-NR) regarding NO_x RACT are addressed in the Response to Comments portions of the DFW and HGB attainment demonstration SIP revisions, respectively.

SUBCHAPTER A. DEFINITIONS

30 TAC §117.10

Statutory Authority

The amended section is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The amended section is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amended section implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401, *et seq.*

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. COMBUSTION CONTROL
AT MAJOR INDUSTRIAL, COMMERCIAL,
AND INSTITUTIONAL SOURCES IN OZONE
NONATTAINMENT AREAS
DIVISION 4. DALLAS-FORT WORTH
EIGHT-HOUR OZONE NONATTAINMENT
AREA MAJOR SOURCES**

30 TAC §117.403

Statutory Authority

The amended section is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The amended section is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards

will be achieved and maintained within each air quality control region of the state.

The amended section implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401, *et seq.*

§117.403. Exemptions.

(a) Units located in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, or Tarrant County exempted from the provisions of this division, except as specified in §§117.410(f), 117.440(i), 117.445(f)(4) and (9), 117.450, and 117.454 of this title (relating to Emission Specifications for Eight-Hour Attainment Demonstration; Continuous Demonstration of Compliance; Notification, Recordkeeping, and Reporting Requirements; Initial Control Plan Procedures; and Final Control Plan Procedures for Attainment Demonstration Emission Specifications), include the following:

(1) industrial, commercial, or institutional boilers or process heaters with a maximum rated capacity equal to or less than:

(A) 2.0 million British thermal units per hour (MMBtu/hr) for boilers; and

(B) 5.0 MMBtu/hr for process heaters;

(2) heat treating furnaces and reheat furnaces with a maximum rated capacity less than 20 MMBtu/hr;

(3) flares, incinerators with a maximum rated capacity less than 40 MMBtu/hr, pulping liquor recovery furnaces, sulfur recovery units, sulfuric acid regeneration units, molten sulfur oxidation furnaces, and sulfur plant reaction boilers;

(4) dryers, heaters, or ovens with a maximum rated capacity of 5.0 MMBtu/hr or less;

(5) any dryers, heaters, or ovens fired on fuels other than natural gas. This exemption does not apply to gas-fired curing ovens used for the production of mineral wool-type or textile-type fiberglass;

(6) any glass, fiberglass, and mineral wool melting furnaces with a maximum rated capacity of 2.0 MMBtu/hr or less;

(7) stationary gas turbines and stationary internal combustion engines, that are used as follows:

(A) in research and testing of the unit;

(B) for purposes of performance verification and testing of the unit;

(C) solely to power other engines or gas turbines during startups;

(D) exclusively in emergency situations, except that operation for testing or maintenance purposes of the gas turbine or engine is allowed for up to 100 hours per year, based on a rolling 12-month basis. Any new, modified, reconstructed, or relocated stationary diesel engine placed into service on or after June 1, 2007, is ineligible for this exemption. For the purposes of this subparagraph, the terms "modification" and "reconstruction" have the meanings defined in §116.10 of this title (relating to General Definitions) and 40 Code of Federal Regulations (CFR) §60.15 (December 16, 1975), respectively, and the term "relocated" means to newly install at an account, as defined in §101.1 of this title (relating to Definitions), a used engine from anywhere outside that account;

(E) in response to and during the existence of any officially declared disaster or state of emergency;

(F) directly and exclusively by the owner or operator for agricultural operations necessary for the growing of crops or raising of fowl or animals; or

(G) as chemical processing gas turbines;

(8) any stationary diesel engine placed into service before June 1, 2007, that:

(A) operates less than 100 hours per year, based on a rolling 12-month basis; and

(B) has not been modified, reconstructed, or relocated on or after June 1, 2007. For the purposes of this subparagraph, the terms "modification" and "reconstruction" have the meanings defined in §116.10 of this title and 40 CFR §60.15 (December 16, 1975), respectively, and the term "relocated" means to newly install at an account, as defined in §101.1 of this title, a used engine from anywhere outside that account;

(9) any new, modified, reconstructed, or relocated stationary diesel engine placed into service on or after June 1, 2007, that:

(A) operates less than 100 hours per year, based on a rolling 12-month basis, in other than emergency situations; and

(B) meets the corresponding emission standard for non-road engines listed in 40 CFR §89.112(a), Table 1 (October 23, 1998), and in effect at the time of installation, modification, reconstruction, or relocation. For the purposes of this paragraph, the terms "modification" and "reconstruction" have the meanings defined in §116.10 of this title and 40 CFR §60.15 (December 16, 1975), respectively, and the term "relocated" means to newly install at an account, as defined in §101.1 of this title, a used engine from anywhere outside that account;

(10) boilers and industrial furnaces that were regulated as existing facilities by 40 CFR Part 266, Subpart H, as was in effect on June 9, 1993;

(11) brick or ceramic kilns with a maximum rated capacity less than 5.0 MMBtu/hr;

(12) low-temperature drying and curing ovens used in mineral wool-type fiberglass manufacturing and wet-laid, non-woven fiber mat manufacturing in which nitrogen-containing resins, or other additives are used;

(13) stationary, gas-fired, reciprocating internal combustion engines with a horsepower (hp) rating less than 50 hp;

(14) electric arc melting furnaces used in steel production;

(15) forming ovens and forming processes used in mineral wool-type fiberglass manufacturing; and

(16) natural gas-fired heaters used exclusively for providing comfort heat to areas designed for human occupancy.

(b) Units located in Wise County exempted from the provisions of this division, except as specified in §§117.440(i), 117.445(f)(4), 117.450, and 117.452 of this title (relating to Final Control Plan Procedures for Reasonably Available Control Technology), include the following:

(1) industrial, commercial, or institutional process heaters with a maximum rated capacity less than 40 MMBtu/hr;

(2) stationary gas turbines and stationary internal combustion engines that are used as follows:

(A) in research and testing of the unit;

(B) for purposes of performance verification and testing of the unit;

(C) solely to power other engines or gas turbines during startups;

(D) exclusively in emergency situations, except that operation for testing or maintenance purposes of the gas turbine or engine is allowed for up to 100 hours per year, based on a rolling 12-month basis; and

(E) in response to and during the existence of any officially declared disaster or state of emergency;

(3) stationary, diesel, reciprocating internal combustion engines;

(4) stationary, dual-fuel, reciprocating internal combustion engines; and

(5) stationary, gas-fired, reciprocating internal combustion engines with a hp rating less than 50 hp.

(c) The emission specifications in §117.410(a)(1) and (c) of this title do not apply to gas-fired boilers during periods that the owner or operator is required to fire fuel oil on an emergency basis due to natural gas curtailment or other emergency, provided:

(1) the fuel oil firing occurs during the months of November, December, January, or February; and

(2) the fuel oil firing does not exceed a total of 72 hours in any calendar month specified in paragraph (1) of this subsection.

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

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SUBCHAPTER G. GENERAL MONITORING AND TESTING REQUIREMENTS

DIVISION 1. COMPLIANCE STACK TESTING AND REPORT REQUIREMENTS

30 TAC §117.8000

Statutory Authority

The amended section is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose

to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The amended section is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amended section implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401, *et seq.*

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 H. ADMINISTRATIVE PROVISIONS

DIVISION 1. COMPLIANCE SCHEDULES

30 TAC §117.9030

Statutory Authority

The amended section is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that

authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The amended section is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amended section implements THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401, *et seq.*

§117.9030. *Compliance Schedule for Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources.*

(a) Reasonably available control technology emission specifications.

(1) The owner or operator of any stationary source of nitrogen oxides (NO_x) in the Dallas-Fort Worth eight-hour ozone nonattainment area that is a major source of NO_x and is subject to §117.405(a) or (b) of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)) shall comply with the requirements of Subchapter B, Division 4 of this chapter (relating to Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources) as follows:

(A) for units subject to the emission specification of §117.405(a) of this title located in Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, or Tarrant Counties, or located at a source in Wise County that emits or has the potential to emit equal to or greater than 100 tons per year (tpy) of NO_x:

(i) submission of the initial control plan required by §117.450 of this title (relating to Initial Control Plan Procedures) was required by June 1, 2016;

(ii) for units subject to the emission specification of §117.405(a) of this title as of January 1, 2017, compliance with all other requirements of Subchapter B, Division 4 of this chapter was required by January 1, 2017, and these units shall continue to comply with the requirements of Subchapter B, Division 4 of this chapter; and

(iii) for units that became subject to the emission specification of §117.405(a) of this title after January 1, 2017, compliance is required as specified in paragraph (2) of this subsection;

(B) for units subject to the emission specifications of §117.405(b) of this title located at sources in Wise County that emit or have the potential to emit equal to or greater than 100 tpy of NO_x:

(i) submission of the initial control plan required by §117.450 of this title was required by June 1, 2016;

(ii) for units subject to the emission specifications of §117.405(b) of this title as of January 1, 2017, compliance with all other requirements of Subchapter B, Division 4 of this chapter was required by January 1, 2017, and these units shall continue to comply with the requirements of Subchapter B, Division 4 of this chapter; and

(iii) for units that became subject to the emission specifications of §117.405(b) of this title after January 1, 2017, compliance is required as specified in paragraph (2) of this subsection; and

(C) for units subject to the emission specifications of §117.405 of this title located at sources in Wise County that emit or have the potential to emit equal to or greater than 50 tpy but less than 100 tpy of NO_x:

(i) submission of the initial control plan required by §117.450 of this title is required no later than January 15, 2021; and

(ii) for units subject to the emission specifications of §117.405 of this title, compliance with all other requirements of Subchapter B, Division 4 of this chapter is required as soon as practicable, but no later than July 20, 2021.

(2) The owner or operator of any stationary source of NO_x that becomes subject to the requirements of §117.405 of this title on or after the applicable compliance date specified in paragraph (1) of this subsection, shall comply with the requirements of Subchapter B, Division 4 of this chapter as soon as practicable, but no later than 60 days after becoming subject.

(b) Eight-hour ozone attainment demonstration emission specifications.

(1) The owner or operator of any stationary source of NO_x in the Dallas-Fort Worth eight-hour ozone nonattainment area that is a major source of NO_x and is subject to §117.410(a) of this title (relating to Emission Specifications for Eight-Hour Attainment Demonstration) shall comply with the requirements of Subchapter B, Division 4 of this chapter as follows:

(A) submit the initial control plan required by §117.450 of this title no later than June 1, 2008; and

(B) for units subject to the emission specifications of §117.410(a) of this title, comply with all other requirements of Subchapter B, Division 4 of this chapter as soon as practicable, but no later than:

(i) March 1, 2009, for units subject to §117.410(a)(1), (2), (4), (5), (6), (7)(A), (8), (10), and (14) of this title;

(ii) March 1, 2010, for units subject to §117.410(a)(3), (7)(B), (9), (11), (12), and (13) of this title;

(C) for diesel and dual-fuel engines, comply with the restriction on hours of operation for maintenance or testing in §117.410(f) of this title, and associated recordkeeping in §117.445(f)(9) of this title (relating to Notification, Recordkeeping, and Reporting Requirements), as soon as practicable, but no later than March 1, 2009; and

(D) for any stationary gas turbine or stationary internal combustion engine claimed exempt using the exemption of §117.403(a)(7)(D), (8), or (9) of this title (relating to Exemptions), comply with the run time meter requirements of §117.440(i) of this title (relating to Continuous Demonstration of Compliance), and recordkeeping requirements of §117.445(f)(4) of this title, as soon as practicable, but no later than March 1, 2009.

(2) The owner or operator of any stationary source of NO_x that becomes subject to the requirements of Subchapter B, Division 4 of this chapter on or after the applicable compliance date specified in paragraph (1) of this subsection, shall comply with the requirements of Subchapter B, Division 4 of this chapter as soon as practicable, but no later than 60 days after becoming subject.

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 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 161. COMMUNITY JUSTICE ASSISTANCE DIVISION ADMINISTRATION

37 TAC §161.21

The Texas Board of Criminal Justice adopts amendments to §161.21, concerning the Role of the Judicial Advisory Council, without changes to the proposed text as published in the January 3, 2020, issue of the *Texas Register* (45 TexReg 115).

The adopted amendments specify that functions of the Judicial Advisory Council include reviewing proposed changes to Texas Department of Criminal Justice (TDCJ) Community Justice Assistance Division (CJAD) standards and making recommendations to the TDCJ CJAD director. The adopted amendments also make minor grammatical updates.

No comments were received regarding the amendments.

The amendments are adopted under Texas Government Code §§492.006, 492.013, 493.003(b), 2110.005.

Cross Reference to Statutes: None.

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 March 9, 2020.

TRD-202001019

Erik Brown

Director of Legal Affairs

Texas Department of Criminal Justice

Effective date: March 29, 2020

Proposal publication date: January 3, 2020

For further information, please call: (936) 437-6700

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CHAPTER 163. COMMUNITY JUSTICE ASSISTANCE DIVISION STANDARDS

37 TAC §163.31

The Texas Board of Criminal Justice adopts amendments to §163.31, concerning Sanctions, Programs, and Services, without changes to the proposed text as published in the November 15, 2019, issue of the *Texas Register* (44 TexReg 7009).

The adopted amendments are necessary to add opportunities for CSCDs and judicial districts to make cost effective and efficient choices about providing service for adult probationers.

No comments were received regarding the amendments.

The amendments are adopted under Texas Government Code §§492.013, 509.003.

Cross Reference to Statutes: None.

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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TRD-202001020

Erik Brown

Director of Legal Affairs

Texas Department of Criminal Justice

Effective date: March 29, 2020

Proposal publication date: November 15, 2019

For further information, please call: (936) 437-6700



37 TAC §163.41

The Texas Board of Criminal Justice adopts amendments to §163.41, concerning Medical and Psychological Information, without changes to the proposed text as published in the November 15, 2019, issue of the *Texas Register* (44 TexReg 7011). The rule will not be republished.

The adopted amendments make minor organizational changes, delete superfluous guidance, and otherwise make no substantive changes.

No comments were received regarding the amendments.

The amendments are adopted under Texas Government Code §§492.013, 509.003.

Cross Reference to Statutes: None.

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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Erik Brown

Director of Legal Affairs

Texas Department of Criminal Justice

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For further information, please call: (936) 437-6700



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC adopts amendments to §§19.1, 19.101, 19.401 - 19.411, 19.413, 19.414, 19.416, 19.417, 19.421, 19.501 - 19.504, 19.601, 19.602, 19.606, 19.702, 19.703, 19.706, 19.801 - 19.803, 19.901, 19.1001, 19.1010, 19.1101, 19.1104, 19.1107 - 19.1111, 19.1113, 19.1201 - 19.1203, 19.1205, 19.1401, 19.1501, 19.1601, 19.1901, 19.1902, 19.1908 - 19.1912, 19.1915, 19.1917, 19.1929, 19.2704 in Title 40, Part 1, Chapter 19, concerning Nursing Facility Requirements for Licensure and Medicaid Certification. The Executive Commissioner also adopts new §§19.701, 19.904, 19.1102, 19.1116, 19.1931 and adopts the repeal of §§19.418, 19.701, 19.705, 19.1102, 19.1103, 19.1903, and 19.1904 in Title 40, Part 1, Chapter 19, concerning Nursing Facility Requirements for Licensure and Medicaid Certification.

The amendments to §§19.101, 19.406, 19.421, 19.502, 19.602, 19.606, 19.702, 19.801, 19.802, 19.901, 19.1001, 19.1010, 19.1109, 19.1110, 19.1113, 19.1201, 19.1912, and new §19.904 are adopted with changes to the proposed text as published in the September 13, 2019, issue of the *Texas Register* (44 TexReg 4979). These sections will be republished.

The amendments to §§19.1, 19.401 - 19.405, 19.407 - 19.411, 19.413, 19.414, 19.416, 19.417, 19.501, 19.503, 19.504, 19.601, 19.703, 19.706, 19.803, 19.1101, 19.1104, 19.1107, 19.1108, 19.1111, 19.1202, 19.1203, 19.1205, 19.1401, 19.1501, 19.1601, 19.1901, 19.1902, 19.1908 - 19.1911, 19.1915, 19.1917, 19.1929, 19.2704; new §§19.701, 19.1102, 19.1116, 19.1931; and the repeal of §§19.418, 19.701, 19.705, 19.1102, 19.1103, 19.1903, and 19.1904 are adopted without changes to the proposed text as published in the September 13, 2019, issue of the *Texas Register* (44 TexReg 4979). These sections will not be republished.

BACKGROUND AND JUSTIFICATION

The purpose of the amendments, new sections, and repeals in 40 Texas Administrative Code (TAC), Chapter 19, is to make HHSC rules consistent with federal regulations for nursing facilities participating in Medicare and Medicaid and to protect the health and safety of nursing facility residents.

The Code of Federal Regulations (CFR), Title 42, Subpart B, §§483.1, 483.5, 483.10, 483.12, 483.15, 483.20, 483.21, 483.24, 483.25, 483.30, 483.35, 483.40, 483.45, 483.50,

483.55, 483.60, 483.65, 483.70, 483.75, 483.80, 483.85, 483.90 and 483.95, was amended effective November 28, 2016, to revise the requirements that nursing facilities must meet to participate in the Medicare and Medicaid programs.

The adopted rules focus on person-centered care and culture change, quality of life improvement, care and services, health outcomes, individual choice, resident safety, professional standards, and quality assurance and performance improvement. The rule changes are necessary to enhance health and safety protections for nursing facility residents, streamline regulatory requirements for nursing facility providers, and improve consistency of regulatory survey activity.

HHSC also replaces references to both the "Texas Department of Human Services" or "DHS" and the "Department of Aging and Disability Services" or "DADS" with references to the "Texas Health and Human Services Commission" or "HHSC" throughout the proposal. The terms "responsible party," "legal representative," and other similar terms are replaced with the term "resident representative," throughout the proposal. The word "Texas" is added to the beginning of Texas codes. HHSC also makes editorial changes throughout the proposal to remove gender-specific language, adopt person-first respectful language, make plural nouns singular such as "resident" instead of "residents," and improve clarity and readability of the rules.

COMMENTS

The 31-day comment period ended October 14, 2019.

During this period, HHSC received comments regarding the proposed rules from ten commenters, including Disability Rights Texas, the Office of the State Long Term Care Ombudsman, and one individual. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Multiple commenters suggested expanding the definition of "comprehensive care plan" in §19.101(26) to add two additional requirements to the planning process. The additional requirements are documentation of the specialized services the nursing facility will provide as a result of preadmission screening and resident review (PASRR) recommendations and the resident's preferences for discharge.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The requirements related to PASRR recommendations are covered in §19.802(b)(3). The requirements related to a resident's preferences for discharge are covered in §19.802(b)(4)(B). The suggested changes to §19.101(26) involve substantive changes that are addressed in other sections of Chapter 19.

Comment: Multiple commenters stated that the definitions of "family representative" in §19.101(43) and "responsible party" in §19.101(123) are not in the federal regulations and are a historical approach to dealing with others designated by a resident who do not necessarily have legal status as a representative. The commenters suggested that these terms be replaced with "resident representative" as defined in §19.101(123) for the sections of the rule within the scope of this project and in other sections during future rule projects.

Response: HHSC declines to make the suggested changes at this time. "Responsible party" cannot be deleted in this chapter because the term is used in other sections of Chapter 19 that are not being amended in this project. Also, the term "family representative" as used in the discussion of family council in §19.403

is intended to mean representative of the family, not the individual resident.

Comment: Multiple commenters stated that the definition of "resident group" as used in §19.101(121) contains unnecessary language that could be interpreted to limit privacy and assembly protections of a resident group. The commenters recommend amending the definition to delete the requirements.

Response: HHSC agrees with the commenters and will change the definition as suggested.

Comment: A commenter suggested amending the definition of "resident representative" in §19.101(122) to clarify that an individual chosen by the resident to act on behalf of the resident to support the resident in decision-making requires the resident's permission.

Response: HHSC disagrees and declines to revise the rule in response to this comment. This request would change the definition of resident representative from what is set forth in 42 CFR §483.5. To ensure consistency in applying these requirements, HHSC will not deviate from the CFR language in its TAC rule.

Comment: Regarding §19.401, multiple commenters recommended creating a new subsection (b) with the language from 42 CFR §483.10(a)(1) related to treating resident with respect and dignity. The commenters also recommended moving language from subsection (a) to new subsection (c) to emphasize a facility's responsibility to protect and promote the rights of each individual.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(a)(1) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(a)(1) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Multiple commenters recommended that the statement of residents' rights from §19.401(c) be a required posting in §19.1921(e). The commenters also recommended comparing the statement of resident rights to the current "Residents' Rights" poster printed by HHSC to ensure consistency and updating the poster as needed.

Response: Section 19.1921(e) does require a facility to post the statement of residents' rights, and these amendments to Chapter 19 do not change that requirement. HHSC believes the current statement of resident rights is consistent with the requirements in the federal and state laws and rules. HHSC declines to revise the rule in response to this comment.

Comment: Regarding §19.406(a), multiple commenters recommended including language from 42 CFR §483.10(d) related to the resident's right to choose and retain a personal attending physician, subject to licensure and professional standards; access to all the physicians that provide care for a resident; and selection of another attending physician if the resident's first choice does not or is unwilling to meet the facility requirements to provide care.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(d) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(d) by reference,

HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Regarding §19.406(a)(2), multiple commenters recommended including all language from 42 CFR §483.10(c)(4), §483.10(c)(5), and §483.10(b)(7)(iii) related to a resident's right to be informed of the type of caregiver who will provide care, the benefits and treatment options, treatment alternatives, and the resident's right to be provided opportunities to participate in his or her care planning.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(c)(4), §483.10(c)(5), and §483.10(b)(7)(iii) is included by reference in §19.401(b). By adopting by reference the provisions in 42 CFR §483.10(c)(4), §483.10(c)(5) and §483.10(b)(7)(iii), HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Regarding §19.406(a)(2), multiple commenters recommended including language related to a resident's right to reasonable accommodation and choice from §483.10(e)(3), §483.10(f)(1) and §483.10(f)(2). The commenter is concerned that this language is not included elsewhere in Chapter 19, making it vitally important for HHSC to include this language in the TAC to protect each resident's quality of life.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from §483.10(e)(3), §483.10(f)(1), and §483.10(f)(2) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(e)(3), §483.10(f)(1) and §483.10(f)(2) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: A commenter stated that §19.406(a)(3) says that "unless found to lack capacity" the individual has the right to participate in planning care and treatment or changes in care and treatment. The commenter stated that even if HHSC means the person is under guardianship, he or she should be supported to participate and express needs and preferences in care planning and changes and should be encouraged to participate alongside their legally authorized representative to the maximum extent possible consistent with Texas guardianship laws.

Response: HHSC agrees with the commenter and revises §19.406(a)(3) to provide that the resident has a right to participate in planning care and treatment or changes in care and treatment, to the extent practicable. This language is consistent with the language in 42 CFR §483.10(b)(7)(iii).

Comment: Regarding §19.407, multiple commenters recommended including language related to personal privacy from 42 CFR §483.10(g). The commenter is concerned that this language is not included elsewhere in Chapter 19, making it vitally important for HHSC to include this language in the TAC to protect each resident's quality of life.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(g)(3) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(g)(3) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Regarding §19.408, multiple commenters recommended including language from 42 CFR §483.10(j) related to the situations a resident has the right to voice grievances about. This language is not included elsewhere in Chapter 19, making it vitally important to include this language in the TAC to protect each resident's quality of life. Also, multiple commenters recommended adding language from 42 CFR §483.10(j) related to an individual's right to file a grievance and a nursing facility's responsibility related to responding to individual grievances. The commenters are concerned about protection to each resident's quality of life because Chapter 19 does not include language related to individual grievances.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(j) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(j) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Regarding §19.409, multiple commenters stated that the requirements related to the age of survey results a nursing facility must have available and the availability of any plans of correction as found in 42 CFR §483.10(g)(11)(ii) should be included in this rule.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(g)(11)(ii) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(g)(11)(ii) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Multiple commenters recommended that language from 42 CFR §483.10(f)(4) be added to §19.413(a). The federal requirements state a resident has the right to receive visitors of the resident's choosing at the time of the resident's choosing, subject to the right to deny visitation and in a manner that does not impose on the rights of another resident.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(f)(4) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(f)(4) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Multiple commenters recommended amending §19.413(a)(9) to add language from 42 CFR §483.10(f)(4)(iii)

related to restrictions that may be placed on the resident's right to visitors.

Responses: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(f)(4)(iii) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(f)(4)(iii) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Multiple commenters suggested adding language from §483.10(f)(4)(G)(v) to §19.413 requiring a facility to have written policies and procedures regarding visitation rights of residents, including those setting forth any clinically necessary or reasonable restrictions or limitations, or safety restrictions or limitations.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(f)(4)(G)(v) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(f)(4)(G)(v) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Multiple commenters suggested adding language from 42 CFR §483.10(f)(4)(G)(vi)(A) to §19.413 regarding a facility's duty to inform each resident of the resident's visitation rights and related facility policy and procedures. The commenters argue the language in 42 CFR §483.10(f)(4)(G)(vi)(A) is more detailed and informative regarding the facility's responsibility to inform residents of their visitation rights.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(f)(4)(G)(vi)(A) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(f)(4)(G)(vi)(A) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Multiple commenters recommended amending §19.416 to add language from 42 CFR §483.10(i)(1)(ii) that states a nursing facility shall exercise reasonable care for the protection of the resident's property from loss or theft.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(i)(1)(ii) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(i)(1)(ii) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Regarding §19.417, multiple commenters recommended including in this rule language from 42 CFR §483.10(e)(5) related to roommate choice. The commenters think excluding this language may lead stakeholders to incor-

rectly believe that only married couples have the right to choose a roommate.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(e)(5) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(e)(5) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Multiple commenters objected to the repeal of §19.418, related to self-administration of medications. The commenters think the right to self-administer medications is important to resident autonomy and dignity and it should be described in Chapter 19.

Response: HHSC declines to rescind the repeal of §19.418. The requirements related to the self-administration of drugs are included in 42 CFR §481.10(c)(7) which is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(c)(7) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Regarding §19.421(a), multiple commenters recommended including in this rule language from 42 CFR §483.10(e)(7)(iii) related to a resident's right to refuse a room transfer if the transfer is solely for the convenience of staff.

Response: HHSC agrees with this comment and will make the requested change to the rule.

Comment: A commenter suggested amending §19.502(b)(5) to clarify how to prevent discharge of a resident with dementia or a physical disability who cannot obtain documents from a bank or other third party required to maintain Medicaid eligibility.

Response: HHSC declines to revise the rule in response to this comment. This rule governs the conduct of a nursing facility, and a nursing facility, by itself, is not able to resolve this problem. The law prohibits a nursing facility from requiring a resident to execute advance directives. Furthermore, a representative of a nursing facility would have a conflict of interest if he or she was also acting as a representative of a resident. Accordingly, HHSC cannot hold the nursing facility responsible ensuring that someone is able to obtain the financial documents to establish or maintain a resident's Medicaid eligibility. Furthermore, HHSC cannot prevent a nursing facility from discharging a resident who is not Medicaid eligible and is not paying the nursing facility for services.

Comment: One commenter suggested amending §19.503(d) to update a reference to Consumer Rights and Services.

Response: The correct citation is §19.502(e)(4)(A), and the commenter is requesting the reference be updated to reflect the correct Ombudsman unit at HHSC. HHSC agrees with the commenter and will make the necessary change to the rule.

Comment: Regarding §19.502(f)(4)(A), multiple commenters recommended amending the language instructing a resident how to request an appeal. The commenters recommended adding, to the discharge notice, the specific name, address (mailing and email) and telephone number of the entity that

receives appeal requests. Also, the commenters state residents and ombudsmen have been told not to contact a local Medicaid Eligibility worker to request an appeal, so this language should be deleted from §19.502(f)(4)(A).

Response: HHSC revised §19.502(f)(4)(A) by removing the requirement that the resident request a hearing through the Medicaid eligibility worker at the local HHSC office. Removing this requirement makes the language in the rule more consistent with the language in 1 TAC §357.11. HHSC declines to add to this section the specific name, address, and telephone number of the entity that receives appeal requests. This would make the rule inconsistent with 1 TAC §357.11.

Comment: One commenter suggested that §19.502(f)(4) should be changed to read "a statement of resident's appeal right, including alternative community placement."

Response: HHSC disagrees and declines to revise the rule in response to the comment. Alternative community placement is discussed during comprehensive care planning as required in §19.802(b)(4).

Comment: Regarding §19.503(c)(2), multiple commenters recommended adding language that will permit a resident to return and resume residence in a nursing facility if the resident receives a discharge notice while he or she is hospitalized and the resident chooses to appeal the discharge. This language is consistent with 42 CFR §483.15(e)(1)(ii) in accordance with the CMS State Operations Manual Appendix PP F-626 which states, "in situations where the facility intends to discharge the resident, the facility must comply with Transfer and Discharge Requirements at §483.15(c), and the resident must be permitted to return and resume residence in the facility while an appeal is pending."

Response: HHSC declines to revise the rule in response to this comment. Sections 19.502 and 19.503, read together, contain the same requirements as the federal regulations.

Comment: Regarding §19.602(a)(1)(B), §19.602(a)(4), §19.602(d), §19.606(b), §19.606(c), §19.606(d), and §19.1010(c)(3), multiple commenters recommended replacing "HHSC" with "HHSC Complaint and Incident Intake" so that a facility cannot bury an incident report by notifying a different part of HHSC or an HHSC contractor.

Response: HHSC partially agrees with the comment and will replace "HHSC" with "HHSC Complaint and Incident Intake" in §§19.602(a)(1)(B), 19.602(a)(4), 19.602(d), 19.606(b), and 19.1010(c)(3). HHSC will also replace "HHSC" with "HHSC Complaint and Incident Intake" in §§19.602(a)(1)(A) and 19.602(c) to make the references in §19.602 consistent. HHSC declines to replace "HHSC" with "HHSC Complaint and Incident Intake" in §§19.606(c) and 19.606(d). These subsections reference statistics provided by HHSC rather than to whom a facility must report an incident.

Comment: Multiple commenters requested that HHSC amend §19.602(d) to require a nursing facility to provide a copy of a written investigation report to a resident or resident representative as required in 42 CFR §483.70(i)(2)(i).

Response: HHSC declines to make this change. The federal regulations do not require a facility to proactively release written investigation reports. The regulations do allow the resident or resident representative to request a copy of a written investigation report.

Comment: Regarding §19.702(b)(1), one commenter recommended changing the requirement that an activities program be directed by a qualified professional who "is eligible for certification" as a therapeutic recreation specialist or as an activities professional by a recognized accrediting body. The commenter recommended that an activities program be directed by a qualified professional who is certified as a therapeutic recreation specialist or as an activities professional by a recognized accrediting body.

Response: HHSC declines to make this change. The federal rules use the "is eligible" language and the goal of HHSC in this rule project is to be as consistent as possible with the federal rules. Furthermore, HHSC does not want to make existing nursing facilities replace currently serving activities directors who are meeting residents' needs.

Comment: Regarding §19.702(b)(1), a commenter suggested keeping the reference to a therapeutic recreation assistant since this level of activities professional is certified by the Consortium for Therapeutic Recreation/Activities Certification, Inc.

Response: HHSC declines to make this change. The actual credential is called a therapeutic recreation associate, rather than an assistant. The website for the Consortium in Texas lists three levels of certification: Therapeutic Recreation Specialist, Therapeutic Recreation Associate, and Activity Director. The adopted rule language permits someone who is certified as an assistant or associate to be an Activities Director and encompasses anyone who is eligible to be certified as an activities professional by a recognized accrediting body. This includes a Therapeutic Recreation Associate.

Comment: Regarding §19.702(b)(1), a commenter requested that two accrediting bodies be added to this rule: the Consortium for Therapeutic Recreation/Activities Certification and the National Certification Council for Activity Professionals.

Response: HHSC agrees with the commenter and will make this change.

Comment: One commenter recommended the deletion of §19.702(b)(2). This subsection allows a person to serve as an Activities Director if the person has two years' experience in a social or recreational program within the last five years, one of which was full-time in a therapeutic activities program.

Response: HHSC declines to make this change. The language in §19.702(b)(2) is consistent with the federal rules in 42 CFR §483.24(c)(2)(ii)(B). To ensure consistency in applying these requirements, HHSC will not deviate from the CFR language in its TAC rule.

Comment: Multiple commenters objected to the repeal of §19.705, Environment. The commenters think the adoption by reference of §483.10(i) in §19.401(b) does not sufficiently protect residents and clarify requirements to providers and other stakeholders.

Response: HHSC declines to rescind the repeal of §19.705. The contents of this rule have been added to proposed §19.401(b) which incorporates by reference 42 CFR §483.10. The requirements related to a safe environment are found in §483.10(i). By adopting the provision in 42 CFR §483.10(i) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: Regarding §19.802, multiple commenters recommended including language from 42 CFR §483.10(c) related to a resident's right to be informed of and provided opportunities to participate in his or her care. The commenters maintained that the additional detail related to a resident's right to participate in care planning is important to include in this section, in addition to mentioning it in §19.406.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The additional language requested from 42 CFR §483.10(c) is included by reference in §19.401(b). By adopting the provisions in 42 CFR §483.10(c) by reference, HHSC can enforce those requirements as state requirements without the need to repeat in state rules detailed federal language. The relevant citation is provided so that readers can easily find the federal language in the CFR, related to resident rights, and in the *Federal Register*.

Comment: A commenter recommended amending §19.803(a)(1)(D) to add "Discharge with supports and services or otherwise at the request of the individual does not require natural supports or unpaid caregiver supports."

Response: HHSC disagrees and declines to revise the rule in response to this comment. The CFR does not say natural supports or unpaid care supports are required. The request would expand the requirements beyond what is required by 42 CFR §483.21(c)(iv). To ensure consistency in applying these requirements, HHSC will not deviate from the CFR language in the adopted rule.

Comment: A commenter suggested adding additional language to §19.803(a)(1)(G)(iii) related to a resident's discharge summary to include the requirement for "an action plan to address barriers to discharge to the community."

Response: HHSC disagrees and declines to revise the rule in response to this comment. The request would expand the requirements beyond what is required by 42 CFR §483.21(c)(vii)(C). To ensure consistency in applying these requirements, HHSC will not deviate from the CFR language in the adopted rule.

Comment: A commenter suggested the rules in §19.904 should be expanded to address situations where a behavioral health provider might be contracted with to provide behavioral health services in the nursing home.

Response: HHSC disagrees and declines to revise the rule in response to this comment. The request would expand the requirements beyond what is required by 42 CFR §483.40. To ensure consistency in applying these requirements, HHSC will not deviate from the CFR language in the adopted rule.

HHSC also made additional edits in response to HHSC staff recommendations in multiple rules so that terminology in the adopted sections of Chapter 19 match the requirements in 42 CFR Chapter 483 to ensure consistency. The terms "care plan" and "comprehensive person-centered care plan" were replaced with the term "comprehensive care plan" in §§19.801(2)(c)(ii), 19.802(b), 19.802(h)(2), 19.901(4), 19.901(7), 19.901(8), 19.901(9), 19.901(10), 19.901(11), 19.904(1), 19.1001(a), 19.1001(a)(1)(C), 19.1001(a)(1)(D), 19.1001(a)(3), 19.1109(2), 19.1110(a), 19.1113(c)(2), 19.1201(3)(A), 19.1912(c), 19.1912(c)(1), 19.1912(d)(4). Clerical edits were made in §§19.101, 19.602(d), 19.901, and 19.904(2)(A). Also, the words *Federal Register* were italicized where appropriate.

SUBCHAPTER A. BASIS AND SCOPE

40 TAC §19.1

STATUTORY AUTHORITY

The amendment is 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

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 March 4, 2020.

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (210) 619-8292



SUBCHAPTER B. DEFINITIONS

40 TAC §19.101

STATUTORY AUTHORITY

The amendment is 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

§19.101. Definitions.

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

(1) Abuse--Negligent or willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical or emotional harm or pain to a resident; or sexual abuse, including involuntary or nonconsensual sexual conduct that would constitute an offense under Texas Penal Code §21.08 (indecent exposure) or Texas Penal Code Chapter 22 (assaultive offenses), sexual harassment, sexual coercion, or sexual assault.

(2) Act--Chapter 242 of the Texas Health and Safety Code.

(3) Activities assessment--See Comprehensive Assessment and Comprehensive Care Plan.

(4) Activity director--The qualified individual appointed by the facility to direct the activities program as described in §19.702 of this chapter (relating to Activities).

(5) Addition--The addition of floor space to an institution.

(6) Administrator--A person currently licensed in accordance with 26 TAC Chapter 555 (relating to Nursing Facility Administrators).

(7) Admission MDS assessment--An MDS assessment that determines a recipient's initial determination of eligibility for medical necessity for admission into the Texas Medicaid Nursing Facility Program.

(8) Advanced practice registered nurse--A person licensed as a registered nurse and approved to practice as an advanced practice registered nurse by the Texas Board of Nursing.

(9) Adverse event--An untoward, undesirable, and usually unanticipated event that causes death or serious injury, or the risk of death or serious injury.

(10) Alzheimer's disease and related disorders--Alzheimer's disease and any other irreversible dementia described by the Centers for Disease Control and Prevention or the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

(11) Applicant--A person or governmental unit, as those terms are defined in the Texas Health and Safety Code, Chapter 242, applying for a license under that chapter.

(12) Attending physician--A physician, currently licensed by the Texas Medical Board, who is designated by the resident or resident representative as having primary responsibility for the treatment and care of the resident.

(13) Authorized electronic monitoring--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

(14) Barrier precautions--Precautions including the use of gloves, masks, gowns, resuscitation equipment, eye protectors, aprons, face shields, and protective clothing for purposes of infection control.

(15) Care and treatment--Services required to maximize resident independence, personal choice, participation, health, self-care, psychosocial functioning and reasonable safety, all consistent with the preferences of the resident.

(16) Certification--The determination by HHSC that a nursing facility meets all the requirements of the Medicaid or Medicare programs.

(17) Certified facility--A facility that meets the requirements of the Medicare program, the Medicaid program, or both.

(18) Certified Ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(19) CFR--Code of Federal Regulations.

(20) Change of ownership-- An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.

(21) Chemical restraints--Any drug administered for the purpose of discipline or convenience, and not required to treat the resident's medical symptoms.

(22) CMS--Centers for Medicare & Medicaid Services.

(23) Complaint--Any allegation received by HHSC other than an incident reported by the facility. Such allegations include, but are not limited to, abuse, neglect, exploitation, or violation of state or federal standards.

(24) Completion date--The date an RN assessment coordinator signs an MDS assessment as complete.

(25) Comprehensive assessment--An interdisciplinary description of a resident's needs and capabilities including daily life functions and significant impairments of functional capacity, as described in §19.801(2) of this chapter (relating to Resident Assessment).

(26) Comprehensive care plan--A plan of care prepared by an interdisciplinary team that includes measurable short-term and long-term objectives and timetables to meet the resident's needs developed for each resident after admission. The plan addresses at least the following needs: medical, nursing, rehabilitative, psychosocial, dietary, activity, and resident's rights. The plan includes strategies developed by the team, as described in §19.802(c)(2) of this chapter (relating to Comprehensive Person-Centered Care Planning), consistent with the physician's prescribed plan of care, to assist the resident in eliminating, managing, or alleviating health or psychosocial problems identified through assessment. Planning includes:

(A) goal setting;

(B) establishing priorities for management of care;

(C) making decisions about specific measures to be used to resolve the resident's problems; and

(D) assisting in the development of appropriate coping mechanisms.

(27) Controlling person--A person with the ability, acting alone or in concert with others, to directly or indirectly, influence, direct, or cause the direction of the management, expenditure of money, or policies of a nursing facility or other person. A controlling person does not include a person, such as an employee, lender, secured creditor, or landlord, who does not exercise any influence or control, whether formal or actual, over the operation of a facility. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of a nursing facility;

(B) any person who is a controlling person of a management company or other business entity that operates a nursing facility or that contracts with another person for the operation of a nursing facility;

(C) an officer or director of a publicly traded corporation that is, or that controls, a facility, management company, or other business entity described in subparagraph (A) of this paragraph but does not include a shareholder or lender of the publicly traded corporation; and

(D) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of a nursing facility, is in a position of actual control or authority with respect to the nursing facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility.

(28) Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and HHSC have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(29) DADS--The term referred to the Department of Aging and Disability Services; it now refers to HHSC.

(30) Dentist--A practitioner licensed to practice dentistry by the Texas State Board of Dental Examiners.

(31) DHS-- This term referred to the Texas Department of Human Services; it now refers to HHSC.

(32) Dietitian--A qualified dietitian is one who is qualified based upon either:

(A) registration by the Commission on Dietetic Registration of the Academy of Nutrition and Dietetics; or

(B) licensure, or provisional licensure, as a dietitian under Texas Occupations Code, Chapter 701 and one year of supervisory experience in dietetic service of a health care facility.

(33) Direct ownership interest--Ownership of equity in the capital, stock, or profits of, or a membership interest in, an applicant or license holder.

(34) Disclosable interest--Five percent or more direct or indirect ownership interest in an applicant or license holder.

(35) Distinct part--That portion of a facility certified to participate in the Medicaid Nursing Facility program or as a SNF in the Medicare program.

(36) Drug (also referred to as medication)--Any of the following:

(A) any substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

(B) any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans;

(C) any substance (other than food) intended to affect the structure or any function of the body of a human; and

(D) any substance intended for use as a component of any substance specified in subparagraphs (A) - (C) of this paragraph. It does not include devices or their components, parts, or accessories.

(37) Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(38) Emergency--A sudden change in a resident's condition requiring immediate medical intervention.

(39) Executive Commissioner--The executive commissioner of the Health and Human Services Commission.

(40) Exploitation--The illegal or improper act or process of a caregiver, family member, or other individual who has an ongoing relationship with a resident using the resources of the resident for monetary or personal benefit, profit, or gain without the informed consent of the resident.

(41) Facility--Unless otherwise indicated, a facility is an institution that provides organized and structured nursing care and service and is subject to licensure under Texas Health and Safety Code, Chapter 242.

(A) For Medicaid, a facility is a nursing facility which meets the requirements of §1919(a) - (d) of the Social Security Act. A facility may not include any institution that is for the care and treatment of mental diseases except for services furnished to individuals age 65 and over and who are eligible as defined in 26 TAC Chapter 303 (relating to Preadmission Screening and Resident Review (PASRR)).

(B) For Medicare and Medicaid purposes (including eligibility, coverage, certification, and payment), the "facility" is always the entity which participates in the program, whether that entity is comprised of all of, or a distinct part of, a larger institution.

(C) "Facility" is also referred to as a nursing home or nursing facility. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care of the resident; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.

(42) Family council--A group of family members, friends, or legal guardians of residents, who organize and meet privately or openly.

(43) Family representative--An individual appointed by the resident to represent the resident and other family members, by formal or informal arrangement.

(44) Fiduciary agent--An individual who holds in trust another's monies.

(45) Goals--Long-term: general statements of desired outcomes. Short-term: measurable time-limited, expected results that provide the means to evaluate the resident's progress toward achieving long-term goals.

(46) Governmental unit--A state or a political subdivision of the state, including a county or municipality.

(47) Health care provider--An individual, including a physician, or facility licensed, certified, or otherwise authorized to administer health care, in the ordinary course of business or professional practice.

(48) Hearing--A contested case hearing held in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) and Chapter 91 of this title (relating to Hearings Under the Administrative Procedure Act).

(49) HHSC--The Texas Health and Human Services Commission.

(50) HIV--Human Immunodeficiency Virus.

(51) Incident--An abnormal event, including accidents or injury to staff or residents, which is documented in facility reports. An occurrence in which a resident may have been subject to abuse, neglect, or exploitation must also be reported to HHSC.

(52) Indirect ownership interest--Any ownership or membership interest in a person that has a direct ownership interest in an applicant or license holder.

(53) Infection control--A program designed to prevent the transmission of disease and infection in order to provide a safe and sanitary environment.

(54) Inspection--Any on-site visit to or survey of an institution by HHSC for the purpose of licensing, monitoring, complaint investigation, architectural review, or similar purpose.

(55) Involuntary seclusion--Separation of a resident from others or from the resident's room or confinement to the resident's room, against the resident's will or the will of a person who is legally authorized to act on behalf of the resident. Monitored separation from other residents is not involuntary seclusion if the separation is a therapeutic intervention that uses the least restrictive approach for the minimum

amount of time, not exceed to 24 hours, until professional staff can develop a care plan to meet the resident's needs.

(56) IV--Intravenous.

(57) Legend drug or prescription drug--Any drug that requires a written or telephonic order of a practitioner before it may be dispensed by a pharmacist, or that may be delivered to a particular resident by a practitioner in the course of the practitioner's practice.

(58) License holder--A person that holds a license to operate a facility.

(59) Licensed health professional--A physician; physician assistant; advanced practice registered nurse; physical, speech, or occupational therapist; pharmacist; physical or occupational therapy assistant; registered professional nurse; licensed vocational nurse; licensed dietitian; licensed social worker; or certified respiratory care practitioner.

(60) Licensed vocational nurse (LVN)--A nurse who is currently licensed by the Texas Board of Nursing as a licensed vocational nurse.

(61) Life Safety Code--NFPA 101.

(62) Life safety features--Fire safety components required by NFPA 101, including building construction, fire alarm systems, smoke detection systems, interior finishes, sizes and thicknesses of doors, exits, emergency electrical systems, and sprinkler systems.

(63) Life support--Use of any technique, therapy, or device to assist in sustaining life. (See §19.419 of this chapter (relating to Advance Directives)).

(64) Local authorities--Persons, including, but not limited to, local health authority, fire marshal, and building inspector, who may be authorized by state law, county order, or municipal ordinance to perform certain inspections or certifications.

(65) Local health authority--The physician appointed by the governing body of a municipality or the commissioner's court of the county to administer state and local laws relating to public health in the municipality's or county's jurisdiction as defined in Texas Health and Safety Code, §121.021.

(66) Long-term care-regulatory--HHSC Regulatory Services Division, which is responsible for surveying nursing facilities to determine compliance with regulations for licensure and certification for Medicaid participation.

(67) Major injury--An injury that qualifies as a major injury under NFPA 99.

(68) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, or food service.

(69) Manager--A person, other than a licensed nursing home administrator, having a contractual relationship to provide management services to a facility.

(70) Managing local ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(71) MDS--Minimum data set. See RAI.

(72) MDS nurse reviewer--A registered nurse employed by HHSC to monitor the accuracy of the MDS assessment submitted by a Medicaid-certified nursing facility.

(73) Medicaid applicant--A person who requests the determination of eligibility to become a Medicaid recipient.

(74) Medicaid nursing facility vendor payment system--Electronic billing and payment system for reimbursement to nursing facilities for services provided to eligible Medicaid recipients.

(75) Medicaid recipient--A person who meets the eligibility requirements of the Title XIX Medicaid program, is eligible for nursing facility services, and resides in a Medicaid-participating facility.

(76) Medical director--A physician licensed by the Texas Medical Board, who is engaged by the nursing home to assist in and advise regarding the provision of nursing and health care.

(77) Medical power of attorney--The legal document that designates an agent to make treatment decisions if the individual designator becomes incapable.

(78) Medication aide--A person who holds a current permit issued under the Medication Aide Training Program as described in Chapter 95 of this title (relating to Medication Aides--Program Requirements) and acts under the authority of a person who holds a current license under state law which authorizes the licensee to administer medication.

(79) Misappropriation--The taking, secretion, misapplication, deprivation, transfer, or attempted transfer to any person not entitled to receive any property, real or personal, or anything of value belonging to or under the legal control of a resident without the effective consent of the resident or other appropriate legal authority, or the taking of any action contrary to any duty imposed by federal or state law prescribing conduct relating to the custody or disposition of property of a resident.

(80) MN--Medical necessity. A determination, made by physicians and registered nurses who are employed by or contract with the state Medicaid claims administrator, that a recipient requires the services of a licensed nurse in an institutional setting to carry out a physician's planned regimen for total care. A recipient's need for custodial care in a 24-hour institutional setting does not constitute medical necessity.

(81) Neglect--The failure to provide goods or services, including medical services that are necessary to avoid physical or emotional harm, pain, or mental illness.

(82) NFPA--National Fire Protection Association.

(83) NFPA 99--NFPA 99, Health Care Facilities Code, 2012 Edition.

(84) NFPA 101--NFPA 101, Life Safety Code, 2012 Edition.

(85) Nurse aide--An individual who provides nursing or nursing-related services to residents in a facility under the supervision of a licensed nurse. This term may include an individual who provides these services through an agency or under a contract with the facility. This definition does not include an individual who is a licensed health professional, a registered dietitian, or someone who volunteers such services without pay. A nurse aide is not authorized to provide nursing or nursing-related services for which a license or registration is required under state law. Nurse aides do not include those individuals who furnish services to residents only as paid feeding assistants.

(86) Nurse practitioner--An advanced practice registered nurse licensed by the Texas Board of Nursing in the role of Nurse Practitioner.

(87) Nurses' station--A nurses' station is an area designated as the focal point on all shifts for the administration and supervision of resident-care activities for a designated number of resident bedrooms.

(88) Nursing care--Services provided by nursing personnel which include, but are not limited to, observation; promotion and maintenance of health; prevention of illness and disability; management of health care during acute and chronic phases of illness; guidance and counseling of individuals and families; and referral to physicians, other health care providers, and community resources when appropriate.

(89) Nursing facility or nursing home--See definition of "facility."

(90) Nursing personnel--Persons assigned to give direct personal and nursing services to residents, including registered nurses, licensed vocational nurses, nurse aides, and medication aides. Unlicensed personnel function under the authority of licensed personnel.

(91) Objectives--See definition of "goals."

(92) OBRA--Omnibus Budget Reconciliation Act of 1987, which includes provisions relating to nursing home reform.

(93) Ombudsman intern--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(94) Ombudsman Program--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(95) Paid feeding assistant--An individual who meets the requirements of §19.1113 of this chapter (relating to Paid Feeding Assistants) and who is paid to feed residents by a facility or who is used under an arrangement with another agency or organization.

(96) PASARR or PASRR--Preadmission Screening and Resident Review.

(97) Palliative Plan of Care--Appropriate medical and nursing care for residents with advanced and progressive diseases for whom the focus of care is controlling pain and symptoms while maintaining optimum quality of life.

(98) Patient care-related electrical appliance--An electrical appliance that is intended to be used for diagnostic, therapeutic, or monitoring purposes in a patient care area, as defined in Standard 99 of the National Fire Protection Association.

(99) Person--An individual, firm, partnership, corporation, association, joint stock company, limited partnership, limited liability company, or any other legal entity, including a legal successor of those entities.

(100) Person-centered care--To focus on the resident as the locus of control, and to support the resident in making choices and having control over the resident's daily life.

(101) Pharmacist--An individual, licensed by the Texas State Board of Pharmacy to practice pharmacy, who prepares and dispenses medications prescribed by a practitioner.

(102) Physical restraint--Any manual method, or physical or mechanical device, material or equipment attached, or adjacent to the resident's body, that the individual cannot remove easily which restricts freedom of movement or normal access to one's body. The term includes a restraint hold.

(103) Physician--A doctor of medicine or osteopathy currently licensed by the Texas Medical Board to practice medicine.

(104) Physician assistant (PA)--An individual who is licensed as a physician assistant under Texas Occupations Code, Chapter 204.

(105) Podiatrist--A practitioner whose profession encompasses the care and treatment of feet who is licensed to practice podiatry by the Texas State Board of Podiatric Medical Examiners.

(106) Poison--Any substance that federal or state regulations require the manufacturer to label as a poison and is to be used externally by the consumer from the original manufacturer's container. Drugs to be taken internally that contain the manufacturer's poison label, but are dispensed by a pharmacist only by or on the prescription order of a practitioner, are not considered a poison, unless regulations specifically require poison labeling by the pharmacist.

(107) Practitioner--A physician, podiatrist, dentist, or an advanced practice registered nurse or physician assistant to whom a physician has delegated authority to sign a prescription order, when relating to pharmacy services.

(108) Private and unimpeded access--Access to enter a facility, or communicate with a resident outside of the hearing or view of others, without interference or obstruction from facility employees, volunteers, or contractors.

(109) PRN (pro re nata)--As needed.

(110) Provider--The individual or legal business entity that is contractually responsible for providing Medicaid services under an agreement with HHSC.

(111) Qualified mental health professional - community services--Has the meaning given in 25 TAC §412.303 (relating to Definitions).

(112) Qualified surveyor--An employee of HHSC who has completed state and federal training on the survey process and passed a federal standardized exam.

(113) Quality assessment and assurance committee--A group of health care professionals in a facility who develop and implement appropriate action to identify and rectify substandard care and deficient facility practice.

(114) Quality-of-care monitor--A registered nurse, pharmacist, or dietitian employed by HHSC who is trained and experienced in long-term care facility regulation, standards of practice in long-term care, and evaluation of resident care, and functions independently of HHSC Regulatory Services Division.

(115) Quality measure report--A report that provides information derived from an MDS that provides a numeric value to quality indicators. This data is available to the public as part of the Nursing Home Quality Initiative (NHQI), and is intended to provide objective measures for consumers to make informed decisions about the quality of care in a nursing facility.

(116) RAI--Resident Assessment Instrument. An assessment tool used to conduct comprehensive, accurate, standardized, and reproducible assessments of each resident's functional capacity as specified by the Secretary of the U. S. Department of Health and Human Services. At a minimum, this instrument must consist of the MDS core elements as specified by CMS; utilization guidelines; and Care Area Assessment process.

(117) Recipient--Any individual residing in a Medicaid certified facility or a Medicaid certified distinct part of a facility whose daily vendor rate is paid by Medicaid.

(118) Rehabilitative services--Rehabilitative therapies and devices provided to help a person regain, maintain, or prevent deterioration of a skill or function that has been acquired but then lost or impaired due to illness, injury, or disabling condition. The term in-

cludes physical and occupational therapy, speech-language pathology, and psychiatric rehabilitation services.

(119) Representative payee--A person designated by the Social Security Administration to receive and disburse benefits, act in the best interest of the beneficiary, and ensure that benefits will be used according to the beneficiary's needs.

(120) Resident--Any individual residing in a nursing facility.

(121) Resident group--A group or council of residents who meet regularly.

(122) Resident representative--

(A) Any of the following:

(i) an individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access medical, social, or other personal information of the resident; manage financial matters; or receive notifications;

(ii) a person authorized by state or federal law (including agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access medical, social, or other personal information of the resident; manage financial matters; or receive notifications;

(iii) legal representative, as used in Section 712 of the Older Americans Act; or

(iv) the court-appointed guardian of a resident.

(B) This definition is not intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, state or federal law, or a court of competent jurisdiction.

(123) Responsible party--An individual authorized by the resident to act for him as an official delegate or agent. Responsible party is usually a family member or relative, but may be a legal guardian or other individual. Authorization may be in writing or may be given orally.

(124) Restraint--A chemical or physical restraint.

(125) Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(126) RN--Registered nurse. An individual currently licensed by the Texas Board of Nursing as a registered nurse.

(127) RN assessment coordinator--A registered nurse who signs and certifies a comprehensive assessment of a resident's needs, using the RAI, including the MDS, as specified by HHSC.

(128) RUG--Resource Utilization Group. A categorization method, consisting of 34 categories based on the MDS, that is used to determine a recipient's service and care requirements and to determine the daily rate HHSC pays a nursing facility for services provided to the recipient.

(129) Secretary--Secretary of the U.S. Department of Health and Human Services.

(130) Services required on a regular basis--Services which are provided at fixed or recurring intervals and are needed so frequently that it would be impractical to provide the services in a home or family setting. Services required on a regular basis include continuous or periodic nursing observation, assessment, and intervention in all areas of resident care.

(131) SNF--A skilled nursing facility or distinct part of a facility that participates in the Medicare program. SNF requirements apply when a certified facility is billing Medicare for a resident's per diem rate.

(132) Social Security Administration--Federal agency for administration of social security benefits. Local social security administration offices take applications for Medicare, assist beneficiaries file claims, and provide information about the Medicare program.

(133) Social worker--A qualified social worker is an individual who is licensed, or provisionally licensed, by the Texas State Board of Social Work Examiners as prescribed by the Texas Occupations Code, Chapter 505, and who has at least:

(A) a bachelor's degree in social work; or

(B) similar professional qualifications, which include a minimum educational requirement of a bachelor's degree and one year experience met by supervised employment providing social services in a health care setting.

(134) Standards--The minimum conditions, requirements, and criteria established in this chapter with which an institution must comply to be licensed under this chapter.

(135) State Medicaid claims administrator--The entity under contract with HHSC to process Medicaid claims in Texas.

(136) State Ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(137) State plan--A formal plan for the medical assistance program, submitted to CMS, in which the State of Texas agrees to administer the program in accordance with the provisions of the State Plan, the requirements of Titles XVIII and XIX, and all applicable federal regulations and other official issuances of the U.S. Department of Health and Human Services.

(138) Stay agreement--An agreement between a license holder and the executive commissioner that sets forth all requirements necessary to lift a stay and rescind a license revocation proposed under §19.2107 of this chapter (relating to Revocation of a License by the HHSC Executive Commissioner).

(139) Substandard quality of care violation--A violation of §19.401(a), §19.401(b), §19.402(b), (c), or (m); §19.406(d) - (h); §19.417(a), (b), or (d); §19.425(b)(1); §19.504(a); §19.601; §19.602; §19.701; §19.703; §19.706(a), (c), (d)(1) - (5), or (e)(7); §19.801; §19.901; §19.904(2) or (4); §19.1501(5), (6), or (7); or §19.1601(e)(2) of this chapter that constitutes:

(A) an immediate threat to resident health or safety;

(B) a pattern of or actual harm that is not an immediate threat; or

(C) a widespread potential for more than minimal harm, but less than an immediate threat, with no actual harm.

(140) Supervision--General supervision, unless otherwise identified.

(141) Supervision (direct)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within the qualified person's sphere of competence. If the person being supervised does not meet assistant-level qualifications specified in this chapter and in federal regulations, the supervisor must be on the premises and directly supervising.

(142) Supervision (general)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within the qualified person's sphere of competence. The person being supervised must have access to the qualified person providing the supervision.

(143) Survey agency--HHSC is the agency that, through contractual agreement with CMS, is responsible for Title XIX (Medicaid) survey and certification of nursing facilities.

(144) *Texas Register*--A publication of the Texas Register Publications Section of the Office of the Secretary of State that contains emergency, proposed, withdrawn, and adopted rules issued by Texas state agencies. The Texas Register was established by the Administrative Procedure and Texas Register Act of 1975.

(145) Therapeutic diet--A diet ordered by a physician as part of treatment for a disease or clinical condition, in order to eliminate, decrease, or increase certain substances in the diet or to provide food which has been altered to make it easier for the resident to eat.

(146) Threatened violation--A situation that, unless immediate steps are taken to correct, may cause injury or harm to a resident's health and safety.

(147) Title II--Federal Old-Age, Survivors, and Disability Insurance Benefits of the Social Security Act.

(148) Title XVI--Supplemental Security Income (SSI) of the Social Security Act.

(149) Title XVIII--Medicare provisions of the Social Security Act.

(150) Title XIX--Medicaid provisions of the Social Security Act.

(151) Total health status--Includes functional status, medical care, nursing care, nutritional status, rehabilitation and restorative potential, activities potential, cognitive status, oral health status, psychosocial status, and sensory and physical impairments.

(152) Universal precautions--The use of barrier precautions and other precautions to prevent the spread of blood-borne diseases.

(153) Unreasonable confinement--Involuntary seclusion.

(154) Vaccine preventable diseases--The diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

(155) Vendor payment--Payment made by HHSC on a daily-rate basis for services delivered to recipients in Medicaid-certified nursing facilities. Vendor payment is based on the nursing facility's approved-to-pay claim processed by the state Medicaid claims administrator. The Nursing Facility Billing Statement, subject to adjustments and corrections, is prepared from information submitted by the nursing facility, which is currently on file in the computer system as of the billing date. Vendor payment is made at periodic intervals, but not less than once per month for services rendered during the previous billing cycle.

(156) Widespread--When the problem causing a violation is pervasive in a facility or represents systemic failure that affected or has the potential to affect a large portion or all of a facility's residents.

(157) Willfully interfere--To act or not act to intentionally prevent, interfere with, or impede or to attempt to intentionally prevent, interfere with, or impede.

(158) Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

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SUBCHAPTER E. RESIDENT RIGHTS

40 TAC §§19.401 - 19.411, 19.413, 19.414, 19.416, 19.417, 19.421

STATUTORY AUTHORITY

The amendments 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

§19.406. *Free Choice.*

(a) Resident rights. The resident has the right to:

(1) choose and retain a personal attending physician, subject to that physician's compliance with the facility's standard operating procedures for physician practices in the facility;

(2) be fully informed in advance about care and treatment and of any changes in that care or treatment that may affect the resident's well-being; and

(3) participate in planning care and treatment or changes in care and treatment, to the extent practicable. See §19.419 of this title (relating to Advance Directives).

(b) Licensed-only facilities. The resident must be allowed complete freedom of choice to obtain pharmacy services from any pharmacy that is qualified to perform the services. A facility must not require residents to purchase pharmaceutical supplies or services from the facility itself or from any particular vendor. The resident has the right to be informed of prices before purchasing any pharmaceutical item or service from the facility, except in an emergency.

(c) Additional requirements regarding freedom of choice for Medicaid recipients. The recipient must be allowed complete freedom of choice to obtain any Medicaid services from any institution, agency, pharmacy, person, or organization that is qualified to perform the ser-

vices, unless the provider causes the facility to be out of compliance with the requirements specified in this chapter.

(1) A facility must not require recipients to purchase supplies or services, including pharmaceutical supplies or services, from the facility itself or from any particular vendor. The recipient has the right to be informed of prices before purchasing any item or services from the facility, except in an emergency.

(2) The facility must furnish Medicaid recipients with complete information about available Medicaid services, how to obtain these services, their rights to freely choose service providers as specified in this subsection and the right to request a hearing before HHSC if the right to freely choose providers has been abridged without due process.

§19.421. Refusal of Certain Transfers in Medicaid-certified Facilities.

(a) A resident has the right to refuse a transfer to another room within the facility, if the purpose of the transfer is:

(1) to relocate a resident of a skilled nursing facility (SNF) from the distinct part of the facility that is an SNF to a part of the facility that is not an SNF;

(2) to relocate a resident of a nursing facility from the distinct part of the facility that is a nursing facility to a distinct part of the facility that is an SNF; or

(3) solely for the convenience of the staff.

(b) A resident's exercise of the right to refuse transfer under this section does not affect the resident's eligibility or entitlement to Medicaid benefits.

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40 TAC §19.418

STATUTORY AUTHORITY

The repeal is 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

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SUBCHAPTER F. ADMISSION, TRANSFER, AND DISCHARGE RIGHTS IN MEDICAID-CERTIFIED FACILITIES

40 TAC §§19.501 - 19.504

STATUTORY AUTHORITY

The amendments 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

§19.502. Transfer and Discharge in Medicaid-certified Facilities.

(a) Examples. Transfer and discharge includes movement of a resident to a bed outside the certified facility, whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement within the same certified facility.

(b) Transfer and discharge requirements. The facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless:

(1) the transfer or discharge is necessary for the resident's welfare, and the resident's needs cannot be met in the facility;

(2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(3) the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(4) the health of other individuals in the facility would otherwise be endangered;

(5) the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Nonpayment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for the resident's stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid;

(6) the resident or resident representative requests a voluntary transfer or discharge; or

(7) the facility ceases to operate as a nursing facility and no longer provides resident care.

(c) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in subsection (b)(1) - (7) of this section, the facility must ensure that the transfer or discharge is documented in the resident's clinical record and appropriate information is communicated to the receiving health care institution or provider.

(1) Documentation must include:

(A) the basis for the transfer per subsection (b)(1) - (7) of this section; and

(B) in the case of subsection (b)(1) of this section, the specific resident's needs that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the needs.

(2) The documentation required by paragraph (1) of this subsection, must be made by:

(A) the resident's physician when transfer or discharge is necessary under subsection (b)(1) or (b)(2) of this section; or

(B) a physician when transfer or discharge is necessary under subsection (b)(3) or (b)(4) of this section.

(3) Information provided to the receiving health care institution or provider must include the following:

(A) contact information of the practitioner responsible for the care of the resident;

(B) resident representative information, including contact information;

(C) advance directive information;

(D) all special instructions or precautions for ongoing care, as appropriate;

(E) comprehensive care plan goals; and

(F) all other necessary information, including a copy of the resident's discharge summary, consistent with §19.803 of this chapter (relating to Discharge Summary (Discharge Plan of Care)), as applicable, to ensure a safe and effective transition of care.

(d) Notice before transfer or discharge. Before a facility transfers or discharges a resident, the facility must:

(1) notify the resident and the resident representative about the transfer or discharge and the reasons for the move in writing and in a language and manner the resident understands;

(2) if the discharge or transfer is initiated by the facility, send a copy of the notice to a representative of the Ombudsman Program at the time a discharge notice is presented to the resident and resident representative, in accordance with the timeframes described in subsection (e) of this section, except that the notice may be provided as soon as practicable, such as in a list of residents sent on a monthly basis, when a resident is temporarily transferred on an emergency basis to an acute care facility;

(3) record the reasons for the transfer or discharge in the resident's clinical record;

(4) include in the notice the items described in subsection (f) of this section; and

(5) comply with §19.2310 of this chapter (relating to Nursing Facility Ceases to Participate) when the facility voluntarily withdraws from Medicaid or Medicare or is terminated from Medicaid or Medicare participation by HHSC or the secretary.

(e) Timing of the notice.

(1) Except when specified in paragraph (3) of this subsection or in §19.2310 of this chapter, the notice of transfer or discharge required under subsection (d) of this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(2) The requirements described in paragraph (1) of this subsection and subsection (h) of this section do not have to be met if the resident or resident representative requests the transfer or discharge.

(3) Notice must be made as soon as practicable before transfer or discharge when:

(A) the safety of individuals in the facility would be endangered, as specified in subsection (b)(3) of this section;

(B) the health of individuals in the facility would be endangered, as specified in subsection (b)(4) of this section;

(C) the resident's health improves sufficiently to allow a more immediate transfer or discharge, as specified in subsection (b)(2) of this section;

(D) the transfer and discharge is necessary for the resident's welfare because the resident's needs cannot be met in the facility, as specified in subsection (b)(1) of this section, and the resident's urgent medical needs require an immediate transfer or discharge; or

(E) a resident has not resided in the facility for 30 days.

(4) When an immediate involuntary transfer or discharge as specified in subsection (b)(3) or (4) of this section, is contemplated, unless the discharge is to a hospital, the facility must:

(A) immediately call the staff of the Office of the State Long-term Care Ombudsman to report its intention to discharge; and

(B) submit to HHSC the required physician documentation regarding the discharge.

(f) Contents of the notice. For nursing facilities, the written notice specified in subsection (d) of this section must include the following:

(1) the reason for transfer or discharge;

(2) the effective date of transfer or discharge;

(3) the location to which the resident is transferred or discharged;

(4) a statement of the resident's appeal rights, including:

(A) the resident has the right to appeal the action as outlined in HHSC's Fair and Fraud Hearings Handbook by requesting a hearing within 90 days after the date of the notice;

(B) if the resident requests the hearing before the discharge date, the resident has the right to remain in the facility until the hearing officer makes a final determination unless failure to transfer or discharge would endanger the health or safety of the resident or individuals in the facility. The facility must document the danger failure to discharge would present; and

(C) information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(5) the name, address, email address, and telephone number of the managing local ombudsman and the toll-free number of the Ombudsman Program;

(6) in the case of a resident with mental illness, the address, email address, and phone number of the state mental health authority; and

(7) in the case of a resident with an intellectual or developmental disability, the authority for individuals with intellectual and developmental disabilities, and the phone number, address, and email

address of the agency responsible for the protection and advocacy of individuals with intellectual and developmental disabilities.

(g) Changes to the notice. If the information in the notice changes before effecting the transfer or discharge, the facility must update the recipients of the notice as soon as practicable once the updated information becomes available.

(h) Orientation for transfer or discharge. A facility must provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. This orientation must be provided in a form and manner that the resident can understand.

(i) Notice of relocation to another room. Except in an emergency, the facility must notify the resident and the resident representative at least five days before relocation of the resident to another room within the facility. The facility must prepare a written notice which contains:

- (1) the reasons for the relocation;
- (2) the effective date of the relocation; and
- (3) the room to which the facility is relocating the resident.

(j) Fair hearings.

(1) Individuals who receive a discharge notice from a facility have 90 days to appeal. If the recipient appeals before the discharge date, the facility must allow the resident to remain in the facility, except in the circumstances described in subsections (b)(5) and (e)(3) of this section, until the hearing officer makes a final determination. Vendor payments and eligibility will continue until the hearing officer makes a final determination. If the recipient has left the facility, Medicaid eligibility will remain in effect until the hearing officer makes a final determination.

(2) When the hearing officer determines that the discharge was inappropriate, the facility, upon written notification by the hearing officer, must readmit the resident immediately, or to the next available bed. If the discharge has not yet taken place, and the hearing officer finds that the discharge will be inappropriate, the facility, upon written notification by the hearing officer, must allow the resident to remain in the facility. The hearing officer will also report the findings to HHSC Regulatory Services Division for investigation of possible noncompliance.

(3) When the hearing officer determines that the discharge is appropriate, the resident is notified in writing of this decision. Any payments made on behalf of the recipient past the date of discharge or decision, whichever is later, must be recouped.

(k) Discharge of married residents. If two residents in a facility are married and the facility proposes to discharge one spouse to another facility, the facility must give the other spouse notice of the spouse's right to be discharged to the same facility. If the spouse notifies a facility, in writing, that the spouse wishes to be discharged to another facility, the facility must discharge both spouses on the same day, pending availability of accommodations.

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SUBCHAPTER G. FREEDOM FROM ABUSE, NEGLECT, AND EXPLOITATION

40 TAC §§19.601, 19.602, 19.606

STATUTORY AUTHORITY

The amendments 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

§19.602. Incidents of Abuse, Neglect, and Exploitation Reportable to the Texas Health and Human Services Commission and Law Enforcement Agencies by Facilities.

(a) In response to allegations of abuse, neglect, exploitation, or mistreatment, the facility must:

(1) ensure that all alleged violations involving abuse, neglect, exploitation or mistreatment, including injuries of unknown source and misappropriation of resident property are reported:

(A) immediately to the administrator of the facility and to HHSC Complaint and Incident Intake, but no later than two hours after the allegation is made, if the events that cause the allegation involve abuse, or result in serious bodily injury; or

(B) no later than 24 hours after the allegation is made to the administrator of the facility and to HHSC Complaint and Incident Intake, if the events that cause the allegation do not involve abuse and do not result in serious bodily injury;

(2) conduct an investigation of the reported acts and have evidence that all alleged violations are thoroughly investigated;

(3) prevent further potential abuse, neglect, exploitation, or mistreatment while the investigation is in progress; and

(4) report the results of all investigations to the administrator or the administrator's designee and to HHSC Complaint and Incident Intake within five working days of the incident and, if the alleged violation is verified, take appropriate corrective action.

(b) A facility owner or employee who has cause to believe that the physical or mental health or welfare of a resident has been or may be adversely affected by abuse, neglect, or exploitation caused by another person must report the abuse, neglect, or exploitation.

(c) Reports described in subsections (a)(1) and (b) of this section must be made to HHSC Complaint and Incident Intake.

(d) Written investigation reports described in subsection (a)(4) of this section must be sent to HHSC Complaint and Incident Intake no later than the fifth working day after the initial.

(e) As a condition of employment, an employee of a facility must sign a statement that states:

(1) the employee may be criminally liable for failure to report abuses; and

(2) the employee has a cause of action against a facility, its owners or employees if the employee is suspended, terminated, disciplined, discriminated against, or retaliated against, under the Texas Health and Safety Code, Title 4, §260A.014, as a result of:

(A) reporting to the employee's supervisor, the administrator, HHSC, or a law enforcement agency a violation of law, including a violation of laws or regulations regarding nursing facilities; or

(B) initiating or cooperating in any investigation or proceeding of a governmental entity relating to care, services, or conditions at the nursing facility.

(f) The statements described in subsection (e) of this section must be available for inspection by HHSC.

(g) A local or state law enforcement agency must be notified of reports described in subsection (b) of this section that allege that:

(1) a resident's health or safety is in imminent danger;

(2) a resident has recently died because of conduct alleged in the report of abuse or neglect or other complaint;

(3) a resident has been hospitalized or treated in an emergency room because of conduct alleged in the report of abuse or neglect or other complaint;

(4) a resident has been a victim of any act or attempted act described in the Texas Penal Code, §§21.02, 21.11, 22.011, or 22.021; or

(5) a resident has suffered bodily injury, as that term is defined in the Texas Penal Code, §1.07, because of conduct alleged in the report of abuse or neglect or other complaint.

§19.606. Reporting of Resident Death Information.

(a) All licensed facilities must report to HHSC the death of any resident in the facility and any resident who is transferred from the facility to a hospital and who dies within 24 hours after transfer.

(b) The facility must submit to HHSC Complaint and Incident Intake a standard HHSC form within ten working days after the last day of the month in which a resident death occurs. The form must include:

(1) name of deceased;

(2) social security number of the deceased;

(3) date of death; and

(4) name and address of the institution.

(c) These reports are confidential under the Texas Health and Safety Code, §260A.016; however, a licensed facility must make available historical statistics provided to the facility by HHSC and must provide the statistics, if requested, to an applicant for admission or the applicant's representative.

(d) HHSC produces statistical information of official causes of death to determine patterns and trends of incidents of death among the elderly and in specific facilities and makes this information available to the public upon request.

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SUBCHAPTER H. QUALITY OF LIFE

40 TAC §19.701, §19.705

STATUTORY AUTHORITY

The repeals 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

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40 TAC §§19.701 - 19.703, 19.706

STATUTORY AUTHORITY

The new section and amendments 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

§19.702. Activities.

(a) The facility must provide, based on the comprehensive assessment and care plan and the preferences of each resident, an ongoing program to support a resident in the resident's choice of activities, both facility-sponsored group and individual activities and independent activities, designed to meet the interests of and support the physical, mental, and psychosocial well-being of each resident, encouraging both independence and interaction in the community.

(b) The activities program must be directed by a qualified professional who is a qualified therapeutic recreation specialist or an activities professional who:

(1) is eligible for certification as a therapeutic recreation specialist or as an activities professional by a recognized accrediting body, such as the National Council for Therapeutic Recreation Certi-

fication, on or after October 1, 1990, the Consortium for Therapeutic Recreation/Activities Certification, or the National Certification Council for Activity Professionals;

(2) has two years of experience in a social or recreational program within the last five years, one of which was full-time in a therapeutic activities program;

(3) is a qualified occupational therapist or occupational therapy assistant; or

(4) has completed an activity director training course approved by a recognized credentialing body, such as the National Certification Council for Activity Professionals, National Council for Therapeutic Recreation Certification, or the Consortium for Therapeutic Recreation/Activities Certification, Inc.

(c) An activity director must complete eight hours of approved continuing education or equivalent continuing education units each year. Approval bodies include organizations or associations recognized as such by certified therapeutic recreation specialists or certified activity professionals or registered occupational therapists.

(d) The facility must ensure that activities assessment and care planning are completed and reviewed or updated as provided in §19.801 and §19.802 of this chapter (relating to Resident Assessment and Comprehensive Person-Centered Care Planning). If indicated by the RAI or the resident's need, an in-depth activities assessment is required.

(e) Toys and recreational equipment for a pediatric resident must be appropriate for the size, age, and developmental level of the resident.

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SUBCHAPTER I. RESIDENT ASSESSMENT

40 TAC §§19.801 - 19.803

STATUTORY AUTHORITY

The amendments 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

§19.801. Resident Assessment.

A facility must conduct, initially and periodically, a comprehensive, accurate, standardized, reproducible assessment of a resident's functional capacity. The facility must electronically transmit to CMS resident-entry-and-death-in-facility tracking records required by the RAI;

and OBRA assessments, including admission, annual, quarterly, significant change, significant correction, and discharge assessments.

(1) Admission orders. At the time a resident is admitted, the facility must have physician orders for the resident's immediate care.

(2) Comprehensive assessments.

(A) A facility must make a comprehensive assessment of a resident's needs, strengths, goals, life history, and preferences, using the current RAI process, including the MDS, Care Area Assessment process, and the Utilization Guidelines specified by HHSC and approved by CMS. The current RAI process is found in the MDS 3.0 manual posted by CMS on <http://www.cms.gov>.

(B) A facility must conduct an additional assessment and document the summary information if the MDS indicates an additional assessment on a care area is required.

(C) A facility must conduct a comprehensive assessment of a resident as follows:

(i) within 14 calendar days after admission, excluding readmissions in which there is no significant change in the resident's physical or mental condition. For purposes of this section, "readmission" means a return to the facility following a temporary absence for hospitalization or for therapeutic leave;

(ii) within 14 calendar days after the facility determines, or should have determined, that there has been a significant change in the resident's physical or mental condition. For purposes of this section, a "significant change" means a major decline or improvement in the resident's status that will not normally resolve itself without further intervention by staff or by implementing standard disease-related clinical interventions, that has an impact on more than one area of the resident's health status, and requires interdisciplinary review or revision of the comprehensive care plan, or both; and

(iii) not less often than once every 12 months.

(3) Quarterly review assessment. A facility must assess a resident using the quarterly review instrument specified by HHSC and approved by CMS not less frequently than once every three months.

(4) Use. A facility must maintain all resident assessments completed within the previous 15 months in the resident's active record and use the results of the assessments to develop, review, and revise the resident's comprehensive care plan as specified in §19.802 of this subchapter (relating to Comprehensive Person-Centered Care Planning).

(5) PASRR. A Medicaid-certified facility must:

(A) coordinate assessments with the PASRR process in 42 CFR, Part 483, Subpart C to the maximum extent practicable to avoid duplicative testing and effort, including:

(i) incorporating the recommendations from the PASRR level II determination and the PASRR evaluation report into a resident's assessment, care planning, and transitions of care; and

(ii) referring a level II resident and a resident suspected of having mental illness, an intellectual disability, or a developmental disability for level II resident review upon a significant change in status assessment; and

(B) promptly report a significant change in the mental or physical condition of a resident by submitting an MDS Significant Change in Status Assessment Form in the LTC Online Portal, in accordance with §19.2704(i)(12) of this chapter (Nursing Facility Responsibilities Related to PASRR).

(6) Automated data processing requirement.

(A) A facility must complete an MDS for a resident. The facility must enter MDS data into the facility's assessment software within 7 days after completing the MDS and electronically transmit the MDS data to CMS within 14 days after completing the MDS.

(B) A facility must complete the Long Term Care Medicaid Information form on an OBRA assessment that is submitted to the state Medicaid claims system for a Medicaid recipient or Medicaid applicant according to HHSC instructions located on the Texas Medicaid Healthcare Partnership Long Term Care Portal at <http://www.tmhp.com>.

(C) Data format. The facility must transmit MDS data to CMS in the format specified by CMS and HHSC.

(D) Information concerning a resident is confidential and a facility must not release information concerning a resident except as allowed by this chapter, including §19.407 of this chapter (relating to Privacy and Confidentiality) and §19.1910(d) of this chapter (relating to Clinical Records).

(7) Accuracy of assessments. The assessment must accurately reflect the resident's status.

(8) Coordination. A registered nurse must conduct or coordinate each assessment with the appropriate participation of health professionals.

(9) Certification.

(A) A registered nurse must sign and certify that the assessment is completed.

(B) Each individual who completes a portion of the assessment must sign and certify the accuracy of that portion of the assessment.

(10) Penalty for falsification under Medicare and Medicaid.

(A) An individual who willfully and knowingly:

(i) certifies a material and false statement in a resident assessment is subject to a civil money penalty of not more than \$1,000 for each assessment; or

(ii) causes another individual to certify a material and false statement in a resident assessment is subject to a civil money penalty of not more than \$5,000 for each assessment.

(B) Clinical disagreement does not constitute a material and false statement.

(11) Use of independent assessors in Medicaid-certified facilities and dually certified facilities. If HHSC determines, under a certification survey or otherwise, that there has been a knowing and willful certification of false statements under paragraph (10) of this section, HHSC may require (for a period specified by HHSC) individuals who are independent of the facility and who are approved by HHSC to conduct and certify the resident assessments under this section.

(12) Pediatric resident assessment.

(A) A facility must ensure that a pediatric assessment:

(i) is performed by a licensed health professional experienced in the care and assessment of children;

(ii) includes parents or guardians in the assessment process; and

(iii) includes a discussion with a parent or guardian about the potential for community transition.

(B) The clinical record of a child must include a record of immunizations, blood screening for lead, and developmental assessment. The local school district's developmental assessment may be used if available.

(C) A licensed health professional must assess a child's functional status in relation to pediatric developmental levels, rather than adult developmental levels.

(D) A facility must ensure pediatric residents receive services in accordance with the guidelines established by the Department of State Health Services' Texas Health Steps (THSteps). For Medicaid-eligible pediatric residents between the ages of six months and six years, blood screening for lead must be done in accordance with THSteps guidelines.

§19.802. *Comprehensive Person-Centered Care Planning.*

(a) Baseline care plans.

(1) The facility must develop and implement a baseline care plan for each resident that includes the instructions needed to provide effective and person-centered care of the resident that meet professional standards of quality care. The baseline care plan must:

(A) be developed within 48 hours of a resident's admission;

(B) include the minimum healthcare information necessary to properly care for a resident, including:

(i) initial goals based on admission orders;

(ii) physician orders;

(iii) dietary orders;

(iv) therapy services;

(v) social services; and

(vi) PASRR recommendation, if applicable.

(2) The facility may develop a comprehensive care plan in place of the baseline care plan if the comprehensive care plan:

(A) is developed within 48 hours of the resident's admission; and

(B) meets the requirements set forth in subsections (b) - (g) of this section, except subsection (c)(1) of this section.

(3) The facility must provide the resident and the resident representative a summary of the baseline care plan that includes:

(A) the initial goals of the resident;

(B) a summary of the resident's medications and dietary instructions;

(C) any services and treatments to be administered by the facility and personnel acting on behalf of the facility; and

(D) any updated information based on the details of the comprehensive care plan, as necessary.

(b) A facility must develop a comprehensive care plan for each resident, consistent with the resident's rights, that includes measurable short-term and long-term objectives and timeframes to meet a resident's medical, nursing, mental, and psychosocial needs that are identified in the comprehensive assessment. If a child is admitted to the facility, the comprehensive care plan must be based on the child's individual needs. The comprehensive care plan must describe the following:

(1) the services that are to be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being as required under §19.701 of this chapter (relating to Quality of Life) and §19.901 of this chapter (relating to Quality of Care);

(2) any services that would otherwise be required under §19.701 of this chapter and §19.901 of this chapter but are not provided due to the resident's exercise of rights, including the right to refuse treatment under §19.403(i) of this chapter (relating to Notice of Rights and Services);

(3) any nursing facility specialized services or nursing facility PASRR support activities the nursing facility will provide as a result of PASRR recommendations, in accordance with Subchapter BB of this chapter (relating to Nursing Facility Responsibilities Related To Preadmission Screening And Resident Review (PASRR)); and

(4) in consultation with the resident and resident representative:

(A) the resident's goals for admission and desired outcomes;

(B) the resident's preference and potential for future discharge, whether the resident's desire to return to the community was assessed, and any referrals to local contact agencies or other appropriate entities; and

(C) discharge plans in the comprehensive care plan as appropriate, in accordance with §19.803 of this subchapter (relating to Discharge Summary (Discharge Plan of Care)).

(c) The comprehensive care plan must be:

(1) developed within seven days after completion of the comprehensive assessment;

(2) prepared by an interdisciplinary team that includes:

(A) the attending physician;

(B) a registered nurse with responsibility for the resident;

(C) a nurse aide with responsibility for the resident;

(D) the qualified dietitian or director of food and nutrition services;

(E) other appropriate staff in disciplines as determined by the resident's needs or as requested by the resident; and

(F) to the extent practicable, the participation of the resident and the resident representative;

(3) periodically reviewed and revised by a team of qualified persons after each assessment, including both the comprehensive and quarterly review assessments; and

(4) for a resident under 22 years of age, annually reviewed at a comprehensive care plan meeting between the facility and the resident's LAR as defined in §19.805(a)(5) of this subchapter (relating to Permanency Planning for a Resident Under 22 Years of Age), which includes a review of:

(A) the LAR's contact information as required by §19.805(b)(4)(F) of this subchapter;

(B) the resident's comprehensive assessment;

(C) the resident's educational status; and

(D) the resident's permanency plan.

(d) Regarding subsection (c)(2)(F) of this section, an explanation must be included in a resident's clinical record if the participation of the resident and the resident representative is determined not practicable for the development of the resident's comprehensive care plan.

(e) A comprehensive care plan must include:

(1) for a resident under 18 years of age, the activities, supports, and services that, when provided or facilitated by the facility, will enable the resident to live with a family; or

(2) for a resident 18-22 years of age, the activities, supports, and services that, when provided or facilitated by the facility, will result in the resident having a consistent and nurturing environment in the least restrictive setting, as defined by the resident and LAR as defined in §19.805(a)(5) of this subchapter.

(f) A comprehensive care plan may include a palliative plan of care. This plan may be developed only at the request of the resident, surrogate decision maker or legal representative for residents with terminal conditions, end stage diseases or other conditions for which curative medical interventions are not appropriate. The plan of care must have goals that focus on maintaining a safe, comfortable and supportive environment in providing care to a resident at the end of life.

(g) For a resident under 22 years of age, the facility must provide written notice to the LAR, as defined in §19.805(a)(5) of this subchapter, of a meeting to conduct an annual review of the resident's comprehensive care plan no later than 21 days before the meeting date and request a response from the LAR.

(h) The services provided or arranged by the facility must:

(1) meet professional standards of quality;

(2) be provided by qualified persons in accordance with each resident's written comprehensive care plan; and

(3) effective November 28, 2019, be culturally-competent and trauma-informed.

(i) The comprehensive care plan must be made available to all direct care staff.

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 J. QUALITY OF CARE

40 TAC §19.901, §19.904

STATUTORY AUTHORITY

The new section and amendment 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code

§326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

§19.901. *Quality of Care.*

Based on the comprehensive assessment of a resident, the facility must ensure that a resident receives treatment and care in accordance with professional standards of practice, the comprehensive person-centered care plan, and the resident's choices, including the following:

(1) Vision and hearing. To ensure that a resident receives proper treatment and assistive devices to maintain vision and hearing abilities, the facility must, if necessary, assist the resident:

(A) in making appointments; and

(B) by arranging for transportation to and from the office of a practitioner specializing in the treatment of vision or hearing impairment or the office of a professional specializing in the provision of vision or hearing assistive devices.

(2) Skin Integrity.

(A) Pressure ulcers. Based on the comprehensive assessment of the resident, the facility must ensure that:

(i) a resident receives care, consistent with professional standards of practice, to prevent pressure ulcers and does not develop pressure ulcers unless the resident's clinical condition demonstrates that they are unavoidable; and

(ii) a resident with pressure ulcers receives necessary treatment and services, consistent with professional standards of practice, to promote healing, prevent infection, and prevent new ulcers from developing.

(B) Foot Care. To ensure that a resident receives proper treatment and care to maintain mobility and good foot health, the facility must:

(i) provide foot care and treatment, in accordance with professional standards of practice, including to prevent complications from the resident's medical condition; and

(ii) if necessary, assist the resident in making appointments with a qualified person, and arranging for transportation to and from such appointments.

(3) Incontinence.

(A) The facility must ensure that a resident who is continent of bladder and bowel on admission receives services and assistance to maintain continence unless the resident's clinical condition is or becomes such that continence is not possible to maintain.

(B) For a resident with urinary incontinence, based on the comprehensive assessment of the resident, the facility must ensure that:

(i) a resident who enters the facility without an indwelling catheter is not catheterized unless the resident's clinical condition demonstrates that catheterization is necessary;

(ii) a resident who enters the facility with an indwelling catheter or subsequently receives one is assessed for removal of the catheter as soon as possible unless the resident's clinical condition demonstrates that catheterization is necessary; and

(iii) a resident who is incontinent of bladder receives appropriate treatment and services to prevent urinary tract infections and to restore continence to the extent possible.

(C) For a resident with fecal incontinence, based on the resident's comprehensive assessment, the facility must ensure that a

resident who is incontinent of bowel receives appropriate treatment and services to restore as much normal bowel function as possible.

(4) Colostomy, urostomy, or ileostomy care. The facility must ensure that a resident who requires colostomy, urostomy, or ileostomy services, receives such care consistent with professional standards of practice, the comprehensive care plan, and the resident's goals and preferences.

(5) Mobility. The facility must ensure that:

(A) a resident who enters the facility without a limited range of motion does not experience reduction in range of motion unless the resident's clinical condition demonstrates that a reduction in range of motion is unavoidable;

(B) a resident with a limited range of motion receives appropriate treatment and services to increase range of motion and to prevent further decrease in range of motion; and

(C) a resident with limited mobility receives appropriate services, equipment, and assistance to maintain or improve mobility with the maximum practicable independence unless a reduction in mobility is unavoidable.

(6) Assisted nutrition and hydration. (Includes naso-gastric and gastrostomy tubes, both percutaneous endoscopic gastrostomy and percutaneous endoscopic jejunostomy, and enteral fluids). Based on a resident's comprehensive assessment, the facility must ensure that a resident:

(A) maintains acceptable parameters of nutritional status, such as usual body weight or desirable body weight range and electrolyte balance, unless the resident's clinical condition demonstrates that this is not possible or the resident preferences indicate otherwise;

(B) is offered sufficient fluid intake to maintain proper hydration and health;

(C) is offered a therapeutic diet when there is a nutritional problem and the health care provider orders a therapeutic diet;

(D) who has been able to eat enough alone or with assistance is not fed by enteral methods unless the resident's clinical condition demonstrates that enteral feeding was clinically indicated and consented to by the resident; and

(E) who is fed by enteral means receives the appropriate treatment and services to restore, if possible, oral eating skills and to prevent complications of enteral feeding including aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic abnormalities, and nasal-pharyngeal ulcers.

(7) Parenteral fluids. Parenteral fluids must be administered consistent with professional standards of practice and in accordance with physician orders, the comprehensive care plan, and the resident's goals and preferences.

(8) Respiratory care, including tracheostomy care and tracheal suctioning. The facility must ensure that a resident who needs respiratory care, including tracheostomy care and tracheal suctioning, is provided such care, consistent with professional standards of practice, the comprehensive care plan, the resident's goals and preferences, and §19.802 of this chapter, (relating to Comprehensive Person-Centered Care Planning).

(9) Prostheses. The facility must ensure that a resident who has a prosthesis is provided care and assistance, consistent with professional standards of practice, the comprehensive care plan, and the resident's goals and preferences, to wear and be able to use the prosthetic device.

(10) Pain management. The facility must ensure that pain management is provided to a resident who requires such services, consistent with professional standards of practice, the comprehensive care plan, and the resident's goals and preferences.

(11) Dialysis. The facility must ensure that a resident who requires dialysis receives such services, consistent with professional standards of practice, the comprehensive care plan, and the resident's goals and preferences.

(12) Trauma-informed care. Effective November 28, 2019, the facility must ensure that a resident who is a trauma survivor receives culturally-competent, trauma-informed care in accordance with professional standards of practice and accounting for resident's experiences and preferences in order to eliminate or mitigate triggers that may cause re-traumatization of the resident.

(13) Bed rails. The facility must attempt to use appropriate alternatives before installing a side or bed rail. If a bed or side rail is used, the facility must ensure correct installation, use, and maintenance of bed rails, including the following elements:

(A) assess the resident for risk of entrapment from bed rails before installation;

(B) review the risks and benefits of bed rails with the resident or resident representative and obtain informed consent before installation;

(C) ensure the bed's dimensions are appropriate for the resident's size and weight; and

(D) follow the manufacturers' recommendations and specifications for installing and maintaining bed rails.

(14) Accidents. The facility must ensure that:

(A) the resident environment remains as free of accident hazards as possible; and

(B) each resident receives adequate supervision and assistive devices to prevent accidents.

(15) Pediatric care.

(A) Licensed nursing care of children. A facility caring for children must have 24 hour a day on-site licensed nursing staff in numbers sufficient to provide safe care. For any facility with five or more children under 26 pounds, at least one nurse must be assigned solely to the care of those children.

(B) Fewer than five pediatric residents. Facilities with fewer than five pediatric residents must assure that the children's rooms are in close proximity to the nurses' station.

(C) Respiratory care of children.

(i) To facilitate the care of ventilator-dependent children or children with tracheostomies, a facility must group those children in rooms contiguous or in close proximity to each other. An exception to this rule is children who are able to be schooled off-site.

(ii) Facilities must assure that alarms on ventilators, apnea monitors, and any other such equipment uniquely identify the child or the child's room.

(iii) A facility caring for children with tracheostomies requiring daily care (including ventilator-dependent children with tracheostomies) must have 24 hour a day on-site respiratory therapy staff in numbers sufficient to provide a safe ratio of respiratory therapist per these residents. For the purposes of this rule, respiratory therapy staff is defined as a registered respiratory therapist

(RRT), a certified respiratory therapy technician (CRT), or a licensed nurse whose primary function is respiratory care.

(I) If the facility cares for nine or more children with tracheostomies requiring daily care (including ventilator-dependent children with tracheostomies), the facility must maintain a ratio of no less than one respiratory therapy staff per nine tracheostomy residents 24 hours a day.

(II) If the facility cares for six or more ventilator dependent children, the facility must:

(-a-) designate a respiratory therapy supervisor, either on staff or contracted who must be credentialed by the National Board for Respiratory Care (either CRT or RRT).

(-b-) provide and document that all respiratory therapy staff is trained in the care of children who are ventilator dependent. This training must be reviewed annually.

(-c-) assure that appropriate care, maintenance, and disinfection of all ventilator equipment and accessories occurs.

§19.904. Behavioral Health Services.

Each resident must receive and the facility must provide the necessary behavioral health care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and care plan.

(1) The facility must have sufficient staff who provide direct services to a resident with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. This is determined by resident assessments and individual comprehensive care plans and considering the number, acuity and diagnoses of the facility's resident population in accordance with §19.1931 of this chapter (relating to Facility Assessment). These competencies and skills sets include knowledge of and appropriate training and supervision for:

(A) caring for a resident with mental and psychosocial disorders, as well as a resident with a history of trauma or post-traumatic stress disorder, that have been identified in the facility assessment conducted pursuant to §19.1931 of this chapter; and

(B) implementing non-pharmacological interventions.

(2) Based on the comprehensive assessment of a resident, the facility must ensure that:

(A) a resident who displays or is diagnosed with mental disorder or psychosocial adjustment difficulty, or who has a history of trauma or post-traumatic stress disorder, receives appropriate treatment and services to correct the assessed problem or to attain the highest practicable mental and psychosocial well-being;

(B) a resident whose assessment did not reveal or who does not have a diagnosis of a mental or psychosocial adjustment difficulty or a documented history of trauma or post-traumatic stress disorder does not display a pattern of decreased social interaction or increased withdrawn, angry, or depressive behaviors, unless the resident's clinical condition demonstrates that development of such a pattern was unavoidable; and

(C) a resident who displays or is diagnosed with dementia, receives the appropriate treatment and services to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being.

(3) If rehabilitative services such as physical therapy, speech-language pathology, occupational therapy, and rehabilitative

services for mental disorders and intellectual disability, are required in the resident's comprehensive care plan, the facility must:

(A) provide the required services, including specialized rehabilitation services as required in §19.802 of this chapter (relating to Comprehensive Person-Centered Care Planning).

(B) obtain the required services from an outside resource in accordance with §19.1906 of this chapter (relating to Use of Outside Resources), from a Medicare or Medicaid provider of specialized rehabilitative services.

(4) The facility must provide medically-related social services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident.

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 K. NURSING SERVICES

40 TAC §19.1001, §19.1010

STATUTORY AUTHORITY

The amendments 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

§19.1001. Nursing Services.

(a) The facility must have sufficient staff with the appropriate competencies and skill sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. This is determined by resident assessments and individual comprehensive care plans and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at §19.1931 of this chapter (relating to Facility Assessment). Staff who have been instructed and who have demonstrated competence in the care of children must provide nursing services to children. Care and services are to be provided as specified in §19.901 of this chapter (relating to Quality of Care).

(1) Sufficient staff.

(A) The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans:

(i) licensed nurses, except when waived under paragraph (5) of this subsection; and

(ii) other nursing personnel, including nurse aides.

(B) The facility must designate a licensed nurse to serve as a charge nurse on each shift, except when waived under paragraph (5) of this subsection.

(C) The facility must ensure that licensed nurses have the specific competencies and skill sets necessary to care for a resident's needs, as identified through resident assessments, and described in the comprehensive care plan.

(D) The facility must provide care that includes assessing, evaluating, planning, and implementing resident comprehensive care plans and responding to a resident's needs.

(2) Registered nurse.

(A) The facility must use the services of a registered nurse for at least eight consecutive hours a day, seven days a week, except when waived under paragraph (5) or (6) of this subsection.

(B) The facility must designate a registered nurse to serve as the director of nursing on a full-time basis, 40 hours per week, except when waived under paragraph (6) of this subsection.

(C) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

(3) Proficiency of nurse aides. The facility must ensure that nurse aides are able to demonstrate competency in skills and techniques necessary to care for a resident's needs, as identified through resident assessments, and described in the resident's comprehensive care plan.

(4) Requirements for facility hiring and use of nurse aides.

(A) General rule. A facility must not use any individual working in the facility as a nurse aide for more than four months, on a full-time basis, unless:

(i) the individual is competent to provide nursing and nursing related services; and

(ii) the individual:

(I) has completed a training and competency evaluation program, or a competency evaluation program approved by the state as meeting the requirements of 42 CFR §§483.151-483.154; or

(II) has been deemed or determined competent as provided in 42 CFR §483.150(a) and (b).

(B) Nonpermanent employees. A facility must not use on a temporary, per diem, leased, or any basis other than a permanent employee any individual who does not meet the requirements in subparagraphs (4)(A)(i) and (ii) of this paragraph.

(C) Competency. A facility must not use any individual who has worked less than four months as a nurse aide in that facility unless the individual:

(i) is a full-time employee in a state-approved training and competency evaluation program;

(ii) has demonstrated competence through satisfactory participation in a state-approved nurse aide training and competency evaluation program, or competency evaluation program; or

(iii) has been deemed or determined competent as provided in 42 CFR §483.150(a) and (b).

(D) Registry Verification. Before allowing an individual to serve as a nurse aide, a facility must receive registry verification

that the individual has met competency evaluation requirements and is not designated in the registry as having a finding concerning abuse, neglect or mistreatment of a resident, or misappropriation of a resident's property, unless:

(i) the individual is a full-time employee in a training and competency evaluation program approved by the state; or

(ii) the individual can prove that the individual has recently successfully completed a training and competency evaluation program, or competency evaluation program approved by the state and has not yet been included in the registry. A facility must follow up to ensure that such an individual actually becomes registered.

(E) Multi-state registry verification. Before allowing an individual to serve as a nurse aide, a facility must seek information from every state registry, established under §1819(e)(2)(A) or §1919(e)(2)(A) of the Social Security Act, that the facility believes will include information about the individual.

(F) Required retraining. If, since an individual's most recent completion of a training and competency evaluation program, there has been a continuous period of 24 consecutive months during none of which the individual provided nursing or nursing-related services for monetary compensation, the individual must complete a new training and competency evaluation program or a new competency evaluation program.

(G) Regular in-service education. The facility must complete a performance review of every nurse aide at least once every 12 months, and must provide regular in-service education based on the outcome of these reviews. The in-service training must:

(i) be sufficient to ensure the continuing competence of a nurse aide, but must be no less than 12 hours per year;

(ii) address areas of weakness as determined in nurse aides' performance reviews and facility assessment at §19.1931 of this chapter, and may address the special needs of a resident as determined by the facility staff;

(iii) for a nurse aide providing services to an individual with cognitive impairments, address the care of the cognitively impaired; and

(iv) include dementia management training and resident abuse prevention training.

(H) The facility must comply with the nurse aide training and registry rules found in Chapter 94 of this title (relating to Nurse Aides).

(5) Waiver of requirement to provide licensed nurses on a 24-hour basis.

(A) To the extent that a facility is unable to meet the requirements of paragraphs (1)(B) and (2)(A) of this subsection, the state may waive these requirements with respect to the facility, if:

(i) the facility demonstrates to the satisfaction of HHSC that the facility has been unable, despite diligent efforts (including offering wages at the community prevailing rate for nursing facilities), to recruit appropriate personnel;

(ii) HHSC determines that a waiver of the requirement will not endanger the health or safety of individuals staying in the facility;

(iii) the state finds that, for any periods in which licensed nursing services are not available, a registered nurse or a physician is obligated to respond immediately to telephone calls from the facility; and

(iv) the waived facility has a full-time registered or licensed vocational nurse on the day shift seven days a week. For purposes of this requirement, the starting time for the day shift must be between 6 a.m. and 9 a.m. The facility must specify in writing the schedule that it follows.

(B) A waiver granted under the conditions listed in this paragraph is subject to annual state review.

(C) In granting or renewing a waiver, a facility may be required by the state to use other qualified, licensed personnel.

(D) The state agency granting a waiver of these requirements provides notice of the waiver to the State Ombudsman and the protection and advocacy systems in the state for individuals with mental illness established under the Protection and Advocacy for Mentally Ill Individuals Act (42 USC Chapter 114, Subchapter I) and individuals with intellectual or developmental disabilities established under the Developmental Disabilities Assistance and Bill of Rights Act (42 USC Chapter 144, Subchapter I, Part C).

(E) The nursing facility that is granted a waiver by the state notifies residents of the facility and the resident representatives of the waiver.

(6) Waiver of the requirement to provide services of a registered nurse for more than 40 hours a week in a Medicare skilled nursing facility (SNF).

(A) The secretary of the U.S. Department of Health and Human Services (secretary) may waive the requirement that a Medicare SNF provide the services of a registered nurse for more than 40 hours a week, including a director of nursing specified in paragraph (2) of this subsection, if the secretary finds that:

(i) the facility is located in a rural area and the supply of Medicare SNF services in the area is not sufficient to meet the needs of individuals residing in the area;

(ii) the facility has one full-time registered nurse who is regularly on duty at the facility 40 hours a week; and

(iii) the facility either has:

(I) only residents whose physicians have indicated (through physician's orders or admission notes) that they do not require the services of a registered nurse or a physician for a 48-hour period; or

(II) made arrangements for a registered nurse or a physician to spend time at the facility, as determined necessary by the physician, to provide necessary skilled nursing services on days when the regular full-time registered nurse is not on duty.

(B) The secretary provides notice of the waiver to the State Ombudsman and the protection and advocacy systems in the state for individuals with mental illness established under the Protection and Advocacy for Mentally Ill Individuals Act (42 USC Chapter 114, Subchapter I) and individuals with intellectual or developmental disabilities established under the Developmental Disabilities Assistance and Bill of Rights Act (42 USC Chapter 144, Subchapter I, Part C).

(C) The SNF that is granted a waiver notifies residents of the facility and the resident representatives of the waiver.

(D) A waiver of the registered nurse requirement under subparagraph (A) of this paragraph is subject to annual renewal by the secretary.

(7) Request for waiver concerning staffing levels. The facility must request a waiver through the local HHSC Regulatory Services Division, in writing, at any time the administrator determines that

staffing will fall, or has fallen, below that required in paragraphs (1) and (2) of this subsection for a period of 30 days or more out of any 45 days.

(A) The following information must be included in the request:

(i) beginning date when facility was or is unable to meet staffing requirements;

(ii) type waiver requested (24-hour licensed nurse or seven-day-per-week R.N.);

(iii) projected number of hours per month staffing reduced for 24-hour licensed nurse waiver or seven-day-per-week R.N. waiver; and

(iv) staffing adjustments made due to inability to meet staffing requirements.

(B) Waivers for licensed-only or certified facilities will be granted by HHSC Regulatory Services Division staff. Waivers for a Medicare SNF receive final approval from the CMS.

(C) If a facility, after requesting a waiver, is later able to meet the staffing requirements of paragraphs (1) and (2) of this subsection, HHSC Regulatory Services Division staff must be notified, in writing, of the effective date that staffing meets requirements.

(D) Verification that the facility appropriately made a request and notification will be done at the time of survey.

(E) Amounts paid to Medicaid-certified facilities in the per diem payment to meet the staffing requirements of paragraphs (1) and (2) of this subsection may be adjusted if staffing requirements are not met.

(8) Duration of waiver. Approved waivers are valid throughout the facility licensure or certification period, unless approval is withdrawn. During the relicensure or recertification survey, the determination is made for approval or denial for the next facility licensure or certification period if a waiver continues to be necessary. The facility requests a redetermination for a waiver from HHSC Regulatory Services Division staff at the time the survey is scheduled. At other times if a request is made, HHSC staff may schedule a visit for waiver determination.

(9) Requirements for waiver approval. To be approved for a waiver, the nursing facility must meet all of the requirements stated in this subchapter and the requirements specified throughout this chapter. In some instances, the survey agency may require additional conditions or arrangements such as:

(A) an additional licensed vocational nurse on day-shift duty when the registered nurse is absent;

(B) modification of nursing services operations; and

(C) modification of the physical environment relating to nursing services.

(10) Denial or withdrawal of a waiver. Denial or withdrawal of a waiver may be made at any time if any of the following conditions exist:

(A) requirements for a waiver are not met on a continuing basis;

(B) the quality of resident care is not acceptable; or

(C) justified complaints are found in areas affecting resident care.

(11) Requirement that SNFs be in a rural area. A SNF (Medicare) must be in a rural area for waiver consideration, as speci-

fied in paragraph (6) of this subsection. A rural area is any area outside the boundaries of a standard metropolitan statistical area. Rural areas are defined and designated by the federal Office of Management and Budget; are determined by population, economic, and social requirements; and are subject to revisions.

(b) Nurse staffing information.

(1) Data requirements. The facility must post the following information:

(A) on a daily basis:

(i) the facility name;

(ii) the current date;

(iii) the resident census; and

(iv) the specific shifts for the day; and

(B) at the beginning of each shift, the total number of hours and actual time of day to be worked by the following licensed and unlicensed nursing staff, including relief personnel directly responsible for resident care:

(i) RNs;

(ii) LVNs; and

(iii) CNAs.

(2) Posting requirements. The nursing facility must post the data described in paragraph (1) of this subsection:

(A) in a clear and readable format; and

(B) in a prominent place readily accessible to residents and visitors.

(3) Public access to posted nurse staffing data. The facility must, upon oral or written request, make copies of nurse staffing data available to the public for review at a cost not to exceed the community standard rate.

(4) Facility data retention requirements. The facility must maintain the posted daily nurse staffing data for the period of time specified by written facility policy or for at least two years following the last day in the schedule, whichever is longer.

§19.1010. Nursing Practices.

(a) A licensed nurse must practice within the constraints of applicable state laws and regulations governing their practice, including the Nurse Practice Act, and must follow the guidelines contained in the facility's written policies and procedures.

(b) A nurse must enter, or approve and sign, nurses' notes in the following instances:

(1) at least monthly; and

(2) at the time of any physical complaints, accidents, incidents, and change in condition or diagnosis, and progress. All of these situations must be promptly recorded as exceptions and included in the clinical record.

(c) If permitted by written policies of the nursing facility, an RN or a physician's assistant may determine and pronounce a resident dead unless a resident is being supported by artificial means that preclude a determination that the resident's spontaneous respiratory and circulatory functions have ceased. The facility's nursing staff and the medical staff or consultant must have jointly developed and approved the policies. The policies must include the following requirements:

(1) The apparent death of a resident must be reported immediately to the attending physician, relatives, and any guardian or legal representatives.

(2) The body of a deceased resident must not be removed from the facility without a physician's or registered nurse's authorization. Telephone authorization is acceptable, if not in conflict with local regulations. Authorization by a justice of the peace, acting as a coroner, is sufficient when the attending or consulting physician or registered nurse is not available.

(3) A death that involves trauma, or unusual or suspicious circumstances, must be reported immediately, in accordance with local regulations, and to HHSC Complaint and Incident Intake, in accordance with §19.602(g)(2) of this chapter (relating to Incidents of Abuse, Neglect, and Exploitation Reportable to the Texas Health and Human Services Commission and Law Enforcement Agencies by Facilities). Deaths must also be reported to HHSC monthly, in accordance with §19.606 of this chapter (relating to Reporting of Resident Death Information).

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SUBCHAPTER L. FOOD AND NUTRITION SERVICES

40 TAC §§19.1101, 19.1102, 19.1104, 19.1107 - 19.1111, 19.1113, 19.1116

STATUTORY AUTHORITY

The amendments and new section 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

§19.1109. *Food Intake.*

Food intake of a resident must be monitored and recorded as follows.

(1) Deviations from normal food and fluid intake must be recorded in the clinical records in accordance with §19.1911(b)(16)(E) of this chapter (relating to Contents of the Clinical Record).

(2) In-between meals and bedtime snacks, and supplementary feedings, either as a part of the overall comprehensive care plan or as ordered by a physician, including caloric-restricted diets, must be documented using the point, percentage, or other system consistently facility-wide.

§19.1110. *Frequency of Meals.*

(a) Each resident must receive and the facility must provide at least three meals daily, at regular times comparable to normal meal-times in the community or in accordance with a resident's needs, preferences, requests, and comprehensive care plan.

(b) There must be not more than 14 hours between a substantial evening meal and breakfast the following day, except when a nourishing snack is served at bedtime, up to 16 hours may elapse between a substantial evening meal and breakfast the following day if a resident group agrees to this meal span.

(c) Suitable, nourishing alternative meals and snacks must be provided to a resident who wants to eat at non-traditional times or outside of scheduled meal service times, consistent with the resident's plans of care.

§19.1113. *Paid Feeding Assistants.*

(a) State-approved training course. The facility may use a paid feeding assistant, if the paid feeding assistant has successfully completed a state-approved training course that meets the requirements of §19.1115 of this subchapter (relating to Requirements for Training of Paid Feeding Assistants) before feeding a resident.

(b) Supervision. A paid feeding assistant must work under the supervision of an RN or an LVN. In an emergency, a paid feeding assistant must call a supervisory nurse for help. A paid feeding assistant can only feed a resident in the dining room.

(c) Resident selection criteria.

(1) The facility must ensure that a paid feeding assistant provides dining assistance only for a resident who has no complicated feeding problems, which include difficulty swallowing, recurrent lung aspirations, and tube or parenteral/IV feedings.

(2) The facility must base resident selection on the interdisciplinary team's assessment and the resident's latest assessment and comprehensive care plan. A resident's comprehensive care plan must reflect the resident's appropriateness for a paid feeding assistant.

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40 TAC §19.1102, §19.1103

STATUTORY AUTHORITY

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SUBCHAPTER M. PHYSICIAN SERVICES

40 TAC §§19.1201 - 19.1203, 19.1205

STATUTORY AUTHORITY

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§19.1201. Physician Services.

A physician must personally approve in writing a recommendation that an individual be admitted to a facility. Each resident must remain under the care of a physician. A physician, physician assistant, or advanced practice registered nurse must provide orders for the resident's immediate care and needs. The facility must ensure that:

(1) the medical care and other health care of each resident is supervised by an attending physician. Any consultations must be ordered by the attending physician;

(2) another physician supervises the medical care and other health care of a resident when the resident's attending physician is unavailable; and

(3) if a child is admitted to the facility:

(A) appropriate pediatric consultative services are utilized, in accordance with the comprehensive assessment and comprehensive care plan; and

(B) a pediatrician or other physician with training or expertise in the clinical care of children with complex medical needs participates in all aspects of the medical care.

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SUBCHAPTER O. DENTAL SERVICES

40 TAC §19.1401

STATUTORY AUTHORITY

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SUBCHAPTER P. PHARMACY SERVICES

40 TAC §19.1501

STATUTORY AUTHORITY

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SUBCHAPTER Q. INFECTION CONTROL

40 TAC §19.1601

STATUTORY AUTHORITY

The amendment is 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

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SUBCHAPTER T. ADMINISTRATION

40 TAC §§19.1901, 19.1902, 19.1908 - 19.1912, 19.1915, 19.1917, 19.1929, 19.1931

STATUTORY AUTHORITY

The amendments and new section 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 agencies; Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities; and Texas Health and Safety Code §326.004, which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

§19.1912. *Additional Clinical Record Service Requirements.*

(a) Index of admissions and discharges. The facility must maintain a permanent, master index of all residents admitted to and discharged from the facility. This index must contain at least the following information concerning each resident:

- (1) name of resident (first, middle, and last);
- (2) date of birth;
- (3) date of admission;
- (4) date of discharge; and
- (5) social security, Medicare, or Medicaid number.

(b) Facility closure. In the event of closure of a facility, change of ownership or change of administrative authority:

(1) the facility must have in place written policies and procedures to ensure that the administrator's duties and responsibilities involve providing the appropriate notices, as required by §19.2310 of this chapter (relating to Nursing Facility Ceases to Participate); and

(2) the new management must maintain documented proof of the medical information required for the continuity of care of all residents. This documentation may be in the form of copies of the resident's clinical record or the original clinical record. In a change of ownership, the two parties will agree and designate in writing who

will be responsible for the retention and protection of the inactive and closed clinical records.

(c) Method of recording and correcting information. All resident care information must be recorded in ink or permanent print except for the medication, treatment, or diet section of the resident's comprehensive care plan. Correction of errors will be in accordance with accepted health information management standards.

(1) Erasures are not allowed on any part of the clinical record, with the exception of the medication, treatment, or diet section of the resident's comprehensive care plan.

(2) Correction of errors will be in accordance with accepted health information management standards.

(d) Required record retention. Periodic thinning of active clinical records is permitted; however, the following items must remain in the active clinical record:

- (1) current history and physical;
- (2) current physician's orders and progress notes;
- (3) current RAI and subsequent quarterly reviews; in Medicaid-certified facilities, all RAIs and Quarterly Reviews for the prior 15-month period;
- (4) current comprehensive care plan;
- (5) most recent hospital discharge summary or transfer form;
- (6) current nursing and therapy notes;
- (7) current medication and treatment records;
- (8) current lab and x-ray reports;
- (9) the admission record; and
- (10) the current permanency plan.

(e) Readmissions.

(1) If a resident is discharged for 30 days or less and readmitted to the same facility, upon readmission, to update the clinical record, staff must:

- (A) obtain current, signed physician's orders;
- (B) record a descriptive nurse note, giving a complete assessment of the resident's condition;
- (C) include any changes in diagnoses;
- (D) obtain signed copies of the hospital or transferring facility history and physical and discharge summary and a transfer summary containing this information is acceptable;
- (E) complete a new RAI and update the comprehensive care plan if evaluation of the resident indicates a significant change, which appears to be permanent and if no such change has occurred, then update only the resident comprehensive care plan; and
- (F) comply with §19.805 of this chapter (regarding Permanency Planning for a Resident Under 22 Years of Age).

(2) A new clinical record must be initiated if the resident is a new admission or has been discharged for over 30 days.

(f) Signatures.

(1) The use of faxing is acceptable for sending and receiving health care documents, including the transmission of physicians' orders. Long term care facilities may utilize electronic transmission if they adhere to the following requirements:

(1) The use of faxing is acceptable for sending and receiving health care documents, including the transmission of physicians' orders. Long term care facilities may utilize electronic transmission if they adhere to the following requirements:

(1) The use of faxing is acceptable for sending and receiving health care documents, including the transmission of physicians' orders. Long term care facilities may utilize electronic transmission if they adhere to the following requirements:

(A) The facility must implement safeguards to assure that faxed documents are directed to the correct location to protect confidential health information.

(B) All faxed documents must be signed by the author before transmission.

(2) Stamped signatures are acceptable for all health care documents requiring a physician's signature, if the person using the stamp sends a letter of intent which specifies that he will be the only one using the stamp, and then signs the letter with the same signature as the stamp.

(3) The facility must maintain all letters of intent on file and make them available to representatives of HHSC upon request.

(4) Use of a master signature legend in lieu of the legend on each form for nursing staff signatures of medication, treatment, or flow sheet entries is acceptable under the following circumstances.

(A) Each nursing employee documenting on medication, treatment, or flow sheets signs employee's full name, title, and initials on the legend.

(B) The original master legend is kept in the clinical records office or director of nurses' office.

(C) A current copy of the legend is filed at each nurses' station.

(D) When a nursing employee leaves employment with the facility, the employee's name is deleted from the list by lining through it and writing the current date by the name.

(E) The facility updates the master legend as needed for newly hired and terminated employees.

(F) The master signature legend must be retained permanently as a reference to entries made in clinical records.

(g) Destruction of Records. When resident records are destroyed after the retention period is complete, the facility must shred or incinerate the records in a manner which protects confidentiality. At the time of destruction, the facility must document the following for each record destroyed:

- (1) resident name;
- (2) clinical or medical record number, if used;
- (3) social security number, Medicare number, Medicaid number or the date of birth; and
- (4) date and signature of person carrying out disposal.

(h) Confidentiality. The facility must develop and implement written policies and procedures to safeguard the confidentiality of clinical record information from unauthorized access.

(1) Except as provided in paragraph (2) of this subsection, the facility must not allow access to a resident's clinical record unless a physician's order exists for supplies, equipment, or services provided by the entity seeking access to the record.

(2) The facility must allow access and release confidential medical information under court order or by written authorization of the resident or the resident representative, as in §19.407 of this chapter (relating to Privacy and Confidentiality).

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40 TAC §19.1903, §19.1904

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SUBCHAPTER BB. NURSING FACILITY RESPONSIBILITIES RELATED TO PREADMISSION SCREENING AND RESIDENT REVIEW (PASRR) DIVISION 2. NURSING FACILITY RESPONSIBILITIES

40 TAC §19.2704

STATUTORY AUTHORITY

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