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

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

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 2. ENFORCEMENT

SUBCHAPTER B. ENFORCEMENT FOR NONCOMPLIANCE WITH PROGRAM REQUIREMENTS OF CHAPTERS 6 AND 7

10 TAC §2.203

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to §2.203 Termination and Reduction of Funding for CSBG Eligible Entities. The rule amendments clarify that the process described in §2.203 does not apply to contracts awarded under CSBG Discretionary funding.

FISCAL NOTE. Mr. Bobby Wilkinson, Executive Director, has determined that, for each year of the first five years the amendment to the rule is in effect, enforcing or administering the amendment does not have any foreseeable implications related to costs or revenues of the state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT. Mr. Wilkinson also has determined that, for the first five years the amendment would be in effect:

1. The proposed amendment to the rule will not create or eliminate a government program;

2. The proposed amendment to the rule will not require a change in the number of employees of the Department;

3. The proposed amendment to the rule will not require additional future legislative appropriations;

4. The proposed amendment to the rule will result in neither an increase nor a decrease in fees paid to the Department;

5. The proposed amendment to the rule will not create a new regulation;

6. The proposed amendment to the rule will not repeal an existing regulation;

7. The proposed amendment to the rule will not increase or decrease the number of individuals subject to the rule's applicability; and

8. The proposed amendment to the rule will neither positively nor negatively affect this state's economy.

PUBLIC BENEFIT/COST NOTE. Mr. Wilkinson also has determined that, for each year of the first five years the amendment to the rule is in effect, the public benefit anticipated as a result of the action will be to further clarify which programs are applicable to the rule. There will not be any economic cost to any individual required to comply with the amendment.

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

REQUEST FOR PUBLIC COMMENT. All comments or questions in response to this action may be submitted in writing from March 24, 2023, through April 24, 2023. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Gavin Reid, P.O. Box 13941, Austin, Texas 78711-3941, or email greid@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 pm Austin local time, April 24, 2023.

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

Except as described herein the proposed amendment affects no other code, article, or statute.

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

(a) This section describes the Department's process for implementing HHS Information Memorandum 116 (Corrective Action, Termination, or Reduction of Funding) (IM 116) and 42 U.S.C. 9915. This process does not apply for Contracts awarded under CSBG Discretionary Funding.

(b) Capitalized words used herein have the meaning assigned in, Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), Chapter 6 of this title (relating to Community Affairs Programs), or assigned by federal or state law.

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

(d) If a Deficiency is identified, the Eligible Entity will be notified in writing. The Department will also review the training and technical assistance that has been provided to the Eligible Entity to determine if further training and technical assistance germane to the Deficiency is warranted. If so, the Eligible Entity will be offered additional training and technical assistance that specifically focuses on the Deficiency.

(e) If an Eligible Entity does not respond to the written notification, does not resolve the Deficiency, or does not propose a reasonable corrective action plan, the uncorrected Deficiency identified by

the Department will be considered a final decision that the Eligible Entity has failed to comply with requirements in a review pursuant to the CSBG Act, and can be considered cause for proceedings to terminate Eligible Entity status or reduce funding in accordance with IM 116 and 42 U.S.C. §§9908(b)(8) and 9915. Such a determination will be issued in a final determination letter from the Department to the Eligible Entity.

(f) If the Department determines that the development and implementation of a Quality Improvement Plan (QIP) is an appropriate requirement and/or that additional training and technical assistance are needed, that requirement will be stated in the final determination letter. The Eligible Entity will be provided 25 calendar days from the date of the final determination letter to submit a proposed QIP compliant with §2.204 of this subchapter and identifying dates for correction. In general, the Deficiency should be cured within 60 calendar days from the date of the final determination letter. If a Deficiency will require more than 60 calendar days, the Eligible Entity must explain why and propose a later date for correction, which the Department may elect to accept or deny. In the event a Deficiency cannot be corrected due to it being a singular past occurrence, the Eligible Entity must demonstrate to the Department that the Deficiency's cause has been identified and properly addressed, so that the Deficiency will not reoccur.

(g) Within 25 calendar days from the date the proposed QIP is received, the Department will either approve it or specify the reasons it cannot be approved. While the Department is reviewing the submitted QIP, the Department will consider the corrective action timeline proposed by the Eligible Entity and may accept that timeline, or recommend an alternate timeline, based on the nature of the Deficiency, and the nature of the correction. The Eligible Entity's inability to resolve the Deficiency within a reasonable timeframe may trigger the commencement of formal legal proceedings to terminate Eligible Entity status.

(h) The Department approved QIP must be implemented as soon as possible and resolution of the Deficiency must be fully met within the specified and approved timelines agreed to by the Department.

(i) If it is determined and/or documented that training and technical assistance are not appropriate; that a QIP is not appropriate; the QIP has not been approved; the QIP has not been met within the specified and approved timeline agreed to within the QIP; or the processes described in subsection (f) of this section have failed to resolve the Deficiency, the Department will contact the Executive Director of the Eligible Entity, and all known members of the Eligible Entity's Board to notify them that staff will be requesting that the Department's Governing Board authorize staff to pursue a hearing with the State Office of Administrative Hearings (SOAH). Such notification will be made at least 45 calendar days prior to the date of the meeting of the Department's Governing Board. If approved by the Department's Governing Board, the Department will arrange and set a date for a hearing with SOAH. If the Eligible Entity does not respond or appear for the SOAH hearing, the consideration of termination of the Eligible Entity's status or reduction of funding will appear on the agenda at a subsequent regularly scheduled meeting of the Department's Governing Board. An Eligible Entity receiving notice of the initiation of a contested case before SOAH is reminded that they will need to read and comply with SOAH's requirements in the way they handle and respond to the matter.

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

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

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

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

Filed with the Office of the Secretary of State on March 10, 2023.

TRD-202301041
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: April 23, 2023
For further information, please call: (512) 475-3959

♦ ♦ ♦

CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER F. COMPLIANCE MONITORING

10 TAC §§10.606, 10.613, 10.622, 10.626, 10.627

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to §10.606 Construction Inspections; §10.613 Lease Requirements; §10.622 Special Rules Regarding Rents and Rent Limit Violations; §10.626 Liability; and §10.627 Temporary Suspension of Sections of this Subchapter. The amendments correct references to other Department rules; add a new and revised notification requirements regarding rent increases, and add existing and new program requirements to existing subsections of the rule and delete outdated reference to Average Income.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed rule action would be in effect, the proposed actions do not create or eliminate a government program, but relate to changes to an existing activity, compliance monitoring.

2. The proposed rule action does not require a change in work that would require the creation of new employee positions, nor

are the proposed actions significant enough to reduce workload to a degree that any existing employee positions are eliminated.

3. The proposed rule action does not require additional future legislative appropriations.

4. The proposed rule action does not result in an increase in fees paid to the Department or in a substantial decrease in fees paid to the Department.

5. The proposed rule action is not creating a new regulation.

6. The proposed rule action will not repeal an existing regulation.

7. The proposed rule action will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed rule action will not negatively or positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

1. The Department has evaluated this rule action and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. This rule relates to the procedures for the handling of compliance monitoring activities of multifamily developments awarded funds through various Department programs. Other than, in the case of a small or micro-business that is an owner or a party to one of the Department's properties, no small or micro-businesses are subject to the rule. If a small or micro-business is such an owner or participant, the proposed rule provides for more clear, transparent processes and does not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the proposed rule because this rule is applicable only to the owners or operators of properties in the Department's portfolio, not municipalities.

3. The Department has determined that because this rule relates only to the process in use for compliance monitoring activities of the Department's portfolio, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed rule action does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the proposed rule action as to its possible effects on local economies and has determined that for the first five years the proposed actions are in effect, there will be no economic effect on local employment, therefore, no local employment impact statement is required to be prepared for the rule.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that no impact is expected on a statewide basis, there are also no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the proposed rule action is in effect, the public benefit anticipated as a result of the action will be a clearer and more germane rule. There will not be economic costs to individuals required to comply with the amended sections.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the proposed rule action is in effect, enforcing or administering the proposed rule action does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held from March 24, 2023, to April 24, 2023, to receive input on the proposed rule action. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Wendy Quackenbush, Compliance Monitoring Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or emailed to wendy.quackenbush@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m. Austin local time April 24, 2023.

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

Except as described herein the proposed rule action affects no other code, article, or statute.

§10.606. Construction Inspections.

(a) Owners are required to submit evidence of final construction within 30 calendar days of completion in a format prescribed by the Department. Owners are encouraged to request a final construction inspection promptly to allow the Department to inspect Units prior to occupancy to avoid disruption of households in the event that corrective action is required. In addition, the Architect of Record must submit a certification that the Development was built in compliance with all applicable laws, and the Engineer of Record (if applicable) must submit a certification that the Development was built in compliance with the design requirements.

(b) During the inspection, the Department will confirm that committed amenities have been provided and will inspect for compliance with the applicable accessibility requirements. In addition, a Uniform Physical Condition Standards inspection may be completed.

(c) IRS Form(s) 8609 [~~and final retainage~~] will not be released until the Owner receives written notice from the Department that all noted deficiencies have been resolved.

§10.613. Lease Requirements.

(a) Eviction and/or termination of a lease. HTC, TCAP, and Exchange Developments must specifically state in the lease or in an addendum attached to the lease that evictions or terminations of tenancy for other than good cause are prohibited. To terminate tenancy, the Owner must serve written notice to the tenant specifying the grounds for the action. For nonpayment of rent, HTC, TCAP, Exchange, and NHTF Developments require a thirty (30) day written notice [~~is required~~]. If the CARES Act is modified to eliminate the 30-day notice requirement, HUD or Treasury requirements will supersede this 30-day [~~subsection's~~] notice requirement for nonpayment of rent.

(b) HOME, TCAP RF, NHTF, NSP, and HOME-ARP Developments are prohibited from evicting low income residents or refusing to renew a lease except for serious or repeated violations of the terms and conditions of the lease, for violations of applicable federal,

state or local law, for completion of the tenancy period for Transitional Housing (if applicable), or for other good cause. It must be specifically stated in the lease or in an addendum attached to the lease that evictions or non-renewal of leases for other than good cause are prohibited (24 CFR §92.253 and 24 CFR §93.303). Owners must also comply with all other lease requirements and prohibitions stated in 24 CFR §92.253 or 24 CFR §93.303, as applicable. To terminate or refuse to renew tenancy in HOME, TCAP RF, NSP, and HOME-ARP Developments, the Owner must serve written notice to the tenant specifying the grounds for the action at least 30 days before the termination of tenancy. For HOME-ARP, Owners may not terminate the tenancy or refuse to renew the lease of the Qualifying Household in any Unit that is supported by capitalized operating costs because of the household's inability to pay rent of more than 30 percent of the qualifying household's income toward rent during the longer of the federal affordability period or the time period identified in the Contract.

(c) In accordance with the Violence Against Women Act, an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking against the documented victim of such actual or threatened domestic violence, dating violence, sexual assault, or stalking shall not be construed as a serious or repeated violation of a lease or good cause for termination of tenancy. Additionally it shall not be construed as a serious or repeated violation of a lease or termination of tenancy if a person has opposed any act or practice made unlawful by the Violence Against Women Act 2022, or because that person testified, assisted, or participated in any matter covered by the Violence Against Women Act 2022. [~~The Department does not determine if an Owner has good cause or if a resident has violated the lease terms for other reasons. Challenges for evictions or terminations of tenancy must be made by a court of competent jurisdiction or an agreement of the parties (including an agreement made in arbitration), and the Department will rely on that determination.~~]

(d) A Development must use a lease or lease addendum that requires households to report changes in student status.

(e) Owners of HTC Developments are prohibited from locking out or threatening to lock out any Development resident, except by judicial process, unless the exclusion is necessary for the purpose of performing repairs or construction work, or in cases of emergency. Owners are further prohibited from seizing or threatening to seize the personal property of a resident except by judicial process unless the resident has abandoned the premises. These prohibitions must be included in the lease or lease addendum.

(f) For HOME, TCAP, TCAP RF, NHTF, 811 PRA, NSP, ERA, and HOME-ARP Developments, properties that were initially built for occupancy prior to 1978 must include in their lease or lease addendum a Lead Warning Statement. To demonstrate compliance, the Department will monitor that all households at HOME, TCAP, TCAP RF, NHTF, NSP, ERA, and HOME-ARP Developments have signed the Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. (24 CFR §92.355, 24 CFR §93.361 and §570.487(c), and Section 1018 of Title X, as applicable). The addendum and disclosure are not required if all lead has been certified to have been cleared from the Development in accordance with 24 CFR §35.130, and the Owner has the required certification in its on-site records.

(g) An Owner may bifurcate a lease to terminate the tenancy of an individual who is a tenant or lawful occupant and engages in criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against another lawful occupant living in the Unit or other affiliated individual as defined in the VAWA 2013.

(h) All NHTF, TCAP RF, NSP, HOME, and HOME-ARP Developments for which the contract is executed on or after December 16, 2016, must use the Department created VAWA lease addendum which provides the ability for the tenant to terminate the lease without penalty if the Department determines that the tenant qualifies for an emergency transfer under 24 CFR §5.2005(e). 811 PRA Units are prohibited from using the expired 2005 VAWA lease addendum. After OMB approval of a VAWA lease addendum, all 811 PRA households must have a valid and executed VAWA lease addendum. For the 811 PRA program certain addenda for the HUD model lease may be required such as Lead Based Paint Disclosure form, house rules, and pet rules. No other attachments to the lease are permissible without approval from the Department's 811 PRA staff.

(i) Leasing of HOME, HOME Match, TCAP RF, or NHTF Units to an organization that, in turn, rents those Units to individuals is not permissible for Developments with contracts dated on or after August 23, 2013. Leases must be between the Development and an eligible household. NSP and HOME-ARP Developments may only utilize Master Leases, if specifically allowed in the Development's LURA.

(j) Housing Tax Credit Units leased to an organization through a supportive housing program where the owner receives a rental payment for the Unit regardless of physical occupancy will be found out of compliance if the Unit remains vacant for over 60 days. The Unit will be found out of compliance under the Event of Noncompliance "Violation of the Unit Vacancy Rule."

(k) It is a Development Owner's responsibility at all times to know what it has agreed to provide by way of common amenities, Unit amenities, and services.

(l) A Development Owner shall post in a common area of the leasing office a copy and provide each household, during the application process and upon a subsequent change to the items described in paragraph (2) of this subsection, the brochure made available by the Department, A Tenant Rights and Resources Guide, which includes:

(1) Information about Fair Housing and tenant choice;

(2) Information regarding common amenities, Unit amenities, and services; and

(3) A certification that a representative of the household must sign prior to, but no more than 120 days prior to, the initial lease execution acknowledging receipt of this brochure.

(4) In the event this brochure is not provided timely or the household does not certify to receipt of the brochure, correction will be achieved by providing the household with the brochure and receiving a signed certification that it was received.

(m) For Section 811 PRA Units, Owners must use the HUD Model lease, HUD form 92236-PRA.

(n) Except as identified in federal or state statute or regulation for Direct Loans, or as otherwise identified in this Chapter, the Department does not determine if an Owner has good cause or if a resident has violated the lease terms. Challenges for evictions or terminations of tenancy must be made by a court of competent jurisdiction or an agreement of the parties (including an agreement made in arbitration), and the Department will rely on that determination.

§10.622. Special Rules Regarding Rents and Rent Limit Violations.

(a) Rent or Utility Allowance Violations of the maximum allowable limit for the HTC program. Under the HTC program, the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees, cannot exceed the maximum applicable limit (as determined by the minimum set-aside elected by the Owner) published by the Department. If it is determined that an HTC Development, during the Compliance Period, collected rent in excess of the rent limit established by the minimum set-aside, the Owner must cor-

rect the violation by reducing the rent charged. The Department will report the violation as corrected on January 1st of the year following the violation. The refunding of overcharged rent does not avoid the disallowance of the credit by the IRS.

(b) Rent or Utility Allowance Violations of additional rent restrictions under the HTC program. If Owners agreed to additional rent and occupancy restrictions, the Department will monitor to confirm compliance. If noncompliance is discovered, the Department will require the Owner to restore compliance by refunding (not a credit to amounts owed the Development) any excess rents to a sufficient number of households to meet the set aside.

(c) Rent Violations of the maximum allowable limit due to application fees. Under the HTC program, Owners may not charge tenants any overhead costs as part of the application fee. Owners must only charge the actual cost for application fees as supported by invoices from the screening company the Owner uses.

(1) The amount of time Development staff spends checking an applicant's income, credit history, and landlord references may be included in the Development's application fee. Development Owners may add up to $5.50 per Unit for their other out-of-pocket costs for processing an application without providing documentation. Example 622(2): A Development's out-of-pocket cost for processing an application is $17.00 per adult. The property may charge $22.50 for the first adult and $17.00 for each additional adult.

(2) Documentation of Development costs for application processing or screening fees must be made available during monitoring reviews or upon request. The Department will review application fee documentation during monitoring reviews. If the Development pays a flat monthly fee to a third party for credit or criminal background checks, Owners must calculate the appropriate fee to be charged applicants by using the total number of applications processed, not just approved applications. Developments that pay a flat monthly fee must determine the appropriate application fee at least annually based on the prior year's activity. If the Department determines from a review of the documentation that the Owner has overcharged residents an application fee or collected impermissible deposits, the noncompliance will be reported to the IRS on Form 8823 under the category "gross rent(s) exceeds tax credit limits." The noncompliance will be corrected on January 1st of the next year.

(3) Owners are not required to refund the overcharged fee amount. To correct the issue, Owners must reduce the application fee for prospective applicants. Once the fee is reduced for prospective applicants, the Department will report the affected back in compliance on January 1st of the year after they were overcharged the application fee or an impermissible deposit.

(4) Throughout the Affordability Period, Owners may not charge a deposit or any type of fee (other than an application fee) for a household to be placed on a waiting list.

(d) Rent or Utility Allowance Violations on MFDL programs, the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees and any rental assistance (unless otherwise described in the LURA) cannot exceed the designated applicable limit published by the Department. If it is determined that the Development collected rent in excess of the allowable limit, the Department will require the Owner to refund or credit the affected residents the amount of rent that was overcharged. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household's account. In the absence of a household's election, a full refund check must be presented to the household within thirty days.

(e) Rent or Utility Allowance Violations on HTC Developments after the Compliance Period, HTC properties for three years after the LURA is released as a result of a foreclosure or deed in lieu of foreclosure (as applicable), BOND, and THTF the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees cannot exceed the designated applicable limit published by the Department. If it is determined that the Development collected rent in excess of the allowable limit, the Department will require the Owner to refund or credit the affected residents the amount of rent that was overcharged. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household account. In the absence of a tenant election, a full refund check must be presented to the household within thirty days.

(f) Trust Account to be established. If the Owner is required to refund rent under subsection (b) or (d) of this section and cannot locate the resident, the excess monies must be deposited into a trust account for the household. If the violation effects multiple households, the Owner may set up a single account with all of the unclaimed funds. The account must remain open for the shorter of a four year period, until all funds are claimed, or the expiration of the Extended Use Agreement. If funds are not claimed after the required period, the unclaimed funds must be remitted to the Texas Comptroller of Public Accounts Unclaimed Property Holder Reporting Section to be disbursed as required by Texas unclaimed property statutes. All unclaimed property remissions to the Comptroller must be broken out by individuals and particular amounts.

(g) Rent Adjustments for HOME, TCAP RF, and HOME-ARP Developments:

(1) 100% HOME/TCAP-RF/HOME-ARP assisted Developments. If a household's income exceeds 80% at recertification, the Owner must charge rent equal to 30% of the household's adjusted income;

(2) HOME/TCAP-RF/HOME-ARP Developments with any Market Rate Units. If a household's income exceeds 80% at recertification, the Owner must charge rent equal to the lesser of 30% of the household's adjusted income or the comparable Market rent; and

(3) HOME/TCAP-RF/HOME-ARP Developments layered with other Department affordable housing programs. If a household's income exceeds 80% at recertification, the owner must charge rent equal to the lesser of 30% of the household's adjusted income or the rent allowable under the other Program.

(h) Rent Adjustments for HOME-ARP Qualified Populations:

(1) Units restricted for occupancy by Qualifying Populations with incomes equal to or less than 50% will have rents of 30% of the adjusted income of the household, with adjustments for number of bedrooms in the unit.

(2) Units restricted for occupancy by Qualifying Populations with incomes greater than 50% of median income but at or below 80% of the median income must pay rent not greater than the rent specified in 24 CFR §92.252(a), high HOME rent.

(3) Units restricted for occupancy by Qualifying Populations with incomes greater than 80% of median income will follow the rent adjustments of subsection (g) of this section.

(i) Employee Occupied Units (HTC and THTF Developments). IRS Revenue Rulings 92-61, 2004-82 and Chief Counsel Advice Memorandum POSTN-111812-14 provide guidance on employee occupied units. In general, employee occupied units are considered facilities reasonably required for the project(s) and not residential rental units. Since the building's applicable fraction is

calculated using the residential rental units/space in a building, employee occupied units are taken out of both the numerator and the denominator.

(j) Owners of HOME, NSP, TCAP-RF, NHTF, and HOME-ARP must comply with §10.403 of this chapter (relating to Review of Annual HOME, NSP, TCAP-RF, and National Housing Trust Fund Rents) which requires annual rent review and approval by the Department's Asset Management Division or Department-procured vendor. Failure to do so will result in an Event of Noncompliance.

(k) Owners are not permitted to increase the household portion of rent more than once during a 12 month period, even if there are increases in rent limits or decreases in utility allowances, unless the Unit or household is governed by a federal housing program that requires such changes or the household transfers to a Unit with additional Bedrooms. If it is determined that the Development increases rent more than once in a 12-month period, the Department will require the Owner to refund or credit the affected household. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household account. In the absence of a tenant election, a full refund check must be presented to the household.

(l) If an Owner is increasing a household's rent $75 or more per month, the Owner is required to provide the household a 75-day written notice of such increase, unless the Unit or household is governed by a federal housing program that requires such a change. If an Owner increases the household's rent more than $75 without providing a 75-day notice, any amounts in excess of $75 per month must be refunded or credited to the affected household(s). The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household account. In absence of a tenant election, a full refund check must be presented to the household.

§10.626. Liability.

[(a)] Full compliance with all applicable program requirements, including compliance with §42 of the Code, is the responsibility of the Development Owner. If the Development Owner engages a third party to address any such requirements, they are jointly and severally liable with the Development Owner. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Development Owner, including the Development Owner's noncompliance with §42 of the Code, the Fair Housing Act, §504 of the Rehabilitation Act of 1973, HOME, HOME-ARP, NHTF, TCAP RF and NSP, program regulations, Bond and ERA program requirements, and any other laws, regulations, requirements, or other programs monitored by the Department.

[(b) On March 23, 2018, the average income test became an option under the housing tax credit program. Sections of this subchapter reflect how the Department will monitor for compliance. If the IRS provides a different interpretation, it is controlling of how the Department must address any aspects under the Internal Revenue Code.]

§10.627. Temporary Suspension of Sections of this Subchapter.

(a) Subject to the limitations stated in this section, temporary suspensions of sections of this subchapter may be granted by the Executive Director if there are extenuating circumstances which make it not possible or an undue administrative burden to comply with a requirement of this subchapter as long as substantial compliance is still in effect. For example, the Executive Director could suspend the requirement to report online or use Department approved forms, or alter the sample size for calculating a utility allowance using the actual use method.

(b) Under no circumstances can the Executive Director, the Enforcement Committee or the Board suspend for any period of time compliance with the HOME Final Rule, NHTF Interim Rule, or regulations issued by HUD or any other federal agency when required by federal law.

(c) Under no circumstances can the Executive Director, the Enforcement Committee or the Board suspend for any period of time Treasury Regulations, IRS publications controlling the submission of IRS Form 8823, or any sections of 26 U.S.C. §42.

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

Filed with the Office of the Secretary of State on March 10, 2023.

TRD-202301045
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: April 23, 2023
For further information, please call: (512) 475-3959

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 97. MOTOR FUEL METERING AND QUALITY

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 97, Subchapter A, §97.2 and §97.3; Subchapter B, §§97.20 - 97.23, 97.25, 97.27, and §97.29; Subchapter D, §97.56, §97.59; Subchapter E, §97.70 and §97.74; new rules at Subchapter B, §§97.30 - 97.33; and the repeal of Subchapter G, §§97.90 - 97.95, regarding the Motor Fuel Metering and Quality program. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 97, implement Texas Occupations, Chapter 2310, Motor Fuel Metering and Quality.

The proposed rules update definitions applicable to the program, clarify the standards applicable to fuel quality, and add merchant and consumer protections from card fraud. The proposed rules are necessary to implement legislative changes from the 87th legislative session, House Bill 2106, related to payment card skimmers on motor fuel devices.

Advisory Board Recommendations

The proposed rules were presented to and discussed by the Motor Fuel Metering and Quality Advisory Board at the Board's meetings on January 19, 2023, and March 1, 2023. The Advisory Board made the following changes to the proposed rules: §§97.30 - 97.33. The Advisory Board voted and recommended that the proposed rules with changes be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §97.2, Definitions, by clarifying the definition of "merchant," adding the definition of "tamper-evident security label" related to skimmers, removing the definition of "operator" which has been incorporated into the definition of "merchant," and renumbering the remaining definitions.

The proposed rules amend §97.3, Adoption by Reference, to update and clarify the standards applicable to motor fuel.

The proposed rules amend §97.20, Registration Required-Devices, to standardize the reference to the person responsible for devices to the "merchant."

The proposed rules amend §97.21, Registration Renewal-Devices, to standardize the reference to the person responsible for devices to the "merchant."

The proposed rules amend §97.22, Registration Changes-Devices, to standardize the reference to the person responsible for devices to the "merchant."

The proposed rules amend §97.23, Device Performance Review Requirements, to clarify that a device performance review may only be performed by a licensed service company and removes references to the September 1, 2020, effective date for implementation of the section that was included when the rules were adopted after the program was transferred to the department.

The proposed rules amend §97.25, Consumer Information Sticker, to remove the reference to the December 1, 2020, effective date for implementation of the section that was included when the rules were adopted after the program was transferred to the department and standardizes the reference to the person responsible for devices to the "merchant."

The proposed rules amend §97.27, Condemned Devices, and standardizes the reference to the person responsible for devices to the "merchant."

The proposed rules amend §97.29, Discovery of Payment Card Skimmers, to retitle the section to "Detection and Reporting of Payment Card Skimmers." The proposed rules also prescribe the timeline a merchant must comply with for reporting the discovery of a skimmer to law enforcement and the department and the steps that must be taken by the merchant after the discovery. The proposed rule includes provisions from §97.92, Minimum Practices for Prevention of Skimmers, and §97.95, Detection, Reporting, and Removal of Skimmers, which are proposed for repeal.

The proposed rules add new §97.30, Unauthorized Removal of Skimmers Prohibited, provides that a skimmer cannot be removed unless instructed to do so by law enforcement or the department, a provision expanded from §97.95, Detection, Reporting, and Removal of Skimmers, which is proposed for repeal. The proposed rules include requirements for how the skimmer must be removed and steps to be taken upon removal.

The proposed rules add new §97.31, Device Security for Motor Fuel Devices, which requires a merchant to take measures to protect each device, if the device is not already protected from unauthorized access with at least two of the preventative measures. The proposed rules include the option for the use of tamper-evident security labels which was a requirement included in §97.92, Minimum Practices for Prevention of Skimmers, which is proposed for repeal.

The proposed rules add new §97.32, Inspection and Maintenance Logs, which includes provisions from §97.92, Minimum Practices for Prevention of Skimmers, which is proposed for repeal, and streamlines the current documentation requirements retail facilities must maintain for devices.

The proposed rules add new §97.33, Fraud Awareness Training, which incorporates the training requirements from §97.92, Minimum Practices for Prevention of Skimmers. The proposed rules require that all employees certified as a Class A, Class B, or Class C operator must complete fraud awareness training provided by the department. The proposed rules also add a requirement for the merchant maintain a record of employee training.

The proposed rules amend §97.56, Service Technician License Requirements-Renewal, and standardizes the terminology for license holders with other department rules.

The proposed rules amend §97.59, Inspection for Payment Card Skimmers, to prohibit the removal of a skimmer by a service technician unless instructed by law enforcement or the department and standardizes the reference to the person responsible for devices to the "merchant" by removing the additional reference to "dealer." The proposed rules include requirements for how the skimmer must be removed and steps to be taken upon removal.

The proposed rules amend §97.70, Device Fees, to correct a clerical error.

The proposed rules amend §97.74, Fee Policy, to standardize formatting for consistency with other department rules.

The proposed rules repeal §97.90, Definitions, by removing common definitions not used in the chapter and relocates applicable definitions into §97.2, Definitions.

The proposed rules repeal §97.91, Policies, Procedures, and Training, which have been incorporated into §97.33, Fraud Awareness Training, as discussed above.

The proposed rules repeal §97.92, Minimum Practices for Prevention of Skimmers, which have been incorporated into §97.29, Detection and Reporting of Payment Card Skimmers, and §97.31, Device Security for Motor Fuel Devices, §97.32, Inspection and Maintenance Logs, and §97.33, Fraud Awareness Training, as discussed above.

The proposed rules repeal §97.93, Additional Practices for the Prevention of Skimmers at Medium-risk Places of Business, which removes requirements that add practices for medium-risk places of business as well as punitive and onerous tasks, creating a financial burden, for example by requiring the installation of electronic monitoring devices by merchants who are victims of skimmer fraud, instead shifting efforts proactively to prevent unauthorized device access and installation of skimmers.

The proposed rules repeal §97.94, Additional Practices for the Prevention of Skimmers at High-risk Places of Business, which removes requirements that add practices for high-risk places of business as well as punitive and onerous tasks, creating a financial burden by requiring the installation of video cameras and lights around each device for merchants who are victims of skimmer fraud, instead shifting efforts proactively to prevent unauthorized device access and installation of skimmers.

The proposed rules repeal §97.95, which has been incorporated into §97.29, Detection and Reporting of Payment Card Skimmers, as discussed above.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reduc-

tions in costs to state or local government as a result of enforcing or administering the proposed rules.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, enforcing or administering the proposed rules does not have foreseeable implications relating to costs or revenues of state governments.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, enforcing or administering the proposed rules does not have foreseeable implications relating to costs or revenues of local governments.

LOCAL EMPLOYMENT IMPACT STATEMENT

(Gov't Code §2001.022, §2001.024(a)(6))

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

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be that members of the public who purchase fuel and retail facility owners will be more protected from card fraud at Texas gas pumps. The improvements in requirements for skimmer detection, reporting, and device security, will help make it more difficult for criminals to install skimmers in fuel devices resulting in fewer financial losses for financial institutions, retailers, and the public. Additionally, fraud awareness training for retail facility employees will help to increase vigilance and awareness of the signs of tampering and potential skimmers in gas pumps so that they can be removed as soon as detected to avoid financial harm to customers.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there will be a cost savings to merchants required to comply with the proposed rules. The proposed rules repeal requirements that add practices for medium and high-risk places of business as well as punitive and onerous tasks, which create a financial burden for merchants who are victims of skimmer fraud, instead shifting efforts proactively to prevent unauthorized device access and installation of skimmers.

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there may be additional costs to persons who are required to comply with the proposed rules. The proposed rules require all merchants to implement at least two security measures on their devices to protect from card fraud. Preventative measures include the option to use tamper-evident security labels, retrofitting or installing EMV-compliant devices, and installing unique locking mechanisms.

It is unknown how many merchants already have these measures implemented and are already in compliance with the proposed rule. Regardless, any costs incurred to improve device security will be offset by the elimination of the losses a merchant would suffer from the installation of skimmers and resulting card fraud.

The proposed rules require a merchant to contact a service technician if a device appears to be compromised due to unauthorized access. This should not result in any extra costs for merchants since they are required by rule to ensure that all devices are in compliance with National Institute of Standards and Technology requirements in order to sell fuel.

The proposed rules require retail facility employees who are certified as Class A, Class B, and Class C operators to complete fraud awareness training. TDLR will develop this training and provide it to merchants and their employees at no cost.

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

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

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

The proposed rules have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government; however, the proposed rules fall under the exception for rules that are necessary to protect the health, safety, and welfare of residents of this state under §2001.0045(c)(6). Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

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

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

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

6. The proposed rules expand, limit, or repeal an existing regulation. The proposed rules expand an existing regulation by improving skimmer detection reporting requirements and requiring merchants to implement security measures on devices.

The proposed rules expand the current regulation that permits a merchant to remove a skimmer by prohibiting the removal of a skimmer by a merchant when instructed by law enforcement or TDLR.

The proposed rules limit and streamline the current documentation requirements retail facilities must maintain for devices.

The proposed rules repeal existing regulations by removing outdated language and those which pose a financial burden on license holders.

7. The proposed rules do not increase the number of individuals subject to the rules' applicability.

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

TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by the proposed rules and the proposed rules do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rules do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department's website at https://ga.tdlr.texas.gov:1443/form/gcerules; by facsimile to (512) 475-3032; or by mail to Shamica Mason, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register.*

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §97.2, §97.3

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed rules.

§97.2. Definitions.

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

(1) - (10) (No change.)

(11) Merchant--Includes: [~~A person whose business includes the sale of motor fuel through motor fuel metering devices, as defined by §607.001(4) of the Texas Business and Commerce Code.~~]

(A) a person whose business includes the sale of motor fuel through motor fuel metering devices, as defined by §607.001(4) of the Texas Business and Commerce Code;

(B) a dealer who operates a service station or other retail outlet that delivers motor fuel into the fuel tanks of motor vehicles or motor boats, as defined in §2310.001(3) of the Code; and

(C) an operator in possession or control of a weighing or measuring device, as defined in §2310.001(8) of the Code.

(12) - (13) (No change.)

[~~(14) Operator--A person in possession or control of a weighing or measuring device, as defined in §2310.001(8) of the Code.~~]

(14) [~~(15)~~] Skimmer--A wire or electronic device that is capable of unlawfully intercepting electronic communications or data to perpetrate fraud, as defined by §607.001(8) of the Texas Business and Commerce Code.

(15) Tamper-evident security label--A label or tape that, once applied to a surface, cannot be removed without self-destructing, or otherwise leaving a clear indication that the label or tape has been removed.

(16) (No change.)

§97.3. Adoption by Reference.

In accordance with Chapter 2310 of the Code, the department adopts the currently published edition of each of the following nationally recognized minimum standards for the purpose of administering and enforcing this chapter:

(1) (No change.)

(2) Motor fuel quality testing standards.

(A) NIST Handbook 130, "Uniform Laws and Regulations in the Areas of Legal Metrology and Fuel Quality," relating to "Uniform Fuels and Automotive Lubricants Regulations," [~~specifically Section 2.20. Gasoline-Oxygenate Blends, Section 2.21. Liquified Petroleum Gas, Section 2.27. Retail Sales of Natural Gas Sold as a Vehicle Fuel, Section 2.30. Ethanol Flex Fuel, and Section 2.31. Biodiesel and Biodiesel Blends,~~] as standard specifications for ethanol [~~alcohol~~] blends with the following modifications:

(i) vapor pressure tolerance not exceeding one pound per square inch for motor fuels blended with up to 15 volume percent ethanol, excluding the time period from May 1 through October 1 for counties required to have low emissions fuels; and

(ii) vapor pressure seasonal specifications may be extended for a maximum period of 15 days to allow for the disbursement of old stocks. However, new stocks of a higher volatility classification must [~~shall~~] not be offered for retail sale prior to the effective date of the higher volatility classification; and

(iii) the vapor/liquid ratio specification must be waived for motor fuels blended with ethanol.

(B) ASTM D4814, "Standard Specification for Automotive Spark-Ignition Engine Fuel," as the standard specifications for gasoline with the following modification,[~~:~~]

[~~(i)~~] vapor pressure and vapor/liquid ratio seasonal specifications may be extended for a maximum period of 15 days to allow for the disbursement of old stocks. However, new stocks of a higher volatility classification must [~~shall~~] not be offered for retail sale prior to the effective date of the higher volatility classification.[~~; and~~]

[~~(ii)~~ ~~the vapor/liquid ratio specification shall be waived for motor fuels blended with ethanol;~~]

(C) - (G) (No change.)

(3) (No change.)

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

Filed with the Office of the Secretary of State on March 10, 2023.

TRD-202301031

Della Lindquist
Interim General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: April 23, 2023
For further information, please call: (512) 463-7750

♦ ♦ ♦

SUBCHAPTER B. MOTOR FUEL METERING DEVICES

16 TAC §§97.20 - 97.23, 97.25, 97.27, 97.29 - 97.33

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed rules.

§97.20. Registration Required--Devices.

(a) Prior to operation, a device must be registered. To register a device, a merchant [~~an owner or operator~~] must submit:

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

(b) Device registrations cannot be transferred. A new merchant [~~an owner or operator~~] must submit a completed registration application under this section.

(c) A change in the merchant's [~~owner or operator's~~] federal employer identification number or social security number (for sole proprietors) constitutes a change of business identity and requires a new registration application to be submitted under this section.

(d) A change in the name or contact information for a merchant [~~an owner or operator~~] must be submitted in a manner prescribed by [~~to~~] the department within 30 calendar days.

(e) - (f) (No change.)

§97.21. Registration Renewal--Devices.

(a) To renew a device registration, a merchant [~~an owner or operator~~] must submit:

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

(b) A merchant [~~An owner or operator~~] is responsible for renewing a device registration before the expiration date. Lack of receipt of a renewal notice from the department must [~~shall~~] not excuse failure to file for renewal or late renewal.

§97.22. Registration Changes--Devices.

(a) If the number of registered devices increases, prior to operation of the new devices the merchant [~~owner or operator~~] must submit:

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

(b) If the number of registered devices decreases, the merchant [~~owner or operator~~] must submit notice in a manner approved by the department or omit the devices when submitting a renewal application.

§97.23. Device Performance Review Requirements.

(a) At least once every two years a DPR must be completed on each registered device.

(b) To be valid, a licensed service company must complete a DPR of a device on a single day. A DPR must include:

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

(3) inspection of the device to:

(A) [~~to~~] ensure operation within NIST Handbook 44 specifications, tolerances, and other technical requirements along with specified manufacturer guidelines; and

(B) [~~to~~] detect the presence of skimmers.

(c) A DPR report must be submitted by a service company within 10 business days of the DPR in a manner prescribed by the department. If a skimmer is detected during a DPR, the discovery must be reported in accordance with §97.29 and §97.59.

[~~(d) Effective date.~~]

[~~(1) Beginning September 1, 2020, devices with a maximum flow rate of 20 GPM or less are subject to this section.~~]

[~~(2) Beginning September 1, 2021, the following devices will also be subject to this section.~~]

[~~(A) Devices with a maximum flow rate of greater than 20 GPM to 100 GPM; and~~]

[~~(B) Devices with a maximum flow rate of greater than 100 GPM.~~]

(d) [~~(c)~~] A supplier is exempt from this section.

§97.25. Consumer Information Sticker.

(a) A [~~By December 1, 2020, a~~] consumer information sticker with the department's contact information and current motor fuel tax rates, must be placed on each face of all motor fuel dispensers.

(b) If any part of the information on the sticker is no longer fully legible and in plain sight of the consumer, it must be replaced within 30 days of the date the merchant discovered [~~owner or operator discovers~~] the condition.

(c) - (d) (No change.)

§97.27. Condemned Devices.

Devices that are declared to be incorrect and are condemned by the department pursuant to §2310.105 of the Code, must be maintained by the merchant [~~owner, operator, or user~~] until the department has granted authorization to dispose, replace, or destroy the device.

§97.29. Detection and Reporting [~~Discovery~~] of Payment Card Skimmers.

(a) A merchant or dealer who discovers or is notified of the presence of a skimmer by a service technician or employee must:

(1) immediately make a report to local [~~notify~~] law enforcement that a skimmer has been discovered and is still installed in the device;

(2) notify the department within 24 hours of the discovery on a form prescribed by the department; [~~and~~]

(3) request the law enforcement report or case number; and

[~~(3) take measures to prevent the motor fuel metering device from being tampered with prior to removal of the skimmer.~~]

(4) place each affected device out of service and block access to prevent tampering with evidence until the skimmer has been removed by law enforcement, the department, or a licensed service technician directed by law enforcement or the department.

(b) The merchant must cooperate with law enforcement, the department, and the Center in the investigation of a suspected or discovered skimmer.

(c) The merchant must provide a copy of available photographic and/or video surveillance of the retail facility to law enforcement.

§97.30. Unauthorized Removal of Skimmers Prohibited.

(a) In order to preserve evidence and the chain of custody, a merchant, retail facility employee, or unlicensed service technician is prohibited from removing a skimmer unless instructed to do so by law enforcement or the department.

(b) If neither law enforcement nor the department has arrived to remove a skimmer within 72 hours after the merchant has notified law enforcement and the department as required by §97.29, a merchant, retail facility employee, or unlicensed service technician may remove the skimmer in accordance with subsection (c).

(c) When removing a skimmer under this section, an individual must:

(1) wear sterile gloves while removing the skimmer(s);

(2) place each skimmer in a clear plastic bag, seal the bag, and label the sealed bag with the date and time the skimmer was removed and bagged, along with the initials of the person removing the skimmer; and

(3) transfer the skimmer(s) to local law enforcement and request the law enforcement case or report number.

(d) The merchant must provide the law enforcement case or report number to the department in a manner prescribed by the department following transfer of the skimmer to law enforcement.

§97.31. Device Security for Motor Fuel Devices.

By January 1, 2024, a merchant is required to take two or more of these measures to protect each device:

(1) replace each factory installed universal locking mechanism with a locking device that utilizes a unique device-specific or site-specific key code or combination;

(2) utilize tamper-evident security labels. Tamper-evident security labels must:

(A) be placed over each panel opening that provides access to an interior portion of the device from which the payment terminal or the device can be accessed;

(B) have a unique serial number or unique custom label or easily identifiable custom label or graphic; and

(C) be replaced if damaged, perforated, or peeled and documented on the inspection log required under section §97.32;

(3) install a physical barrier, lock, or other physical securing device that restricts access to the electronic financial transaction compartment of the device;

(4) install and maintain monitoring devices or sensors on all doors or panels providing access to an interior portion of the device and associated payment terminal components which emit an audible alarm and/or disable the device when unauthorized access is attempted;

(5) retrofit, upgrade, or replace each device with an enabled EMV-compliant payment terminal that meets the security, interoperability, and functionality specifications issued by EMVCo, LLC; or

(6) install and maintain a high-resolution video camera system and forecourt lighting. To meet the requirements of this section:

(A) the video camera system must record the forecourt area at all times it is open to the public, and the system must retain all videos for 30 days or more. Cameras must be positioned to record:

(i) each device;

(ii) the license plates of vehicles approaching or departing the immediate area around each device; and

(iii) any person interacting with each device at a pixel density of at least 50 pixels per foot; and

(B) lighting must be bright enough to ensure a minimum illumination of 10 lumens per square foot at grade.

§97.32. Inspection and Maintenance Logs.

(a) Inspection log. Each merchant is required to complete a daily inspection of all devices and maintain an inspection log completed by an employee of the merchant.

(1) At least once daily, a retail facility employee must:

(A) inspect all devices for external damage, the appearance of unusual exterior payment terminal components, or other signs indicative of unauthorized access or tampering, including missing or damaged tamper-evident security labels, broken panels or locks, pry marks, or devices disabled by a door sensor or monitoring device; and

(B) if unauthorized access or tampering is confirmed, ensure a thorough device inspection is performed by a licensed service technician, or a person with sufficient knowledge and expertise necessary to identify a skimmer.

(2) An inspection log must include at a minimum:

(A) the name or initials of the employee completing the inspection; and

(B) the date and time the inspection was performed.

(b) Maintenance log. Each merchant is required to maintain a log to document the identity of all individuals who access each device. The maintenance log must include individuals contracted or employed by the merchant.

(1) Prior to accessing a device or performing device maintenance activities, an individual not employed by the merchant must present identification to an employee at the retail facility.

(2) Each individual accessing a device to perform maintenance activities, must provide the following information, at a minimum, on the maintenance log:

(A) the individual's name and phone number;

(B) the individual's service technician license number, or driver's license number if not licensed by the department;

(C) the name of the individual's employer, including the service company's license number if the individual is employed by a service company licensed by the department;

(D) the date and time the individual completed maintenance or access of the device(s); and

(E) the device number(s) accessed.

(c) All logs must be maintained for one calendar year from the date of maintenance and must be provided to the department or an authorized representative of the department upon request.

(d) This section is effective January 1, 2024.

§97.33. Fraud Awareness Training.

(a) A retail facility employee designated, trained, or certified as a Class A, Class B, or Class C operator in accordance with Chapter 334, Subchapter N, is required to complete fraud awareness training provided by the department. Training must be completed by the employee within 14 days of beginning employment in their position.

(b) In addition to the training required by this section, a merchant may require an employee to complete training which includes best practices and procedures for the identification, detection, and prevention of skimmers.

(c) A record of completion of training required by the department must be maintained in the employee's personnel file. Training records must be provided to the department or an authorized representative of the department upon request.

(d) This section is effective June 1, 2024.

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

Filed with the Office of the Secretary of State on March 10, 2023.

TRD-202301032
Della Lindquist
Interim General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: April 23, 2023
For further information, please call: (512) 463-7750

♦ ♦ ♦

SUBCHAPTER D. SERVICE COMPANIES AND SERVICE TECHNICIANS

16 TAC §97.56, §97.59

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed rules.

§97.56. Service Technician License Requirements--Renewal.

(a) (No change.)

(b) A late renewal means the license holder [~~licensee~~] will have an unlicensed period from the expiration date of the expired license to the issuance date of the renewed license. During the unlicensed period, a person may not perform any device maintenance activities under this chapter.

(c) A license holder [~~licensee~~] is responsible for renewing their license before the expiration date. Lack of receipt of a license renewal notice from the department must [~~shall~~] not excuse failure to file for renewal or late renewal.

§97.59. Inspection for Payment Card Skimmers.

(a) (No change.)

(b) A service technician or the service company that employs the technician must report the finding of a skimmer:

(1) immediately to the [a] merchant [~~or dealer~~]; and

(2) within 24 hours to the department on a form prescribed by the department.

(c) In order to preserve evidence and the chain of custody, a service technician must not remove a skimmer unless instructed by law enforcement or the department.

(d) If neither law enforcement nor the department has arrived to remove a skimmer within 72 hours after the merchant has notified law enforcement and the department as required by §97.29, a merchant, retail facility employee, or unlicensed service technician may remove the skimmer in accordance with subsection (e).

(e) When removing a skimmer under this section, an individual must:

(1) wear sterile gloves while removing the skimmer(s);

(2) place each skimmer in a clear plastic bag, seal the bag, and label the sealed bag with the date and time the skimmer was removed and bagged, along with the initials of the person removing the skimmer; and

(3) transfer the skimmer(s) to local law enforcement and request the law enforcement case or report number.

(f) The service technician must provide the law enforcement case or report number to the department in a manner prescribed by the department following transfer of the skimmer to law enforcement.

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

Filed with the Office of the Secretary of State on March 10, 2023.

TRD-202301033
Della Lindquist
Interim General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: April 23, 2023
For further information, please call: (512) 463-7750

♦ ♦ ♦

SUBCHAPTER E. FEES

16 TAC §97.70, §97.74

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed rules.

§97.70. Device Fees.

(a) Registration Fees (initial and renewal):

(1) (No change.)

(2) A device with a maximum flow rate of greater than 20 GPM but not greater than 100 GPM (includes a fuel quality fee of $7)--$127; and

(3) A device with a maximum flow rate greater than 100 GPM--$450.[; and]

(b) (No change.)

§97.74. Fee Policy.

(a) All fees paid to the department are non-refundable.

(b) Late renewal fees for registrations and licenses issued under this chapter are provided under §60.83 [of this title (relating to Late Renewal Fees)].

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

Filed with the Office of the Secretary of State on March 10, 2023.

TRD-202301034
Della Lindquist
Interim General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: April 23, 2023
For further information, please call: (512) 463-7750

♦ ♦ ♦

SUBCHAPTER G. SKIMMERS

16 TAC §§97.90 - 97.95

STATUTORY AUTHORITY

The proposed repeals are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt repeals as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed repeals are those set forth in Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed repeals.

§97.90. Definitions.

§97.91. Policies, Procedures, and Training.

§97.92. Minimum Practices for Prevention of Skimmers.

§97.93. Additional Practices for the Prevention of Skimmers at Medium-risk Places of Business.

§97.94. Additional Practices for the Prevention of Skimmers at High-risk Places of Business.

§97.95. Detection, Reporting, and Removal of Skimmers.

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

Filed with the Office of the Secretary of State on March 10, 2023.

TRD-202301030
Della Lindquist
Interim General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: April 23, 2023
For further information, please call: (512) 463-7750

♦ ♦ ♦