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 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 133. FORMS

7 TAC §§133.2 - 133.4, 133.9 - 133.11, 133.14, 133.15, 133.19 - 133.23

The Texas State Securities Board adopts the repeal of thirteen rules, concerning forms adopted by reference. Specifically, the Board adopts the repeal of §133.2, a form concerning Public Information Charges--Billing Detail; §133.3, a form concerning The State Securities Board Adopts by Reference the ADA Accommodations Request Form; §133.4, a form concerning Request for Consideration of a Registration Application by a Military Applicant; §133.9, a form concerning Notice Filing for Third Party Brokerage Arrangements on Financial Entity Premises; §133.10, a form concerning Investment Company Report of Sales; §133.11, a form concerning Sales Report for Non-continuous Offerings; §133.14, a form concerning Consent of Independent Accountants; §133.15, a form concerning Texas Crowdfunding Portal Registration; §133.19, a form concerning Waiver or Refund Request by a Military Applicant; §133.20, a form concerning Texas Crowdfunding Portal Registration by an Authorized Small Business Development Entity; §133.21, a form concerning Crowdfunding Exemption Notice (SEC Rule 147A Offerings using §139.26); §133.22, a form concerning Waiver or Refund Request by a Military Spouse for a Renewal Fee; and §133.23, a form concerning Request for Recognition of Out-Of-State License or Registration by a Military Spouse, without changes to the proposed text as published in the October 21, 2022, issue of the *Texas Register* (47 TexReg 6953). The repealed rules will not be republished.

The repealed forms have been replaced with new forms being concurrently adopted that have been updated to standardize and improve them through nonsubstantive changes.

Thirteen existing forms have been eliminated so they can be replaced with improved standardized forms.

No comments were received regarding adoption of the repeals.

The repeals are adopted under the authority of the Texas Government Code, §4002.151. Section 4002.151 provides the Board with the authority to adopt rules as necessary to implement the provisions of the Texas Securities Act, including rules governing registration statements, applications, notices, and reports; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. The repeal of rule §133.3 is also adopted under the authority of the Texas Occupations Code, §54.003, which provides that agencies shall adopt rules to provide reasonable examination accommodations to examinees diagnosed as having dyslexia for each licensing examination administered by the agency. The repeals of rules §§133.4 and 133.19 are also adopted under the authority of Chapter 55 of the Texas Occupations Code, which authorizes the agency to adopt rules for licensure or registration of a person who is a military spouse, military service member, or military veteran who meets certain criteria. The repeal of rule §133.20 is also adopted under the authority of the Texas Government Code, §4003.252(a), which provides the Board with the authority to adopt rules to regulate and facilitate online intrastate crowdfunding by authorized small business development entities. The repeals of rules §§133.22 and 133.23 are also adopted under the authority of the Texas Occupations Code, §55.0041, which requires a state agency that issues a license to adopt rules to implement §55.0041 and authorizes a state agency to adopt rules to provide for the issuance of a license to a military spouse to whom the agency provides confirmation under subsection (b)(3) of §55.0041.

The repeals affect Chapters 4003 to 4006 of the Texas Government Code, particularly the statutes contained in Chapter 4003, Subchapters A and F; Chapter 4004, Subchapters A-D and F; Chapter 4005, Subchapter A; and Chapter 4006, Subchapters A-C and E; as well as Texas Government Code, §4007.105.

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 27, 2023.

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Travis J. Iles
Securities Commissioner
State Securities Board
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Proposal publication date: October 21, 2022
For further information, please call: (512) 305-8303

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7 TAC §§133.2 - 133.4, 133.9 - 133.11, 133.14, 133.15, 133.19 - 133.23

The Texas State Securities Board adopts thirteen rules concerning forms adopted by reference. Specifically, the State Securities Board adopts new §133.2, a form concerning Public Information Charges - Billing Detail; §133.3, a form concerning ADA Accommodations Request; §133.4, a form concerning Request for Consideration of a Registration Application by a Military Applicant; §133.9, a form concerning Notice Filing for Third Party Brokerage Arrangements on Financial Entity Premises; §133.10, a form concerning Investment Company Report of Sales in the State of Texas; §133.11, a form concerning Sales Report for Non-continuous Offerings; §133.14, a form concerning Consent

of Independent Accountants; §133.15, a form concerning Texas Crowdfunding Portal Registration; §133.19, a form concerning Waiver or Refund Request by a Military Applicant; §133.20, a form concerning Texas Crowdfunding Portal Registration by an Authorized Small Business Development Entity; §133.21, a form concerning Crowdfunding Exemption Notice; §133.22, a form concerning Waiver or Refund Request by a Military Spouse for a Renewal Fee; and §133.23, a form concerning Request for Recognition of Out-Of-State License or Registration by a Military Spouse, without changes to the proposed text as published in the October 21, 2022, issue of the *Texas Register* (47 TexReg 6954). The new rules will not be republished.

The new sections adopt by reference forms that are updated to standardize and improve the forms through nonsubstantive changes. Additionally, the name of Form 133.3 is changed to more concisely describe the form; the name of Form 133.10 is changed to add "in the State of Texas" to remind the reporting party that only sales in Texas need be included in the report; and the name of Form 133.21 is changed to remove an unnecessary parenthetical. Existing forms §§133.2 - 133.4, 133.9 - 133.11, 133.14, 133.15, and 133.19 - 133.23 are being concurrently adopted for repeal.

Thirteen forms have been replaced with new, improved, and updated forms.

No comments were received regarding adoption of the new rules.

The new rules are adopted under the authority of the Texas Government Code, §4002.151. Section 4002.151 provides the Board with the authority to adopt rules as necessary to implement the provisions of the Texas Securities Act, including rules governing registration statements, applications, notices, and reports; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. New rule §133.3 is also adopted under the authority of the Texas Occupations Code, §54.003, which provides that agencies shall adopt rules to provide reasonable examination accommodations to examinees diagnosed as having dyslexia for each licensing examination administered by the agency. New rules §§133.4 and 133.19 are also adopted under the authority of Chapter 55 of the Texas Occupations Code, which authorizes the agency to adopt rules for licensure or registration of a person who is a military spouse, military service member, or military veteran who meets certain criteria. New rule §133.20 is also adopted under the authority of the Texas Government Code, §4003.252(a), which provides the Board with the authority to adopt rules to regulate and facilitate online intrastate crowdfunding by authorized small business development entities. New rules §§133.22 and 133.23 are also adopted under the authority of the Texas Occupations Code, §55.0041, which requires a state agency that issues a license to adopt rules to implement §55.0041 and authorizes a state agency to adopt rules to provide for the issuance of a license to a military spouse to whom the agency provides confirmation under subsection (b)(3) of §55.0041.

The new rules affect Chapters 4003 to 4006 of the Texas Government Code, particularly the statutes contained in Chapter 4003, Subchapters A and F; Chapter 4004, Subchapters A-D and F; Chapter 4005, Subchapter A; and Chapter 4006, Subchapters A-C and E; as well as Texas Government Code, §4007.105.

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 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.219

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 16 TAC §25.219(d) is not included in the print version of the Texas Register. The figure is available in the on-line version of the April 7, 2023, issue of the Texas Register.)

The Public Utility Commission of Texas (commission) adopts new 16 Texas Administrative Code (TAC) §25.219, relating to Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that Implements Customer Choice After May 1, 2023. The commission adopts this rule and accompanying tariff with changes to the proposed text as published in the December 16, 2022, issue of the *Texas Register* (47 TexReg 8197). The rule be republished.

The adopted rule and accompanying pro-forma tariff set the terms and conditions of access by a competitive retailer to the delivery system of a municipally owned utility or electric cooperative implementing customer choice after May 1, 2023.

The commission received comments on the proposed rule from Alliance for Retail Markets and the Texas Energy Association for Marketers (collectively, the REP Coalition), Lubbock Power and Light (LP&L), South Texas Electric Cooperative (STEC), STEC and Texas Electric Cooperatives, Inc (STEC and TEC) and Texas Public Power Association (TPPA).

General Comments

LP&L expressed support for this rule and tariff. LP&L noted that the revisions and updates are vital to its entry into the competitive retail electricity market.

§25.219(a) - Purpose and Application

Proposed subsection (a) defines the purpose and application of the rule as establishing and governing the non-discriminatory terms and conditions of access by competitive retailers to the delivery system of a municipally owned utility or electric cooperative that implements customer choice after May 1, 2023.

LP&L and TPPA noted that while subsection (a) outlines the purpose of the rule, it does not clearly specify the applicability of the rule. LP&L suggested a second sentence be added to state that the rule only applies to municipally owned utilities and electric cooperatives that implement customer choice after May 1, 2023. Further, LP&L recommended the commission clearly state that §25.215, relating to Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice, does not apply to a municipally owned utility or electric cooperative covered by §25.219. TPPA and the REP Coalition agreed.

LP&L also recommended that the meaning of "implements customer choice" be defined in the rule as the date on which the municipally owned utility or electric cooperative opens its market to retail customers. The REP Coalition agreed with this recommendation.

Commission Response

The commission agrees with LP&L, TPPA, and the REP Coalition and modifies subsection (a) to clarify the application of the rule. The commission further modifies the rule to clarify that §25.219 applies to municipally owned utilities and electric cooperatives that implement, or are preparing to implement, customer choice after May 1, 2023 and that these entities are not required to comply with §25.215. The addition of "or are preparing to implement" is necessary, because subsection (c) of the rule requires the entity in question to file its tariff with the commission before it implements customer choice.

The commission agrees with the recommendation of LP&L and the REP Coalition to clarify in the rule that the date a municipally owned utility or electric cooperative opens its territory to retail competition is the date it implements customer choice. The commission modifies the rule accordingly.

§25.219(c) - Access Tariff

Proposed subsection (c) sets forth the requirements that "each" municipally owned utility or electric cooperative must follow in order to file its access tariff with the commission. These requirements include the municipality owned utility or electric cooperative using its own name in lieu of "[Utility]".

The REP Coalition recommended that the term "Utility" in subsection (c) be changed to "Company" to help prevent confusion with how utility is defined in PURA §11.004. Specifically, the PURA definition of utility does not include municipally owned utilities and electric cooperatives.

Commission Response

The commission declines to replace "Utility" with "Company" as suggested by the REP Coalition. "[Utility]" is used throughout the tariff as a placeholder for the municipally owned utility or electric cooperative to insert its own name into the tariff in the appropriate locations. The commission disagrees that the use of the term "Utility" in subsection (c) will be confused with the use of the term in PURA §11.004, because the term is only used in the rule to describe the requirement that the municipally owned utility or electric cooperative substitute its own name for that term in the tariff. The rule explicitly applies to municipally owned utilities and electric cooperatives, and a single use of "Utility" to properly reference the tariff terminology does not undercut the clear and direct language of the rule. Moreover, the commission does not agree that the recommended term "Company" would be an improvement. Companies are commonly understood to refer to commercial entities, so referring to municipally owned utilities and electric cooperatives as companies may also result in misunderstandings of the rule.

TPPA commented that proposed subsection (c) is unclear. TPPA argued that the phrase "each" municipally owned utility and electric cooperative" could be read to require all municipally owned utilities and electric cooperatives, including those who have not entered customer choice, to file a tariff. TPPA suggested clarifying that the requirement to file an access tariff applies only to municipally owned utilities and electric cooperatives that have chosen to implement customer choice. The REP Coalition agreed with TPPA that a clarification is required. TPPA and the REP Coalition offered suggested language.

Commission Response

The commission agrees with TPPA and the REP Coalition that this subsection should be clarified to ensure the requirement only applies to municipally owned utilities and electric cooperatives that have chosen to implement customer choice after May 1, 2023. The commission makes clarifying changes to the rule.

§25.219(d) - Pro-Forma Retail Access Tariff

The REP Coalition proposed that the figure be labeled §25.219 rather than §25.215.

Commission Response

The commission agrees with the REP Coalition and relabels the figure accordingly.

Access Tariff: Chapter 1, Definitions, Tampering

The proposed access tariff defines tampering as: Any unauthorized alteration, manipulation, change, modification, or diversion of [Utility]'s facilities, including Metering Equipment, that could adversely affect the integrity of billing data or the [Utility]'s ability to collect the data needed for billing or settlement. Tampering includes, but is not limited to, harming or defacing [Utility]'s facilities, physically or electronically disorienting the Meter, attaching objects to the Meter, inserting objects into the Meter, or other electrical or mechanical means of altering billing and settlement data or other electrical or mechanical means of altering Delivery Service.

STEC recommended that the definition of tampering be modified to read "including Metering Equipment or other action that could adversely effect the integrity of billing data..." to expand the scope of activities included in the definition. The REP Coalition agreed, but recommended the new phrase be placed after the list of other tampering actions to avoid any potential confusion: "modification, diversion or other action impacting [Utility]'s facilities...".

Commission Response

The commission declines to expand the definition of "tampering" as recommended by STEC and the REP Coalition. The proposed definition of tampering has been in use in the investor owned utility access tariff for years, and commenters do not provide any grounds for modifying this well-established definition or examples of actions that should be considered tampering but are not captured by the definition.

Access Tariff Section 3.1 Applicability

Section 3.1 of the access tariff describes the applicability of the tariff.

The REP Coalition recommended that section 3.1 include language setting forth a performance standard that the municipally owned utility or electric cooperative use reasonable diligence to comply with the operational and transactional requirements, timelines in the tariff, and any related requirements. The REP Coalition argued that this standard is in the pro forma tariff for investor-owned utilities and would be appropriate here to ensure the municipally owned utility or electric cooperative tries with reasonable diligence to abide by the tariff.

STEC and TEC argued that a "reasonable diligence" performance standard is both unnecessary and less straightforward than the statutory performance standard. Under PURA §40.056 and 41.056, municipally owned utilities and electric cooperatives must provide other retail electric providers with nondiscriminatory terms and conditions of access to distribution facilities for retail customers. STEC and TEC pointed out that if a municipally owned utility or electric cooperative fails to comply with these provisions of PURA, the commission may prohibit the municipally owned utility or electric cooperative from providing retail service outside of its certificated retail service area until its actions are remedied.

Commission Response

The commission agrees with the REP Coalition to add the reasonable diligence standard from the pro forma tariff for investor owned utilities to this access tariff. However, the commission adds this language to section 3.2, which contains general requirements and is a more appropriate location for this provision. The commission disagrees with STEC and TEC that PURA §40.056 and §41.056 provide a more straightforward performance standard. These statutory provisions provide a process and remedy for when a municipally owned utility or electric cooperative engage in anticompetitive behavior. A reasonable diligence performance standard does not conflict with these statutory provisions, which will continue to apply to municipally owned utilities and cooperatives.

Access Tariff Section 3.2, General

Section 3.2 of the access tariff requires a municipally owned utility or electric cooperative to state that it has no ownership interest in any electric power and energy it delivers.

STEC proposed a change to section 3.2 to require the municipally owned utility or electric cooperative to state that it has no ownership interest in any electric power or energy supplied by third-party competitive retailers or delivered to retail customers that purchase electric energy from third-party competitive retailers. STEC expressed that many municipally owned utilities and electric cooperatives own generation or have long-term generation contracts and, therefore, would have an ownership interest in the electricity each supplies to its own retail customers. STEC commented that under the proposed tariff many cooperatives and municipally owned utilities would be precluded from participation in the competitive electricity market. The REP Coalition did not dispute the basis for the request but suggested language that removed the specification of "third-party" competitive retailers.

Commission Response

The commission agrees with STEC that a municipally owned utility or electric cooperative may own generation to serve its customers. Accordingly, the commission modifies the tariff to only require the municipally owned utility or electric cooperative to state that it does not have an ownership interest in electric power and energy it delivers to retail customers that purchase electric energy from third-party competitive retailers. The commission disagrees with the REP Coalition's proposed language, which does not specify "third-party" competitive retailers. A municipally owned utility or electric cooperative may have an ownership interest in the generation it provides to its own customers. It must not have an ownership interest in the electricity supplied by third party retailers.

Access Tariff Section 4.3.B.1 Initiation of Access Where Construction Services are not Required

The REP Coalition pointed out that there should not be brackets around "utility" in "good utility practice," because this is a specific industry term that should not be modified.

Commission Response

The commission agrees with the REP Coalition and removes the brackets accordingly.

Access Tariff Section 4.3.C, Requests for Discretionary Services Including Construction Services

Section 4.3.C of the access tariff delineates the process for requesting discretionary services from a municipally owned utility or electric cooperative by a retail customer or a competitive retailer that is requesting on behalf of the retail customer.

The REP Coalition proposed a change to section 4.3.C to clarify that the municipally owned utility or electric cooperative must acknowledge receipt of a competitive retailer's electronic service request and notify the competitive retailer about service completion date in the field. LP&L responded that there are differences in communication depending on whether communications are made through the competitive retailer, retail customer, or both. LP&L commented that the REP Coalition's proposed edits would need to be clarified further to ensure that the communications for the specific services would be through the process identified by the applicable municipally owned utility or electric cooperative and laid out in section 4.3.

Commission Response

The commission agrees that the additional detail suggested by the REP Coalition would improve the tariff. The commission also agrees with LP&L that whether discretionary services may be requested by a competitive retailer on behalf of a retail customer is determined by the municipally owned utility or electric cooperative. The commission modifies the tariff to reflect that a competitive retailer may request discretionary services on behalf of a retail customer by mutual consent of the competitive retailer and the municipally owned utility or competitive retailer. The commission also modifies the tariff to include the additional clarifications requested by the REP Coalition.

Access Tariff Section 4.3.F, Identification of the Premises and Selection of Rate Schedules

Section 4.3.F of the access tariff provides a list of actions a municipally owned utility or an electric cooperative must take to establish, assign, and maintain ESI IDs in accordance with provisions set by applicable legal authorities. The section also requires a municipally owned utility or electric cooperative to select appropriate rate schedules for the delivery service provided. The section states that for service to a new retail customer at an existing premise, the municipally owned utility or electric cooperative will bill actual demand of the existing retail customer.

LP&L recommended modifications to section 4.3.F to clarify that for a new retail customer at an existing premise, the municipally owned utility or electric cooperative will bill actual demand of the existing retail customer subject to chapter 5 of its delivery service tariff and applicable legal authorities. LP&L explained that section 4.3.F needs more flexibility to accommodate the various kinds of demand charges associated with seasonal differences, demand rachets, etc. that a municipally owned utility or electric cooperative may charge a new retail customer at an existing premise. LP&L provided language.

Commission Response

The commission agrees with LP&L that a new retail customer at an existing premise may have different demand patterns than the existing customer at that premise. The commission modifies the language in this section to provide flexibility to the municipally owned utility or electric cooperative to bill new customers at an existing premise appropriately while their demand is established.

New Proposed Access Tariff Section 4.3.L, Critical Care and Critical Load Customer Designation

The REP Coalition pointed out that the proposed tariff does not address critical care or critical load customers. The REP Coalition noted that PURA §17.005(f), for municipally owned utilities, and 17.006(f), for electric cooperatives, contemplate that these entities will have critical care residential customers, critical load industrial customers, and other critical load according to commission rules adopted under PURA §38.076. The REP Coalition commented that while it is appropriate for details of the processes surrounding critical care and critical load designations to exist in other documents, pro forma tariff should address at a high level the existence and communication regarding such designations. The REP Coalition provided language.

Commission Response

The commission agrees that the tariff should address critical care and critical load customer levels at a high level. However, the commission's rules to implement PURA §38.076 have not been fully implemented, so the precise obligations of competitive retailers are not yet fully established. Accordingly, the commission modifies the tariff to require that the municipally owned utility and competitive retailer will, by mutual consent, establish procedures to enable both entities to comply with all requirements established in applicable legal authorities related to critical care and critical load customer designations.

Access Tariff Section 4.4.A.4, Billing Cycle

Section 4.4.A.4 of the access tariff requires invoiced charges to be based on a cycle of approximately one month, unless otherwise stated in the municipally owned utility's or electric cooperative's delivery service tariff or in section 4.8.A.3, Out of Cycle Meter Reads, of this tariff.

The REP Coalition pointed out that the heading of section 4.8.A.3 is incorrectly referenced as Out of Cycle Meter Reads, and that it should be updated to reflect the accurate heading of the section, Meter Readings For The Purpose Of A Self-Selected Switch Or To Verify Accuracy Of Meter Reading.

Commission Response

The commission modifies section 4.4.A.4 of the tariff to correctly reference the heading of section 4.8.A.3.

Access Tariff Section 4.4.A.5, Remittance

Section 4.4.A.5 of the access tariff contains the requirements regarding remittance of payment. The heading for the section is "REMITTANCE."

The REP Coalition suggested changing the heading of section 4.4.A.5 to "REMITTANCE FOR CONSOLIDATED BILLING," because the requirements of this section only applies when the municipally owned utility or electric cooperative sends a consolidated bill.

Commission Response

The commission agrees with the REP Coalition that section 4.4.A.5 only applies when the municipally owned utility or electric cooperative sends a consolidated bill and changes the heading accordingly.

Access Tariff Section 4.4.C.1, Calculation and Transmittal of Delivery Service Invoices by [~~Utility~~]

Section 4.4.C.1 of the access tariff delineates the process and requirements for a municipally owned utility or electric cooperative to calculate and transmit electronic invoices for delivery system charges to a competitive retailer that chooses to issue a consolidated bill.

STEC recommended striking a requirement that, if requested by the competitive retailer, the municipally owned utility or electric cooperative provide information on any billing determinants that were not provided on the electronic invoice. STEC explained that it is not clear which billing determinants would be invoiced that are not provided on an electronic invoice in accordance with Texas SET.

The REP Coalition opposed this recommendation. It argued that this requirement is important for billing disputes that are addressed via MarkeTRAK (a dispute resolution tool used in the ERCOT marketplace). The REP Coalition explained that the applicable TX SET transaction provides multiple options for what billing information can be sent to account for the different billing determinants within various entities' tariffs under different rates and rate classes. Billing information sent may sometimes not be accurate for the applicable rate schedule or premise under the applicable tariff. Thus, a competitive retailer may need to be able to request more information to address any billing issues that arise.

Commission Response

The commission declines to modify the tariff to remove the requirement that a municipally owned utility or electric cooperative provide the competitive retailer with any information on billing determinants that were not provided on an electronic invoice, if requested. The commission agrees with the REP Coalition that in some cases the billing determinants sent on the invoice may not be accurate for the applicable rate schedule or premise under the applicable tariff. In these instances, the competitive retailer may need to request additional information on the billing determinants.

STEC's proposed redline of this section also removed, without explanation, a requirement that the start and end dates for the billing periods match the start and end dates of the meter reading for the premises. The REP Coalition opposed eliminating this requirement. It argued that MarkeTRAK requires that dates submitted via the tool reflect the dates of the start and end meter reads. Therefore, the REP Coalition continued, deleting this requirement from the access tariff would obfuscate MarkeTRAK requirements.

Commission Response

The commission declines to remove the requirement to have the start and end dates for the billing period match the meter reading start and end dates. This requirement is consistent with existing practice and with how information is submitted via MarkeTRAK.

Access Tariff Section 4.4.C.3, Invoice Corrections

Section 4.4.C.3 lists the circumstances under which a municipally owned utility or electric cooperative must issue invoice corrections and specifies the process that must be followed.

The REP Coalition pointed out that an incomplete sentence that was intended to be deleted was unintentionally left in the document.

Commission Response

The commission agrees with the REP Coalition and deletes the typographical error.

Access Tariff Section 4.4.D, Remittance of Invoiced Charges

Proposed section 4.4.D of the access tariff states that payments for all charges except discretionary service charges invoiced to competitive retailer will be due 35 calendar days following the municipally owned utility's or electric cooperative's transmittal of a valid invoice.

The REP Coalition pointed out a conflict in the language that referenced 35 days in one area and 30 days in another sentence to refer to the same payment provision. The REP Coalition recommended correcting the reference to a 30-day requirement be modified to 35 days, which is consistent with the timeframe for the equivalent requirement in the access tariff for investor owned utilities.

Commission Response

The commission agrees with the REP Coalition and corrects the reference to a 30-day requirement to a 35-day requirement, consistent with the requirement timeframes in the investor owned utility access tariff.

Access Tariff Section 4.4.D.3, Invoice Disputes

Proposed section 4.4.D.3 of the access tariff sets out the procedures for resolving invoice disputes. Under the proposed tariff, an invoice following the resolution of a dispute is due within one business day of the resolution of the dispute.

STEC recommended modifying the deadline for a competitive retailer to pay a disputed invoice from one business day to three business days. STEC argued that this will provide the competitive retailer with adequate administrative time to process the invoice and issue payment.

Commission Response

The commission agrees that three days is a reasonable amount of time for the competitive retailer to process and pay the disputed invoice and modifies the tariff accordingly.

Access Tariff Section 4.6.B.2, Default of [~~Utility~~] Related to Failure to Provide Meter Reading Data

Proposed section 4.6.B.2 of the access tariff provides that a competitive retailer may pursue remedies for failure of a municipally owned utility or electric cooperative to provide meter reading data.

The REP Coalition noted that either the competitive retailer or the municipally owned utility or electric cooperative could discover a failure of meter reading data and recommended that the tariff reflect both scenarios. The REP Coalition also stated that the time period to cure the delinquency must run from the date the municipally owned utility or electric cooperative discovers such failure.

LP&L opined that the competitive retailer is in the best position to discover a failure in meter reading data. LP&L further commented that if the municipally owned utility or electric cooperative did find an error, it could lead to uncertainty about the parties' rights and timelines related to discovery of missing data and curing of delinquency. Therefore, LP&L recommended that the language remain unchanged.

Commission Response

The commission declined to amend section 4.6.B.2 to also consider scenarios where the municipally owned utility or electric cooperative discovers a failure in meter reading data. The commission agrees with LP&L that this would introduce uncertainty into the remedy timelines and that competitive retailers are in the best position to identify missing data.

Access Tariff Section 4.6.C.4, Default Related to De-Certification of a Competitive Retailer as a Retail Electric Provider or Loss of Municipal Registration

Proposed section 4.6.C.4 requires a competitive retailer, upon loss of commission certification as a REP, to abide by 16 TAC §25.107, relating to Certification of Retail Electric Providers, with respect to notice and transfer of retail customers to another qualified competitive retailer or the provider of last resort (POLR).

The REP Coalition pointed out that commission practice has been to allow multiple POLRs to serve for each class and territory. The REP Coalition opined that even if the municipally owned utility or electric cooperative is selecting its own POLR, the tariff should be clear that one or more entities are permitted to serve as POLR.

Commission Response

The commission agrees with the REP Coalition that multiple providers of last resort are permissible and modifies the tariff accordingly.

Access Tariff Section 4.7, Measurement and Metering of Service

Proposed section 4.7 of the access tariff states that charges for electric power and energy are calculated using measurements obtained from metering equipment that is owned, installed, and read by the municipally owned utility or electric cooperative, by estimation, or by other methods defined in the entity's delivery service tariff.

To clarify what constitutes complete Interval Data, the REP Coalition recommended adding a provision that is included in the §25.215 version of the access tariff that specifies that the inclusion of missing interval data does not meet the requirement to provide complete interval data for a billing period. The REP Coalition explained that it is necessary that competitive retailers

receive data for all the intervals to match the Texas Standard Electronic Transaction (Texas SET) transactions used by the competitive retail electric market.

Commission Response

The commission agrees with the REP Coalition that missing interval data should not be considered complete interval data and modifies the tariff accordingly.

Access Tariff Section 4.8.A. Data from Meter Reading

Proposed section 4.8 of the access tariff states that a municipally owned utility or electric cooperative must provide access to interval data for interval demand recorder customers through a web-portal or other means in real time if this data is not provided by ERCOT.

The REP Coalition recommended extending the requirement that a municipally owned utility or electric cooperative provide retail customers readings from an interval data recording meter in real time to any type of meter that records interval data. LP&L did not object to the proposed changes but recommended that providing such data in real time should not be mandatory. LP&L also stated that it hopes to make such data available in real time but is uncertain if that will be feasible upon its initial implementation of retail competition.

Commission Response

The commission agrees with the REP Coalition that there are multiple meter types that record interval data, and that customers would benefit from having access to this data in real time when available. The commission also agrees with LP&L that municipally owned utilities and electric cooperatives should not be required to make this information available for all types of meters in real time. The commission modifies the tariff to permit municipally owned utilities and electric cooperatives to provide interval data in real time to customers "served with a meter that records interval data." This modified language is still a permissive requirement but is broader than the proposed tariff language which was limited to interval demand customers.

Appendix A Section I

Appendix A of the tariff is the signed agreement that states the terms and conditions that govern the relationship between a competitive retailer and municipally owned utility or electric cooperative. It contains information about how outages, service requests, and billing inquiries will be handled, including a requirement that the competitive retailer provide an address the municipally owned utility or electric cooperative can provide the competitive retailer with notice for late payments.

STEC recommended modifying the rule to require electronic mailing addresses instead of physical mailing addresses when providing notice of late payments to competitive retailers.

Commission Response

The commission modifies the rule to require an electronic mailing address instead of a physical mailing address for the provision of notice of late payment to competitive retailers, as recommended by STEC. This modification will increase the efficiency with which competitive retailers are made aware of late payments.

Appendix A Proposed New Section II

The REP Coalition suggested adding a new section II under Appendix A, designation of entity performing billing, that would memorialize the selection of the default billing method. This new section would require a competitive retailer to perform consolidated billing unless the retail customer affirmatively opts for dual billing and agrees to pay any associated discretionary charges as found in Chapter 5 of the tariff. The REP Coalition provided language.

STEC and TEC argued that the REP Coalition's proposal was problematic, because it eliminates the option for the municipally owned utility or electric cooperative to provide consolidated billing. STEC and TEC stated that setting a default position of single billing by the competitive retailer runs contrary to PURA §41.057, which states that an electric cooperative that opts into competition may continue to bill retail customers. STEC and TEC stated that the proposal is intended to allow a municipally owned utility or electric cooperative to insert its own language to reflect additional billing options. They also opined that the language is vague and does not accomplish the stated goal of memorializing the billing procedure selections set out in Chapter 4 of the tariff.

Commission Response

The commission agrees with STEC and TEC that setting a default position of a single bill from the competitive retailer is contrary to the language of PURA §41.057, which grants municipally owned utilities and electric cooperatives the ability to provide consolidated billing. However, the commission agreed there is value in memorializing the selection of bill methods in the tariff. The commission adds a new section II to allow for the designation of the billing entity for when a retail customer requests to receive a single consolidated bill and for the designation of a billing entity for transmission and distribution charges when the customer does not request a single bill.

Appendix A Section V.

Proposed section V of Appendix A requires a competitive retailer to warrant that it is certified as a retail electric provider by the commission.

STEC proposed to remove this requirement from section V, because municipally owned utilities and electric cooperatives who have entered retail competition are not required to be certified as retail electric providers.

LP&L disagreed and argued that the delivery service provider must be able to confirm that all entities planning to market to retail customers in its area are duly authorized to operate in Texas. LP&L proposed that a competitive retailer should either be certified as a retail electric provider by the commission or must be a municipally owned utility or an electric cooperative that is authorized to conduct business in Texas.

Commission Response

The commission agrees with STEC that a municipally owned utility or electric cooperative that has entered retail competition is not required to be certified as a retail electric provider. However, it is appropriate for the tariff to require a competitive retailer to verify that it is authorized to sell electrical power and energy to retail customers in Texas. The commission modifies the tariff accordingly.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this rule, the commission makes other minor modifications for the purpose of clarifying its intent.

The new rule is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.001 (PURA), which provides

the commission with the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; PURA §14.002, which provides the commission with the authority to make, adopt, and enforce rules reasonably required in the exercise of its powers and jurisdiction and specifically; PURA §32.101, which requires an electric utility to file its tariff with each regulatory authority; PURA §38.001, which requires an electric utility to furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable; PURA §38.002, which grants the commission the authority, on its own motion or on complaint and after reasonable notice to adopt just and reasonable standards, classifications, rules, or practices an electric utility must follow in furnishing a service; PURA §39.107, which establishes customer choice in a service area; PURA §39.203 which grants the commission the authority to establish reasonable and comparable terms and conditions for open access on distribution facilities for all retail electric utilities offering customer choice; PURA §40.054(c) which grants the commission the authority to establish terms and conditions for access, by other REPs to the municipally owned utility's distribution facilities for municipally owned utilities participating in customer choice; and PURA §41.054(c) which grants the commission the authority to establish terms and conditions for access, by other retail electric providers to the electric cooperative's distribution facilities for electric cooperatives participating in customer choice.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 32.101, 38.001, 38.002, 39.107, 39.203, 40.054(c) and 41.054(c).

§25.219. Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that Implements Customer Choice after May 1, 2023.

(a) Purpose and Application. This section and the pro-forma access tariff set forth in subsection (c) of this section establish and govern the non-discriminatory terms and conditions of access by competitive retailers to the delivery system of a municipally owned utility or electric cooperative that implements customer choice after May 1, 2023. This section applies to a municipally owned utility or electric cooperative that implements, or is preparing to implement, customer choice after May 1, 2023. For purposes of this section, the date a municipally owned utility or electric cooperative opens its territory to retail competition is the date it implements customer choice. A municipally owned utility or electric cooperative that implements customer choice after May 1, 2023 is not required to comply with §25.215 of this title (relating to Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice).

(b) A municipally owned utility or electric cooperative that has implemented customer choice after May 1, 2023 must provide retail delivery service, including delivery service to a retail customer at transmission voltage, to retail customers. Retail delivery service must be provided in accordance with the rates, terms, and conditions set forth in the delivery service tariffs promulgated by the municipally owned utility or electric cooperative.

(c) Access tariff. Not later than the 90th day before the date a municipally owned utility or electric cooperative to which this rule applies implements customer choice, the municipally owned utility or electric cooperative must file with the commission its tariff governing access by competitive retailers to retail customers connected to the delivery system of the municipally owned utility or electric cooperative using the pro-forma access tariff in subsection (d) of this section. A municipally owned utility or an electric cooperative may add to or modify only Chapters 2 and 5 of the access tariff, reflecting individual characteristics and rates. Chapters 1, 3, and 4 of the pro-forma access tariff must be used exactly as written; these Chapters can be changed only through the rulemaking process. The access tariff, however, must contain the name of the municipally owned utility or electric cooperative in lieu of "[Utility]".

(d) Pro-Forma Retail Access Tariff. Tariff for Retail Access. Figure: 16 TAC §25.219(d)

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 23, 2023.

TRD-202301156
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: April 12, 2023
Proposal publication date: December 16, 2022
For further information, please call: (512) 936-7322

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TITLE 22. EXAMINING BOARDS

PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 511. ELIGIBILITY
SUBCHAPTER C. EDUCATIONAL REQUIREMENTS

22 TAC §511.57

The Texas State Board of Public Accountancy adopts an amendment to §511.57, concerning Qualified Accounting Courses, without changes to the proposed text as published in the February 3, 2023, issue of the *Texas Register* (48 TexReg 459) and will not be republished.

To be eligible to take the UCPA exam an applicant must have completed a minimum number of hours of course work from an accredited higher education institution. The Board is recognizing the addition of courses in financial planning as acceptable course work.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 and §901.655 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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 23, 2023.

TRD-202301153

J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Effective date: April 12, 2023
Proposal publication date: February 3, 2023
For further information, please call: (512) 305-7842

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22 TAC §511.58

The Texas State Board of Public Accountancy adopts an amendment to §511.58, concerning Definitions of Related Business Subjects and Ethics Courses, without changes to the proposed text as published in the February 3, 2023, issue of the *Texas Register* (48 TexReg 461) and will not be republished.

To be eligible to take the UCPA exam an applicant must have completed a minimum number of hours of course work from an accredited higher education institution. The Board is specifically recognizing the addition of acceptable course work to be courses in information systems and data analytics. Course work in information systems and related courses is limited to a maximum of 6 credit semester hours. Course work in data analytics and related courses is limited to a maximum of 9 credit semester hours.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 and §901.655 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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 23, 2023.

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J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
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Proposal publication date: February 3, 2023
For further information, please call: (512) 305-7842

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SUBCHAPTER D. CPA EXAMINATION

22 TAC §511.72

The Texas State Board of Public Accountancy adopts an amendment to §511.72, concerning Uniform Examination, without changes to the proposed text as published in the February 3, 2023, issue of the *Texas Register* (48 TexReg 463) and will not be republished.

The rule recognizes that an individual taking the UCPA exam will be required to pay an examination fee to the National Association of Boards of Accountancy.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 and §901.655 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

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 23, 2023.

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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 307. BEHAVIORAL HEALTH PROGRAMS

SUBCHAPTER E. CHILDREN'S MENTAL HEALTH--RESIDENTIAL TREATMENT CENTER PROJECT

26 TAC §§307.201, 307.203, 307.205, 307.207, 307.209, 307.211, 307.213, 307.215, 307.217, 307.219, 307.221, 307.223

The Texas Health and Human Services Commission (HHSC) adopts new §307.201, concerning Purpose; §307.203, concerning Application; §307.205, concerning Definitions; §307.207 concerning Eligibility Criteria to Participate in the RTC Project; §307.209, concerning Referral Process; §307.211, concerning Interest List Management; §307.213, concerning Assessing Eligibility; §307.215, concerning Notification and Appeal Process; §307.217, concerning Application Packet; §307.219, concerning Local Mental Health Authority and Local Behavioral Health Authority Requirements; §307.221, concerning Residential Treatment Center Contractor Requirements; and §307.223, concerning Discharge Plan.

Sections 307.205, 307.207, 307.209, 307.211, 307.217, 307.219, and 307.221 are adopted with changes to the proposed text as published in the December 9, 2022, issue of the *Texas Register* (47 TexReg 8093). These rules will be republished.

Sections 307.201, 307.203, 307.213, 307.215, and 307.223 are adopted without changes to the proposed text as published in the December 9, 2022, issue of the *Texas Register* (47 TexReg 8093). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The new sections are necessary to implement the relinquishment avoidance program in accordance with Texas Family Code §262.351 and §262.353, which provides beds in residential

treatment center (RTC) facilities to prevent the relinquishment of parental conservatorship to the Texas Department of Family and Protective Services (DFPS) solely to obtain mental health services for a child with a serious emotional disturbance. The new rules govern the use of relinquishment prevention beds through the RTC Project rules and the provision of RTC Project services necessary to address the interrelated roles and responsibilities of HHSC, DFPS, local mental health authorities (LMHAs) and local behavioral health authorities (LBHAs), and contracted RTCs pursuant to Texas Family Code §262.353 as adopted by Senate Bill (S.B.) 642, 87th Legislature, Regular Session, 2021.

COMMENTS

The 31-day comment period ended January 9, 2023.

During this period, HHSC received comments regarding the proposed rules from three commenters, including the Texas Medical Association, Disability Rights Texas, and the Texas Council of Community Centers. A summary of comments relating to the rules and HHSC's responses follow.

Comment: One commenter suggested revising the rules to expand outpatient services through the program, including increasing the availability of residential treatment facilities, outpatient step-down services, early intervention, and community-based wraparound services.

Response: HHSC disagrees and declines to revise the rules in response to this comment. The expansion of services is outside the scope of this rule project. HHSC will explore this recommendation with agency leadership and stakeholders.

Comment: One commenter suggested revising the rules to inform the public about what treatment options are available to the child and their family if the RTC Project application and appeal are unsuccessful and how to access those treatment options.

Response: HHSC disagrees and declines to revise the rules in response to this comment. Section 307.213(a)(1) of this subchapter cross references 26 TAC §306.163 (relating to Most Appropriate and Available Treatment Options) which requires the designated LMHA or LBHA to provide the individual and their family with the most appropriate and available treatment alternatives for an individual in need of mental health services.

Comment: One commenter suggested HHSC reference the requirement under Texas Family Code §264.1261(b-2), as enacted by S.B. 1896, 87th Legislature, Regular Session, 2021, that youth must discharge from an outpatient or inpatient mental health facility no later than 72 hours after the determination that continuation in the facility is not medically necessary.

Response: HHSC disagrees and declines to revise the rules in response to this comment. Texas Family Code §264.1261(b-2), as amended by S.B. 1896, applies to inpatient and outpatient mental health facilities. While there is not a definition for these terms for purposes of §264.1261(b-2), definitions under Texas Health and Safety Code §571.003, set requirements for these types of facilities. RTCs are not included in these definitions. Additionally, Texas Family Code §264.1261(b-1) distinguishes RTCs from mental health facilities. HHSC believes more than 72 hours may be needed to complete discharges from RTCs to allow adequate time for the RTC to work with families to ensure appropriate services and supports are available to the family and child. A parent or legal guardian can pick up a child at any time if desired, and RTCs must comply with state law allowing parents or legal guardians to do so.

Comment: One commenter recommended revising §307.207(a)(3) clarifying that the diagnosis of a serious emotional disturbance is required from an individual authorized under Texas state law to make the diagnosis.

Response: HHSC agrees to modify the rule, however, HHSC has included that the serious emotional disturbance (SED) is determined by a professional authorized to make the determination within the scope of their Texas state license, permit, or other certification, rather than using the term "diagnosis" in the requirement. An SED is not solely a medical diagnosis, but also includes identifying functional impairments by non-medical qualified professionals.

Comment: One commenter requested clarification on whether Youth Empowerment Services Waiver services need to be exhausted to access the RTC Project services in §307.207(b).

Response: HHSC disagrees and declines to revise the rules in response to this comment. The RTC Project is not limited to the child's parent or managing conservator exhausting YES Waiver services. An LAR can request a referral to the RTC Project if there are no community-based mental health or financial resources available to adequately protect the safety and well-being of the child or others.

Comment: One commenter recommended revising §307.209(a)(1) to allow a physician, with the consent of the child's LAR, to request a referral for RTC Project services through LMHAs or LBHAs, as this may help reduce the number of families who may relinquish a child during a hospital stay.

Response: HHSC agrees to modify the rule and has also chosen to amend §307.209(a)(1) to allow any individual supporting the family to submit a referral with the consent of the LAR. This broadens who can support the family by making referrals to the RTC Project.

Comment: One commenter recommended streamlining the process for all parties in §307.209(e) by requiring the RTC Project team to notify the LMHA or LBHA and the LAR within seven business days if a child is determined ineligible for services.

Response: HHSC declines to revise the rules in response to this comment. Under §307.209(e), the LMHA or LBHA currently notifies the LAR of the eligibility determination. HHSC believes this is most appropriate as the LMHA or LBHA is the family's primary point of contact regarding the RTC Project. This process is consistent with other HHSC mental health program requirements for LMHAs or LBHAs to serve as the primary point of contact for individuals seeking services.

Comment: One commenter recommended allocating funding in §307.213(a) to support an LMHA or LBHA position dedicated to screening for RTC Project eligibility, continuity of care, discharge planning, and communication related to eligibility, placement determinations, progress, and denials.

Response: HHSC declines to revise the rules in response to this comment. The creation of a new LMHA or LBHA position is outside the scope of this rule project. HHSC will explore this recommendation with agency leadership and stakeholders.

Comment: One commenter recommended allocating resources in §307.213(b) to support the RTC Project emergency eligibility response.

Response: HHSC declines to revise the rules in response to this comment. The allocation of additional resources requires

agency review and approval which occurs outside of the rule-making process, and it is outside the scope of this rule project. HHSC will explore this recommendation with agency leadership and stakeholders.

Comment: One commenter recommended streamlining the process in §307.217(c) by requiring HHSC to notify the LMHA or LBHA and the child's LAR of the admission to an RTC facility within two business days.

Response: HHSC declines to revise the rules in response to this comment. Under §307.217(e), the LMHA or LBHA currently notifies the LAR of the admission. HHSC believes this is most appropriate as the LMHA or LBHA is the family's primary point of contact regarding the RTC Project. This process is consistent with other HHSC mental health program requirements for LMHAs or LBHAs to serve as the primary point of contact for individuals seeking services.

Comment: One commenter requested clarification regarding §307.219(c) on the expectation for families requesting a referral to the RTC Project who decline any services available under Level of Care-RTC.

Response: HHSC declines to revise the rules in response to this comment because the expectations for the families are outlined in §307.221(g) and in the Family Agreement that is required by subsection (g).

Comment: One commenter recommended clarification in §307.219(c) on the method for funding adjunct services provided by the LMHA or LBHA and not the RTC facility that may be required if the family does not have insurance coverage.

Response: HHSC declines to revise the rules in response to this comment. The method of payment for community mental health services is addressed in 25 TAC Part 1 Chapter 412, Subchapter C (relating to Charges for Community Services) and addresses when a family may not have private resources available.

Comment: One commenter recommended including language in §307.219(c)(5) regarding proper scope-of-licensure authorized under state law to perform such services and make diagnoses.

Response: HHSC agrees to modify the rule as recommended. The language under §307.219(c)(5) is amended to provide that the mental health diagnosis must be determined by a professional authorized to make the determination within the scope of their Texas state license, permit, or other certification.

Comment: One commenter recommended clarifying language in §307.219(c)(11) to reference providers authorized by state law to prescribe and to refer to "medications" rather than "needed medications."

Response: HHSC agrees to modify the rule as recommended. The language under §307.219(c)(11) is amended to reference providers authorized to prescribe medications under state law.

HHSC made minor editorial changes to §307.205(12) to clarify that the minimum capacity for general residential operations for RTCs is seven children in accordance with Texas Human Resources Code, §42.002; to §307.205(16) by adding Texas before the Government Code citation for consistency; and to §307.207(b) by changing "LAR" to "parent or managing conservator" and combining information in subsection (b)(1) with subsection (b) for clarity and understanding. Subsection (b)(2) was renumbered to new subsection (c) and the subsequent subsection was renumbered.

HHSC made editorial changes to §307.209(e); §307.217(c), §307.217(c)(1), §307.217(c)(4); and §307.217(e) by clarifying that the timeframe begins after notification; and to §307.217(b)(2) and §307.217(d) by adding two business day timeframes. HHSC made minor editorial changes to §307.211(b)(9) clarifying that a child is no longer in need of RTC project services if there is a request to remove the child's name from the RTC project interest list; and deleted "after determined eligible for the RTC Project" in §307.219(c)(5) as it is unnecessary language.

HHSC made minor grammatical changes to §307.211(b)(2) and §307.221(b)(3).

STATUTORY AUTHORITY

The new sections 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, and Texas Family Code §262.353(c) which requires HHSC and DFPS to jointly adopt comprehensive guidance for providers and families that describes how to access services under the relinquishment avoidance program.

§307.205. Definitions.

The following words and terms, when used in this subchapter, have the following meanings:

(1) Business day--Any day except a Saturday, Sunday, or legal holiday listed in Texas Government Code §662.021.

(2) Case manager--An employee of the local mental health authority (LMHA) or local behavioral health authority (LBHA) who provides mental health case management services.

(3) Child--A person under 18 years of age as defined under Texas Human Resources Code §42.002 and not emancipated under state law.

(4) DFPS--The Texas Department of Family and Protective Services.

(5) Eligibility assessment--The process an LMHA or an LBHA uses to gather information from a child and the child's legally authorized representative to determine if the child meets eligibility criteria for receiving services through the Residential Treatment Center (RTC) Project.

(6) HHSC--The Texas Health and Human Services Commission, or its designee.

(7) LAR--Legally authorized representative. A person authorized by law to act on behalf of a child regarding a matter described in this subchapter, and may include a parent, legal guardian, or managing conservator of a child.

(8) LBHA--Local behavioral health authority. An entity designated as the local behavioral health authority by HHSC in accordance with Texas Health and Safety Code §533.0356.

(9) LMHA--Local mental health authority. An entity designated as the local mental health authority by HHSC in accordance with Texas Health and Safety Code §533.035(a).

(10) LPHA--Licensed practitioner of the healing arts. A person who is:

(A) a physician;

(B) a physician assistant;

(C) an advanced practice registered nurse;

(D) a licensed psychologist;

(E) a licensed professional counselor;

(F) a licensed clinical social worker; or

(G) a licensed marriage and family therapist.

(11) Ombudsman--The Ombudsman for Behavioral Health Access to Care established by Texas Government Code §531.02251 serves as a neutral party to help individuals, including individuals who are uninsured or have public or private health benefit coverage, and behavioral health care providers navigate and resolve issues related to the individual's access to behavioral health care, including care for mental health conditions and substance use disorders.

(12) RTC--Residential treatment center. A general residential operation regulated under Texas Human Resources Code Chapter 42 and Chapter 748 of this title (relating to Minimum Standards for General Residential Operations) for seven or more children that exclusively provides treatment services for children with emotional disorders.

(13) RTC Project--The HHSC relinquishment avoidance program that provides residential mental health services to a child with a serious emotional disturbance without the child entering the managing conservatorship of DFPS, in accordance with Texas Family Code Chapter 262, Subchapter E.

(14) RTC project team--The HHSC team that provides oversight of the RTC Project.

(15) RTC contractor--A residential treatment center that contracts with HHSC to provide services under this subchapter.

(16) SED--Serious emotional disturbance. A mental, behavioral, or emotional disorder of sufficient duration to result in functional impairment that substantially interferes with or limits a person's role or ability to function in family, school, or community activities in accordance with Texas Government Code §531.251.

(17) Service planning team--A team that must develop, review, and revise the service plan and discharge plan. The team must consist of:

(A) an RTC contractor;

(B) in addition to the requirements outlined in Chapter 748, Subchapter I of this title (relating to Admission, Service Planning, and Discharge), the service planning team includes:

(i) the child;

(ii) the child's LAR;

(iii) a representative from the LMHA or LBHA assigned to work with the child and family; and

(iv) the child's individual and family therapist; and

(C) other participants on the service planning team may include other individuals as requested by the child, the child's LAR, the LMHA or LBHA, or the RTC and agreed upon by the child's LAR.

§307.207. Eligibility Criteria to Participate in the RTC Project.

(a) The child must:

(1) be a resident of the State of Texas;

(2) be younger than 18 years of age;

(3) have an SED as determined by a professional authorized to make the determination within the scope of their Texas state license, permit, or other certification;

(4) require residential treatment services, as outlined in §307.213 of this subchapter (relating to Assessing Eligibility); and

(5) not be in DFPS managing conservatorship by written court order issued under Texas Family Code Chapter 153.

(b) The child's parent or managing conservator must be at risk of relinquishing parental conservatorship of the child if there are no community-based mental health or financial resources available to adequately protect the safety and well-being of the child or others, including household members, because of the child's SED.

(c) The child's LAR must attest to the appropriate referral source as described in §307.209(a) of this subchapter (relating to Referral Process) that the family is at risk of relinquishing the child for the sole purpose of accessing mental health services.

(d) The RTC Project limits the number of children for participation in the RTC Project based on funding and placement availability.

§307.209. Referral Process.

(a) A referral may occur in one of two ways:

(1) An LAR, or an individual supporting the family with the LAR's consent, interested in the RTC Project requests a referral for treatment services through the child's designated LMHA or LBHA which then submits a referral to the RTC Project team; or

(2) DFPS may submit a referral to the RTC Project team when DFPS receives an intake for which a referral may be appropriate.

(b) Upon receipt of a referral from the RTC Project, the LMHA or LBHA schedules the child's eligibility assessment with the child's LAR.

(c) The LMHA or LBHA must notify the child's LAR of the child's eligibility assessment results within two business days after eligibility is determined and send a complete application packet within two business days after its completion to the RTC Project team as outlined in §307.217 of this subchapter (relating to Application Packet).

(d) If the child is eligible for RTC Project services, the RTC Project team places the child on the RTC Project interest list.

(e) If the child's eligibility for the RTC Project is not approved at the time of the referral, the RTC Project notifies the LMHA or LBHA within seven business days. The LMHA or LBHA notifies the child's LAR, in writing, within seven business days after notification. The child's LAR may request a review of this decision as outlined in §307.215 of this subchapter (relating to Notification and Appeal Process).

§307.211. Interest List Management.

(a) The child remains on the RTC Project interest list until the child is admitted to an RTC or removed from the interest list pursuant to §307.211(b) of this section.

(b) The RTC Project team removes a child's name from the interest list if:

(1) the RTC Project team determines the child is ineligible in accordance with §307.207 of this subchapter (relating to Eligibility Criteria to Participate in the RTC Project);

(2) the child's LAR submits a request to remove the child's name from the RTC Project interest list verbally or in writing;

(3) the child's LAR declines RTC Project services verbally or in writing;

(4) the child's LAR declines LMHA or LBHA services verbally or in writing;

(5) the child is placed in DFPS managing conservatorship by written court order issued under Texas Family Code Chapter 153;

(6) the child is no longer a resident of Texas;

(7) the child is committed to the Texas Juvenile Justice Department or the Texas Department of Criminal Justice;

(8) the child is deceased;

(9) The child is no longer in need of RTC Project services and has been on the interest list for over 30 calendar days as described in subsection (c) of this section;

(10) the LMHA, LBHA, or RTC Project team has been unable to contact the child's LAR to complete the activities or documents required for the application packet;

(11) the child is admitted for treatment through the RTC Project; or

(12) the child has exhausted all placement options or has been denied admission into all eligible RTC operations participating in the RTC Project more than once, as outlined in the HHSC RTC Project policy manual.

(c) If the child is no longer in need of RTC Project services, the child's LAR may request that the child remain on the RTC Project interest list for 30 calendar days in case such services are needed in the future. While the child is on the interest list, the LMHA or LBHA must monitor the child's need for RTC Project services and offer, provide, or secure services for the child at the appropriate level of care indicated by the child's eligibility assessment.

§307.217. Application Packet.

(a) The LMHA or LBHA must ensure an application packet is completed for every child on the interest list who meets eligibility criteria for the RTC Project.

(1) The LMHA or LBHA assists the child's LAR to complete the application packet and submits the completed application packet on behalf of the child's LAR to the RTC Project team.

(2) The RTC Project team looks for RTC treatment for the child after eligibility is determined and the application packet is complete.

(b) After the RTC Project team submits the child's application packet to the RTC contractor, the RTC contractor must:

(1) review the application packet to determine eligibility for RTC contractor admission in accordance with Chapter 748, Subchapter I of this title (relating to Admission, Service Planning, and Discharge); and

(2) notify the RTC Project team, in writing, of the child's eligibility for admission within two business days after the RTC contractor's determination is made.

(c) If the RTC contractor determines they can admit and treat the child, the RTC Project team notifies the appropriate LMHA or LBHA within two business days, and the LMHA or LBHA notifies the child's LAR of the admission options within two business days after notification.

(1) If there are multiple RTC treatment options, the RTC Project team notifies the appropriate LMHA or LBHA, and the LMHA or LBHA notifies the child's LAR within two business days after notification.

(2) The child's LAR consults with the LMHA or LBHA and makes a final determination to accept or decline the RTC options.

(3) The LMHA or LBHA notifies the RTC Project Team about the child's LAR's decision within two business days.

(4) the RTC Project team authorizes the child's LAR's choice of available RTC options within two business days after notification.

(d) If the RTC contractor determines they are unable to meet the treatment needs of the child at the RTC, the RTC contractor must notify the RTC Project team within two business days after making the determination and describe the reasons why the child cannot be admitted.

(e) If all RTC contractors associated with the RTC Project deny the child's admission, the RTC Project team will notify the LMHA or LBHA that the child is denied by all RTC contractors within seven business days after the last contractor denial. The LMHA or LBHA must notify the child's LAR, in writing, within seven business days after notification.

§307.219. Local Mental Health Authority and Local Behavioral Health Authority Requirements.

(a) The LMHA or LBHA must not require an LAR to contact DFPS to initiate a referral to the RTC Project in accordance with Texas Family Code §262.353.

(b) The LMHA or LBHA must designate a staff person as an RTC Project liaison responsible for receiving and submitting referrals to the RTC Project.

(c) The LMHA or LBHA must assign a case manager after the child is determined eligible for the RTC Project. The LMHA or LBHA case manager must:

(1) offer the child services at the appropriate level of care indicated by the eligibility assessment, including referrals to community resources as appropriate;

(2) offer the child's LAR Certified Family Partner services, as defined in §306.305 of this title (relating to Definitions);

(3) assist the child's LAR in applying for Medicaid or Medicaid Buy-In;

(4) assist the child's LAR with completing the application packet after determined eligible for the RTC Project;

(5) as part of the application packet, assist the child's LAR with obtaining either a psychiatric evaluation, psychosocial assessment, or psychological evaluation of the child that includes a mental health diagnosis, if one has not been completed within the past year or if it is not available. The mental health diagnosis must be determined by a professional authorized to make the determination within the scope of their Texas state license, permit, or other certification;

(6) enroll the child in an RTC level of care, provided in the Utilization Management Guidelines and Manual posted on the HHSC website after the child's admission to the RTC;

(7) attend service planning team meetings conducted by the RTC contractor;

(8) submit monthly progress reports to the RTC Project team;

(9) attend the child's discharge planning meeting conducted by the RTC contractor;

(10) schedule a discharge follow-up appointment with the child and family after the child's discharge from the RTC; and

(11) schedule a child's appointment with a physician, or designee authorized by Texas state law, to prescribe medications after the child's discharge from the RTC.

§307.221. Residential Treatment Center Contractor Requirements.

(a) RTC contractors must be licensed by HHSC Child Care Regulation and have a contract with HHSC to provide RTC Project services.

(b) The RTC contractor must provide comprehensive residential treatment services as outlined in this subchapter, in the HHSC contract, and as described in the HHSC child-care minimum standards for general residential operations. The RTC must:

(1) provide psychotherapy services that include individual and family therapy;

(2) psychopharmacological therapy for the treatment of psychiatric illness with psychotropic medication on an ongoing basis if indicated based on psychiatric evaluation;

(3) integrate a trauma-informed care approach into the care, treatment, and supervision of each child. Trauma-informed care is care that is child and family-centered and takes into consideration:

(A) the unique culture, experiences, and beliefs of the child and family;

(B) the impact traumatic experiences have on the life of the child;

(C) the symptoms of childhood trauma;

(D) an understanding of the child's personal trauma history;

(E) the recognition of the child's trauma triggers;

(F) methods of responding that improve the child's ability to trust, to feel safe, and to adapt to changes in the child's environment; and

(G) the impact traumatic experiences have on the child's family;

(4) include habilitation activities, such as vocational services, as appropriate; and

(5) provide services in accordance with the HHSC provider contract.

(c) The RTC contractor must assign an LPHA for each child. The LPHA or treatment director must:

(1) ensure the delivery of therapeutic services to the child;

(2) provide recommendations for the child's service plan, in consultation with the service planning team; and

(3) provide recommendations for the child's discharge plan in consultation with the service planning team.

(d) The RTC contractor must notify all members of the service planning team in writing at least two weeks in advance of the child's service plan meetings.

(e) If the child's service planning team determines the child needs continued residential treatment beyond six months, and the RTC contractor does not have an agreement for an extended treatment curriculum with HHSC, the RTC must:

(1) submit a request to the RTC Project team for the child's ongoing treatment before the sixth month of treatment in accordance with the RTC Project policy manual posted on the HHSC website; and

(2) document in the child's service plan the need for an anticipated length of stay beyond the six-month timeframe, and why a less intensive level of care is not appropriate.

(f) The service plan must:

(1) be approved by the service planning team and must meet the requirements outlined in Chapter 748, Subchapter I of this title (relating to Admission, Service Planning, and Discharge); and

(2) be reviewed monthly, and updated at least every 90 calendar days, in accordance with Chapter 748, Subchapter I of this title. If the child's needs change, the service plan must be updated to address the changes.

(g) The child's LAR must be included by the RTC contractor in developing the child's service plan, and in meetings to the greatest extent possible, as provided in the Residential Treatment Center Project Family Agreement. If the child's LAR, or other parties responsible for the child's care are unable to participate, the RTC contractor must review the service plan to ensure that the child's service plan goals and level of care adequately address the child's treatment needs.

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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Karen Ray
Chief Counsel
Health and Human Services Commission
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Proposal publication date: December 9, 2022
For further information, please call: (512) 560-2938

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION
SUBCHAPTER D. EFFECT OF CRIMINAL CONDUCT

28 TAC §§1.504, 1.508, 1.509

The commissioner of insurance adopts amendments to 28 TAC §§1.504, 1.508, and 1.509, concerning the establishment of a new process for license applicants and others to complete the fingerprinting process. The sections are adopted with nonsubstantive changes to the proposed text published in the January 6, 2023, issue of the *Texas Register* (48 TexReg 19). The text will be republished.

REASONED JUSTIFICATION. The amendments are necessary to update the fingerprinting process procedure. The new procedure restricts access to the Texas Department of Public Safety (DPS) fingerprint code on the website of the Texas Department of Insurance (TDI or the department). Previously, the DPS fingerprint code could be accessed by anyone who visited TDI's website. The DPS fingerprint code is now available only to those who request a fingerprint service code through TDI's new online

portal. TDI updated the fingerprinting process procedure at the request of DPS. Descriptions of the amended sections follow.

Section 1.504. Fingerprint Requirement. Amended §1.504 adds language that states for a natural person, agency, or company to be eligible to apply for a license, registration, certification, or association with a regulated agency or company, the applicant must start the application or registration process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website at www.tdi.texas.gov/agent/fingerprinting-process.html.

The amended section also includes nonsubstantive text changes that update statutory citations to remove redundant information and insert titles of referenced provisions; remove redundant information in an internal reference; replace "pursuant to" with "under," "prior to" with "before," and "subchapter" with "title"; and correct punctuation.

The text of subsection (c) as proposed is not adopted. Proposed subsection (c) replaced "commissioner" with "Commissioner," but the updated style guide mandates the usage of "commissioner." Given this update, adopted subsection (c) will revert to the rule's original usage of "commissioner."

Section 1.508. Use and Confidentiality of Fingerprints. Amended §1.508 includes nonsubstantive text changes that update statutory citations to insert titles of referenced provisions and replace "pursuant to" with "under" and "shall" with "will."

Section 1.509. Fingerprint Format and Complete Application. Amended §1.509 adds language that requires individuals having their fingerprints captured by a criminal law enforcement agency to coordinate with the vendor authorized by DPS to obtain a fingerprint card, including paying any upfront processing fees. Amended §1.509 also requires those same individuals to mail the completed card to the vendor authorized by DPS.

Amended §1.509 removes language that allows the department's examination vendor to capture fingerprints. Amended §1.509 also removes language that requires (1) certain individuals to pay the department's examination vendor; and (2) individuals having their fingerprints captured by a criminal law enforcement agency to submit to the department payment for all applicable fingerprint processing fees in the amount and in the manner stated on the department's application or biographical submission form, or as otherwise posted by the department if the individual is not using a department form. Amended §1.509 also removes language that specifies that fingerprint cards may be obtained by sending a written request to the department's Licensing Division and that criminal history processing time and rejection rates for applications and submissions using paper fingerprint cards may be greater than with electronic fingerprints.

There are also nonsubstantive text changes that replace "shall" with "will" or "must," as appropriate, and delete the words "of time." The word "subchapter" is also replaced with "title."

The text of subsections (a) to (c) as proposed is not adopted. Proposed subsections (a) to (c) used the following phrase: "vendor acceptable to the Texas Department of Public Safety." Adopted subsections (a) to (c) replaces "acceptable to" with "authorized by" in order to add specificity. Given this update, adopted subsections (a) to (c) will use the following phrase: "vendor authorized by the Texas Department of Public Safety."

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

STATUTORY AUTHORITY. The commissioner adopts the amendments to §§1.504, 1.508, and 1.509 under Insurance Code §§801.056, 801.155, 981.009, 1305.007, 4001.005, 4056.005, 4101.005, 4102.004, 4151.006, 4152.004, 4153.003, 4201.003, 4202.004(d), and 36.001.

Insurance Code §801.056 provides that the department may deny an application for an authorization if the applicant or a corporate officer of the applicant fails to provide a complete set of fingerprints on request by the department.

Insurance Code §801.155 provides that the department may adopt rules under Chapter 801, Subchapter D prescribing the contents of a petition for issuance or reinstatement of a certificate of authority.

Insurance Code §981.009 provides that the commissioner may adopt rules to implement Chapter 981 or satisfy requirements under federal law or regulations.

Insurance Code §1305.007 provides that the commissioner may adopt rules as necessary to implement Chapter 1305.

Insurance Code §4001.005 provides that the commissioner may adopt rules necessary to implement Insurance Code Title 13 and to meet the minimum requirements of federal law, including regulations.

Insurance Code §4056.005 provides that the commissioner may adopt rules as necessary to implement Chapter 4056, Subchapter A and Subchapter B and to meet the minimum requirements of federal law, including regulations.

Insurance Code §4101.005 provides that the commissioner may adopt rules necessary to implement Chapter 4101 and to meet the minimum requirements of federal law, including regulations.

Insurance Code §4102.004 specifies that the commissioner may adopt reasonable and necessary rules to implement Chapter 4102.

Insurance Code §4151.006 specifies that the commissioner may adopt, in the manner prescribed by Chapter 36, Subchapter A, rules that are fair, reasonable, and appropriate to augment and implement Chapter 4151.

Insurance Code §4152.004 specifies that the commissioner may adopt reasonable rules as necessary to implement Chapter 4152.

Insurance Code §4153.003 specifies that the commissioner may adopt rules necessary to carry out Chapter 4153 and to regulate risk managers.

Insurance Code §4201.003 specifies that the commissioner may adopt rules to implement Chapter 4201.

Insurance Code §4202.004(d) provides that the commissioner will require that each officer of an applicant and each owner or shareholder of the applicant or, if a purchaser is publicly held, each owner or shareholder described by §4202.004(a)(1), submit a complete and legible set of fingerprints to the department for the purpose of obtaining criminal history record information from the Texas Department of Public Safety and the Federal Bureau of Investigation. The department will conduct a criminal history check of each applicant using information (1) provided under Insurance Code §4202.004; and (2) made available to the department by the Texas Department of Public Safety, the Federal Bureau of Investigation, and any other criminal justice agency under Government Code Chapter 411.

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.

§1.504. Fingerprint Requirement.

(a) In the manner described in §1.509 of this title (relating to Fingerprint Format and Complete Application), each individual listed in §1.503 of this title (relating to Application of Fingerprint Requirement) must, at or near the same time that they submit their biographical information or application for licensure, registration, authorization, certification, or permit, also submit:

(1) a complete set of the individual's fingerprints;

(2) full payment for all processing fees charged by the Texas Department of Public Safety and the Federal Bureau of Investigation; and

(3) all additional identifying information required by the Texas Department of Public Safety and the Federal Bureau of Investigation for processing fingerprints.

(b) An individual listed in §1.503 of this subchapter is exempt from the requirement set forth in subsection (a) of this section if the individual satisfies the requirements of this subsection.

(1) Except as provided in subsection (d) of this section, the individual is submitting an application or biographical information, and:

(A) previously provided the department a complete, legible fingerprint card or electronic set of fingerprints as part of an earlier submission which was granted or approved; and

(B) maintains that prior license, or licensed entity association, in good standing on the date of the subsequent application.

(2) The individual is licensed, or associated with an entity licensee, under Insurance Code Chapter 981, Subchapter E, concerning Surplus Lines Agents, or Title 13, concerning Regulation of Professionals, and is:

(A) renewing an unexpired license or license that has been expired for not more than 90 days; or

(B) applying for a license that has been expired for more than 90 days but not more than one year.

(3) The individual is applying for an original emergency license under Insurance Code Chapter 4051, concerning Property and Casualty Agents; Chapter 4053, concerning Managing General Agents; or Chapter 4101, concerning Insurance Adjusters. Emergency licensees who later qualify for a permanent license by examination must submit a complete set of fingerprints and payment of all fingerprint processing fees before issuance of the permanent license.

(4) The individual, or the entity with which the individual is associated, is renewing an unexpired license, certification, registration, or authorization.

(5) The individual is licensed under Insurance Code Chapter 2651, Subchapter A, concerning Title Insurance Agent's License, or Chapter 2652, concerning Escrow Officers, and is renewing an unexpired license or license that has been expired for not more than 90 days.

(6) The individual is submitting an application under Insurance Code Chapter 2651, Subchapter A, or Chapter 2652 and has previously provided the department a complete, legible fingerprint card or electronic set of fingerprints as part of an earlier Insurance Code Chapter 2651, Subchapter A, or Chapter 2652 submission that was granted or approved; and either:

(A) maintains that prior license in good standing on the date of the current application; or

(B) held a prior Insurance Code Chapter 2651 , Subchapter A, or Chapter 2652 license that has not been canceled for more than 60 days and maintained that license in good standing at the time of cancellation.

(c) The commissioner may waive the requirement in subsection (a) of this section if the commissioner determines that the individual is unable to provide fingerprints due to permanent physical injury or illness. The individual seeking a waiver under this subsection must submit evidence of such a condition to the satisfaction of the commissioner.

(d) The exemption set forth in subsection (b)(1) of this section is subject to the department's ability to maintain an individual's previously submitted set of fingerprints, and the department may require a complete set of fingerprints and payment of all fingerprint processing fees from an individual notwithstanding the exemption.

(e) This subchapter does not limit the department's statutory authority to require the submission of fingerprints or obtain criminal history information.

(f) For a natural person, agency, or company to be eligible for a license, registration, certification, or association with a regulated agency or company, the natural person, agency, or company must start the application or association process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website at www.tdi.texas.gov/agent/fingerprinting-process.html. The requesting agency, company, or natural person must submit information necessary to complete the fingerprint service code request, including:

(1) the agency's name, agency representative's name, agency's email address, and license type the agency is applying for, if applying for association with an agency;

(2) the company's name, company representative's name, and company's email address, if applying for association with a company; and

(3) the natural person's name, state of residence, email address, and license type the natural person is applying for, if applying for a license as a natural person.

§1.508. Use and Confidentiality of Fingerprints.

(a) The department will submit all fingerprints received under this subchapter to the Texas Department of Public Safety and the Federal Bureau of Investigation to obtain criminal history information on the individual for the purpose of determining the individual's fitness for licensure, authorization, certification, permit, or registration, or control of an entity holding or seeking a license, authorization, certificate, permit, or registration.

(b) The department will use and maintain all criminal history information obtained under this subchapter in accordance with state and federal laws, including:

(1) Texas Government Code §411.106, concerning Access to Criminal History Record Information: Texas Department of Insurance;

(2) Texas Government Code §411.084, concerning Use of Criminal History Record Information;

(3) United States Public Law 92-544; and

(4) Code of Federal Regulations 28 CFR 50.12.

§1.509. Fingerprint Format and Complete Application.

(a) Each individual described in §1.503 of this title (relating to Application of Fingerprint Requirement) and who is required to submit fingerprints under §1.504 of this title (relating to Fingerprint Requirement) must have a complete set of their fingerprints captured by:

(1) an electronic fingerprint vendor authorized by the Texas Department of Public Safety; or

(2) a criminal law enforcement agency, including a sheriff's office or police department.

(b) Individuals having their fingerprints captured by a vendor authorized by the Texas Department of Public Safety must pay, in a manner acceptable to the vendor, all fingerprint capture and processing fees directly to the vendor at the time the fingerprints are captured or at such time as is acceptable to the vendor.

(c) Individuals having their fingerprints captured by a criminal law enforcement agency must:

(1) coordinate with the vendor authorized by the Texas Department of Public Safety to obtain a fingerprint card, including paying any upfront processing fees;

(2) pay that agency any associated charges that may apply to the capture of their fingerprints in a manner acceptable to that agency; and

(3) mail the completed card to the vendor authorized by the Texas Department of Public Safety.

(d) All fingerprint impressions must be legible and suitable for use by the Texas Department of Public Safety and Federal Bureau of Investigation.

(e) Individuals required to submit fingerprints must submit them within the time frame indicated on the specific application or biographical submission form. Individuals may request an extension by contacting the division of the department that will process the application or biographical submission.

(f) The application or submission of a person required to submit fingerprints will not be complete until the department receives the criminal history information.

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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Jessica Barta
General Counsel
Texas Department of Insurance
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CHAPTER 19. LICENSING AND REGULATION OF INSURANCE PROFESSIONALS

SUBCHAPTER Q. DISCOUNT HEALTH CARE PROGRAM REGISTRATION AND RENEWAL REQUIREMENTS

28 TAC §19.1602

The commissioner of insurance adopts amendments to 28 TAC §19.1602, concerning discount health care program registration and renewal. The amendments are necessary to update department contact information that appears in the section, and to address that fax is no longer a valid method to submit forms. The commissioner adopts §19.602 with nonsubstantive changes to the proposed text published in the January 6, 2023, issue of the *Texas Register* (48 TexReg 23). The text will be republished.

REASONED JUSTIFICATION. The department has moved from its previous location in the William P. Hobby Building at 333 Guadalupe Street in Austin, Texas 78701, to the Barbara Jordan State Office Building at 1601 Congress Avenue in Austin, Texas 78701. Because of this, references in §19.1602 to the former location need to be removed or updated. The amendments also update the department's website, phone numbers, and agency division names, and make additional nonsubstantive text changes, and remove the fax number because fax is no longer a valid method of submitting discount health care program operator registration application forms. A description of the adopted amended section follows.

Section 19.1602. Registration Requirement. Amendments to §19.1602 remove outdated mailing addresses and update the department's website, phone number, and agency division names. In addition, an amendment to subsection (a)(2)(H) corrects a citation to the Insurance Code.

There are also nonsubstantive text changes that replace "shall" with "will" or "must," as appropriate; replace "subchapter" and "chapter" with "title," "which" with "that," and "pursuant to" with "under"; and update statutory citations to insert titles of referenced provisions. Multiple unnecessary "the" instances were also removed, "10 percent" was replaced with "10%," "court appointed" was replaced with "court-appointed," and the word "internet" was removed. All such changes were made to follow current department language preferences.

The text of subsection (c)(1)(B) as proposed is not adopted, and the remaining subparagraphs are redesignated as appropriate to reflect this change. Proposed subsection (c)(1)(B) listed a fax number for submitting discount health care program operator registration application forms, but fax is no longer a valid method for these submissions.

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

STATUTORY AUTHORITY. The commissioner adopts amended §19.1602 under Insurance Code §7001.003 and §36.001.

Insurance Code §7001.003 specifies that the commissioner may adopt rules in the manner prescribed by Insurance Code Chapter 36, Subchapter A, as necessary to implement Chapter 7001.

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

§19.1602. Registration Requirement.

(a) Registration Requirement. An applicant for registration to offer a discount health care program in this state is required to submit all of the following to the department:

(1) the initial registration fee of $1,000 as provided in Insurance Code §7001.006, concerning Fees, and §19.802 of this title (relating to Amount of Fees) that is nonrefundable and nontransferable;

(2) a complete application for registration that contains all the information required by Insurance Code §7001.005, concerning Application for Registration and Renewal of Registration, and this section, including:

(A) the applicant's full legal name and federal employer identification number or social security number; daytime telephone number with extension; toll free telephone number; website address; physical address, including city, state, and ZIP code; mailing address, including the city, state, and ZIP code; a contact person's name, including the title, telephone number, and email address; the applicant's agent for service of process, including the physical address, city, state, and ZIP code;

(B) identification of whether the applicant is a corporation, association, limited partnership, limited liability company, limited liability partnership, sole proprietorship, or other legal entity;

(C) any and all assumed names to be used by the applicant in operating a discount health care program. If a filing is required under the Assumed Business or Professional Name Act under the Texas Business and Commerce Code, or any similar statute, the discount health care program operator applicant for registration must provide the department with a copy of the assumed name certificate reflecting the registration of each assumed name used by the discount health care program operator applicant;

(D) a statement generally describing the applicant, its facilities, personnel, and the health care services or products for which a discount will be made available under its discount health care programs;

(E) a copy of the form of all contracts made or to be made between the applicant and any providers or provider networks regarding the provision of health care services or products to members;

(F) a copy of the applicant's charter, certificate of authority, or registration obtained from the Texas Secretary of State's office;

(G) if the applicant is an entity subject to the bank or farm credit administration, a copy of the documentation issued by a federal or Texas state agency authorizing the entity to do business in Texas;

(H) an original surety bond payable to the department for the use and benefit of members in the principal amount of $50,000, as required by Insurance Code §562.103(f)(1), concerning Program Operator Duties, and §19.1603 of this title (relating to Financial Responsibility Requirement), except that an insurer that holds a certificate of authority under Texas Insurance Code Title 6, concerning Organization of Insurers and Related Entities, is not required to maintain the surety bond;

(I) lists of marketers, both entities and individuals, separated as follows:

(i) a list of the marketers, both entities and individuals, authorized to sell or distribute the program operator's programs under the program operator's name; and

(ii) a list of the marketers, both entities and individuals, authorized to private label the program operator's programs;

(J) a certification in writing to the department that its programs comply with the requirements of Insurance Code Chapter 7001, concerning Registration of Discount Health Care Program Operators, and Chapter 562, concerning Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Regarding Discount Health Care Programs;

(K) a list of names, addresses, official positions, and biographical information of:

(i) the individuals responsible for conducting the applicant's affairs;

(ii) each member of the board of directors, board of trustees, executive committee, or other governing board or committee;

(iii) the officers;

(iv) any contracted management company personnel; and

(v) any person owning or having the right to acquire 10% or more of the voting securities of the applicant;

(L) a complete biographical certificate concerning each individual whose biographical information is required under Insurance Code §7001.005(a)(2) and this section, including:

(i) the identification of the individual's relationship to the applicant;

(ii) the name of the applicant;

(iii) the full name; title; social security number; date of birth; mailing address, including the city, state, and ZIP code; telephone number; fax number; and email address of the individual;

(iv) excluding traffic violations and a first DWI offense, a response to the following questions:

(I) whether the individual has any pending misdemeanor or felony charges by indictment, information, or any other instrument filed in Texas or in any other state or by the federal government;

(II) whether the individual has ever been convicted of any misdemeanor or felony offense in Texas, in any other state, or by the federal government;

(III) whether the individual has ever had deferred adjudication on any misdemeanor or felony charge or offense in Texas, in any other state, or by the federal government; and

(IV) whether the person has ever served any period of probation for any misdemeanor or felony offense in Texas, in any other state, or by the federal government;

(v) if the response is positive to any question under clause (iv)(I) - (IV) of this subparagraph, the applicant for registration as a discount health care program operator is required to provide to the department original certified copies of the charging document, indictment, information, or any other charging document, any judgment of conviction, deferred adjudication order, or probation order, and any order terminating probation, community supervision certificate, or parole certificate for each offense. If the court does not maintain the record, the submission of a letter on the court's letterhead will be required. If the arrest did not result in a prosecution, the submission of a records search from the appropriate jurisdiction indicating a final disposition will be required. A statement describing the circumstances leading to the offense and the individual's age at the time of the offense will be required. Letters of recommendation from any person aware of a particular criminal history may be provided;

(vi) a response to the question whether the individual whose biographical information is required under Insurance Code §7001.005(a)(2) and this section, or any entity in which the individual served as a director, officer, shareholder, manager, member, or partner, has ever been the subject of an administrative or legal action filed by the department, or any other insurance department, financial regulatory

agency, or of an action filed on behalf of the State of Texas or any other state or by the federal government based on alleged violations of state or federal insurance, securities, or financial regulatory laws that the individual has not previously reported to the department. If the response is positive, the applicant for registration as a discount health care program operator is required to provide to the department a description of the circumstances regarding the administrative or legal action and a copy of any document sent to the individual to commence the administrative or legal action that described the nature of the action;

(vii) a response to the question whether the individual, whose biographical information is required under Insurance Code §7001.005(a)(2) and this section, is indebted to any discount health care program operator, policyholder, insurance or reinsurance company, insurance agency, general agent, managing general agency, premium finance company or court-appointed liquidator for membership refunds, premiums collected, or commissions retained, or have any claims or judgments filed against the individual for membership refunds, retaining premiums, or commissions. If the response is positive, the applicant for registration as a discount health care program operator is required to provide to the department a description of the circumstances regarding the indebtedness, including the name and contact information of the person or entity to whom the individual is indebted;

(viii) a response to the question whether the individual whose biographical information is required under Insurance Code §7001.005(a)(2) and this section has ever had a discount health care program contract cancelled for cause, such as for misrepresentation or misappropriation. If the response is positive, the applicant for registration as a discount health care program operator is required to provide to the department a description of the circumstances regarding the cancellation including the name and contact information of the individual or entity that cancelled the contract;

(ix) a copy of a fingerprint receipt from the state authorized fingerprint collection vendor for each individual that uses the electronic fingerprint process;

(x) an acknowledgment from each individual whose biographical information is required under Insurance Code §7001.005(a)(2) and this section that the fingerprints provided will be used to check criminal history records of the Texas Department of Public Safety and the Federal Bureau of Investigation; and

(xi) compliance with the requirements of Chapter 1, Subchapter D, of this title (relating to Effect of Criminal Conduct) relating to fingerprint requirements for a criminal background check under Insurance Code §7001.008, concerning Criminal Background Check.

(b) Registration Application Forms. The discount health care program operator registration application forms are available at www.tdi.texas.gov/forms/form11dhcpo.html and at the Agent and Adjuster Licensing Office of the Texas Department of Insurance's mailing address.

(c) Submission of Registration Application Forms. The following paragraphs apply to the submission of discount health care program operator registration application forms.

(1) Except for the list of marketers required under Insurance Code §7001.005(a)(4) and this section, a discount health care program operator must submit the registration application forms by:

(A) mail, to the Texas Department of Insurance, Agent and Adjuster Licensing Office's mailing address;

(B) email to TDI-DiscountHealth@tdi.texas.gov;

(C) in other formats that are acceptable to the department including an electronic format; or

(D) more current mailing addresses, email addresses, and telephone numbers for the Agent and Adjuster Licensing Office of the Texas Department of Insurance as made available on the department's website.

(2) A discount health care program operator must submit the list of the marketers in the format found on the department's website via email to TDI-DiscountHealth@tdi.texas.gov.

(3) Assistance with applying for registration as a discount health care program operator is available at the department's Agent and Adjuster Licensing Office Customer Service phone line at 512-676-6500, email address at license@tdi.texas.gov, and the department's website.

(d) The registration is valid for one year from the date issued by the department and is required to be renewed annually.

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 34. STATE FIRE MARSHAL

The commissioner of insurance adopts amendments to 28 TAC §§34.514, 34.613, 34.713, and 34.811, concerning rules for fire extinguishers, fire alarms, fire sprinklers and the storage and sale of fireworks. These amendments are necessary to implement the department's updated fingerprinting process. The amendments add language that states that for a natural person to be eligible to register for specific licenses and permits, the natural person must start the application or registration process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website. Section 34.514 is adopted without changes and §§34.613, 34.713, and 34.811 are adopted with nonsubstantive changes to the proposed text published in the January 6, 2023, issue of the *Texas Register* (48 TexReg 26). The text of §§34.613, 34.713, and 34.811 will be republished.

REASONED JUSTIFICATION. The amendments are necessary to update the fingerprinting process procedure. The new procedure restricts access to the Texas Department of Public Safety (DPS) fingerprint service code on the website of the Texas Department of Insurance (TDI). Previously, the DPS fingerprint service code could be accessed by anyone who visited TDI's website. The DPS fingerprint service code is now available only to those who request a fingerprint service code through TDI's new online portal. TDI updated the fingerprinting process procedure at the request of DPS. Descriptions of the amended sections follow, organized by subchapter.

SUBCHAPTER E. FIRE EXTINGUISHER RULES.

Section 34.514. Applications. Amended §34.514 adds language that states that for a natural person to be eligible for a Type A, K, or PL license, the natural person must start the ap-

plication or registration process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website at www.tdi.texas.gov/fire/fingerprinting-process.html. Amended §34.514 also adds similar language for an apprentice permit: the natural person must start the application or registration process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website. In addition, an amendment to subsection (b)(2) corrects a citation to §34.511, and amended §34.514 updates statutory citations to insert titles of referenced provisions.

SUBCHAPTER F. FIRE ALARM RULES.

Section 34.613. Applications. Amended §34.613 adds language that states that for a natural person to be eligible for any fire alarm license, the natural person must start the application or registration process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website at www.tdi.texas.gov/fire/fingerprinting-process.html. Amended §34.613 also deletes an unnecessary use of the word "the" and changes "25 percent" to "25%" for consistency with current agency style, and it updates a statutory citation to insert the title of the referenced provision. Amended §34.613 also replaces "the Fire Alarm Rules" with "this subchapter" for consistency with the current agency style for referencing rules.

The text of subsection (a)(7) as proposed is not adopted. Proposed subsection (a)(7) states "Commissioner," but the updated style guide mandates the usage of "commissioner." Given this update, adopted subsection (a)(7) will replace "Commissioner" with "commissioner."

SUBCHAPTER G. FIRE SPRINKLER RULES.

Section 34.713. Applications. Amended §34.713 adds language that states that for a natural person to be eligible for a responsible managing employee license, the natural person must start the application or registration process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website at www.tdi.texas.gov/fire/fingerprinting-process.html. Amended §34.713 also changes "70 percent" to "70%" for consistency with current agency style, and it updates statutory citations to follow current agency style.

The text of subsection (a)(7)(A) as proposed is not adopted. Proposed subsection (a)(7)(A) states "state fire marshal's office," but the style guide mandates the usage of "State Fire Marshal's Office." Given the style guide's instruction, adopted subsection (a)(7)(A) will replace "state fire marshal's office" with "State Fire Marshal's Office."

Additionally, the text of subsection (a)(7)(B) as proposed is not adopted. Proposed subsection (a)(7)(B) states "State Fire Marshall's Office," which misspells "Marshal." Given the misspelling, adopted subsection (a)(7)(B) will replace "State Fire Marshall's Office" with "State Fire Marshal's Office."

SUBCHAPTER H. STORAGE AND SALE OF FIREWORKS.

Section 34.811. Requirements, Pyrotechnic Operator License, Pyrotechnic Special Effects Operator License, and Flame Effects Operator License. Amended §34.811 adds language stating that for a natural person to be eligible for a pyrotechnic operator license, pyrotechnic special effects operator license, or flame effects operator license, the natural person must start the application process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website at www.tdi.texas.gov/fire/fingerprinting-process.html. Amended §34.811 also changes "70 percent" to "70%" and "twelve-month" to "12-month" for consistency with current agency style.

Additionally, the text of subsection (g)(1) as proposed is not adopted. Proposed subsection (g) states that "a pyrotechnic operator license will not be issued to any person who fails to meet the requirements of subsection (a) of this section and the following: (1) assisted in conducting at least five permitted or licensed public displays in Texas under the direct supervision of and verified in writing by a pyrotechnic operator licensed in Texas; (2) be at least 21 years of age." Adopted subsection (g)(1) will add an "and" after "licensed in Texas" to provide additional clarification that the conditions listed in subsections (g)(1) and (g)(2) are both required. Therefore, adopted subsection (g)(1) will state "assisted in conducting at least five permitted or licensed public displays in Texas under the direct supervision of and verified in writing by a pyrotechnic operator licensed in Texas; and."

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

SUBCHAPTER E. FIRE EXTINGUISHER RULES

28 TAC §34.514

STATUTORY AUTHORITY. The commissioner adopts the amendments to §34.514 under Insurance Code §§6001.051(b), 6001.052(b) and (c), and 36.001.

Insurance Code §6001.051(b) specifies that the commissioner may issue rules the commissioner considers necessary to administer Chapter 6001 through the state fire marshal.

Insurance Code §6001.052(b) specifies that the commissioner will adopt and administer rules determined essentially necessary for the protection and preservation of life and property regarding (1) registration of firms engaged in the business of installing or servicing portable fire extinguishers or planning, certifying, installing, or servicing fixed fire extinguisher systems or hydrostatic testing of fire extinguisher cylinders; (2) the examination and licensing of individuals to install or service portable fire extinguishers and plan, certify, install, or service fixed fire extinguisher systems; and (3) requirements for installing or servicing portable fire extinguishers and planning, certifying, installing, or servicing fixed fire extinguisher systems. Insurance Code §6001.052(c) specifies that the commissioner by rule will prescribe requirements for applications and qualifications for licenses, permits, and certificates issued under Chapter 6001.

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

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

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SUBCHAPTER F. FIRE ALARM RULES

28 TAC §34.613

STATUTORY AUTHORITY. The commissioner adopts the amendments to §34.613 under Insurance Code §§6002.051(b), 6002.052(b), and 36.001.

Insurance Code §6002.051(b) specifies that the commissioner may issue rules the commissioner considers necessary to administer Chapter 6002 through the state fire marshal.

Insurance Code §6002.052(b) specifies that, under rules adopted under Texas Insurance Code §6002.051, the department may create specialized licenses or registration certificates for an organization or individual engaged in the business of planning, certifying, leasing, selling, servicing, installing, monitoring, or maintaining fire alarm or fire detection devices or systems. The rules must establish appropriate training and qualification standards for each kind of license and certificate.

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

§34.613. Applications.

(a) Approvals and certificates of registration.

(1) Applications for approvals, certificates, and branch office certificates must be submitted on the forms adopted by reference in §34.630 of this title (relating to Application and Renewal Forms) and be accompanied by all fees, documents, and information required by Insurance Code Chapter 6002, concerning Fire Detection and Alarm Device Installation, and this subchapter. An application will not be deemed complete until all required forms, fees, and documents have been received in the State Fire Marshal's Office.

(2) Applications must be signed by the sole proprietor, or by each partner of a partnership, or by an officer of a corporation. For applicants using an assumed name, the application must also be accompanied by evidence of compliance with the Assumed Business or Professional Name Act, Texas Business and Commerce Code Chapter 71. The application must also include written authorization by the applicant permitting the state fire marshal or the state fire marshal's representative to enter, examine, and inspect any premises, building, room, or establishment used by the applicant while engaged in the business to determine compliance with the provisions of Insurance Code Chapter 6002 and this subchapter.

(3) For corporations, the application must also include the name of each shareholder owning more than 25% of the shares issued by the corporation; the corporate taxpayer identification number; the charter number; a copy of the corporate charter of a Texas corporation or, in the case of a foreign corporation, a copy of the Texas certificate of authority to do business; and a copy of the corporation's current franchise tax certificate from the State Comptroller's Office showing it is in active status.

(4) A registered firm must employ at least one full-time licensed individual at each location of a main or branch office.

(5) Insurance is required as follows:

(A) The state fire marshal will not issue a certificate of registration under this subchapter unless the applicant files with the State Fire Marshal's Office evidence of an acceptable general liability insurance policy.

(B) Each registered firm must maintain in force and on file in the State Fire Marshal's Office a certificate of insurance identifying the insured and the exact nature of the business insured. In identifying the named insured, the certificate of insurance must include either an assumed name or the name of the corporation; partners, if any; or sole proprietor, if applicable.

(6) A firm billing a customer for monitoring is engaged in the business of monitoring and must comply with the insurance requirements of this subchapter for a monitoring firm.

(7) Applicants for a certificate of registration who engage in monitoring must provide the specific business locations where monitoring will take place and the name and license number of the fire alarm licensees at each business location. A fire alarm licensee may not serve in this capacity for a registered firm other than the firm applying for a certificate of registration. In addition, the applicants must provide evidence of listing or certification as a central station by a testing laboratory approved by the commissioner and a statement that the monitoring service complies with NFPA 72, as adopted in §34.607 of this title (relating to Adopted Standards).

(8) Applicants for a certificate of registration--single station must provide a statement, signed by the sole proprietor, a partner of a partnership, or by an officer of the corporation, indicating that the firm exclusively engages in the business of planning, certifying, leasing, selling, servicing, installing, monitoring, or maintaining single station devices.

(b) Fire alarm licenses.

(1) To be complete, applications for a license from an employee or agent of a registered firm must be submitted on forms provided by the state fire marshal and be accompanied by all fees, documents, a criminal history report from the Texas Department of Public Safety, and information required by Insurance Code Chapter 6002 and this subchapter. Applications must be signed by the applicant and by a person authorized to sign on behalf of the registered firm. All applicants for any type of license must successfully complete a qualifying test as required in Insurance Code Chapter 6002 and this subchapter as designated by the State Fire Marshal's Office. The qualifying test, given as part of the training for residential fire alarm technician license, must include questions regarding Insurance Code Chapter 6002 and this subchapter. For a natural person to be eligible for any fire alarm license, the natural person must start the application or registration process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website at www.tdi.texas.gov/fire/fingerprinting-process.html. The requesting natural person must submit information necessary to complete the fingerprint service code request, including the natural person's name, natural person's state of residence, natural person's email address, and license type the natural person is applying for.

(2) Applicants for fire alarm technician licenses must:

(A) furnish notification from the National Institute for Certification in Engineering Technologies (NICET) or the Electronic Security Association (ESA), confirming the applicant's successful

completion of the test requirements in work elements pertaining to fire alarm systems, as determined by the state fire marshal; or

(B) successfully complete a technical qualifying test as designated by the State Fire Marshal's Office.

(3) Applicants for a fire alarm monitoring technician license must successfully complete a technical qualifying test as designated by the State Fire Marshal's Office, or provide evidence of current registration in Texas as a registered engineer.

(4) Applicants for a residential fire alarm superintendent (single station) license must successfully complete a technical qualifying test as designated by the State Fire Marshal's Office.

(5) Applicants for a residential fire alarm superintendent license must:

(A) furnish notification from NICET or ESA confirming the applicant's successful completion of the test requirements in work elements pertaining to fire alarm systems, as determined by the state fire marshal; or

(B) successfully complete a technical qualifying test as designated by the State Fire Marshal's Office.

(6) Applications for a fire alarm planning superintendent license must be accompanied by one of the following documents as evidence of technical qualifications for a license:

(A) proof of registration in Texas as a professional engineer; or

(B) a copy of NICET's or ESA's notification letter confirming the applicant's successful completion of the test requirements for NICET or ESA certification at Level III for fire alarm systems.

(7) An applicant for a residential fire alarm technician license must provide evidence of the applicant's successful completion of the required residential fire alarm technician training course from a training school approved by the State Fire Marshal's Office.

(c) Instructor and training school approvals.

(1) Instructor approvals. An applicant for approval as an instructor must:

(A) hold a current fire alarm planning superintendent license, residential fire alarm superintendent license, or fire alarm technician license issued by the State Fire Marshal's Office;

(B) submit a completed Instructor Approval Application, Form No. SF247, signed by the applicant, that is accompanied by all fees; and

(C) furnish written documentation of a minimum of three years of experience in fire alarm installation, service, or monitoring of fire alarm systems unless the applicant has held a fire alarm planning superintendent license, residential fire alarm superintendent license, or fire alarm technician license for three or more years.

(2) Training school approvals.

(A) An applicant for approval of a training school must submit a completed Training School Approval Application, Form No. SF 246, to the State Fire Marshal's Office. To be complete, the application must be:

(i) signed by the applicant, the sole proprietor, by each partner of a partnership, or by an officer of a corporation or organization as applicable;

(ii) accompanied by a detailed outline of the proposed subjects to be taught at the training school and the number and location of all training courses to be held within one year following approval of the application; and

(iii) accompanied by all required fees.

(B) After review of the application for approval for a training school, the state fire marshal will approve or deny the application within 60 days following receipt of the materials. A letter of denial will state the specific reasons for the denial. An applicant that is denied approval may reapply at any time by submitting a completed application that includes the changes necessary to address the specific reasons for denial.

(d) Renewal applications.

(1) In order to be complete, renewal applications for certificates, licenses, instructor approvals, and training school approvals must be submitted on the forms adopted by reference in §34.630 of this title and be accompanied by all fees, documents, a criminal history report from the Texas Department of Public Safety, and information required by Insurance Code Chapter 6002 and this subchapter. A complete renewal application deposited with the United States Postal Service is deemed to be timely filed, regardless of actual date of delivery, when its envelope bears a postmark date that is before the expiration of the certificate or license being renewed.

(2) A licensee with an unexpired license who is not employed by a registered firm at the time of the licensee's renewal may renew that license, but the licensee may not engage in any activity for which the license was granted until the licensee is employed and qualified by a registered firm.

(e) Complete applications. The application form for a license, registration, instructor approval, and training school approval must be accompanied by the required fee and must, within 180 days of receipt by the State Fire Marshal's Office of the initial application, be complete and accompanied by all other information required by Insurance Code Chapter 6002 and this subchapter, or a new application must be submitted including all applicable fees.

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SUBCHAPTER G. FIRE SPRINKLER RULES

28 TAC §34.713

STATUTORY AUTHORITY. The commissioner adopts the amendments to §34.713 under Insurance Code §§6003.051(b), 6003.052(b), and 36.001.

Insurance Code §6003.051(b) specifies that the commissioner may issue rules the commissioner considers necessary to administer Chapter 6003 through the state fire marshal.

Insurance Code §6003.052(b) specifies that, under rules adopted under Texas Insurance Code §6003.051(b), the depart-

ment may create a specialized licensing or registration program for fire protection sprinkler system contractors.

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

§34.713. Applications.

(a) Certificates of registration.

(1) Applications for certificates must be submitted on forms provided by the state fire marshal and must be accompanied by all other information required by Insurance Code Chapter 6003, concerning Fire Protection Sprinkler System Service and Installation, and this subchapter. An application will not be deemed complete until all required forms and documents have been received in the State Fire Marshal's Office.

(2) Applications must be signed by the sole proprietor, by each partner of a partnership, or by an officer of a corporation. For corporations, the application must be accompanied by the corporate charter of a Texas corporation or, in the case of a foreign corporation, a copy of the Texas certificate of authority to do business. For applicants using an assumed name, the application must also be accompanied by evidence of compliance with Business and Commerce Code Chapter 71, concerning Assumed Business or Professional Name. The application must also include written authorization by the applicant that permits the state fire marshal or the state fire marshal's representative to enter, examine, and inspect any premises, building, room, or establishment used by the applicant while engaged in the business so the state fire marshal can determine whether the applicant is in compliance with the provisions of Insurance Code Chapter 6003 and this subchapter.

(3) For corporations, the application must also include the corporate taxpayer identification number, the charter number, and a copy of the corporation's current franchise tax certificate from the State Comptroller's Office that shows the corporation is in active status.

(4) An applicant must not designate as its full-time responsible managing employee (RME) a person who is the designated full-time RME of another registered firm.

(5) A registered firm must not conduct any business as a fire protection sprinkler contractor until a full-time RME, as applicable to the business conducted, is employed. An individual with an RME-General Inspector's license does not constitute compliance with the requirements of this subsection.

(6) A certificate of registration may not be renewed unless the firm has at least one licensed RME as a full-time employee before the expiration of the certificate of registration to be renewed. If an applicant for renewal does not have an RME as a full-time employee as a result of death or disassociation of an RME within 30 days preceding the expiration of the certificate of registration, the renewal applicant must inform the license section of the State Fire Marshal's Office of the employment of a full-time RME before the certificate of registration will be renewed.

(7) Insurance required.

(A) The state fire marshal must not issue a certificate of registration under this subchapter unless the applicant files with the State Fire Marshal's Office a proof of liability insurance. The insurance must include products and completed operations coverage.

(B) Each registered firm must maintain in force and on file in the State Fire Marshal's Office the certificate of insurance identifying the insured and the exact nature of the business insured. In identifying the named insured, the certificate of insurance must include either an assumed name or the name of the corporation; partners, if any; or sole proprietor, as applicable. Failure to do so will be cause for administrative action.

(C) Evidence of public liability insurance, as required by Insurance Code §6003.152, concerning Required Insurance Coverage for Registration Certificate, must be in the form of a certificate of insurance executed by an insurer authorized to do business in this state, or a certificate of insurance for surplus lines coverage, secured in compliance with Insurance Code Chapter 981, concerning Surplus Lines Insurance, as contemplated by Insurance Code §6003.152(c).

(b) Responsible managing employee licenses.

(1) Original and renewal applications for a license from an employee of a firm engaged in the business must be submitted on forms provided by the state fire marshal, along with a criminal history report from the Texas Department of Public Safety and accompanied by all other information required by Insurance Code Chapter 6003 and this subchapter. For a natural person to be eligible for a responsible managing employee license, the natural person must start the application or registration process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website at www.tdi.texas.gov/fire/fingerprinting-process.html. The requesting natural person must submit information necessary to complete the fingerprint service code request, including the natural person's name, natural person's state of residence, natural person's email address, and license type the natural person is applying for.

(2) The following documents must accompany the application as evidence of technical qualifications for a license:

(A) RME-General:

(i) proof of current registration in Texas as a professional engineer; or

(ii) a copy of the NICET notification letter confirming the applicant's successful completion of the test requirements for certification at Level III for water-based fire protection systems layout.

(B) RME-Dwelling:

(i) proof of current registration in Texas as a professional engineer; or

(ii) a copy of the NICET notification letter confirming the applicant's successful completion of the test requirements for certification at Level II for fire protection automatic sprinkler system layout and evidence of current employment by a registered fire sprinkler contractor.

(C) RME-Underground Fire Main:

(i) proof of current registration in Texas as a professional engineer; or

(ii) a copy of the notification letter confirming at least a 70% grade on the test covering underground fire mains for fire protection sprinkler systems, administered by the State Fire Marshal's Office or an outsource testing service.

(D) RME-General Inspector:

(i) a copy of the NICET notification letter confirming the applicant's successful completion of the examination requirements for certification at Level II for Inspection and Testing of Water-Based Systems; and

(ii) evidence of current employment by a registered fire protection sprinkler system contractor.

(c) Complete applications. The application form for a license or registration must be accompanied by the required fee and must, within 180 days of receipt by the department of the initial application, be complete and accompanied by all other information required by Insurance Code Chapter 6003 and this subchapter, or a new application must be submitted including all applicable fees.

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SUBCHAPTER H. STORAGE AND SALE OF FIREWORKS

28 TAC §34.811

STATUTORY AUTHORITY. The commissioner adopts the amendments to §34.811 under Occupations Code §2154.051 and §2154.052 and Insurance Code §36.001.

Occupations Code §2154.051 authorizes the commissioner to determine reasonable criteria and qualifications for licenses.

Occupations Code §2154.052 provides that the commissioner may issue rules to administer Chapter 2154; that the commissioner will adopt and the state fire marshal will administer rules the commissioner considers necessary for the protection, safety, and preservation of life and property; and that the commissioner will adopt rules for applications for licenses.

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.

§34.811. Requirements, Pyrotechnic Operator License, Pyrotechnic Special Effects Operator License, and Flame Effects Operator License.

(a) Applicants for a pyrotechnic operator license, pyrotechnic special effects operator license, or flame effects operator license must take a written test and obtain at least a passing grade of 70%. Written tests may be supplemented by practical tests or demonstrations deemed necessary to determine the applicant's knowledge and ability. The content, frequency, and location of the tests must be designated by the state fire marshal.

(b) Examinees who fail may file a retest application, accompanied by the required fee.

(c) An applicant may only schedule each type of test three times within a 12-month period.

(d) An applicant for a license must complete and submit all application requirements within one year of the successful completion of any test required for a license; otherwise, the test is voided and the individual will have to pass the test again.

(e) The state fire marshal may waive a test requirement for an applicant with a valid license from another state having license requirements substantially equivalent to those of this state.

(f) A licensee whose license has been expired for two years or longer and makes application for a new license must pass another test.

(g) A pyrotechnic operator license will not be issued to any person who fails to meet the requirements of subsection (a) of this section and the following:

(1) assisted in conducting at least five permitted or licensed public displays in Texas under the direct supervision of and verified in writing by a pyrotechnic operator licensed in Texas; and

(2) be at least 21 years of age.

(h) The application must be accompanied by a criminal history report from the Texas Department of Public Safety. For a natural person to be eligible for a pyrotechnic operator license, pyrotechnic special effects operator license, or flame effects operator license, the natural person must start the application process by submitting a formal request for a fingerprint service code by completing the fingerprinting process information required on the department's website at www.tdi.texas.gov/fire/fingerprinting-process.html. The requesting natural person must submit information necessary to complete the fingerprint service code request, including the natural person's name, natural person's state of residence, natural person's email address, and license type the natural person is applying for.

(i) A licensee must be able to show proof of licensure while engaged in the activities of the business.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 58. OYSTERS, SHRIMP, AND FINFISH

SUBCHAPTER A. STATEWIDE OYSTER FISHERY PROCLAMATION

31 TAC §58.21

The Texas Parks and Wildlife Commission in a duly noticed meeting on November 3, 2022, adopted an amendment to 31 TAC §58.21, concerning Taking or Attempting to Take Oysters from Public Oyster Beds: General Rules, without changes to the proposed text as published in the September 30, 2022, issue

of the *Texas Register* (47 TexReg 6400). The rule will not be republished.

The amendment prohibits the harvest of oysters in Carlos Bay, Mesquite Bay, and Ayres Bay (hereafter referred to as the Carlos-Mesquite-Ayres complex). The closure to oyster harvest would protect ecologically sensitive and unique oyster habitat from the negative biological impacts of increased harvest pressure. The amendment also temporarily prohibits the harvest of oysters for two years within the boundary of one restoration area in Approved Area TX-24 in the San Antonio Bay system (Josephine's Reef, 48 acres), and within the boundary of one restoration area in Conditionally Approved Area TX-6 in Galveston Bay (Dollar Reef, 80.2 acres). The amendment also extends the existing temporary closure for one year at three sites in Conditionally Approved Area TX-4 in upper Galveston Bay (Trinity Sanctuary Reef, Trinity Harvestable Reef 1, and Trinity Harvestable Reef 2; approximately 23.0, 16.9 and 16.9 acres, respectively). The Texas Department of State Health Services (DSHS) regulates shellfish sanitation and designates specific areas where oysters may be harvested for human consumption. The designation of "Approved" and "Conditionally Approved" is determined by DSHS.

Oyster reefs in Texas have been impacted by drought, flooding, and hurricanes (e.g. Hurricane Ike, September 2008 and Hurricane Harvey, August 2017; major flooding in the coastal bend during summer/fall 2021) as well as high harvest pressure.

Because dredge harvest activities significantly reduce the vertical relief and structural complexity of oyster reefs (Lenihan and Peterson 1998), dredge-associated habitat degradation can drastically reduce the ecosystem services (the economic value of the conditions and processes through which natural ecosystems, and the species that make them up, sustain and fulfill human life) that are provided by the vertical relief and structure of oyster reefs, such as shoreline protection and habitat provision (Lenihan et al. 2001). While dredging has had limited positive impact on small, privately cultivated oyster reefs where cultch is simultaneously placed (Mercaldo-Allen and Goldberg 2011), extensive dredging on wild (i.e., uncultivated) reefs has often been linked to widescale loss of oyster resources, and associated habitat loss has been linked with declines in biodiversity and abundance of coastal faunal communities (Beck et al. 2011). Reduction in vertical relief and structural complexity can lead to increased sedimentation and decreased nutrient availability to resident oysters as well as increased disease prevalence (Colden et al. 2017, Beck et al. 2011), which in turn leads to additional stress resulting in further habitat degradation and loss of resilience. An evaluation of long-term trends in global oyster fisheries shows that oyster fishery decline typically begins with a loss of vertical relief and complexity as a result of dredge related fishing practices (Beck et al. 2011).

The positive effects of protecting oyster habitat from harvest has been well-documented in the scientific literature; larval output and oyster density are significantly higher on restored reefs that are protected from harvest as compared to non-restored or harvestable restored reefs. These non-harvested restoration sites also have greater diversity in the size and age of oysters (Buzan et al. 2015, Peters et al. 2017). The protection from vertical degradation and harvest creates a protected source of broodstock that can enhance oyster populations in surrounding harvested areas (Brietburg et al. 2000). Thus, the increased recruitment and live oyster abundance associated with non-harvested restoration sites is directly linked to sustaining productive fisheries.

In 2017, the department closed six minor bays to oyster harvest (42 TexReg 6018). Those minor bays are unique in that they are relatively shallow systems containing intertidal and shallow-water oyster habitat adjacent to expansive seagrass beds and intertidal vegetation. Historically, oyster resources located in these minor bays and shoreline areas were rarely exploited, as commercial fishing was typically directed towards the more profitable and efficiently harvested reef complexes in larger and deeper waters; thus, the minor bays have functioned as de facto spawning reserves because harvest pressure was minimal and oyster larvae produced from these areas were available to populate oyster habitat on adjacent reefs and bays. However, as oyster resources became depleted on deep-water reefs, commercial harvest effort was redirected to shallow-water reefs. The resultant increase in harvest pressure and the consequent negative impacts to sensitive habitat complexes necessitated regulatory action to prohibit harvest in those systems.

In 2021, the department became aware of increasing harvest efforts for oysters in the Carlos-Mesquite-Ayres complex, which generated concerns with respect to the long-term impacts to habitat within the complex. Shellfish harvest is reported to the department by harvest area rather than bay system or individual reef system, but Mesquite Bay happens to have its own unique harvest area designation (TX-28). The total number of reported commercial vessels reporting harvest from Mesquite Bay during the 2021-2022 commercial oyster season was the highest on record (145 unique vessels compared to an average of 51 unique vessels in license years 2015-2021). Despite relatively early in-season closures for the harvest areas that make up Mesquite (closed December 21st), Carlos (closed January 19th), and Ayres (closed January 14th) bay area complex, the 2021-2022 season accounted for 30.4% of coastwide landings in an area that represents only 2.8% of total oyster habitat. The season opened on November 1 and runs until April 30 unless in-season closure thresholds are met and the areas are closed early by the department. The department has determined that in terms of ecological importance and risk of habitat loss, the harvest impacts on the Carlos-Mesquite-Ayres complex are consistent with similar conditions necessitating the closure in 2017 of the six minor bay systems mentioned previously in this preamble. Closure of the Carlos-Mesquite-Ayres complex will allow these reefs to serve as protected sources of broodstock that support population of adjacent harvest areas to achieve optimum yield on a continuing basis. Providing sustained broodstock sources to re-seed nearby oyster reefs promotes long-term sustainability of the resource and thus long-term viability of the commercial oyster industry. As oyster reefs are both habitat and the source of a harvested product, sustainable reefs are needed to ensure the long-term health of oyster resources and the additional habitat and ecosystem services they provide. The proposed amendment would allow efficient enforcement efforts in the protection of these reefs. Furthermore, the department has determined the amount of commercial harvest experienced in this relatively small area of oyster habitat is not sustainable for the long-term ecosystem health of these reef complexes.

The Carlos-Mesquite-Ayres complex area is characterized by both intertidal and deeper oyster reefs, expansive seagrass beds, and fringing salt marsh habitats. The orientation of the shallow reefs in the system provides protection against erosion of the shoreline and associated wetlands as well as sensitive seagrass habitats. The proximity of shallow water and

intertidal oyster habitat to other estuarine habitat types (e.g., seagrasses and marshes) is a major factor affecting macrofauna (invertebrates that live on or in sediment or attached to hard substrates) density and community composition (Grabowski et al. 2005; Gain et al. 2017). Based on a wide-ranging literature review, Grabowski et al (2012) estimated an annual value of ecosystem services provided by oyster reefs in 2011 dollars at a maximum of $99,421 per hectare ($40,251 per acre; using a conversion of 2.47 acres per hectare) per year. Based on these values, ecosystem services provided by oyster reefs in the Carlos-Mesquite-Ayres complex are valued at a maximum of $85,694,379 per year (2,129 acres multiplied by $40,251 per acre). The minimum value of ecosystem services provided by the aforementioned reefs is calculated at $4,747,670 (2,129 acres multiplied by $2,230 per acre; Grabowski et al. 2012) with an average value of $8,899,220 (2,129 acres multiplied by $4,180 per acre; Grabowski et al. 2012).

Seagrasses, wetlands, and oyster reefs in this area are near Cedar Bayou and serve as critical nursery habitats for young fish and invertebrates recruiting to the estuary (including both red drum and blue crab) via Cedar Bayou pass (Hall et al. 2016). The protection and continued availability of this habitat may increase the growth, survival, and subsequent recruitment to the fishery for these organisms (Byer et al. 2017; Longmire et al. 2021). This habitat can have a positive economic impact on recreational fisheries (Grabowski et al. 2012). In 2018, the total economic impact of saltwater sportfishing in Texas was $3.66 billion (Southwick Associates 2020). For Aransas and San Antonio bays alone, the estimated total economic impact of recreational fishing in 2018 was $270.8 million based on angler effort in those areas. Protection of oyster reefs in those areas contributes to the support of a viable sportfish population and sportfish industry. Studies of recreational fishing opportunities resulting from the Half Moon Reef restoration project in Matagorda Bay indicate that the restored reef adds $691,000 to Texas' gross domestic product each year and generates an additional $1.273 million in annual economic activity. The restored reef also created a dozen new jobs related to recreational fishing and $465,000 in annual labor income (Carlton et al. 2016)

In terms of both the number of commercial oyster boats fishing in this area and oyster landings, the Carlos-Mesquite-Ayres complex experienced similar increased harvest pressure in 2016-2017 as the six minor bays that were closed to oyster harvest mentioned earlier in this preamble (e.g., 1,227 vessel trips in Mesquite Bay compared to an average of 1,037 vessel trips in Christmas Bay in 2017). While harvest pressure in the Carlos-Mesquite-Ayres complex declined after the record high during the 2016-17 season, it has increased again in recent years. During the 2021-2022 commercial oyster season, the number of reported commercial vessel trips in Mesquite Bay (1,087 vessel trips) and the total commercial harvest (28,667 sacks) are the second highest on record. While landings on many of the reefs in Carlos Bay and Ayres Bay cannot be independently assessed because those data are aggregated into larger harvest areas (in this case, TX-29 and TX-25, respectively), anecdotal observations reported by the public and department staff indicate increased harvest in these systems. Further, the department has been contacted by members of the public concerned that the structural integrity of the habitat in this complex has been degraded by oyster harvest effort in terms of physical structure and vertical relief. While the department does not have long-term monitoring data on physical habitat structure, live oyster abundance can be used as a proxy for habitat health, as oyster habitats are biogenic (the organisms create the habitat). Several of the reefs within this complex have live oyster abundances that are substantially lower than the average oyster abundance for the entire bay system, indicating that they may have become structurally degraded and thus a priority for protection.

Over the past year, oyster reefs in the Coastal Bend, a geographic area encompassing Corpus Christi Bay northward through Aransas Bay, have been negatively impacted by increased oyster mortality and the resultant impacts of commercial oyster fishing pressure that has been redirected to and concentrated on the remaining viable reef complexes. The preferred salinity range for oysters is 14-30"° (mille, or tenth of a percent) for adults and 18-23"° for egg and larval development. Spat (juvenile oysters) settling is optimized at 16-22"° with diminishing settlement below 16"° (Pattillo et. al., 1997). Additionally, when salinities drop below 10"° "limited or no recruitment" occurs (La Peyre et al., 2013). While spawning in Texas is likely to occur in every month except July and August, peak spawning events occur from May to early June and again in September and October. During the summer and fall of 2021, many Texas estuaries experienced heavy rainfall and flooding, which brought salinities well below the preferred range for oyster recruitment and survival. Most notably, salinity in nearby Copano Bay dropped below the 10"° threshold beginning in June 2021, and its monthly average ranged from 2.7"° to 7.5"° from June 2021 to December 2021. Sustained low salinity resulted in total oyster mortality over 50% in Copano Bay during fall 2021. Given that Copano Bay typically supported the commercial fishing effort in this area of the coast, much of the commercial fleet redistributed its effort to higher-salinity portions of the bay during the 2021-2022 commercial oyster season---primarily the Carlos-Mesquite-Ayres complex. While observed salinities in this area were not as low as those observed in Copano Bay, they were still sub-optimal during the fall 2021 and winter 2021-2022 timeframe (i.e., <16"° from July 2021-November 2021), which likely impacted the ability of the complex to recover from the effects of increased harvest pressure. The significant ecological value and sensitivity of the Carlos-Mesquite-Ayres complex, coupled with the increasing harvest pressure, have produced conditions consistent with those that necessitated the closure of the six minor bay systems in 2017.

Therefore, the amendment prohibits oyster harvest in all waters of Mesquite Bay, Carlos Bay, and Ayres Bay from a line drawn between two points at the southern end of Carlos Bay (28.11450, -96.92570; 28.11061, -96.88817) to a line drawn between two points at the northern end of Ayers Bay (28.21394, -96.81237; 28.18807, -96.79233). The proposed amendment would affect 2,129 acres of oyster habitat (approximately 2.8% of coastwide oyster habitat). The delineation of the closed areas will enhance enforcement efforts in the area.

The temporary restoration closures will allow for the planting of oyster cultch in those areas and enough time for those oysters to reach legal size for harvest. Oyster cultch is the material to which oyster spat (juvenile oysters) attach in order to create an oyster bed. The temporary restoration closure for the reseeding or restoration of oyster areas, followed by an additional two years of closure will ensure that adequate oyster spat can be recruited to the reef and allows enough time so that when the reef is reopened it will provide opportunity for harvest of legal oysters to occur. Closing areas temporarily for reseeding or restoration supports the long-term sustainability of the oyster fishery while achieving optimum yield on a continuing basis. Allowing adequate time to ensure both growth and structure of the reef

provides for longer term benefits to the fishery when the reef is reopened for harvest, provides benefits to adjacent reef areas in the terms of broodstock during the temporary protection, and considers the economic costs to ensure that restoration efforts are successful. As oyster reefs serve as both habitat and the source of harvested product, sustainable reefs are needed to ensure the long-term health of oyster resources and the additional habitat and ecosystem services they provide. The department has determined that efficient enforcement of the proposed amendment will be possible.

Oyster reefs in Texas have been impacted due to drought, flooding, and hurricanes (Hurricane Ike, September 2008 and Hurricane Harvey, August 2017), as well as high harvest pressure. The department's oyster habitat restoration efforts to date have resulted in a total of approximately 1,705 acres of oyster habitat returned to productive habitat within these bays.

House Bill 51 (85th Legislature, 2017) included a requirement that certified oyster dealers re-deposit department-approved cultch materials in an amount equal to thirty percent of the total volume of oysters purchased in the previous license year. Funds and materials generated from House Bill 51 are expected to be used to restore at least 24 acres on Josephine's Reef in 2022.

Oyster abundance on this reef has severely declined over time, and average oyster abundance on Josephine's Reef is now substantially lower than other reefs in the San Antonio Bay system based on an assessment of TPWD resource monitoring data. The portion of Josephine's Reef selected for restoration is characterized by degraded substrates. The restoration activities will focus on establishing stable substrate and providing suitable conditions for spat settlement and oyster bed development.

Construction of the Houston Ship Channel Expansion Channel Improvement Project (HSC ECIP) will result in unavoidable adverse impacts to oyster reefs. During the Final Integrated Feasibility Report - Environmental Impact Statement for the HSC ECIP, mitigation was proposed in the form of restoring oyster reefs in Galveston Bay to compensate for the loss of habitat from the channel modifications. Two mitigation sites, Dollar Reef and San Leon Reef, were selected in coordination with appropriate resource agencies. Both sites were impacted by Hurricane Ike and have been the focus of TPWD efforts to restore reef structures in the bay.

The Dollar Reef Mitigation Site was recently constructed and completed under a contract awarded by the United States Army Corps of Engineers (USACE). The mitigation site consists of three oyster pads consisting of one 13.0-acre oyster pad (Dollar Reef Mitigation Pad A-1), one 17.4-acre oyster pad (Dollar Reef Mitigation Pad A-2), and one 14.2-acre oyster pad (Dollar Reef Mitigation Pad A-3). The pads are spaced approximately 800 feet apart and are oriented in a northeast-to-southwest direction. Portions of the mitigation site are within restricted harvest areas as defined by DSHS Order Number MR-1743, while the remaining area is within a conditionally approved area (TX-6); The restricted harvest areas are not included in the closure request.

The three sites in Galveston Bay TX-6 (Trinity Sanctuary Reef, Trinity Harvestable Reef 1, and Trinity Harvestable Reef 2) were temporarily closed in November 2020 in preparation for restoration, which was completed in January 2021. Abundant rainfall in the late spring and early summer of 2021 caused salinity to be unfavorably low in the area, which negatively impacted oyster recruitment to the restored reefs. No live oysters or spat were collected at any of the three sites during April and July 2021; a few live oysters were observed in November 2021. By January 2022, oysters had begun recruiting to the restoration sites with increased abundance, but these oysters have not yet had a chance to grow to maturity; as of April 2022, 100% of the sampled oysters were below market size. An additional year of closure will allow the oysters that have recruited to the restoration site to grow to maturity.

The department received 1,577 comments opposing adoption of all or part of the rule as proposed for the Mesquite Bay Complex Closure. The department received 3745 comments supporting all or part of the rule and 1195 comments opposing adoption for all or part of the rule for the temporary restoration closure. Of those comments, 372 articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow. Because of the large number of comments and the fact that many comments repeat or consist of common themes, the department has organized the comments by category. Therefore, the number of cumulative commentors below is actually greater than this number listed above due to dividing individual comments into multiple different comments bins or themes.

Mesquite Bay Complex Closure

One-hundred and nine commenters opposed adoption on the basis that the rule will result in economic impacts that cannot be justified. The department disagrees with the comments and responds that it has a statutory duty to ensure the sustainability of oyster populations as well as the many other species that depend on oyster reefs as habitat, and that there are substantial economic benefits resulting from ecosystem services provided by a healthy reef, including water filtration, nitrogen removal, carbon sequestration, protection from erosion, and aquatic species diversity, not to mention the viability of oyster populations. Failure to protect oyster habitat and populations may result in diminishing abundance until the fishery can no longer support commercial exploitation. No changes were made as a result of the comments.

Forty-two commenters opposed adoption and stated that the closures should not be permanent. The department disagrees with the comments and responds that the Mesquite Bay Complex contains sensitive, ecologically important reef habitats that will not remain so over time if subjected to continued commercial harvest pressure. The reefs of the Mesquite Bay Complex are ecologically connected to nearby sensitive saltmarsh and seagrass habitats that serve as nurseries for fish and invertebrate species. The literature indicates that dredge harvest activities significantly reduce the vertical relief and structural complexity of oyster reefs (Lenihan and Peterson 1998) and that reefs closed to oyster harvest show improved health and provide broodstock to surrounding, harvestable reefs (Buzan et al. (2015), Peters et al. (2017), and Brietburg et al. (2000)). Permanently closing these reefs to harvest will protect the ecosystem services provided by these reefs and allow them to serve as a source of oyster larvae for nearby harvestable reefs, which will contribute to a healthy fishery. No changes were made as a result of the comments.

Sixty-four commenters opposed adoption and stated that dredging is beneficial or necessary for oyster reefs to survive. The department disagrees with the comments and responds that a significant body of scientific research indicates that unharvested reefs have better habitat quality, higher vertical relief, increased

habitat structural complexity, and higher abundance of oysters and associated fish and invertebrates than reefs subjected to harvest. In Texas, the department has conducted monitoring in Christmas Bay and St. Charles Bay following the closure of those areas in 2017. In Christmas Bay, overall mean oyster density in 2022 was 1.8 times higher and the density of market-sized oysters (those >3" in size) was nearly 2 times higher than pre-closure values. In St. Charles Bay, reefs in the closed area were compared to a nearby reef open to harvest as a reference. The unharvested (closed) reef had 1.2 times as much spat set (juvenile oysters attached to substrate), 7.1 times as many 1" - 1.99" oysters, 17.5 times as many 2" - 2.99" oysters, and 18 times as many market-sized oysters (> 3") as the reference reef. The department has determined that limited ecological benefits may come from dredging oyster reefs. One such example is dredging a reef following extreme sedimentation events (such as during hurricanes), when reefs may become buried in sediment. Recovery from such events can be accomplished using "bagless" or non-harvesting dredges used to uncover oysters from overlaid sediment. The best available science shows that, with the exception of response to extreme sedimentation events, unharvested reefs are healthier than harvested reefs. No changes were made as a result of the comments.

Twenty-five commenters opposed adoption of the rule on the basis that other, less disruptive, alternatives could be implemented instead to achieve the goal of the rule. The department disagrees with the comments and responds that documented harvest pressure on sensitive and ecologically important habitat warrants closure of the Mesquite Bay Complex. As stated previously in this preamble, there is significant scientific literature using multiple metrics that demonstrate reefs closed to oyster harvest show improved health following closure. The department has determined that closure is the most effective method to immediately and effectively preserve the oyster reefs in this complex. The department also notes that it has implemented several other management strategies to improve oyster abundance in tandem with the closure, including reef restoration, license buyback programs, and bag and size limits. Also, the department is actively engaged in restoration activities for the purpose of commercial harvest. The department is also investigating possibilities with respect to the creation of additional opportunities for public/private partnerships to restore oyster habitats. No changes were made as a result of the comments.

Forty-one commenters opposed adoption of the rule and stated that the closures are not supported by science or the available data. Commenters specifically stated they believed the data used to justify the closures is incorrect, that the regulated community is more knowledgeable than biologists, and that departmental data cannot be trusted. Several commenters stated they believed the size of dredge used for sampling by the department was inappropriate. The department disagrees with the comments and responds that although anecdotal experiences of the regulated community have value, anecdotal inference is neither as reliable nor as useful as inference based on data that have been systematically collected under rigorously controlled conditions on a repetitive basis over time, which provides the spatial and temporal robustness necessary to be confident in selecting management strategies to address oyster reef degradation and reduced abundance. Accordingly, the department bases management actions on data that are collected and analyzed according to widely accepted and validated standards. With respect to dredges, although the dredges used in routine and targeted oyster sampling are not the same as those typically used by the regulated community, department sampling methods are done consistently over time and all thresholds are based on catch rates of market sized oysters that can be calculated consistently across bay systems. When the department's targeted oyster sampling data is compared to the oyster landings data required to be reported to the department, the accuracy of the sampling data is validated. No changes were made as a result of the comments.

Thirty-seven commenters opposed adoption of the rule on the basis that closing harvest areas will result in the redirection and concentration of effort on remaining open reefs, which will result in the degradation of the remaining reefs. The department disagrees with the comments and responds that while closure of harvest areas can concentrate fishing effort in areas remaining open to harvest, the Mesquite Bay Complex contains ecologically important and sensitive reef habitats that were not historically subjected to large amounts of harvest pressure. Permanently closing these reefs to harvest will protect the ecosystem services provided by the reefs and allow them to be a source for oyster larvae to populate nearby harvestable reefs, contributing to a healthy fishery. The department further responds that the opening and closing of shellfish harvest areas to oyster fishing is only one component of the department's oyster management strategy. Closing harvest areas is necessary when there aren't enough market sized oysters in a harvest area to support a sustainable fishery, as well as to prevent ecosystem degradation. In these situations, continued harvest pressure jeopardizes the long-term health and sustainability of the fishery and the ecosystem. The department also notes that the impacts of oyster harvest are addressed through multiple management strategies including bag and size limits, harvest days, and in-season closures. No changes were made as a result of the comments.

Twelve commenters opposed adoption on the basis that the department is beholden to or working on behalf of special interest groups. The department disagrees with the comments and responds that the rule as adopted is intended to discharge the department's statutory duty to protect and conserve the public resources of the state and was promulgated following a robust public input process, the results of which were duly considered by the commission. No changes were made as a result of the comments.

Nine commenters opposed adoption and stated that the rule is a violation of constitutional rights. The department disagrees with the comment and responds that the rules were validly promulgated in compliance with all applicable statutory laws and do not violate any provision of state or federal constitutions. No changes were made as a result of the comments.

Thirty commenters opposed adoption and stated that the department should have been more inclusive of the regulated community in the process of developing the rules. The department disagrees with the comment and responds that the regulated community, at the invitation of the department, was extensively involved in the process of developing the rules as adopted. The department coordinates with and utilizes regulations and restoration work groups comprised of members of the regulated community, academics, and NGOs to develop additional management options for the fishery. No changes were made as a result of these comments.

One commenter opposed adoption and stated that the department should have solicited the participation of Native Americans in the development of the rule. The department agrees that Native American participation is important when the interests of

Native Americans are involved; however, to the department's knowledge there is no commercial oystering in Texas by Native Americans. No changes were made as a result of these comments.

Five comments opposed adoption and stated that the rule should apply solely to commercial oystering activities. The department disagrees and responds that although recreational oyster harvest activities are neither as intense nor as physically stressful to oyster habitat and associated ecosystems, the fastest way to recover the fishery in the Mesquite Bay Complex is to cease all oyster harvest. No changes were made as a result of these comments.

Three commenters opposed adoption on the basis that current oyster harvest pressure is unsustainable. The department agrees with the comment that the current harvest pressure is unsustainable and thus the comment supports the reason the proposal was made and is being adopted. No changes were made as a result of these comments.

One commenter opposed adoption on the basis that more needs to be done to reduce commercial oyster harvesting. The department agrees with the comments and replies that this rule is being implemented alongside other management activities to control and monitor oyster harvest, such as in-season oyster monitoring, seasonal reef closures, the commercial license buyback program, and oyster reef restoration to support a commercially viable and ecologically sustainable fishery. No changes were made as a result of this comment.

One commenter opposed adoption on the basis that the task force orders given by the commission in March of 2022 were not followed and therefore the commission was unable to rule on the decision. The department disagrees with the comment and responds that the oyster regulatory and restoration work groups were formed by the department as directed by the commission and were comprised of members of the regulated community, academics, and NGOs. These "task forces" each met twice before the rule was deliberated to discuss management options for the fishery and restoration of oyster habitats. No changes were made as a result of this comment.

Three commenters opposed adoption on the basis that the commission disregards or does not consider public comment in their deliberations. The department disagrees with the comments and responds that all public comment received in response to the proposed rule was forwarded to the members of the commission prior to the commission meeting at which the rule was deliberated; in addition, staff presented a summary of public comment to the commission and the public at the same meeting. No changes were made as a result of the comments.

Twenty commenters opposed adoption and stated that all fishing activity (i.e., recreational as well as commercial) should be prohibited in the Mesquite Bay Complex because it isn't fair to allow recreational harvest of fish if commercial harvest of oysters is prohibited. The department disagrees with the comments and responds that sportfishing activity does not cause damage to the vertical relief and structural integrity of the reef (as is the case with oyster dredging), and recreational fishing does not have an associated incidental oyster mortality, whereas oyster dredging leads to approximately 10% incidental oyster mortality (Lenihan and Peterson 2004). Finally, recreational fishing effort at the current time poses no resource concerns. No changes were made as a result of the comments.

Eleven commenters opposed adoption and stated that the site selection and restoration methods used by the department should be improved. The department disagrees with the comments and responds that the rule is a response to threats to the fishery and habitat posed by harvest activities; thus, the comments are not germane to the rulemaking. The department plans to continue working with the restoration work group comprised of members of the regulated community, academics, and NGO to coordinate restoration activities. No changes were made as a result of the comments.

One commenter opposed adoption on the basis that global warming is to blame for low oyster abundance, presumably as opposed to harvest. The department agrees that changes to water temperatures, salinities, and other environmental factors as a result of climate variability may negatively affect oyster populations. However, the department disagrees that high harvest pressure has not negatively impacted reefs in the Mesquite Complex and responds that there is ample evidence that dredging negatively impacts oyster reef health and that the reefs in this ecologically sensitive area have endured high harvest pressure during recent years. Closing harvest areas is necessary when there aren't enough market sized oysters in a harvest area to support a sustainable fishery, as well as to prevent ecosystem degradation. In these situations, continued harvest pressure jeopardizes the long-term health and sustainability of the fishery and the ecosystem. No changes were made as a result of the comment.

Six commenters opposed adoption on the basis that demand for oysters as a food source is too high to justify closure of the Mesquite Bay Complex. The department disagrees with the comments and responds that there is abundant empirical evidence that high consumer demand for fisheries resources, if not regulated appropriately, can result in damage to the resource, and in some extreme cases, extirpation of a targeted species. The department also responds that there are many other public and private reefs in Texas that continue to produce consumable oysters, as well out-of-state sources. The department also notes that the closure of the Mesquite Bay Complex may result in increased oyster production in surrounding areas that remain open for commercial harvest activities. No changes were made as a result of the comments.

Five commenters opposed adoption and stated that harvest opportunity should be limited to resident licensees. The department disagrees with the comment and responds that although courts have validated the authority of individual states to impose higher fees for nonresidents than are imposed for residents to enjoy hunting and fishing activities generally, differential standards for the enjoyment of licensure must bear a rational relationship to a legitimate state purpose of managing or conserving a resource. The department reasons that the biological impact of nonresident oyster boats with respect to the conditions necessitating the closure is identical to that of resident oyster boats and that when the statute that created a license moratorium (cap on number of licenses) was adopted it allowed for both resident and non-resident licenses. Additionally, imposing differential standards for resident and nonresident oyster boats would be costly, administratively problematic, and difficult to enforce. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that other bays (e.g., Copano, Matagorda, San Antonio, and Galveston) should be closed in addition to the Mesquite Bay Complex. The department disagrees with the comments and responds that all har-

vestable oyster reefs are continuously monitored to detect declining catch rates, which is one index for determining the need for closure. Other than monitored reef closures already in effect, only the Mesquite Bay Complex closure is justified at the current time, which is additionally supported because it (the Complex) contains ecologically sensitive habitat for a number of species that would benefit from protection from the physical effects of oyster dredging. No changes were made as a result of the comments.

One commenter opposed adoption on the basis that rules will ruin the United States of America and force consumers to buy oysters from China. The department disagrees with the comment and responds that the closures imposed by the rule affect 2.8% of the harvestable oyster acreage in Texas, which is not believed to be sufficient to stop commercial oystering in Texas or force consumers to become dependent upon China for oysters. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the department's sampling is ineffective. The department disagrees with the comments and responds that the department's sampling protocols for both routine oyster reef sampling and Targeted Oyster Sampling (TOS) use a scientifically sound method to measure the catch rate of market-sized oysters. The department conducts routine sampling activities at different areas within known reef locations in an objective and controlled manner, based on the precepts of sound and accepted biological management practices, to create randomized datasets upon which to base management decisions. Analysis of TOS data shows that it is consistent with oyster landings data required to be reported to the department, from which the department concludes that the data is valid. Several commenters also indicated that the size of dredge used by the department causes the sampling data to be biased and unreliable. The department responds that dredge size is irrelevant, provided the length of time and the speed at which the dredge is pulled are uniform across all instances of sampling. Moreover, the department has been consistent in the oyster dredge sampling methodology beginning in 1984. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that oysters provide important ecosystem services. The department agrees that oysters are an important ecological resource and that the proposed closure will preserve and even improve those services. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that better enforcement of oyster regulations is needed. The department disagrees with the comment and responds that the department is confident that current law enforcement efforts (including operations targeted at oyster harvest) are sufficient to detect, prosecute, and convict violators. No changes were made as a result of the comments.

One commenter opposed adoption that stated that the bay bottom should be shared. The department neither agrees nor disagrees with the comments but responds that another state agency, the General Land Office (GLO), is the state agency charged by statute with managing bay bottoms. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that a better option is to limit the number of commercial oyster boats. The department agrees with the comment and responds that the commercial oyster fishery is already a "limited-entry" fishery, meaning the number of licenses is capped and cannot grow. Additionally, the department operates a license-buyback program, the intent of which is to stabilize the economic viability of commercial oyster harvest by reducing the number of participants. The department believes that these measures will have the long-term result of establishing equilibrium between commercial harvest pressure and commercial viability of the fishery. To limit the number of vessels in any other way would involve additional processes for selecting and allotting fishing opportunity, which would be costly and controversial. The department believes that the current system of area closures and limitations on season length is sufficient to provide for responsible management of the resource. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that the regulated commercial community is a key participant in reef restoration and that oyster dredging is a beneficial component of reef restoration. The department agrees that the regulated community is an important component of reef restoration activities, primarily through participation in the oyster shell recovery program created by the Texas Legislature, but disagrees that dredging is always beneficial for reef restoration. The majority of scientific research, including research conducted by the department, shows that reefs not subjected to harvest have improved habitat quality, higher vertical relief, increased habitat structural complexity, and higher abundance of oysters and associated fish and invertebrates than reefs subjected to harvest pressure. The department has determined that limited ecological benefits may come from dredging oyster reefs in some circumstances. One such example is dredging a reef following extreme sedimentation events (such as during hurricanes), when reefs may become buried in sediment. Recovery from such events can be accomplished using "bagless" or non-harvesting dredges used to uncover oysters from overlaid sediment. The best available science shows that, with the exception of response to extreme sedimentation events, unharvested reefs are healthier than harvested reefs. No changes were made as a result of the comments.

Two commenters opposed adoption on the basis that "more information" is needed. The department disagrees with the comments and responds that the available data is sufficient to justify the closure of the Mesquite Bay Complex. The department has presented and made available the biological and ecological data to support that action, including peer-reviewed studies demonstrating that oyster reefs closed to harvest contain more oysters, support more diverse fauna, and can have higher vertical relief than reefs subjected to oyster harvesting, which is associated with reef health and resilience. Additionally, the department has observed and demonstrated increased harvest pressure in the Mesquite Bay Complex which is inconsistent with a sustainable oyster fishery. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that there should be no management of oyster reefs or harvest and that nature should be left to take its course. The department disagrees with the comments and responds that there is abundant historical, empirical, and scientific evidence proving that unregulated commercial exploitation of any natural resource can lead to irreversible negative impacts. Additionally, the department has a statutory duty to manage and conserve the oyster resources of the state. No changes were made as a result of the comments.

Five commenters opposed adoption on the basis that the closure of a bay can never be justified. The department disagrees with

the comments and responds that the department has a statutory duty to manage and conserve the oyster resources of the state and that the closure imposed by the rule as adopted is completely justified, both in the context of that duty and in the context of the principles of sound biological management. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department has no authority to close waters to oyster harvest. The department disagrees with the comments and responds that under Parks and Wildlife Code, Chapter 76, the commission may close areas to the taking of oysters when the commission finds that area is being overworked or damaged to prevent depletion and create a sustainable fishery. No changes were made as a result of the comment.

Eight commenters opposed adoption and stated that the rules would force members of the regulated community out of business. The department disagrees with the comments and responds that the rule closes less than 3% of the public reefs available for commercial exploitation in the state, that continued harvest activities in the affected areas at current levels are unsustainable, and that the department is obligated to perform its statutory duty to manage and conserve the resource. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department should build sporting infrastructure and not manage fisheries. The department disagrees with the comment and responds that it has a statutory duty to manage and conserve the fish and wildlife resources of the state, which includes the management actions necessary to benefit the oyster resources of the state and to preserve the natural ecosystems upon which other species depend. No changes were made as a result of the comments.

One commenter opposed adoption and stated that it is unfair to close oyster harvest while commercial harvest of flounder is allowed to continue as populations are declining. The department disagrees with the comments and replies that although healthy flounder populations are part of a healthy bay ecosystem, they are unlike oysters in that they are not an integral component of physical habitat structure; therefore, the management approaches are not comparable. Additionally, the department has taken multiple regulatory actions in the past twenty years to address declining flounder populations, the latest of which included a six-week closure to flounder harvest in both the recreational and commercial fisheries. No changes were made as a result of the comments.

Nine commenters opposed adoption on the basis that the oyster industry does not need more regulation. The department disagrees with the comments and responds that appropriate regulatory actions to manage and conserve the fishery are necessary for a sustainable fishery. No changes were made as a result of the comments.

Seven commenters opposed adoption and stated that the department does not understand the problem. The department disagrees with the comments and responds that the department employs numerous specialists with the experience, expertise, and education necessary to effectively carry out the agency's statutory duty to protect and conserve the resource. The department also responds that on the basis of continuous standardized data-collection and monitoring activities over the course of decades, it is confident that its characterization of the status of oyster populations is accurate. No changes were made as a result of the comments.

Eleven commenters opposed adoption and stated the department's "traffic light" system is flawed. The department disagrees with the comments and responds that the "traffic light" system (the department's in-season targeted oyster sampling program, which utilizes certain thresholds as the basis for temporary closures under statute) allows the department to act within the annual harvest season to protect oyster reefs that are being subjected to overharvest. No changes were made as a result of the comments.

Nine commenters opposed adoption and stated that the economic impact study included in the proposal and public hearing material is incorrect. The department disagrees with the comments and responds that the rule was validly promulgated in compliance with all applicable requirements of the Administrative Procedure Act, including all provisions relating to fiscal and economic analyses. No changes were made as a result of the comments.

Nine commenters opposed adoption and stated that the closure is unnecessary because the industry will self-regulate. The department disagrees with the comment and responds that if self-regulation was an effective management option, there would be no reef degradation and no need for regulatory intervention. That is not the case, as there is evidence of reef degradation, and the department has a statutory duty to act to protect and conserve the fishery. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that the department should focus on harmful energy and chemical industry activities, or other industries whose activities may affect water quality, instead of closing oyster reefs to commercial harvest. The department disagrees with the comments and responds that while a host of causal factors can affect oysters and their habitat, the department is not the primary agency tasked with responding to environmental pollution. In any case, the major factor driving oyster population declines in the Mesquite Bay Complex is overharvest. No changes were made as a result of the comments.

Eight commenters opposed adoption and stated that the areas currently open for harvest are bad or unproductive. The department disagrees with the comment and responds that the rule does not contemplate any topic other than the status of oyster populations and habitat in the Mesquite Bay Complex; therefore, the comments are not germane. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department should re-evaluate previously closed areas. The department agrees with the comment and responds that closed active harvest areas are routinely sampled and monitored, and closure status is maintained accordingly. Additionally, other minor bay areas that have been closed on a more permanent basis are responding and recovering as expected without being subject to commercial oyster harvest. No changes were made as a result of these comments.

One commenter opposed adoption and stated that the commission is charged with optimizing the yield of oysters for commercial harvest. The department agrees with the commenter and responds that yield optimization can only occur in a healthy ecosystem capable of producing harvestable oysters at sustainable levels. If a particular reef is not capable of withstanding harvest pressure or is being physically degraded, the yield will decline, meaning the department has failed to

discharge its duty to optimize yields. No changes were made as a result of the comment.

Six commenters opposed adoption and stated that rule action should be delayed. The department disagrees with the comments and responds that failure to act now will result in further degradation of the habitat and the species that depend upon it within the Mesquite Bay Complex. No changes were made as a result of the comments.

One commenter opposed adoption and stated opposition to leasing shoreline for the Certificate of Location (COL) program because it will restrict fishing access. The department disagrees with the comment and responds that although the comment is not germane to the rule as adopted, the COL program does not lease shoreline and therefore does not affect fishing access. No changes were made as a result of the comment.

Temporary Restoration Closure Comments

Fourteen commenters opposed adoption and stated that the areas should be closed longer and/or a different metric should be used to determine the basis for reopening. The department disagrees with the comment and responds that two years is generally sufficient time to recruit two generations of oysters for harvest. The department also notes that if monitoring reveals that oyster abundance is very low, the commission has the authority to extend the closure. No changes were made as a result of the comments.

One commenter opposed adoption and stated that oyster management decisions should be left up to elected officials. The department agrees with the comment and responds that the Texas Legislature, an elected body, has delegated authority to manage aquatic resources, including oysters, to the commission. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the regulated community should decide how to restore reefs. The department disagrees with the comments and responds that although input and cooperation from the regulated community is appreciated and helpful, the commission must consider a broader range of concerns in making decisions regarding oyster management and oyster reef restoration. No changes were made as a result of the comments.

One commenter opposed adoption and stated that consumers want oysters. The department agrees with the comment and responds that there are bays open to commercial oystering and oysters from outside of Texas are widely available as well. No changes were made as a result of these comments.

The department received one comment opposing adoption on the basis that "the time is already up." The department interprets this comment to refer to the extension of the closure of reefs in Trinity Bay and if that is the case, disagrees and responds that abundant rainfall in the late spring and early summer of 2021 caused salinity to be unfavorably low in the area, which negatively impacted oyster recruitment to the restored reefs. Very few live oysters were seen there during sampling in November of 2021, and during sampling in April 2022, 100% of the sampled oysters were below market size. The closure of these reefs was extended for another year to allow the oysters recruited to the restoration site to grow to maturity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that reefs should be opened for commercial harvest immediately following the completion of restoration activities. The department disagrees with the comment and responds that closing the reef to commercial harvest following restoration activities helps ensure that oysters can recruit to the restored reef and grow to legal harvest size before being subjected to harvest activities. No changes were made a result of the comments.

One commenter opposed adoption and stated that the closure should affect a smaller area. The department disagrees with the comment and responds that the size of the closure area reflects the area where restoration activities will take place and is additionally modified to create an easily mappable perimeter to enhance compliance and enforcement. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should restore other areas. The department neither agrees nor disagrees with the comment and responds that the decision to close and restore a reef is driven by biological indices and restoration needs in any given bay system. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should wait until the project is complete before closing the reef to commercial harvest. The department disagrees with the comments and responds that closures are needed as the projects begin until completion and the appropriate time after completion to ensure the biological goals of the restoration project are met. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should "open up" the commercial license buyback program. The department agrees that the commercial license buyback program is an important tool to manage the commercial fishery and responds that it plans to continue to open rounds of the license buyback program. The department disagrees that the commercial license buyback program is able to accomplish the goals of the temporary restoration closures, which are designed to allow recruitment of oysters to restored reefs and allow time for adequate growth into the market size class. No changes were made as a result of the comment.

Seven commenters opposed adoption on the basis that the department is beholden to or working on behalf of special interest groups. The department disagrees with the comments and responds that the rule as adopted is intended to discharge the department's statutory duty to protect and conserve the public resources of the state and was promulgated following a robust public input process, the results of which were duly considered by the commission. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the closure would damage the reefs. The department disagrees with the comment and responds that the rule as adopted is intended to improve oyster reef health, based on the best available science and departmental data. The department adds that it is unaware of any scientific evidence to suggest that closing a reef to oystering will result in ecological damage to the reef. No changes were made as a result of the comments.

Ten commenters opposed adoption and stated that dredging is good or necessary for oyster reefs to survive. The department disagrees with the comments and responds that a significant body of scientific research indicates that unharvested reefs have better habitat quality, higher vertical relief, increased habitat structural complexity, and higher abundance of oysters and associated fish and invertebrates than reefs subjected to

harvest. In Texas, the department has conducted monitoring in Christmas Bay and St. Charles Bay following the closure of those areas in 2017. In Christmas Bay, overall mean oyster density in 2022 was 1.8 times higher than pre-closure and the density of market-sized oysters (those >3" in size) was nearly 2 times higher than pre-closure values. In St. Charles Bay, reefs in the closed area were compared to a nearby reef open to harvest as a reference. The unharvested (closed) reef had 1.2 times as much spat set (juvenile oysters attached to substrate), 7.1 times as many 1" - 1.99" oysters, 17.5 times as many 2" - 2.99" oysters, and 18 times as many market-sized oysters (> 3") as the reference reef. The department has determined that limited ecological benefits may come from dredging oyster reefs. One such example is dredging a reef following extreme sedimentation events (such as during hurricanes), when reefs may become buried in sediment. Recovery from such events can be accomplished using "bagless" or non-harvesting dredges used to uncover oysters from overlaid sediment. The best available science shows that, with the exception of response to extreme sedimentation events, unharvested reefs are healthier than harvested reefs. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that more data was needed. The department disagrees with the comments and responds that in light of the literature and departmental data there is more than enough data to justify the closure. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that the department should focus on harmful energy and chemical industry activities, or other industries whose activities may affect water quality, instead of closing oyster reefs to commercial harvest. The department disagrees with the comments and responds that while a host of causal factors can affect oysters and their habitat, the department is not the primary agency tasked with responding to environmental pollution. In any case, these restoration closures are designed to allow for recruitment of oysters to the restored reefs and to give time for these oysters to grow to a harvestable size. No changes were made as a result of the comments.

One commenter opposed adoption and stated that restored areas should be opened exclusively to resident oyster boats for some period of time before nonresident oyster boats are allowed to conduct harvest activities. The department disagrees with the comment and responds that although courts have validated the authority of individual states to impose higher fees for nonresidents than are imposed for residents to enjoy hunting and fishing activities generally, differential standards for the enjoyment of licensure must bear a rational relationship to a legitimate state purpose of managing or conserving a resource. The department reasons that the biological impact of nonresident oyster boats with respect to the conditions necessitating the closure is identical to that of resident oyster boats and that when the statute that created a license moratorium (cap on number of licenses) was adopted it allowed for both resident and non-resident licenses. Additionally, imposing differential standards for resident and nonresident oyster boats would be costly, administratively problematic, and difficult to enforce. No changes were made as a result of the comment.

One comment opposed adoption and stated that limited harvest on the restored reefs should be allowed. The department disagrees with the comment and responds that a complete closure is the fastest and most efficient way to recover the reef. The purpose of the closure is to allow the re-establishment of oysters on the substrate; harvest of any kind during this time would negatively impact the new spat and young oysters as they establish themselves on the substrate and grow to a harvestable size. Even limited harvest could potentially impact this process, and allowing harvest only in specific areas of the restored reef that may contain higher abundances of market size oysters would be costly, administratively problematic, and difficult to enforce. No changes were made as a result of the comment.

Seven commenters opposed adoption and stated that the closure is unnecessary because the industry will self-regulate. The department disagrees with the comment and responds that if self-regulation was an effective management option, there would be no need for regulatory intervention. Harvest has been documented on other reefs with very few market-sized oysters as has reef degradation. Temporary restoration closures represent the quickest and most efficient method of restoring oyster resources by allowing recruitment to the restored reef and allowing young oysters to grow to a harvestable size. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the regulated community should bear the costs for restoration. The department agrees the regulated community should contribute to the costs of restoration but disagrees with the comment in part and responds that oyster restoration funds come from a variety of sources, including grants, fishery disaster relief funds, and shell fees that are paid by the regulated community. No changes were made as a result of the comment.

Nine commenters opposed adoption and stated that despite department claims, the closure will not be temporary. The department disagrees with the comments and responds that the goal of the closures is to allow two generations of oysters to successfully settle on the substrate and allow young oysters to grow to a harvestable size. Typically, two years is sufficient for this to occur; however, in years with abnormal salinities or storms recruitment is negatively impacted and establishment is affected. No changes were made as a result of the comments.

One commenter opposed adoption and stated that God will decide the health of the oysters. The department neither agrees nor disagrees with the comment and responds that notwithstanding a remarkable and sudden reversal of population status, the rule as adopted is necessary at this time to protect and conserve oyster resources. No changes were made as a result of the comment.

Six commenters opposed adoption on the basis that the rules as adopted are a violation of constitutional rights. The department disagrees with the comment and responds that the rules were validly promulgated in compliance with all applicable statutory laws and do not violate any provision of state or federal constitutions. No changes were made as a result of these comments.

Four commenters opposed adoption and stated that alternatives to closures should be explored. The department disagrees with the comments and responds that the areas designated for closure have been degraded to the extent that they no longer support sustainable commercial harvest and there is a need for restoration and the closure of the restored areas is needed for commercial harvest to become viable again. The department is confident, based on historical precedent, that the closures will result in the re-establishment of healthy populations of oysters that can be harvested by both recreational and commercial users. No changes were made as a result of the comments.

Nineteen commenters opposed adoption and stated that the economic impact was "too high" to justify the closure. The department disagrees with the comments and responds that the areas designated for closure have been degraded to the extent that they no longer support sustainable commercial harvest; it is axiomatic that the economic impact of the absence of oysters is more problematic than a temporary restoration closure that has the probability of resulting in future commercial viability. No changes were made as a result of the comments.

One commenter opposed adoption and stated disagreement with the duration of the closure without indicating a preference. The department disagrees with the comment and responds that restoration closures are temporary and intended to allow for reseeding and setting of spat. If conditions and data indicate the reef could benefit from a longer closure, the department will pursue an extension, but the department's intent is to open an area only when it is capable of sustaining renewed harvest pressure. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that there should be no management of oyster reefs or harvest and that nature should be left to take its course. The department disagrees with the comments and responds that there is abundant historical, empirical, and scientific evidence proving that unregulated commercial exploitation of any natural resource can lead to irreversible negative impacts. Additionally, the department has a statutory duty to manage and conserve the oyster resources of the state. No changes were made as a result of the comments.

Five commenters opposed adoption and stated that there are options besides total closures. The department disagrees with the comments and responds that the temporary restoration closures are not permanent closures and represent the quickest and most efficient method of restoring oyster resources. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the commercial cohort of the regulated community enjoys too much influence with the department and the commission. The department disagrees with the comment and responds that it has a statutory duty to manage and conserve oyster resources while achieving, on a continuing basis, the optimum yield for the oystering industry; therefore, the interests of the commercial sector must be considered in all management decisions. However, the department is also required to equitably distribute the opportunity for the public to enjoy ownership of natural resources, and the department and the commission are guided by both requirements. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the closure is not meaningful if harvest is allowed following reopening. The department disagrees with the comments and responds that it is charged with preventing the depletion of oyster reefs while achieving, on a continuing basis, the optimum yield for the oystering industry. Additionally, the department is required by statute to equitably distribute the opportunity for enjoyment of a public resource. Therefore, the department has determined that it is appropriate, once a restored reef is viable, to allow harvest activities to resume. The department notes that resource monitoring will continue, and if necessary, a reef may be closed again if threatened by overharvest. No changes were made as a result of the comments.

The department received one comment opposing adoption on the basis that the closures were "untexan." The department disagrees with the comments and responds that it is not germane to the rulemaking, and the Texas Constitution declares the preservation and conservation of the state's natural resources as public rights and duties. No changes were made as a result of the comment.

One commenter opposed adoption and stated that "the department already has the authority." The department agrees with the comment. No changes were made as a result of the comment.

Six commenters opposed adoption and stated that closure of the areas will result in the redirection and concentration of effort on remaining open reefs, which will result in the degradation of the remaining reefs. The department disagrees with the comments and responds that while closure of harvest areas can redirect fishing effort to areas remaining open for harvest, the areas designated for closure have been degraded to the extent that they no longer support sustainable commercial harvest and need reef restoration. The department also notes that monitoring to detect declining catch rates and other signs of overharvest will continue, and the department will recommend management actions necessary to protect such areas. No changes were made as a result of the comments.

One commenter opposed adoption and stated that oysters provide important ecosystem services. The department agrees with the comment. No changes were made as a result of this comment.

One commenter opposed adoption and stated that oysters are overharvested. The department agrees that oyster abundance on the reefs closed for restoration has declined over time, leading to a need to restore these degraded areas. The department further replies that the "stop light" in-season closure system is designed to allow the department to sustainable manage the fishery by closing reefs quickly once they show signs of being overworked, specifically low abundance of market-sized oysters. A threshold must be met to reopen those reefs. Restoration of reefs, like those included in this rule, will help replenish wild oyster populations. No changes were made as a result of the comment.

One commenter opposed adoption and stated that nature plays a larger role in oyster population health than harvest. The department disagrees with the comment and responds that nature is unpredictable and cannot be controlled by humans; however, when human activity is additive to or responsible for stress on natural systems, it is prudent to take what actions can be taken to minimize the severity of that stress.

The department also notes the existence of ample evidence that dredging negatively impacts oyster reef health. No changes were made as a result of the comments.

One commenter opposed adoption and stated that it is unfair to close the reefs to sportfishing. The department replies that the rule, as proposed, did not contemplate sportfishing and the rule, as adopted, does not affect sportfishing. No changes were made as a result of the comment.

Two commenters opposed adoption and expressed antipathy to private oyster "leases" (i.e. Certificates of Location). The department disagrees that the rule addresses or affects private oyster Certificates of Location. No changes were made as a result of the comments.

The department received 7,040 comments supporting adoption of the rule as proposed.

Prestige Oyster Co. and Miller Seafood Co. opposed adoption of the rule as proposed.

The Coastal Bend Bays and Estuaries Program, Guadalupe Trout Unlimited, Congressional Sportsmen's Foundation, CCA Texas, Texas Chapter of the Wildlife Society, San Antonio Bay Partnership, Pew Charitable Trust, Friends of Rio Grande Valley Reef, Back Country Hunter and Anglers - Texas Chapter, FlatsWorthy, International Crane Foundation, Capt. Tommy Moore Aransas Country Navigation District Commissioner, The Nature Conservancy in Texas, Texas Wildlife Association,

Sierra Club, National Wildlife Federation, Audubon Texas, Plateau Land and Wildlife, Safari Club International - Austin Chapter, Safari Club International - Houston Chapter, Saltwater-Fisheries Enhancement Association, Texas Foundation for Conservation, and

Galveston Bay Foundation supported adoption of the rule as proposed.

The amendment is adopted under the authority of Parks and Wildlife Code, §76.301, which authorizes the commission to regulate the taking, possession, purchase and sale of oysters, including prescribing the times, places, conditions, and means and manner of taking oysters, and §76.115, which authorizes the commission to close an area to the taking of oysters when the commission finds that area is being overworked or damaged or the area is to be reseeded or restocked.

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 22, 2023.

TRD-202301139
James Murphy
General Counsel
Texas Parks and Wildlife Department
Effective date: April 11, 2023
Proposal publication date: September 30, 2022
For further information, please call: (512) 389-4775

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY

37 TAC §4.15

The Texas Department of Public Safety (the department) adopts amendments to §4.15, concerning Compliance Review and Safety Audit Programs. This rule is adopted without changes to the proposed text as published in the February 10, 2023, issue of the *Texas Register* (48 TexReg 643) and will not be republished.

The proposed amendments to §4.15 are necessary to harmonize updates to 49 CFR Part 385 with those laws adopted by Texas. The proposed amendment for §4.15 adds "Compliance Review" in the title, creates a needed separation of Compliance Review (CR) and Safety Audit (SA) in the body of the rule. "On-site" was removed from the CR procedures to accommodate both "on-site" and "off-site" reviews. Additionally, "contractors" was added to the list of those authorized to conduct SA with oversight by the department. These contractors will be supported by a federal grant.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference and §644.155.

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 21, 2023.

TRD-202301125
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
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For further information, please call: (512) 424-5848

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