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

TITLE 1. ADMINISTRATION

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 252. ADMINISTRATION

1 TAC §252.6

The Commission on State Emergency Communications (CSEC) adopts amended §252.6, concerning the administration, including distribution, of wireless and prepaid wireless emergency service fees, without changes to the proposed text as published in the February 15, 2019, issue of the Texas Register (44 TexReg 649).

REASONED JUSTIFICATION

Section 252.6 provides the procedures by which CSEC determines the proportionate amount of wireless emergency services fees remitted under Health and Safety Code §771.0711 and attributable to each Regional Planning Commission (RPC) and Emergency Communication District (ECD); and distributes the proportionate amount to each ECD not participating in the state 9-1-1 program.

Subsection 252.6(a) is amended to reflect the change in name from the State Data Center to the Texas Demographic Center.

Subsection 252.6(b) is amended to make clear that it is the joint responsibility of affected RPCs and ECDs to provide the Commission with agreed adjustments to the proposed population distributions to accurately reflect their 9-1-1 service populations.

Subsection 252.6(d) is amended to authorize Commission staff to request a review and modification of the adopted distribution percentages to account for changes in 9-1-1 service boundaries not reflected in the state demographer's population estimates.

CSEC received no comments on proposed amended §252.6.

STATEMENT OF AUTHORITY

The amendments are adopted pursuant to the Health and Safety Code §§771.051, 771.074, 771.0711(c), 771.0712(a) and 771.078(b)(2).

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

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 28, 2019.
TRD-201900943

CHAPTER 255. FINANCE

1 TAC §255.3

The Commission on State Emergency Communications (CSEC) adopts amended §255.3 concerning CSEC's policy regarding allocation of equalization surcharge (surcharge) funding to an Emergency Communication District not participating in the state 9-1-1 program without changes to the proposed text as published in the February 15, 2019, issue of the Texas Register (44 TexReg 651); therefore, the rule will not be republished.

REASONED JUSTIFICATION

Section 255.3 is amended to correct the name of Emergency Communication District and deletes the plural term "Districts," adds the abbreviation "(ECD)," inserts the term "Regional Planning Commission," and deletes the term "9-1-1" to provide additional clarity. New subsection 255.3(b) is added to make clear the condition precedent for an Emergency Communication District to request equalization surcharge and is to make known its intent in time to be considered for inclusion in CSEC's biennial Legislative Appropriations Request. The condition precedent is waived for an Emergency Communication District's emergency surcharge request. New subsection 255.3(b) reflects that CSEC's 9-1-1 equalization surcharge appropriations are earmarked in the LAR to provide necessary supplemental funding to Regional Planning Commissions and for the CSEC to utilize consistent with its LAR.

PUBLIC COMMENTS AND AGENCY RESPONSE

CSEC received no comments on proposed amended §255.3.

STATEMENT OF AUTHORITY

The amendments are adopted pursuant to Health and Safety Code Chapter 771, §771.072(d) and §771.051.

No other statute, article, 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 28, 2019.
TRD-201900944
The amendments are adopted under the following statutes: Texas Government Code §531.0055 and §531.033, which require the HHSC Executive Commissioner to adopt rules necessary to carry out HHSC’s duties and to provide services; Texas Government Code §531.302(a), which requires the HHSC Executive Commissioner to adopt rules for the state prescription drug program; Texas Government Code §531.021(a) and Texas Human Resources Code §32.021(a), which authorize HHSC to operate the Medicaid program; Texas Human Resources Code §32.021(c), which requires the HHSC Executive Commissioner to adopt rules as necessary to properly and efficiently operate the Medicaid program; and Texas Insurance Code, chapter 1369, subchapter J, which requires a process for adopting medical synchronization plans.

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 26, 2019.

TRD-201900925
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: April 15, 2019
Proposal publication date: December 28, 2018
For further information, please call: (512) 462-6271

DIVISION 4. LIMITATIONS

1 TAC §354.1867

STATUTORY AUTHORITY

The amendments are adopted under the following statutes: Texas Government Code §531.0055 and §531.033, which require the HHSC Executive Commissioner to adopt rules necessary to carry out HHSC’s duties and to provide services; Texas Government Code §531.302(a), which requires the HHSC Executive Commissioner to adopt rules for the state prescription drug program; Texas Government Code §531.021(a) and Texas Human Resources Code §32.021(a), which authorize HHSC to operate the Medicaid program; Texas Human Resources Code §32.021(c), which requires the HHSC Executive Commissioner to adopt rules as necessary to properly and efficiently operate the Medicaid program; and Texas Insurance Code, chapter 1369, subchapter J, which requires a process for adopting medical synchronization plans.

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 26, 2019.

TRD-201900925
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: April 15, 2019
Proposal publication date: December 28, 2018
For further information, please call: (512) 462-6271

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER F. PHARMACY SERVICES

The Texas Health and Human Services Commission (HHSC) adopts amendments to §354.1831, concerning Covered Drugs; §354.1867, concerning Refills; and §354.1921, concerning Addition of Drugs to the Texas Drug Code Index.

The §§354.1831, 354.1867, and 354.1921 are adopted without changes to the proposed text as published in the December 28, 2018, issue of the Texas Register (43 TexReg 8517), and therefore will not be republished.

BACKGROUND AND JUSTIFICATION

The amendments to §354.1867 ensure that the Texas Medicaid fee-for-service program complies with Texas Insurance Code provisions the Texas Legislature adopted in 2017 pertaining to medication synchronization plans for the filling or refilling of multiple prescriptions. See Act of May 23, 2017, 85th Legislature, Regular Session, R.S. §1 (House Bill 1296) (enacting Texas Insurance Code chapter 1369, subchapter J). Consistent with Texas Insurance Code chapter 1369, subchapter J, the amendments allow a Texas Medicaid fee-for-service enrollee with a chronic illness to work with the state, the prescribing provider, and a pharmacist to the refill dates of multiple prescriptions so that the enrollee can pick up filled refills on a single day each month as opposed to having to make multiple pharmacy visits to obtain different prescription medications with different refill dates.

Other amendments reflect the use of a drug’s acquisition cost in calculating reimbursement as required under the Medicaid State Plan and 42 CFR §447.512. The amendments specify that HHSC calculates pharmacy reimbursement for all medications using a drug’s acquisition cost or the usual and customary price charged to the general public.

The amendments also define necessary terms and clarify that a limited set of home health supplies is available through the pharmacy benefit.

COMMENTS

The 30-day comment period ended January 28, 2019.

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

DIVISION 2. ADMINISTRATION

1 TAC §354.1831

STATUTORY AUTHORITY

The amendments are adopted under the following statutes: Texas Government Code §531.0055 and §531.033, which require the HHSC Executive Commissioner to adopt rules necessary to carry out HHSC’s duties and to provide services; Texas Government Code §531.302(a), which requires the HHSC Executive Commissioner to adopt rules for the state prescription drug program; Texas Government Code §531.021(a) and Texas Human Resources Code §32.021(a), which authorize HHSC to operate the Medicaid program; Texas Human Resources Code §32.021(c), which requires the HHSC Executive Commissioner to adopt rules as necessary to properly and efficiently operate the Medicaid program; and Texas Insurance Code, chapter 1369, subchapter J, which requires a process for adopting medical synchronization plans.

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 26, 2019.

TRD-201900925
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: April 15, 2019
Proposal publication date: December 28, 2018
For further information, please call: (512) 462-6271
The amendments are adopted under the following statutes: Texas Government Code §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code §531.021(a) and Texas Human Resources Code §32.021(a), which authorize HHSC to operate the Medicaid program; Texas Human Resources Code §32.021(c), which requires the HHSC Executive Commissioner to adopt rules as necessary to properly and efficiently operate the Medicaid program; and Texas Insurance Code, chapter 1369, subchapter J, which requires a process for adopting medical synchronization plans.

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 26, 2019.

TRD-201900926
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: April 15, 2019
Proposal publication date: December 28, 2018
For further information, please call: (512) 462-6271

CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER J. PURCHASED HEALTH SERVICES
DIVISION 28. PHARMACY SERVICES: REIMBURSEMENT
1 TAC §§355.8541, 355.8548, 355.8551

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.8541, concerning Legend and Non-Legend Medications; §355.8548, concerning 340B Covered Entities; and §355.8551, concerning Professional Dispensing Fee. The §§355.8541, 355.8548, and 355.8551 are adopted without changes to the proposed text as published in the December 28, 2018, issue of the Texas Register (43 TexReg 8521), and therefore will not be republished.

BACKGROUND AND JUSTIFICATION
The amendments align the Medicaid/CHIP Pharmacy rules with the current Medicaid State Plan and 42 CFR §447.512. The amended federal regulations implemented drug reimbursement changes made to the Medicaid Drug Rebate Program by the Affordable Care Act. The amendments do not constitute a change to current pharmacy reimbursement under Medicaid fee-for-service (FFS).

COMMENTS
The 30-day comment period ended January 28, 2019.
During this period, HHSC did not receive any comments regarding the proposed rules.

STANATORY AUTHORITY
The amendments are adopted under the following statutes: Texas Government Code §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code §531.021(a) and Texas Human Resources Code §32.021(a), which authorize HHSC to operate the Medicaid program; Texas Government Code §531.021(b-1), which requires the HHSC Executive Commissioner to adopt rules governing the determination of rates for Medicaid payments; Texas Government Code §531.021(d), which authorizes the HHSC Executive Commissioner to provide for payment of Medicaid rates in accordance with applicable federal law; Texas Government Code §531.033, which provides the HHSC Executive Commissioner with broad authority to adopt rules as necessary to properly and efficiently operate the Medicaid program.

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 26, 2019.

TRD-201900927
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: April 15, 2019
Proposal publication date: December 28, 2018
For further information, please call: (512) 462-6271

CHAPTER 392. PURCHASE OF GOODS AND SERVICES FOR SPECIFIC HEALTH AND HUMAN SERVICES COMMISSION PROGRAMS
SUBCHAPTER E. CONTRACT MANAGEMENT FOR DSHS FACILITIES AND CENTRAL OFFICE
1 TAC §392.411

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §392.411, concerning Award of Construction Contracts in Title 1, Part 15, Chapter 392, Subchapter E of the Texas Administrative Code (TAC). The repeal is adopted without changes to the proposed text as published in the January 11, 2019, issue of the Texas Register (44 TexReg 174), and, therefore, will not be republished.

BACKGROUND AND JUSTIFICATION
Texas Health and Safety Code, §551.007, requires the HHSC Executive Commissioner to design, construct, equip, furnish,
and maintain buildings and improvements authorized by law at facilities under HHSC's jurisdiction. Texas Government Code, §531.0055(e), (f)(4), and (j), also task the Executive Commissioner with the administrative duties of contracting and purchasing and adopting rules necessary to implement these duties. TAC §392.411 requires HHSC to give notice of its intent to award a construction contract by publishing an invitation for bids (IFB) notice twice in two newspapers of general circulation.

The repeal of TAC §392.411 will allow posting of construction contracts on the Electronic State Business Daily and through the use of plan rooms according to state statute. Texas Government Code, Chapter 2269, governs the various procurement methods available for construction contracts. The current administrative rule restricts the procurement method to only one type, and an IFB is not always the most appropriate procurement method for construction contracts. HHSC should determine the proper procurement method on a case-by-case basis pursuant to Chapter 2269 in order to best meet the business objective and project goals of each procurement. Therefore, HHSC determined that the repeal of §392.411 is necessary to enable the procurement of construction contracts in the most fiscally sound and statutorily compliant manner possible.

COMMENTS

The 30-day comment period ended February 10, 2019. During the comment period, HHSC received one comment from the Texas Press Association against the rule repeal.

Comment: The Texas Press Association stated that repeal of the rule would eliminate needed public notice requirements and would allow HHSC to decide the amount and type of notice required with no oversight regarding the decision.

Response: HHSC declines to make the requested change to the proposed repeal of §392.411. The Texas Press Association's concerns are unwarranted and fail to take into account existing state statutes. HHSC is required to follow state procurement laws regarding the public posting of procurement opportunities as well as the requirements of Texas Government Code Chapter 2269 concerning the contracting and delivery procedures for construction projects. Repealing the administrative rule will not prevent HHSC from publishing notice in a newspaper if the notice is deemed appropriate. However, HHSC will not be required to do so if it determines the statutorily mandated notice is sufficient.

STATUTORY AUTHORITY

The rule repeal is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority.

The rule repeal affects Government Code §531.0055(f)(4), which provides the Executive Commissioner with authority to contract for the Health and Human Services System, and Health and Safety Code §551.007, which requires the Executive Commissioner to build, furnish, and maintain buildings.

The rule repeal is consistent with Government Code §531.00553 and Government Code Chapter 2269.

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 April 1, 2019.

TRD-201900972
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: April 21, 2019
Proposal publication date: January 11, 2019
For further information, please call: (512) 406-2451

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 24. FOOD DISTRIBUTION AND PROCESSING

The Texas Department of Agriculture (Department) adopts the repeal of Title 4, Part 1, Chapter 24, Subchapter A, Food Distribution Program, §§24.101 - 24.122; Subchapter B, The Texas Commodity Assistance Program (TEXCAP), §§24.601 - 24.611; and Subchapter C, Commodity Supplemental Food Program, §§24.701 - 24.715, without changes to the proposal published in October 12, 2018, issue of the Texas Register (43 TexReg 6726). Chapter 24 is adopted for repeal to eliminate outdated references to the Department of Human Services, the previous administrator of the Food Distribution Program, and reiterations of Federal statutes, thus simplifying the rules and reducing confusion to the public and program participants.

The Department did not receive any comments on the proposed repeal in the October 12, 2018, issue of the Texas Register (43 TexReg 6726).

Concurrently at the time of this adoption, new Title 4, Part 1, Chapter 26, Subchapter D, relating to The Emergency Food Assistant Program (TEFAP), has been filed for adoption. The new adopted rules for TEFAP in Chapter 26 are adopted to replace existing outdated rules in Chapter 24 for TEXCAP.

SUBCHAPTER A. FOOD DISTRIBUTION PROGRAM

4 TAC §§24.101 - 24.122

This repeal is adopted under §12.0025 of the Texas Agriculture Code (Code), which authorizes the Department to adopt rules as necessary to administer the Food Distribution Program and the Commodity Supplemental Food Program, as well as §12.016, which authorizes the Department to adopt rules as necessary for the administration of its powers and duties under the Code.

The code affected by the adoption is Chapter 12 of the Texas Agriculture Code.

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 26, 2019.

TRD-201900909

44 TexReg 1838 April 12, 2019 Texas Register
SUBCHAPTER B. THE TEXAS COMMODITY ASSISTANCE PROGRAM (TEXCAP)

4 TAC §§24.601 - 24.611

This repeal is adopted under §12.0025 of the Texas Agriculture Code (Code), which authorizes the Department to adopt rules as necessary to administer the Food Distribution Program and the Commodity Supplemental Food Program, as well as §12.016, Code which authorizes the Department to adopt rules as necessary for the administration of its powers and duties under the Code.

The code affected by the adoption is Chapter 12 of the Texas Agriculture Code.

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 26, 2019.

TRD-201900910

Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Effective date: April 15, 2019
Proposal publication date: October 12, 2018
For further information, please call: (512) 463-4075

SUBCHAPTER C. COMMODITY SUPPLEMENTAL FOOD PROGRAM

4 TAC §§24.701 - 24.715

This repeal is adopted under §12.0025 of the Texas Agriculture Code (Code), which authorizes the Department to adopt rules as necessary to administer the Food Distribution Program and the Commodity Supplemental Food Program, as well as §12.016, Code which authorizes the Department to adopt rules as necessary for the administration of its powers and duties under the Code.

The code affected by the adoption is Chapter 12 of the Texas Agriculture Code.

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 26, 2019.

TRD-201900911

CHAPTER 26. FOOD AND NUTRITION DIVISION

SUBCHAPTER D. THE EMERGENCY FOOD ASSISTANCE PROGRAM (TEFAP)

4 TAC §§26.101 - 26.112

The Texas Department of Agriculture (Department) adopts new Title 4, Part 1, Chapter 26, Subchapter D, The Emergency Food Assistance Program (TEFAP), §§26.101 - 26.112, with changes to the proposal published in the October 26, 2018, issue of the Texas Register (43 TexReg 7021) therefore the rules will be republished. The adopted rules replace current program rules set forth for the Texas Commodity Assistance Program (TEXCAP), Chapter 24, Subchapter B, §§24.101 - 24.122, which have contemporaneously been adopted for repeal at the time of this submission.

The adopted new rules enable the Department to administer TEFAP in strict accordance with the provisions of Title 7, Part 250 of the Code of Federal Regulations (CFR), pertaining to Donation of Foods for Use in the United States, Its Territories and Possessions and Areas Under Its Jurisdiction, and 7 CFR Part 251, pertaining to The Emergency Food Assistance Program. The adopted rules remove outdated references and duplicative rules which were previously included in TEXCAP, Subchapter B, Chapter 24 of the Administrative Code.

The Department did not receive any comments on the proposal.

This adoption is made under §12.0025 of the Texas Agriculture Code (Code), which authorizes the Department to adopt rules as necessary to administer The Emergency Food Assistance Program, as well as §12.016, which authorizes the Department to adopt rules as necessary for the administration of its powers and duties under the Code.

The code affected by the adoption is Chapter 12 of the Texas Agriculture Code.

§26.101. Authority and Purpose.

(a) Authority. Pursuant to an agreement with the USDA, the TDA administers TEFAP for the state of Texas, in accordance with 7 CFR Part 250, 7 CFR Part 251, and 2 CFR Part 200, as applicable.

(b) Purpose. The purpose of TEFAP is to serve congregate meals and to distribute food to eligible households.

§26.102. Terms and Definitions.

In addition to terms and definitions set out in 7 CFR Parts 250 and 251, and 2 CFR Part 200, the following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise. In the event of a conflict between a definition in this section and TDA guidance, the definition in this section shall prevail. In the event of a conflict between a definition in this section and federal law, the provisions of federal law, whether statute, regulation or guidance, shall prevail.

(1) Allocation--A process of designating entitlement.
(2) CFR--Code of Federal Regulations.

(3) Compliance review--A review conducted by TDA of a CE or its sub-distributing agencies; or a review of a sub-distributing agency conducted by a CE.

(4) Congregate meal--A meal prepared with USDA Foods and provided to persons who gather in a congregate setting to participate.

(5) Congregate setting--A place where people gather to receive meals prepared with USDA Foods.

(6) Contracting entity (CE)--An entity that holds a TEFAP agreement with TDA.

(7) Corrective action plan (CAP)--A plan developed by a CE or sub-agency to correct deficiencies or noncompliance findings related to the receipt and use of USDA Foods.

(8) Emergency feeding organization (EFO)--A public or private, nonprofit organization that provides nutrition assistance to relieve situations of emergency and distress through the provision of food to eligible persons.

(9) House--An individual or group of related or unrelated individuals (excluding boarders and residents of institutions) who live together as a single economic unit and customarily purchase and prepare food in common.

(10) ID--Identification.

(11) Letter of Credit amount--The reimbursement limit during the contract year.

(12) Participant--A person that participates in TEFAP.

(13) Policy--Applicable federal and state statutes, regulations and other laws, along with written instructions, guidance, handbooks, manuals, and other documents issued by USDA or TDA to clarify or explain existing laws and regulations. TDA may communicate TEFAP policy by the TEFAP Handbook; email; forms and form instructions; reference in contract; and any other type of communication. TDA may implement policy changes prior to amending state rules, as required by federal laws and regulations, or as needed to implement federal or state laws and regulations.

(14) Recipient--A person or household receiving USDA Foods.

(15) Service area--The specific geographical area served by a single TEFAP CE. Service areas are determined, at TDA's discretion, by predefined areas within the state, including, but not limited to, the following: county or counties; zip codes; or neighborhoods.

(16) Site--a location that holds a TEFAP agreement with either a CE or a sub-distributing agency.

(17) Sub-agency--The collective term for sub-distributing agencies and sites.

(18) Sub-distributing agency--An entity that holds a TEFAP agreement with a CE and a site.

(19) TDA--Texas Department of Agriculture.

(20) TEFAP--The Emergency Food Assistance Program.

(21) USDA--United States Department of Agriculture.

§26.103. Agreements.

If a CE fails to comply with the terms or conditions of its USDA Foods Agreement Between Contracting Entity and Texas Department of Agriculture, TDA may:

(1) Immediately terminate or suspend the agreement; and/or

(2) Modify the terms of any agreement to ensure the availability of USDA Foods to eligible groups in all areas (including areas where poor economic conditions exist), and in a manner equitable to CEs.

§26.104. Selection of Contracting Entities.

(a) Selection criteria. CEs shall be selected for participation in TEFAP based on the following criteria:

(1) The organization's geographic location;

(2) The number of eligible persons who live in the organization's service area, as identified by poverty, unemployment, or other statistics;

(3) The organization's food storage capacity;

(4) The organization's ability to receive, handle, safeguard, and distribute large volumes of product;

(5) The organization's ability to effectively and efficiently distribute USDA Foods throughout its service area with or without access to limited federal funds earmarked to reimburse certain allowable administrative costs;

(6) The organization's ability and willingness to submit financial statements, reports, or other information requested or required by TDA;

(7) The organization's access to donated food and funds from sources other than USDA;

(8) The organization's willingness to supplement USDA Foods with non-USDA Foods and provide both to eligible sub-agencies;

(9) The organization's existing food distribution channels;

(10) The organization's activity in developing, or assisting other entities to develop, distribution or feeding sites to ensure service to all parts of its service areas;

(11) The organization's connection to and level of cooperation with organizations that have similar operations and goals, including a goal to ensure the availability of food assistance in all areas of the state;

(12) The organization's ability and willingness to network with and distribute USDA Foods to other food providers;

(13) The organization's willingness and capacity to accomplish the following:

(A) Serve all participants through CE services and/or through sub-agency services;

(B) Handle program administration, distribution, record maintenance, and eligibility determinations; and

(C) Comply with all program requirements as required by policy and guidance from TDA and USDA;

(14) The organization's total caseload based on services provided to a specific recipient group within any service area; and

(15) The organization's agreement that providing false or fraudulent information in conjunction with an application for participation is subject to penalties.

(b) EFO agreements. TDA reserves the right to make agreements with any type of EFO to ensure program access.

(a) Advertise. CEs must advertise distributions of USDA Foods using methods including, but not limited to, the following:

(1) The media (internet, TV, radio, and newspapers);
(2) Civic and religious organizations;
(3) City and county governments; and
(4) Social service organizations.

(b) Public information notices. CEs must ensure that sites notify the public of the locations, days and hours of distribution.

(c) Eligibility determination. Household eligibility determinations must be made by a CE or sub-agency based on requirements set forth in §26.106 of this title (relating to Eligibility Criteria for Households).

(d) Confidentiality. CEs must protect confidential participant information as required by federal and state statute.

(e) Shared maintenance. CEs may charge fees that are allowed by TDA for shared maintenance.

(f) Availability of records. CEs must make records available to TDA upon request. Such records shall include CE findings concerning or relating to sub-agencies.

(g) Agreements. CEs may terminate or suspend agreements, or take other appropriate action, for sub-agencies’ noncompliance.


Only TDA and USDA can establish eligibility criteria. CEs shall only determine eligibility based on paragraphs (1) through (4) of this subsection.

(1) Household eligibility. CEs must determine household eligibility at least annually based on eligibility criteria.

(A) Income. Except as otherwise specified, the applicant household’s gross yearly or monthly income (before deductions) in relation to household size must not exceed 185% of the federal poverty guidelines.

(B) Crisis food assistance. An applicant household whose income exceeds 185% of the federal poverty guidelines and that has incurred the costs of a household crisis may be eligible for crisis food assistance.

(C) Categorical eligibility. An applicant household is automatically (categorically) eligible for USDA Foods if it currently receives assistance from one of the following programs: Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), or non-institutional Medicaid benefits.

(2) Residency for Households. At the time of application, households are required to reside within the service area, but not for any specific length of time.

(A) CEs and sub-agencies may ask for, but must not require, participants to provide proof of residency. CEs and sub-agencies must provide USDA Foods to all participants even if they cannot or will not provide proof of residency. CEs and sub-agencies must clarify the following points to applicants and participants:

(i) The inability or unwillingness to provide proof of residency is not a barrier to participation.

(ii) Participants will receive USDA Foods without proof of residency.

(B) A CE may make exceptions for the service area.

(3) Identity for Households.

(A) CEs and sub-agencies may request but must not require any applicant or participant to provide proof of ID.

(B) CEs and sub-agencies must provide USDA Foods to all participants even if they cannot or will not provide ID. CEs and sub-agencies are required to ensure that applicants and participants understand the following:

(i) The inability or unwillingness to provide proof of ID shall not prevent participation.

(ii) Participants will receive USDA Foods, regardless of failure to provide proof of ID.

(4) Citizenship. There are no citizenship requirements. CEs and sub-agencies must not require any applicant or participant to prove citizenship through any means whatsoever.


(a) Any person has a right to request and to receive a congregate meal containing USDA Foods.

(b) There are no residency requirements for receipt of congregate meals, and CEs and sub-agencies shall not impose residency requirements.

(c) CEs and sub-agencies shall not request proof of ID from participants for congregate meals.

(d) There are no eligibility requirements for receipt of congregate meals, and CEs and sub-agencies shall not impose eligibility requirements.

(e) There are no citizenship requirements. CEs and sub-agencies shall not require any applicant or participant to prove citizenship through any means whatsoever.


(a) Allocation to CEs. TDA uses a "60/40" formula to allocate entitlement to CEs. The formula is based 60% on the number of persons in a county who have incomes at or below the official poverty line, and 40% on the number of unemployed persons.

(1) TDA has the discretion to allocate entitlement by another method, such as according to historical or projected usage rates (the number of meals and/or households served).

(2) TDA may reserve an amount of administrative funds, as necessary, to add new CEs during a contract year.

(3) TDA determines service areas and allocates USDA Foods to CEs that serve within each service area.

(4) TDA reserves the right to contract with and allocate entitlement to any type of EFO to ensure the availability of TEFAP to all persons and households according to service areas.

(b) Allocation to sub-agencies. CEs’ allocations to eligible sub-agencies are subject to TDA’s review and approval. CEs must allocate a share of USDA Foods to sub-agencies according to the priorities specified by agreements.

(c) Distribution to recipients. Sub-agencies’ distribution times and methods are subject to TDA or a CE’s review and approval.

(1) Sub-agencies must distribute foods at least monthly unless TDA grants an exception to the sub-agency to provide distribution less frequently.
(2) TDA recommends distribution on a first come, first served basis.

(d) Distribution quantities. A CE or sub-agency may determine the quantity of USDA Foods to be included in congregate meals and in household distribution. The quantity provided to each participant is subject to TDA or a CE's review and approval.

(1) Congregate meals. The quantity of USDA Foods in congregate meals is based on the following considerations:
   (A) Available resources;
   (B) The days and hours of operation;
   (C) The number of people requesting meals;
   (D) The customary size of food portions served to adults or to categories of people with special nutritional needs; and
   (E) Other factors.

(2) Households. The quantity of USDA Foods in food packages is based on the following considerations:
   (A) Available resources;
   (B) The days and hours of operation;
   (C) The number of households requesting USDA Foods;
   (D) Household size; and
   (E) Other factors.


(a) The actual reimbursement rate or reimbursement amount depends on the amount of available administrative funds and the allocation method used.

(b) TDA will notify CEs of any changes to the allocation and/or the reimbursement rate or amount.

(c) To the extent that administrative funds are available, TDA will reimburse CEs their allowable costs up to Letter of Credit amounts.

(d) CEs must submit monthly reimbursement claims, including all allowable costs of distributing USDA Foods and other donated foods.

(e) At the end of each contract year, TDA will reallocate any uncommitted administrative funds, first to reimburse any remaining costs of distributing USDA Foods, and second to reimburse the costs of distributing non-USDA Foods.

(1) Before reallocation, TDA may notify CEs of a cutoff date after which TDA will not reimburse monthly claims.

(2) A cutoff date enables TDA to reallocate administrative funds which were not committed during the contract year.

(f) Shared maintenance fees are not an allowable administrative cost.

(1) CEs may directly charge sub-agencies their usual and customary shared maintenance fees.

(2) At its discretion, TDA can require CEs to reduce or waive shared maintenance fees.

(g) To the extent authorized by law, TDA may change policy regarding the costs associated with distributing USDA Foods as necessary to ensure the equitable distribution of USDA Foods. Prior to making any policy change, TDA will consult with the affected CEs and other stakeholders.


CEs are subject to the audit requirements specified in federal regulations.


(a) TDA may amend or modify a CAP based on new information, changes in circumstances, and the CE's progress in CAP implementation.

(b) A CE may amend or modify a sub-agency's CAP based on new information, changes in circumstances, or in CAP implementation.

(c) TDA may extend due dates of completion for CEs that have made good faith efforts, as defined by TDA, to correct deficiencies or to comply with requirements.

(d) A CE may extend the time frames for a sub-agency to implement a CAP based on the sub-agency's good faith efforts, as defined by the CE, to correct deficiencies or to comply with program requirements.


(a) TDA shall conduct compliance reviews of CEs and sub-agencies as it deems necessary.

(b) TDA maintains the right to review a CE's procurement and other program related documents at any time, upon request. Failure to provide any required documents shall result in findings.

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 26, 2019.

TRD-201900912

Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture

Effective date: April 15, 2019

Proposal publication date: October 26, 2018

For further information, please call: (512) 463-4075

◆◆◆◆

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 8. PROJECT RENTAL ASSISTANCE PROGRAM RULE

10 TAC §8.7

The Texas Department of Housing and Community Affairs (the Department) adopts the amendment of 10 TAC Chapter 8, Project Rental Assistance Program Rule, §8.7 Program Regulations and Requirements with changes to the proposed text as published in the December 21, 2018, issue of the Texas Register (43 TexReg 8197). The purpose of amendment is to provide greater clarity to property owners participating in the 811 Program Rental Assistance Program on the Department's response process when notified of a vacant unit by the property.

Tex. Gov't Code §2001.0045(b), does apply to the rule being adopted and no exceptions are applicable. However, the rule already exists and the only amendment to the rule provides greater
specificity for how the Department will respond when a participating property owner notifies the Department of an available unit. There are no costs associated with this rule, therefore no costs or impacts warrant a need to be offset.

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


1. Mr. David Cervantes, Acting Director, has determined that, for the first five years the amendment would be in effect, the amendment does not create or eliminate a government program, but relates to a limited revision providing improved clarity in the administration of the Section 811 Project Rental Assistance Program (Section 811 PRA).

2. The amendment does not require a change in work that would require the creation of new employee positions, nor is the amendment significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The amendment does not require additional future legislative appropriations.

4. The amendment does not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The amendment is not creating a new regulation.

6. The action will amend an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity of the rules governing the administration of the Section 811 PRA Program.

7. The amendment will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The amendment will not negatively nor positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department has evaluated this amendment and determined that the amendment will not create an economic effect on small or micro-businesses or rural communities.

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

2. This rule relates to the Department ensuring that Owners of Eligible Multifamily Properties have assurance that they are able to maintain occupancy of their Developments while participating in the Section 811 PRA Program. Other than an Owner who may be considered to be a small or micro-business, which would not generally be the case, no small or micro-businesses are subject to the rule. However, if an Owner considers itself a small or micro-business, this rule provides greater assurance that their Development's occupancy will not be disrupted by their participation in the Section 811 PRA Program.

3. The Department has determined that because the rule applies only to Owners that have made a commitment to the Department under other Multifamily Programs, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The amendment does not contem-
Except as described herein the amendment affects no other code, article, or statute.

§8.7. Program Regulations and Requirements.

(a) Participation in the 811 PRA Program is encouraged and incentivized through the Department's Multifamily Rules. Once committed in the Multifamily Application, a Development must not accept a fund source that would prevent it from participating in the 811 PRA Program.

(b) An Existing Development that is already participating in the 811 PRA Program is eligible to have an additional commitment of 811 PRA Units as long as the integrated housing requirements as noted in §8.3(c) of this chapter (relating to Participation as a Proposed Development) are not violated.

(c) The types (e.g., accessible, one bedroom, first floor, etc.) and the specific number of Assisted Units (e.g., units 101, 201, etc.) will be "floating" (flexible) and dependent on the needs of the Department and the availability of the Assisted Units on the Eligible Multifamily Property.

(d) Occupancy Requirements. Owner is required to follow all applicable Program Requirements including but not limited to the following occupancy requirements found in HUD Handbook 4350.3 REV-1 and Housing Notices:

1. H 2012-06, Enterprise Income Verification (EIV) System;
2. H 2012-26, Extension of Housing Notice 2011-25, Enterprise Income Verification (EIV) & You Brochure-Requirements for Distribution and Use;
3. H 2012-22, Further Encouragement for O/As to Adopt Optional Smoke-Free Housing Policies;
4. H 2012-11, State Registered Lifetime Sex Offenders in Federally Assisted Housing;
5. H 2012-09, Supplemental Information to Application for Assistance Regarding Identification of Family Member, Friend or Other Persons or Organization Supportive of a Tenant for Occupancy in HUD Assisted Housing; or

(e) Use Agreements. The Owner must execute the Use Agreement, as found in Exhibit 10 of the Cooperative Agreement, before the execution of the RAC and comply with the following:

1. Use Agreement should be properly recorded according to local laws in the official public records on the Eligible Multifamily Property. The Owner shall provide to TDHCA within 30 days of its receipt of the recorded Use Agreement, a copy of the executed, recorded Use Agreement.
2. From the date the Property Agreement is entered into, the Owner shall not enter into any future use agreements or other subsidy programs that would diminish the number of Assisted Units that can be placed on the Eligible Multifamily Property.
3. TDHCA will enforce the provisions of the Use Agreement and RAC consistent with HUD's internal control and fraud monitoring requirements.
4. Tenant Certifications, Reporting and Compliance.

1. TRACS & EIV Systems. The Owner shall have appropriate software to access the Tenant Rental Assistance Certification System (TRACS) and the EIV System. The Owner shall be responsible for ensuring Program information is entered into these systems. TRACS is the only system by which an Eligible Multifamily Property can request Project Rental Assistance payments.
2. Outside Vendors. The Owner has the right to refuse assistance from outside vendors hired by TDHCA, but is still required to satisfy the Program Requirements.
3. Tenant Certification. The Owner shall transmit Eligible Tenant's certification and recertification data, transmit voucher data, and communicate errors electronically in a form consistent with HUD reporting requirements for HUD Secure Systems.
4. Tenant Selection and Screening.

1. Target Population. TDHCA will screen Eligible Applicants for compliance with TDHCA's Program Target Population criteria and do an initial screening for Program Requirements. The Inter-Agency Partnership Agreement describes the specific Target Population eligible for TDHCA's Program. The Target Population may be revised, with HUD approval.
2. Tenant Selection Plan. Upon the execution of the Participation Agreement, the Owner will submit the Eligible Multifamily Property's Tenant Selection Criteria, as defined by and in accordance with 10 TAC §10.610 (relating to Written Policies and Procedures), to TDHCA for approval. TDHCA will review the Tenant Selection Plan for compliance with existing Tenant Selection Criteria requirements, and consistent with TDHCA's Section 811 PRA Participant Selection Plan.
3. Tenant Eligibility and Selection. The Owner is responsible for ultimate eligibility and selection of an Eligible Tenant and will comply with the following:

A. The Owner must accept referrals of an Eligible Tenant from TDHCA and retain copies of all applications received. The Owner is responsible for notifying the prospective Eligible Tenant and TDHCA in writing regarding any denial of a prospective Eligible Tenant's application to an Eligible Multifamily Property and the reason for said denial. In the notice of denial, the Owner is responsible for notifying the Eligible Tenant of the right to dispute a denial, as outlined in HUD Handbook 4350.3. The results of the dispute must be sent to the Eligible Tenant and TDHCA in writing.
B. The Owner is responsible for determining age of the qualifying member of the Eligible Families. Eligible Family member must be at least 18 years of age and under the age of 62.
C. The Owner is responsible for criminal background screening as required by HUD Handbook 4350.3.
D. Verification of Income. The Owner is responsible for determining income of Eligible Families. The Owner shall verify income through the Enterprise Income Verification (EIV) System. The Owner must certify an Eligible Tenant and Eligible Families at least annually and verify their income. If the household is also designated under the Housing Tax Credit or other Department administered program, the Owner must obtain third party, or first hand, verification of income in addition to using the EIV system.

(h) Rental Assistance Contracts.

1. Applicability. If requested by TDHCA, the Owner shall enter into a RAC. Not all properties with an Owner Participation Agreement will have a RAC, but when notified by TDHCA, the Eligible Multifamily Property must enter into a RAC(s) and begin serving Eligible Applicants.

44 TexReg 1844 April 12, 2019 Texas Register
(2) Notice. TDHCA will provide written notice to the owner if and when it intends to enter into a RAC with the owner.

(3) Assisted Units. TDHCA will determine the number of units (up to the maximum listed in the Property Agreement) to place in the RAC(s) which may be fewer than the number of units identified in the Property Agreement.

(4) TDHCA will designate the bedroom composition of the Assisted Units, as required by the RAC. However, based on an actual Eligible Tenant, this may fluctuate. It is possible that an Eligible Multifamily Property will have a RAC for fewer units than the number committed in the Participation Agreement.

(5) If no additional applicants are referred to the property, the RAC may be reduced to the number of Assisted Units. Owners who have an executed RAC, must continue to notify TDHCA of any vacancies for units not under a RAC if additional units were committed under the Agreement. For instance, if the Owner has committed 10 units under the Agreement and has a RAC for five Assisted Units, the Owner must continue to notify TDHCA of all vacancies until there is a RAC for 10 Assisted Units.

(6) Amendments. The Owner agrees to amend the RAC(s) upon request of TDHCA. Some examples are amendments that may either increase or decrease the total number of Assisted Units or increase or decrease the associated bedroom sizes; multiple amendments to the RAC may occur over time. The total number of Assisted Units in the RAC will not exceed the number of Assisted Units committed in the Participation Agreement, unless by request of the Owner.

(7) Contract Term. TDHCA will specify the effective date of the RAC. During the first year of the RAC, the Owner may request the anniversaried date of the RAC with existing federal or state housing programs layered on the Eligible Multifamily Property.

(8) Rent Increase. Owners must submit a written request to TDHCA 30 days prior to the anniversary date of the RAC to request an annual increase.

(9) Utility Allowance. The RAC will identify the TDHCA approved Utility Allowance being used for the Assisted Units for the Eligible Multifamily Property. The Owner must notify TDHCA if there are changes to the Utility Allowance calculation methodology being used.

(10) Termination. Although TDHCA has discretion to terminate a RAC due to good cause, an owner cannot opt-out of a RAC. The RAC survives a foreclosure, assignment, sale in lieu of foreclosure, or sale of the Eligible Multifamily Property to the extent allowed by law.

(11) Foreclosure of Eligible Multifamily Property. Upon foreclosure, assignment, sale in lieu of foreclosure, or sale of the Eligible Multifamily Property to the extent allowed by law:

(A) The RAC shall be transferred to new owner by contractual agreement or by the new owner's consent to comply with the RAC, as applicable;

(B) Rental Assistance Payments will continue uninterrupted in accordance with the terms of the RAC; and

(C) Voluntary and involuntary transfers or conveyances of property must adhere to the ownership transfer process in 10 TAC §10.406, as amended. Regarding Ownership Transfer requests.

(i) Advertising and Affirmative Marketing.

(1) Advertising Materials. Upon the execution of the Property Agreement, the owner must provide materials for the purpose of advertising the Eligible Multifamily Property, including but not limited to:

(A) Depictions of the units including floor plans;

(B) Brochures;

(C) Tenant selection criteria;

(D) House rules;

(E) Number and size of available units;

(F) Number of units with accessible features (including, but not limited to units designed to meet Uniform Federal Accessibility Standards, the Fair Housing Act, or the Americans with Disabilities Act);

(G) Documentation on access to transportation and commercial facilities; and

(H) A description of on-site amenities.

(2) Affirmative Marketing. TDHCA and its service partners will be responsible for affirmatively marketing the Program to Eligible Applicants.

(3) At any time, TDHCA may choose to advertise the Eligible Multifamily Property, even if the Eligible Multifamily Property has not yet entered into a RAC.

(j) Leasing Activities.

(1) Segregation of Assisted Units. The Owner must take actions or adopt procedures to ensure that the Assisted Units are not segregated to one area of a building (such as on a particular floor or part of a floor in a building) or in certain sections within the Eligible Multifamily Property.

(2) Form of Lease. The Owner will use the HUD Section 811 PRA Model Lease (HUD-92236-PRA), Exhibit 11 of the Cooperative Agreement and any Department approved Addendums, for all Eligible Families once a RAC is signed. The initial lease will be for not less than one year.

(3) Communication. Owners are required to document in writing all communication between the Eligible Tenant and the Owner, or Owner-designated agent regarding applications, notifications, evictions, complaints, non-renewals and move outs.

(4) Lease Renewals and Changes. The Owner must notify TDHCA of renewals of leases with Eligible Families and any changes to the terms of the lease.

(k) Rent.

(1) Tenant Rent Payment. The Owner is responsible for remitting any Tenant Rent payment due to the Eligible Tenant if the Utility Allowance exceeds the Total Tenant Payment. The Owner will determine the Tenant Rent payment of the Eligible Tenant, based on HUD Handbook 4350.3, and is responsible for collecting the Tenant Rent payment.

(2) Rent Increase. Owner must provide the Eligible Tenant with at least 30 days notice before increasing rent.

(3) Rent Restrictions. Owner will comply with the following rent restrictions:

(A) If the Development has a TDHCA enforced rent restriction that is equal to or lower than Fair Market Rent (FMR), the
initial rent is the maximum TDHCA enforced rent restriction at the Development.

(B) If there is no existing TDHCA enforced rent restriction on the Unit, or the existing TDHCA enforced rent restriction is higher than FMR, TDHCA will work with the Owner to conduct a market analysis of the Eligible Multifamily Property to support that a rent higher than FMR is attainable.

(C) After the signing of the original RAC with TDHCA, the Owner may request a new anniversary date to be consistent with other rent restrictions on the Eligible Multifamily Property allowed by TDHCA.

(D) After the signing of the original RAC, upon request from the Owner to TDHCA, Rents may be adjusted on the anniversary date of the RAC.

(E) Adjustments may not result in higher rents charged for an Assisted Unit as compared to a non-assisted unit. The calculation or methodology used for the annual increase amount will be identified in the Eligible Multifamily Property's RAC.

(F) Owner can submit a request for a rent increase or to change the contract anniversary date using HUD Form 92458.

(i) Vacancy; Transfers; Eviction; Household Changes.

(1) Holding Assisted Units. Once an Owner signs a RAC, the Eligible Multifamily Property must hold an available Assisted Unit for 60 days while a qualified Eligible Applicant applies for and moves into the Assisted Unit.

(2) Notification. Owner will notify TDHCA of determination of ineligibility or the termination of any participating Eligible Families or any member of a participating Eligible Family.

(3) Initial Lease-up. Owners of newly constructed, acquired and/or rehabilitated Eligible Multifamily Property must notify TDHCA no later than 180 days before the Eligible Multifamily Property will be available for initial move-in.

(4) Vacancy. Once a RAC is executed, the Owner must notify TDHCA of the vacancy of any Unit, including those that have not previously been occupied by an Eligible Tenant, as soon as possible, not to exceed seven calendar days from when the Owner learns that an Assisted Unit will become available. TDHCA will acknowledge receipt of the notice by responding to the Owner in writing within three business days from when the notice is received by the Department stating whether or not TDHCA will be accepting the available Unit, and making a subsequent referral for the Unit. If the qualifying Eligible Tenant vacates the Assisted Unit, TDHCA will determine if the remaining family members are eligible for continued assistance from the Program.

(5) Vacancy Payment. An Owner of an Eligible Multifamily Property that is not under a RAC may not receive a vacancy payment. TDHCA may make vacancy payments not to exceed 80% of the Contract Rent, during this time to the Eligible Multifamily Property, potentially for up to 60 days. After 60 days, the Owner may lease that Assisted Unit to a non-Eligible Tenant.

(6) Household Changes; Transfers. Owners must notify TDHCA if the Eligible Tenant requests an Assisted Unit transfer. Owner will notify TDHCA of any household changes in an Assisted Unit within three business days. If the Owner determines that, because of a change in household size, an Assisted Unit is smaller than appropriate for the Eligible Tenant to which it is leased or that the Assisted Unit is larger than appropriate, the Owner shall refer to TDHCA's written policies regarding family size, unit transfers, and waitlist management. If the household is determined by TDHCA to no longer be eligible, TDHCA will notify the Owner. Rental Assistance Payments with respect to the Assisted Unit will not be reduced or terminated until the eligible household has been transferred to an appropriately sized Assisted Unit.

(7) Eviction and Nonrenewal. Owners are required to notify the Department by sending a copy of the applicable notice via email to the 811 TDHCA Point of Contact, as identified in the Owner Participation Agreement, at least three calendar days before providing a Notice to Vacate or a Notice of Nonrenewal to the Tenant.

(m) Construction Standards, Accessibility, Inspections and Monitoring.

(1) Construction Standards. Upon execution of a RAC, the Eligible Multifamily Property shall be required to conform to Uniform Physical Conditions Standards (UPCS) which are uniform national standards established by HUD for housing that is decent, safe, sanitary, and in good repair. The site, building exterior, building systems, dwelling units and common areas of the Eligible Multifamily Property, as more specifically described in 24 CFR §5.703, must be inspected in any physical inspection of the property.

(2) Inspection. Prior to occupancy, the Eligible Tenant must be given the opportunity to be present for the move-in unit inspection.

(3) Repair and Maintenance. Owner will perform all repair and maintenance functions, including ordinary and extraordinary maintenance; will replace capital items; and will maintain the premises and equipment, appurtenant thereto, in good repair, safe and sanitary condition consistent with HUD and TDHCA requirements.

(4) Accessibility. Owner must ensure that the Eligible Multifamily Property will meet or exceed the accessibility requirements under 24 CFR Part 8, which implements Section 504 of the Rehabilitation Act of 1973; the Fair Housing Act Design Manual; Titles II and III of the Americans with Disabilities Act (42 U.S.C. §§12131 - 12189), as implemented by the U.S. Department of Justice regulations at 28 CFR Parts 35 and 36; and the Federal Fair Housing Act as implemented by HUD at 24 CFR Part 100. However, Assisted Units can consist of a mix of accessible units for those persons with physical disabilities and non-accessible units for those persons without physical disabilities.

(n) Owner Training. The Owner is obligated to train all property management staff on the requirements of the Program. The Owner will ensure that any new property management staff who is involved in serving Eligible Families review training materials found on the Program's webpage including webinars, manuals and checklists.

(o) Reporting Requirements. Owner shall submit to TDHCA such reports on the operation and performance of the Program as required by the Participation Agreement and as may be required by TDHCA. Owner shall provide TDHCA with all reports necessary for TDHCA's compliance with 24 CFR Part 5, or any other federal or state law or regulation.

(p) Environmental Laws and Regulations.

(1) Compliance with Laws and Regulations. Owner must comply with, as applicable, any federal, state, or local law, statute, ordinance, or regulation, whether now or hereafter in effect, pertaining to health, industrial hygiene, or the environmental conditions on, under, or about the Land or the Improvements, including without limitation, the following, as now or hereafter amended:

(A) Hazardous Materials Transportation Act (49 U.S.C.A. §1801 et seq.);
B) Insecticide Fungicide and Rodenticide Act (7 U.S.C.A. §136 et seq.);

C) National Environmental Policy Act (42 U.S.C. §4321 et seq.) (NEPA);


E) Resource, Conservation and Recovery Act (24 U.S.C. §6901 et seq.) (RCRA);


H) Clean Air Act (42 U.S.C. §7401 et seq.) (CAA);

I) Federal Water Pollution Control Act and amendments (33 U.S.C. §1251 et seq.) (Clean Water Act or CWA);

J) Any corresponding state laws or ordinances including but not limited to Chapter 26 of the Texas Water Code regarding Water Quality Control;


L) Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act (Chapter 363 of the Texas Health & Safety Code);

M) County Solid Waste Control Act (Chapter 364 of the Texas Health & Safety Code);

N) Texas Clean Air Act (Chapter 382 of the Texas Health & Safety Code);

O) Hazardous Communication Act (Chapter 502 of the Texas Health & Safety Code); and

P) Regulations, rules, guidelines, or standards promulgated pursuant to such laws, statute and regulations, as such statutes, regulations, rules, guidelines, and standards, as amended from time to time.

2) Environmental Review. The environmental effects of each activity carried out with funds provided under this Agreement must be assessed in accordance with the provisions of the Program Requirements, National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. §432 et seq.). Each such activity must have an environmental review completed and support documentation prepared in accordance with 10 TAC §10.305 complying with the NEPA, including screening for vapor encroachment following American Society for Testing and Materials (ASTM) 2600-10.

q) Labor Standards.

(1) Owner understands and acknowledges that every contract for the construction (rehabilitation, adaptive reuse, or new construction) of housing that includes 12 or more units assisted with Program funds must contain provisions in accordance with Davis-Bacon Regulations.


(3) Owner further acknowledges that if more housing units are constructed than the anticipated 11 or fewer housing units, it is the Owner's responsibility to ensure that all the housing units will comply with these federal labor standards and requirements under the Davis-Bacon Act as supplemented by the U.S. Department of Labor regulations ("Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction" at 29 CFR Part 5).

(4) Owner also understands that structuring the proposed assistance for the rehabilitation or construction of housing under this Agreement to avoid the applicability of the Davis-Bacon Act is prohibited.

(5) Construction contractors and subcontractors must comply with regulations issued under these federal acts described herein, with other federal laws, regulations pertaining to labor standards, including but not limited to "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction" at 29 CFR Part 5, HUD Federal Labor Provisions (HUM 4010).

(t) Lead-Based Paint. Housing assisted with Program funds is subject to the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§8421 - 8464), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. §§8451 - 8456), and implementing regulations Title X of the 1992 Housing and Community Development Act at 24 CFR Part 35, (including subparts A, B, J, K, M and R). Owner shall also comply with the Lead: Renovation, Repair, and Painting Program Final Rule, 40 CFR Part 745 and Response to Children with Environmental Intervention Blood Lead Levels. Failure to comply with the lead-based paint requirements may be subject to sanctions and penalties pursuant to 24 CFR §35.170.

(s) Limited English Proficiency. Owner shall comply with the requirements in Executive Order 13166 of August 11, 2000, reprinted at 65 FR 50121, August 16, 2000, Improving Access to Services for Persons with Limited English Proficiency and 67 FR 41455. To ensure compliance the Owner must take reasonable steps to ensure that LEP persons have meaningful access to the program and activities. Meaningful access may entail providing language assistance services, including oral and written translation, where necessary.

(t) Procurement of Recovered Materials. Owner, its subrecipients, and its contractors must comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired by the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

(v) Nondiscrimination, Fair Housing, Equal Access and Equal Opportunity.

(1) Equal Opportunity. The Owner agrees to carry out an Equal Employment Opportunity Program in keeping with the principles as provided in President's Executive Order 11246 of September 24, 1965, as amended, and its implementing regulations at 41 CFR Part 60.

(2) Fair Housing Poster. The Owner is required to place a fair housing poster (HUD-928.1 and HUD-928.1.A) provided by TDHCA in the leasing office, online, or anywhere else rental activities occur pursuant to 24 CFR §200.620(e). A copy of the poster in Spanish and in English can be found at http://www.tdhca.state.tx.us/section-8111-pra/participating-agents.htm.


(4) Affirmatively Furthering Fair Housing. By Owner's execution of the Agreement and pursuant to Section 808(e)(5) of the Fair Housing Act, Owner agrees to use funds in a manner that follows the State of Texas' "Analysis of Impediments" or "Assessment of Fair Housing", as applicable and as amended, and will maintain records in this regard.

(5) Protections for Victims of Domestic Violence, Dating Violence, Sexual Assault, or Stalking. Subpart L of 24 CFR part 5 shall apply to the Assisted Units in Eligible Multifamily Properties.

(w) Security of Confidential Information.

(1) Systems Confidentiality Protocols. Owner must undertake customary and industry standard efforts to ensure that the systems developed and utilized under this Agreement protect the confidentiality of every Eligible Applicant's and Eligible Tenant's personal and financial information, both electronic and paper, including credit reports, whether the information is received from the Eligible Applicants, Tenants or from another source. Owner must undertake customary and industry standard efforts so that neither they nor their systems vendors disclose any Eligible Applicant's or Tenant's personal or financial information to any third party, except for authorized personnel in accordance with this Agreement.

(2) Protected Health Information. If Owner collects or receives documentation for disability, medical records or any other medical information in the course of administering the Program, Owner shall comply with the Protected Health Information state and federal laws and regulations, as applicable, under 10 TAC §1.24, (relating to Protected Health Information), Chapter 181 of the Texas Health and Safety Code, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104-191, 110 Stat. 1936, enacted August 21, 1996), and the HIPAA Privacy Rules (45 CFR Part 160 and Subparts A and E of 45 CFR Part 164). When accessing confidential information under this Program, Owner hereby acknowledges and further agrees to comply with the requirements under the Interagency Data Use Agreement between TDHCA and the Texas Health and Human Services Agencies dated October 1, 2015, as amended.

(x) Real Property Acquisition and Relocation. Except as otherwise provided by federal statute, HUD-assisted programs or projects are subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act or URA) (42 U.S.C. §4601), and the government wide implementing regulations issued by the U.S. Department of Transportation at 49 CFR Part 24. The Uniform Act's protections and assistance apply to acquisitions of real property and displacements resulting from the acquisition, rehabilitation, or demolition of real property for federal or federally assisted programs or projects. With certain limited exceptions, real property acquisitions for a HUD-assisted program or project must comply with 49 CFR Part 24, Subpart B. To be exempt from the URA's acquisition policies, real property acquisitions conducted without the threat or use of eminent domain, commonly referred to as voluntary acquisitions, the Owner must satisfy the applicable requirements of 49 CFR §24.101(b)(1) - (5). Evidence of compliance with these requirements must be maintained by the recipient. The URA's relocation requirements remain applicable to any tenant who is displaced by an acquisition that meets the requirements of 49 CFR §24.101(b)(1) - (5). The relocation requirements of the Uniform Act, and its implementing regulations at 49 CFR Part 24, cover any person who moves permanently from real property or personal property from real property as a direct result of acquisition, rehabilitation, or demolition for a program or project receiving HUD assistance. While there are no statutory provisions for temporary relocation under the URA, the URA regulations recognize that there are circumstances where a person will not be permanently displaced but may need to be moved from a project for a short period of time. Appendix A of the URA regulation (49 CFR §24.2(a)(9)(ii)(D)) explains that any tenant who has been temporarily relocated for a period beyond one year must be contacted by the displacing agency and offered URA relocation assistance.

(y) Dispute Resolution; Conflict Management.

(1) Eligible Tenant Disputes. The Owner or Owner's representative is required to participate in a Dispute Resolution process, as required by HUD, to resolve an appeal of an Eligible Tenant dispute with the Owner.

(2) Agreement Disputes. In accordance with Tex. Gov't Code 2306.082, it is TDHCA's policy to encourage the use of appropriate alternative dispute resolution procedures (ADR) under the Government Dispute Resolution Act and the Negotiated Rulemaking Act (Chapters 2009 and 2006 respectively, Tex. Gov't Code), to assist in the fair and expeditious resolution of internal and external disputes involving the TDHCA and the use of negotiated rulemaking procedures for the adoption of TDHCA rules. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by TDHCA's ex parte communications policy, TDHCA encourages informal communications between TDHCA staff and the Owner, to exchange information and informally resolve disputes. TDHCA also has administrative appeals processes to fairly and expeditiously resolve disputes. If at any time the Owner would like to engage TDHCA in an ADR procedure, the Owner may send a proposal to TDHCA's Dispute Resolution Coordinator. For additional information on TDHCA's ADR policy, see TDHCA's Alternative Dispute Resolution and Negotiated Rulemaking at 10 TAC §1.17.

(3) Conflict Management. The purpose of the Conflict Management process is to address any concerns that Owner or Owner's agent or representative may have with an Eligible Family. At any
time, an Eligible Family may choose to give consent to their Section
811 service coordinator to work directly with the property manager of
the Eligible Multifamily Property. However, such consent cannot be
made a condition of tenancy.

The agency certifies that legal counsel has reviewed the adoption
and found it to be a valid exercise of the agency’s legal au-

The adopted amendments to §115.1 add new definitions and
renumber the section accordingly.

The adopted amendments to §115.70 update standards of con-
duct to reflect industry best practices by adding requirements to:
- use generally accepted standards of midwifery care;
- exercise ordinary diligence in the provision of midwifery care;
- act competently in the provision of midwifery care; and
- refrain from knowingly making material misrepresentations to
  the Department or a client.

The adopted repeal of §115.90 removes the requirement for the
Department to provide a copy of the midwife roster to counties.

The adopted amendments to §115.100 update the standards for
the practice of midwifery to reflect best practices by adding a re-
requirement to document assessments of clients for factors which
might preclude a client from receiving midwifery care.

The adopted repeal of existing §115.111 eliminates current rules
for inter-professional care, which are being replaced with a new
§115.111.

The adopted new §115.111 establishes the role of the midwife in
coordinating care with other health care providers.

The adopted amendments to §115.112 determine when and how
a midwife may terminate a client relationship.

The adopted amendments to §115.113 clarify when a midwife
must call 911 and transfer care in an emergency situation.

The adopted amendments to §115.114 clarify prenatal care re-
requirements by:
- clarifying the list of conditions that require a midwife to recom-
  mend referral;
- clarifying and expanding the list of conditions that require a
  midwife to recommend transfer; and
- requiring a midwife, when a client reaches 42.0 weeks gesta-
  tion and is not yet in labor, to either: (1) transfer the client to a
  physician or a qualified delegate of a physician; or (2) collaborate
  care with a physician and obtain appropriate antenatal testing.

The adopted amendments to §115.115 clarify requirements dur-
ing labor and delivery.

TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF
LICENSING AND REGULATION

CHAPTER 115. MIDWIVES

The Texas Commission of Licensing and Regulation (Commis-
sion) adopts amendments to existing rules at 16 Texas Adminis-
trative Code (TAC), Chapter 115, §§115.1, 115.70, 115.100,
115.112 - 115.115, 115.117 - 115.119; adopts the repeal of ex-
isting rules §§115.90 and §115.111; and adopts new §115.111,
regarding the Midwives program.

The amendments to §§115.1, 115.70, 115.100, 115.112 - 115.115
and 115.117, and new §115.111, are adopted with changes to the
proposed text as published in the September 28, 2018, issue of the
Texas Register (43 TexReg 6426). The rules will be republished.

JUSTIFICATION AND EXPLANATION OF THE RULES

The adopted rules implement House Bill (HB) 2886 and House
Bill (HB) 4007, 85th Legislature, Regular Session (2017). Col-
lectively these bills:
- remove criminal, civil, and administrative liability for licensed
  midwives who are unable to administer prophylaxis to a new-
  born’s eyes because of an objection from a parent, managing
  conservator, or guardian;
- mandate that midwives document objections from the parent,
  managing conservator, or guardian in the child’s medical record;
and
- require the Department to post a list of licensed midwives on
  its internet site but remove the requirement to provide the list to
  counties.

The adopted rules also implement recommendations of the Mid-
wives Advisory Board to update the standard of practice require-
ments by:

- requiring midwives to either terminate the midwife-client rela-
tionship or collaborate care with a physician, or a qualified de-
egrate of a physician, when a client refuses a non-emergency
transfer to a physician or a qualified delegate of a physician;
- specifying that an emergency exists when a client refuses a
transfer deemed necessary by the midwife during labor, delivery,
or six hours after delivery, and requiring the midwife to call 911
and provide further care until the arrival of EMS, at which point
the midwife may only provide further care if requested by EMS;
- clarifying and expanding the list of prenatal conditions which
require the midwife to recommend transfer of a client to a physi-
ocian or a qualified delegate of a physician; and
- requiring midwives, when a client reaches 42.0 weeks gesta-
tion and is not yet in labor, to either: (1) transfer the client to a
physician or a qualified delegate of a physician; or (2) collaborate
care with a physician and obtain appropriate antenatal testing.

SECTION-BY-SECTION SUMMARY

The adopted amendments to §115.1 add new definitions and
renumber the section accordingly.

The adopted amendments to §115.70 update standards of con-
duct to reflect industry best practices by adding requirements to:
- use generally accepted standards of midwifery care;
- exercise ordinary diligence in the provision of midwifery care;
- act competently in the provision of midwifery care; and
- refrain from knowingly making material misrepresentations to
  the Department or a client.

The adopted repeal of §115.90 removes the requirement for the
Department to provide a copy of the midwife roster to counties.

The adopted amendments to §115.100 update the standards for
the practice of midwifery to reflect best practices by adding a re-
requirement to document assessments of clients for factors which
might preclude a client from receiving midwifery care.

The adopted repeal of existing §115.111 eliminates current rules
for inter-professional care, which are being replaced with a new
§115.111.

The adopted new §115.111 establishes the role of the midwife in
coordinating care with other health care providers.

The adopted amendments to §115.112 determine when and how
a midwife may terminate a client relationship.

The adopted amendments to §115.113 clarify when a midwife
must call 911 and transfer care in an emergency situation.

The adopted amendments to §115.114 clarify prenatal care re-
requirements by:
- clarifying the list of conditions that require a midwife to recom-
  mend referral;
- clarifying and expanding the list of conditions that require a
  midwife to recommend transfer; and
- requiring a midwife, when a client reaches 42.0 weeks gesta-
  tion and is not yet in labor, to either: (1) transfer the client to a
  physician or a qualified delegate of a physician; or (2) collaborate
care with a physician and obtain appropriate antenatal testing.

The adopted amendments to §115.115 clarify requirements dur-
ing labor and delivery.
The adopted amendments to §115.117 clarify newborn care during the first six weeks after birth by updating the list of conditions that require a midwife to recommend referral.

The adopted amendments to §115.118 clarify standards for administration of oxygen by a midwife to a mother or newborn.

The adopted amendments to §115.119 remove criminal, civil, and administrative liability for licensed midwives who are unable to administer prophylaxis to a newborn’s eyes because of an objection from a parent, conservator, or guardian.

PUBLIC COMMENTS

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the September 28, 2018, issue of the Texas Register (43 TexReg 6426). The deadline for public comment was October 29, 2018. The Department received 26 comments during the 30-day public comment period, including five late comments. One joint comment was submitted by the Texas Medical Association, the Texas Association of Obstetricians and Gynecologists, and the Texas District of the American College of Obstetricians and Gynecologists (hereinafter referred to collectively as “the Physician Associations”). One comment was submitted by the Association of Texas Midwives. The public comments received with the Department’s responses are summarized below.

§115.1. Definitions.

Comment: The Physician Associations recommend changing the definition of “collaboration” in proposed §115.1(6) to expressly mention physicians as a profession with whom midwives may collaborate and to provide more consistency in terminology by choosing between “health care practitioner” used in this definition and “health care professional” used in other definitions.

Department Response: The Department agrees with the comment and has amended proposed §115.1(6) to read: “Collaboration--The process in which a midwife and a physician or another licensed health care professional of a different profession jointly manage the care of a woman or newborn according to a mutually agreed-upon plan of care.”

Comment: The Physician Associations recommend changing the definition of “consultation” in proposed §115.1(8) to expressly mention physicians as a profession with whom midwives may consult and to require that a consultation be done with a licensed health care professional of a different profession, rather than with just another “lay midwife.”

Department Response: The Department does not use the term “lay midwife” because Texas-licensed midwives are licensed health care professionals. However, the Department otherwise agrees with the comment and has amended proposed §115.1(8) to read: “Consultation--The process by which a midwife, who maintains responsibility for the woman’s care, seeks the advice of a physician or another licensed health care professional or member of the health care team of a different profession.”

Comment: The Physician Associations recommend changing the definition of “referral” in proposed §115.1(19) by specifying that referral to a physician must be to a Texas-licensed physician and removing the phrase “working in association with a licensed physician” and replacing it with the phrase “working under supervision and delegation of a physician.”

Department Response: The Department agrees with the comment and has amended proposed §115.1(19) to read: “Referral--The process by which a midwife directs the client to a physician or another licensed health care professional who has current obstetric or pediatric knowledge and who is working under supervision and delegation of a physician.” Section 115.1(13) defines “physician” as “[a] physician licensed to practice medicine in Texas by the Texas Medical Board.”

Comment: The Physician Associations recommend changing the definition of “transfer” in proposed §115.1(22) by: expressly mentioning physicians as a profession to whom midwives may transfer patients’ care; specifying that transfer to a physician must be to a Texas-licensed physician; and removing the phrase “working in association with a licensed physician” and replacing it with the phrase “working under supervision and delegation of a physician.”

Department Response: The Department agrees with the comment and has amended proposed §115.1(22) to read: “Transfer--The process by which a midwife relinquishes care of the client for pregnancy, labor, delivery, or postpartum care of the newborn to a physician or another licensed health care professional who has current obstetric or pediatric knowledge and who is working under the supervision and delegation of a physician.” Section 115.1(13) defines “physician” as “[a] physician licensed to practice medicine in Texas by the Texas Medical Board.”

§115.70. Standards of Conduct.

Comment: One commenter expressed disapproval of the removal of the word “demonstrated” from §115.70(1)(M) because the commenter believes it is more conclusive to leave it.

Department Response: The Department disagrees with the comment. The Department has determined that the term “demonstrated” is redundant and unnecessary because any enforcement action based on “a lack of personal or professional character in the practice of midwifery” would necessarily require evidence of the midwife’s practice that demonstrates such deficiency in character. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to proposed §115.70(1)(N), one commenter stated that the phrase “generally accepted standards of midwifery care” could refer to North American Registry of Midwives (NARM) requirements or be clarified by the Midwifery Model of Care, avoiding the typical medical model of care.

Department Response: The Department has determined that it is preferable to use the proposed language because its breadth can accommodate changes to the standards of midwifery care without reference to any particular organization or model. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to proposed §115.70(1)(P), one commenter asked how the phrase “failure to act competently” will be judged.

Department Response: The issue of whether a midwife has acted competently is a determination that will be made by considering all of the legal provisions and standards applicable to licensed Texas midwives and may, in some circumstances, require expert witness advice and testimony from other midwives with appropriate qualifications. The Department did not make any changes to the proposed rules in response to this comment.

§115.100. Standards for the Practice of Midwifery in Texas.
Comment: The Physician Associations recommend changing proposed §115.100(a)(4) to require midwives to adhere to the Global Standards for Midwifery Education adopted by the International Confederation of Midwives (ICM).

Department Response: The Department disagrees with the comment. The standards adopted by ICM include many issues that fall outside of the scope of midwifery as defined by the Texas Midwifery Act. The ICM standards that do fit the scope of midwifery in Texas are included in the standards adopted by the Midwives Alliance of North America (MANA), which are already referenced in §115.100(a)(4). The Department did not make any changes to the proposed rules in response to this comment.

Comment: The Physician Associations recommend changing §115.100(c)(3) to require midwives to transfer records by adding the phrase “and promptly use” after the word “provide.”

Department Response: The comment does not address any current proposed rule change. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to proposed §115.100(d), the Physician Associations support the directive to engage in periodic evaluation and quality assurance but find that it is unclear how the data will be collected, analyzed, and used to improve quality of care. They recommend that TDLR develop a standardized set of guidelines and documentation requirements for the collected data to further quality assurance and improvement.

Department Response: The comment addresses issues that are beyond the scope of the Department’s proposed changes to the rule. The Department did not make any changes to the proposed rules in response to this comment.

New §115.111. Coordinating Care with Other Health Care Providers.

Comment: The Physician Associations oppose the authorization under proposed §115.111(b)(1) for a midwife to continue care of a patient (without any additional assistance or consultation with another health professional) after the midwife has already identified some condition that increases the risk of complication and requires a higher level of care. They point out that this is outside the scope of midwifery as defined in the Texas Midwifery Act.

Department Response: The Department agrees with the comment and has amended proposed §115.111(b) by adding the phrase “who is at a low risk of developing complications” to clarify that the rule does not apply to conditions that require a higher level of care. Proposed §115.111(b) has been amended to read: “If a client who is at a low risk of developing complications elects not to accept a referral or a physician or associate’s advice, the midwife shall: (1) continue to care for the client after discussing and documenting the risks in the midwifery record, which shall include informing the client that her condition may worsen and require transfer; (2) seek a consultation; (3) manage the client in consultation with an appropriate health care professional; or (4) terminate care.”

Comment: The Physician Associations recommend changing the language in proposed §115.111(c) to better match the language in Occupations Code §203.401(2)(A) relating to the administration of prescription drugs and by removing the passive voice and ambiguity in the phrase “must be obtained.”

Department Response: The Department agrees with the comment and has amended proposed §115.111(c) to read: “If a midwife administers any prescription medication to a client or her newborn other than oxygen and eye prophylaxis, the midwife must do so in accordance with standing delegation orders from and under the supervision of a physician licensed in Texas. The midwife shall ensure that the orders are current (renewed annually) and comply with state law and the rules of the Texas Medical Board.”

Comment: With regard to proposed §115.111(c), one commenter stated that requiring standing delegation orders from a physician creates a barrier to care and an undue burden on the healthcare delivery system and that TDLR should develop a training and certification program that allows midwives full access to routine, life-saving medications.

Department Response: The Department does not have the statutory authority to make the change requested by the comment. The Texas Legislature determines who has the authority to prescribe and administer prescription medications in Texas, so making the change suggested by this comment would require legislative action. The Department did not make any changes to the proposed rules in response to this comment.

§115.112. Termination of the Midwife-Client Relationship.

Comment: With regard to proposed §115.112(2)(A), the Physician Associations express concern that the reduction in days of required notice could increase the risk that the patient will experience a lapse in care and will increase the burden on the patient to identify a new health care provider willing to accept responsibility for her care. They suggest adding a requirement to complete a transition of care plan with the patient.

Department Response: The Department disagrees with the comment. Occupations Code §203.351(b)(5) already requires the informed choice and disclosure statement to include a description of medical backup arrangements, so there should not be an increased risk of the client experiencing a lapse in care due to the decrease in the number of days of required notice of the midwife’s termination of care. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to proposed §115.112(2)(A), one commenter supported the change from 30 days to 14 days written notice because it is more reasonable.

Department Response: The Department appreciates this comment. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to proposed §115.112(3)(B), the Physician Associations state that there is no statutory authority for a midwife to jointly manage the care of a patient because the Texas Midwifery Act does not contain the word “collaboration.”

Department Response: The Department disagrees with the comment. Occupations Code §203.151(a-1)(1) provides that “[t]he commission shall adopt rules prescribing the standards for the practice of midwifery in this state...” The Department has determined that this language is intentionally broad to provide the Commission flexibility to adopt concepts not specifically articulated in the statutory language, as long as they do not exceed the scope of the statutory language. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to proposed §115.112(3)(B), the Physician Associations express concern that if the midwife already recognizes that a transfer may be in the patient’s best interest,
there is nothing to gain from the midwife's joint management of the patient with another health care professional because the conditions for which a transfer recommendation is required are serious conditions that cannot be treated properly by a person who does not have advanced medical training.

**Department Response:** The Department disagrees with the comment. Proposed §115.112(3) is meant to address situations where the client refuses a transfer. The Department has determined that when the client refuses transfer, it is better for the midwife to have the option to continue care in collaboration with a health care professional than it is for the midwife to be forced to terminate the midwife-client relationship and increase the likelihood of an unassisted birth. The Department did not make any changes to the proposed rules in response to this comment.

Comment: The Physician Associations recommend changing proposed §115.112(3)(B) to read: "manage the client in collaboration with a physician or another licensed health care professional who has current obstetric or pediatric knowledge and who is working under supervision and delegation of a physician."

**Department Response:** The Department agrees with the comment and has amended proposed §115.112(3)(B) to read: "manage the client in collaboration with a physician or another licensed health care professional who has current obstetric or pediatric knowledge and who is working under the supervision and delegation of a physician."

§115.113. Transfer of Care in an Emergency Situation.

Comment: With regard to proposed §115.113(b), the Association of Texas Midwives suggested removing the phrase "unless requested by first responders" because a midwife might find herself in a situation where she would be drawn back into the primary care provider position or, if she refused to continue care, may find herself compromised.

**Department Response:** The Department agrees with the comment and has amended proposed §115.113(b) to read: "It is an emergency if, during labor, delivery, or six hours immediately following placental delivery, the midwife determines that transfer is necessary and the client refuses transfer. The midwife shall call 911 and provide further care as indicated by the situation. The midwife shall not provide any further care after the arrival of emergency medical service (EMS) personnel but may do so if requested by EMS personnel."

Comment: With regard to proposed §115.113(b), four commenters had concerns, that first responders, such as police officers and firefighters, may not have sufficient medical training and knowledge to take over care and may not request help from the midwife.

**Department Response:** The Department agrees with the comment and has amended proposed §115.113(b) to read: "It is an emergency if, during labor, delivery, or six hours immediately following placental delivery, the midwife determines that transfer is necessary and the client refuses transfer. The midwife shall call 911 and provide further care as indicated by the situation. The midwife shall not provide any further care after the arrival of emergency medical service (EMS) personnel but may do so if requested by EMS personnel."

Comment: With regard to proposed §115.113(b), one commenter stated that midwives often report negative experiences and outcomes due to factors related to emergency medical service (EMS) care. The commenter stated that while the midwife may be the more experienced obstetric provider, EMS has its own policies and procedures to follow. The commenter stated that TDLR should investigate which actions a midwife can take when EMS appears to put a mother or baby at risk.

**Department Response:** The Department understands that EMS personnel may not have the obstetric knowledge and skills that midwives possess. However, when an emergency situation exists, EMS is necessary to transport the client to a facility where a higher level of care can be provided. It would be outside the scope of midwifery to continue providing sole care of the client in an emergency situation. The midwife may contact the health care professional or institution to whom the client is being transferred to communicate concerns about EMS actions that appear to put the mother or baby at risk. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to proposed §115.113(b), one commenter asked what happens if the client refuses care from the first responders.

**Department Response:** The midwife would not be authorized to continue sole care of the client in this situation because the client's condition does not qualify as a "normal" labor, delivery, or postpartum period and therefore falls outside of the scope of the Texas Midwifery Act. The Department did not make any changes to the proposed rules in response to this comment.

§115.114. Prenatal Care.

Comment: The Physician Associations expressed concern that the rules do not require planning for emergency transfers and suggested adding the following language to §115.114(a): "The plan of care must include a plan developed with the patient for transfers in emergency situations that accounts for the situations in which a transfer is required and consideration of the licensed health care professionals or institutions that the patient will be transferred to in the event of an emergency."

**Department Response:** This comment does not address any current proposed rule change. However, it should be noted that Occupations Code §203.351(b)(5) already requires the informed choice and disclosure statement to include a description of medical backup arrangements. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to proposed §115.114(c)(8), ten commenters were concerned that "uterine surgery" is too broad of a term that includes procedures, such as dilation and curettage, which should not preclude an out-of-hospital birth.

**Department Response:** The Department agrees with the comment and has amended proposed §115.114(c)(8) to read: "previous uterine surgery involving incision into the uterine myometrium, other than a low transverse cesarean section."

Comment: With regard to proposed §115.114(c)(8), the Physician Associations expressed concern that a midwife would be allowed to continue caring for a patient who has had a low transverse cesarean section because vaginal birth after cesarean section has risks and may result in the need for an emergency cesarean section. They suggest changing the language to remove the phrase "other than a low transverse cesarean section."

**Department Response:** The Department disagrees with the comment. The Department, in consultation with the Midwives Advisory Board, has determined that although vaginal birth after cesarean section involves risks that would require the midwife to recommend referral, it does not constitute a high-risk condition.
Comment: With regard to proposed §115.114(c)(8), one commenter stated that the old language is better because it is specific to the uterine fundus.

Department Response: The Department agrees that the published language was too broad, so the Department has amended proposed §115.114(c)(8) to read: "previous uterine surgery involving incision into the uterine myometrium, other than a low transverse cesarean section."

Comment: With regard to §115.114(d), the Association of Texas Midwives suggests changing the proposed language to read "collaborate with a health care professional" instead of "a physician," to better reflect the new proposed definition of "collaboration" as "the process in which a midwife and a health care practitioner of a different profession jointly manage the care of a woman or newborn according to a mutually agreed-upon plan of care."

Department Response: The Department disagrees with the comment because the Department has determined that the risks associated with continued gestation at 42.0 weeks require the advice and assistance of a physician. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to §115.114(d), 14 commenters expressed concern that many midwives, especially in rural areas, have limited or no access to physicians willing and able to participate in collaboration or transfer at 42.0 weeks.

Department Response: The Department acknowledges that many midwives, especially in rural areas, have limited access to physicians; however, the Department has determined that the risks associated with continued gestation at 42.0 weeks require the advice and assistance of a physician. The commenters seem to misunderstand the intent and effect of the proposed rule. Section 115.1(12) already defines "normal childbirth" as "the labor and vaginal delivery at or close to term (37 up to 42 weeks) of a pregnant woman whose assessment reveals no abnormality or signs or symptoms of complications." This definition already created the requirement of transfer at 42 weeks, but it left some ambiguity about what is meant by "42 weeks." The proposed rule more clearly draws the line at "42.0 weeks" while also adding the option of continuing midwifery care through collaboration with a physician and appropriate antenatal testing. Therefore, rather than limiting the options for midwifery care, the proposed rule is actually expanding the options for midwifery care. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to §115.114(d), 11 commenters stated that it is a standard of care for midwives to order appropriate antenatal testing without a collaborating physician.

Department Response: The Department disagrees with the comment because antenatal testing is necessarily done by a physician. The Department has determined that the risks associated with continued gestation at 42.0 weeks require the advice and assistance of a physician. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to §115.114(d), seven commenters stated that being 42 weeks gestation does not threaten the lives of most mothers or fetuses, as long as proper monitoring shows no problems.

Department Response: The Department disagrees with the comment because the Department, through consultation with the Midwives Advisory Board, has determined that the risks associated with continued gestation at 42.0 weeks require the advice and assistance of a physician. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to §115.114(d), seven commenters submitted suggestions for alternatives to collaboration with a physician that allow the midwife to continue sole care of the client.

Department Response: The Department disagrees with the suggested alternatives because the Department, through consultation with the Midwives Advisory Board, has determined that the risks associated with continued gestation at 42.0 weeks require the advice and assistance of a physician. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to §115.114(d), five commenters stated that the proposed change unfairly restricts the mother's right to choose the conditions of her birth.

Department Response: The Department disagrees with the comment because the Department, through consultation with the Midwives Advisory Board, has determined that the risks associated with continued gestation at 42.0 weeks require the advice and assistance of a physician. The commenters seem to misunderstand the intent and effect of the proposed rule. Section 115.1(12) already defines "normal childbirth" as "the labor and vaginal delivery at or close to term (37 up to 42 weeks) of a pregnant woman whose assessment reveals no abnormality or signs or symptoms of complications." This definition already created the requirement of transfer at 42 weeks, but it left some ambiguity about what is meant by "42 weeks." The proposed rule more clearly draws the line at "42.0 weeks" while also adding the option of continuing midwifery care through collaboration with a physician and appropriate antenatal testing. Therefore, rather than limiting the options for midwifery care, the proposed rule is actually expanding the options for midwifery care. The Department did not make any changes to the proposed rules in response to this comment.

Comment: With regard to §115.114(d), one commenter asked what the midwife is supposed to do when the client refuses collaboration and transfer at 42.0 weeks and the midwife terminates care but is still responsible for care for 14 days.

Department Response: The midwife should not wait until 42.0 weeks to determine whether the client will agree to collaboration or transfer. This determination should be made in advance so that if the client will not agree, the midwife can begin the termination process with sufficient time for the care to be terminated on the date the client reaches 42.0 weeks. The Department did not make any changes to the proposed rules in response to this comment.

§115.115. Labor and Delivery.

Comment: With regard to §115.115(e)(6), 26 commenters opposed the proposed language because it includes conditions which cannot be detected by intermittent auscultation and would require continuous electronic fetal monitoring. Many of these commenters included suggestions for changes that list conditions which can be detected by intermittent auscultation.
Department Response: In response to the comments received on this rule, the Midwives Advisory Board recommended amending proposed §115.115(e)(6) to read: "abnormal fetal or uterine monitoring, which includes but is not limited to bradycardia, tachycardia, abnormal rhythm, persistent decelerations after position changes, and uterine tachysystole." However, after considering the concerns raised in public comments and discussing the issue, the Commission believes that further study of this issue is warranted and therefore declines to adopt the proposed amendment to §115.115(e)(6) at this time, leaving the current language in effect. The Commission has directed that this rule be returned to the Board for further consideration. The Department will work with the Board on development of a proposed rule amendment to bring to the Commission at a later date.

Comment: With regard to §115.115(e)(6), one commenter supported the proposed language and believed that the listed conditions can be detected without continuous electronic fetal monitoring.

Department Response: In response to the comments received on this rule, the Midwives Advisory Board recommended amending proposed §115.115(e)(6) to read: "abnormal fetal or uterine monitoring, which includes but is not limited to bradycardia, tachycardia, abnormal rhythm, persistent decelerations after position changes, and uterine tachysystole." However, after considering the concerns raised in public comments and discussing the issue, the Commission believes that further study of this issue is warranted and therefore declines to adopt the proposed amendment to §115.115(e)(6) at this time, leaving the current language in effect. The Commission has directed that this rule be returned to the Board for further consideration. The Department will work with the Board on development of a proposed rule amendment to bring to the Commission at a later date.

Comment: With regard to §115.115(e)(6), one commenter stated that the specificity of the proposed language is problematic because the standards and terminology could change and require further amendments to the rule.

Department Response: In response to the comments received on this rule, the Midwives Advisory Board recommended amending proposed §115.115(e)(6) to read: "abnormal fetal or uterine monitoring, which includes but is not limited to bradycardia, tachycardia, abnormal rhythm, persistent decelerations after position changes, and uterine tachysystole." However, after considering the concerns raised in public comments and discussing the issue, the Commission believes that further study of this issue is warranted and therefore declines to adopt the proposed amendment to §115.115(e)(6) at this time, leaving the current language in effect. The Commission has directed that this rule be returned to the Board for further consideration. The Department will work with the Board on development of a proposed rule amendment to bring to the Commission at a later date.

§115.117. Newborn Care During the First Six Weeks After Birth.

Comment: With regard to §115.117(c)(4), one commenter stated that it is better to leave the language as it is because it is accepted terminology.

Department Response: The Department disagrees with the comment. The Department has determined that the new language reflects the proper medical standard and is preferable because it provides more specificity. The Department did not make any changes to the proposed rules in response to this comment.

§115.118. Administration of Oxygen.

Comment: With regard to §115.118(a), the Physician Associations express concern that the proposed language could be interpreted to mean that there is no requirement for a midwife to provide oxygen when the client or the newborn require it. The Physician Associations believe that Occupations Code §203.151 requires a midwife to provide oxygen when a client or newborn require it.
Department Response: The Department disagrees with the comment. The relevant statutory language in Occupations Code §203.151(a-1) provides: "The commission shall...(1) adopt rules prescribing the standards for the practice of midwifery in this state, including standards for... (B) administration of oxygen by a midwife to a mother or newborn[,]" The Department does not interpret this language as a requirement for midwives to administer oxygen; rather, the Department interprets the language as a requirement to adopt standards for administration of oxygen to be applied when a midwife chooses to administer oxygen. The Department did not make any changes to the proposed rules in response to this comment.

ADVISORY BOARD RECOMMENDATIONS AND COMMISSION ACTION

The Midwives Advisory Board (Board) met on January 8, 2019, to discuss the proposed rules and the comments received. The Board recommended adopting the proposed rules with changes to §§115.1 and §115.100, proposed new §115.111, and §§115.112 - 115.115.

At its meeting on March 22, 2019, the Commission adopted the rules with changes as recommended by the Board, with the exception of the proposed amendments to §115.115(e)(6), which the Commission did not adopt. The Commission has directed that this rule be returned to the Board for further consideration.

16 TAC §§115.1, 115.70, 115.100, 115.111 - 115.115, 115.117 - 115.119

STATUTORY AUTHORITY

The amendments and new rules are adopted under Texas Occupations Code, Chapters 51 and 203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 203. No other statutes, articles, or codes are affected by the adoption.

§115.1. Definitions.

The following words and terms used in this chapter shall have the following meaning unless the context clearly indicates otherwise.

(1) Act—The Texas Midwifery Act, Texas Occupations Code, Chapter 203.

(2) Advisory Board—The Midwives Advisory Board appointed by the presiding officer of the Commission with the approval of the Commission.

(3) Appropriate health care facility—The Department of State Health Services, a local health department, a public health district, a local health unit or a physician's office where specified tests can be administered and read, and where other medical/clinical procedures normally take place.

(4) Approved midwifery education courses—The basic midwifery education courses approved by the department.


(6) Collaboration—The process in which a midwife and a physician or another licensed health care professional of a different profession jointly manage the care of a woman or newborn according to a mutually agreed-upon plan of care.

(7) Commission—The Texas Commission of Licensing and Regulation.

(8) Consultation—The process by which a midwife, who maintains responsibility for the woman's care, seeks the advice of a physician or another licensed health care professional or member of the health care team of a different profession.

(9) Department—The Texas Department of Licensing and Regulation.

(10) Executive director—The executive director of the department.

(11) Health authority—A physician who administers state and local laws regulating public health under the Health and Safety Code, Chapter 121, Subchapter B.

(12) Local health unit—A division of a municipality or county government that provides limited public health services as provided by the Health and Safety Code, §121.004.

(13) Newborn care—The care of a child for the first six weeks of the child's life.

(14) Normal childbirth—The labor and vaginal delivery at or close to term (37 up to 42 weeks) of a pregnant woman whose assessment reveals no abnormality or signs or symptoms of complications.

(15) Physician—A physician licensed to practice medicine in Texas by the Texas Medical Board.

(16) Postpartum care—The care of a woman for the first six weeks after the woman has given birth.

(17) Program—The department's midwifery program.

(18) Public health district—A district created under the Health and Safety Code, Chapter 121, Subchapter E.

(19) Referral—The process by which a midwife directs the client to a physician or another licensed health care professional who has current obstetric or pediatric knowledge and who is working under supervision and delegation of a physician.

(20) Retired midwife—A midwife licensed in Texas who is over the age of 55 and not currently employed in a health care field.

(21) Standing delegation orders—Written instructions, orders, rules, regulations or procedures prepared by a physician and designated for a patient population, and delineating under what set of conditions and circumstances actions should be instituted, as described in the rules of the Texas Medical Board in Chapter 193 (relating to Standing Delegation Orders) and §115.111 of this title (relating to Coordinating Care with Other Health Care Providers).

(22) Transfer—The process by which a midwife relinquishes care of the client for pregnancy, labor, delivery, or postpartum care or care of the newborn to a physician or another licensed health care professional who has current obstetric or pediatric knowledge and who is working under the supervision and delegation of a physician.

(23) Voluntary charity care—Midwifery care provided without compensation and with no expectation of compensation.

§115.70. Standards of Conduct.

The following are grounds for denial of application for licensure or license renewal and for disciplinary action.

(1) The commission or executive director may deny an application for initial licensure or license renewal and may take disciplinary action against any person based upon proof of the following:

(A) violation of the Act or rules adopted under the Act;

(a) The department may refuse to renew the license of a person who fails to pay an administrative penalty imposed under the Act, unless enforcement of the penalty is stayed or a court has ordered that the administrative penalty is not owed.

(b) The department may refuse to renew the license of a person who fails to pay an administrative penalty imposed under the Act, unless enforcement of the penalty is stayed or a court has ordered that the administrative penalty is not owed.

§115.100. Standards for the Practice of Midwifery in Texas.

(a) Using reasonable skill and knowledge, the midwife shall:

(1) provide clients with a description of the scope of midwifery services and information regarding the client's rights and responsibilities in accordance with the Act;

(2) assess the client on an ongoing basis for any factors which might preclude a client from admission into or continuing in midwifery care and document that assessment in the midwifery record;

(3) provide clients with information about other providers and services when requested or when the care required is not within the scope of practice of midwifery; and

(4) practice in accordance with the knowledge, clinical skills, and judgments described in the most recently adopted version of the Midwives Alliance of North America (MANA) Core Competencies for Basic Midwifery Practice, within the bounds of the midwifery scope of practice as defined by the Act and Rules;

(b) The midwife shall provide care in a safe and clean environment. The midwife shall:

(1) carry and use when needed, resuscitation equipment; and

(2) use universal precautions for infection control.

(c) The midwife shall document midwifery care in legible, complete health records. The midwife shall:

(1) maintain records that completely and accurately document the client's history, physical exam, laboratory test results, antepartum visits, consultations, referrals, labor, delivery, postpartum visits, and neonatal evaluations at the time midwifery services are delivered and when reports are received;

(2) review problems identified by the midwife or by other professionals or consumers in the community; and

(3) act to resolve problems that are identified.

(d) The midwife shall engage in a periodic process of evaluation and quality assurance. The midwife shall:

(1) collect client care data systematically and be involved in analysis of that data for the evaluation of the process and outcome of care;

(2) review problems identified by the midwife or by other professionals or consumers in the community; and

(3) act to resolve problems that are identified.

§115.111. Coordinating Care with Other Health Care Providers.

(a) A midwife shall consult with, refer to, collaborate with, or transfer to an appropriate healthcare provider or facility in accordance with the Act and this chapter.

(b) If a client who is at a low risk of developing complications elects not to accept a referral or a physician or associate's advice, the midwife shall:

(1) continue to care for the client after discussing and documenting the risks in the midwifery record, which shall include informing the client that her condition may worsen and require transfer;

(2) seek a consultation;
§115.112. Termination of the Midwife-Client Relationship.

A midwife shall terminate care of a client only in accordance with this section unless a transfer of care results from an emergency situation.

(1) Once the midwife has accepted a client, the relationship is ongoing and the midwife cannot refuse to continue to provide midwifery care to the client unless:
   (A) the client has no need of further care;
   (B) the client terminates the relationship; or
   (C) the midwife formally terminates the relationship.

(2) The midwife may terminate care for any reason by:
   (A) providing a minimum of 14 days written notice, during which the midwife shall continue to provide midwifery care;
   (B) making an attempt to tell the client in person and in the presence of a witness of the midwife’s wish to terminate care and the date that care will be terminated;
   (C) providing a list of alternate health care providers; and
   (D) documenting the termination of care in midwifery records.

(3) If a client elects not to accept a non-emergency transfer, the midwife shall:
   (A) terminate the midwife-client relationship; or
   (B) manage the client in collaboration with a physician or another licensed health care professional who has current obstetric or pediatric knowledge and who is working under the supervision and delegation of a physician.

§115.113. Transfer of Care in an Emergency Situation.

(a) In an emergency situation, the midwife shall initiate emergency care as indicated by the situation and immediate transfer of care by making a reasonable effort to contact the health care professional or institution to whom the client will be transferred and to follow the health care professional’s instructions; and continue emergency care as needed while:
   (1) transporting the client by private vehicle; or
   (2) calling 911 and reporting the need for immediate transfer.

(b) It is an emergency if, during labor, delivery, or six hours immediately following placental delivery, the midwife determines that transfer is necessary and the client refuses transfer. The midwife shall call 911 and provide further care as indicated by the situation. The midwife shall not provide any further care after the arrival of emergency medical service (EMS) personnel but may do so if requested by EMS personnel.

§115.114. Prenatal Care.

(a) Using reasonable skill and knowledge, the midwife shall collect, assess, and document maternal care data through a detailed obstetric, gynecologic, medical, social, and family history and a complete prenatal physical exam and appropriate laboratory testing, including antenatal testing if necessary; develop and implement a plan of care; thereafter evaluate the client’s condition on an ongoing basis; and modify the plan of care as necessary. Health education/counseling shall be provided by the midwife as appropriate.

(b) If on initial or subsequent assessment, one of the following conditions exists, the midwife shall recommend referral and document that recommendation in the midwifery record:
   (1) infection requiring antimicrobial therapy;
   (2) Hepatitis;
   (3) non-insulin dependent diabetes;
   (4) thyroid disease;
   (5) current drug or alcohol abuse;
   (6) asthma;
   (7) abnormal pap smear (consistent with malignancy or pre-malignancy) during the current pregnancy;
   (8) seizure disorder;
   (9) prior cesarean section (except for prior classical or vertical incision, which will require transfer in accordance with subsection (c)(8));
   (10) twin gestation;
   (11) history of prior antepartum or neonatal death;
   (12) history of prior infant with a genetic disorder;
   (13) abnormal vaginal bleeding;
   (14) maternal age less than 15 or estimated date of delivery;
   (15) history of cancer (except for ovarian, breast, uterine, or cervical cancer which will require transfer in accordance with subsection (c)(16));
   (16) psychiatric illness; or
   (17) any other condition or symptom which could adversely affect the mother or fetus, as assessed by a midwife exercising reasonable skill and knowledge.

(c) If on initial or subsequent assessment, one of the following conditions exists, the midwife shall recommend transfer in accordance and document that recommendation in the midwifery record:
   (1) placenta previa in the third trimester;
   (2) Human Immunodeficiency Virus (HIV) positive or Acquired Immunodeficiency Syndrome (AIDS);
   (3) cardiovascular disease, including hypertension, with the exception of varicosities;
   (4) severe psychiatric illness;
   (5) history of cervical incompetence with surgical therapy;
   (6) pre-term labor (less than 37 weeks);
   (7) Rh or other blood group isoimmunization;
   (8) previous uterine surgery involving incision into the uterine myometrium, other than a low transverse cesarean section;
   (9) preeclampsia/eclampsia;
§115.115. Labor and Delivery.

(a) Using reasonable skill and knowledge, the midwife shall evaluate the client when the midwife arrives for labor and delivery, by obtaining a history, performing a physical exam, and collecting laboratory specimens.

(b) The midwife shall monitor the client's progress in labor by monitoring vital signs, contractions, fetal heart tones, cervical dilation, effacement, station, presentation, membrane status, input/output and subjective status as indicated.

(c) The midwife shall assist only in normal, spontaneous vaginal deliveries as allowed by the Act or this chapter.

(d) The midwife shall not engage in the following:

(1) application of fundal pressure on abdomen or uterus during first or second stage of labor;
(2) administration of oxytocin, ergot, or prostaglandins prior to or during first or second stage of labor; or
(3) any other prohibited practice as delineated by the Act, §203.401 (relating to Prohibited Practices).

(e) If on initial or subsequent assessment during labor or delivery, one of the following conditions exists, the midwife shall initiate immediate emergency transfer in accordance with §115.113 and document that action in the midwifery record:

(1) prolapsed cord;
(2) chorio-amnionitis;
(3) uncontrolled hemorrhage;
(4) gestational hypertension/preeclampsia/eclampsia;
(5) severe abdominal pain inconsistent with normal labor;
(6) a non-reassuring fetal heart rate pattern;
(7) seizure;
(8) thick meconium unless the birth is imminent;
(9) visible genital lesions suspicious of herpes virus infection;
(10) evidence of maternal shock;
(11) preterm labor (less than 37 weeks);
(12) presentation(s) not compatible with spontaneous vaginal delivery;
(13) laceration(s) requiring repair beyond the scope of practice of the midwife;
(14) failure to progress in labor;
(15) retained placenta; or
(16) any other condition or symptom which could threaten the life of the mother or fetus, as assessed by a midwife exercising reasonable skill and knowledge.

§115.117. Newborn Care During the First Six Weeks After Birth.

(a) Prior to delivery, the midwife shall establish a plan with the client for continuing care of the newborn. This plan shall:

(1) include referral or transfer to a health care professional who has current pediatric knowledge;
(2) include a recommendation that the client pre-arrange the timing of the first newborn visit with the health care professional; and
(3) be documented in the midwifery record.

(b) Using reasonable skill and knowledge, the midwife shall:

(1) collect, assess and document newborn care data by monitoring the vital signs, performing a physical exam, and obtaining the laboratory tests necessary for the infant during the postpartum period;
(2) provide appropriate education and counseling to the mother; and
(3) observe the newborn for a minimum of two hours after he or she is stable with no signs of distress.

(c) If on any newborn assessment in the immediate postpartum period (first six hours of life), one of the following conditions exists, the midwife shall recommend referral and document that recommendation in the midwifery record:

(1) birth injury;
(2) gestational age assessment less than 36 weeks;
(3) small for gestational age;
(4) larger than 97th percentile for gestational age; or
(5) any other abnormal newborn behavior or appearance which could adversely affect the newborn, as assessed by a midwife exercising reasonable skill and knowledge.

(d) If on any newborn assessment in the immediate postpartum period (first six hours of life), one of the following conditions exists, the midwife shall initiate immediate transfer to an appropriate health care professional, initiate emergency care as indicated by the situation, continue care as needed, and document that action in the midwifery record:

(1) non-transient respiratory distress;
(2) non-transient pallor or central cyanosis;
(3) jaundice;
(4) apgar at 5 minutes less than or equal to 6;
(5) prolonged apnea;
(6) hemorrhage;
(7) signs of infection;
(8) seizure;
(9) major congenital anomaly not diagnosed prenatally;
(10) unstable vital signs;
(11) prolonged:
   (A) lethargy;
   (B) flaccidity; or
   (C) irritability;
(12) inability to suck;
(13) persistent jitteriness;
(14) hyperthermia;
(15) hypothermia; or
(16) other abnormal newborn behavior or appearance which could threaten the life of the newborn, as assessed by a midwife exercising reasonable skill and knowledge.

(e) If on any newborn assessment after the immediate postpartum period, one of the following conditions exists, the midwife shall recommend referral to an appropriate health care professional and document that recommendation in the midwifery record:

(1) abnormal laboratory test results;
(2) minor congenital anomaly;
(3) failure to thrive; or
(4) any other abnormal newborn behavior or appearance which could adversely affect the infant, as assessed by a midwife exercising reasonable skill and knowledge.

(f) If on any newborn assessment after the immediate postpartum period, one of the following conditions exists, the midwife shall initiate immediate transfer to an appropriate health care professional and document that action in the midwifery record:

(1) respiratory distress;
(2) pallor or central cyanosis;
(3) pathological jaundice;
(4) hemorrhage;
(5) seizure;
(6) inability to urinate or pass meconium within 24 hours of birth;
(7) unstable vital signs;
(8) lethargy;
(9) flaccidity;
(10) irritability;
(11) inability to feed;
(12) persistent jitteriness; or
(13) any other abnormal newborn behavior or appearance which could threaten the life of the newborn, as assessed by a midwife exercising reasonable skill and knowledge.

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 28, 2019.
TRD-201900952
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Effective date: May 1, 2019
Proposal publication date: September 28, 2018
For further information, please call: (512) 463-3671

16 TAC §115.90, §115.111
The repeals are adopted under the Texas Occupations Code, Chapters 51 and 203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 203. No other statutes, articles, or codes are 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 28, 2019.
TRD-201900953
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Effective date: May 1, 2019
Proposal publication date: September 28, 2018
For further information, please call: (512) 463-3671

TITLE 22. EXAMINING BOARDS
PART 9. TEXAS MEDICAL BOARD
CHAPTER 194. MEDICAL RADIOLOGIC TECHNOLOGY
SUBCHAPTER A. CERTIFICATE HOLDERS, NON-CERTIFIED TECHNICIANS, AND OTHER AUTHORIZED INDIVIDUALS OR ENTITIES
22 TAC §§194.6, 194.10, 194.12, 194.13, 194.23
The Texas Medical Board (Board) adopts amendments to Chapter 194, relating to Medical Radiologic Technology, §194.6, Procedural Rules and Minimum Eligibility Requirements for Applicants for a Certificate or Placement on the Board's Non-Certified Technician General Registry; §194.10, Retired Certificate or NCT General Registration Permit; §194.12, Standards for the Approval of Certificate Program Curricula
and Instructors; §194.13, Mandatory Training Programs for Non-Certified Technicians; and §194.23, Criminal Backgrounds. The amendments in §194.6 and §194.10 are being adopted without changes to the proposed text as published in the December 7, 2018, issue of the Texas Register (43 TexReg 7850). The adopted amendments will not be republished. The Board made non-substantive typographical corrections in §§194.12, 194.13 and 194.23. These rules will be republished.

The amendments to §194.6, relating to Procedural Rules and Minimum Eligibility Requirements for Applicants for a Certificate or Placement on the Board’s Non-Certified Technician General Registry, make several changes to temporary certification requirements, language related to examinations required for registration as an NCT or general or limited certification, and otherwise correct typographical errors and improve the clarity of the rule.

Amendments repeal language requiring temporary limited certification in order for an applicant to attempt passage of a limited examination. Amendments add language allowing such applicants to qualify for exam attempts prior to program completion through a simplified application process for obtaining approval. Other related amendments eliminate language providing for temporary limited certification solely upon successful completion of a limited medical radiologic program. These amendments were proposed in order to expedite limited certificate applicants’ ability to take the appropriate limited examination, thereby increasing such applicants’ ability to pass and obtain full limited certification more quickly. Further, the amendments will result in eliminating an individual’s ability to perform limited medical radiologic procedures prior to successful examination passage, increasing public safety. Temporary limited and general certificates and temporary registration as an NCT would remain as an option for those applicants who meet certain requirements.

Amendments add language clarifying that all applicants for certification or registration will be required to pass the Texas jurisprudence examination. Other amendments repeal language requiring that an applicant pass the jurisprudence examination within three attempts. The changes align the rules with recent rule amendments repealing jurisprudence exam attempt limits for individuals applying for medical licensure, made pursuant to Senate Bill 674 (85th Legislature, Regular Session). It is the Board’s interpretation that SB 674 is intended to eliminate passage attempt limitations for the jurisprudence examination for all applicants applying for licensure under the Texas Medical Board and Advisory Boards’ jurisdiction.

The amendments to §194.10, relating to Retired Certificate or NCT General Registration Permit, repeal language requiring retired certificate holders or NCTs who wish to return to active status to provide professional evaluations from each employment held before his or her certificate or registration permit was placed on retired status.

The amendments to §194.12, relating to Standards for the Approval of Certificate Program Curricula and Instructors, require all limited certificate programs to obtain accreditation by board recognized national or regional accrediting entities in order to obtain board approval. Such amendments will ensure that staff resources are efficiently used, while maintaining the rigorously of the approval process. Further, all currently approved limited training programs have such accreditation status, meaning that the effect of adopting such amendments will have minimal cost impact on such programs, if any.

The amendments to §194.13, relating to Mandatory Training Programs for Non-Certified Technicians, amend the rules related to requirements for mandatory training programs for non-certified technicians for the purpose of providing clarity on required processes for approval and renewal procedures related to programs and instructors.

The amendments to §194.23, relating to Criminal Backgrounds, amend the rules so that language is added for clarity and consistency.

Comments were received from the Texas Medical Association and the Texas Orthopaedic Association on §194.6.

Comment No. 1 - Texas Medical Association

The Texas Medical Association (TMA) opposed language amending §194.6 so that non-certified technicians (NCTs) are required to pass a jurisprudence examination, questioning the Board of Medical Radiologic Technology’s authority to require such an examination and stating that the examination represents an unnecessary cost and potential bar to NCT registration.

Board Response: The Board disagrees that the examination represents an unnecessary or prohibitive cost related to the NCT registration process and disagrees that the test is not authorized under the Medical Radiologic Technology Act. The authority is provided under the MRT Act’s provisions related to ensuring public health and safety through the regulation of the practice of radiologic technology by NCTs. The exam is being tailored so that it will represent a low-cost method for ensuring that NCTs have retained knowledge about highly important practice safety issues (including the identification of dangerous or hazardous procedures that may not be performed by NCTs) and requirements related to maintenance of registration, such as renewal and address update requirements, therefore avoiding interruption in registration and ensuring the receipt of important correspondence from the Board.

Comment No. 2 - Texas Orthopaedic Association

The Texas Orthopaedic Association (TOA) commented on §194.6 and the amended language requiring NCTs to pass a jurisprudence examination, and §194.13, related to NCT training program requirements. TOA encouraged the Board to include stakeholders in the process of adopting NCT training program rules, and expressed concerns about requiring NCTs to pass an examination, asking that if the Board proceeds to adopt such amendments, that the Board work with stakeholders on ensuring that the examination ensures a higher level of care and not an unnecessary regulatory burden.

Board Response: The Board included stakeholders in the rule-making process, presenting the amendments at a meeting on September 28, 2018. Board staff is developing a tailored and low cost examination for NCTs, focused on ensuring that NCTs retain important information related to the most important practice safety issues (including the identification of dangerous or hazardous procedures that may not be performed by NCTs), and requirements related to maintenance of registration, such as renewal and address update requirements, therefore avoiding interruption in registration and ensuring the receipt of important correspondence from the Board. The examination is designed so that it will ensure public safety and assist NCTs to maintain compliance with the timely maintenance of registration requirements.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §601.052, which provides author-
ity for the Board to recommend rules to establish licensing and other fees and recommend rules necessary to administer and enforce this chapter. The amendments are further authorized under S.B. 674 (85th Legislature, R.S.).

No other statutes, articles or codes are affected by this adoption.


(a) General certificate programs. All curricula and programs to train individuals to perform radiologic procedures must be accredited by accrediting organizations recognized by:

(1) the Council for Higher Education Accreditation, including but not limited to: the JRCNMT; or
(2) the United States Secretary of Education, including, but not limited to JRCERT, ABHES, or SACS.

(b) Limited Certificate Programs. All programs and curricula training individuals to perform limited radiologic procedures must:

(1) be accredited by JRCERT, ABHES, or SACS to offer a limited curriculum in radiologic technology; or
(2) be accredited by JRCCVT to offer a curriculum in invasive cardiovascular technology.

(c) Application procedures for certificate programs.

(1) Application shall be made by the program director on official forms available from the board.

(2) The application must be notarized and shall be accompanied by the following items:

(A) the application fee, in accordance with Chapter 175 of this title (relating to Fees and Penalties);
(B) a copy of the current accreditation issued to the program by accepted accrediting organizations under subsections (a) - (b) of this section; and
(C) an agreement to allow the board to conduct an administrative audit of the program to determine compliance with this section.

(d) Procedure for Approval or Denial.

(1) Review by the Executive Director.

(A) The executive director or designee shall review applications for approval and may determine whether an applying program is eligible for approval, or refer an application to the Education Committee of the board for review.

(B) If the executive director or designee determines that the applying program clearly meets all approval requirements, the executive director or designee may approve the applicant, to be effective on the date issued without formal board approval.

(C) If the executive director determines that the applying program does not clearly meet all approval requirements prescribed by the Act and this chapter, approval may be issued only upon action by the board following a recommendation by the Education Committee. The Education Committee may recommend to grant or deny the approval request.

(2) Reconsideration of Denials.

(A) Determinations to deny approval of a program may be reconsidered by the Education Committee or the board based on additional information concerning the applying program and upon a showing of good cause for reconsideration.

(B) A decision to reconsider a denial determination shall be a discretionary decision by the Education Committee, based on consideration of the additional information. Requests for reconsideration shall be made in writing by the applying program director.

(c) Grounds for Denial or Withdrawal of Approval.

(1) Failure of the applying or approved training program to comply with the provisions of this chapter or the Act may be grounds for denial or withdrawal of the approval of the training program.

(2) In the event that the board receives complaints against an approved program, such information shall be referred to the board's investigation department.

(3) Any material misrepresentation of fact by an approved or applying program in any information required to be submitted to the board is grounds for denial or withdrawal of approval.

(4) The board may deny or withdraw its approval of a program after giving the program written notice setting forth its reasons for denial or withdrawal and after giving the program a reasonable opportunity to be heard by the Education Committee of the board.

(f) Renewal.

(1) The training program director shall be responsible for applying for renewal of the training program's approval. The program director must apply for renewal every three years by submitting the required form and documents and by paying the required renewal fee to the board on or before the expiration date of the approval.

(2) Failure to submit the renewal form and renewal fee will result in the expiration of the training program's approval. In the case that the approval is expired, to obtain a new approval, the training program must reapply to meet all requirements for approval under this section.

(3) A training program which fails to apply for renewal or otherwise holds an expired approval shall cease representing the program as an approved training program. The program director shall notify currently enrolled students that the training program is no longer approved under this section. The notification shall be in writing and must be issued within ten days of the expiration of the approval.

(g) Required Reports to the Board. The program director shall report the following to the board within 30 days after the event:

(1) Any change of address for the physical location of the program; or
(2) any change in accreditation status by an acceptable accrediting organization under subsections (a) - (b) of this section.


(a) General. This section sets out the minimum standards for board approval of mandatory non-certified technician training programs, as required by the Act, §601.201, which are intended to train individuals to perform radiologic procedures which have not been identified as dangerous or hazardous. Non-certified technicians are distinct from individuals performing a radiologic procedure under hardship exemption granted under §194.16 of this chapter (relating to Hardship Exemptions).

(b) Training Requirements. In order to successfully complete a program, each student must complete the following minimum training:

(1) courses which are fundamental to diagnostic radiologic procedures:
(A) radiation safety and protection for the patient, self and others--22 classroom hours;

(B) image production and evaluation--24 classroom hours; and

(C) radiographic equipment maintenance and operation--16 classroom hours which includes at least 6 hours of quality control, darkroom, processing, and Texas Regulations for Control of Radiation; and

(2) one or more of the following units of applied human anatomy and radiologic procedures of the:

(A) skull (5 views: Caldwell, Townes, Waters, AP/PA, and lateral)--10 classroom hours;

(B) chest--8 classroom hours;

(C) spine--8 classroom hours;

(D) abdomen, not including any procedures utilizing contrast media--4 classroom hours;

(E) upper extremities--14 classroom hours;

(F) lower extremities--14 classroom hours; and/or

(G) pediatric--5 classroom hours.

(3) Live, In-Person Instructor Direction Required. All hours of the training program completed for the purposes of this section must be live, in-person, and directed by an approved instructor. No credit will be given for training completed by self-directed study, remote learning, or correspondence.

(c) Application Procedures and Eligibility Requirements for Training Programs. An application shall be submitted to the board at least 30 days prior to the starting date of the training program.

(1) Application shall be made by the program director on official forms available from the board.

(2) The application must be notarized and shall be accompanied by the following items:

(A) the application fee, in accordance with Chapter 175 of this title (relating to Fees and Penalties); and

(B) an agreement to allow the board to conduct an administrative audit of the program to determine compliance with this section.

(d) Training Program Application Materials. The application shall include, at a minimum:

(1) the beginning date and the anticipated length of the training program;

(2) the number of programs which will be conducted concurrently and whether programs will be conducted consecutively;

(3) the number of students anticipated in each program;

(4) the daily hours of operation;

(5) the location, mailing address, phone and facsimile numbers of the program;

(6) the name of the training program director;

(7) a list of the names of the approved instructors and the topics each will teach;

(8) clearly defined and written policies regarding the criteria for admission, discharge, readmission and completion of the program;

(9) evidence of a structured pre-planned learning experience with specific outcomes;

(10) a letter or other documentation from the Texas Workforce Commission, Career Schools and Colleges Section indicating that the proposed training program has complied with or has been granted exempt status under Texas Education Code, Chapter 132. If approval has been granted by the Texas Higher Education Coordinating Board, a letter or other documentation is not necessary; and

(11) specific written agreements to:

(A) provide the training as set out in subsection (b) of this section and provide not more than 75 students per instructor in the classroom;

(B) advise students that they are prohibited from performing radiologic procedures which have been identified as dangerous or hazardous in accordance with §194.17 of this chapter (relating to Dangerous or Hazardous Procedures) unless they become an LMRT, MRT or a practitioner;

(C) use written and oral examinations to periodically measure student progress;

(D) keep an accurate record of each student's attendance and participation in the program, accurate evaluation instruments and grades for not less than 5 years. Such records shall be made available upon request by the board or any governmental agency having authority;

(E) issue to each student who successfully completes the program a certificate or written statement including the name of the student, name of the program, dates of attendance and the types of radiologic procedures covered in the program completed by the student;

(F) retain an accurate copy for not less than five years and submit an accurate copy of the document described in subparagraph (E) of this paragraph to the board within 30 days of the issuance of the document to the student; and

(G) permit site inspections by employees or representatives of the board to determine compliance with this section.

(e) Application Procedures and Eligibility Requirements for Instructors.

(1) Except as otherwise provided, all persons who will provide instruction and training in an approved program under this section must obtain approval by the board prior to initiating instruction or training.

(2) To obtain board approval, all individual(s) must at a minimum:

(A) submit an application on a form prescribed by the board;

(B) pay the required application fee, as set forth under Chapter 175 of this title;

(C) successfully complete an education program in accordance with §194.12 of this chapter and not less than six months classroom or clinical experience teaching the subjects assigned; and

(D) have at least one or more of the following qualifications:

(i) be a currently certified MRT who is also currently credentialed as a radiographer by the American Registry of Radiologic Technologists (ARRT);
(ii) be a currently certified LMRT (excluding a temporary certificate) whose limited certificate category(ies) matches the category(ies) of instruction and training; and/or

(iii) be a practitioner who is in good standing with all appropriate regulatory agencies, and is not the subject of any disciplinary order; and

(E) submit to the board any other information the board considers necessary to evaluate the applicant's qualifications.

(f) Procedure for Approval or Denial.
   (1) Review by the Executive Director.
      (A) The executive director or designee shall review applications for approval and may determine whether an applying program or instructor is eligible for approval, or refer an application to the Education Committee of the board for review.
      (B) If the executive director or designee determines that the applying program or instructor clearly meets all approval requirements, the executive director or designee may approve the applicant, to be effective on the date issued without formal board approval.
      (C) If the executive director determines that the applying program or instructor does not clearly meet all approval requirements prescribed by the Act and this chapter, approval may be issued only upon action by the board following a recommendation by the Education Committee. The Education Committee may recommend to grant or deny the approval request.
   (2) Reconsideration of Denials.
      (A) Determinations to deny approval of a program or instructor may be reconsidered by the Education Committee or the board based on additional information concerning the applying program or instructor and upon a showing of good cause for reconsideration.
      (B) A decision to reconsider a denial determination shall be a discretionary decision by the Education Committee, based on consideration of the additional information. Requests for reconsideration shall be made in writing by the applying program director or instructor.

(g) Renewal.
   (1) Training Program.
      (A) The training program director shall be responsible for renewing the approval of the training program.
      (B) The program director must apply for renewal of program approval every three years by submitting the required form and documents and by paying the required renewal fee to the board on or before the expiration date of the approval.
   (C) Failure to submit the renewal form and renewal fee will result in the expiration of the training program's approval. In the case that the approval is expired, to obtain a new approval, the training program must reapply and meet all requirements for approval under this section.

      (D) A training program which does not renew the approval shall cease representing the program as an approved training program. The program director shall notify currently enrolled students that the training program is no longer approved under this section. The notification shall be in writing and must be issued within ten days of the expiration of the approval.

   (2) Instructor.

(A) The instructor must apply for renewal of approval every three years by submitting the required form and documents and by paying the required renewal fee to the board on or before the expiration date of the approval.

(B) Failure to submit the renewal form and renewal fee will result in the expiration of the instructor's approval. In the case that the approval is expired, to obtain a new approval, the instructor must reapply to meet all requirements for approval under this section.

(C) The instructor who does not renew the approval shall cease representing that he or she is approved by the board to provide instruction in a non-certified technician training program in Texas.

(h) Grounds for Denial or Withdrawal of Approval.
   (1) Failure of the applying or approved instructor or training program to comply with the provisions of this chapter or the Act may be grounds for denial or withdrawal of the approval of the instructor or the training program.
   (2) An approved instructor who holds a limited certificate may not teach, train, or provide clinical instruction in a portion of a training program that is different from the limited scope of certification that is listed on the permit. Providing instruction that exceeds the instructor's limited scope of practice is grounds for denial or withdrawal of approval.
   (3) In the event that the board receives complaints against an approved instructor or program, such information shall be referred to the board's investigation department.
   (4) Any material misrepresentation of fact by a program or instructor in any information required to be submitted to the board is grounds for denial or withdrawal of approval.
   (5) The board may deny or withdraw its approval of a program or instructor after giving the program or instructor written notice setting forth its reasons for denial or withdrawal and after giving the program or instructor a reasonable opportunity to be heard by the Education Committee of the board.

(i) Change of Program Address. The program director shall report within 30 days after the event any change of address for the physical location of the program.

§194.23. Criminal Backgrounds.
This section sets out the guidelines and criteria related to the board's authority to deny certification, registration, or other approval, or to take disciplinary action based upon a person's criminal background.

   (1) The board may suspend or revoke any certificate, registration, or other approval; disqualify a person from receiving any certificate, registration, or other approval; or deny to a person the opportunity to be examined for a certificate if the person is convicted of or subject to a deferred adjudication, enters a plea of nolo contendere or guilty to a felony or misdemeanor, and if the crime directly relates to the duties and responsibilities of a certificate, registration, or permit holder.

   (2) In considering whether a pleading of nolo contendere or a criminal conviction directly relates to the occupation of a holder of a certificate, registration, or other approval, the board shall consider:
      (A) the nature and seriousness of the crime;
      (B) the relationship of the crime to the purposes for certification, registration, or other approval; and
      (C) the extent to which a certification, registration, or other approval might offer an opportunity to engage in further criminal
activity of the same type as that which the person previously has been involved.

(3) The following felonies and misdemeanors apply to any certificate, registration, or other approval because these criminal offenses indicate an inability or a tendency to be unable to perform as a holder of a certificate, registration, or other approval:

(A) the misdemeanor of knowingly or intentionally acting as a certificate holder without a certificate under the Act;

(B) any misdemeanor and/or felony offense defined as a crime of moral turpitude by statute or common law;

(C) a misdemeanor or felony offense involving:

(i) forgery;

(ii) tampering with a governmental record;

(iii) delivery, possession, manufacturing, or use of controlled substances and dangerous drugs;

(D) a misdemeanor or felony offense under various titles of the Texas Penal Code:

(i) Title 5 concerning offenses against the person;

(ii) Title 7 concerning offenses against property;

(iii) Title 9 concerning offenses against public order and decency;

(iv) Title 10 concerning offenses against public health, safety, and morals; and

(v) Title 4 concerning offenses of attempting or conspiring to commit any of the offenses in this section.

(4) The misdemeanors and felonies listed in paragraph (3) of this section are not exclusive. The Board may consider other particular crimes in special cases in order to promote the intent of the Act and these sections.

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 28, 2019.

TRD-201900946
Scott Freshour
General Counsel
Texas Medical Board
Effective date: April 17, 2019
Proposal publication date: December 7, 2018
For further information, please call: (512) 305-7016

PART 11. TEXAS BOARD OF NURSING
CHAPTER 213. PRACTICE AND PROCEDURE
22 TAC §213.33

The Texas Board of Nursing (Board) adopts amendments to §213.33(b) and (e), relating to Factors Considered for Imposition of Penalties/Sanctions. The amendments are adopted with changes to the proposed text as published in the February 15, 2019, issue of the Texas Register (44 TexReg 665). A non-substantive change was made in (c) to conform to Texas Register formatting guidelines; therefore, the rule will be republished.

Reasoned Justification

The amendments are adopted under the authority of the Occupations Code §301.461 and §301.151 and are necessary to conform to statutory mandates and eliminate redundant language from the rule.

Background

The Texas Legislature adopted House Bill (HB) 2950 during the 85th Regular Legislative Session. HB 2950 amended the Occupations Code §301.461 (Nursing Practice Act) to prohibit the Board from imposing upon an applicant or licensee the costs of an administrative hearing at the State Office of Administrative Hearings (SOAH). The adopted amendments are necessary to conform to this statutory requirement. The adopted amendments also eliminate redundant language from the section and clarify the use of the Board’s Disciplinary Matrix.

How the Section Will Function

The adopted amendments only affect subsections (b) and (e) of the section. Subsection (b) contains the Board’s Disciplinary Matrix. The adopted amendments eliminate redundant language from the preamble of the Disciplinary Matrix. The adopted amendments also clarify that the Board and SOAH must consider the requirements of the Occupations Code §301.4531 in matters involving multiple violations or individuals with prior discipline. In such cases, §301.4531 requires the Board to consider taking a more severe disciplinary action than would typically be taken for a single violation or if the individual was not previously the subject of disciplinary action. No other changes are made to the Board’s Disciplinary Matrix.

The adopted amendments to §213.33(e)(12) eliminate the assessment of costs, as they relate to a contested case hearing at SOAH, from the rule. Potential appellate costs authorized by the Government Code §2001.177 are not affected by the adopted changes.

Summary of Comments Received

The Board did not receive any comments on the proposal.

Statutory Authority

The amendments are adopted under the authority of the Occupations Code §301.151 and §301.461.

Section 301.151 addresses the Board’s rulemaking authority. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders under Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Section 301.461 states that the Board may not assess a person who is found to have violated Chapter 301 the administrative costs of conducting a hearing to determine the violation.

§213.33. Factors Considered for Imposition of Penalties/Sanctions.

(a) The Board and the State Office of Administrative Hearings (SOAH) shall utilize the Disciplinary Matrix set forth in subsection (b) of this section in all disciplinary and eligibility matters.

(b) The Disciplinary Matrix is as follows:

Figure: 22 TAC §213.33(b)
(c) The Board and SOAH shall consider the following factors in conjunction with the Disciplinary Matrix when determining the appropriate penalty/sanction in disciplinary and eligibility matters. The mitigating and aggravating factors specified in the Matrix are in addition to the factors listed in this subsection. Further, the presence of mitigating factors in a particular case does not constitute a requirement of dismissal of a violation of the NPA and/or Board rules. If multiple violations of the NPA and/or Board rules are present in a single case, the most severe sanction recommended by the Matrix for any one of the individual offenses should be considered by the Board and SOAH pursuant to Tex. Occ. Code §301.4531. The following factors shall be analyzed in determining the tier and sanction level of the Disciplinary Matrix for a particular violation or multiple violations of the Nursing Practice Act (NPA) and Board rules:

(1) evidence of actual or potential harm to patients, clients, or the public;
(2) evidence of a lack of truthfulness or trustworthiness;
(3) evidence of misrepresentation(s) of knowledge, education, experience, credentials, or skills which would lead a member of the public, an employer, a member of the health-care team, or a patient to rely on the fact(s) misrepresented where such reliance could be unsafe;
(4) evidence of practice history;
(5) evidence of present fitness to practice;
(6) whether the person has been subject to previous disciplinary action by the Board or any other health care licensing agency in Texas or another jurisdiction and, if so, the history of compliance with those actions;
(7) the length of time the person has practiced;
(8) the actual damages, physical, economic, or otherwise, resulting from the violation;
(9) the deterrent effect of the penalty imposed;
(10) attempts by the licensee to correct or stop the violation;
(11) any mitigating or aggravating circumstances, including those specified in the Disciplinary Matrix;
(12) the extent to which system dynamics in the practice setting contributed to the problem;
(13) whether the person is being disciplined for multiple violations of the NPA or its derivative rules and orders;
(14) the seriousness of the violation;
(15) the threat to public safety;
(16) evidence of good professional character as set forth and required by §213.27 of this chapter (relating to Good Professional Character);
(17) participation in a continuing education course described in §216.3(f) of this title (relating to Requirements) completed not more than two years before the start of the Board's investigation, if the nurse is being investigated by the Board regarding the nurse’s selection of clinical care for the treatment of tick-borne diseases; and
(18) any other matter that justice may require.

(d) Each specific act or instance of conduct may be treated as a separate violation.

(e) The Board may, upon the finding of a violation, enter an order imposing one or more of the following disciplinary actions, with or without probationary stipulations:

(1) Denial of temporary permit or licensure (including renewal, reinstatement/reactivation, or the return to direct patient care from a limited license);

(2) Approval of temporary permit or licensure (including renewal, reinstatement/reactivation, or the return to direct patient care from a limited license), with one or more reasonable probationary stipulations as a condition of issuance, renewal, or reinstatement/reactivation. Additionally, the Board may determine, in accordance with §301.468 of the NPA, that an order denying a license application/petition, license renewal, license reinstatement/reactivation, or temporary permit be probated. Reasonable probationary stipulations may include, but are not limited to:

(A) submit to care, supervision, counseling, or treatment by a health provider designated by the Board as a condition for the issuance, renewal, or reinstatement/reactivation of the license or temporary permit or the return to direct patient care from a limited license;

(B) submit to an evaluation as outlined in subsections (k) and (l) of this section and/or pursuant to the Occupations Code §301.4521;

(C) participate in a program of education or counseling prescribed by the Board;

(D) limit specific nursing activities and/or practice settings and/or require periodic Board review;

(E) practice for a specified period under the direction of a registered nurse or vocational nurse designated by the Board;

(F) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or

(G) perform public service which the Board considers appropriate;

(3) Issuance of a Warning. The issuance of a Warning shall include reasonable probationary stipulations which may include, but are not limited to, one or more of the following:

(A) submit to care, supervision, counseling, or treatment by a health provider designated by the Board;

(B) submit to an evaluation as outlined in subsections (k) and (l) of this section and/or pursuant to the Occupations Code §301.4521;

(C) participate in a program of education or counseling prescribed by the Board;

(D) limit specific nursing activities and/or practice settings and/or require periodic Board review;

(E) practice for a specified period of at least one year under the direction of a registered nurse or vocational nurse designated by the Board;

(F) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or

(G) perform public service which the Board considers appropriate;

(4) Issuance of a Reprimand. The issuance of a Reprimand shall include reasonable probationary stipulations which may include, but are not limited to, one or more of the following:
(A) submit to care, supervision, counseling, or treatment by a health provider designated by the Board;

(B) submit to an evaluation as outlined in subsections (k) and (l) of this section and/or pursuant to the Occupations Code §301.4521;

(C) participate in a program of education or counseling prescribed by the Board;

(D) limit specific nursing activities and/or practice settings and/or require periodic Board review;

(E) practice for a specified period of at least two years under the direction of a registered nurse or vocational nurse designated by the Board;

(F) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or

(G) perform public service which the Board considers appropriate;

(5) Limitation or restriction of the person's license or permit, including limits on specific nursing activities and/or practice settings and/or periodic Board review;

(6) Suspension of the person's license or permit. The Board may determine that the order of suspension be enforced and active for a specific period and/or probated with reasonable probationary stipulations as a condition for lifting or staying the order of suspension. Reasonable probationary stipulations may include, but are not limited to, one or more of the following:

(A) submit to care, supervision, counseling, or treatment by a health provider designated by the Board;

(B) submit to an evaluation as outlined in subsections (k) and (l) of this section and/or pursuant to the Occupations Code §301.4521;

(C) participate in a program of education or counseling prescribed by the Board;

(D) limit specific nursing activities and/or practice settings and/or require periodic Board review;

(E) practice for a specified period of not less than two years under the direction of a registered nurse or vocational nurse designated by the Board;

(F) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing conducted through urinalysis; or

(G) perform public service which the Board considers appropriate;

(7) Remit payment of an administrative penalty or fine;

(8) Acceptance of a Voluntary Surrender of a nurse's license(s) or permit;

(9) Revocation of the person's license or permit;

(10) Require participation in remedial education course or courses prescribed by the Board which are designed to address those competency deficiencies identified by the Board;

(11) Assessment of a fine as set forth in §213.32 of this chapter (relating to Corrective Action Proceedings and Schedule of Administrative Fines);

(12) Assessment of costs as authorized by the Government Code §2001.177; and/or

(13) Require successful completion of a Board approved peer assistance program.

(f) Every order issued by the Board shall require the person subject to the order to participate in a program of education or counseling prescribed by the Board, which at a minimum, will include a review course in nursing jurisprudence and ethics.

(g) The following disciplinary and eligibility sanction policies, as applicable, shall be used by the Executive Director, Board and SOAH when determining the appropriate penalty/sanction in disciplinary and eligibility matters:

(1) Sanctions for Behavior Involving Fraud, Theft, and Deception, approved by the Board and published on August 28, 2015, in the Texas Register and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html;

(2) Sanctions for Behavior Involving Lying and Falseification, approved by the Board and published on August 28, 2015, in the Texas Register and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html;

(3) Sanctions for Sexual Misconduct approved by the Board and published on February 22, 2008, in the Texas Register (33 TexReg 1649) and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html; and

(4) Sanctions for Substance Use Disorders and Other Alcohol and Drug Related Conduct, approved by the Board and published on August 28, 2015, in the Texas Register and available on the Board's website at http://www.bon.state.tx.us/disciplinaryaction/dsp.html.

(h) To the extent that a conflict exists between the Disciplinary Matrix and a disciplinary and eligibility sanction policy described in subsection (g) of this section, the Disciplinary Matrix controls.

(i) Unless otherwise specified, fines shall be payable in full by cashier's check or money order not later than the 45th day following the entry of an Order.

(j) The payment of a fine shall be in addition to the full payment of all applicable fees and satisfaction of all other applicable requirements of the NPA and the Board's rules.

(k) If the Board has probable cause to believe that a person is unable to practice nursing with reasonable skill and safety because of physical impairment, mental impairment, chemical dependency/substance use disorder, or abuse/misuse of drugs or alcohol, the Board may require an evaluation that meets the following standards:

(1) The evaluation must be conducted by a Board-approved addictionologist, addictionist, medical doctor, neurologist, doctor of osteopathy, psychologist, neuropsychologist, advanced practice registered nurse, or psychiatrist, with credentials appropriate for the specific evaluation, as determined by the Board. In all cases, the evaluator must possess credentials, expertise, and experience appropriate for conducting the evaluation, as determined by the Board. The evaluator must be familiar with the duties appropriate to the nursing profession.

(2) The evaluation must be designed to determine whether the suspected impairment prevents the person from practicing nursing with reasonable skill and safety to patients. The evaluation must be conducted pursuant to professionally recognized standards and methods. The evaluation must include the utilization of objective tests and instruments with valid and reliable validity scales designed to test the person's fitness to practice. The evaluation may include testing of the person's psychological or neuropsychological stability only if the person is suspected of mental impairment, chemical dependency, or drug
or alcohol abuse. If applicable, the evaluation must include information regarding the person's prognosis and medication regime.

(3) The person subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board. The person subject to evaluation should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the person a copy.

(i) When determining evidence of present fitness to practice because of known or reported unprofessional conduct, lack of good professional character, or prior criminal history:

(1) The Board may request an evaluation conducted by a Board-approved forensic psychologist, forensic psychiatrist, or advanced practice registered nurse who:

(A) evaluates the behavior in question or the prior criminal history of the person;

(B) seeks to predict:

(i) the likelihood that the person subject to evaluation will engage in the behavior in question or criminal activity again, which may result in the person committing a second or subsequent reportable violation or receiving a second or subsequent reportable adjudication or conviction; and

(ii) the continuing danger, if any, that the person poses to the community;

(C) is familiar with the duties appropriate to the nursing profession;

(D) conducts the evaluation pursuant to professionally recognized standards and methods; and

(E) utilizes objective tests and instruments, as determined and requested by the Board, that are designed to test the psychological or neuropsychological stability, fitness to practice, professional character, and/or veracity of the person subject to evaluation.

(2) The person subject to evaluation shall sign a release allowing the evaluator to review the file compiled by Board staff and a release that permits the evaluator to release the evaluation to the Board.

(3) The person subject to evaluation should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the person a copy.

(m) Notwithstanding any other provision herein, a person's failure to appear in person or by attorney on the day and at the time set for hearing in a contested case shall entitle the Board to revoke the person's license.

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 April 1, 2019.
TRD-201900973
Jena Abel
Deputy General Counsel
Texas Board of Nursing
Effective date: April 21, 2019
Proposal publication date: February 15, 2019
For further information, please call: (512) 305-6822

TITLE 28. INSURANCE
PART 1. TEXAS DEPARTMENT OF INSURANCE
CHAPTER 33. CONTINUING CARE PROVIDERS

The Texas Department of Insurance has renamed Chapter 33 and adopts amendments to 28 TAC §§33.2, 33.3, 33.5, 33.6, and 33.8 - 33.10, and new 28 TAC §§33.101 - 33.105 relating to Continuing Care Providers and Continuing Care in Residence. The department also adopts by reference the 19 forms listed in §33.8. The amendments and new sections are adopted with changes to the proposed text published in the January 18, 2019, issue of the Texas Register (44 TexReg 317). The department revised a typographical error in §33.2(9) and other non-substantive changes.

REASONED JUSTIFICATION. The amendments and new sections are necessary to implement House Bill 2697, 84th Legislature, Regular Session (2015). HB 2697 added continuing care in residence to the scope of continuing care under Health and Safety Code Chapter 246.

Chapter Name Change.

The name of Chapter 33 is changed from "Continuing Care Retirement Facilities" to "Continuing Care Providers" to reflect that Chapter 33 applies not only to continuing care in facilities, but also to continuing care in residence.

Subchapter A. General Provisions.

Amendments to §33.2 add new definitions, revise existing definitions, and make changes to conform to the department's style guidelines. Existing definitions are renumbered as appropriate following addition of the new defined terms.

The definitions of "actuarial review" in §33.2(3), "continuing care" in §33.2(7), "entrance fee" in renumbered §33.2(13), "facility" in renumbered §33.2(14), "provider" in renumbered §33.2(20), and "resident" in renumbered §33.2(24), are amended to clarify the application of each term to continuing care in residence.

The definition for "continuing care in residence" is adopted in §33.2(9). The definition for "continuing care in residence" is consistent with Health and Safety Code §246.0025 and clarifies who is subject to the rule. The text of §33.2(9) as proposed is changed to correct a typographical error; the word "Continuing" is capitalized, for consistency with capitalization of the other definitions.

The definition for "financial statements" is adopted in §33.2(15). The definition for "financial statements" clarifies that financial statements for all providers must be completed in accordance with generally accepted accounting principles of the U.S. and establishes additional requirements for continuing care in residence providers. The additional requirements are listed in §33.2(15)(A) - (D). They include segmented income statement reporting, which report facility services and in-residence services separately based on an actuarial review; reporting balance sheet liabilities for facility services and in-residence services separately; disclosing in a supporting schedule entrance fee activity by resident; and disclosing the ratios described in §33.505(b)(2) - (7).
Amendments to §33.3 reflect that the chapter applies to providers rather than facilities, because Health and Safety Code Chapter 246 was expanded from continuing care provided in facilities to include continuing care in residence.

Amendments to §33.5 update an outdated statutory citation to Insurance Code Chapter 82.

Amendments to §33.6 clarify that a certificate of authority is required to provide care under a continuing care contract as defined in Health and Safety Code Chapter 246, regardless of where the continuing care services are provided.

Amendments to §33.8 add three forms adopted by reference and amend existing forms adopted by reference. The amendments to §33.8 also add references to the department's internal form numbering system ("FIN" numbers) for all CCRC forms for clarity. Nonsubstantive information on the listed forms is indicated in brackets, including the department's physical address, mailing addresses, and electronic addresses; submission locations; submission formats and methods; and contact information. Nonsubstantive information is subject to change. The most current versions of the forms will be available on the department's website. The amended forms will encourage electronic submissions, which should result in greater efficiency and cost savings to persons submitting the forms to the department.

Changes to existing CCRC Form 6a (FIN389) amend the directions providers must follow to prepare and submit disclosure statements. Amendments to existing CCRC Form 9 (FIN392) allow the form to be used for entrance fee escrow release requests for both facility-based and residence-based continuing care contracts. It provides additional notice to escrow agents about releasing continuing care in residence entrance fee escrow funds only after the department's approval.

New CCRC Forms 1a (FIN604), 6b (FIN605), and 14a (FIN607) are also adopted by reference in §33.8. A licensed provider must use CCRC Form 1a (FIN604) to request authority to offer continuing care in residence. CCRC Form 6b (FIN605) lists the contents continuing care in residence providers must include in disclosure statements, which are filed with the department and given to prospective residents. CCRC Form 14a (FIN607) is the form a continuing care in residence provider must use to request that the department approve the release of continuing care in residence entrance fee escrow funds.

Amendments to CCRC Form 3 (FIN384) and CCRC Form 4 (FIN385) update the social security number requirement to note "Disclosure of Social Security Number is required under Texas Family Code §231.302." These two forms, and the other forms listed as adopted by reference in §33.8, will also have nonsubstantive updates for letterhead, submission addresses, and current department style guidelines.

Amendments to §33.9 describe how to submit inquiries, applications, and other filings to the department.

Amendments to §33.10 clarify that the Commissioner may investigate not only unauthorized continuing care facilities but also unauthorized continuing care in residence providers.

**Subchapter B. Continuing Care in Residence.**

Section 33.101 is added to define the scope of Subchapter B relating to continuing care in residence. The subchapter addresses applying for authority, disclosure statements, and entrance fee escrow accounts for providers offering continuing care in residence.

Section 33.102 is added to specify the information that must be provided and the process that must be followed to apply for authority to offer continuing care in residence.

Section 33.103 is added to explain when and how a continuing care in residence provider must compile and file disclosure statements related to continuing care in residence. Continuing care in residence providers must file a disclosure statement with the department annually or more frequently, when amended for accuracy.

Section 33.104 is added regarding entrance fee escrow account requirements. Section 33.104(a) references the current rules that the department will apply to the continuing care in residence escrow account. Section 33.104(b) requires continuing care in residence entrance fee escrow accounts be held in escrow. It also states that providers must request release of the escrow funds using CCRC Form 14a (FIN607), and it provides that a request must be approved by the department before an escrow agent may release the funds. Section 33.104(c) establishes the information the department will consider when a provider requests the release of entrance fee escrow funds and the conditions that will prevent the department from approving the request. Section 33.104(d) states that the department will issue a determination on a provider's request to both the provider and the escrow agent.

Section 33.105 is added to describe requirements for continuing care in residence form contracts. Section 33.105(a) requires providers to use a standard continuing care in residence contract. Section 33.105(b) lists requirements for the standard form, including that it must contain an amortization schedule for release of entrance fee escrow funds, a description of the provider's statutory duties and obligations, and a specific disclosure regarding cancellation rights. Health and Safety Code §246.056 requires a cancellation rights disclosure; subsection (d) of that section provides language for the disclosure and requires that at least a substantially similar version of that language be included in the contract. Consistent with that, the department's required disclosure includes language clarifying the cancellation rights associated with a continuing care in residence contract.

In addition, the amended sections include non-substantive editorial and formatting changes to conform the sections to the department's current style and to improve the rule's clarity.

**SUMMARY OF COMMENTS.** The department did not receive any comments on the proposal.

**SUBCHAPTER A. GENERAL PROVISIONS**

28 TAC §§33.2, 33.3, 33.5, 33.6, 33.8 - 33.10

**STATUTORY AUTHORITY.** Amendments to §§33.2, 33.3, 33.5, 33.6, and 33.8 - 33.10 are adopted under Health and Safety Code §246.003(b) and §246.0737, and Insurance Code §36.001.

Health and Safety Code §246.003(b) authorizes the department to adopt rules to implement Health and Safety Code Chapter 246.
Health and Safety Code §246.0737 charges the department with adopting rules that establish a different set of criteria for release of continuing care in residence entrance fees from escrow.

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.

§33.2. Definitions.
The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.


2. Actuarial funded status--The ratio of actuarial assets plus net accounting assets to actuarial liabilities plus actuarial refund liabilities.

3. Actuarial review--An analysis performed by a qualified actuary in accordance with actuarial standards of practice of the current actuarial balance of the financial condition of a facility and of the provider's continuing care in residence operations, if any. An actuarial review includes, but is not limited to, the following:

   A. an actuarial report;
   B. a statement of actuarial opinion;
   C. an actuarial balance sheet;
   D. a cash flow projection; and
   E. disclosure of the actuarial methodology, formulas, and assumptions, including justification for continuing care in residence entrance fee escrow account amortization schedules.

4. Affiliate--A person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the person specified.

5. Audited financial statements--Statements prepared by an independent Certified Public Accountant (CPA), which includes an audit opinion from the CPA concerning the financial statements.

6. Commissioner--The Commissioner of Insurance of the Texas Department of Insurance.

7. Continuing care--The furnishing of a living unit, together with personal care services, nursing services, medical services, or other health-related services, to an individual who is not related by consanguinity or affinity to the provider of the care under a continuing care contract, regardless of whether the services and the living unit are provided at the same location. The term "continuing care" includes continuing care in residence.

8. Continuing care contract--An agreement that requires the payment of an entrance fee by or on behalf of an individual in exchange for the furnishing of continuing care by a provider and that is effective for:

   A. the life of the individual; or
   B. more than one year.

9. Continuing care in residence--Continuing care services provided to an individual in the individual's residence or otherwise enabling the individual to remain in the individual's residence, as authorized under Health and Safety Code §246.0025.

10. Control--The possession, direct or indirect, of the power to direct or cause the direction of management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or non-management services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. This definition also includes the terms "controlling," "controlled by," and "under common control with." Control is presumed to exist if any person, directly or indirectly, owns, controls, or holds with the power to vote, or holds irrevocable proxies representing, 10 percent or more of the voting securities or authority of any other person. This presumption may be rebutted to show that control does not in fact exist.

11. Debt service coverage ratio--Total excess (deficit) of revenues and gains in excess of expenses and losses plus interest expense plus depreciation expense plus amortization expense minus amortization of deferred revenues from entry fees plus net proceeds from entry fees, divided by annual debt service (annual principal and interest payment or maximum annual debt service).

12. Department--The Texas Department of Insurance.

13. Entrance fee--An initial or deferred transfer of money, or other property valued at an amount in excess of three months' payments for rent or services, made, or promised to be made, as full or partial consideration for acceptance by a provider of a specified individual entitled to receive continuing care under a continuing care contract. The term does not include a deposit made under a reservation agreement.

14. Facility--A place in which a person undertakes to provide continuing care. A place is an establishment, complex, campus, or group of living units at which a provider engages in the business of providing continuing care. If two or more establishments, complexes, campuses, or groups of living units are located on one premises, they must be treated as one facility if their operations are controlled by the same provider. If two or more establishments, complexes, campuses, or group of living units are located on one premises but controlled by separate providers, they must be treated as separate facilities. A facility that is constructed on an as-needed basis and for which a certificate of authority is obtained from the department prior to facility construction will be considered a phase-in facility. The term does not include an individual's residence if the residence is not a living unit provided by a provider.

15. Financial Statements--Financial statements completed in accordance with generally accepted accounting principles. Financial statements for providers with continuing care in residence operations must:

   A. include segmented financial statement reporting, separating the facility services and in residence services, including an actuarial review;
   B. include a balance sheet that reports liabilities for obligations for facility-based services and obligations for in residence services separately;
   C. disclose entrance fee activity for the fiscal year including the amount held in escrow at the beginning of the year, any amounts collected during the year, any amounts released during the year, and the total amount held in escrow at the end of the year; and
   D. disclose the ratios addressed in §33.505(b)(2) - (7) of this title.

16. Fund balance--Assets as shown on the balance sheet minus liabilities shown on the balance sheet.

17. Living unit--A room, apartment, cottage, or other area within a facility that is set aside for the exclusive use or control of one or more specified individuals.
(18) Long-term nursing care—Nursing care provided for a period longer than 365 consecutive days.
(19) Person—An individual, corporation, association, or partnership, including a fraternal or benevolent order or society.
(20) Provider—A person who undertakes to provide continuing care under a continuing care contract, whether in a facility or in an individual's residence.
(21) Qualified actuary—A member of the American Academy of Actuaries or the Society of Actuaries or a person recognized by the Commissioner as having comparable training or experience.
(22) Reservation agreement—An agreement that requires the payment of a deposit to reserve a living unit for a prospective resident. A deposit made under a reservation agreement is not considered an entrance fee.
(23) Reservation agreement deposit—A deposit paid under a reservation agreement.
(24) Resident—An individual entitled to receive continuing care from a provider under a continuing care contract.

§33.3. Scope.
This chapter applies to a provider if the provider:

(1) provides continuing care under a continuing care contract agreement;
(2) enters into, offers, or solicits a continuing care contract; or
(3) enters into, offers, or solicits a reservation agreement on or after September 1, 1993.

§33.5. Violation of Rules.
A violation of any provision of this chapter or of any order of the Commissioner or the department entered under this chapter may subject the violator to penalties, including those stated in Insurance Code Chapter 82.

§33.6. Fees for Filing Application for Certificate of Authority.
An applicant filing for a certificate of authority under Health and Safety Code §246.022 must pay the department a nonrefundable filing fee of $10,000. No fee is required for a §33.102 application for authority for continuing care in residence.

§33.8. Forms.
The forms listed in this section are available on the department's website. The department adopts and incorporates by reference the forms listed in paragraphs (1) - (19) of this subsection, and their use is required, where applicable, for compliance with the provisions of this chapter. Forms that are on the department's letterhead will use the most current version of that letterhead, as it may change from time to time. Bracketed information in the forms is subject to change, including the department's physical, mailing, and electronic addresses; submission locations; submission formats and methods; and contact information. Persons submitting the forms should verify that they are using the most recent online version before submitting.

(1) CCRC Form 1 (FIN382)—Application for certificate of authority to do business in the State of Texas under Health and Safety Code Section 246.022;
(2) CCRC Form 1a (FIN604)—Application for authority to offer continuing care in residence in Texas under Health and Safety Code Section 246.0025(b);
(3) CCRC Form 2 (FIN383)—Application for Commissioner approval to release excess loan reserve escrow fund amounts under Health and Safety Code Section 278.078;
(4) CCRC Form 3 (FIN384)—Officers and directors page;
(5) CCRC Form 4 (FIN385)—Biographical data form;
(6) CCRC Form 4a (FIN386)—Biographical data form for not-for-profit CCRC board members;
(7) CCRC Form 5 (FIN387)—Delivery of disclosure statement;
(8) CCRC Form 6 (FIN388)—Format for disclosure statement for continuing care facility;
(9) CCRC Form 6a (FIN389)—Instructions for preparing a continuing care retirement community disclosure statement for filing with the Texas Department of Insurance;
(10) CCRC Form 6b (FIN605)—Format for disclosure statement for continuing care in residence;
(11) CCRC Form 7 (FIN390)—Change of control statement for CCRC;
(12) CCRC Form 8 (FIN391)—Certification of changes to disclosure statement;
(13) CCRC Form 9 (FIN392)—Notice of request to release entrance fee escrow funds;
(14) CCRC Form 10 (FIN393)—Notice of request to release funds from the reserve fund escrow account;
(15) CCRC Form 11 (FIN394)—Notice by provider of re-payment of previously released funds to the reserve fund escrow account;
(16) CCRC Form 12 (FIN395)—Affidavit of re-payment of previously released funds to the reserve fund escrow account;
(17) CCRC Form 13 (FIN396)—Notice of lien;
(18) CCRC Form 14 (FIN397)—Calculations concerning conditions; and
(19) CCRC Form 14a (FIN607)—Provider request for release of continuing care in residence entrance fee escrow funds.

§33.9. Address for Filings.
(a) All inquiries, correspondence, applications, and other filings under this chapter must be sent to the appropriate physical, mailing, or electronic address:

(1) specified on the applicable department form being used; or
(2) listed on the department website.

(b) Notwithstanding a requirement in this chapter to make a submission in a paper form, any inquiry, correspondence, application, or other filing under this chapter may be submitted electronically to the department, unless specifically requested in a specified format by the department.

§33.10. Unauthorized Providers Required to Respond to Inquiries.
If the Commissioner becomes aware of an unauthorized provider and makes inquiries to determine the applicability of this chapter and the Act to the provider, the recipient of an inquiry must respond within 30 days. The Commissioner may conduct any necessary investigation or examination regarding the inquiry and, if warranted, take action against the provider.
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 28, 2019.

TRD-201900948
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: April 17, 2019
Proposal publication date: January 18, 2019
For further information, please call: (512) 676-6584

SUBCHAPTER B. CONTINUING CARE IN RESIDENCE

28 TAC §§33.101 - 33.105

STATUTORY AUTHORITY. Sections 33.101 - 33.105 are adopted under Health and Safety Code §246.003(b) and §246.0737, and Insurance Code §36.001.

Health and Safety Code §246.003(b) authorizes the department to adopt rules to implement Health and Safety Code Chapter 246.

Health and Safety Code §246.0737 directs the Commissioner to establish escrow release requirements for continuing care in residence different from those applicable to facility-based entrance fee escrow funds.

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.

§33.101. Scope.

This subchapter establishes the requirements and procedures for certificates of authority, disclosure statements, and entrance fee escrow accounts applicable to continuing care in residence under Health and Safety Code §246.022. With respect to continuing care in residence, this subchapter governs in case of conflict with other provisions of this chapter.

§33.102. Adding Authority for Continuing Care in Residence.

(a) Sections 33.202, 33.203, 33.205, and 33.206 of this title apply to continuing care in residence.

(b) A person must also hold a certificate of authority to provide continuing care at a facility before the person is eligible to receive authority to provide continuing care in residence. A provider must have authority to provide continuing care in residence before accepting any consideration or entering into any contracts for continuing care in residence.

(c) To apply for authority to provide continuing care in residence, an applicant must submit a CCRC Form 1a (FIN 604), including the following:

(1) the provider's CCRC certificate of authority license number;
(2) format for disclosure statement for continuing care in residence (CCRC Form 6b (FIN605));
(3) a business plan which includes:

(A) a three-year financial projection with associated assumptions;
(B) the geographic region proposed for continuing care in residence services;
(C) evidence of the actuarial review for entrance fee (and related amortization schedule) and service fee amounts;
(D) information regarding resident qualification;
(E) information regarding marketing and advertising activities; and
(F) information regarding refund procedures applicable before a resident receives continuing care in residence services; and

(d) Information and filings under this subchapter must be submitted, as applicable, on paper or in an electronic format that is acceptable to the department. The department's submission locations, formats, and contact information are subject to change; persons submitting forms or information must confirm that they are using the most recent version before submitting to the department. CCRC forms are available on the department's website.

(e) The time period specified in Health and Safety Code §246.022 begins when the department has received all required material and information and deems the application complete.

(f) Incomplete applications will expire without refund one year from the date of receipt of the applicant's initial CCRC Form 1a (FIN604) Application for Authority to Offer Continuing Care in Residence Services in the State of Texas under Health and Safety Code §246.0025(b).

§33.103. Disclosure Statement Requirements.

(a) Sections 33.302, 33.303, 33.305, 33.307, and 33.308 of this title apply to continuing care in residence.

(b) The organization and elements of the disclosure statement, including any revisions, must follow the format in CCRC Form 6b (FIN605). The disclosure statement or revision must be submitted in compliance with CCRC Form 6a (FIN389).

(c) The disclosure statement must be submitted to the department before any of the following occur:

(1) the provider contracts to provide continuing care in residence in Texas;
(2) the provider extends the term of an existing contract to provide continuing care in residence in Texas; or
(3) the provider or provider's agent solicits a continuing care contract in Texas for an individual who resides in Texas at the time of the solicitation. A continuing care contract is considered solicited if, during the 12-month period preceding the date on which the continuing care contract is signed or accepted by either party, information concerning the availability of the continuing care contract is given:

(A) by personal, telephone, mail, or other communication directed to and received by a person at a location in Texas; or
(B) in paid advertisements published or broadcast from within Texas, other than in a publication in which more than two-thirds of the circulation is outside Texas.

(d) The provider must submit the initial and annual revisions of the disclosure statement not later than 120 days after the end of the

ADOPTED RULES  April 12, 2019  44 TexReg 1871
The disclosure statement must also include the following:

1. Annual audited financial statements as defined in §33.2 of this title;
2. Annual actuarial review; and
3. Information about how the amortization schedules in care in residence contracts are calculated and applied to releases described under §33.104(b) of this title.

No less than 30 days before entering into a contract with a third-party to manage the provider's continuing care in residence operations, a provider must submit one copy of the management contract to the department as set out in §33.9 of this title.

§33.104 Entrance Fee Escrow Account Requirements.

(a) Sections 33.401(b) - (e) and 33.402(a) of this title apply to continuing care in residence.

(b) Entrance fees must be held in escrow as set forth in Health and Safety Code §246.071. An escrow agent cannot release, and the provider cannot request or accept, entrance fee funds from the escrow agent without department approval. A provider must file CCRC Form 14a (FIN607) to request release of entrance fee escrow funds for identified residents. An escrow agent must file a CCRC Form 9 (FIN392) when a provider requests the agent release entrance fee escrow account funds.

(c) To obtain department approval:

1. A provider must verify in Form 14a (FIN607) that:
   A. The identified residents are receiving continuing care in residence;
   B. The requested amount complies with amortization schedules contained in the continuing care in residence contracts; and
   C. The provider's assets exceed the actuarial present value of the expected costs of performing all remaining obligations to all residents under continuing care contracts; and
2. The provider must disclose its operating ratio and current ratio. A provider is not eligible for a release of continuing care in residence entrance fee escrow funds if the provider's:
   A. Operating ratio is greater than 100 percent, unless there is a cash flow analysis acceptable to the department; or
   B. Current ratio is not greater than 150 percent.

(d) The department will issue a determination on the request for release of continuing care in residence entrance fee escrow funds to both the provider and escrow agent.

§33.105 Contract Requirements for Continuing Care in Residence.

(a) Providers must use a standard form to contract with residents for continuing care in residence.

(b) The standard contract form must:

1. Contain an amortization schedule showing when the provider will be entitled to release of a resident's entrance fee from escrow;
2. Include or reference all the provider's statutory duties and obligations, including the refund provisions of Health and Safety Code §246.057; and
3. Include the following information about the resident's cancellation rights, in bold, capitalized, or underlined type so as to be conspicuous: "You may cancel this contract at any time before midnight of the seventh day, or a later day if specified in the contract, after the date on which you sign this contract, or you receive the provider's disclosure statement, whichever occurs later. If you elect to cancel the contract, you must do so by written notice and you will be entitled to receive a refund of all assets transferred other than periodic charges applicable to your receiving continuing care in residence services."

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 28, 2019.
TRD-201900949
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: April 17, 2019
Proposal publication date: January 18, 2019
For further information, please call: (512) 676-6584

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES
CHAPTER 7. DADS ADMINISTRATIVE RESPONSIBILITIES
SUBCHAPTER B. CONTRACTS
MANAGEMENT FOR STATE FACILITIES AND CENTRAL OFFICE
40 TAC §7.59

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §7.59, concerning Award of Construction Contracts, in Title 40, Part 1, Chapter 7, Subchapter B of the Texas Administrative Code (TAC). The repeal is adopted without changes to the proposed text as published in the January 11, 2019, issue of the Texas Register (44 TexReg 226), and therefore will not be republished.

Background and Justification

Texas Health and Safety Code, §§551.007, requires the HHSC Executive Commissioner to design, construct, equip, furnish, and maintain buildings and improvements authorized by law at facilities under HHSC's jurisdiction. Texas Government Code, §§531.0055(e), (f),(4), and (j), also task the Executive Commissioner with the administrative duties of contracting and purchasing and adopting rules necessary to implement these duties. TAC §7.59 requires HHSC to give notice of its intent to award a construction contract by publishing an invitation for bids (IFB) notice twice in two newspapers of general circulation.

The repeal of TAC §7.59 will allow posting of construction contracts on the Electronic State Business Daily and through the use of plan rooms according to state statute. Texas Government Code, Chapter 2269, governs the various procurement methods available for construction contracts. The current administrative rule restricts the procurement method to only one type, and an...
IFB is not always the most appropriate procurement method for construction contracts. HHSC should determine the proper procurement method on a case-by-case basis pursuant to Chapter 2269 in order to best meet the business objective and project goals of each procurement. Therefore, HHSC determined that the repeal of §7.59 is necessary to enable the procurement of construction contracts in the most fiscally sound and statutorily compliant manner possible.

HHSC is simultaneously adopting the repeal of §392.411, TAC Title 1, Part 15, Chapter 392, Subchapter E, Contract Management for DSHS Facilities and Central Office, to also allow agency consideration of additional procurement methods available for construction contracts instead of one type. These adopted repeals will make it unnecessary for agency construction contract bids to be placed in newspapers across the state.

Comments
The 30-day comment period ended February 10, 2019. During the comment period, HHSC received one comment from the Texas Press Association against the rule repeal.

Comment: The Texas Press Association stated that repeal of the rule would eliminate needed public notice requirements and would allow HHSC to decide the amount and type of notice required with no oversight regarding the decision.

Response: HHSC declines to make the requested change to the proposed repeal of §7.59. The Texas Press Association’s concerns are unwarranted and fail to take into account existing state statutes. HHSC is required to follow state procurement laws regarding the public posting of procurement opportunities as well as the requirements of Texas Government Code Chapter 2269 concerning the contracting and delivery procedures for construction projects. Repealing the administrative rule will not prevent HHSC from publishing notice in a newspaper if the notice is deemed appropriate. However, HHSC will not be required to do so if it determines the statutorily mandated notice is sufficient.

Statutory Authority
The repeal is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority.

The repeal affects Government Code §531.0055(f)(4), which provides the Executive Commissioner with authority to contract for the Health and Human Services System, and Health and Safety Code §551.007, which requires the Executive Commissioner to build, furnish, and maintain buildings.

The repeal is consistent with Government Code §531.00553 and Government Code Chapter 2269.

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 April 1, 2019.

TRD-201900971
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Effective date: April 21, 2019
Proposal publication date: January 11, 2019
For further information, please call: (512) 406-2451

ADMITTED RULES  April 12, 2019  44 TexReg 1873