

ADOPTED RULES

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY SUBCHAPTER G. ADMINISTRATIVE ACTIONS AND SANCTIONS

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts amendments to §371.1603, concerning Legal Basis and Scope; and §371.1715, concerning Damages and Penalties.

The amendments to §371.1603 and §371.1715 are adopted without changes to the proposed text as published in the December 13, 2019, issue of the *Texas Register* (44 TexReg 7576). These rules will not be republished.

BACKGROUND AND PURPOSE

The purpose of the amendments is to clarify the factors that the agency considers when imposing and scaling enforcement actions as required by Texas Government Code §531.102(x), including appropriate mitigating factors, as well as to clarify that the agency assesses penalties in accordance with relevant law, particularly Texas Human Resource Code §32.039.

During its last review of the HHSC-Office of Inspector General (OIG), the Sunset Advisory Commission recommended that the agency revise its rules to provide direction for determining which sanction to apply to each violation committed by a person subject to agency regulation. After consulting with stakeholders, the Executive Commissioner proposed amendments to §371.1603 to provide that direction while also affirming that each matter is evaluated on a case-by-case basis. The amended rule clarifies those factors that the agency applies when determining the seriousness, prevalence of error, harm, or potential harm of a violation, as required by statute. The amendments add examples of mitigating factors that the agency may consider when evaluating a violation and scaling resulting enforcement actions. The amendments also clarify that a person potentially subject to an enforcement action may introduce such mitigating factors in any contested case, as well as during the agency's informal resolution process.

The amendments to §371.1715 clarify that OIG has the authority to impose administrative penalties on behalf of HHSC or other health and human service agencies, if such penalties are authorized by law, and that penalties for violations concerning Medicaid and other medical assistance programs will be imposed in

accordance with §32.039, Texas Human Resources Code, which provides ranges of penalties for specific violations. The amendments also clarify that OIG will, when imposing penalties, apply the factors in accordance with §371.1603.

COMMENTS

The 31-day comment period ended January 13, 2020. During this period, HHSC received comments regarding the proposed rules from the Texas Medical Association, the Texas Dental Association, the Texas Health Care Association, Superior HealthPlan, BakerHostetler, LLP, and In-Home Attendant Services. A summary of comments relating to the rules, and HHSC responses, follows.

Comment: One commenter agrees that the amended rule language in §371.1603 protects the due process of a person subject to agency regulation. The commenter also agrees with OIG that each case must be evaluated individually, allowing the person potentially subject to an enforcement action to submit mitigating factors for the agency's consideration during a contested case and during the agency's informal resolution process, as the agency evaluates violations, and scales resulting enforcement actions.

Response: OIG appreciates the supportive comment. No change was made in response to the comment.

Comment: Two commenters suggest changing the phrase "sole discretion" in §371.1603(c) to "reasonable discretion." One commenter believes this change is necessary to ensure that recipient and community needs are considered in connection with the determination of whether to grant an installment agreement. Further, one commenter suggests this change should occur to ensure that similarly situated providers are treated in a reasonably consistent manner.

Response: OIG regularly offers installment agreements when warranted by the facts. However, OIG considers this comment to be beyond the scope of the amendment. The language "[a]t OIG's sole discretion, overpayments may be collected in a lump sum or through installments" is an existing provision in the rule. OIG added the sentence to which the commenter referred as an accommodation to an informal commenter seeking to ensure that providers are aware of their opportunity to request installment agreements. The phrase "sole discretion" in the added sentence reiterates the existing provision in the first sentence of §371.1603(c). No change was made in response to this comment.

Comment: Two commenters recommend that the phrase "administrative penalties or both" in §371.1603(c) should be deleted. One commenter states that it is incongruous to subject a person to an administrative penalty for paying under the terms of an installment agreement when an installment agreement is not a basis for the imposition of an administrative penalty under the

Texas Administrative Code (TAC) rules that provide grounds for enforcement. The commenter further states that the imposition of administrative penalties for utilization of an installment agreement would result in the stacking of administrative penalties.

Response: The administrative penalties referenced in the rule are default penalties for failing to comply with the terms of an installment agreement. OIG reserves the right to use installment agreements and reserves the right to include default penalty provisions in the installment agreements in case a person fails to comply with the agreement. Default penalties only come into effect if the provider fails to comply with the terms of the installment agreement. Additionally, a provider is not required to accept an installment agreement that includes a provision for the assessment of penalties. OIG has authority, under Texas Human Resources Code §32.039(b)(3) and 1 TAC §371.1655(3) and (9), to assess a penalty for failing to repay overpayments after receiving notice of a delinquency or failing to comply with a settlement agreement. A provider's delinquency in making a payment required by a settlement agreement is a new ground for enforcement that exposes the provider to the risk of additional penalties. This is not stacking of penalties, but penalties assessed as a result of contract non-compliance. No change was made in response to this comment.

Comment: One commenter suggests establishing a specified rate of interest in connection with installment agreements, including using a provision similar to that set forth in 1 TAC §357.643, updated to refer to Texas Finance Code §304.102.

Response: OIG uses, in its current settlement agreement forms, the judgment rate referenced in Texas Finance Code §304.003 to calculate interest in connection with installment agreements. No change was made in response to this comment.

Comment: One commenter requests that OIG provide a citation for the underlying statutory authority that serves as the basis for the proposed amendment language regarding authorization of interest and/or penalties in §371.1603(c).

Response: OIG has authority under Texas Human Resources Code §32.039(b)(3) and 1 TAC §371.1655(3) and (9) to assess a penalty for failing to repay overpayments after receiving notice of a delinquency or failing to comply with a settlement agreement. Furthermore, a provider is not required to accept an installment agreement that includes a provision for the assessment of interest and/or administrative penalties. Unless prohibited by law, parties to a contract may mutually agree on remedies for default. A provider's delinquency in making a payment required by a settlement agreement is a new ground for enforcement that exposes the provider to the risk of additional penalties. No change was made in response to this comment.

Comment: One commenter requests that if the proposed amendment language in §371.1603(c) is adopted, the language should be amended to state that (1) the interest and/or penalties referenced are only for late or missed payments and (2) a good cause exception must be included in the settlement agreement.

Response: OIG routinely considers evidence of good cause submitted by a provider who is delinquent in making payments required by a settlement agreement. Every settlement agreement contains an amendment clause allowing amendment by mutual agreement. When warranted by the facts, OIG considers amendment of the settlement agreement to adjust the payment schedule. No change was made in response to this comment.

Comment: One commenter suggests that OIG adopt an approach similar to that used in federal regulation 42 CFR §405.371(b)(3), which addresses suspension of Medicare payments to providers and suppliers of services. Specifically, HHSC would establish an outside period of time at which point a case would be deemed to be closed under §371.1603(e), unless OIG took affirmative action to keep the case open.

Response: OIG did not propose any amendments to §371.1603(e), the subsection this comment concerns. The purpose of the amendments is to clarify the factors the agency considers when imposing and scaling enforcement actions as required under Texas Government Code §531.102(x), including appropriate mitigating factors, as well as to clarify that the agency assesses penalties in accordance with relevant law, particularly Texas Human Resources Code §32.039. HHSC did not propose to amend how long an OIG case remains open. Therefore, the commenter's suggested amendment is outside the scope of the proposed amendments. No change was made in response to this comment.

Comment: One commenter recommends that other factors be included in §371.1603(f) for determining the severity of a sanction, including (1) the presence or absence of a direct benefit to the person, (2) whether complicity in the violation is widespread throughout the provider organization, (3) the level of intent or culpability of the parties, (4) the degree of difficulty in detecting the particular type of offense, and (5) the lack of remedial steps taken by the person.

Response: The factors listed in §371.1603(f)(1) - (3) and (g) already allow OIG to consider factors such as those proposed by the commenter. No change was made in response to this comment.

Comment: One commenter asserts that the phrase "except as provided in other statute, rule, or regulation" in §371.1603(f) is vague and fails to give physicians and providers fair notice of when the listed factors will be considered versus when they will not. The commenter further recommends that the proposed rules specifically describe whether and when OIG will consider the factors listed in the proposed rules and that OIG clearly specify any exceptions in the rule proposal (preferably with applicable statutory/regulatory citations).

Response: The introductory phrase --"[e]xcept as provided in other statute, rule, or regulation"-- is included in the rule because other law exists that does not allow OIG to use discretion in determining the appropriate administrative action or sanction. For example, federal law (42 USC §1396a(a)(39)) and 1 TAC §371.1705 require OIG to exclude from Medicaid persons convicted of certain crimes. Federal regulation (42 CFR §455.416) requires the State Medicaid agency to terminate the enrollment of a provider under certain circumstances, such as being terminated from Medicare or Medicaid in another state. Further, because federal and state law is so expansive, it would be impracticable to list all laws that may restrict OIG's discretion in determining the appropriate sanction. No change was made in response to this comment.

Comment: One commenter requests that OIG clarify the meaning of the phrase "prevalence of errors" in §371.1603(f)(2) to make clear the context, what type of errors are being considered (clerical or medical), and whether the errors must be related to the alleged violation.

Response: The rule language was taken directly from Texas Government Code §531.102(x), which requires the adoption

of rules establishing criteria that include consideration of "the prevalence of errors by the provider." The statute does not limit the type of error that may be considered; therefore, OIG reserves the right to consider the prevalence of all types of errors committed by the provider in determining an appropriate administrative action or sanction. No change was made in response to this comment.

Comment: One commenter states that, with respect to harm "potentially resulting from [the] errors" as used in §371.1603(f)(3), OIG should establish a noncompliance matrix, based on the Severity Matrix used by CMS, to help assure that the potential errors are evaluated consistently. The commenter suggests that the matrix should focus on whether the harm potentially resulting from the noncompliance is isolated, part of a pattern, or a widespread occurrence, and on the severity of the harm.

Response: Texas Government Code §531.102(x) requires the adoption of rules establishing criteria that include consideration of "the financial or other harm to the state or recipients resulting or potentially resulting from those errors." A case-by-case approach in which OIG may consider all of the factors listed in §371.1603(f)(1) - (6), (g)(1) - (10), and (h)(1) - (7) allows for the most flexibility to consider all available facts. Additionally, the factors listed in §371.1603(f)(1) - (3) and (g) already allow OIG to consider factors such as those proposed by the commenter. The Severity Matrix used by CMS is a graphical representation of the assessment factors used to determine the severity and scope of the violations. Both of those concepts are factored into this rule along with many other factors prescribed by statute, recommended by stakeholders, and required to ensure appropriate actions under the circumstances. No change was made in response to this comment.

Comment: One commenter states that "potential harm" referenced in §371.1603(f)(3) is an unmeasurable standard, there is insufficient notice in the amended rule as to what type of actions would create potential harm, and that the inclusion of "potential harm" could have significant financial consequences to health plans and providers. The commenter urges HHSC to remove "potential" from the rule.

Response: Texas Government Code §531.102(x) requires the adoption of rules establishing criteria that include consideration of "the financial or other harm to the state or recipients resulting or *potentially* resulting from those errors" (emphasis added). No change was made in response to this comment.

Comment: One commenter states that the language "whether the person had previously committed a violation" in §371.1603(f)(4) could be interpreted as any violation within any given time, known or unknown and, therefore, should be changed to "whether the HHSC has made a prior finding of this violation."

Response: The language in §371.1603(f)(4) is identical to the language in Texas Human Resource Code §32.039(e)(2) that requires OIG to consider "whether the person had previously committed a violation" when OIG is determining the amount of penalty to be assessed for a violation of §32.039(b). No change was made in response to this comment.

Comment: One commenter states that the language in §371.1603(f)(4) and (6) is based on Texas Human Resource Code §32.039(e) and is specific to determining an amount of an administrative penalty for certain types of violations, but the proposed rule language would permit consideration of these factors in a broader context. The commenter further states that

it is unaware of specific statutory authority that broadens the scope of the application of §32.039(e). Finally, the commenter recommends replacing §371.1603(f)(4) and (6) with the following language:

(f)(_) in determining the amount of a penalty to be assessed, if any, for a violation falling under Tex. Hum. Res. Code, Section 32.039(c)(2) and (e), the OIG shall consider:

- (i) the seriousness of the violation;
- (ii) whether the person had previously committed a violation; and
- (iii) the amount necessary to deter the person from future violations.

Response: A state agency has authority expressly provided by statute or necessarily implied to carry out the express powers. Texas Government Code §531.102(x) requires the HHSC Executive Commissioner to "adopt rules establishing criteria for determining enforcement and punitive actions with regard to a provider who has violated state law, program rules, or the provider's Medicaid agreement," and the statute does not limit the factors HHSC may consider. Additionally, proposed §371.1603(f)(6) is limited to the application of administrative penalties. Finally, OIG increases transparency by including in rule the factors OIG considers in determining the appropriate administrative action or sanction. No change was made in response to this comment.

Comment: One commenter recommends that proposed §371.1603(f)(6) should include appropriate objective factors guiding OIG on how to calculate this form of administrative penalty, and that penalties should conform to actual harm and other factors and not solely OIG's view of a deterrent amount. The commenter is also concerned about the application of an administrative penalty for an action that causes no harm but is subject to a fine under the sole guidance that OIG believes that a penalty of that size would be required to deter the person from committing a future violation.

Response: OIG does not calculate an administrative penalty solely on OIG's view of a deterrent amount. When making a preliminary determination regarding the appropriate amount of administrative penalties, OIG, as set out in §371.1603(f), must consider the six factors listed in §371.1603(f) and may consider any other relevant factors, including the twenty-one factors in §371.1603(g) and (h). Texas Human Resource Code §32.039(e)(2) requires, in determining the amount of penalty to pursue under subsection (c)(2), that OIG consider "the amount necessary to deter the person from committing future violations." Because the Legislature has required consideration of this factor, no change was made in response to this comment.

Comment: One commenter states that Texas Government Code §531.102(x) only mentions mitigating factors, not "aggravating" ones and so there is no authorization for the list of aggravating factors in §371.1603(g). The commenter recommends that the proposed §371.1603(g) (and the current aggravating factor list) be removed from the rule and that OIG should only rely on consideration of those factors listed under §371.1603(f). The commenter further states that many of the additional factors listed in §371.1603(g) are redundant with the considerations listed in §371.1603(f). The commenter states that the first five aggravating factors listed in §371.1603(g) relate to harm to patients and the public; but "financial or other harm to the state or recipients" is already listed as a main consideration under §371.1603(f). The commenter recommends that if OIG continues to list con-

sideration of additional factors in §371.1603(g), OIG should (i) remove criteria (g)(1) through (5) (since criteria (1) - (5) mention the type of harm caused by providers, which is already captured in the general consideration of "financial or other harm to the state or recipients" under §371.1603(f)(3)); and (ii) limit the consideration of previous disciplinary actions or violations to those related to the present violation (as reflected by OIG's proposed amendment language in proposed §371.1603(g)(9) and (g)(10)).

Response: The fact that Texas Government Code §531.102(x) does not contain the word "aggravating" does not mean that there is no authorization for consideration of a list of factors that are aggravating. Section 531.102(x) requires HHSC to adopt rules establishing criteria that include taking into consideration the three factors listed in (x)(1)(A) - (C). Those factors (seriousness of the violation, prevalence of errors, and harm resulting or potentially resulting), by their very nature, represent aggravating factors when present, or mitigating factors when absent. Additionally, the primary mandate in §531.102(x) is to adopt rules "establishing criteria for determining enforcement and punitive actions with regard to a provider who has violated state law, program rules, or the provider's Medicaid provider agreement." Because the statute requires the adoption of rules establishing criteria that "include" consideration of certain factors, the criteria listed in the rule is not limited to the specific factors listed in §531.102(x)(1)(A) - (C) and not limited to mitigating factors. Several of the factors listed in §371.1603(g) are not amended by the proposed rule changes (e.g. (g)(2), (5) - (7)). Other factors listed in §371.1603(g) are more specific than those listed in (f) (e.g. (g)(1), (8), (9)). OIG has, in response to informal stakeholder comments, limited - as described in amended (g)(8) and (9) - consideration of previous disciplinary action or violations of board orders to those relevant to the violation(s) under consideration by OIG. No change was made in response to this comment.

Comment: One commenter states that the potential for harm is a standard that covers all conduct, whether appropriate or otherwise, that such a standard cannot be uniformly applied, and that an unknown amount of potential harm does not provide appropriate notice for persons to identify what level or type of potential harm would be a factor in assessing the amount of administrative damage or penalty.

Response: Texas Government Code §531.102(x) requires the adoption of rules establishing criteria that include consideration of "[t]he financial or other harm to the state or recipients resulting or *potentially* resulting from those errors" (emphasis added). No change was made in response to this comment.

Comment: One commenter states that striking severity of economic harm done to a patient essentially leaves an ambiguous measurement of economic harm and leaves an abundance of discretion on behalf of OIG to assess harm to a patient. The commenter suggests that the word severity remain in the rule.

Response: Pursuant to §371.1603(g), when determining the seriousness, harm or potential harm of the violation, OIG may consider the physical, emotional, or economic harm to one or more patients/individuals. In OIG's view, considering the degree of the harm includes considering the severity of the harm. No change was made in response to this comment.

Comment: One commenter states that the use of the term "relevant" in §371.1603(g)(8) and (9) is confusing and should be replaced with "substantially the same as." The commenter states further that the previous licensure action should be final action of any board review.

Response: In response to informal stakeholder comments, OIG added language to §371.1603(g)(8) and (9) to narrow OIG's consideration of previous disciplinary action and violation of previous orders. OIG disagrees that the term "relevant" is confusing. The language "previous disciplinary action by a licensing board" is an existing provision in the current rule and is outside the scope of the proposed amendments. Additionally, licensing board disciplinary actions are often resolved through informal processes such as warning letters or settlement agreements. OIG reserves the right to consider a licensing board's previous disciplinary action in whatever form the various licensing boards utilize and agrees that mere allegations filed with a licensing board would not be sufficient. If a person disagrees with the finality of the licensing board's action or the weight OIG should give the action, a party may address these matters in discussions with OIG or in a contested case, if necessary. No change was made in response to this comment.

Comment: One commenter states that §371.1603(g)(8) and (9) are redundant in that licensing board disciplinary actions in (g)(8) are imposed for licensing board violations in (g)(9). The commenter states that these two sections should be combined to avoid unreasonable stacking or amplification of penalties.

Response: A disciplinary action taken by a licensing board may result in a board order imposing certain affirmative conditions or restrictions. As such, a violation of the board's order may constitute a new act or omission-- that may or may not result in board disciplinary action-- worthy of consideration when determining the appropriate sanction or penalty. No change was made in response to this comment.

Comment: One commenter states that the phrase "may consider" in §371.1603(h) should be changed to "shall consider." The commenter states that if OIG is aware of a mitigating factor, it should be considered. Another commenter requests that OIG clarify that it will consider all applicable mitigating evidence, regardless of its source, and will notify physicians and providers of the opportunity to present mitigating evidence.

Response: As provided in §371.1603(f), OIG must take into consideration any mitigating factors --regardless of source-- when making a preliminary determination of the appropriate administrative action or sanction. Section 371.1603(h) lists items that may be considered as mitigating factors. If the facts of a particular case support any of the items listed in (h), and OIG determines that such facts are mitigating, OIG must take such facts into consideration as required in (f). OIG notes that if a person disagrees with or wishes to dispute the proposed administrative action or sanction, the person may decline to sign a settlement agreement offered by OIG and has a right to request and have a hearing. OIG considers the rule language to be the vehicle by which OIG provides notice that providers have the burden to present mitigating evidence to OIG. No change was made in response to this comment.

Comment: One commenter recommends that OIG add two mitigating factors to §371.1603(h): (1) whether the physician or provider had implemented procedures or safeguards to prevent the violation; and (2) the provider's lack of prior record.

Response: OIG believes the factors listed in §371.1603(h), as amended, particularly (h)(2), (6), and (7), and (f)(4), provide sufficient opportunity for OIG to consider the mitigating factors proposed by the commenter. No change was made in response to this comment.

Comment: One commenter agrees that the amended rule language protects the due process of a person subject to agency regulation and agrees with OIG that each case must be evaluated individually.

Response: OIG appreciates the supportive comment. No change was made in response to the comment.

Comment: One commenter states that Texas Human Resource Code §32.039 is limited in its application to certain violations specifically listed in that statutory provision (e.g., certain anti-kickback violations, false claims violations, and managed care organization violations). The commenter further states that OIG's proposed amendment language in §371.1715 appears to extend the application of Texas Human Resource Code §32.039 to other types of violations. The commenter requested more information on the statutory language authorizing the amendments proposed in §371.1715.

Response: The language added to §371.1715(a) is taken directly from Texas Government Code §531.102(h)(1). No change was made in response to the comment.

Comment: One commenter states that the proposed change in §371.1715(a) greatly expands the scope clearly identified by the Legislature as it relates to OIG and would permit OIG to take any administrative penalty that has been granted to any health and human services agency, rather than the prescribed penalties authorized by Texas Human Resource Code §32.039.

Response: The language added to subsection (a) is taken directly from Texas Government Code §531.102(h)(1). No change was made in response to the comment.

Comment: One commenter submits questions, comments, concerns and suggested solutions related to Financial Management Services Agencies.

Response: This comment does not specifically address any particular proposed amendment to §371.1603 or §371.1715, therefore, OIG considers this comment to be beyond the scope of the proposed amendments. No change was made in response to this comment.

DIVISION 1. GENERAL PROVISIONS

1 TAC §371.1603

STATUTORY AUTHORITY

The amendments are authorized under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code §531.102(a), which provides OIG with the authority to obtain any information or technology necessary to enable it to meet its responsibilities; Texas Government Code §531.102(a-2), which requires the Executive Commissioner of HHSC to work in consultation with OIG to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.102(x), which requires the HHSC Executive Commissioner, in consultation with OIG, to adopt rules establishing criteria for determining enforcement and punitive actions with regard to a provider who has violated state law, program rules, or the provider's Medicaid provider agreement; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas,

to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program; Texas Government Code §531.1131(e), which provides HHSC with the authority to adopt rules necessary to implement that section; and Texas Human Resources Code §32.039, which provides HHSC with the authority to assess administrative penalties and damages and provides due process for persons potentially subject to more damages and penalties.

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 30, 2020.

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For further information, please call: (512) 491-4058



DIVISION 3. ADMINISTRATIVE ACTIONS AND SANCTIONS

1 TAC §371.1715

STATUTORY AUTHORITY

The amendments are authorized under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code §531.102(a), which provides OIG with the authority to obtain any information or technology necessary to enable it to meet its responsibilities; Texas Government Code §531.102(a-2), which requires the Executive Commissioner of HHSC to work in consultation with OIG to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.102(x), which requires the HHSC Executive Commissioner, in consultation with OIG, to adopt rules establishing criteria for determining enforcement and punitive actions with regard to a provider who has violated state law, program rules, or the provider's Medicaid provider agreement; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program; Texas Government Code §531.1131(e), which provides HHSC with the authority to adopt rules necessary to implement that section; and Texas Human Resources Code §32.039, which provides HHSC with the authority to assess administrative penalties and damages and provides due process for persons potentially subject to more damages and penalties.

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 30, 2020.



TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts new 16 Texas Administrative Code (TAC) §25.112, relating to registration of brokers, and new 16 TAC §25.486, relating to customer protections for brokerage services with changes to the proposed text as published in the November 29, 2019 issue of the *Texas Register* (44 TexReg 7274). The rules will be republished. These rules will implement the requirements of Public Utility Regulatory Act (PURA) §39.3555 enacted as Senate Bill 1497 by the 86th Texas Legislature, Regular Session, and effective on September 1, 2019. These new sections are adopted under Project Number 49794.

The commission received comments on the proposed new sections from John Turala; Bottom Line Energy; Electricity Ratings, LLC; Oncor Electric Delivery Company LLC; Office of Public Utility Counsel (OPUC); Energy Ogre; RES Nation LLC; Alliance for Retail Markets (ARM); J. Pollock, Inc; Power Wizard, LLC; Texas Energy Association for Marketers (TEAM); Calpine Retail; The Energy Professionals Association (TEPA); and Brasovan Group LLC. The commission received reply comments on the proposed new sections from Energy Ogre; Enel X North America Inc; Power Wizard; CenterPoint Energy, Inc.; ARM; TEAM; AEP Energy, Inc.; OPUC; Calpine Retail; TEPA, and Patriot Energy Group, Inc and EMEX, LLC (collectively, EMEX/Patriot).

General Application of Aggregator Requirements to Brokers

OPUC, ARM, and Calpine each argued that the legislative intent behind PURA §39.3555 (for consistency, commenter references to Senate Bill 1497 are summarized as referencing PURA §39.3555) is for the commission to regulate brokers in a similar fashion as it regulates aggregators. Each of these three commenters pointed to the 2019 *Scope of Competition Report in Electric Markets in Texas: Report to the 86th Legislature*, in which the commission recommended that "the Legislature require retail electric brokers to register with the Commission in a manner similar to retail electric aggregators to ensure that customers who use a retail electric broker have adequate customer protections." ARM and OPUC each also referenced versions of the author's statement of intent for PURA §39.3555, which each described the bill as creating the same registration standard for brokers as currently applies to aggregators.

With regard to broker registration requirements, OPUC argued that the legislative history indicates that the commission should apply the same registration requirements to brokers as currently

apply to aggregators. ARM, on the other hand, pointed to additional legislative intent that was read into the record by State Representatives Tan Parker and Jim Murphy that indicated that registration should require only basic information about brokers and not require disclosure of any of their "secret sauce" with regard to how they operate their business. ARM interpreted the legislative history of PURA §39.3555 as evidencing the Legislature's intent to treat "brokers 'the same' as aggregators for customer protection purposes while minimizing any administrative or financial burden associated with registration."

In reply comments, TEPA argued that the application of aggregator requirements to brokers is not provided for by the preexisting provisions of PURA or the new provisions contained in PURA §39.3555. TEPA further argues that PURA §39.001 provides the commission with specific directives including that "electric services and their prices should be determined by customer choices and the normal forces of competition" as provided by PURA §39.001(a); that regulatory authorities may not make rules or issue orders regulating competitive electric services, prices, or competitors or restricting or conditioning competition" as provided by PURA §39.001(c); and that regulatory authorities must "order competitive rather than regulatory methods...to the greatest extent feasible" as provided by PURA §39.001(d).

TEPA argued that PURA clearly intends that brokers be regulated differently than aggregators. TEPA points to a number of differences between PURA §39.3555 and the "more extensive provisions for aggregators enacted in the original provisions of Chapter 39." TEPA also noted that PURA §§39.353 (a), (b), (d), (e), (g), (h); and 39.3535, 39.354, 39.3545, 39.356, and 39.357 all apply to aggregators and not brokers, providing more evidence in support of treating the two entity types differently.

Commission Response

The adopted rules are intended to provide a straightforward registration process together with the customer protections that are appropriate for brokers. The adopted rules are necessarily informed by the commission's experience with other competitive entities, such as aggregators, but the provisions in these rules are tailored to the provision of brokerage services and the requirements of PURA §39.3555. The commission declines to make changes based upon these general comments. The commission will respond to specific requests to adopt rules for brokers that are similar to rules that currently apply to aggregators in the appropriate sections below.

General Comments on 16 TAC §25.112

Comments Addressing Interim Registration

Beginning August 8, 2019, the commission accepted interim registrations from brokers to implement the new registration requirement pending development of a new rule. Brokers that submitted completed interim registration forms were assigned an interim registration number. ARM and TEAM each recommended that the commission require brokers with interim registrations to reregister using the commission's new registration form by July 1, 2020. TEAM and ARM further recommended that brokers with interim registrations be allowed to continue providing brokerage services until September 1, 2020, with the caveat that operating under an interim registration during this period does not constitute an exemption from the commission's customer protection rules. OPUC agreed that brokers with interim registrations should be required to reregister.

Commission Response

The commission declines to require brokers with interim registrations to reregister because doing so would impose an unnecessary burden on brokers and commission staff. The registration requirements included in new 16 TAC §25.112 are not materially different from the requirements that were in place when the interim registrations occurred. Upon final adoption of new 16 TAC §25.112, all brokers with interim registrations will be considered fully registered, and commission staff will update commission records to indicate such. Accordingly, the commission also declines to add language clarifying that the commission's customer protection rules apply to brokers with interim registrations, because these brokers will be fully registered upon final adoption of this rule. Moreover, the commission's customer protection rules apply to all brokers, regardless of their registration status.

Comments on 16 TAC §25.112(a)

Reliance on Broker Registration Number

ARM requested that retail electric providers (REPs) be allowed to rely upon a broker's provision of its broker registration number as evidence of registration. ARM argued such a process would be less burdensome than requiring the REP to check the list on the commission's website to confirm a broker's registration status. TEAM and Calpine Retail supported this request in reply comments.

OPUC opposed this request in reply comments. OPUC argued the broker registration number alone would not allow the REP to determine if the registration has been suspended, withdrawn, or expired. OPUC suggested, as an alternative to maintaining the proposed language, that if the commission decided to allow REPs to rely upon the registration number provided by the broker to verify the broker's registration status, that the commission require REPs to rely upon the publicly available list of registered brokers posted on the commission's website and the broker registration number provided to the REP by the broker.

In reply comments, TEPA argued that REPs are permitted to require broker registrations numbers in their agreements with brokers. It also asserted that it could not cite any possible prohibition of this practice, finding no provision in PURA §39.3555 that provides the commission a statutory basis to regulate discretionary competitive agreements between REPs and brokers.

Commission Response

The commission declines to modify the rule to allow REPs to rely solely upon a registration number provided by a broker to determine that broker's registration status. While relying on the broker's representation might be less burdensome on REPs, the commission agrees with OPUC that this approach would not ensure that the broker's registration is valid. REPs are not required to use the list provided by the commission. The list is intended to assist REPs in complying with the statutory prohibition against knowingly providing bids and offers to unregistered brokers. The commission also agrees with TEPA that nothing in this rule prohibits a REP from requiring a broker to provide its registration number before agreeing to provide that broker with bids or offers.

Replace "bids and offers" with "prices for retail electric products or services"

Under 16 TAC §25.112(a), a REP must not knowingly provide bids or offers to a person who provides brokerage services in this state for compensation or other consideration and is not registered as a broker. Power Wizard suggested that the words "bids and offers" be replaced with "prices for retail electric products or services" to more accurately reflect interactions between REPs and retail electric brokers. TEAM opposed Power Wizard's proposal, stating that existing language tracks the statute. TEAM also noted that the use of those terms would introduce confusion because 16 TAC §§25.474 (relating to Selection of Retail Electric Provider) and 25.475 (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers) already impose obligations on REPs regarding retail electric products and services.

Commission Response

The commission declines to replace "bids and offers" with "prices for retail electric products or services," as suggested by Power Wizard. The commission agrees with TEAM that "bids and offers" tracks the language of the statute. PURA §39.3555 defines brokerage services very broadly, which reflects the diverse array of interactions among brokers, clients, and REPs. Power Wizard's proposed change would narrow the scope of REP and broker interactions that are subject to the statutory requirement for REPs to do business only with registered brokers.

Brasovan asserted that some registered brokers might attempt to contract with unregistered third-party contractors to skirt the requirements of this section. Brasovan suggested that either the commission require any individual that is not an employee of a registered company or sole proprietor to register, or the commission require the registered entity through which the pricing was obtained be fully liable for any agents that work through them.

Commission Response

The commission agrees with Brasovan that a registered broker cannot avoid the commission's rules by contracting with a third party. If a registered broker outsources any component of the provision of brokerage services to a subcontractor, agent, or any other entity, the broker remains accountable under applicable laws and commission rules for any activity conducted on its behalf by the third-party entity. The commission adds language to clarify this point.

Broker responsibility for subcontractors or agents

Comments made regarding broker responsibility for subcontractor or agents were raised in response to rule sections other than 16 TAC §25.112. Specifically, ARM recommended adding a provision to proposed 16 TAC §25.486(d) holding a broker responsible for its representations to customers and applicants by employees or other agents of the broker concerning brokerage or retail electric service that are made through advertising, marketing, or other means. TEAM supported this proposal in reply comments.

Commission Response

The commission generally agrees with ARM's comments but finds that the recommended provision is more appropriately added to 16 TAC §25.112(a) and has amended that rule accordingly.

Comments on 16 TAC §25.112(b)

J. Pollock requested that the commission adopt a definition of "consulting services" and clarify that consulting services are not

brokerage services. J. Pollock argued that there is a fundamental difference between brokers and consultants. A broker, according to J. Pollock, is a person or firm who arranges transactions between a buyer and a seller for a commission paid when the deal is executed. By contrast, a consultant focuses on meeting the client's needs and collects a fee that is independent of the client's electricity usage or the details of the client's retail electric contract. J. Pollock further argued that defining brokers to include consultants would have the unintended consequence of requiring legal counsel that reviews contract terms and conditions to register as a broker. J. Pollock requested that if the commission adopts the proposal for publication, it clarify that legal advisors must register as brokers.

In reply comments, Calpine Retail agreed that the commission should consider adopting a definition of consulting services and stated that consulting services are clearly different from brokerage services.

TEAM, TEPA, ARM, and Power Wizard opposed adding a definition of consulting services. These parties argued that excluding consulting services from the definition of brokerage services would be inconsistent with the plain language of PURA §39.3555, which defines brokerage services broadly to include persons who provide "advice or procurement services to...a retail electric customer regarding the selection of a [REP], or the products or services offered by a [REP]". ARM indicated that J. Pollock's proposal would create a loophole, allowing persons providing brokerage services to avoid registering as brokers and complying with the customer protection requirements of PURA and the commission's rules. Power Wizard explained that legal advice related to the terms and conditions of a contract for the purchase of retail electric service is easily distinguishable from providing advice or procurement services regarding the selection of a REP.

Commission Response

The commission declines to include a definition of "consulting services." The commission agrees that adopting a definition of consulting services would exclude from the registration requirement consultants who are engaging in activities within the statutory definition of "brokerage services." Doing so would be inconsistent with the plain language of PURA §39.3555. The Legislature's inclusion of the term "advice" makes it clear that brokers are not limited to persons or firms who arrange transactions between buyers and sellers for a commission when a deal is executed, as suggested by J. Pollock. The commission agrees with Power Wizard that other types of advice, such as legal, financial, regulatory, or energy management, are distinguishable from advice regarding the selection of a retail electric product, service, or provider.

Comments on 16 TAC §25.112(b)(2)

TEPA suggested that the definition of brokerage services specify that the services must be offered for compensation or other consideration to prevent friendly advice from neighbors being construed as brokerage services. TEAM opposed this suggestion in reply comments. TEAM argued that this was not in line with the statutory definition of brokerage services and could create unintended regulatory gaps.

Commission Response

The commission declines to change the definition of brokerage services in response to these comments. The commis-

sion agrees with TEAM that deviating from the statutory definition of brokerage services could create unintended regulatory gaps. The requirement to register with the commission and many of the other provisions of 16 TAC §§25.112 and 25.486 do not apply unless the broker is receiving some form of compensation or is entering into a written agreement with a client. To address the few remaining scenarios in which an interaction between neighbors could be construed under the statute as the provision of brokerage services, the commission will rely on enforcement discretion to avoid unintended enforcement outcomes.

Comments on 16 TAC §25.112(c)

Type of Customer Registration Requirement

ARM commented that registrants should be required to state the types of customers to whom they intend to provide brokerage services. ARM argued this is required to achieve consistency with the interim form. In reply comments, ARM noted that this information would assist commission staff in their review of a registration application from a potential broker. TEAM supported this in its reply because it is not overly burdensome, is required of other market participants, and may be helpful to the commission in better understanding each broker's role in the marketplace.

TEPA opposed requiring registrants to specify the types of customers to whom the registrant intends to provide brokerage services. TEPA argued that the type of customers a broker serves may change after its initial registration, requiring frequent updates.

Commission Response

The commission declines to require a registrant to specify the types of customers to whom it intends to provide brokerage services. Doing so is not necessary to evaluate broker registration applications. The commission will update the registration form, as necessary, to resolve any inconsistencies with the rules.

Affiliate Disclosure Registration Requirement

TEAM, ARM, TEPA and OPUC each proposed a requirement that brokers disclose certain affiliates as part of the registration process. Power Wizard also indicated, in reply comments, that it supported affiliate disclosure when potentially useful or beneficial to customers.

TEPA recommended that affiliate relationships between brokers and REPs should be required to be disclosed as part of the broker registration process. TEPA argued that the premise of broker registration is that consumers need transparent, reliable information about various market participants to make an informed decision about competitive choices for electricity. TEPA continued that if the consumer is not provided accurate and complete information, consumer confidence will be undermined, and the value of brokerage services will be diminished in the marketplace.

TEAM suggested requiring brokers to provide the names of both the affiliates and subsidiaries of the registering party who are registered or certified by the commission. ARM suggested a similar disclosure requirement, advocating for the disclosure of relationships with all customer-facing competitive entities. ARM asked that the name of any REP, aggregator, electric utility, or other broker that is an affiliate of the broker be included.

Power Wizard opposed TEAM's initial suggestion in reply comments, arguing that many entities that must register with the commission, such as registered power generators or certified re-

newable energy credit generators, are unlikely to be relevant to retail electric consumers. Power Wizard suggested limiting disclosure to those affiliates that are public facing entities. Calpine Retail supported ARM's proposal in reply comments. In reply comments, ARM and TEAM submitted a harmonized proposal requiring disclosure of the name of any REP, aggregator, electric utility, or other broker that is an affiliate or subsidiary of the registrant.

OPUC proposed adding affiliate disclosure requirements by applying the aggregator affiliate disclosure requirements of 16 TAC §§25.111(f)(1)(J)-(L) (relating to Registration of Aggregators) to brokers. Under these provisions, a registrant would be required to disclose: the names of the affiliates and subsidiaries, if any, of the registering party that provide utility-related services (such as telecommunications, electric, gas, water, or cable service); any affiliate or agency relationships and the nature of any affiliate or agency agreements with REPs or transmission and distribution utilities, and an explanation of plans to disclose its agency relationships with REPs to customers and REPs with whom it does business; and, a list of other states, if any, in which the registering party and registering party's affiliates and subsidiaries that provide utility-related services currently conduct or previously conducted business. In reply comments, OPUC indicated that it preferred broader disclosure requirements but also supported the proposals of TEAM and ARM.

TEAM noted in reply comments that requiring disclosure of some items recommended by OPUC would impose additional burdens on brokers with limited benefit toward achieving transparency and preventing customer confusion. Specifically, TEAM questioned the value of requiring the disclosure of affiliates that provide utility-related services like cable service or requiring explanations of a broker's plans to disclose its affiliate relationships to customers. TEAM also noted, however, that OPUC's proposed subsections would not impose an anomalous burden on brokers, as they replicate existing registration requirements for aggregators. ARM opposed OPUC's recommendation regarding the disclosure of agency relationships with REPs, arguing that brokers are never agents of REPs and so a disclosure of agency agreements would always yield a null result.

Commission Response

The commission declines to require affiliate disclosure as part of the registration process, as requested by TEAM, ARM, TEPA, and OPUC. Commission staff does not need information about a registrant's affiliates to process its registration application because there are no prohibitions against these affiliations. If commission staff needs this information as part of an investigation or complaint proceeding, commission staff can request it at that time.

The commission intends for broker registration to be a simple process. While clients may benefit from transparency regarding potential conflicts of interest between brokers and other regulated entities, this can be accomplished without requiring disclosure at the time of registration.

Clients will have access to some affiliate information as part of the mandatory disclosures a broker must make prior to the initiation of brokerage services under 16 TAC §25.486, the specifics of which are described as part of the commission's response to comments filed concerning that section. This access provides clients with relevant affiliate information that is up to date when the client is faced with the decision of whether to work with a particular broker. Moreover,

if a client is interested in a broker's other affiliates, or any other information, it can request that information from the broker.

OPUC's Requested Registration Disclosures

OPUC described the registration requirements in the proposed rule as collecting only the names and contact information of entities providing brokerage services to residential and small commercial customers. OPUC urged that more information should be required in the broker registration process, because these entities will directly engage with consumers in offering their brokerage services. OPUC recommended that the commission strengthen the customer protections in the proposed rule to conform with the intent of PURA §39.3555. OPUC continued that applying the same registration requirements as currently apply to aggregators would be appropriate. Specifically, OPUC advocated for the application of 16 TAC §§25.111(f)(1)(H)-(Q) to brokers. OPUC's suggestions regarding 16 TAC §§25.111(f)(1)(J)-(L) are addressed separately above in the context of adding affiliate disclosure requirements to the registration requirements.

The specific requirements recommended by OPUC address delinquency with taxing authorities; prior retail electric experience; anticipated sources of compensation and the broker's plan for disclosing that compensation to customers; history of bankruptcy; prior convictions of an officer, director or principal; known active customer protection investigations; and complaint history.

In reply comments, TEAM stated generally that it was not opposed to OPUC's proposed additions, which would require several disclosures related to protecting customers and protecting against fraud. TEAM also generally supported the concept of compensation disclosure requirements. It argued that any compensation disclosure required during registration should complement the compensation disclosure required to a broker's clients in 16 TAC §25.486(f).

TEPA, Enel X, and Power Wizard each opposed OPUC's broad application of aggregator rules to the broker registration process. TEPA argued that no provisions of law have been identified to support these suggestions. Enel X submitted that the proposed rule strikes a good balance on the amount of information brokers are required to submit with their applications. Enel X opposed suggestions by OPUC and others to increase the regulatory burden of the application process, finding OPUC's suggestions more in line with full licensing, rather than mere registration. Power Wizard argued that the fact that consumers engage directly with brokers does not alone necessitate the additional disclosures, as OPUC argued. The disclosure requirements in the proposed rule demonstrate the commission's recognition of the different levels of risk that consumers face when engaging the services of a REP, an aggregator, or a broker, and the proposed rule provides an appropriate level of disclosure in light of the lower level of consumer risk associated with the use of brokerage services by consumers.

Commission Response

The commission declines to adopt disclosure requirements for brokers similar to those found in 16 TAC §§25.111(f)(1)(H), (I), and (M)-(Q). The commission agrees with Enel X and Power Wizard that the additional disclosures requested by OPUC would be overly burdensome for registrants. None of the information that any of the suggested provisions would produce is required for com-

mission staff to evaluate a broker registration application. If the commission staff needs any of this information in the future to assess whether a broker has violated a commission rule, it can request the information at that time.

Comments on 16 TAC §25.112(c)(1)

Increased Database Functionality

TEPA requested the commission expand the search function of the database to allow for "doing business as" (commonly referred to as "dba") searches. Alternatively, it suggested the commission could require a streamlined registration or sub-registration for all allowable names used by the broker to market or offer brokerage services.

Commission Response

The commission declines to include language related to the search function of the broker database. Putting specific database requirements into rules may limit commission staff's ability to make improvements or necessary modifications to the database in the future without amending the rule.

With regard to the suggestion that the commission require sub-registration for all allowable names used by the broker to market or offer brokerage services, registrants are required to provide all business names of the registrant, limited to five business names. The commission interprets business names to include any assumed names that a broker uses when conducting its business.

Broker Naming Restrictions; Utility Cobranding

TEAM, ARM, OPUC, and Power Wizard argued that the rules should prohibit cobranding with a transmission and distribution utility (TDU), including its affiliates. TEAM highlighted that the commission has prevented REPs from cobranding with a TDU and that this prohibition has been upheld by the Third Circuit Court of Appeals. TEAM was concerned that cobranding would suggest a broker can improve the service a client receives from its TDU affiliate and lead to the subsidization of a competitive affiliate by a regulated entity. ARM recommended language prohibiting broker names from being, among other things, contrary to 16 TAC §25.272 (relating to Code of Conduct for Electric Utilities and Their Affiliates). TEAM and ARM harmonized their proposals in reply comments and suggested that business names may not be duplicative in whole or in part of the brand or business name of a TDU.

In reply comments, OPUC and Power Wizard both agreed with preventing TDU cobranding on the grounds that such a practice would be confusing or misleading, deceptive, or duplicative. Enel X requested a clarification be made that only TDUs located "in this state" are of concern. Enel X argued that it does not raise the same policy concerns when a broker is part of a corporate family that owns transmission assets outside of Texas.

CenterPoint Energy and AEP Energy opposed including a prohibition on brokers cobranding with TDUs. CenterPoint Energy argued that utility affiliate branding restrictions do not apply to aggregators and, moreover, go beyond the language of PURA §39.3555. These naming restrictions would significantly disrupt the lawful business activities of competitive entities that have provided brokerage services for years. CenterPoint Energy used the example of TrueCost, a web-based platform, which has been associated with the CenterPoint Energy name and brand since 2012. CenterPoint Energy argued that cobranding

does not harm customers, undermine customer confidence in shopping for electricity, or cause undue customer confusion. Additionally, CenterPoint Energy cited Docket No. 40636, *Petition for Declaratory Ruling Regarding CenterPoint Energy Houston Electric, LLC Joint Advertising With a Competitive Affiliate*, as evidence the issue has already been litigated. In that matter, the commission found insufficient evidentiary support for the claims made by TEAM or ARM.

AEP Energy argued that a prohibition on cobranding was unnecessary, citing numerous statutory protections that apply to broker registrants and their use of names. PURA §39.157(d)(6) prohibits a utility from conducting joint advertising or promotional activities with a competitive affiliate (such as a broker) that may favor the competitive affiliate. AEP Energy highlighted that ARM acknowledged in initial comments that this language had already been used by the commission to deny a utility-affiliated REP certification to sell electric service to residential customers in Docket No. 39509, *Application of AEP Texas Commercial & Industrial Retail Limited Partnership for Amendment to a Retail Electric Provider Certification*. AEP Energy noted that though this was a fact-specific decision, the commission pointed out that neither PURA nor commission rules categorically prohibited a utility and its competitive affiliates from sharing the same or similar names. The broker rule should, similarly, not set out a blanket restriction. AEP Energy argued that there is nothing about the nature of brokerage services to distinguish them from these other affiliates. Additionally, AEP Energy pointed to PURA §§17.004(a)(1) and 39.101(b)(6), which already protect customers from unfair, misleading, or deceptive practices. AEP Energy further argued that the proposed rules 16 TAC §§25.486(d)(1) and 25.112(g)(2) also protect customers from fraudulent communications and make these offenses significant violations.

AEP Energy also made policy arguments against the limitation of business names in this context. AEP Energy believes that a customer using brokerage services is more sophisticated, better understands how the market works, and is unlikely to be misled or confused about who is providing the service. Further, AEP Energy stated its intention to offer brokerage services only to commercial and industrial customers. In these contexts, AEP Energy believed the concerns raised by TEAM and ARM are inapplicable, and that the commission implicitly recognized this difference when it denied certification to a utility-affiliated REP to sell electric service to residential customers based on this purported confusion but continued to allow the REP to sell electric service to commercial and industrial customers.

Commission Response

The commission declines to add a provision prohibiting a broker from cobranding with a TDU, as requested by ARM and TEAM. The commission agrees with AEP Energy that neither PURA nor commission rules prohibit a utility and its competitive affiliates from sharing the same or similar names. The relationship between brokers and TDUs does not justify adopting a different approach. Power Wizard's and OPUC's concern about customer confusion is addressed by the prohibition on misleading, fraudulent, unfair, deceptive, or anti-competitive communications in 16 TAC §25.486(d). TEAM's concern that cobranding would lead to cross-subsidization between a TDU and a competitive affiliate is addressed by the restrictions on joint marketing contained in 16 TAC §25.272. Ultimately, a blanket prohibition on cobranding between a utility and

a broker is not necessary to provide adequate customer protections for clients receiving brokerage services.

Broker Naming Restrictions; Deceptive, Misleading, Vague, or Duplicative

TEAM and ARM supported a prohibition on branding that is misleading, deceptive or duplicative with an existing REP, broker, or aggregator. The risk of confusion regarding the business name or brand of a broker is greater because brokers will now be able to identify themselves as officially registered with the commission. TEAM argued that secretary of state review is insufficient and only verifies whether names are distinguishable from other registered names.

TEAM suggested language prohibiting business names that are deceptive, misleading, vague, or duplicative of a name previously approved for use by another broker, aggregator, or REP not affiliated with the registrant. ARM presented similar language, and in reply, the two groups harmonized their proposals and suggested language limiting the registrant to five business names that are not deceptive, misleading, vague, or otherwise contrary to 16 TAC §25.272 or duplicative of a name previously approved for use by a REP, aggregator, or another broker that is not affiliated with the registrant.

Commission Response

The commission declines to include a provision in the adopted rule that expressly prohibits broker names that are misleading, deceptive or duplicative of other registered entities because it is unnecessary. The broker industry has been functioning for more than a decade and the commission is aware of only a few anecdotal examples of brokers attempting to use misleading names.

Brokers and consultants exist in many industries that do not have naming restrictions beyond secretary of state registration. REPs that are concerned with their intellectual property being violated have other remedies available. Similarly, if a broker is misleading customers through the use of branding, the prohibited communications provisions of 16 TAC §25.486 would apply.

Broker Naming Restrictions; PowerToChoose.org

TEAM commented that the rules should prevent broker names or web addresses from being duplicative with PowerToChoose.org. It suggested language requiring that business names and web addresses may not be deceptive, misleading, vague, or duplicative of the PowerToChoose.org website.

ARM replied that some of TEAM's language is duplicative of the general prohibition in the proposed rule against misleading, fraudulent, unfair, deceptive, or anti-competitive communications. Further, PURA protects customers from misleading and deceptive conduct and the REP and aggregator rules include this.

Commission Response

The commission declines to add language prohibiting names that are duplicative of PowerToChoose.org. The commission agrees with ARM's observations that misleading branding is already prohibited under 16 TAC §25.486. Further, the commission maintains an active trademark on the phrase "Power to Choose" and will defend it as necessary.

Comments on 16 TAC §25.112(c)(2)

ARM suggested that the registrant should be also required to provide its website address on its registration application. ARM argued that this would be of practical value and not overly burdensome. TEAM agreed with this recommendation in reply comments. TEAM pointed out that a requirement to provide a website address would align with its proposal that websites should not be deceptive, misleading, or largely duplicative of PowerToChoose.org.

Commission Response

The commission declines to require a registrant to provide its website address as part of its application. The commission does not agree with TEAM and ARM that the practical value of requiring a registrant to provide, and subsequently keep up to date, a website is enough to justify the requirement.

Comments on 16 TAC §25.112(c)(7)

ARM recommended that, for clarity, the commission should modify the required elements of the affidavit to specify that the registrant will comply with "all applicable laws and the commission's rules."

Commission Response

The commission declines to modify the affidavit, as requested by ARM. To receive a broker registration, a broker must affirm that it understands and will comply with all applicable laws and rules. Applicants must affirm their intent to follow all applicable law and rules, not just those within the jurisdiction of the commission to enforce.

Comments on 16 TAC §25.112(d)(2)

TEPA and TEAM each filed comments arguing that the basic information on the registration form does not warrant treatment as proprietary or confidential and recommended removing proposed §25.112(d)(2), which allowed a registrant to designate information on its registration as proprietary or confidential.

Commission Response

The commission agrees that the basic information required on the broker registration form does not warrant treatment as proprietary or confidential and removes proposed §25.112(d)(2) from the adopted rule.

Comments on 16 TAC §25.112(d)(4)(A)

TEPA suggested that the number of days that a registrant has to cure deficiencies in its application be increased from ten to 15, as it is possible that the notification would not reach the registrant within ten days by regular mail. In the alternative, TEPA recommended that the commission be required to provide the notification using email or registered mail. TEPA argues that a short cure window could be harmful to small brokers who are not technically savvy.

TEAM and ARM opposed TEPA's proposed change in reply comments. TEAM argued that affording registrants ten days to cure deficiencies is consistent with the commission's registration requirements for other entities. ARM pointed out that the rule provides ten working days, giving registrants more time to cure deficiencies than suggested by TEPA.

Commission Response

The commission declines to increase the number of days a registrant has to cure deficiencies in its application or change the notification requirements. The broker registra-

tion requirements do not necessitate that registrants be allowed more time to cure deficiencies than is afforded other commission-registered entities. Moreover, the rule clarifies that a deficient application is rejected without prejudice, allowing the registrant to reapply without penalty.

Comments on 16 TAC §25.112(e)

OPUC supported the three-year expiration and renewal provisions to ensure customers have access to an accurate broker list.

TEAM and ARM each argued in favor of replacing the renewal requirement with an update requirement. TEAM recommended that a broker should be required to submit an online update to its registration information or verify that the information on file remains current every three years. TEAM further recommended that if a broker fails to update or affirm its registration at least every three years, the commission may remove the broker from the list on the commission's website. In reply comments, ARM argued that failure to timely update or verify the information on file with the commission should result in revocation of the broker's registration in addition to removal from the list posted on the commission's website. ARM argues that a mandatory revocation would best incentivize brokers to keep their registrations up to date. ARM also argued that because PURA §39.3555(g) requires that a determination on an application for registration as a broker be made within 60 days, that a registrant be required to submit the update or renewal information no earlier than 60 days prior to the expiration of its registration rather than 90. In reply comments, TEAM and ARM each suggested language synchronizing these proposals.

TEPA, J. Pollock and EMEX/Patriot argued that the commission should remove the registration renewal requirement. These parties argued that PURA §39.3555 does not provide a renewal requirement and that there is no precedent for requiring a retail market entity to re-register with the commission. EMEX/Patriot contended in reply comments that the legislative intent of PURA §39.3555 was not to impose new or more restrictive requirements on brokers than are present for aggregators. J. Pollock argued that there was no compelling policy reason to require registration renewals and that it would be a drain on staff resources to process these renewal applications. J. Pollock also pointed out that the commission has the authority to revoke registrations if necessary. TEPA suggested that if this requirement remained in the rule, brokers receive a notification prior to the deadline for registration renewal, that a broker be allowed to renew at any point prior to the expiration of its registration, and the commission sunset this provision after the first three-year renewal period. TEPA further requested that the commission address what happens if a broker renews its registration after the 90-day window.

Commission Response

The commission agrees with OPUC it is important to ensure that the commission's broker list remains up to date. While PURA §39.3555 does not expressly authorize registration requirements beyond an initial registration, as EMEX/Patriot argued, it does instruct the commission to adopt rules as necessary to implement its provisions. Maintaining an accurate list of brokers currently doing business in the state is a sufficient reason to require periodic registration updates. Moreover, J. Pollock's arguments that processing registration renewals would overburden the commission's resources and that the commission can always revoke a

broker's registration do not accurately reflect the relative burdens these two activities put on the commission's resources. A full revocation proceeding is significantly more involved and time consuming than processing a registration renewal or update.

The commission has replaced the registration renewal requirement with a requirement that a broker update its registration information at least once every three years. The commission has also added language to the registration amendment requirement of 16 TAC §25.112(f) to consider a registration amendment to be a registration update. These changes will ensure that the commission's records remain up to date while reducing the frequency with which a broker is required to update its registration.

The commission declines to add specific notification requirements, as requested by TEPA. It is a broker's responsibility to keep its registration up to date. The adopted rule requires a broker to update its registration at least 90 days prior to expiration. This 90-day window will provide commission staff an opportunity to contact brokers who have failed to timely update their registrations, as commission resources allow.

The commission also declines to sunset this provision, as requested by TEPA, as there is no future date at which the commission's list of registered brokers will no longer need to be up to date.

Comments on 16 TAC §25.112(g)

ARM and Calpine Retail requested three additions to the list of significant violations in proposed 16 TAC §25.112(g) based on the significant violations applicable to REPs [16 TAC §§25.107 (related to Certification of Retail Electric Providers)] and aggregators in (§25.111). These violations would include bankruptcy or insolvency, or failure to meet its financial obligations in a timely manner; suspension or revocation of a registration, certification, or license by any state or federal authority; and conviction of a felony by the registrant or a principal or officer employed by the registrant, of any crime involving fraud, theft or deceit related to the registrant's brokerage service. ARM argued that these additions would align with the statutory guidance to apply the same customer protections to brokers as aggregators. Calpine Retail argued that it could see no reason why these provisions would apply to REPs and aggregators, but not brokers. In reply comments, TEAM supported the addition of these provisions, but noted that even if they were not included in the final rule, the commission could still enforce based on them, because it is a nonexclusive list.

In reply comments, OPUC characterizes ARM's and Calpine Retail's suggestion as a requirement to disclose the conviction of a felony, and then goes on to argue that this requirement does not go far enough. OPUC contended that the commission should require the disclosure of felonies, fraud and other serious violations, regardless of whether these violations relate to the broker's brokerage services. The commission should require ample and necessary information to determine whether a person should be deemed qualified to enter a customer's home or business to provide brokerage services. Furthermore, OPUC concludes, customers have the right to this information when deciding whether to do business with a broker.

Commission Response

The commission declines to add significant violations to the list, as requested by ARM and Calpine Retail. The suggested additions do not align with requirements included in the customer protection rules that apply to brokers, so they are inappropriate for inclusion on a list of significant violations. The commission does, however, agree with TEAM's observation that this is a nonexclusive list. Moreover, the absence of a violation from this list should not be interpreted as evidence that it is not a significant violation or that it cannot serve as grounds for revocation or suspension. The purpose of this list is to highlight examples of significant violations that the commission views as clear cut and instructive for the type of entity involved.

The commission does not agree with ARM's assertion that there is no difference between brokers and other competitive entities with regard to these significant violations. Brokers are not essential for obtaining electric service. Moreover, a broker does not have the same financial responsibilities as a REP or an aggregator that collects deposits, and it does not have the ability to apply switch holds or request disconnections. Ultimately, the commission will determine if a rule violation is significant based upon the facts and circumstances involved.

The commission interprets OPUC's reply comments on this section as a reassertion of its position regarding the disclosures required under 16 TAC §25.112(c). The commission has already addressed this position.

Comments on 16 TAC §25.112(g)(6)

Authorizing Broker Fees on Retail Electric Bills

Calpine Retail requested clarification as to whether a broker can authorize the amount of the broker fee that will be embedded in the energy charge billed by the REP to the customer. Calpine Retail further developed this request in its reply, explaining that the typical arrangement between a REP and a broker is for the REP to bill all charges to the customer, including the broker fee. Because it is a violation for REPs to bill unauthorized charges, Calpine Retail believes it is important for REPs to know whether a broker is allowed to authorize these charges.

Commission Response

The commission finds that no changes are necessary based upon Calpine Retail's comments. The person who can authorize a broker's fee to be included on a retail electric customer's bill depends upon the fee arrangement. If the broker compensation is included as part of the energy charge to which the customer agreed, then no explicit customer authorization is required. In this regard, the broker fee is no different than marketing or any other cost that is embedded into the price of electric service offered by the REP. If, however, the broker's fee appears as a separate charge on a REP's bill, 16 TAC §25.481(b)(2) (relating to Unauthorized Charges) applies. Under this provision, a customer must clearly and explicitly consent to obtaining a product or service offered and to having the associated charges appear on the customer's electric bill.

Significant Violations; Unauthorized Charges

TEPA and RES Nation argued that billing an unauthorized charge or causing an unauthorized charge to be billed to a customer's retail electric service bill should be removed from the list of significant violations. TEPA stated that brokers do not have control over what charges are contained on the bill the

customer receives from the REP so brokers should not be held accountable for a REP billing mistake. TEPA appreciated that unauthorized charges are possible but is not aware of a specific circumstance where brokers, in the normal course of business, would be responsible for this activity. TEPA is concerned that this provision may make brokers de facto parties to REP billing errors and disputes. RES Nation noted that it could have its registration suspended or revoked for "unauthorized billing" despite not billing customers in the first place.

TEAM disagreed with TEPA's and RES Nation's concerns over paragraph (g)(6) and advocated for it to remain intact. TEAM found the concerns misplaced because brokers have control over the violations set forth in the rule through directly billing clients (or non-clients) brokerage service fees, and by causing unauthorized charges to be billed by the REP. As proposed by the commission, the rule captures only "causing" behavior. TEAM provided the examples of when a broker misrepresents to a REP the amount of fee that the broker is entitled to receive from a client, or when a broker fails to make required disclosures about compensation to a client who then files a complaint concerning unexpected increases in their retail electric service bill. TEAM also commented that although RES Nation may not directly bill its clients, direct billing scenarios do exist. Subsection (g)(6) could capture a direct billing situation where a client agrees to a flat fee with a broker who subsequently sends the client a bill for a higher fee than agreed. Subsection (g)(6) remains relevant and necessary for such scenarios.

Commission Response

The commission declines to remove "billing an unauthorized charge or causing an unauthorized charge to be billed to a customer's retail electric service bill" from the list of significant violations as requested by TEPA and RES Nation. PURA §17.004(a)(1) provides all buyers of retail electric services protection from being billed for services that were not authorized. The commission considers billing an unauthorized charge or causing an unauthorized charge to be billed to a customer's retail electric account a significant violation, regardless of the type of entity responsible.

With regard to the concerns addressed by TEPA and RES Nation, the commission agrees that a broker should not be held accountable for a REP billing mistake or a charge for which it was not responsible. Whether a broker is the cause of an unauthorized charge appearing on a customer's retail electric bill will, in many instances, be a fact specific inquiry. The commission does not agree that this provision should not apply to brokers. The commission agrees with TEAM that this provision covers scenarios where a broker directly bills a client for the provision of brokerage services. The commission also recognizes that the broker industry employs a wide array of business models, some of which may allow a broker to cause a charge to appear on a customer's bill. The commission's intent is to make it clear that if a broker causes an unauthorized charge to appear on a customer's bill, it risks revocation or suspension, in addition to an administrative penalty.

General Comments on 16 TAC §25.486

Replacing "on paper or electronically" with "in writing"

TEAM suggested that references to "on paper or electronically" should be replaced with "in writing" as defined in 16 TAC §25.471 (relating to General Provisions of Customer Protection Rules) to

provide consistency across the commission's customer protection rules.

Commission Response:

The commission agrees that using the defined term "in writing" would provide consistency across the commission's customer protection rules and makes the recommended change.

Replacing "client" with "customer"

ARM recommended striking the definition of "client" and replacing "client" with "customer" throughout 16 TAC §25.486 to maintain consistency with other sections of the commission's customer protection rules. Calpine Retail and OPUC supported this proposal in reply comments. In reply comments, ARM further argued that the term "client" would create a subcategory of customer that is specific to brokers, and such a subcategory is not necessary because a customer of a broker fits within the existing definition as a person currently receiving electric service from a REP. ARM also suggested amending the definitions of "customer" and "applicant" in 16 TAC §25.471 to include brokers in Project No. 50406.

Commission Response

The commission declines to strike the definition of "client" and replace all instances of "client" throughout this section with "customer," as requested by ARM. Under 16 TAC §25.471(d)(4), a customer is a person who is currently receiving retail electric service from a REP. The commission disagrees with ARM that "client," as defined in this section, would be a subcategory of "customer." While there is some overlap, neither of these terms subsumes the other. Not all customers are receiving or soliciting brokerage services from a broker, nor are all clients currently receiving retail electric service from a REP.

Because ARM applied its suggestion to replace "client" with "customer" to each of its recommended changes, the commission considered the merits of each recommended change in the context of the related comment.

The commission also declines to make changes in response to ARM's recommendations regarding amendments to 16 TAC §25.471 because changes to that rule are not included in the scope of this project.

Prohibitions on Unauthorized Charges and Unauthorized Changes in REP

ARM, TEAM, and OPUC supported the addition of a new subsection in 16 TAC §25.486 to align with the slamming and cramming violations that are included on the significant violations list contained in 16 TAC §25.112. Specifically, ARM recommended language requiring that a broker must not bill an unauthorized charge or cause an unauthorized charge to be billed to a customer's retail electric service bill and that a broker must not switch or cause to be switched the REP of a customer without first obtaining the customer's authorization. OPUC and TEAM supported ARM's recommendations in reply comments.

Commission Response

The commission agrees with ARM that the prohibitions against unauthorized charges and unauthorized changes in provider listed on the significant violation list of 16 TAC §25.112(g) should have corresponding provisions in the customer protection rules. The commission has added

16 TAC §25.486(h), which contains ARM's recommended language.

Comments on 16 TAC §25.486(a)

ARM recommended the addition of a disclaimer sentence to clarify that nothing in this section is intended to supersede, infringe upon, limit, or otherwise reduce customer protections, disclosure requirements, and marketing guidelines otherwise established by PURA Chapters 17 and 39 or by the commission's rules. In reply comments, TEAM stated that this proposal would promote clarity and customer protections.

Commission Response

The commission declines to add the disclaimer language recommended by ARM. As a matter of law, commission rules cannot supersede, infringe upon, limit, or otherwise reduce the customer protections established by statute. If an issue arises with conflicting sections of the commission's rules, it will be resolved using the appropriate rules of construction.

Comments on 16 TAC §25.486(b)

Proposed Definition of "REP agent"

TEPA suggested adding a definition of "REP agent." TEPA argued that this would help customers understand the differences between a broker or agent that represents the consumer and an agent of the REP that is part of the sales force employed by a REP to exclusively market and sell the product and services of that REP. Calpine Retail supported this suggestion in reply comments. Calpine Retail submits that REP agents are subcontractors of the REP that have entered into an agreement to sell or promote the REP's products and services. In this subcontracting relationship, the REP is responsible for the REP agent's compliance with the commission's customer protection rules.

In reply comments, ARM opposed the addition of a definition of REP agent. ARM argued that it might cause confusion to have different types of agents defined in this portion of the rule. ARM further argued that defining REP agent here is outside of the scope of a rulemaking that is focused on brokers. ARM continued that the definition would not be helpful, because REP agents are already governed by 16 TAC §§25.107(a)(3) and 25.472(b)(1)(B)(i) (relating to Privacy of Customer Information). Finally, ARM contended that brokers are not acting as agents of a REP, because REPs do not exercise control over brokers.

Commission Response

The commission declines to add a definition of "REP agent" as recommended by TEPA. Under 16 TAC §25.107(a)(3), a REP remains accountable under applicable laws and commission rules for all activities conducted on its behalf by any subcontractor, agent, or any other entity. The REP's accountability is not limited to agents or subcontractors. Introducing a definition of REP agent in this project could have the unintended consequence of narrowing or creating confusion as to the scope of a REP's responsibility for the activities conducted on its behalf. Any proposals that would alter a REP's responsibilities, except as they relate to brokers and brokerage services, is outside of the scope of this project.

Proposed Definition of "transaction broker"

Power Wizard suggested the commission include a definition of "transaction broker," referring to brokers that are not an agent

of either party in a transaction. Power Wizard argued that customers would benefit from disclosure and transparency regarding agency obligations of brokers that are not client agents. In reply comments, ARM argued that this definition is not necessary and is a tautology because it is duplicative of the definition of "broker" already included in the proposed rule. ARM continued that this term is not referenced anywhere else in the proposed rule.

Commission Response

The commission agrees with ARM that Power Wizard's recommendation to adopt a definition of "transaction broker" is unnecessary. The term transaction broker is not used anywhere in this rule, and the commission is not imposing any unique requirements on the group Power Wizard describes as transaction brokers.

Comments on 16 TAC §25.486(b)(3)

Definition of "client"

ARM recommended modifying the definition of "client" by replacing "person" with "retail customer" as an alternative to its prior recommendation of striking the term client from this section. ARM argued that if one broker solicits services from another broker on behalf of a customer, the first broker could then be considered a "client." In reply comments, TEAM and ARM presented a synchronized proposal, recommending replacing "person" with "applicant or customer."

Commission Response

The commission declines to modify the definition of client by replacing "person" with "retail customer" or "applicant or customer," because these proposals would narrow the definition. A person who is not receiving retail electric service and has not yet applied for retail electric service can still be a client. For example, a young adult who is establishing electric service for the first time or a business planning to open its first location in this state are neither applicants nor customers.

With regard to the hypothetical presented by ARM of one broker soliciting brokerage services from another broker on behalf of a client, the commission agrees that the first broker would be a client of the second broker for purposes of this rule. However, because the second broker would not be collecting the proprietary client information of the first broker or providing the first broker with brokerage services, only a limited number of the provisions of this section would apply.

Soliciting Brokerage Services

Energy Ogre asked for clarification on what constitutes "soliciting" services. It questions whether an individual who visits a broker's website and submits their name and email for further information but never proceeds any further be considered one who solicits services and therefore falls under the category of a client. Energy Ogre recommended that a residential customer becomes a "client" when one enters into a contract with a broker.

Commission Response

The commission declines to modify the definition of "client," as requested by Energy Ogre, such that a residential customer becomes a client only upon entering into a contract with a broker. Brokers employ a diverse array

of business models, many of which do not require a client to enter into a contract or provide the broker with any compensation. The commission defines "client" broadly to ensure that the customer protection provisions apply across all brokerage service models.

With regard to what constitutes soliciting brokerage services, the commission interprets this phrase broadly and according to its common usage. A person is soliciting brokerage services from a broker if it is interacting with a broker, either directly or indirectly through the broker's website or marketing materials, in an attempt to obtain brokerage services or to evaluate whether to obtain brokerage services from that broker. In Energy Ogre's hypothetical, the individual who submits their name and email on a broker's website is a client of that broker for the purposes of this section. This designation triggers the proprietary client information requirements of 16 TAC §25.486(j) and requires the broker to treat the information provided by the client accordingly. It does not, however, trigger many of the other provisions of this section, because the broker has not yet initiated the provision of brokerage services.

Comments on 16 TAC §25.486(b)(4)

Client Agent Entities

Bottom Line Energy asked for clarification on what type of entities "client agent" referenced. Bottom Line Energy requested clarity on whether this was intended to refer to an authorized agent within an organization or a broker who charges a fee and sets up a contract to shop for REP services on behalf of the organization.

Commission Response

A client agent is a broker that, as part of the brokerage services it provides, is authorized to act as the client's agent for the purpose of selection of, enrollment for, or contract execution of a product or service offered by a retail electric provider. The precise level of authority that a client agent is granted is determined by the terms of the written agreement between the broker and the client. An authorized agent within a client's organization, as described by Bottom Line Energy, is not a client agent.

Account Maintenance

Energy Ogre argued that the definition of "client agent" should be expanded to include the ongoing maintenance of the residential client's electric account as that is a much needed and desired service the client agent provides to residential customers. ARM opposed this expansion in reply comments. ARM argued that the maintenance and administration of a customer's account is the REP's responsibility. ARM further argued that a similar proposal was included in House Bill 2212, which was not voted out of the State Affairs committee.

Commission Response

The commission declines to expand the definition of "client agent" to include account maintenance as requested by Energy Ogre. The ongoing maintenance of a residential client's electric account is not a brokerage service as that term is defined in this section. If a broker provides additional services other than brokerage services to a client, such as bill payment services or energy efficiency consulting, those services are not addressed by this rule unless the provision of those services is intermingled with

brokerage services such that a broker's compliance with these rules cannot be determined without evaluating those services as well.

Non-Broker Client Agents

Calpine Retail requested that the definition of "client agent" include entities other than brokers that have the legal right and authority to act on behalf of a client regarding the selection of, enrollment for, or contract execution of a product or service offered by a REP, including electric service.

Commission Response

The commission declines to expand the definition of "client agent" to include entities other than brokers as requested by Calpine Retail. If an entity other than a broker has the legal right and authority to act on behalf of a retail electric customer or applicant, the rights and responsibilities of that entity regarding that customer or applicant are governed by the laws that created the applicable agency relationship. Agency relationships that do not involve brokers are outside of the scope of this rule.

Comments on 16 TAC §25.486(b)(5)

In response to the proposed definition of "proprietary client information," TEPA argued that electricity brokers, in the normal course of business, do not disclose client information to third parties without authorization from their client. TEPA stated that they oppose "unnecessary disclosure requirements," particularly when the potential exists for such information to be released publicly through the Open Records Act, to which state agencies are subject.

Commission Response

The commission declines to make changes based on TEPA's comments. The definition of "proprietary client information" does not create any disclosure requirements.

ARM reasserted its general suggestion that "client" be replaced with "customer" for consistency throughout the commission's customer protection rules. In reply comments, TEAM recommended expanding the section to refer to a "client or retail electric customer" to protect more information and make it clear that the specified information is proprietary even if it concerns retail electric customers that are not the broker's client.

Commission Response

The commission also declines to replace "client" with "customer," as recommended by ARM, because this would remove protections from clients that are not yet customers. The commission agrees with TEAM that including the term "retail electric customer" in addition to "client" will protect more proprietary information and makes the recommended change.

Comments on 16 TAC §25.486(c)

Under proposed 16 TAC §25.486(c), a client other than a residential or small commercial class customer or applicant, or a non-residential customer or applicant whose load is part of an aggregation in excess of 50 kilowatts, may agree, in writing, to a different level of protections than is required by this section. This agreement must be provided to the customer and provided to commission staff upon request.

TEAM suggested that proposed 16 TAC §25.486(c) should be modified to match 16 TAC §25.471, which applies to the en-

tire subchapter and allows certain customers and applicants to agree to terms of service that, subject to certain listed exceptions, reflect either a higher or lower level of customer protections than would otherwise apply under 16 TAC Subchapter R (relating to Customer Protection Rules for Retail Electric Service). TEAM also recommended that REPs should be provided a copy of the written agreement between the broker and the client in which the client agrees to receive a lower level of customer protections from the broker. In reply comments, Calpine Retail agreed that a copy of the agreement should also be provided to the customer's REP. ARM found this subsection duplicative of the waiver provisions in 16 TAC §25.471. Furthermore, ARM argued, repetition in 16 TAC §25.486 may imply that the remaining provisions of 16 TAC §25.471(a)(3) do not apply generally to 16 TAC Subchapter R, which could result in unintended regulatory uncertainty. Accordingly, ARM recommended deletion of this section or alternatively replacing "client" with "customer." In reply comments, TEAM agreed with ARM's initial comment that subsection (c) could be deleted with modification to 16 TAC §25.471 to include brokers in the scope of some aspects of that rule.

EMEX/Patriot disagreed that proposed 16 TAC §25.486(c) is duplicative of 16 TAC §25.471 on the grounds that 16 TAC §25.471 applies to REPs, not brokers.

EMEX/Patriot also disagreed that the customer protection agreements required under this subsection should be provided to REPs, stating that no rationale has been provided for why brokers should have to reveal provisions of their business relationships regarding customer protections with REPs. Enel X also opposed requiring brokers to share customer protection agreements with REPs, who are not regulators. Enel X argued that only the commission has that authority. Sharing market sensitive and proprietary information with REPs would violate the customer's right to confidentiality of its arrangement with the broker. Finally, Enel X noted that there is no need to share this agreement with the REP because the customer's agreement with their broker has no bearing on the relationship between the REP and the customer.

TEPA recommended clarifying that brokers need to disclose only the relevant portions of contracts that contain voluntary alternation of customer protection provisions. To require disclosure of the full agreement would be violative of the requirements to protect "proprietary client information" as defined in 16 TAC §25.486(b)(5) of the proposed rule. The rule should not require a broker to provide entire contract agreements or other information unnecessary for a specific identified purpose or not authorized by the broker's client. In reply comments, TEAM agreed with TEPA that the disclosure could be limited to the relevant portions of the contract.

In reply comments, ARM reiterated its belief that this subsection is duplicative of 16 TAC §25.471 and should be struck. ARM argued that if it is not struck, the agreement at issue is inherently relevant in its entirety and the commission should require disclosure of the full contract to the REP.

Commission Response

The commission does not agree that 16 TAC §25.486(c) is duplicative of the waiver provisions contained in 16 TAC §25.471(a)(3), which provide certain customers with the ability to waive, with certain exceptions, the customer protections in Subchapter R. The language in 16 TAC §25.486(c) has a much narrower focus, in that it allows certain clients

of brokers to agree to a different level of customer protections related to the provision of brokerage services than is provided in 16 TAC §25.486. A client that agrees to a different level of customer protections related to the provision of brokerage services does not, by virtue of that agreement, waive any other customer protections they are entitled to under Subchapter R. The commission has added language to clarify this point.

The commission declines to add language requiring a broker to provide to a client's REP a copy of a written agreement, or a relevant portion of an agreement, entered into under this subsection. The commission agrees with Enel X that such agreements might contain sensitive or proprietary information a REP is not entitled to, and that the agreements do not necessarily have any bearing on the relationship between the client and their REP. If a REP believes that it needs access to such agreements, it can obtain them through private agreement with the parties involved.

Comments on 16 TAC §25.486(d)

ARM recommended including a provision holding a broker responsible for its representations to customers and applicants by employees or other agents of the broker concerning brokerage or retail electric service that are made through advertising, marketing, or other means. TEAM supported this proposal in reply comments.

Commission Response

The commission declines to include a requirement holding a broker responsible for its representations as requested by ARM, as it is unnecessary. All broker communications are required to be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive under 16 TAC §25.486. However, the commission agrees with ARM that a broker is responsible for the actions of its employees or other agents. As previously noted, the commission added language to 16 TAC §25.112(a) to clarify this responsibility.

Comments on 16 TAC §25.486(d)(1)

ARM, TEAM, and OPUC recommended adding three additional prohibited communications to the nonexclusive list in 16 TAC §25.486(d)(1). First, ARM recommended prohibiting the use of the term "fixed" to market a product that does not meet the definition of a fixed rate product. ARM argued that this prohibition already applies to REPs and aggregators under 16 TAC §25.475(c)(1)(A). ARM also noted that the commission has already received a formal complaint involving this topic (see Docket No. 43337, *Complaint of Syed Enterprises Inc. Against AP Gas & Electric LLC*). Second, ARM recommended prohibiting falsely stating or suggesting that pricing or contract terms are offered by a REP if they are not so offered. ARM pointed to a pending formal complaint involving this issue as well (see Docket No. 46951, *Complaint of Romtex Enterprises, Inc*). Last, ARM recommended prohibiting falsely suggesting, implying, or otherwise leading someone to believe that a contract has benefits for a period of time longer than the initial contract term, which is also applicable to REPs and aggregators under 16 TAC §25.475(c)(1)(A). TEAM supported ARM's recommendations in reply comments. OPUC also supported ARM's recommendations and stated that it is very important and necessary that customers understand the terms of the agreement that they are entering into and it is unacceptable for customers to be given false or misleading information about contract terms.

Commission Response

The commission declines to add additional items to the list of examples of prohibited communications, because these additions are unnecessary on a nonexclusive list. The core requirement of this subsection is that broker communications must be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive. Each of the activities described by ARM are unambiguous violations of the general prohibition.

Comments on 16 TAC §25.486(d)(1)(A)

ARM and TEAM suggested changes to the prohibition against leading a client to believe that receiving brokerage services will provide a customer with more reliable service from a TDU. First, these parties argued that "better quality service" should be used instead of "more reliable service" because reliability has a narrow meaning in the electric industry and this change would align this provision with 16 TAC §25.475(c)(1)(A)(iii), applicable to REPs and aggregators. Second, they argued that brokers should also be prohibited from representing that receiving brokerage services will provide a customer with better quality service from a REP, because REPs provide the same quality of service to all similarly situated customers.

ARM further recommended replacing "client" with "someone" in this provision to ensure that brokers are not permitted to mislead potential as well as current customers.

Commission Response

The commission declines to replace "more reliable service" with "better quality service" as requested by ARM and TEAM. The commission agrees that more reliable service has a specific meaning in the utility industry, and this meaning aligns with the commission's intended prohibition. A broker cannot represent to a client that brokerage services can provide the client with fewer outages or otherwise affect the continuity or adequacy of that client's electric service, because these claims are necessarily false. A retail electric customer's choice of REP or broker has no effect on the reliability of electric service. A broker may offer a wide array of consulting services and expanding this provision with a broad phrase such as "quality of service" might prevent a broker from engaging in otherwise legitimate business activities. The general prohibition against misleading, fraudulent, unfair, deceptive, or anti-competitive representations is sufficient to prevent brokers from making false representations in this area.

The commission also declines to expand the language of this prohibition to representations about the quality of service provided by REPs. REPs and brokers are each customer-facing entities that employ widely different practices in areas such as pricing, customer service, and complaint handling. Unlike with a TDU, it is not inherently misleading for a broker to represent that it can help pair a client with a REP that best suits its particular preferences or that it has the ability to work with certain REPs to obtain better quality of service for a client. However, to the extent that a broker is making false claims about the quality of service provided by a particular REP, the general prohibition against misleading, fraudulent, unfair, deceptive, or anti-competitive communications applies.

The commission also declines to replace "client" with "someone" in this section as requested by ARM, because

it is unnecessary. Client is defined to include a person that solicits brokerage services. This ensures that a person that ARM describes as a potential customer is also protected by the language of this section.

Comments on 16 TAC §25.486(d)(1)(C)

Regarding the prohibition against a broker falsely suggesting that brokerage services are being provided without compensation, TEPA noted that its code of conduct already prohibits this conduct. Brasovan supported retaining this requirement but suggested that it be reframed as a prohibition against falsely stating or suggesting that the brokerage services are being provided at no cost to the customer, whether paid for directly or indirectly by the customer.

Commission Response

The commission declines to make changes based upon these comments. TEPA's code of conduct is not a sufficient substitute for a commission rule. The commission cannot rely upon an individual organization to fulfill the commission's statutory obligation to provide customer protections to the recipients of brokerage services in Texas.

The commission also declines to reframe the prohibition against falsely stating or suggesting that brokerage services are being provided without compensation in terms of costs, directly or indirectly, borne by the customer as suggested by Brasovan. Whether a broker is receiving compensation is a much more straightforward and enforceable standard than whether those services are being provided at no cost to the client. In many instances, a retail electric customer represented by a broker is offered the same rate as a retail electric customer who is not represented by a broker. If the broker in this scenario receives compensation from the REP when the client enrolled, it is not clear if the client incurred any indirect costs. It is, however, clear the broker received compensation for providing brokerage services.

Comments on 16 TAC §25.486(d)(1)(D)

Brasovan requested clarification on whether "falsely claiming to be the client agent of a customer" refers to a broker falsely claiming to the REP that it is working as an agent of the customer or falsely claiming to the customer that it is working as an agent to the customer and, therefore, only in the customer's best interest. Brasovan suggested that both of these activities should be prohibited.

Commission Response

As proposed, this prohibition referred to a broker falsely claiming to be a client agent of a customer as that term is defined in 16 TAC §25.486(b)(4). This communication is prohibited whether the communication is directed at the customer, a REP, or any other person. No changes are required to address Brasovan's suggestion.

However, the commission does expand 16 TAC §25.486(d)(1)(D) to prohibit falsely claiming to be a client agent of a "customer or applicant." Under 16 TAC §25.471(d)(1), a person who is applying for retail electric service is defined as an applicant. Brokers are also prohibited from falsely claiming to be the client agent of a person who is applying for retail electric service.

Comments on 16 TAC §25.486(d)(2)

This section requires a broker to include its registered name on all printed advertisements, electronic advertising over the Internet, and websites. ARM and Power Wizard recommended that brokers also be required to include their registration number on these communications. ARM argued that this would not be burdensome, would help customers verify a broker's registration status, and is consistent with the aggregator requirements. TEAM supported this addition in reply comments.

Commission Response

The commission declines to require brokers to include their registration number on all marketing materials. The commission does not agree that a customer will be unable to verify a broker's registration status with the broker's registered name. Moreover, many brokers have been in operation for many years, and requiring the inclusion of a recently assigned registration number would require a broker to replace all of its existing marketing materials to comply with the rule.

Comments on 16 TAC §25.486(e)

ARM argued that PURA §39.3555 specifically invokes the applicability of Chapter 17 of PURA to brokers and that PURA §17.004(a)(3) requires certain information to be made available in English, Spanish, and other languages as determined by the commission. ARM continued that the broker rules should include provisions similar to those in effect for aggregators to give effect to this provision. Specifically, ARM recommended that brokers be required to provide the terms of service documents required by this subchapter and information concerning the availability of electric discount programs to the client in English, Spanish, or the language used to market the broker's products and services, as designated by the customer. TEAM and OPUC supported this recommendation in their respective reply comments. OPUC agreed with ARM's statutory analysis and explained that this would provide additional and necessary customer protection safeguards that will enable customers to understand all aspects of the terms of services being offered by the broker.

ARM also requested the inclusion of a provision stating that if a broker markets a REP's services in a language that the REP is unable to support, the broker will be responsible for assisting the customer with translation services and the REP will not be held responsible for supporting that language under this subchapter. TEAM supported this request in reply.

TEPA replied generally to the comments filed by ARM and OPUC that the services for which a broker may be held accountable must necessarily be services that a broker offers and may legally offer retail electric customers rather than for services for which a broker is not legally authorized to provide under new and existing laws.

Commission Response

The commission declines to expand the requirements of this subsection, as requested by ARM, TEAM, and OPUC. Terms of service documents are REP-created documents that are relevant to the relationship between REPs and customers. As such, requirements related to these documents fall outside of the scope of this rulemaking.

The commission also declines to require brokers to provide translation services if they market a REP's services to a client in a language that the REP cannot support. Requiring a broker to provide ongoing translation services is overly burdensome.

The commission modifies the language of 16 TAC §25.486(e) by replacing the word "provide" with "offer." This modification is intended to allow brokers and clients to agree to a different language for communications, so long as the client has the option of receiving information in the language that was used to market the broker's services to the client.

Comments on 16 TAC §25.486(f)

Regarding the disclosures a broker is required to provide a client prior to the initiation of brokerage services, TEPA noted that its members have strong policy objections to "this type of business practice regulation" being applied to the fully competitive discretionary services offered by brokers.

Commission Response

PURA §39.3555(e) explicitly requires a person that registers as a broker with the commission to comply with disclosure requirements established by the commission and PURA, Chapters 17 and 39. The disclosure requirements the commission is applying to the broker community are not overly burdensome and are necessary to provide clients with enough information to make informed decisions regarding the selection of a broker.

Grandfathering Clause for Existing Clients

TEPA requested that the commission include a grandfathering clause to allow brokers to provide the required disclosures to existing clients at the renewal of an existing broker-client agreement. TEAM supported TEPA's proposal in reply comments and recommended the commission also require brokers to provide the required disclosures concurrently with the client's renewal of brokerage services.

Commission Response

The commission declines to include a grandfathering clause as none is necessary. These disclosures are required prior to the initiation of brokerage services, but the requirement does not apply to brokerage services that were initiated prior to the adoption of these rules. However, the commission agrees that these customers should receive these disclosures upon the renewal of those services. The commission adds language to clarify this requirement and to require the broker to provide these disclosures when there is a material change in the services provided or in the terms and conditions of the services provided.

Disclosure of Broker Type

Power Wizard suggested that the commission require a broker to disclose whether the broker is acting as a client agent, a transaction broker, or as an agent of the REP. Power Wizard argued that broker clients would benefit from a direct disclosure of which parties to the retail electric transaction, if any, the broker owes a duty of loyalty, or other fiduciary responsibility.

Commission Response

The commission declines to add language requiring a broker to disclose whether they are acting as a client agent, a transaction broker, or as an agent of the REP as none is necessary. A broker acting as a client agent is subject to specific disclosure requirements under 16 TAC §25.486(g), and the commission is not adopting "transaction broker" or "REP agent" as defined terms.

Comments on 16 TAC §25.486(f)(3)

TEPA supported the proposed requirement that brokers must disclose their relationships with REPs to individual customers. It argued this would provide customers with the transparent and reliable information needed to make informed decisions about market participants. TEPA contended that customer confidence is necessary to preserve the value of brokers in the marketplace.

ARM, TEAM, and Calpine Retail advocated for expanding the affiliate disclosure requirement beyond REP affiliations. ARM recommended disclosure of all customer-facing affiliated entities and suggested language adding aggregators or other brokers that are affiliates of the broker. Calpine Retail supported ARM's position, arguing that the commission should require disclosure of these affiliate relationships, establish a code of conduct for REP-affiliated brokers, or both. Calpine Retail asserted that over the past year, several REPs have either started or purchased brokers, which presents a clear conflict of interest. Calpine Retail viewed this disclosure as especially important because there are no requirements for REP-affiliated brokers to provide written contracts to customers with a description of services provided or other relevant information. TEAM also supported ARM's position in reply but thought the language should capture other market-related affiliations by adding wording to include any affiliate of the broker who is registered or certified by the commission.

Commission Response

The commission declines to expand the affiliate disclosure requirements to include entities other than REPs. The role of a broker in the market is to assist its clients in the selection of a REP or product. A broker affiliated with a REP could present a conflict of interest, because the broker would have a direct financial incentive to persuade its clients to enroll with its affiliate. Brokers' relationships with other market entities do not present the same inherent risk so a mandatory disclosure requirement is not necessary. However, if an interested client requests information on a broker's other affiliates, a broker is prohibited from misleading or deceiving the client under 16 TAC §25.486(d). If the broker elects not to disclose the requested information, the client can choose not to make use of its services.

Comments on 16 TAC §25.486(f)(5)

ARM suggested removing the modifier "if applicable" from the requirement to disclose the duration of the agreement to provide brokerage services. ARM stated that all agreements, even one-time agreements, will have a duration, and the customer will benefit from having clarity regarding the duration of the agreement.

Commission Response

The commission declines to remove "if applicable," as requested by ARM. Brokerage services can include elements that do not have a meaningful duration. For instance, the service offered by an online shopping site that allows a client to generate a list of retail products that meet certain criteria does not have a meaningful duration.

Comments on 16 TAC §25.486(f)(6)

TEPA opposed the inclusion of any broker compensation requirements. It also argued that the method and amount of compensation is proprietary, and requiring disclosure is anti-competitive and will force the commoditization of brokerage services. TEPA further asserted that requiring compensation disclosure goes beyond the oversight extended to the commission by PURA §39.3555 and requested that the commission refrain from assert-

ing any form of regulatory oversight or restrictions on the rates or prices of brokers. In reply comments, TEPA noted that the TEPA code of conduct requires brokers to disclose their fee upon request by the customer and stated that TEPA does not oppose that type of requirement.

Energy Ogre, Power Wizard, John Turala, ARM, and Brasovan supported the compensation disclosure requirement as proposed. Energy Ogre argued that the requirement is both reasonable and consistent with other types of required disclosures in the industry. Energy Ogre further argued that the compensation a broker receives, and from whom, is vital information to a residential customer. However, Energy Ogre indicated that a distinction could be made on the need for disclosure of compensation in a commercial setting versus a residential setting. John Turala argued that disclosure is important for transparency purposes. Brasovan suggested that brokers should also have to disclose how much compensation they receive from a REP. Brasovan further recommended that REPs should have to guarantee this compensation in their contracts. ARM specified that it valued transparency and that it is not asking for the rates of brokers to be regulated beyond disclosure requirements.

Electricity Ratings and RES Nation supported fee disclosure only in circumstances where the broker is directly compensated by the client. Electricity Ratings argued this approach would avoid confusion as to whether compensation received by brokers from third party sources relates to brokerage services or other unrelated services the broker provides. RES Nation also argued that this will maintain the privacy of business relationships in the competitive marketplace.

In reply comments, TEAM argued that the position taken by RES Nation and Electricity Ratings opens the door to manipulation and circumvention of the rule. TEAM asserts that a broker seeking to avoid disclosure obligations may argue that a fee charged to a client as part of the energy charge on the customer bill provided by the REP is indirect, alleviating the broker's disclosure obligation. TEAM recommended that the details to be disclosed include the amount the client will pay or how the compensation will be calculated, and how the compensation will be billed to the client. TEAM argued that brokers bill a number of different ways, and customers need to know where to look to evaluate whether they are being appropriately billed for brokerage services.

Commission Response

The commission disagrees with TEPA that compensation disclosure is inherently anti-competitive and would force the commoditization of brokerage services. Nearly every competitive industry has transparent pricing. The commission also disagrees with TEPA's contention that compensation disclosure goes beyond the oversight extended to the commission by PURA §39.3555. The plain text of PURA §39.3555 requires a broker to "comply with...disclosure requirements...established by the commission."

Prior to the initiation of brokerage services, a broker is required to provide its client a description of how the broker will be compensated for providing brokerage services and by whom. This level of mandatory disclosure coupled with the prohibition against unauthorized charges of 16 TAC §25.486(h) provides clients with adequate customer protections in this area. Accordingly, the commission removes the language from proposed 16 TAC §25.486(f)(6) that required a broker to disclose the details of compensation provided directly by the client.

The commission declines to adopt the recommendation of Brasovan that brokers be required to disclose the amount of compensation that they receive from REPs. The knowledge that a broker is being compensated by a REP is enough to alert a client to possible conflicts of interest while respecting the proprietary practices of brokers. The commission notes that there is no rule against a broker disclosing the full details of its compensation, nor is there a rule against a client requesting those details.

The commission also declines to require REPs to guarantee a broker's compensation in their contracts, as requested by Brasovan. If a broker desires to have its compensation guaranteed by a REP, it can negotiate for that term with the REP.

Comments on 16 TAC §25.486(f)(7)

TEPA argued that requiring a broker to disclose how a client can terminate the agreement to provide brokerage services is overly prescriptive and asserted that the matter of contract termination by the client should be left to the representation agreement between the broker and client. It further argued that termination is covered in such agreements and should not be subject to additional disclosure requirements. OPUC disagreed, arguing that customers should have the right to know how to terminate a brokerage services agreement. ARM also opposed TEPA's position, arguing that this requirement is relevant and not overly burdensome.

Commission Response

The commission declines to make changes in response to these comments as none are necessary. The commission agrees with OPUC and ARM that requiring a broker to disclose how a client can terminate an agreement to provide brokerage services is essential information for the client and not overly burdensome for the broker. The required disclosures can be provided to the client as a part of the representation agreement, prior to the initiation of brokerage services.

Calpine Retail commented that generally there is no agreement between a broker and a customer unless the broker directly bills the customer via a separate invoice. They explained that broker fees are typically included in the REP bill, so the commission needs to provide guidance on how REPs should respond to requests by customers wanting to terminate their arrangement with the broker. Calpine Retail also noted that the commission should revise the rule to require brokers to notify REPs how to handle such termination.

Commission Response

With regard to Calpine Retail's request for clarity on how a REP should proceed if a customer who wishes to terminate its relationship with the broker contacts the REP, it is the commission's intent that this situation be addressed by the parties through private agreement.

Comments on 16 TAC §25.486(f)(8)

TEPA argued that requiring a broker to disclose early termination fees is overly prescriptive and should be left to the representation agreement between the broker and its client. ARM argued in reply comments that this requirement is relevant and not overly burdensome so should be included in the final rule.

Commission Response

The commission declines to make changes in response to these comments as none are necessary. The existence of a termination fee is a critical piece of information. The commission agrees with ARM that this requirement is not overly burdensome. The required disclosures can be provided to the client as a part of the representation agreement, prior to the initiation of brokerage services.

Comments on 16 TAC §25.486(g)

Comments related to whether REPs are required to accept client agent submitted enrollments

Energy Ogre and Power Wizard argued that REPs should be required to accept customer enrollments submitted by client agents on behalf of their clients. Energy Ogre argued that REPs use a variety of tactics, such as enrollment delays and Internet Protocol address blocking, to delay or prevent enrollments by client agents. Energy Ogre represented that it is always upfront with the terms of agent authorization with its clients and its clients knowingly and willingly enter into an agreement with Energy Ogre. Energy Ogre continued that as the market evolves and becomes more complicated, it will be increasingly important for a broker like Energy Ogre to have the authority to act on behalf of its residential customers. Energy Ogre advocated for a commission review and approval process for broker agency agreements.

Power Wizard proposed, in reply comments, that "the Commission require REPs to accept all customer enrollments that are complete, including all customer information that is required to process the enrollment, and are accompanied by a simple confirmation from the enrolling client agent that they have obtained authority from the retail electric customer using the Commission approved form text." The combination of a completed enrollment, which includes information that can only be obtained with the assistance of the retail electric customer, and verification of agent authority on a commission-approved form text, which the commission can request from the broker at any time, should be all that is necessary for a customer to utilize the services of a client agent and enroll with a REP.

In reply comments, EMEX/Patriot argued that any disputes between individual client agents and REPs regarding agency agreements should be resolved commercially or through agency law. EMEX/Patriot asserted that it has used agency agreements for nearly 20 years in almost every restructured electric market and has not experienced even one instance of a REP refusing to accept its agreement, which it provides to REPs with all its executed client contracts. EMEX/Patriot argued that if specific brokers have encountered problems with REPs accepting their agreements, "it is not likely because REPs are being arbitrary in their standards." EMEX/Patriot argued that the value that brokers bring to the table is that they have strong relationships with their clients and are trusted by REPs.

TEAM and ARM each argued that REPs should not be required to accept a broker's representation that it has legal authority to execute an enrollment for a customer. ARM argued that this violates a bedrock principle of a free and competitive market that buyers and sellers come together willingly. Similarly, TEAM argued that in the competitive marketplace a service provider should not be forced to be in the position of accepting another company's determinations of who the service provider's customers might be, or the terms of the contract with those customers. TEAM recommended the commission include language that a REP is only required to accept a broker's representation

of agency authority if the broker has a statutorily-recognized durable power of attorney.

ARM, EMEX/Patriot, Energy Ogre, and Power Wizard filed reply comments opposing TEAM's proposed durable power of attorney language. ARM argued that REPs should be able to decide what evidence of agency authority they will accept because REPs are liable under the customer protection rules for unauthorized enrollments. ARM also worried that requiring "a REP to accept certain types of purported evidence may put a REP in a position where it is required by one rule to violate another rule."

EMEX/Patriot, Energy Ogre, and Power Wizard each argued that a durable power of attorney is unnecessary. EMEX/Patriot asserted that the requirement would be unique to this jurisdiction. Energy Ogre and Power Wizard contended that requiring a durable power of attorney would set an impractical standard and goes against the goals of bolstering customer protections and maintaining a healthy and robust marketplace. These parties also pointed out that a durable power of attorney is used to convey broad and sweeping power to an agent. A client agent is not making potentially lifesaving medical decisions or executing an estate for a deceased or incapacitated person. Other agents, such as insurance and real estate agents, are not required to have a durable power of attorney.

In reply comments, ARM and TEAM suggested language clarifying that a REP is not obligated to accept a third-party's representation or evidence that it has legal authority to execute enrollment for the customer.

Commission Response

The commission declines to include language governing under what circumstances a REP must accept a broker's representation that it has agency authority to act on a client's behalf or that requires a REP to accept an enrollment submitted by a client agent. The commission agrees with EMEX/Patriot that these issues should be resolved commercially and through agency law. The commission does not intend to alter or adjudicate any claims of agency authority that may exist under areas of law that are not within the commission's jurisdiction.

With regard to Energy Ogre's arguments about the tactics that REPs use to prevent the enrollment of applicants that are represented by client agents, the commission agrees with ARM and TEAM that a fundamental principle of competitive markets is that buyers and sellers come together willingly. As long as it abides by the discrimination prohibitions of PURA and 16 TAC §25.471(c), and any other applicable laws, a REP is not prohibited from refusing to provide electric service to the clients of client agents.

While the commission will not prohibit REPs from verifying the agency authority of client agents before enrolling a client as a customer, the commission adopts the following language to reduce the compliance risk for REPs and facilitate quicker enrollments of this type: "For purposes of complying with the requirements §25.474, a REP may rely upon the representations made by a client agent provided that the client agent is registered with the commission and provides evidence of agency authority."

Comments Related to a Standardized Agency Authorization Process

Energy Ogre proposed that each broker create its own version of the client agent agreement to allow for individuality and cre-

ativity. After being submitted to and approved by the commission, the form could contain the words "this form approved by the PUC." Energy Ogre argued that having over one thousand different forms would lead to confusion for all parties involved, but that commission approval would mitigate that confusion.

Bottom Line Energy and Energy Ogre each requested that the commission adopt a standard client agency agreement. Bottom Line Energy argued that a standard one-page form would be simple and give a client a general understanding of how the agency relationship would work. Energy Ogre supported a standard form as an alternative to its proposal of commission-approved forms. In reply comments, Power Wizard supported the commission adopting standardized form text.

TEAM argued in reply that the commission does not need to become involved in the private party contractual matters between competitive market entities and opposed all of the standardized form proposals.

TEPA, ARM, and EMEX/Patriot all filed reply comments opposing the adoption of a standard form. TEPA argued that a standardized form is not provided for by PURA §39.3555 and the legislature did not adopt other legislation with similar language. TEPA also requested that if the commission did adopt a standardized form, that it only apply to residential customers. EMEX/Patriot asserted that no other jurisdiction requires a specific form for such agreements for client agents and that disagreements between competitive entities should be resolved commercially or under agency law.

Commission Response

The commission declines to add a provision creating a commission review and approval process for broker agency agreements. The commission also declines to create a standard agency authorization form. The commission agrees that it should not interfere with contractual matters of private parties more than is necessary to provide recipients of brokerage services with adequate customer protections. Additionally, individually preapproving a separate broker agency agreement for each broker would be a drain on the commission's resources. Conversely, a standardized form would limit the ability of brokers and clients to negotiate specific terms tailored to the intended relationship between the two parties. The commission also notes that mandatory REP contract documents, such as the Terms of Service document, the Your Rights as a Customer document, and the Electricity Facts Label, do not have commission-approved forms, despite the commission having a greater level of authority over REPs than brokers.

Comments Related to Mandatory Indemnification

TEAM proposed that client agents be required to indemnify the REP against any future complaints, actions, and harm resulting from any and all claims that the enrollment was not authorized or verified or that the broker did not have authority to act as the client's agent. In reply comments, TEAM and ARM each submitted a modified version of this proposal that would allow REPs to require a broker that acts as a client agent to provide the indemnification described above.

In reply comments, EMEX/Patriot and Power Wizard opposed the proposal that client agents be required to indemnify REPs. EMEX/Patriot argued that REPs and brokers are sophisticated commercial actors and are equipped to establish fair terms for dealing with such situations in the commercial agreements be-

tween one another, as is the practice today. Power Wizard added that if brokers falsely claim to have agency authority, the commission has authority to pursue enforcement actions against the person responsible for the unauthorized enrollment. The commission will not pursue an enforcement action against a REP if the broker is solely responsible.

Commission Response

The commission declines to include language requiring that client agents provide REPs with indemnity as suggested by TEAM. The commission agrees with EMEX/Patriot that REPs and brokers can establish fair terms through private contract. For purposes of complying with the requirements of 16 TAC §25.474, 16 TAC §25.486(g)(4) allows a REP to rely upon the representations made by a client agent provided that the client agent is registered with the commission and provides evidence of agency authority. If desired, REPs and brokers may negotiate for further indemnification by private agreement.

Comments of 16 TAC §25.486(g)(2)(E)

ARM suggested that the commission specify that the customer data referenced in this provision includes the customer's proprietary customer information. This will require a client agent to inform the client how its proprietary customer information will be used, protected, and retained by the broker and disposed of at the conclusion of the agency relationship. TEAM and ARM included language that incorporated this suggestion in the synchronized language in reply comments.

Commission Response

The commission agrees with ARM that this is a useful clarification. The commission adds language to this provision clarifying that the customer data referenced in this provision includes the client's proprietary client information.

Comments on 16 TAC §25.486(g)(3)

ARM supported language in the proposal that requires a client agent to provide evidence of its agency authority upon the request of a REP with which the broker seeks to enroll its client. ARM requested that the commission also require a client agent to provide notice to the customer's REP of record when a broker's agency authority changes or is revoked by the customer. TEAM and ARM presented synchronized language in reply comments that incorporated this recommendation.

Power Wizard requested the commission strike the requirement that brokers provide evidence of agency authority to a REP with which the broker seeks to enroll the client. Power Wizard argued that delegating the verification of the client agent to REPs is unnecessary and opens the door to potential anti-competitive abuses and discrimination by REPs against customers who use concierge services and other shopping tools to make better shopping decisions. Power Wizard noted that the proposed rule was silent with regard to both the reasons such evidence is required and the rules that govern the actions a REP must take after evidence of agent authority has been provided.

In reply comments, Power Wizard argued that 16 TAC §§25.112 and 25.486 provide the commission with sufficient oversight authority to distinguish rule violations by brokers from rule violations by REPs, as well as providing enforcement authority to hold brokers accountable for rule violations. If a broker misrepresented its client agent authority, the broker would be subject to a possible enforcement action by the commission. Power Wizard fur-

ther argues that these new powers eliminate the need for REPs to police broker representations regarding client agent authority, thereby also eliminating any need for REPs to receive notice regarding changes to a client agent's authority.

ARM filed reply comments opposing Power Wizard's proposal. ARM noted that although brokers will now have some responsibility related to customer complaints, the REP has financial and regulatory responsibility for the unauthorized enrollment of a customer. ARM asserted that a party dealing with an agent has an obligation to ascertain not only the validity of the agent's authority but also the extent. As applied here, a REP needs to know whether a broker has agency authority with respect to a customer and the scope of that authority. In the context of a broker, ARM argued, apparent authority is not sufficient. ARM distinguished this from a situation where a REP may reasonably assume that an officer of a company is authorized to execute a retail electric contract on behalf of the company. If the broker did not have the agency to bind a customer to a contract, that contract would be invalid, but the REP would likely have already incurred costs (such as hedging, TDU charges, and wholesale settlements) that may not be recoupable.

Commission Response

The commission declines to require client agents to notify a client's REP of record when their agency authority changes or is terminated. The rule requires brokers to provide evidence of their agency authority to a REP at the time the broker seeks to enroll the client so that the REP can avoid fraudulent enrollments. However, the rule does not prohibit REPs and brokers from agreeing to additional notifications.

The commission also declines to strike the requirement that brokers provide evidence of agency authority upon the request of REPs with which the broker seeks to enroll a client. The commission does not agree with Power Wizard's contention that the commission's ability to pursue enforcement actions against fraudulent claims of agency authority eliminates the role that a REP plays in protecting the integrity of its enrollment process. The commission agrees with ARM that REPs have financial and regulatory responsibility for unauthorized enrollments and need to have the ability to verify the authority of agents with which they do business. REPs are also in the best position to prevent unauthorized switches before they occur.

The commission disagrees with Power Wizard's assertion that allowing REPs to verify the agency authority of a client agent opens the door to anti-competitive abuses by REPs.

Comments on 16 TAC §25.486(h)

Proposed 16 TAC §25.486(h) authorized a broker to enter into an agreement with a REP to assume all or part of the REP's enrollment responsibilities without creating an agency relationship with that REP. TEPA, ARM, and Power Wizard each filed comments indicating that the roles of the different entities envisioned by this section needed to be clarified. ARM believed that the phrasing of proposed subsection (h) may lead to confusion over which entities can enroll customers and act as an agent. ARM also expressed concerns with any proposal that would mandate that REPs enroll customers represented by a broker or client agent.

TEAM argued that performing actions on behalf of a REP does not comport with the definition of brokerage services, and entities that are doing so currently are already under the commission's

jurisdiction as an agent of the REP. ARM and Power Wizard argued that brokers are not REP agents. TEAM, ARM, and Power Wizard agreed that REPs should not be held accountable for broker actions outside of an agency relationship. ARM argued that while REPs may enter into agreements with brokers to accept customers enrolled by the brokers, the existence of such an agreement does not create an agency relationship between the REP and broker, and therefore, brokers should be required to comply with 16 TAC §25.474 both as a matter of practice and as a means to give effect to the text and written legislative intent of PURA §39.3555. Power Wizard agreed that brokers are not REP agents, but clarified that brokers were not necessarily client agents either. To avoid confusion regarding liability and fiduciary responsibilities, Power Wizard argued these brokers should be recognized as independent agents who represent their own interests, and the commission should hold them, and not REPs accountable for any violation of the commission's customer protection rules.

TEPA argued that the proposed "broker enrollment" provisions are unnecessary, because commission rules already provide authority for entities such as brokers to provide "retail electric functions" without specific authorization in the commission's rules or a contract with a REP. In making this claim, TEPA relied upon 16 TAC §25.107(a)(2), which establishes that a person "who does not purchase, take title to, or resell electricity in order to provide electric service to a retail customer is not a REP and may perform a service for a REP without obtaining a certificate pursuant to this section," and 16 TAC §25.107(a)(3), which clarifies that when a REP contractually outsources a service for which a REP certificate is not required (i.e. services referred to in the rule as "retail electric functions"), it remains responsible "under Commission rules for those functions and remains accountable to applicable laws and Commission rules for all activities conducted on its behalf by any subcontractor, agent, or any other entity." TEPA also noted that no provisions identified in statute or in 16 TAC §25.107 require an outsourced retail electric function to be provided through a contract with the REP.

TEAM, ARM, and TEPA each requested that the commission strike proposed subsection (h) entirely, but each also recommended language as an alternative. TEAM proposed clarifying that a broker in this situation must also comply with 16 TAC §25.474 and all its advertising claims must comply with 16 TAC §25.475(i). In reply, ARM indicated that TEAM's clarification would be helpful, but preferred its recommendation to incorporate 16 TAC §25.475(i) into proposed 16 TAC §25.486(d) to be more consistent with the rule provisions that apply to aggregators and REPs. In initial comments, ARM recommended modifying this subsection to allow brokers to conduct customer enrollments under 16 TAC §25.474 and to require that an agreement between a REP and a broker under this subsection must be memorialized on paper or electronically and provided to the commission upon request. In reply comments, ARM and TEAM each presented a synchronized proposal that required a broker that is not an agent of a REP under 16 TAC §25.471(d)(10) that conducts all or part of a customer enrollment must do so in compliance with the requirements of 16 TAC §25.474. They further recommended that a REP may, but is not required to, accept such enrollments, and any agreement between a REP and a broker under this subsection must be memorialized on paper or electronically and provided to the commission upon request.

TEPA recommended the commission adopt a definition of "enrollment services" as the process of obtaining authorization and verification for a request for service that is a move-in or switch

in accordance with 16 TAC §25.471. TEPA also recommended a definition for a "client enrollment agent" be referenced in this section, and added to the definitions section of the rule to help consumers distinguish between: (a) brokers who may simply be "brokers"; (b) brokers who act in an agency relationship with a customer; and (c) and brokers who have entered into an agreement with a REP to enroll customers or applicants under the terms specified in this new proposed section.

Commission Response

Proposed 16 TAC §25.486(h) was intended to provide requirements for ongoing businesses that perform enrollment services without an express agency relationship with a REP. However, the commission agrees with comments suggesting that the proposed language would further confuse the role of different entities with regard to customer enrollments. The commission also agrees with TEPA that 16 TAC §25.107(a)(2) allows a broker to conduct enrollment activities as a "service for a REP." Moreover, 16 TAC §25.107(a)(3) makes it clear that under current law a REP can outsource retail electric functions to a "sub-contractor, agent, or any other entity." Accordingly, the commission agrees that brokers that conduct enrollment activities are not required to have an agency relationship with a REP. Because the commission's intended purpose for this section is already provided for under current law, the commission removes proposed 16 TAC §25.486(h) from the rule. The commission also declines to adopt any of the alternate language recommended by the commenters as it is unnecessary.

However, the commission disagrees that REPs are not accountable for enrollment activities conducted by brokers on their behalf. Under 16 TAC §25.107(a)(3), "[a] REP that outsources retail electric functions...remains accountable to applicable law and commission rules for all activities conducted on its behalf by any subcontractor, agent or any other entity." To the extent that a broker assumes any of the duties of a REP with regard to the enrollment process, the REP will be accountable under the rules for all activities conducted on its behalf by that broker.

With regard to the concerns of TEAM and ARM, a REP is not required to accept an enrollment conducted by a broker. It is the intention of the commission that REPs remain accountable for enrollments under 16 TAC §25.474, and REPs and brokers continue to address these issues through private agreement, as necessary.

Comments on 16 TAC §25.486(i)

TEPA argued it would be appropriate to include the modifier "unduly" in this section to conform the broker discrimination prohibitions to those applicable to REPs and aggregators. TEAM indicated that it maintains its support of this section, unmodified, but does not oppose the addition of "unduly."

Commission Response

The commission agrees that inclusion of the term "unduly" is appropriate and would align 16 TAC §25.486(i) with the discrimination prohibitions that apply to REPs and aggregators. The commission makes the recommended change.

Comments on 16 TAC §25.486(j)(1)

Oncor recommended that the commission include an additional provision in this subsection modeled after 16 TAC §25.472(b)(3),

which allows a REP to request a customer or applicant's monthly usage from a TDU. This would require that, upon receiving authorization from a client, a broker must request from the TDU the monthly usage of the client's premise for the previous 12 months, and the TDU, upon receipt of a written request or other proof of authorization, must provide the requested information to the requesting broker no later than three business days after the request for proof of authorization is submitted.

Oncor explained that all four TDUs in Texas's competitive retail market have implemented automated historical usage portals. Using Oncor's REP portal, a REP that affirms it has authorization from its customers may request up to 250 ESI IDs at a time and receive the historical usage within minutes. However, because brokers are not subject to the provisions of 16 TAC §25.472(b)(3), the portal used by brokers requires them to attach a copy of the customers' signed letter of authorization rather than allow the broker to simply affirm they have authorization, as the REPs are allowed to do. Oncor also explained that in 2018, Oncor fulfilled requests for more than 360,000 ESI IDs through their automated portals, and at that volume, all process improvements are meaningful. Power Wizard supported Oncor's proposal in reply comments.

ARM filed reply comments opposing Oncor's proposed language. ARM noted that no commission rule governs how Oncor manages its portal and PURA §39.3555 does not address TDUs' provision of historical usage data to brokers. For these reasons, ARM argued that this proposal is outside the scope of this rulemaking. ARM further argued that, if anything, this should be a permissive requirement, not mandatory as Oncor proposed. ARM also argued that even though brokers are now within commission's jurisdiction, broker comments throughout this rulemaking indicate that they do not wish to be included within the full scope of the commission's customer protection rules related to retail electric service. This runs contrary to Oncor's argument in support of not requiring evidence of authority. ARM recommended that it is appropriate to continue to require that brokers submit proof of authorization from a customer to obtain that customer's historical usage data.

Commission Response

The commission declines to include a provision modeled after 16 TAC §25.472(b)(3) as requested by Oncor. The commission agrees with ARM that broker registration applications are not subject to the same level of review as REP licensing applications, nor are brokers subject to the authorization and verification requirements of 16 TAC §25.474 when enlisting clients. The commission will not mandate the release of proprietary client information by a public utility to brokers because it is not clear that the utility has the ability to verify whether the customer has authorized the release of the information.

Comments on 16 TAC §25.486(j)(1)

Verifiable Authorization to Release Customer Information

ARM requested that the commission require a broker to obtain the customer's verifiable authorization by means of one of the methods authorized in 16 TAC §25.474 prior to releasing customer information. ARM argued that this would track the language of 16 TAC §25.472(b)(1) and prevent a double standard with REPs and aggregators. TEAM supported this recommendation in reply comments.

Commission Response

The commission declines to modify 16 TAC §25.486(j) to require brokers to obtain verifiable authorization by means of one of the methods authorized in 16 TAC §25.474 prior to releasing proprietary client information. Brokers are not otherwise required to use these methods when obtaining client authorization, and it would be burdensome to require such use in this context. The commission retains the requirement that brokers obtain authorization to release proprietary client information in writing. The commission notes that under 16 TAC §25.486(k)(1)(A), brokers must maintain records to verify compliance with this requirement.

Release of Customer Information to Agents, Vendors, Partners, or Affiliates

ARM recommended adding language that would track the requirements of 16 TAC §25.472(b)(1)(B), which would provide an additional exception to the prohibition against releasing proprietary client information to agents, vendors partners, or affiliates of the broker and impose requirements related to that exception. TEAM supported ARM's suggested additions in reply comments.

Commission Response

The commission declines to adopt the additional provisions suggested by ARM related to the release of proprietary client information to an agent, vendor, partner, or affiliate of the broker. Brokers and their clients can, by private agreement and consistent with the requirements of this section, determine for what purposes the broker may release the client's proprietary client information and to whom.

Comments on 16 TAC §25.486(j)(1)(B)

TEPA urged the commission to remove proposed 16 TAC §25.486(j)(1)(B), which would allow brokers to release proprietary client information to OPUC, upon request under PURA §39.101(d). This provision of PURA requires a REP, power generation company, aggregator, or other entity that provides retail electric service to submit reports to the commission and OPUC annually and on request relating to the person's compliance with PURA §39.101. TEPA objected to granting OPUC the right to require brokers to provide confidential and proprietary information about retail electric services without customer approval. TEPA continued that brokers are not subject to the statutory provisions that establish these reporting requirements, and that using this mechanism to assert this authority for OPUC is inappropriate and inconsistent with the competitive, discretionary nature of the services offered by brokers to retail electric customers. TEPA requested that if this provision remains, it should apply only to services for residential and small commercial customers. TEPA also opposed requiring brokers to file annual reports with the commission.

In reply, OPUC argued that under PURA Chapter 13, OPUC is the independent office responsible for representing the interests of residential and small commercial consumers and is statutorily responsible for maintaining a system to promptly and efficiently act on complaints that are filed with OPUC that it has the authority to resolve. OPUC contends that it should have access to all information that is necessary to protect residential and small commercial customer interests, including proprietary customer information possessed by brokers. ARM argued in reply comments that brokers should be required to file these annual reports. ARM stated that while brokers are not specifically included on the list of entities that are statutorily required to file these reports, PURA §39.3555 specifically invokes the customer protections found in Chapters 17 and 39.

Commission Response

The commission strikes proposed 16 TAC §25.486(j)(1)(B) in response to TEPA's comments. The commission agrees with ARM that the broad language of PURA §39.3555 would allow the commission to require brokers to file annual reports and disclose proprietary customer information contained in those reports to OPUC. However, at the current time, the commission believes that requiring brokers to file an annual report would be overly burdensome to a market segment that has just come under the commission's jurisdiction.

The commission agrees that OPUC should have all the information that it needs to address residential and small commercial complaints. However, OPUC can obtain authorization from a complainant to obtain that complainant's proprietary client information as needed.

Comments on 16 TAC §25.486(j)(1)(C)

TEAM recommended that the commission modify proposed 16 TAC §25.486(j)(1)(C) to clarify that brokers can also release proprietary client information to REPs or TDUs as necessary to solicit bids under terms approved by the commission.

Commission Response

The commission declines to permit brokers to release proprietary client information to REPs or TDUs for purposes of soliciting bids without the express authorization of the client, as suggested by TEAM. Instead, the commission removes proposed 16 TAC §25.486(j)(1)(C) from the rule. It is the intent of the commission that clients authorize any release of their proprietary client information by a broker. The removal of this provision should not place an additional burden on brokers, because a broker is not prohibited from obtaining client authorization through a general release that describes, with precision, the circumstances in which a broker can release the client's proprietary client information. The commission also notes that 16 TAC 25.486(d) applies to any communications describing how a client's proprietary client information will be used must be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive.

Comments on 16 TAC §25.486(j)(2)

Sale of Client-Specific Information

TEAM, ARM, and OPUC recommended that the commission prohibit the sale of client-specific information under any circumstances. TEAM argued that REPs are not allowed to sell customer-specific information and recommended language prohibiting the sale of proprietary client information. ARM recommended language prohibiting the sale of customer-specific information. In addition to recommending the prohibition on the sale of client information in reply comments, OPUC also supported the proposed rule language prohibiting the sale of customer-specific information without a customer's permission.

Commission Response

The commission declines to include a prohibition on the sale of client-specific information as requested by TEAM, ARM, and OPUC. Retail electric customers in deregulated areas of the state must interact with a REP to receive electric service. If REPs were permitted to sell customer-specific information, there would be a risk that requesting authorization to allow this sale would become an industry standard, preventing a customer from obtaining electric service

without agreeing to allow the sale of their information. Conversely, customers are not required to use brokers to obtain retail electric service. If a client elects to engage a broker and authorize the broker to sell their information, the commission will not prevent the client from doing so.

Sale of Clients Upon Broker Market Exit

RES Nation requested clarification that, when exiting the market, selling clients to another broker is not a violation of this rule. In reply comments, TEAM and ARM each opposed this suggestion. TEAM argued that this is unnecessary in the context of brokers. Because customers are not required to obtain brokerage services, there is no need for the commission to facilitate the transfer of clients to another broker and no reason why a broker should be able to sell customer-specific information to another broker under any circumstance. ARM argued that if a broker is exiting the market, it would make sense to sell the broker entity, not the individual customer's proprietary data. Furthermore, ARM continued, no such exception exists for aggregators exiting the market.

Commission Response

In response to RES Nation's request for clarification on whether, when exiting the market, selling clients to another broker is a violation of the rule, the commission clarifies that the same requirements apply in the context of a market exit as would apply otherwise. With regard to the sale of proprietary client information, a broker must first obtain consent from the client in writing. The commission also notes that any transfer of a client to a different broker would trigger the required disclosure requirements of 16 TAC §25.486(f) and the requirements of 16 TAC §25.486(g) if the broker is a client agent.

The commission agrees with TEAM that brokerage services are not essential, and the commission does not need to provide a process for the transfer of clients upon a broker market exit. However, the commission will not prohibit brokers and clients from including terms in their private agreements that provide for this outcome, so long as the terms are consistent with PURA and the commission's rules.

Comments on 16 TAC §25.486(k)

ARM recommended restyling this subsection from "customer service" to "customer access" for consistency with 16 TAC §25.485.

Commission Response

The commission agrees that ARM's proposed edit would provide consistency with 16 TAC §25.485. The commission restyles this subsection "Client Access and Complaint Handling."

Comments on 16 TAC §25.486(k)(1)

Access to Customer Service Representatives

Electricity Ratings argued that brokers generally do not have access to client bills or the ability to terminate REP services unless the broker is a client agent. Accordingly, Electricity Ratings requested that the commission modify this provision to only require client agents to provide customer access to customer service representatives to discuss bills and the termination of REP service. Electricity Ratings also requested the commission clarify that brokers who are not client agents are only required to pro-

vide client access to customer service representatives to discuss termination of service agreements with the broker.

TEPA filed reply comments in support of Electricity Ratings's proposed modifications regarding the termination of brokerage service agreements. However, in reference to Electricity Ratings's proposal that only client agents must provide client access to discuss bills and the termination of REP service, TEPA pointed out that no provisions exist in PURA §39.3555 that provide the basis for distinguishing treatment for different types of registered brokers. Accordingly, TEPA opposed the suggested addition of new language intended to authorize limited and specific actions for which a broker not need a grant of authority in the rules.

Commission Response

The commission agrees with Electricity Ratings that brokers should be required to provide clients access to customer service representatives to discuss the termination of agreements to provide brokerage services. The commission makes the recommended change.

The commission declines to adopt the client agent related language that Electricity Ratings recommends. Instead, the commission adds broader language requiring a broker to provide reasonable access to its service representatives to discuss charges on bills or any other aspect of the brokerage services provided to the client by the broker.

Complaints Submitted to Broker

TEAM stated that it is unclear when the broker must inform the client of the commission's complaint process. It suggested adding it to the initial disclosures to the client and to any communication regarding an unresolved complaint brought to the broker by a client.

Commission Response

The commission declines to adopt TEAM's recommendation that a broker be required to provide information regarding the commission's informal complaint resolution process as part of the initial disclosures and as a part of every communication with a client with a pending complaint, as this could be burdensome if the broker and client have multiple communications regarding a complaint. Instead, the commission adds a requirement that the broker provide information to the client regarding the commission's informal complaint resolution process within 21 days of receiving the complaint.

ARM recommended adding a deadline of 21 days for a broker to investigate client complaints and advise the complainant of the results.

Commission Response

The commission declines to require a broker to complete its own internal complaint investigation process within 21 days, as recommended by ARM. The requirement for brokers to provide the complainant with information regarding the commission's informal complaint resolution process within 14 days provides sufficient customer protections.

Comments on 16 TAC §25.486(k)(3)

ARM recommends that the commission replace "may not" with "must not" to clarify that a broker must not use a written or verbal agreement with a client to impair the right of a residential or small commercial customer to file a complaint.

Commission Response

The commission agrees with ARM that a broker must not use a written or verbal agreement with a client to impair the right of a residential or small commercial customer to file a complaint and makes the recommended change.

Debt Collection During Pendency of an Informal Complaint

ARM suggested adding an additional provision prohibiting debt collection or reporting to a credit agency during the pendency of an informal complaint. TEAM supported this proposal in reply comments and argued that this proposal complements proposed 16 TAC §25.112(g), which lists unauthorized charges as a significant violation.

Commission Response

The commission has added a provision prohibiting the initiation of collection activities, including a report of a customer's delinquency to a credit reporting agency, with respect to the disputed portion of the bill, during the pendency of an informal complaint. Under 16 TAC §22.272(d), commission staff must attempt to informally resolve all complaints within 35 days, making this a sensible customer protection relative to the minor burden it imposes on brokers.

Comments on 16 TAC §25.486(k)(3)(B)

ARM pointed out that some of the information required by this subsection may not be available if a complaint is initiated against an unregistered broker or before a customer receives an electric service identifier. ARM recommended the commission add "if any" to 16 TAC §§25.486(k)(3)(B)(iii) and (v).

Commission Response

The commission declines to make changes based upon this comment. Under 16 TAC §25.486(k)(3)(B), a complaint should include the listed information as applicable. If a broker does not have a registration number or a customer does not yet have an electric service identifier, then these pieces of information are not applicable. Moreover, the purpose of this list is to assist commission staff in processing complaints as efficiently as possible. Commission staff endeavors to process each informal complaint it receives, even if the complainant cannot provide each of the listed items.

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

SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

16 TAC §25.112

Statutory Authority

These new sections are adopted under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code §14.002 (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and §39.3555, which requires entities that provide brokerage services in this state to register as brokers with the commission and to comply with customer protection provisions established by the commission and Chapters 17 and 39 of PURA and which requires the commission to adopt rules as necessary to implement the section.

Cross reference to statutes: Public Utility Regulatory Act §14.002 and §39.3555.

§25.112 Registration of Brokers.

(a) Registration required. A person must not provide brokerage services, including brokerage services offered online, in this state for compensation or other consideration unless the person is registered with the commission as a broker. A broker is responsible for all activities conducted on its behalf by any subcontractor or agent. A retail electric provider (REP) is not permitted to register as a broker and must not knowingly provide bids or offers to a person who provides brokerage services in this state for compensation or other consideration and is not registered as a broker. A REP may rely on the publicly available list of registered brokers posted on the commission's website to determine whether a broker is registered with the commission.

(b) Definitions. The following terms, when used in this section, have the following meanings unless the context indicates otherwise:

(1) Broker--A person that provides brokerage services.

(2) Brokerage services--Providing advice or procurement services to, or acting on behalf of, a retail electric customer regarding the selection of a REP, or a product or service offered by a REP.

(c) Requirements for a person seeking to register as a broker. A person seeking to register under this section must provide the information listed in this subsection.

(1) All business names of the registrant limited to five business names;

(2) The mailing address, telephone number, and email address of the principal place of business of the registrant;

(3) The name, title, business mailing address, telephone number, and email address for the registrant's commission contact person;

(4) The name, title, business mailing address, telephone number, and email address of the registrant's customer service contact person;

(5) The name, title, business mailing address, telephone number, and email address of the registrant's commission complaint contact person;

(6) The form of business being registered (e.g., corporation, partnership, or sole proprietor); and

(7) An affidavit from the owner, partner, or officer of the registrant affirming that the registrant is authorized to do business in Texas under all applicable laws and is in good standing with the Texas Secretary of State; that all statements made in the application are true, correct, and complete; that any material changes in the information will be provided in a timely manner; and that the registrant understands and will comply with all applicable law and rules.

(d) Registration procedures. The following procedures apply to a person seeking to register as a broker:

(1) A registration application must be made on the form approved by the commission, verified by notarized oath or affirmation, and signed by an owner, partner, or officer of the registrant. The form may be obtained from the central records division of the commission or from the commission's Internet site. Each registrant must file its registration application form with the commission's filing clerk in accordance with the commission's procedural rules.

(2) The registrant must promptly inform the commission of any material change in the information provided in the registration application while the application is being processed.

(3) An application will be processed as follows:

(A) Commission staff will review the submitted form for completeness. Within 20 working days of receipt of an application, the commission staff will notify the registrant by mail or e-mail of any deficiencies in the application. The registrant will have ten working days from the issuance of the notification to cure the deficiencies. If the deficiencies are not cured within ten working days, commission staff will notify the registrant that the registration application is rejected without prejudice.

(B) Commission staff will determine whether to accept or reject the application within 60 days of the receipt of a complete application.

(C) An applicant may contest commission staff's rejection of its application by filing a petition for formal review of the registration application in accordance with the commission's procedural rules. The registrant has the burden of proof to establish that its application meets the requirements of PURA and commission rules.

(e) Registration Update. Unless updated, a broker registration expires three years after the date of the assignment of a broker registration number or the registration's most recent update. Each registrant must submit the information required to update its registration with the commission not less than 90 days prior to the expiration date of the current registration. An expired registration is no longer valid, and the broker will be removed from the broker list on the commission's website.

(f) Registration Amendment. A broker must amend its registration to reflect any changes in the information previously submitted, including business name, mailing address, email address, or telephone number within 30 calendar days from the date of the change. This amendment is an update under (e) of this section.

(g) Suspension and Revocation of Registration and Administrative Penalty. The commission may impose an administrative penalty for violations of PURA or commission rules. The commission may also suspend or revoke a broker's registration for significant violations of PURA or commission rules. Significant violations include, but are not limited to, the following:

- (1) providing false or misleading information to the commission;
- (2) engaging in fraudulent, unfair, misleading, deceptive or anti-competitive practices;
- (3) a pattern of failure to meet the requirements of PURA, commission rules, or commission orders;
- (4) failure to respond to commission inquiries or customer complaints in a timely fashion;
- (5) switching or causing to be switched the REP of a customer without first obtaining the customer's authorization; or
- (6) billing an unauthorized charge or causing an unauthorized charge to be billed to a customer's retail electric service bill.

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

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SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE PROVIDERS

16 TAC §25.486

Statutory Authority

These new sections are adopted under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code §14.002 (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and §39.3555, which requires entities that provide brokerage services in this state to register as brokers with the commission and to comply with customer protection provisions established by the commission and Chapters 17 and 39 of PURA and which requires the commission to adopt rules as necessary to implement the section.

Cross reference to statutes: Public Utility Regulatory Act §14.002 and §39.3555.

§25.486. *Customer Protections for Brokerage Services.*

(a) Applicability. This section applies to all brokers.

(b) Definitions. The following terms, when used in this section, have the following meanings unless the context indicates otherwise:

(1) Broker--As defined in §25.112 of this title (relating to Registration of Brokers).

(2) Brokerage services--As defined in §25.112 of this title.

(3) Client--A person who receives or solicits brokerage services from a broker.

(4) Client agent--A broker who has the legal right and authority to act on behalf of a client regarding the selection of, enrollment for, or contract execution of a product or service offered by a retail electric provider (REP), including electric service.

(5) Proprietary client information--Any information that is compiled by a broker on a client or retail electric customer that makes possible the identification of any individual client or retail electric customer by matching such information with the client's or customer's name, address, retail electric account number, type or classification of retail electric service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual retail electric or brokerage services contract terms and conditions, price, current charges, billing records, or any information that the client or customer has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the client or customer to whom the information relates does not constitute proprietary client information.

(c) Voluntary Alteration of Customer Protections. A client other than a residential or small commercial class customer or applicant, or a non-residential customer or applicant whose load is part of an aggregation in excess of 50 kilowatts, may agree to a different level

of customer protections related to the provision of brokerage services than is required by this section. Any such agreements do not change the level of customer protections a client is entitled to relating to the provision of retail electric service. Any agreements containing a different level of protections from those required by this section must be in writing and provided to the client. Copies of such agreements must be provided to commission staff upon request.

(d) Broker Communications.

(1) All written, electronic, and oral communications, including advertising, websites, direct marketing materials, and billing statements produced by a broker must be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive. Prohibited communications include, but are not limited to:

(A) Stating, suggesting, implying or otherwise leading a client to believe that receiving brokerage services will provide a customer with more reliable service from a transmission and distribution utility (TDU);

(B) Falsely suggesting, implying or otherwise leading a client to believe that a person is a representative of a TDU, REP, aggregator, or another broker;

(C) Falsely stating or suggesting that brokerage services are being provided without compensation; and

(D) Falsely claiming to be the client agent of a customer or applicant.

(2) All printed advertisements, electronic advertising over the Internet, and websites must include the broker's registered name.

(e) Language Requirements. A broker must offer customer service and any information required by this section to a client in the language used to market the broker's products and services to that client.

(f) Required Disclosures. A broker must inform a client of the following prior to the initiation of brokerage services, the renewal of those services, or a material change in the services provided, or the terms and conditions of those services:

(1) The broker's registered name, business mailing address, and contact information;

(2) The broker's commission registration number;

(3) The registered name of any REP that is an affiliate of the broker;

(4) A clear description of the services the broker will provide for the client;

(5) The duration of the agreement to provide brokerage services, if applicable;

(6) A description of how the broker will be compensated for providing brokerage services and by whom;

(7) How the client can terminate the agreement to provide brokerage services, if applicable;

(8) The amount of any fee or other cost the client will incur for terminating the agreement to provide brokerage services, if applicable; and

(9) The commission's telephone number and email address for complaints and inquiries.

(g) Client Agent Requirements.

(1) An agreement between a broker and a client that authorizes the broker to act as a client agent for the client must be in writing.

(2) In addition to the requirements of subsection (f) of this section, a broker that acts as a client agent for the client must inform the client of the following:

(A) A clear description of the actions the broker is authorized to take on the client's behalf;

(B) The duration of the agency relationship;

(C) How the client can terminate the agency agreement;

(D) The amount of any fee or other cost the client will incur for terminating the agency agreement; and

(E) How the client's customer data, including proprietary client information, and account access information will be used, protected, and retained by the broker and disposed of at the conclusion of the agency relationship.

(3) A broker that is authorized to act as a client agent for the client must provide evidence of that authority upon request of the client, commission staff, or a REP with which the broker seeks to enroll the client.

(4) For purposes of §25.474 of this title (relating to Selection of Retail Electric Provider), a REP may rely upon the representations made by a client agent provided that the client agent is registered with the commission and provides evidence of agency authority.

(h) Unauthorized Charges and Unauthorized Changes of Retail Electric Provider.

(1) Unauthorized charges. A broker must not bill an unauthorized charge or cause an unauthorized charge to be billed to a customer's retail electric service bill.

(2) Unauthorized service changes. A broker must not switch or cause to be switched the REP of a customer without first obtaining the customer's authorization.

(i) Discrimination Prohibited. A broker must not unduly refuse to provide brokerage services or otherwise unduly discriminate in the provision of brokerage services to any client because of race, creed, color, national origin, ancestry, sex, marital status, source or level of income, disability, or familial status; or refuse to provide brokerage services to a client because the client is located in an economically distressed geographic area or qualifies for low-income affordability or energy efficiency services; or otherwise unreasonably discriminate on the basis of the geographic location of a client.

(j) Proprietary Client Information.

(1) A broker must not release proprietary client information to any person unless the client authorizes the release in writing. This prohibition does not apply to the release of such information to the commission.

(2) A broker is not permitted to sell, make available for sale, or authorize the sale of any client-specific information or data obtained unless the client authorizes the sale in writing.

(k) Client Access and Complaint Handling.

(1) Client Access. Each broker must ensure that clients have reasonable access to its service representatives to make inquiries and complaints, discuss charges on bills or any other aspect of the brokerage services provided to the client by the broker, terminate an agreement to provide services, and transact any other pertinent business. A broker must promptly investigate client complaints and advise the complainant of the results. A broker must inform the com-

plaintiff of the commission's informal complaint resolution process and the following contact information for the commission within 21 days of receiving the complaint: Public Utility Commission of Texas, Customer Protection Division, P.O. Box 13326, Austin, Texas 78711-3326; (512) 936-7120 or in Texas (toll-free) 1-888-782-8477, fax (512) 936-7003, e-mail address: customer@puc.texas.gov, Internet website address: www.puc.texas.gov, TTY (512) 936-7136, and Relay Texas (toll-free) 1-800-735-2989.

(2) **Complaint Handling.** A client has the right to make a formal or informal complaint to the commission. A broker may not use a written or verbal agreement with a client to impair this right for a client that is a residential or small commercial customer. A broker must not require a client that is a residential or small commercial customer to engage in alternative dispute resolution, including requiring complaints to be submitted to arbitration or mediation by third parties.

(3) **Informal Complaints.**

(A) A person may file an informal complaint with the commission by contacting the commission at: Public Utility Commission of Texas, Customer Protection Division, P.O. Box 13326, Austin, Texas 78711-3326; (512) 936-7120 or in Texas (toll-free) 1-888-782-8477, fax (512) 936-7003, e-mail address: customer@puc.texas.gov, Internet website address: www.puc.texas.gov, TTY (512) 936-7136, and Relay Texas (toll-free) 1-800-735-2989.

(B) A complaint should include the following information, as applicable:

- (i) The complainant's name, billing and service address, telephone number and email address, if any;
- (ii) The name of the broker;
- (iii) The broker's registration number;
- (iv) The name of any relevant REP;
- (v) The customer account number or electric service identifier;
- (vi) An explanation of the facts relevant to the complaint;
- (vii) The complainant's requested resolution; and
- (viii) Any documentation that supports the complaint.

(C) The commission will forward the informal complaint to the broker.

(D) The broker must investigate each informal complaint forwarded to the broker by the commission and advise the commission in writing of the results of the investigation within 21 days after the complaint is forwarded to the broker by the commission.

(E) The commission will review the complaint information and the broker's response and notify the complainant of the results of the commission's investigation.

(F) The broker must keep a record for two years after receiving notification by the commission that the complaint has been closed. This record must show the name and address of the complainant, the date, nature, and outcome of the complaint.

(G) While an informal complaint process is pending, the broker must not initiate collection activities, including a report of the customer's delinquency to a credit reporting agency, with respect to the disputed portion of the bill.

(4) **Formal Complaints.** If the complainant is not satisfied with the results of the informal complaint process, the complainant may file a formal complaint with the commission within two years of the date on which the commission closes the informal complaint. Formal complaints will be docketed as provided in the commission's procedural rules.

(l) **Record Retention.**

(1) A broker must establish and maintain records and data that are sufficient to:

(A) Verify its compliance with the requirements of any applicable commission rules; and

(B) Support any investigation of customer complaints.

(2) All records required by this section must be retained for no less than two years, unless otherwise specified.

(3) Unless otherwise prescribed by the commission or its authorized representative, all records required by this subchapter must be provided to the commission within 15 calendar days of its request.

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

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TITLE 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION

The State Board for Educator Certification (SBEC) adopts amendments to 19 Texas Administrative Code (TAC) §§230.21, 230.33, 230.36, 230.55, 230.104, and 230.105, concerning professional educator preparation and certification. The amendment to §230.21 is adopted with changes to the proposed text as published in the January 3, 2020 issue of the *Texas Register* (45 TexReg 58) and will be republished. The amendments to §§230.33, 230.36, 230.55, 230.104, and 230.105 are adopted without changes to the proposed text as published in the January 3, 2020 issue of the *Texas Register* (45 TexReg 58) and will not be republished. The amendments implement the statutory requirements of Senate Bill (SB) 1839 and House Bills (HBs) 2039 and 3349, 85th Texas Legislature, Regular Session, 2017, and HB 3, 86th Texas Legislature, 2019. The amendment to Subchapter C, Assessment of Educators, reduces the amount of time for computer- and paper-based examination retakes from 45 to 30 days and updates the figure specifying the required test for issuance of the standard certification, including the removal of the master teacher certification class and the Principal: Early Childhood-Grade 12 certificate and the addition of

Early Childhood-Grade 3 (EC-3), Science of Teaching Reading, and Trade and Industrial Workforce Training. The amendment to Subchapter D, Types and Classes of Certificates Issued, requires the English as a Second Language Supplemental assessment for issuance of an intern certificate obtained through the intensive pre-service route. The amendment to Subchapter E, Educational Aide Certificate, allows the Educational Aide I certificate to be issued to high school students who have completed certain career and technical education courses. Changes to Subchapter G, Certificate Issuance Procedures, clarify that requests for certificate corrections be submitted to the Texas Education Agency (TEA) within six weeks from the original date of issuance. The changes also implement the requirement specified in statute that certified classroom teachers must complete training prior to receiving test approval for the Early Childhood: Prekindergarten-Grade 3 certificate. The SBEC made changes to the proposed text in Figure: 19 TAC §230.21(e) in response to public comment and to revert text for future rulemaking.

REASONED JUSTIFICATION: The SBEC rules in 19 TAC Chapter 230 specify the testing requirements for certification and the additional certificates based on examination. These requirements ensure educators are qualified and professionally prepared to instruct the schoolchildren of Texas. The following provides a description of changes to Chapter 230, Subchapters C, D, E, and G.

Subchapter C, §230.21. Assessment of Educators

The adopted amendment to §230.21(a)(1)(D) reduces the amount of time between computer- and paper-based retakes from 45 days to 30 days. The adopted amendment is in response to stakeholder feedback from the July 2019 SBEC meeting and allows candidates an additional testing window in the summer to meet certification requirements.

Additionally, the adopted amendment to §230.21(e) amends Figure: 19 TAC §230.21(e) to remove §241.60, Principal: Early Childhood-Grade 12, as new principal certifications were created, effective December 23, 2018; to comply with HB 3 by removing all master teacher certificates from the current list of active certifications; to comply with HB 3 by adding 293 Science of Teaching Reading TExES as a required content pedagogy test for the §233.2, Early Childhood: Prekindergarten-Grade 3 certification; to comply with SB 1839 and HB 2039 to create the required assessments for the §233.2, Early Childhood: Prekindergarten-Grade 3 certification; and to comply with HB 3349 to create the required assessments for the new §233.14, Trade and Industrial Workforce Training: Grades 6-12 certification, along with providing for a transition from the current content tests to the anticipated content pedagogy tests as follows:

Figure 1: 19 TAC Chapter 230 - Preamble

At the February 21, 2020 meeting, the SBEC took action to revert the following proposed amendments to §230.21(e) to allow staff more time to work through transition dates to bring back for the SBEC's consideration at the May 1, 2020 meeting. To comply with HB 3, requiring educators who teach any grade level from Prekindergarten-Grade 6 to demonstrate proficiency in the science of teaching reading on a certification examination beginning January 1, 2021, the proposed amendments would have added 293 Science of Teaching Reading TExES as a required content pedagogy test for the following certifications: §233.2, Core Subjects: Early Childhood-Grade 6; §233.2, Core Subjects: Grades 4-8; §233.3, English Language Arts and Reading:

Grades 4-8; §233.3, English Language Arts and Reading/Social Studies: Grades 4-8.

Further, the proposed amendments to Figure §230.21(e) would have phased out retired assessments by removing the retired 183 Braille TExES assessment for the §233.8, Teacher of Students with Visual Impairments Supplemental: Early Childhood-Grade 12 certification and would have provided for a transition from the current content tests to the anticipated content pedagogy tests for §233.12, Physical Education: Early Childhood-Grade 12; §233.3, English Language Arts and Reading: Grades 4-8; and §233.2, Core Subjects: Early Childhood-Grade 6, as follows:

Figure 2: 19 TAC Chapter 230 - Preamble

Subchapter D, §230.33, Classes of Certificates, and §230.36, Intern Certificates

The adopted amendment to §230.33(b)(5) aligns with the mandate in HB 3 to repeal the master teacher certificate class, giving those certificates contained therein a "legacy" designation for educator assignment purposes until they expire.

The adopted amendment to §230.36(f)(2)(C) adds the requirement of the English as Second Language (ESL) Supplemental assessment for issuance of the intern certificate through the intensive pre-service route. This will ensure teachers are ready to serve students in their classroom.

Subchapter E, §230.55. Certification Requirements for Educational Aide I

TEA staff in the divisions of Educator Certification, Instructional Support, and Career and Technical Education are working collaboratively to support the work associated with industry-based certifications. Industry certifications were designed to prepare students for success in postsecondary endeavors and are used for public school accountability.

The adopted amendment to §230.55 adds the word "either" to provide two possible paths to qualify for an Educational Aide I certificate: a path for conventional high school graduates and an alternate path for high school students 18 years of age or older to attain educational industry experience while still in school. The alternate path to certification in adopted new §230.55(3) and (4) allows students to earn Educational Aide I credentials after completing career and technical education courses and allows schools to accurately reflect these students as "career ready" in their accountability measures.

Subchapter G, §230.104. Correcting a Certificate or Permit Issued in Error and §230.105. Issuance of Additional Certificates Based on Examination

The adopted amendment to §230.104(b) adds the requirement that if an entity incorrectly issues a certificate, TEA must receive a request to correct the error from the entity within six weeks. The adopted change also requires educators to inform the recommending educator preparation program (EPP) of any assignment change that would require the educator to be certified in a different certification area. This will ensure teachers are teaching in their correct assignments. The adopted amendment also applies to supplemental certifications, such as the Early Childhood-Grade 12 ESL certification, to ensure candidates are prepared to teach the students they serve.

The adopted amendment to §230.105(3) complies with SB 1839 and HB 2039 to mandate all candidates complete training re-

quirements for issuance of an Early Childhood: Prekindergarten-Grade 3 certification. Remaining paragraphs are renumbered.

SUMMARY OF COMMENTS AND RESPONSES. The public comment period on the proposal began January 3, 2020, and ended February 3, 2020. The SBEC also provided an opportunity for registered oral and written comments on the proposal at the February 21, 2020 meeting in accordance with the SBEC board operating policies and procedures. The following is a summary of the public comments received on the proposal and the responses.

Comment: Nine individuals commented in support of proposed §230.55(3) and (4), which would allow students to earn Educational Aide I credentials after completing career and technical education courses. The commenters cited the benefit to students of being able to work while furthering their education and the benefit to school districts in staffing and for accountability purposes.

Board Response: The SBEC agrees. The SBEC believes the amendment would provide high school students the opportunity to attain educational industry experience while still in school and would allow school districts to accurately reflect these students as "career ready" in their accountability measures.

Comment: The Association of Texas Professional Educators and the Texas Association of Future Educators suggested lowering the age requirement for the Educational Aide I certificate from 18 years old to 17 years old, citing students who graduate and are not 18 years old until after the end of their senior year of high school.

Board Response: The SBEC disagrees. The SBEC rule in §230.11(b)(1) requires that all applicants for a Texas educator certificate be at least 18 years of age to ensure that only those legally considered adults are held accountable for the oversight of children. The rule would allow high school students to obtain the required training while taking high school classes, thereby allowing the students to receive certification as soon as they turn 18 years old.

Comment: Three Texas administrators commented in support of the proposed amendment to §230.21(a)(1)(D) that would reduce the time a candidate must wait between examination re-tests from 45 to 30 days.

Board Response: The SBEC agrees. The amendment is responsive to stakeholder input requesting the reduction of time between re-tests and would allow candidates an additional testing window to meet certification requirements.

Comment: One Texas administrator commented in opposition to the proposed amendment that would add the assessments for the Early Childhood-Grade 3 certification, stating that this would cause staffing issues, potential additional costs to the district, and potential disruption to the classrooms. Additionally, the commenter stated that a test does not determine a good teacher or expert in the field.

Response: The SBEC disagrees. The Texas Legislature mandated the creation of a new certificate for Early Childhood: Prekindergarten-Grade 3. Additionally, the current certificate for Core Subjects: Early Childhood-Grade 6 is still in place to provide certification and employment flexibility for candidates and districts.

Regarding the comment on utility of certification examinations for certification purposes, the SBEC disagrees. In §230.11(b)(6), all

applicants for Texas certification must pass the appropriate certification examination that reflects the appropriate SBEC educator standards and the Texas Essential Knowledge and Skills. Certification examinations, along with pre-service training, field-based experiences, and clinical experiences, play a role in determining a candidate's readiness to serve as a Texas educator.

Comment: One Texas administrator commented that the Performance Assessment for School Leaders (PASL) examination be offered more often.

Response: The comment is outside the scope of the proposed rulemaking. The TEA staff will consider this feedback for testing options with the testing vendor.

Comment: One Texas teacher commented in opposition of removing Early Childhood-Grade 12 (EC-12) certifications because it would deny excellent teachers with opportunities to teach in multiple grade levels.

Response: The comment is outside the scope of the proposed rulemaking. The only EC-12 certificates being removed as part of this rulemaking are the Principal: Early Childhood-Grade 12 certificate, due to a new EC-12 certificate, and the master teacher certificates, due to HB 3, 86th Texas Legislature, 2019, that requires the SBEC to no longer issue master teacher certificates. The TEA staff will consider this feedback for future rulemaking under the jurisdiction of the SBEC.

Comment: One individual requested clarification on the transition plan for some of the changing exams, such as the Physical Education (PE) EC-12 content exam, which will no longer be offered after August 31, 2021. The commenter asked if the old exam will still allow candidates to become certified for one year after the exam change occurs to prevent candidates from having to take both the old and new exams. The commenter suggested that candidates who previously passed the expiring PE EC-12 content exam be given until August 31, 2022, to complete all certification requirements and become standard certified.

Response: The comment is outside the scope of the proposed rulemaking. The TEA staff will consider this feedback for future rulemaking under the jurisdiction of the SBEC.

Comment: One individual requested clarification regarding the appropriate Braille examination(s) in the proposed amendment to Figure §230.21(e) that are required for issuance of the Teacher of Students with Visual Impairments Supplemental: Early Childhood-Grade 12 certificate. The commenter pointed out that the current reference is confusing as to which examination(s) are appropriate for issuance.

Response: The SBEC agrees. The language in the proposed amendment to Figure §230.21(e) regarding the appropriate examinations for the Visually Impaired Supplemental certificate was confusing. The SBEC took action to revert the language in the amendment to allow TEA staff the opportunity to correct the technical errors and bring back the correct references to the Braille examination at the May 1, 2020 SBEC meeting.

Comment: One individual commented that the content certification examination no longer meets the requirements of TEC, §21.048, as of January 2020.

Response: The comment is outside the scope of the proposed rulemaking, but the SBEC offers the following clarification. The content certification examination, Pre-Admission Content Test (TX PACT), governed by TEC, §21.0441, is used to measure the content readiness of potential teacher candidates for the pur-

pose of admission to an EPP. The content pedagogy examination, Texas Examination of Educator Standards (TExES), governed by TEC, §21.048, is used to measure teacher candidate readiness for certification issuance.

The State Board of Education (SBOE) took no action on the review of amendments to §§230.21, 230.33, 230.36, 230.55, 230.104, and 230.105 at the April 17, 2020 SBOE meeting.

SUBCHAPTER C. ASSESSMENT OF EDUCATORS

19 TAC §230.21

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC) §21.041(b)(1), (2), and (4), which requires the State Board for Educator Certification (SBEC) to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; TEC, §21.044(a) as amended by Senate Bills (SB) 7, 1839, and 1963, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to propose rules establishing training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program; TEC, §21.048, as amended by House Bill (HB) 3, 86th Texas Legislature, 2019, which states that the SBEC shall propose rules prescribing comprehensive examinations for each class of certificate issued by the board that includes not requiring more than 45 days elapsing between examination retakes and that starting January 1, 2021, all candidates teaching prekindergarten through grade six must demonstrate proficiency in the science of teaching reading on a certification examination; TEC, §21.050(a), which states that a person who applies for a teaching certificate must possess a bachelor's degree; TEC, §21.050(b), as amended by House Bill (HB) 3217, 86th Texas Legislature, 2019, which states that the SBEC shall provide for a minimum number of semester credit hours for field-based experience or internship; TEC, §21.050(c), which states that a person who receives a bachelor's degree required for a teaching certificate on the basis of higher education coursework completed while receiving an exemption from tuition and fees under the TEC, §54.363, may not be required to participate in any field experience or internship consisting of student teaching to receive a teaching certificate; TEC, §21.051, as amended by SB 1839, 85th Texas Legislature, Regular Session, 2017, which provides a requirement that before a school may employ a certification candidate as a teacher of record, the candidate must have completed at least 15 hours of field-based experience in which the candidate was actively engaged at an approved school in instructional or educational activities under supervision; TEC, §22.064, as amended by HB 3, 86th Texas Legislature, 2019, which requires the SBEC to designate all Master Teacher certificates as Legacy Master Teacher; TEC, §22.082, which requires the SBEC to subscribe to the criminal history clearinghouse as provided by Texas Government Code, §411.0845, and may obtain any law enforcement or criminal history records that relate to a specific applicant for or holder of a certificate issued under TEC, Chapter 21, Subchapter B; and Texas Occupations Code, §54.003, which states that a licensing authority shall provide accommodations and eligibility criteria for examinees diagnosed as having dyslexia.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code (TEC), §§21.041(b)(1), (2), and (4); 21.044(a), as amended by Senate Bills (SB) 7, 1839, and 1963, 85th Texas Legislature, Regular Session, 2017; 21.048, as amended by HB 3, 86th Texas Legislature, 2019; 21.050(a); 21.050(b), as amended by House Bill (HB) 3217, 86th Texas Legislature, 2019; 21.050(c); 21.051, as amended by SB 1839, 85th Texas Legislature, Regular Session, 2017; 22.064, as amended by HB 3, 86th Texas Legislature, 2019; 22.082; and Texas Occupation Code, §54.003.

§230.21. Educator Assessment.

(a) A candidate seeking certification as an educator must pass the examination(s) required by the Texas Education Code (TEC), §21.048, and the State Board for Educator Certification (SBEC) in §233.1(e) of this title (relating to General Authority) and shall not retake an examination more than four times, unless the limitation is waived for good cause. The burden of proof shall be upon the candidate to demonstrate good cause.

(1) For the purposes of the retake limitation described by the TEC, §21.048, an examination retake is defined as a second or subsequent attempt to pass any examination required for the issuance of a certificate, including an individual core subject examination that is part of the overall examination required for the issuance of a Core Subjects certificate as described in §233.2 of this title (relating to Early Childhood; Core Subjects).

(A) A canceled examination score is not considered an examination retake.

(B) An examination taken by an educator during a pilot period is not considered part of an educator's five-time test attempt limit.

(C) Pursuant to TEC, §21.0491(d), the limit on number of test attempts does not apply to the trade and industrial workforce training certificate examination prescribed by the SBEC.

(D) A candidate who fails a computer- or paper-based examination cannot retake the examination before 30 days have elapsed following the candidate's last attempt to pass the examination.

(2) Good cause is:

(A) the candidate's highest score on an examination is within one conditional standard error of measurement (CSEM) of passing, and the candidate has completed 50 clock-hours of educational activities. CSEMs will be published annually on the Texas Education Agency (TEA) website;

(B) the candidate's highest score on an examination is within two CSEMs of passing, and the candidate has completed 100 clock-hours of educational activities;

(C) the candidate's highest score on an examination is within three CSEMs of passing, and the candidate has completed 150 clock-hours of educational activities;

(D) the candidate's highest score on an examination is not within three CSEMs of passing, and the candidate has completed 200 clock-hours of educational activities;

(E) if the candidate needs a waiver for more than one of the individual core subject examinations that are part of the overall examination required for the issuance of a Core Subjects certificate, the candidate has completed the number of clock-hours of educational activities required for each individual core subject examination as described in subparagraphs (A)-(D) of this paragraph up to a maximum of 300 clock-hours. The number of clock-hours for each examination

may be divided equally based on the number of examinations in the waiver request, but the number of clock-hours for an examination shall not be less than 50; or

(F) if a CSEM is not appropriate for an examination, the TEA staff will identify individuals who are familiar and knowledgeable with the examination content to review the candidate's performance on the five most recent examinations, identify the deficit competency or competencies, and determine the number of clock-hours of educational activities required.

(3) Educational activities are defined as:

(A) institutes, workshops, seminars, conferences, interactive distance learning, video conferencing, online activities, undergraduate courses, graduate courses, training programs, in-service, or staff development given by an approved continuing professional education provider or sponsor, pursuant to §232.17 of this title (relating to Pre-Approved Professional Education Provider or Sponsor) and §232.19 of this title (relating to Approval of Private Companies, Private Entities, and Individuals), or an approved educator preparation program (EPP), pursuant to §228.10 of this title (relating to Approval Process); and

(B) being directly related to the knowledge and skills included in the certification examination competency or competencies in which the candidate answered less than 70 percent of competency questions correctly. The formula for identifying a deficit competency is the combined total of correct answers for each competency on the five most recent examinations divided by the combined total of questions for each competency on the five most recent examinations.

(4) Documentation of educational activities that a candidate must submit includes:

(A) the provider, sponsor, or program's name, address, telephone number, and email address. The TEA staff may contact the provider, sponsor, or program to verify an educational activity;

(B) the name of the educational activity (e.g., course title, course number);

(C) the competency or competencies addressed by the educational activity as determined by the formula described in paragraph (3)(B) of this subsection;

(D) the provider, sponsor, or program's description of the educational activity (e.g., syllabus, course outline, program of study); and

(E) the provider, sponsor, or program's written verification of the candidate's completion of the educational activity (e.g., transcript, certificate of completion). The written verification must include:

(i) the provider, sponsor, or program's name;

(ii) the candidate's name;

(iii) the name of the educational activity;

(iv) the date(s) of the educational activity; and

(v) the number of clock-hours completed for the educational activity. Clock-hours completed before the most recent examination attempt or after a request for a waiver is submitted shall not be included. One semester credit hour earned at an accredited institution of higher education is equivalent to 15 clock-hours.

(5) To request a waiver of the limitation, a candidate must meet the following conditions:

(A) the candidate is otherwise eligible to take an examination. A candidate seeking a certificate based on completion of an EPP must have the approval of an EPP to request a waiver;

(B) beginning September 1, 2016, the candidate pays the non-refundable waiver request fee of \$160;

(C) the candidate requests the waiver of the limitation in writing on forms developed by the TEA staff; and

(D) the request for the waiver is postmarked not earlier than:

(i) 45 calendar days after an unsuccessful attempt at the fourth retake of an examination as defined in the TEC, §21.048; or

(ii) 90 calendar days after the date of the most recent denied waiver of the limitation request; or

(iii) 180 calendar days after the date of the most recent unsuccessful examination attempt that was the result of the most recently approved request for waiver of the limitation.

(6) The TEA staff shall administratively approve each application that meets the criteria specified in paragraphs (2)-(5) of this subsection.

(7) An applicant who does not meet the criteria in paragraphs (2)-(5) of this subsection may appeal to the SBEC for a final determination of good cause. A determination by the SBEC is final and may not be appealed.

(b) A candidate seeking a standard certificate as an educator based on completion of an approved EPP may take the appropriate certification examination(s) required by subsection (a) of this section only at such time as the EPP determines the candidate's readiness to take the examinations, or upon successful completion of the EPP, whichever comes first.

(c) The holder of a lifetime Texas certificate effective before February 1, 1986, must pass examinations prescribed by the SBEC to be eligible for continued certification, unless the individual has passed the Texas Examination of Current Administrators and Teachers (TECAT).

(d) The commissioner of education approves the satisfactory level of performance required for certification examinations, and the SBEC approves a schedule of examination fees and a plan for administering the examinations.

(e) The appropriate examination(s) required for certification are specified in the figure provided in this subsection. Figure: 19 TAC §230.21(e)

(f) Scores from examinations required under this title must be made available to the examinee, the TEA staff, and, if appropriate, the EPP from which the examinee will seek a recommendation for certification.

(g) The following provisions concern ethical obligations relating to examinations.

(1) An educator or candidate who participates in the development, design, construction, review, field testing, scoring, or validation of an examination shall not reveal or cause to be revealed the contents of the examination to any other person.

(2) An educator or candidate who administers an examination shall not:

(A) allow or cause an unauthorized person to view any part of the examination;

(B) copy, reproduce, or cause to be copied or reproduced any part of the examination;

(C) reveal or cause to be revealed the contents of the examination;

(D) correct, alter, or cause to be corrected or altered any response to a test item contained in the examination;

(E) provide assistance with any response to a test item contained in the examination or cause assistance to be provided; or

(F) deviate from the rules governing administration of the examination.

(3) An educator or candidate who is an examinee shall not:

(A) copy, reproduce, or cause to be copied or reproduced any test item contained in the examination;

(B) provide assistance with any response to a test item contained in the examination, or cause assistance to be provided;

(C) solicit or accept assistance with any response to a test item contained in the examination;

(D) deviate from the rules governing administration of the examination; or

(E) otherwise engage in conduct that amounts to cheating, deception, or fraud.

(4) An educator, candidate, or other test taker shall not:

(A) solicit information about the contents of test items on an examination that the educator, candidate, or other test taker has not already taken from an individual who has had access to those items, or offer information about the contents of specific test items on an examination to individuals who have not yet taken the examination;

(B) fail to pay all test costs and fees as required by this chapter or the testing vendor; or

(C) otherwise engage in conduct that amounts to violations of test security or confidentiality integrity, including cheating, deception, or fraud.

(5) A person who violates this subsection is subject to:

(A) sanction, including, but not limited to, disallowance and exclusion from future examinations either in perpetuity or for a period of time that serves the best interests of the education profession, in accordance with the provisions of the TEC, §21.041(b)(7), and Chapter 249 of this title (relating to Disciplinary Proceedings, Sanctions, and Contested Cases); and/or

(B) denial of certification in accordance with the provisions of the TEC, §21.041(b)(7), and Chapter 249 of this title; and/or

(C) voiding of a score from an examination in which a violation specified in this subsection occurred as well as a loss of a test attempt for purposes of the retake limit in subsection (a) of this section.

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

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Cristina De La Fuente-Valadez

Director, Rulemaking

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

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SUBCHAPTER D. TYPES AND CLASSES OF CERTIFICATES ISSUED

19 TAC §230.33, §230.36

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC) §21.003(a); which states that a person may not be employed as a teacher, teacher intern or teacher trainee, librarian, educational aide, administrator, educational diagnostician, or school counselor by a school district unless the person holds an appropriate certificate or permit issued as provided by the TEC, Chapter 21, Subchapter B; TEC, §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; TEC, §21.031(b), which states that the SBEC shall ensure that all candidates for certification or renewal of certification should demonstrate the knowledge and skills necessary to improve the performance of a diverse student population; TEC, §21.041(b)(1)-(5), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; requires the SBEC to propose rules that specify the period for which each class of educator certificate is valid; requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; and requires the SBEC to propose rules that include requirements for educators that hold a similar certification issued by another state or foreign country; TEC, §21.041(b)(9), which requires the SBEC to propose rules for the regulation of continuing education requirements; TEC, §21.051, as amended by Senate Bill 1839, 85th Texas Legislature, Regular Session, 2017, which provides a requirement that before a school may employ a certification candidate as a teacher of record, the candidate must have completed at least 15 hours of field-based experience in which the candidate was actively engaged at an approved school in instructional or educational activities under supervision; TEC, §22.064, as amended by House Bill 3, 86th Texas Legislature, 2019, which requires the SBEC to designate all Master Teacher certificates as Legacy Master Teacher; TEC, §22.0831(c), which requires SBEC to review the national criminal history of a person seeking certification; and TEC, §22.0831(f)(1) and (2), which state that SBEC may propose rules regarding the deadline for the national criminal history check and implement sanctions for persons failing to comply with the requirements.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code (TEC), §§21.003(a); 21.031(a); 21.031(b); 21.041(b)(1)-(5) and (9); 21.051, as amended by Senate Bill 1839, 85th Texas Legislature, Regular Session, 2017; 22.064, as amended by House Bill 3, 86th Texas Legislature, 2019; 22.0831(c); and TEC, §22.0831(f)(1) and (2).

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

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SUBCHAPTER E. EDUCATIONAL AIDE CERTIFICATE

19 TAC §230.55

STATUTORY AUTHORITY. The amendment implements Texas Education Code (TEC), §21.041(a), which states that the board may adopt rules as necessary for its own procedures; and TEC, §21.041(b)(1)-(4), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and requires the SBEC to propose rules that specify the period for which each class of educator certificate is valid.

CROSS REFERENCE TO STATUTE. The amendment is adopted under Texas Education Code (TEC) §§21.041(a) and (b)(1)-(4).

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

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SUBCHAPTER G. CERTIFICATE ISSUANCE PROCEDURES

19 TAC §230.104, §230.105

STATUTORY AUTHORITY. The amendments implement Texas Education Code (TEC), §21.031(a), which states that the SBEC shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; TEC, §21.041(b)(1)-(5), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; requires the SBEC to propose rules that specify the classes

of educator certificates to be issued, including emergency certificates; requires the SBEC to propose rules that specify the period for which each class of educator certificate is valid; requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; and requires the SBEC to propose rules that include requirements for educators that hold a similar certification issued by another state or foreign country; TEC, §21.041(b)(9), which requires the SBEC to propose rules for the regulation of continuing education requirements; TEC, §21.041(c), which states that the SBEC may adopt fees for the issuance and maintenance of an educator certification to adequately cover the cost of the administration; TEC, §21.044(a), as amended by SBs 7, 1839, and 1963, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to propose rules establishing training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program; TEC, §21.044(e), which states that in proposing rules under this section for a person to obtain a certificate to teach a health science technology education course, the board shall specify that a person must have: (1) an associate degree or more advanced degree from an accredited institution of higher education; (2) current licensure, certification, or registration as a health professions practitioner issued by a nationally recognized accrediting agency for health professionals; and (3) at least two years of wage-earning experience utilizing the licensure requirement; TEC, §21.044(f), which states that the SBEC may not propose rules for a certificate to teach a health science technology education course that specifies that a person must have a bachelor's degree or that establish any other credential or teaching experience requirements that exceed the requirements under Subsection (e); TEC, §21.048, as amended by HB 3, 86th Texas Legislature, 2019, which states that the SBEC shall propose rules prescribing comprehensive examinations for each class of certificate issued by the board that includes not requiring more than 45 days elapsing between examination retakes and that starting January 1, 2021, all candidates teaching prekindergarten through grade six must demonstrate proficiency in the science of teaching reading on a certification examination; TEC, §21.0485, which states the issuance requirements for certification to teach students with visual impairments; TEC, §21.0489, which specifies the issuance requirements for the Early Childhood: Prekindergarten-Grade 3 certification; TEC, §21.050(a), which states that a person who applies for a teaching certificate must possess a bachelor's degree; TEC, §21.050(b), as amended by HB 3217, 86th Texas Legislature, 2019, which states that the SBEC shall provide for a minimum number of semester credit hours for field-based experience of internship; TEC, §21.050(c), which states that a person who receives a bachelor's degree required for a teaching certificate on the basis of higher education coursework completed while receiving an exemption from tuition and fees under the TEC, §54.363, may not be required to participate in any field experience or internship consisting of student teaching to receive a teaching certificate; TEC, §22.082, which requires SBEC to subscribe to the criminal history clearinghouse as provided by Texas Government Code, §411.0845, and may obtain any law enforcement or criminal history records that relate to a specific applicant for or holder of a certificate issued under Chapter 21, Subchapter B; TEC, §22.0831(c), which requires SBEC to review the national criminal history of a person seeking certification; TEC, §22.0831(f)(1) and (2), which state that SBEC may propose rules regarding the deadline for the national criminal history check and implement sanctions for persons failing to comply with the requirements; and Texas Occupations Code, §53.105,

which states that a licensing authority may require a fee that is in an amount sufficient to cover the cost of administration.

CROSS REFERENCE TO STATUTE. The amendments are adopted under Texas Education Code (TEC) §§21.031(a); 21.041(b)(1)-(5) and (9) and (c); 21.044(a), as amended by SBs 7, 1839, and 1963, 85th Texas Legislature, Regular Session, 2017; (e), and (f); 21.048, as amended by House Bill (HB) 3, 86th Texas Legislature, 2019; 21.0485; 21.0489; 21.050, as amended by House Bill (HB) 3217, 86th Texas Legislature, 2019; 21.054(a), as amended by SBs 7, 179, and 1839, 85th Texas Legislature, Regular Session, 2017, and HB 2424, 86th Texas Legislature, 2019; 22.082; and 22.0831(c) and (f); and Texas Occupations Code, §53.105.

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

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.2

Introduction. The Texas Board of Nursing (Board) adopts amendments to §217.2, relating to *Licensure by Examination for Graduates of Nursing Education Programs Within the United States, its Territories, or Possessions* without changes to the proposed text published in the March 20, 2020, issue of the *Texas Register* (45 TexReg 1938). The rules will not be reprinted.

Reasoned Justification. The amendments are adopted under the authority of the Occupations Code §301.2511 and §301.151. The adopted amendments require applicants to submit fingerprints for a complete criminal background check prior to licensure, in compliance with the Occupations Code §301.2511, and eliminate subsection (f) of the section because military programs, like the U.S. Army Practical Nurse Course, are reviewed and approved by the Board in the same manner as all other nursing programs. Further, military courses other than the U.S. Army Practical Nurse Course are approved by the Board.

How the Section Will Function. Adopted §217.2(a)(5) clarifies that applicants for initial licensure by examination must submit fingerprints for a complete criminal background check. Section 217.2(f) is eliminated from the section in its entirety.

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 §301.2511 and §301.151.

Section 301.2511(a) provides that an applicant for a registered nurse license must submit to the Board, in addition to satisfying the other requirements of the subchapter, a complete and legible set of fingerprints, on a form prescribed by the Board, for the purpose of obtaining criminal history record information from the Department of Public Safety and the Federal Bureau of Investigation. Section §301.2511(b) provides that the Board may deny a license to an applicant who does not comply with the requirement of subsection (a). Issuance of a license by the Board is conditioned on the Board obtaining the applicant's criminal history record information under the section. Finally, §301.2511(c) states that the Board by rule shall develop a system for obtaining criminal history record information for a person accepted for enrollment in a nursing educational program that prepares the person for initial licensure as a registered or vocational nurse by requiring the person to submit to the Board a set of fingerprints that meets the requirements of subsection (a). The Board may develop a similar system for an applicant for enrollment in a nursing educational program. The Board may require payment of a fee by a person who is required to submit a set of fingerprints under this subsection.

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.

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

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Texas Board of Nursing

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For further information, please call: (512) 305-6822



22 TAC §217.3

The Texas Board of Nursing (Board) adopts amendments to §217.3, relating to Temporary Authorization to Practice/Temporary Permit, without changes to the proposed text published in the March 20, 2020, issue of the *Texas Register* (45 TexReg 1939). The rule will not be republished.

Reasoned Justification. The amendments are adopted under the authority of the Occupations Code §301.2511, §301.252(a), and §301.151.

First, the adopted amendments require new graduates seeking temporary authorization to practice as a graduate nurse or graduate vocational nurse to submit fingerprints for a complete criminal background check prior to licensure, in compliance with the Occupations Code §301.2511, and pass the jurisprudence

exam, in compliance with the Occupations Code §301.252, prior to receiving a graduate nurse or graduate vocational nurse permit. Graduate nurses who are issued graduate permits may practice nursing if appropriately supervised. As such, the public needs to be assured that these nurses have undergone background checks to ensure safe practice and have demonstrated competency by passing the Board's jurisprudence and ethics exam.

Second, the adopted amendments make non-substantive changes to paragraph (3) to increase the readability of the paragraph.

Third, the adopted amendments clarify that a temporary permit may be re-issued if a nurse is unable to complete requirements that are necessary for the nurse's licensure reinstatement within a six-month period. Due to an individual's performance pace, it may take a nurse longer than six months to complete requirements necessary for licensure reinstatement. The intent of §217.3(c) is to provide a mechanism for nurses to demonstrate their competency to return to nursing practice. Since these nurses cannot practice nursing until they complete the Board's requirements, they pose no risk of harm to the public during this time. The adopted amendment merely allows the nurse a sufficient amount of time to re-establish current licensure after demonstrating he/she is safe and competent to do so. Further, this change is consistent with recent amendments to §217.3(b) that were adopted by the Board on January 27, 2020.

How the Sanction Will Function. Adopted §217.3(a)(1) corrects a typographical error. Adopted §217.3(a)(1)(E) requires individuals seeking temporary authorization to practice to submit fingerprints for a complete criminal background check prior to receipt of the permit. Adopted §217.3(a)(1)(F) requires individuals seeking temporary authorization to practice to obtain a passing score on the jurisprudence exam approved by the Board, effective September 1, 2009, prior to receipt of the permit. Adopted §217.3(a)(3) clarifies that a new graduate who has been authorized to practice nursing as a graduate vocational nurse pending the results of the licensing examination must work under the direct supervision of a licensed vocational nurse or a registered nurse who is physically present in the facility or practice setting and who is readily available to the graduate vocational nurse for consultation and assistance. Further, a new graduate who has been authorized to practice nursing as a graduate nurse pending the results of the licensing examination must work under the direct supervision of registered nurse who is physically present in the facility or practice setting and who is readily available to the graduate nurse for consultation and assistance. Adopted §217.3(c) clarifies that a permit may be renewed beyond six months.

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 §301.2511, §301.252(a), and §301.151.

Section 301.2511(a) provides that an applicant for a registered nurse license must submit to the Board, in addition to satisfying the other requirements of the subchapter, a complete and legible set of fingerprints, on a form prescribed by the Board, for the purpose of obtaining criminal history record information from the Department of Public Safety and the Federal Bureau of Investigation. Section §301.2511(b) provides that the Board may deny a license to an applicant who does not comply with the require-

ment of subsection (a). Issuance of a license by the Board is conditioned on the Board obtaining the applicant's criminal history record information under the section. Finally, §301.2511(c) states that the Board by rule shall develop a system for obtaining criminal history record information for a person accepted for enrollment in a nursing educational program that prepares the person for initial licensure as a registered or vocational nurse by requiring the person to submit to the Board a set of fingerprints that meets the requirements of subsection (a). The Board may develop a similar system for an applicant for enrollment in a nursing educational program. The Board may require payment of a fee by a person who is required to submit a set of fingerprints under this subsection.

Section 301.252(a) provides that each applicant for a registered nurse license or a vocational nurse license must submit to the Board a sworn application that demonstrates the applicant's qualifications under this chapter, accompanied by evidence that the applicant: (1) has good professional character related to the practice of nursing; (2) has successfully completed a program of professional or vocational nursing education approved under §301.157(d); and (3) has passed the jurisprudence examination approved by the Board as provided by subsection (a-1).

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.

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

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For further information, please call: (512) 305-6822



22 TAC §217.6

The Texas Board of Nursing (Board) adopts amendments to 22 TAC §217.6, relating to Failure to Renew License, without changes to the proposed text published in the March 20, 2020, issue of the *Texas Register* (45 TexReg 1947). The rule will not be republished.

Reasoned Justification. The amendments are being adopted under the authority of the Occupations Code §301.301(d) and §301.151. Board Rule 217.6(b) addresses the licensure renewal of a nurse who is not currently practicing nursing and who has failed to maintain current licensure from any licensing authority for four or more years. The rule currently sets out the criteria that an individual must meet in order to renew his/her license under these circumstances. Among the various requirements, an individual must currently complete the online Texas Board of

Nursing Jurisprudence Prep Course; the Texas Board of Nursing Jurisprudence and Ethics Workshop; or a Texas Board of Nursing approved Nursing Jurisprudence and Ethics course *in addition to* completing a refresher course, extensive orientation, or program of study. Fifteen percent (15%) of the required content of a Board approved refresher course, extensive orientation, or program of study must include the review of the Nursing Practice Act, Rules, Position Statements. This is the same content that is included in the online Texas Board of Nursing Jurisprudence Prep Course; the Texas Board of Nursing Jurisprudence and Ethics Workshop; and a Texas Board of Nursing approved Nursing Jurisprudence and Ethics course. The Board recognizes that the existing requirements of the rule may be unnecessarily redundant in this regard. The adopted amendments, therefore, eliminate these redundant requirements from the rule. Individuals will still be required to complete a Board approved refresher course, extensive orientation, or program of study, which must include an adequate focus on nursing jurisprudence and ethics. Further, because a nurse will be required to successfully pass the Board's nursing jurisprudence exam, the public can be adequately assured that the nurse has successfully mastered this content prior to renewal of licensure.

How the Section Will Function. Adopted §217.6(b)(3) is eliminated from the section. The remaining amendments re-number the section accordingly.

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 §301.301(d) and §301.151.

Section 301.301(d) provides that the Board by rule shall set a length of time beyond which an expired license may not be renewed. The Board by rule may establish additional requirements that apply to the renewal of a license that has been expired for more than one year but less than the time limit set by the Board beyond which a license may not be renewed. The person may obtain a new license by submitting to reexamination and complying with the requirements and procedures for obtaining an original license.

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.

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

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22 TAC §217.8

The Texas Board of Nursing (Board) adopts the repeal of 22 TAC §217.8, relating to Duplicate or Substitute Credentials, without changes to the proposed text published in the March 20, 2020, issue of the *Texas Register* (45 TexReg 1948). The repeal will not be republished.

Reasoned Justification. The repeal is adopted under the authority of the Occupations Code §301.151 and eliminates the section in its entirety. The Board's processes have changed over time, and the current section is now obsolete. Because an individual may now verify his/her license and print a wall certificate directly from the Board's website, the Board has stopped printing duplicate wall certificates for licensees whose original wall certificate was lost or destroyed. Additionally, the Board no longer issues wallet-sized licenses to any licensee. Further, when an individual changes his/her name and notifies the Board, the Board's online licensure verification system will reflect the name change, but the individual is not able to print a new wall certificate reflecting the name change. The wall certificate will continue to reflect the name of the individual as it was issued on the original wall certificate. As such, the current processes outlined in Board Rule 217.8 are no longer applicable.

How the Section Will Function. The adopted repeal eliminates §217.8 in its entirety.

Summary of Comments Received. The Board did not receive any comments on the proposal.

Statutory Authority. The repeal is adopted under the authority of the Occupations Code §301.151.

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.

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

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For further information, please call: (512) 305-6822



22 TAC §217.9

The Texas Board of Nursing (Board) adopts amendments to 22 TAC §217.9, relating to Inactive and Retired Status, without changes to the proposed text published in the March 20, 2020, issue of the *Texas Register* (45 TexReg 1949). The rule will not be republished.

Reasoned Justification. The amendments are adopted under the authority of the Occupations Code §301.261(d) and §301.151. Board Rule §217.9 addresses a nurse who has not practiced nursing and whose license has been in inactive status for four or more years. The rule currently sets out the criteria that an individual must meet in order to reactivate his/her license under these circumstances. Among the various requirements, an individual must currently complete the online Texas Board of Nursing Jurisprudence Prep Course; the Texas Board of Nursing Jurisprudence and Ethics Workshop; or a Texas Board of Nursing approved Nursing Jurisprudence and Ethics course *in addition to* completing a refresher course, extensive orientation, or program of study. Fifteen percent (15%) of the required content of a Board approved refresher course, extensive orientation, or program of study must include the review of the Nursing Practice Act, Rules, and Position Statements. This is the same content that is included in the online Texas Board of Nursing Jurisprudence Prep Course; the Texas Board of Nursing Jurisprudence and Ethics Workshop; and a Texas Board of Nursing approved Nursing Jurisprudence and Ethics course. The Board recognizes that the existing requirements of the rule may be unnecessarily redundant in this regard. The adopted amendments, therefore, eliminate these redundant requirements from the rule. Individuals will still be required to complete a Board approved refresher course, extensive orientation, or program of study, which must include an adequate focus on nursing jurisprudence and ethics. Further, because a nurse will still be required to successfully pass the Board's nursing jurisprudence exam, the public can be adequately assured that the nurse has successfully mastered this content prior to reactivation of licensure.

How the Section Will Function. The adopted amendments eliminate §217.9(g)(4) in its entirety and renumber the remaining paragraphs accordingly.

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 §301.261(d) and §301.151.

Section 301.261(d) provides that the Board shall remove a person's license from inactive status if the person: (1) requests that the Board remove the person's license from inactive status; (2) pays each appropriate fee; and (3) meets the requirements determined by the Board.

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.

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

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CHAPTER 222. ADVANCED PRACTICE REGISTERED NURSES WITH PRESCRIPTIVE AUTHORITY

22 TAC §222.3

Introduction. The Texas Board of Nursing (Board) adopts amendments to §222.3, relating to Renewal of Prescriptive Authority without changes to the proposed text published in the March 20, 2020, issue of the *Texas Register* (45 TexReg 1951). The rules will not be republished.

Reasoned Justification. The amendments are being adopted under the authority of the Texas Occupations Code §301.151 and §157.0513, the Texas Health and Safety Code §481.0764 and §481.07635, and House Bills (HB) 2454, 2059, 3285, and 2174, enacted by the 86th Texas Legislature.

The adopted amendments are necessary for consistency with adopted changes to §216.3, pertaining to *Continuing Competency*. Section 216.3 was amended on November 19, 2019, in order to implement the requirements of HB 2454, HB 2059, HB 3285, and HB 2174.

Prior to its amendment in November 2019, §216.3 required advanced practice registered nurses holding prescriptive authority to complete at least three contact hours of continuing education related to prescribing controlled substances each biennium, in addition to at least five contact hours of continuing education in pharmacotherapeutics within the same licensing period. The Board originally adopted this requirement in November 2013, following the passage of SB 406, enacted by the 83rd Texas Legislature, Regular Session, effective November 1, 2013. SB 406 expanded the scope of advanced practice registered nurses by authorizing the ordering/prescribing of Schedule II controlled substances in certain settings. The additional targeted continuing education adopted by the Board at that time was reasonably related to the expanded scope of practice authorized by SB 406. Further, the requirement was also adopted during a time when the Board began seeing an increase in the number of its non-therapeutic prescribing cases related to the then up-and-coming opioid crisis.

The new continuing education requirements enacted during the 86th Legislative Session, however, were designed to provide specific education regarding many of the issues affecting the opioid crisis. The Board found many of its prior concerns to be adequately addressed by the new continuing education course requirements. Further, the Board recognized the potential overlap between the new continuing education courses and the existing education requirements for advanced practice registered nurses. As such, the Board eliminated the potentially duplicative requirements to only require advanced practice registered nurses holding prescriptive authority to complete at least five contact hours of continuing education in pharmacotherapeutics each biennium. The Board believed this change could reduce some of the financial burden associated with required continu-

ing education courses without sacrificing the safety of the public or the competency of its practitioners.

The adopted amendments to §222.3 are now necessary to conform the section to the amendments adopted by the Board in November 2019.

How the Sections Will Function. Adopted §222.3(b) requires an advanced practice registered nurse seeking to maintain prescriptive authority to attest, on forms provided by the Board, to completing at least five contact hours of continuing education in pharmacotherapeutics within the preceding biennium. The other requirements of the subsection have been eliminated.

Summary of Comments Received. The Board did not receive any comments on the proposal.

Statutory Authority. The amendments are adopted under the Texas Occupations Code §301.151 and §157.0513, the Texas Health and Safety Code §481.0764 and §481.07635, and House Bills (HB) 2454, 2059, 3285, and 2174, enacted by the 86th Texas Legislature.

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 Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Section 157.0513(a) provides that the board, the Texas Board of Nursing, and the Texas Physician Assistant Board shall jointly develop a process to exchange information regarding the names, locations, and license numbers of each physician, APRN, and physician assistant who has entered into a prescriptive authority agreement; by which each board shall immediately notify the other boards when a license holder of the board becomes the subject of an investigation involving the delegation and supervision of prescriptive authority, as well as the final disposition of any such investigation; by which each board shall maintain and share a list of the board's license holders who have been subject to a final adverse disciplinary action for an act involving the delegation and supervision of prescriptive authority; and to ensure that each APRN or physician assistant who has entered into a prescriptive authority agreement authorizing the prescribing of opioids is required to complete not less than two hours of continuing education annually regarding safe and effective pain management related to the prescription of opioids and other controlled substances, including education regarding reasonable standards of care; the identification of drug-seeking behavior in patients; and effectively communicating with patients regarding the prescription of an opioid or other controlled substance.

Section 481.0764(f) provides that a prescriber or dispenser whose practice includes the prescription or dispensation of opioids shall annually attend at least one hour of continuing education covering best practices, alternative treatment options, and multi-modal approaches to pain management that may include physical therapy, psychotherapy, and other treatments. The board shall adopt rules to establish the content of continuing education described by this subsection. The board may collaborate with private and public institutions of higher education and hospitals in establishing the content of the continuing education. This subsection expires August 31, 2023.

Section 481.07635(a) provides that a person authorized to receive information under Section 481.076(a)(5) shall, not later than the first anniversary after the person is issued a license, certification, or registration to prescribe or dispense controlled substances under this chapter, complete two hours of professional education related to approved procedures of prescribing and monitoring controlled substances.

Section 481.07635(b) states that a person authorized to receive information may annually take the professional education course under this section to fulfill hours toward the ethics education requirement of the person's license, certification, or registration.

Section 481.07635(c) states that the regulatory agency that issued the license, certification, or registration to a person authorized to receive information under Section 481.076(a)(5) shall approve professional education to satisfy the requirements of this section.

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

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 412. LOCAL MENTAL HEALTH AUTHORITY RESPONSIBILITIES SUBCHAPTER D. MENTAL HEALTH SERVICES--ADMISSION, CONTINUITY, AND DISCHARGE

The Texas Health and Human Services Commission (HHSC) adopts the repeal of Texas Administrative Code, Title 25, Part 1, Chapter 412, Subchapter D, concerning Mental Health Services--Admission, Continuity, and Discharge, §§412.151 - 412.154, 412.161 - 412.163, 412.171 - 412.179, 412.191 - 412.195, 412.201 - 412.208, 412.221, and 412.231 - 412.233. The repeal is adopted without changes to the proposed text as published in the November 29, 2019, issue of the *Texas Register* (44 TexReg 7316), and therefore will not be republished.

BACKGROUND AND JUSTIFICATION

As required by Texas Government Code §531.0201(a)(2)(C), client services functions previously performed by the Department of State Health Services (DSHS) were transferred to the Texas Health and Human Services Commission (HHSC) on September 1, 2016, in accordance with Texas Government Code §531.0201 and §531.02011. The purpose of the adoption is to repeal the rules in Title 25, Part 1, Chapter 412,

Subchapter D, Mental Health Services--Admission, Continuity, and Discharge. New rules in Title 26, Part 1, Chapter 306, Subchapter D, Mental Health Services--Admission, Continuity, and Discharge are adopted elsewhere in this issue of the *Texas Register*.

COMMENTS

The 31-day comment period ended December 30, 2019. During this period, HHSC did not receive comments regarding the proposed repeals.

DIVISION 1. GENERAL PROVISIONS

25 TAC §§412.151 - 412.154

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

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

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For further information, please call: (512) 838-4349



DIVISION 2. SCREENING AND ASSESSMENT FOR CRISIS SERVICES AND ADMISSION INTO LMHA SERVICES--LMHA RESPONSIBILITIES

25 TAC §§412.161 - 412.163

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

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

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DIVISION 3. ADMISSION TO SMHFS--SMHF RESPONSIBILITIES

25 TAC §§412.171 - 412.179

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

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

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Department of State Health Services

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DIVISION 4. TRANSFERS AND CHANGING LMHAS

25 TAC §§412.191 - 412.195

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

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

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For further information, please call: (512) 838-4349



DIVISION 5. DISCHARGE AND ATP FROM SMHF

25 TAC §§412.201 - 412.208

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

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

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Karen Ray
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Department of State Health Services
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For further information, please call: (512) 838-4349



DIVISION 6. DISCHARGE FROM LMHA SERVICES

25 TAC §412.221

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

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

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DIVISION 7. TRAINING, REFERENCES, AND DISTRIBUTION

25 TAC §§412.231 - 412.233

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

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

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Karen Ray
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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 306. BEHAVIORAL HEALTH DELIVERY SYSTEM

SUBCHAPTER D. MENTAL HEALTH SERVICES--ADMISSION, CONTINUITY, AND DISCHARGE

The Texas Health and Human Services Commission (HHSC) adopts new Chapter 306, Subchapter D, concerning Mental Health Services--Admission, Continuity, and Discharge, comprising §§306.151 - 306.154, 306.161 - 306.163, 306.171 - 306.178, 306.191 - 306.195, 306.201 - 306.207, and 306.221 in the Texas Administrative Code (TAC), Title 26, Part 1. Sections 306.153, 306.161 - 306.163, 306.171 - 306.178, 306.191, 306.194, 306.195, 306.201 - 306.207 and 306.221 are adopted with changes to the proposed text as published in the November 29, 2019, issue of the *Texas Register* (44 TexReg 7319). These sections will be republished.

Sections 306.151, 306.152, 306.154, 306.192, and 306.193 are adopted without changes to the proposed text as published in the November 29, 2019, issue of the *Texas Register* (44 TexReg 7319), and therefore will not be republished.

BACKGROUND AND JUSTIFICATION

As required by Texas Government Code §531.0201(a)(2)(C), client services functions previously performed by the Department of State Health Services (DSHS) were transferred to the HHSC on September 1, 2016, in accordance with Texas Government Code §531.0201 and §531.02011. The new rules in Title 26, Chapter 306 address the content of rules in Title 25, Chapter 412, Subchapter D, concerning Mental Health Services--Admission, Continuity, and Discharge. The rules in Chapter 412 are repealed elsewhere in this issue of the *Texas Register*.

The rules establish guidelines for admission, transfers, and discharges from state hospitals, local mental health authorities (LMHAs) and local behavioral health authorities (LBHAs), and continuity of services for persons receiving LMHA or LBHA services and inpatient services at a state mental health facility (SMHF) or a facility with a contracted psychiatric bed (CPB). The rules also implement certain provisions in Senate Bill (S.B.) 562, S.B. 1238, and House Bill 601, 86th Legislature, Regular Session, 2019, that relate to voluntary admission requirements and admission criteria for maximum security units.

COMMENTS

The 31-day comment period ended December 30, 2019. During this period, HHSC received comments regarding the proposed rules from one commenter, Disability Rights Texas. A summary of comments relating to the new Chapter 306, Subchapter D, concerning Mental Health Services--Admission, Continuity, and Discharge and HHSC responses follows.

Comment: The commenter expressed general concerns that the rules may not be written in language easily understood and suggested that HHSC did not offer an informal comment period.

Response: HHSC disagrees and declines to revise the rules in response to this comment. The rules were carefully considered and discussed. The informal comment period occurred in June 2016. Based on the feedback received from the informal comment period, HHSC met with external stakeholders in the development of these rules over the past four years.

Comment: The commenter suggested changes to three definitions under §306.153. The commenter suggested adding a reference to the Civil Practice and Remedies Code, Chapter 137, to the definition of advance directive in §306.153(5); suggested adding coordination with a person who provides support to an individual in the definition of continuity of care in §306.153(14); and suggested adding language to include information about the individuals psychiatric, social history, symptomology or support system to the definition of intake assessment in 306.153(36).

Response: HHSC agrees and made the suggested changes in response to the commenter's feedback.

Comment: The commenter recommended clarifying the term "alternate services" in §306.171(d)(2) as it does not refer to services for an emergency medical condition.

Response: HHSC agrees with the commenter and clarified that the facility must coordinate alternate outpatient community services with an LMHA or LBHA. Editorial changes were made by moving §306.171(d)(1) to §306.171(c)(2) and combining

§306.171(d)(2) with §306.171(d). The changes were made to increase understanding and to reflect the process a facility must follow if an individual arrives at the facility with an emergency medical condition.

Comment: The commenter recommended adding language to §306.174(b) to delineate the minimum age of an individual that may be admitted into the Waco Center for Youth and recommended considering another setting or program in the discharge planning process under §306.174(d).

Response: HHSC agrees with the commenter and incorporated both recommendations as suggested. Section 306.174(b) was revised to clarify that a child under 10 years of age may not be admitted to the Waco Center for Youth. HHSC additionally made changes to include a child in §306.174(a), (c), and (d) and made grammatical changes accordingly. HHSC also added language to allow another setting or program in the discharge planning process, in addition to a psychiatric hospital.

Comment: The commenter had several suggestions to the rules in §306.175. The commenter recommended establishing a time frame in which services would be made available to an individual who does not meet admission criteria in §306.175(b) and recommended establishing a time frame in which the physical and psychiatric examinations and determination occur in §306.175(c)(2). The commenter also recommended adding information about psychiatric, social history, support system or symptomology in the intake assessment under §306.175(g). Additionally, the commenter recommended adding language requiring documentation of the justification for continued inpatient care in §306.175(j). The commenter also inquired about the rationale for changing the evaluation from three times a week to once a week in §306.175(j).

Response: HHSC agrees with the commenter and established time frames as suggested. The rules were revised to require an LMHA or LBHA to notify the individual or their support system that an individual failed to meet admission criteria within 24 hours. The rules were revised to require a physician to conduct an examination of an individual requesting voluntary admission within 72 hours before or 24 hours after voluntary admission. The revision to §306.175(g) was added as suggested and additional revisions were made to §§306.176(e) and 306.177(c) for consistency. The revision to §306.175(j) regarding documented justification for continued stay for an individual voluntarily receiving acute inpatient treatment was added as suggested. Regarding the commenters inquiry, HHSC determined that the frequency of the evaluation, as written, is appropriate for individuals that are voluntarily admitted.

Comment: The commenter stated that coordinating alternate services as clinically indicated fails to ensure the provision of assessment for services if the person is seeking services in §306.176(d)(2) and recommended adding language in §306.176(d)(3) to notify persons who provide support other than family when an individual is released from a facility.

Response: HHSC agrees with the commenter. The rules were revised to require an LMHA or LBHA to coordinate alternate outpatient community services for an individual within a specified time frame.

Comment: The commenter recommended adding language indicating that the SMHF or facility with a CPB is responsible for contacting the LMHA or LBHA and suggested clarifying the time frame the contact must occur in §306.177(c)(4).

Response: HHSC declines to modify the rule in response to this comment. The recommendation does not apply to this section.

Comment: The commenter suggested a couple of recommendations to §306.191. A suggestion was made to consider the geographical proximity of any persons the individual indicates during a transfer between state mental health facilities in §306.191(b)(4). The commenter questioned if an LMHA could provide input to deny a transfer and suggested clarifying the type of input that is sought from an LMHA in §306.191(b)(5).

Response: HHSC agrees with the commenter and revised §306.191(b)(4) as suggested. HHSC deleted §306.191(b)(5) because this subsection pertains to transfers between state mental health facilities and does not apply to LMHAs or LBHAs.

Comment: The commenter expressed general concerns regarding continuity of services and undefined terms used in §306.195. The commenter recommended: retaining the term "originating" instead of "designated" LMHA in §306.195(a)(1); clarifying the term "open access process" and requiring LMHAs to initiate an appointment for an individual seeking services in §306.195(a)(1)(B)(i); clarifying the term "access information" in §306.195(a)(1)(C) and "open access procedures" in §306.195(a)(1)(D) and suggested requiring an LMHA to secure the appointment for an individual instead of providing information; adding language to ensure continuation of services by providing pertinent information to the receiving LMHA or LBHA prior to the individual's transfer in §306.195(a)(1)(E); and providing a time frame within which the notification of the denial, reduction or termination of services and the right to appeal occurs in §306.195(a)(3). The commenter also stated that §306.195(a)(1)(H) contradicts statements made repeatedly by HHSC that there is no waiting list for services.

Response: HHSC agrees with the commenter as to the term "designated" and retained the term "originating" LMHA or LBHA. HHSC deleted the term "open access processes" and revised language to clarify that the LMHA or LBHA must educate an individual by providing information regarding walk-in intake services, if applicable. HHSC deleted the requirement regarding access information and renumbered the subparagraphs. HHSC revised language to require the originating LMHA or LBHA to submit pertinent information to the receiving LMHA or LBHA after the individual's transfer request to ensure continuity of care. HHSC revised rules to require the new LMHA or LBHA to notify the individual or LAR in writing of the termination, suspension, or reduction of services within ten business days. HHSC declines to modify rules in response to the comment about the waiting list for services. Community-based services are provided based on the availability of the provider's capacity to serve individuals, except for those individuals that have Medicaid. Grammatical changes were made accordingly.

Comment: The commenter made several suggestions to the discharge planning rules in §306.201. The commenter recommended: adding a time frame for a facility to notify persons involved in discharge planning of scheduled staffings and reviews in §306.201(b)(2); revisiting language that requires an LMHA to identify available living arrangements to consider expectations that would diminish the likelihood of readmission in §306.201(c)(3); deleting "recommended" living arrangements and replacing it with "preferred" living arrangements in §306.201(d)(1)(A); requiring facilities to notify other persons, as requested by the individual, of a discharge in §306.201(e)(2); considering the Health Insurance Portability and Accountability Act, which states that records can only be

omitted under certain circumstances and may conflict with language in §306.201(h)(2); clarifying that the facility must send a copy of the discharge packet to a county jail, if the county jail has facilitated needed services through another entity in §306.201(h)(3)(B)(iii); requiring a description of the frequency and intensity of the services in the written discharge summary in §306.201(k)(3)(B); and suggested adding language to require a facility to provide information about the resolution of the apparent conflict when caregivers refuse to participate in discharge planning in §306.201(k)(5).

Response: HHSC agrees with the commenter and revised §306.201(b)(2), §306.201(e)(2), §306.201(h)(2), and §306.201(h)(3)(B)(iii) as suggested. HHSC deleted the word "recommended" in §306.201(d)(1)(A), however it was not replaced with "preferred" as suggested since the rule already speaks to individual preferences. HHSC declines to modify the rule in response to §306.201(c)(3) implying the inclusion of a temporary shelter as a living arrangement. The language, as written, places the responsibility on the LMHA or LBHA to identify living arrangements consistent with the individual's clinical needs and preference. HHSC agrees with the commenter suggested edit to §306.201(k)(3)(B) and incorporated the suggestion in the discharge summary by adding the requirement of describing the level of care for services received. HHSC declines to modify the rule in response to requiring information about the resolution of an individual's refusal to participate in discharge planning in §306.201(k)(5). There is no resolution to a refusal to participate in discharge planning, only documentation of the refusal.

Comment: The commenter also made a few recommendations to §306.202, Special Considerations for Discharge Planning. The commenter recommended that the discharge planning review in §306.202(a)(1) focus on how effective the services have been in preventing an unnecessary hospitalization and recommended retaining the term, "effectiveness" instead of "best use of clinical services." The commenter also suggested that the LMHA should determine the type, amount, scope and duration of the services needed to prevent unnecessary admissions in §306.202(a)(3).

Response: HHSC agrees with the commenter and revised the rule as suggested.

Comment: The commenter recommended a change to §306.203(c)(1) to require the SMHF or facility with a CPB to "immediately" assist an individual in creating a written request to leave the SMHF or facility with a CPB rather than assisting the individual "as soon as possible."

Response: HHSC declines to modify the rule in response to this comment because the proposed language reflects the language of the statute at Section 572.004(a) of the Health and Safety Code, which requires the patient be assisted with the written request "as soon as possible."

Comment: The commenter stated that the language in §306.205(b)(3) regarding the deterioration of the individual's condition is vague and recommended retaining the original rule language.

Response: HHSC agrees with the commenter and revised the rule as suggested.

Comment: The commenter recommended establishing a reasonable time frame within which the services are available in §306.207(a)(1)(B)(ii). The commenter also recommended in-

cluding information about the attempts made to locate and contact the individual who fails to appear for a face-to-face contact in §306.207(a)(1)(D).

Response: HHSC agrees with the commenter and incorporated the recommendation by adding "as determined by the individual's level of care," which describes the frequency of services, in §306.207(1)(B)(ii). HHSC revised §306.207(1)(D) as suggested.

HHSC made grammatical changes to the definition of LIDDA in §306.153(39); minor in §306.153(47); ombudsman in §306.153(50); and recovery or treatment plan in §306.153(59).

HHSC made minor editorial changes to certain definitions in §§306.153(6), 306.153(14)(E), 306.153(27), 306.153(37), 306.153(38), 306.153(40), 306.153(62), and 306.153(63) for accuracy, understanding, and consistency.

HHSC replaced the proposed definition of mental illness in §306.153(45) with the definition of mental illness in Chapter 307 that includes "developmental disability" because the proposed definition was too broad. HHSC also replaced the proposed definition of peer specialist in §306.153(54) with the definition in 1 TAC Chapter 354, Subchapter N (relating to Peer Specialist Services) for accuracy and consistency.

Minor grammatical changes were made to §§306.163(b)(2) and (b)(6), 306.171(a), 306.172(1), 306.174(d), 306.175(a)(1)(C), and 306.202(a)(2)(A) for accuracy, understanding, and consistency. Minor editorial changes were made to §§306.153(24), 306.153(26), 306.153(68), 306.161(c)(1) and (d)(2), §306.162(d), 306.163(b)(7)(c)(1) and (f)(2), 306.173(a)(1), 306.175(e), 306.176(b)(2), 306.178, 306.191, 306.194, 306.201(c)(3), 306.201(d)(1)(E) and (d)(1)(I)(ii), 306.201(e)(1), and 306.207(1)(B)(iii).

Minor editorial changes were made to incorporate people first language in §§306.153(33), 306.153(34), 306.178, 306.191(c), 306.194(a), 306.203(a) and (b), 306.203(e)(1)(A), 306.205(a), and 306.206(a). Sections 306.203 and 306.204 were renamed to reflect people first language.

Minor editorial changes were made to update cross references to 25 TAC Chapter 412, Subchapter G that was administratively transferred to 26 TAC Chapter 301, Subchapter G in the following sections: §§306.153(57); 306.153(59)(A); 306.153(69); 306.161(a), (d), and (d)(3); 306.195(a)(1)(G) and (a)(2)(A)(iii); 306.202(g)(1)(B)(i) and (g)(2)(B)(i); 306.207(1)(C); and 306.221(b)(1). Cross references were also updated in §§306.153(35), 306.201(c)(7), and 306.202(b)(2) and (b)(3).

DIVISION 1. GENERAL PROVISIONS

26 TAC §§306.151 - 306.154

STATUTORY AUTHORITY

The new sections are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§306.153. Definitions.

The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise.

(1) Absence--When an individual, previously admitted to an SMHF and not discharged from the SMHF, is physically away from the SMHF for any reason, including hospitalization, home visit, special activity, unauthorized departure, or absence for trial placement.

(2) Admission--

(A) An individual's acceptance to an SMHF's custody or a facility with a CPB for inpatient services, based on:

(i) a physician's order issued in accordance with §306.175(h)(2)(C) of this subchapter (relating to Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility);

(ii) a physician's order issued in accordance with §306.176(c)(3) of this subchapter (relating to Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility for Emergency Detention);

(iii) a court's order of protective custody issued in accordance with Texas Health and Safety Code §574.022;

(iv) a court's order for temporary inpatient mental health services issued in accordance with Texas Health and Safety Code §574.034, or Texas Family Code Chapter 55;

(v) a court's order for extended inpatient mental health services issued in accordance with Texas Health and Safety Code §574.035, or Texas Family Code Chapter 55; or

(vi) a court's order for commitment issued in accordance with the Texas Code of Criminal Procedure, Chapter 46B or Chapter 46C.

(B) The acceptance of an individual in the mental health priority population into LMHA or LBHA services.

(3) Adolescent--An individual at least 13 years of age, but younger than 18 years of age.

(4) Adult--An individual at least 18 years of age or older.

(5) Advance directive--As used in this subchapter, includes:

(A) an instruction made under Texas Health and Safety Code §§166.032, 166.034 or 166.035 to administer, withhold, or withdraw life-sustaining treatment in the event of a terminal or irreversible condition;

(B) an out-of-hospital DNR order, as defined by Texas Health and Safety Code §166.081;

(C) a medical power of attorney under Texas Health and Safety Code, Chapter 166, Subchapter D; or

(D) a declaration for mental health treatment for preferences or instructions regarding mental health treatment in accordance with Civil Practice and Remedies Code Chapter 137.

(6) Alternate provider--An entity that provides mental health services or substance use disorder treatment services in the community but not pursuant to a contract or memorandum of understanding with an LMHA or LBHA.

(7) APRN--Advanced practice registered nurse. A registered nurse licensed by the Texas Board of Nursing to practice as an advanced practice registered nurse as provided by Texas Occupations Code §301.152.

(8) Assessment--The administrative process an SMHF or a facility with a CPB uses to gather information from a prospective patient, including a medical history and the problem for which the prospective patient is seeking treatment, to determine whether a prospective patient should be examined by a physician to determine if admission is clinically justified, as defined by Texas Health and Safety Code §572.0025(h)(2).

(9) Assessment professional--In accordance with Texas Health and Safety Code §572.0025(c)-(d), a staff member of an SMHF or facility with a CPB whose responsibilities include conducting the intake assessment described in §306.175(g) and §306.176(e) of this subchapter, and who is:

(A) a physician licensed to practice medicine under Texas Occupations Code, Chapter 155;

(B) a physician assistant licensed under Texas Occupations Code, Chapter 204;

(C) an APRN licensed under Texas Occupations Code, Chapter 301;

(D) a registered nurse licensed under Texas Occupations Code, Chapter 301;

(E) a psychologist licensed under Texas Occupations Code, Chapter 501;

(F) a psychological associate licensed under Texas Occupations Code, Chapter 501;

(G) a licensed professional counselor licensed under Texas Occupations Code, Chapter 503;

(H) a licensed social worker licensed under Texas Occupations Code, Chapter 505; or

(I) a licensed marriage and family therapist licensed under Texas Occupations Code, Chapter 502.

(10) ATP--Absence for trial placement. When an individual, currently admitted to an SMHF, is physically away from the SMHF for the SMHF to evaluate the individual's adjustment to a particular living arrangement before the individual's discharge and as a potential residence following discharge. An ATP is a type of furlough, as referenced in Texas Health and Safety Code, Chapter 574, Subchapter F.

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

(12) Capacity--An individual's ability to understand and appreciate the nature and consequences of a decision regarding the individual's medical treatment, and the ability of the individual to reach an informed decision in the matter.

(13) Child--An individual at least three years of age, but younger than 13 years of age.

(14) Continuity of care--Activities designed to ensure an individual is provided uninterrupted services during a transition between inpatient and outpatient services and that assist the individual and the individual's LAR in identifying, accessing, and coordinating LMHA or LBHA services and other appropriate services and supports in the community needed by the individual, including:

(A) assisting with admissions and discharges;

(B) facilitating access to appropriate services and supports in the community, including identifying and connecting the individual with community resources, and coordinating the provision of services;

(C) participating in developing and reviewing the individual's recovery or treatment plan;

(D) promoting implementation of the individual's recovery or treatment plan; and

(E) coordinating notification of continuity of care services between the individual and the individual's family and any other person providing support as authorized by the individual, and LAR, if any.

(15) Continuity of care worker--An LMHA, LBHA, or LIDDA staff member responsible for providing continuity of care services. The staff member may collaborate with a peer specialist, recovery specialist, or family partner to provide continuity of services.

(16) COPSD--Co-occurring psychiatric and substance use disorder.

(17) COPSD model--An application of evidence-based practices for an individual diagnosed with co-occurring conditions of mental illness and substance use disorder.

(18) CPB--Contracted psychiatric bed. A state-funded contracted psychiatric bed that:

(A) is authorized by an LMHA or LBHA; and

(B) is used for inpatient care in the community, and this does not include a crisis respite unit, crisis residential unit, an extended observation unit, or a crisis stabilization unit.

(19) CRCG--Community Resource Coordination Group. A local interagency group comprised of public and private providers who collaborate to develop individualized service plans for individuals whose needs may be met through interagency coordination and cooperation. CRCGs are established and operate in accordance with a Memorandum of Understanding on Services for Persons Needing Multiagency Services, required by Texas Government Code §531.055.

(20) Crisis--A situation in which:

(A) an individual presents an immediate danger to self or others;

(B) an individual's mental or physical health is at risk of serious deterioration; or

(C) an individual believes he presents an immediate danger to self or others, or the individual's mental or physical health is at risk of serious deterioration.

(21) Crisis treatment alternatives--Community-based facilities or units providing short-term, residential crisis treatment to ameliorate a behavioral health crisis in the least restrictive environment, including crisis stabilization units, extended observation units, crisis residential units, and crisis respite units. The intensity and scope of services varies by facility type and is available in a local service area based upon the local needs and characteristics of the community.

(22) Day--Calendar day.

(23) DD--Developmental disability. As listed in the Texas Health and Safety Code §531.002, an individual with a severe, chronic disability attributable to a mental or physical impairment or a combination of mental and physical impairments that:

(A) manifests before the person reaches 22 years of age;

(B) is likely to continue indefinitely;

(C) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individual-

ized supports, or other forms of assistance that are of a lifelong or extended duration and are individually planned and coordinated; and

(D) results in substantial functional limitations in three or more of the following categories of major life activity:

- (i) self-care;
- (ii) receptive and expressive language;
- (iii) learning;
- (iv) mobility;
- (v) self-direction;
- (vi) capacity for independent living; and
- (vii) economic self-sufficiency.

(24) Designated LMHA or LBHA--The LMHA or LBHA:

(A) that serves the individual's county of residence, which is determined in accordance with §306.162 of this subchapter (relating to Determining County of Residence); or

(B) that does not serve the individual's county of residence but has taken responsibility for ensuring the individual's LMHA or LBHA services.

(25) Discharge--

(A) From an SMHF or a facility with a CPB: The release of an individual from the custody and care of a provider of inpatient services.

(B) From LMHA or LBHA services: The termination of LMHA or LBHA services delivered to an individual by an LMHA or LBHA.

(26) Discharged unexpectedly--A discharge from an SMHF or facility with a CPB:

- (A) due to an individual's unauthorized departure;
- (B) at the individual's request;
- (C) due to a court releasing the individual;
- (D) due to the death of the individual; or
- (E) due to the execution of an arrest warrant for the individual.

(27) Emergency medical condition--A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances, or symptoms of substance use disorder) such that the absence of immediate medical attention could reasonably result in:

(A) placing the health of the individual (or with respect to a pregnant woman, the health of the woman or her unborn child) or others in serious jeopardy;

- (B) serious impairment to bodily functions;
- (C) serious dysfunction of any bodily organ or part;
- (D) serious disfigurement; or
- (E) in the case of a pregnant woman having contractions:

(i) inadequate time to affect a safe transfer to another hospital before delivery; or

(ii) a transfer posing a threat to the health and safety of the woman or the unborn child.

(28) Face-to-face--A form of contact occurring in person or through the use of audiovisual or other telecommunications technology.

(29) Facility--A care facility including a state mental health facility, private psychiatric hospital, medical hospital, and community setting, but does not include a nursing facility or an assisted living facility.

(30) HHSC--Texas Health and Human Services Commission or its designee.

(31) ID--Intellectual disability. Consistent with Texas Health and Safety Code §591.003, significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and originating before age 18.

(32) Individual--A person seeking or receiving services under this subchapter.

(33) Individual involuntarily receiving treatment--An individual receiving inpatient services based on an admission to a state mental health facility or a facility with a CPB made in accordance with:

(A) §306.176 of this subchapter;

(B) §306.177 of this subchapter (relating to Admission Criteria Under Order of Protective Custody or Court-ordered Inpatient Mental Health Services);

(C) an order for temporary inpatient mental health services issued in accordance with Texas Health and Safety Code §574.034 or Texas Family Code, Chapter 55;

(D) an order for extended inpatient mental health services issued in accordance with Texas Health and Safety Code §574.035 or Texas Family Code, Chapter 55;

(E) an order for commitment issued in accordance with Texas Code of Criminal Procedure, Chapter 46B; or

(F) an order for commitment issued in accordance with Texas Code of Criminal Procedure, Chapter 46C.

(34) Individual voluntarily receiving treatment--An individual receiving inpatient services based on an admission made in accordance with:

(A) §306.175 of this subchapter; or

(B) §306.178 of this subchapter (relating to Voluntary Treatment Following Involuntary Admission).

(35) Inpatient services--Residential psychiatric treatment provided to an individual in an SMHF, a facility with a CPB, a hospital licensed under the Texas Health and Safety Code, Chapter 241 or Chapter 577, or a CSU licensed under Chapter 510 of this title (relating to Private Psychiatric Hospitals and Crisis Stabilization Units).

(36) Intake assessment--The administrative process conducted by an assessment professional for gathering information about a prospective patient including the psychiatric and medical history, social history, symptomology and support system and giving a prospective patient information about the facility and the facility's treatment and services.

(37) LAR--Legally authorized representative. A person authorized by state law to act on behalf of an individual for the purposes of:

(A) admission, transfer or discharge that includes:

(i) a parent, non-Department of Family and Protective Services managing conservator or guardian of a minor;

(ii) a Department of Family and Protective Service managing conservator of a minor acting pursuant to Texas Health and Safety Code §572.001 (c-2) - (c-4); and

(iii) a person eligible to consent to treatment for a minor under §32.001(a), Texas Family Code, or a person who may request from a district court authorization under Texas Family Code, Chapter 35 for the temporary admission of a minor.

(B) consent on behalf of an individual with regard to a matter described in this subchapter other than admission, transfer or discharge includes:

(i) persons described by subparagraph (A) of this paragraph; and

(ii) an agent acting under a Medical Power of Attorney under Texas Health and Safety Code, Chapter 166 or a Declaration for Mental Health Treatment under Texas Civil Practice and Remedies Code, Chapter 137.

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

(39) LIDDA--Local intellectual and developmental disability authority. An entity designated by HHSC in accordance with Texas Health and Safety Code §533A.035.

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

(41) LMHA or LBHA network provider--An entity that provides mental health services in the community pursuant to a contract or memorandum of understanding with an LMHA or LBHA, including that part of an LMHA or LBHA directly providing mental health services.

(42) LMHA or LBHA services--Inpatient and outpatient mental health services provided by an LMHA or LBHA network provider to an individual in the individual's home community.

(43) Local service area--A geographic area composed of one or more Texas counties defining the population that may receive services from an LMHA or LBHA.

(44) MCO--Managed care organization. An entity governed by Chapter 843 of the Texas Insurance Code to operate as a health maintenance organization or to issue a private provider benefit plan.

(45) Mental illness--An illness, disease, or condition, other than a sole diagnosis of epilepsy, dementia, substance use disorder, ID, or DD that:

(A) substantially impairs an individual's thought, perception of reality, emotional process, or judgment; or

(B) grossly impairs behavior as demonstrated by recent disturbed behavior.

(46) MH priority population--Mental health priority population. As identified in state performance contracts with LMHAs or LBHAs, those groups of children, adolescents, and adults with mental illness or serious emotional disturbance assessed as most in need of mental health services.

(47) Minor--An individual younger than 18 years of age.

(48) Nursing facility--A long-term care facility licensed by HHSC as a nursing home, nursing facility, or skilled nursing facility as defined in Texas Health and Safety Code, Chapter 242.

(49) Offender with special needs--An individual who has a terminal or serious medical condition, a mental illness, an ID, a DD, or a physical disability, and is served by the Texas Correctional Office on Offenders with Medical or Mental Impairments as provided in Texas Health and Safety Code, Chapter 614.

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

(51) PASRR--Preadmission screening and resident review in accordance with 40 TAC Chapter 19, Subchapter BB (relating to Nursing Facility Responsibilities Related to Preadmission Screening and Resident Review (PASRR)).

(52) PASRR Level I screening--The process of screening an individual to identify whether the individual is suspected of having a mental illness, ID, or DD.

(53) PASRR Level II evaluation--A face-to-face evaluation of an individual suspected of having a mental illness, ID, or DD performed by a LIDDA, LMHA, or LBHA to determine if the individual has a mental illness, ID, or DD, and if so, to:

(A) assess the individual's need for care in a nursing facility;

(B) assess the individual's need for nursing facility specialized services, LIDDA specialized services, and LMHA or LBHA specialized services; and

(C) identify alternate placement options.

(54) Peer specialist--A person who uses lived experience in addition to skills learned in formal training, to deliver strengths-based, person-centered services to promote an individual's recovery and resiliency in accordance with 1 TAC Chapter 354, Subchapter N.

(55) Permanent residence--The physical location where an individual lives, or if a minor, where the minor's parents or legal guardian lives. A post office box is not a permanent residence.

(56) Preliminary examination--An assessment for medical stability and a psychiatric examination in accordance with Texas Health and Safety Code §573.022(a)(2).

(57) QMHP-CS--Qualified mental health professional-community services. A staff member who meets the requirements and performs the functions described in Chapter 301, Subchapter G of this title (relating to Mental Health Community Services Standards).

(58) Recovery--A process of change through which individuals improve their health and wellness, live a self-directed life, and strive to reach their full potential.

(59) Recovery or treatment plan--A written plan:

(A) developed in collaboration with an individual or the individual's LAR if required, and a QMHP-CS or Licensed Practitioner of the Healing Arts (LPHA) as defined in §301.303 of this title (relating to Definitions);

(B) amended at any time based on an individual's needs or requests;

(C) that guides the recovery treatment process and fosters resiliency;

(D) completed in conjunction with the uniform assessment;

(E) that identifies the individual's changing strengths, capacities, goals, preferences, needs, and desired outcomes; and

(F) that includes recommended services and supports or reasons for the exclusion of services and supports.

(60) Screening--Activities performed by a QMHP-CS to:

(A) collect triage information through face-to-face or telephone interviews with an individual or collateral contact;

(B) determine if the individual's need is emergent, urgent, or routine, conducted before the face-to-face assessment to determine the need for emergency services; and

(C) determine the need for in-depth assessment.

(61) SMHF--State mental health facility. A state hospital or a state center with an inpatient psychiatric component.

(62) SSLC--State supported living center. Consistent with Texas Health and Safety Code §531.002, a residential facility operated by the State to provide individuals with an ID a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills.

(63) Substance use disorder--The use of one or more drugs, including alcohol, which significantly and negatively impacts one or more major areas of life functioning and which meets the criteria for substance use as described in the current edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM)* published by the American Psychiatric Association.

(64) TAC--Texas Administrative Code.

(65) TCOOMMI--Texas Correctional Office on Offenders with Medical or Mental Impairments or its designee.

(66) Transfer--To move from one facility to another facility.

(67) Treating physician--A physician who coordinates and oversees an individual's treatment.

(68) Treatment team--A group of treatment providers, an individual, the individual's LAR, if any, and the LMHA, LBHA, or LIDDA who work together in a coordinated manner to provide comprehensive mental health services to the individual.

(69) Uniform assessment--An assessment tool adopted by HHSC under §301.353 of this title (relating to Provider Responsibilities for Treatment Planning and Service Authorization) used for recommending an individual's level of care.

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

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DIVISION 2. SCREENING AND ASSESSMENT FOR CRISIS SERVICES AND ADMISSION INTO LOCAL MENTAL HEALTH AUTHORITY OR LOCAL BEHAVIORAL HEALTH AUTHORITY SERVICES--LOCAL MENTAL HEALTH AUTHORITY OR LOCAL BEHAVIORAL HEALTH AUTHORITY RESPONSIBILITIES

26 TAC §§306.161 - 306.163

STATUTORY AUTHORITY

The new sections are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§306.161. *Screening and Assessment.*

(a) If an individual is in crisis, an LMHA or LBHA ensures immediate screening and, if recommended based on the screening, a face-to-face intake assessment of an individual in the LMHA's or LBHA's local service area in accordance with §301.327 of this title (relating to Access to Mental Health Community Services).

(b) When the crisis is resolved, the LMHA or LBHA must assess the individual using the uniform assessment and determine:

(1) referral for ongoing services at the LMHA or LBHA;

(2) referral to an alternate provider;

(3) referral to community-based crisis treatment alternative as described in §306.163 of this division (relating to Most Appropriate and Available Treatment Options);

(4) the individual's transportation by identifying and ensuring the individual's transportation needs were met; or

(5) no referral is needed.

(c) If an individual is not in crisis, an LMHA or LBHA screens each individual presenting for services at the LMHA or LBHA as follows:

(1) an LMHA or LBHA staff who is a QMHP-CS or LPHA conducts a screening; and

(2) an LMHA or LBHA staff determines whether the individual's county of residence is within the LMHA's or LBHA's local service area.

(d) If the individual's county of residence is within the LMHA's or LBHA's local service area and the screenings described in subsections (a) and (c) of this section indicates an intake assessment is needed, the LMHA or LBHA conducts an assessment in accordance with §301.353(a) of this title (relating to Provider Responsibilities for Treatment Planning and Service Authorization).

(1) LMHAs and LBHAs serve individuals in the MH priority population designated by HHSC. For an individual in the MH

priority population, the LMHA or LBHA identifies which services the individual may be eligible to receive and, if appropriate, determines whether the individual receives services immediately or places the individual on a waiting list for services and refers the individual to other community resources.

(2) Individuals who are enrolled in Medicaid must receive services immediately and may not be placed on a waiting list.

(3) An LMHA or LBHA must serve an individual in accordance with §301.327 of this title.

(4) For an individual not in the MH priority population, the LMHA or LBHA must provide the individual with written notification regarding:

(A) the denial of services and the opportunity to appeal in accordance with §306.154 of this subchapter (relating to Notification and Appeals Process for Local Mental Health Authority or Local Behavioral Health Authority Services); and

(B) the availability of information and assistance from the Ombudsman by contacting the Ombudsman at 1-800-252-8154 or online at hhs.texas.gov/ombudsman.

§306.162. Determining County of Residence.

(a) County of Residence for Adults.

(1) An adult's county of residence is the county which the adult or the adult's LAR indicates is the county of the adult's permanent residence, unless there is a preponderance of evidence to the contrary. If the adult is not a Texas resident or indicates no permanent address, the adult's county of residence is the county in which the evidence indicates the adult resides.

(2) If an adult is unable to communicate the location of the adult's permanent residence and there is no evidence indicating the location of the adult's permanent residence or if an adult is not a Texas resident, the adult's county of residence is the county in which the adult is physically present when the adult requests or requires services.

(3) If an LMHA or LBHA is paying for an adult's community mental health services delivered in the local service area of another LMHA or LBHA, or if an LMHA or LBHA is paying for an adult's living arrangement that is located outside the LMHA's or LBHA's local service area, the county in which the paying LMHA or LBHA is located is the adult's county of residence.

(b) County of Residence for Minors.

(1) Except as provided in paragraph (2) of this subsection, a minor's county of residence is the county in which the minor's LAR's permanent residence is located.

(2) A minor's county of residence is the county in which the minor currently resides if:

(A) it cannot be determined in which county the minor's LAR's permanent residence is located;

(B) a state agency is the minor's LAR;

(C) the minor does not have an LAR; or

(D) the minor is at least 16 years of age and self-enrolling into services.

(c) Dispute regarding county of residence initiated by an LMHA or LBHA.

(1) The LMHA or LBHA must initiate or continue providing clinically necessary services, including discharge planning, during the dispute resolution process.

(2) If an LMHA or LBHA initiates a dispute that executive directors of the affected LMHAs or LBHAs cannot resolve, the HHSC performance contract manager(s) of the affected LMHAs or LBHAs resolves the dispute.

(d) Disputes regarding county of residence initiated by or on behalf of an individual. The Ombudsman may consult with the HHSC performance contract manager(s) of the affected LMHAs or LBHAs and help resolve a dispute initiated by or on behalf of an individual.

(e) Changing county of residence status. Changing an individual's county of residence requires agreement between the LMHAs or LBHAs affected by the change, except as provided in §306.195 of this subchapter (relating to Changing Local Mental Health Authorities or Local Behavioral Health Authorities).

§306.163. Most Appropriate and Available Treatment Options.

(a) Recommendation for treatment. The designated LMHA or LBHA is responsible for recommending the most appropriate and available treatment alternative for an individual in need of mental health services.

(b) Inpatient services.

(1) Before an LMHA or LBHA refers an individual for inpatient services, the LMHA or LBHA must screen and assess the individual to determine if the individual requires inpatient services.

(2) If the screening and assessment indicates the individual requires inpatient services and inpatient services are the least restrictive setting available, the LMHA or LBHA refers the individual:

(A) to an SMHF or facility with a CPB, if the LMHA or LBHA determines that the individual meets the criteria for admission; or

(B) to an LMHA or LBHA network provider of inpatient services.

(3) If the individual is identified in the applicable HHSC automation system as having an ID, the LMHA or LBHA informs the designated LIDDA that the individual has been referred for inpatient services.

(4) If the LMHA, LBHA, or LMHA or LBHA-network provider refers the individual for inpatient services, the LMHA or LBHA must communicate necessary information to the contracted inpatient provider before or at the time of admission, including the individual's:

(A) identifying information, including address;

(B) legal status (e.g., regarding guardianship, charges pending, custody as applicable;

(C) pertinent medical and medication information, including known disabilities;

(D) behavioral information, including information regarding COPSD;

(E) other pertinent treatment information;

(F) finances, third-party coverage, and other benefits, if known; and

(G) advance directive.

(5) If an LMHA or LBHA, other than the individual's designated LMHA or LBHA, refers the individual for inpatient services, the SMHF or facility with a CPB notifies the individual's designated LMHA or LBHA of the referral for inpatient services by the end of the next business day.

(6) The designated LMHA or LBHA assigns a continuity of care worker to an individual admitted to an SMHF, a facility with a CPB, or an LMHA or LBHA inpatient services network provider.

(7) If the individual has an ID or DD, the designated LIDDA assigns a continuity of care worker to the individual.

(8) The LMHA or LBHA continuity of care worker, and LIDDA continuity of care worker as applicable, are responsible for the facilitation of the individual's continuity of services.

(c) Community-based crisis treatment options.

(1) An LMHA or LBHA must ensure the provision of crisis services to an individual experiencing a crisis while the individual is in its local service area.

(2) Individuals in need of a higher level of care, but not requiring inpatient services, have the option, as available, for admission to other services such as crisis respite, crisis residential, extended observation, or crisis stabilization unit.

(d) LMHA or LBHA Services.

(1) If an LMHA or LBHA admits an individual to LMHA or LBHA services, the LMHA or LBHA ensures the provision of services in the most integrated setting available.

(2) The LMHA or LBHA assigns, to an individual receiving services, a staff member who is responsible for coordinating the individual's services.

(e) Court Ordered Treatment. The LMHA or LBHA must provide services to an individual ordered by a court to participate in outpatient mental health services or competency restoration services, if available, when the court identifies the LMHA or LBHA as being responsible for those services.

(f) Referral to alternate provider.

(1) If an individual requests a referral to an alternate provider, and it is not court ordered to receive services from the LMHA or LBHA, the LMHA or LBHA makes a referral to an alternate provider in accordance with the request.

(2) If an individual has third-party coverage, but the coverage will not pay for needed services because the designated LMHA or LBHA does not have a provider in its network that is approved by the third-party coverage, the designated LMHA or LBHA acts in accordance with 25 TAC §412.106(c)(2) (relating to Determination of Ability to Pay).

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

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DIVISION 3. ADMISSION TO A STATE MENTAL HEALTH FACILITY OR A FACILITY

WITH A CONTRACTED PSYCHIATRIC BED--PROVIDER RESPONSIBILITIES

26 TAC §§306.171 - 306.178

STATUTORY AUTHORITY

The new sections are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§306.171. General Admission Criteria for a State Mental Health Facility or Facility with a Contracted Psychiatric Bed.

(a) With the exceptions of Waco Center for Youth, a maximum-security unit, and an adolescent forensic unit, an SMHF or facility with a CPB may admit an individual, who has been assessed by an LMHA or LBHA and recommended for inpatient admission, only if the individual has a mental illness and, as a result of the mental illness:

(1) presents a substantial risk of serious harm to self or others; or

(2) evidences a substantial risk of mental or physical deterioration.

(b) An individual's admission to an SMHF or facility with a CPB may not occur if the individual:

(1) requires specialized care that is not available at the SMHF or facility with a CPB; or

(2) has a physical medical condition that is unstable and could reasonably require inpatient medical treatment for the condition.

(c) If an individual arrives at an SMHF or facility with a CPB for mental health services, and the individual was not screened or referred by an LMHA or LBHA as described in §306.163 of this subchapter (relating to Most Appropriate and Available Treatment Options):

(1) the SMHF or facility with a CPB notifies the designated LMHA or LBHA that the individual has presented for services at the SMHF or facility with a CPB; and

(2) the SMHF or facility with a CPB physician determines if the individual has an emergency medical condition and the physician decides whether the facility has the capability to treat the emergency medical condition.

(A) If the SMHF or facility with a CPB has the capability to treat the emergency medical condition, the facility admits the individual as required by the Emergency Medical Treatment and Active Labor Act (EMTALA) (42 USC §1395dd).

(B) If the SMHF or facility with a CPB does not have the capability to treat the emergency medical condition in accordance with EMTALA, the facility provides evaluation and treatment within its capability to stabilize the individual and arranges for the individual to be transferred to a hospital that has the capability to treat the emergency medical condition.

(d) If an LMHA or LBHA authorized an individual's admission to an SMHF or a facility with a CPB and the facility determines

that the individual does not meet inpatient criteria for admission, the facility contacts the designated LMHA or LBHA to coordinate alternate outpatient community services. The designated LMHA or LBHA must contact the individual within 24 hours after being notified that the individual does not meet inpatient admission criteria.

§306.172. Admission Criteria for Maximum-Security Units.

An individual's admission to a maximum-security unit occurs only if the individual is:

(1) committed pursuant to Chapter 46B or Chapter 46C of the Texas Code of Criminal Procedure and determined to require admission to a maximum-security unit; or

(2) determined manifestly dangerous in accordance with HHSC state hospital policies.

§306.173. Admission Criteria for an Adolescent Forensic Unit.

(a) An adolescent forensic unit admits an adolescent only if the adolescent meets the criteria described in a paragraph of this subsection.

(1) Condition of probation or parole. The adolescent's admission to an adolescent forensic unit fulfills a condition of probation or parole for a juvenile offense if the adolescent:

(A) based on a clinical evaluation, is determined to be in need of specialized mental health treatment in a secure treatment setting to address violent behavior or delinquent conduct;

(B) has co-occurring psychiatric and substance use disorders; or

(C) has exhausted available community resources for treatment and has been recommended for admission by the local CRCG.

(2) Commitment under Texas Family Code, Chapter 55. The adolescent has been committed to a mental health facility under the Texas Family Code, Chapter 55, Subchapter C or D.

(3) Determined manifestly dangerous. The adolescent has been determined manifestly dangerous in accordance with HHSC state hospital policies.

(b) An adolescent may not be admitted to an adolescent forensic unit if a physician determines the adolescent has an ID.

§306.174. Admission Criteria for Waco Center for Youth.

(a) An individual's admission to Waco Center for Youth occurs only if the individual:

(1) is an adolescent, or an adolescent whose age at admission allows adequate time for treatment programming before reaching 18 years of age;

(2) is diagnosed as emotionally disturbed;

(3) has a history of behavior adjustment problems;

(4) needs a structured treatment program in a residential facility; and

(5) is currently receiving LMHA or LBHA services or inpatient services at an SMHF or a facility with a CPB and has been referred for admission by:

(A) the LMHA or LBHA after presentation and endorsement by the local CRCG that all appropriate community-based resources have been exhausted and Waco Center for Youth is the least restrictive environment needed, the LMHA presents the CRCG letter of recommendation with the referral;

(B) the LMHA or LBHA, following a documented LMHA or LBHA assessment that local resources have been explored and exhausted (if the full CRCG cannot convene in a timely manner); or

(C) an SMHF.

(b) Waco Center for Youth may not admit:

(1) a child under 10 years of age;

(2) an adolescent that has been found to have engaged in delinquent conduct or conduct indicating a need for supervision under the Texas Family Code, Title 3;

(3) an adolescent that is acutely psychotic, suicidal, homicidal, or seriously violent; or

(4) an adolescent that is determined by a physician to have an ID.

(c) If the Waco Center for Youth denies admission for services, Waco Center for Youth provides the adolescent's LAR written notification stating:

(1) the reason for the denial of services; and

(2) that the LAR may appeal the denial by contacting the LMHA or LBHA.

(d) If an adolescent receiving services at Waco Center for Youth requires admission to a psychiatric hospital or another setting or program, the discharge planning process includes the joint determination of the psychiatric hospital and Waco Center for Youth of the clinical appropriateness of readmission to Waco Center for Youth. With the agreement of the adolescent's treatment team, the Waco Center for Youth leadership, psychiatric hospital leadership, and the adolescent's LAR, the adolescent is prioritized for readmission to Waco Center for Youth.

§306.175. Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility.

(a) Request for voluntary admission.

(1) In accordance with Texas Health and Safety Code §572.001, a request for voluntary admission of an individual with a mental illness may only be made by:

(A) the individual, if the individual is at least 16 years of age or older;

(B) the LAR if:

(i) the individual is younger than 18 years of age; and

(ii) the LAR is described by §306.153(36)(A)(i) or (iii) of this subchapter (relating to Definitions); or

(C) the LAR, if the LAR is described by §306.153(36)(A)(ii), and admission is sought pursuant to the provisions of Texas Health and Safety Code §572.001(c-1) - (c-4).

(2) In accordance with Texas Health and Safety Code §572.001(b) and (e), a request for admission must:

(A) be in writing and signed by the LAR or individual making the request; and

(B) include a statement that the LAR or individual making the request:

(i) agrees that the individual remains in the SMHF or facility with a CPB until the individual's discharge; and

(ii) consents to diagnosis, observation, care, and treatment of the individual until:

(I) the discharge of the individual; or

(II) the individual is entitled to leave the SMHF or facility with a CPB, in accordance with Texas Health and Safety Code §572.004, after a request for discharge is made.

(3) The consent given under paragraph (2)(B)(ii) of this subsection does not waive an individual's rights described in:

(A) 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services);

(B) 25 TAC Chapter 405, Subchapter E (relating to Electroconvulsive Therapy (ECT));

(C) 25 TAC Chapter 414, Subchapter I (relating to Consent to Treatment with Psychoactive Medication--Mental Health Services); and

(D) 25 TAC Chapter 415, Subchapter F (relating to Interventions in Mental Health Services).

(b) Failure to meet admission criteria. If the physician of an SMHF or facility with a CPB determines that an individual does not meet admission criteria and that community resources may appropriately serve the individual, the facility contacts the LMHA or LBHA to discuss the availability and appropriateness of community-based services for the individual to receive. The LMHA or LBHA must contact the individual, the individual's family or any other person providing support as authorized by the individual, and LAR, if any, no later than 24 hours after the LMHA or LBHA is notified of the failure to meet the admission criteria.

(c) Examination.

(1) A physician must conduct an examination on each individual requesting voluntary admission in accordance with this subsection.

(2) In accordance with Texas Health and Safety Code §572.0025(f)(1)(A), a physician conducts a physical and psychiatric examination, either in person or through the use of audiovisual or other telecommunications technology within 72 hours before voluntary admission or 24 hours after voluntary admission for the following:

(A) an assessment for medical stability; and

(B) a psychiatric examination, and, if indicated, a substance use assessment.

(3) In accordance with Texas Health and Safety Code §572.0025(f)(1); the physician may not delegate the examination to a non-physician.

(d) Meets admission criteria. If, after examination, the physician determines that the individual meets admission criteria of the SMHF or facility with a CPB, the SMHF or facility with a CPB admits the individual.

(e) Does not meet admission criteria. If, after the examination, the physician determines that the individual does not meet the admission criteria of the SMHF or facility with a CPB, the SMHF or the facility with a CPB contacts the designated LMHA or LBHA to coordinate alternate outpatient community services as clinically indicated.

(f) Capacity to consent.

(1) If a physician determines that an individual whose consent is necessary for a voluntary admission does not have the capacity

to consent to diagnosis, observation, care, and treatment, the SMHF or the facility with a CPB may not voluntarily admit the individual.

(2) When appropriate, the SMHF or the facility with a CPB initiates an emergency detention proceeding in accordance with Texas Health and Safety Code, Chapter 573, or files an application for court-ordered inpatient mental health services in accordance with Texas Health and Safety Code Chapter 574.

(g) Intake assessment. In accordance with Texas Health and Safety Code §572.0025(b), an assessment professional for an SMHF or facility with a CPB, before voluntary admission of an individual, conducts an intake assessment for:

(1) obtaining relevant information about the individual, including:

(A) psychiatric and medical history;

(B) social history;

(C) symptomology;

(D) support systems;

(E) finances;

(F) third-party coverage or insurance benefits; and

(G) advance directives;

(2) explaining, orally and in writing, the individual's rights described in 25 TAC Chapter 404, Subchapter E;

(3) explaining, orally and in writing, the SMHF's or facility with a CPB's services and treatment as they relate to the individual;

(4) explaining, orally and in writing, the existence, purpose, telephone number, and address of the protection and advocacy system established in Texas, pursuant to Texas Health and Safety Code §576.008; and

(5) explaining, orally and in writing, the individual trust fund account, charges for services, and the financial responsibility form.

(h) Requirements for voluntary admission. An SMHF or facility with a CPB may voluntarily admit an individual only if:

(1) a request for admission is made in accordance with subsection (a) of this section;

(2) a physician has:

(A) in accordance with Texas Health and Safety Code §572.0025(f)(1):

(i) conducted an examination in accordance with subsection (c) of this section within 72 hours before the admission or 24 hours after the admission; or

(ii) has consulted with a physician who has conducted an examination in accordance with subsection (c) of this section within 72 hours before the admission or 24 hours after the admission;

(B) determined that the individual meets the admission criteria of the SMHF or facility with a CPB and that admission is clinically justified; and

(C) issued an order admitting the individual; and

(3) in accordance with Texas Health and Safety Code §572.0025(f)(2), the administrator or designee of the SMHF or facility with a CPB has signed a written statement agreeing to admit the individual.

(i) Documentation of admission order. In accordance with Texas Health and Safety Code §572.0025(f)(1), the order described in subsection (h)(2)(C) of this section is issued:

(1) in writing and signed by the issuing physician; or

(2) orally or electronically if, within 24 hours after its issuance, the SMHF or facility with a CPB has a written order signed by the issuing physician.

(j) Periodic evaluation. To determine the need for continued inpatient treatment, a physician or physician's designee must evaluate and document justification for continued stay for an individual voluntarily receiving acute inpatient treatment as often as clinically indicated, but no less than once a week.

§306.176. *Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility for Emergency Detention.*

(a) Acceptance for preliminary examination. In accordance with Texas Health and Safety Code §573.021 and §573.022, an SMHF or facility with a CPB accepts for a preliminary examination:

(1) an individual, of any age, who has been apprehended and transported to the SMHF or facility with a CPB by a peace officer or emergency medical services personnel in accordance with Texas Health and Safety Code §573.001 or §573.012; or

(2) an adult who has been transported to the SMHF or facility with a CPB by the adult's guardian in accordance with Texas Health and Safety Code §573.003.

(b) Preliminary examination.

(1) A physician conducts a preliminary examination of an individual as soon as possible but not more than 12 hours after the individual is transported to the SMHF or facility with a CPB for emergency detention.

(2) The preliminary examination consists of:

(A) an assessment for medical stability; and

(B) a psychiatric examination, including a substance use assessment if indicated, to determine if the individual meets the criteria described in subsection (c)(1) of this section.

(c) Requirements for emergency detention. The SMHF or facility with a CPB admits an individual for emergency detention if:

(1) in accordance with Texas Health and Safety Code §573.022(a)(2), a physician determines from the preliminary examination that:

(A) the individual has a mental illness;

(B) the individual evidences a substantial risk of serious harm to himself or others;

(C) the described risk of harm is imminent unless the individual is immediately detained; and

(D) emergency detention is the least restrictive means by which the necessary detention may be accomplished;

(2) in accordance with Texas Health and Safety Code §573.022(a)(3), a physician makes a written statement documenting the determination described in paragraph (1) of this subsection and describing:

(A) the nature of the individual's mental illness;

(B) the risk of harm the individual evidences, demonstrated either by the individual's behavior or by evidence of severe emo-

tional distress and deterioration in the individual's mental condition to the extent that the individual cannot remain at liberty; and

(C) the detailed information on which the physician based the determination;

(3) the physician issues and signs a written order admitting the individual for emergency detention; and

(4) the individual meets the admission criteria of the SMHF or facility with a CPB.

(d) Release.

(1) The SMHF or facility with a CPB releases the individual accepted for a preliminary examination if:

(A) a preliminary examination of the individual has not been conducted within 12 hours after the individual is apprehended and transported to the facility by the peace officer or transported for emergency detention; or

(B) in accordance with Texas Health and Safety Code §573.023(a), the individual is not admitted for emergency detention on completion of the preliminary examination.

(2) If the SMHF or facility with a CPB does not admit the individual on an emergency detention, the facility contacts the designated LMHA or LBHA to coordinate alternate outpatient community services. The designated LMHA or LBHA must contact the individual within 24 hours of being notified that the individual does not meet inpatient admission criteria to coordinate alternate outpatient community services.

(3) In accordance with Texas Health and Safety Code §576.007(a), if an individual who is an adult is not admitted on emergency detention, the SMHF or facility with a CPB makes a reasonable effort to notify the individual's family, or any other person providing support as authorized by the individual, and LAR, if any, before he or she is released.

(e) Intake assessment. An assessment professional for an SMHF or facility with a CPB conducts an intake assessment as soon as possible, but not later than 24 hours after an individual is admitted for emergency detention. The intake assessment includes:

(1) obtaining relevant information about the individual, including:

(A) psychiatric and medical history;

(B) social history;

(C) symptomology;

(D) support systems;

(E) finances;

(F) third-party coverage or insurance benefits; and

(G) advance directives;

(2) explaining, orally and in writing, the individual's rights described in 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services);

(3) explaining, orally and in writing, the SMHF's or facility with a CPB's services and treatment as they relate to the individual;

(4) explaining, orally and in writing, the existence, purpose, telephone number, and address of the protection and advocacy system established in Texas, pursuant to Texas Health and Safety Code §576.008; and

(5) explaining, orally and in writing, the individual trust fund account, charges for services, and the financial responsibility form.

§306.177. Admission Criteria Under Order of Protective Custody or Court-ordered Inpatient Mental Health Services.

(a) An SMHF or facility with a CPB admits an individual:

(1) under a protective custody order only if a court has issued a protective custody order in accordance with Texas Health and Safety Code §574.022; or

(2) for court-ordered inpatient mental health services only if a court has issued:

(A) an order for temporary inpatient mental health services issued in accordance with Texas Health and Safety Code §574.034, or Texas Family Code Chapter 55;

(B) an order for extended inpatient mental health services issued in accordance with Texas Health and Safety Code §574.035, or Texas Family Code Chapter 55;

(C) an order for commitment issued in accordance with the Texas Code of Criminal Procedure, Chapter 46B; or

(D) an order for commitment issued in accordance with the Texas Code of Criminal Procedure, Chapter 46C.

(b) If an SMHF or facility with a CPB admits an individual in accordance with subsection (a) of this section, a physician, PA, or APRN issues and signs a written order admitting the individual. Admission of an individual in accordance with subsection (a) of this section is not a medical act and does not require the use of independent medical judgment or treatment by the physician, PA, or APRN issuing and signing the written order.

(c) An SMHF or a facility with a CPB conducts an intake assessment as soon as possible, but not later than 24 hours after the individual is admitted under a protective custody order or court-ordered inpatient mental health services. The intake assessment includes:

(1) obtaining relevant information about the individual, including:

- (A) psychiatric and medical history;
- (B) social history;
- (C) symptomology;
- (D) support systems;
- (E) finances;
- (F) third-party coverage or insurance benefits; and
- (G) advance directives; and

(2) explaining, orally and in writing, the individual's rights described in 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services);

(3) explaining, orally and in writing, the SMHF's or facility with a CPB's services and treatment as they relate to the individual; and

(4) explaining, orally and in writing, the existence, purpose, telephone number, and address of the protection and advocacy system established in Texas, pursuant to Texas Health and Safety Code §576.008.

§306.178. Voluntary Treatment Following Involuntary Admission.

An SMHF or a facility with a CPB continues to provide inpatient services to an individual involuntarily receiving treatment after the indi-

vidual is eligible for discharge as described in §306.204 of this subchapter (relating to Discharge of an Individual Involuntarily Receiving Treatment), if, after consultation with the designated LMHA or LBHA:

(1) the SMHF or facility with a CPB obtains written consent for voluntary inpatient services that meets the requirements of a request for voluntary admission, as described in §306.175(a) of this subchapter (relating to Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility); and

(2) the individual's treating physician:

(A) examines the individual; and

(B) based on the examination in subparagraph (A) of this paragraph, issues an order for voluntary inpatient services that meets the requirements of §306.175(i) of this subchapter.

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

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DIVISION 4. TRANSFERS AND CHANGING LOCAL MENTAL HEALTH AUTHORITIES OR LOCAL BEHAVIORAL HEALTH AUTHORITIES

26 TAC §§306.191 - 306.195

STATUTORY AUTHORITY

The new sections are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§306.191. Transfers Between State Mental Health Facilities.

(a) The individual, the individual's LAR, any other person authorized by the individual, SMHF staff, the designated LMHA or LBHA, or another interested person may initiate a request to transfer an individual from one SMHF to another SMHF.

(b) A transfer between SMHFs may occur when deemed advisable by the administrator of the transferring SMHF with the agreement of the administrator of the receiving SMHF based on:

- (1) the condition and desires of the individual;
- (2) geographic residence of the individual;

- (3) program and bed availability; and
- (4) geographical proximity to the individual's family and any other person authorized by the individual, and LAR, if any.

(c) An individual voluntarily receiving treatment may not be transferred without the consent of the individual or LAR who made the request for voluntary admission in accordance with §306.175(a)(1) of this subchapter (relating to Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility).

(d) If an SMHF transfers an individual receiving court-ordered inpatient mental health services from one SMHF to another SMHF, the transferring SMHF notifies the committing court of the transfer.

(e) If a prosecuting attorney has notified the SMHF administrator that an individual has criminal charges pending, the administrator notifies the judge of the court before which charges are pending if the individual transfers to another SMHF.

(f) 25 TAC Chapter 415, Subchapter G (relating to Determination of Manifest Dangerousness) or HHSC state hospital policies govern transfer of an individual between an SMHF and a maximum-security unit or adolescent forensic unit.

§306.194. Transfers Between a State Mental Health Facility and Another Facility in Texas.

(a) Texas Health and Safety Code §575.011, §575.014, and §575.017 govern transfer of an individual between an SMHF and a psychiatric hospital. An SMHF must not transfer an individual voluntarily receiving treatment without the consent of the individual or LAR who made the request for voluntary admission in accordance with §306.175(a)(1) of this subchapter (relating to Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility).

(b) Texas Health and Safety Code §575.015 and §575.017 govern transfer of an individual from an SMHF to a federal correctional facility. The transferring SMHF notifies the designated LMHA or LBHA of the transfer.

(c) Texas Health and Safety Code §575.016 and §575.017 govern transfer of an individual from a facility of the institutional division of the Texas Department of Criminal Justice to an SMHF.

§306.195. Changing Local Mental Health Authorities or Local Behavioral Health Authorities.

(a) Requirements related to an individual currently receiving LMHA or LBHA services who intends to move his or her permanent residence to a county within the local service area of another LMHA or LBHA and seek services from the new LMHA or LBHA.

(1) The originating LMHA or LBHA must:

(A) initiate transition planning with the receiving LMHA or LBHA;

(B) educate the individual on the provisions of this subchapter regarding the individual's transfer, consisting of:

(i) information regarding walk-in intake services, if applicable, where no appointment is scheduled for the individual's initial intake to determine eligibility;

(ii) the individual's rights as eligible for services; and

(iii) the receiving LMHA or LBHA is notified of the individual's intent to move the individual's permanent residence;

(C) assist in facilitating and scheduling the intake appointment at the new LMHA or LBHA once the relocation has been confirmed;

(D) submit to the receiving LMHA or LBHA treatment information pertinent to the individual's continuity of care with submission after the individual's transfer request;

(E) ensure the individual has sufficient medication for up to 90 days or to last until the medication management appointment date at the receiving LMHA or LBHA;

(F) maintain the individual's case in open status in the applicable HHSC automation system for 90 days or until notified that the individual has been admitted to services at the receiving LMHA or LBHA, whichever occurs first;

(G) conduct an intake assessment in accordance with §301.353(a) of this title (relating to Provider Responsibilities for Treatment Planning and Service Authorization) and determine whether the LMHA or LBHA has the capacity to serve the individual immediately or place the individual on a waiting list for services; and

(H) authorize an initial 180 days of services for an adult and 90 days for a child or an adolescent for transitioning and ongoing care, including the provision of medications, if the individual is eligible and not on the waiting list.

(2) If the individual seeks services from the new LMHA or LBHA without prior knowledge of the originating LMHA or LBHA:

(A) the receiving LMHA or LBHA must:

(i) initiate transition planning with the originating LMHA or LBHA;

(ii) promptly request records pertinent to the individual's treatment, with the individual's consent, if applicable;

(iii) conduct an intake assessment in accordance with §301.353(a) of this title and determine whether the individual should receive services immediately or be placed on a waiting list for services; and

(iv) if the individual is eligible and the individual is not on the waitlist, authorize an initial 180 days of services for an adult and 90 days for a child or an adolescent for transitioning and ongoing care, including the provision of medications; and

(B) the originating LMHA or LBHA must:

(i) submit requested information to the new LMHA or LBHA within seven days after the request; and

(ii) maintain the individual's case in open status in the applicable HHSC automation system for 90 days or until notified that the individual has been admitted to services at the new LMHA or LBHA, whichever occurs first.

(3) If the new LMHA or LBHA denies services to the individual during the transition period, or reduces or terminates services at the conclusion of the authorized period, the new LMHA or LBHA must notify the individual or LAR in writing within ten business days of the proposed action and the right to appeal the proposed action in accordance with §306.154 of this subchapter (relating to Notification and Appeals Process for Local Mental Health Authority or Local Behavioral Health Authority Services).

(b) Requirements related to an individual receiving inpatient services at an SMHF or facility with a CPB. If an individual at an SMHF or facility with a CPB informs the SMHF or facility with a CPB that the individual intends to move the individual's permanent residence

to a county within the local service area of another LMHA or LBHA and seek services from the new LMHA or LBHA:

(1) the SMHF or facility with a CPB notifies the following of the individual's intent to move the individual's permanent residence upon discharge:

(A) the originating LMHA or LBHA, if the individual was receiving LMHA or LBHA services from the originating LMHA or LBHA before admission to the SMHF or facility with a CPB; and

(B) the new LMHA or LBHA;

(2) the following participate in the individual's discharge planning in accordance with §306.201 of this subchapter (relating to Discharge Planning):

(A) the SMHF or facility with a CPB;

(B) the new LMHA or LBHA; and

(C) the originating LMHA or LBHA, if the individual was receiving LMHA or LBHA services from the originating LMHA or LBHA before admission to the SMHF or facility with a CPB; and

(3) if the individual was receiving LMHA or LBHA services from the originating LMHA or LBHA before admission to the SMHF or facility with a CPB, the originating LMHA or LBHA maintains the individual's case in open status in the applicable HHSC automation system for 90 days or until notified that the individual is admitted to services at the new LMHA or LBHA, whichever occurs first.

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DIVISION 5. DISCHARGE AND ABSENCES FROM A STATE MENTAL HEALTH FACILITY OR FACILITY WITH A CONTRACTED PSYCHIATRIC BED

26 TAC §§306.201 - 306.207

STATUTORY AUTHORITY

The new sections are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§306.201. Discharge Planning.

(a) At the time of an individual's admission to an SMHF or facility with a CPB, the designated LMHA or LBHA, if any, and the SMHF or facility with a CPB begins discharge planning for the individual.

(b) The designated LMHA or LBHA continuity of care worker or other designated staff; the designated LIDDA continuity of care worker, if applicable; the individual; the individual's LAR, if any; and any other person authorized by the individual coordinates discharge planning with the SMHF or facility with a CPB.

(1) Except for the SMHF or facility with a CPB treatment team and the individual, involvement in discharge planning may be through teleconference or video-conference calls.

(2) The SMHF or the facility with a CPB must provide a minimum of 24-hour notification before scheduled staffings and reviews to persons involved in discharge planning.

(3) The LMHA, LBHA, or LIDDA, if applicable, and the SMHF or facility with a CPB involved in discharge planning must coordinate all discharge planning activities and ensure the development and completion of the discharge plan before the individual's discharge.

(c) Discharge planning must consist of the following activities:

(1) Considering all pertinent information about the individual's clinical needs, the SMHF or facility with a CPB must identify and recommend specific clinical services and supports needed by the individual after discharge or while on ATP.

(2) The LMHA, LBHA, or LIDDA, if applicable, must identify and recommend specific non-clinical services and supports needed by the individual after discharge, including housing, food, and clothing resources.

(3) If an individual needs a living arrangement, the LMHA or LBHA continuity of care worker must identify a setting consistent with the individual's clinical needs and preference that is available and has accessible services and supports as agreed upon by the individual or the individual's LAR.

(4) The LMHA, LBHA, or LIDDA, if applicable must identify potential providers and resources for the services and supports recommended.

(5) The SMHF or facility with a CPB must counsel the individual and the individual's LAR, if any, to prepare them for care after discharge or while on ATP.

(6) The SMHF or facility with a CPB must provide the individual and the individual's LAR, if any, with written notification of the existence, purpose, telephone number, and address of the protection and advocacy system established in Texas, pursuant to Texas Health and Safety Code §576.008.

(7) The LMHA or LBHA must comply with the Preadmission Screening and Resident Review processes as described in Chapter 303 of this title (relating to Preadmission Screening and Resident Review (PASRR)) for an individual recommended to move to a nursing facility.

(d) Before an individual's discharge:

(1) The individual's treatment team must develop a discharge plan to include the individual's stated wishes. The discharge plan must consist of:

(A) a description of the individual's living arrangement after discharge, or while on ATP, that reflects the individual's preferences, choices, and available community resources;

(B) arrangements and referrals for the available and accessible services and supports agreed upon by the individual or LAR recommended in the individual's discharge plan;

(C) a written description of recommended clinical and non-clinical services and supports the individual may receive after discharge or while on ATP. The SMHF or facility with a CPB documents arrangements and referrals for the services and supports recommended upon discharge or ATP in the discharge plan;

(D) a description of problems identified at discharge or ATP, including any issues that may disrupt the individual's stability in the community;

(E) the individual's goals, strengths, interventions, and objectives as stated in the individual's discharge plan in the SMHF or facility with a CPB;

(F) comments or additional information;

(G) a final diagnosis based on the current edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) published by the American Psychiatric Association;

(H) the names, contact information, and addresses of providers to whom the individual will be referred for any services or supports after discharge or while on ATP; and

(I) in accordance with Texas Health and Safety Code §574.081(c), a description of:

(i) the types and amount of medication the individual needs after discharge or while on ATP until the individual is evaluated by a physician; and

(ii) the person or entity responsible for providing and paying for the medication.

(2) The SMHF or facility with a CPB must request that the individual or LAR, as appropriate, sign the discharge plan, and document in the discharge plan whether the individual or LAR agree or disagree with the plan.

(3) If the individual or LAR refuses to sign the discharge plan described in paragraph (2) of this subsection, the SMHF or facility with a CPB documents in the individual's record if the individual or LAR agrees to the plan or not, reasons stated, and any other circumstances of the refusal.

(4) If applicable, the individual's treating physician must document in the individual's record reasons why the individual does not require continuing care or a discharge plan in accordance with Texas Health and Safety Code §574.081(g).

(5) If the LMHA or LBHA disagrees with the SMHF or facility with a CPB treatment team's decision concerning discharge:

(A) the treating physician of the SMHF or facility with a CPB consults with the LMHA or LBHA physician or designee to resolve the disagreement within 24 hours;

(B) and if the disagreement continues unresolved:

(i) the medical director or designee of the SMHF or facility with a CPB consults with the LMHA or LBHA medical director; and

(ii) if the disagreement continues unresolved after consulting with the LMHA or LBHA medical director:

(I) the medical director or designee of the SMHF or facility with a CPB refers the issue to the State Hospital System Chief Medical Officer; and

(II) the State Hospital System Chief Medical Officer collaborates with the Medical Director of the Behavioral Health Section to render a final decision within 24 hours of notification.

(e) Discharge notice to family or LAR.

(1) In accordance with Texas Health and Safety Code §576.007, before discharging an individual who is an adult, the SMHF or facility with a CPB makes a reasonable effort to notify the individual's family or any other person providing support as authorized by the individual or LAR, if any, of the discharge if the adult grants permission for the notification.

(2) Before discharging an individual at least 16 years of age or younger than 18 years of age, the SMHF or facility with a CPB makes a reasonable effort to notify the individual's family as authorized by the individual or LAR, if any, of the discharge if the individual grants permission for the notification.

(3) Before discharging an individual younger than 16 years of age, the SMHF or facility with a CPB notifies the individual's LAR of the discharge.

(f) Release of minors. Upon discharge, the SMHF or facility with a CPB may release a minor younger than 16 years of age only to the minor's LAR or the LAR's designee.

(1) If the LAR or the LAR's designee is unwilling to retrieve the minor from the SMHF or facility with a CPB and the LAR is not a state agency:

(A) the SMHF or facility with a CPB:

(i) notifies the Department of Family and Protective Services (DFPS), so DFPS can take custody of the minor from the SMHF or facility with a CPB;

(ii) refers the matter to the local CRCG to schedule a meeting with representatives from the required agencies described in subsection (f)(2)(A) of this section, the LAR, and minor to explore resources and make recommendations; and

(iii) documents the CRCG referral in the discharge plan; and

(B) the medical directors or their designees of the SMHF or facility with a CPB; designated LMHA, LBHA, or LIDDA; and DFPS meet to develop and solidify the discharge recommendations.

(2) If the LAR is a state agency unwilling to assume physical custody of the minor from the SMHF or facility with a CPB, the SMHF or the facility with a CPB:

(A) refers the matter to the local CRCG to schedule a meeting with representatives from the member agencies, in accordance with 40 TAC Chapter 702, Subchapter E (relating to Memorandum of Understanding with Other State Agencies) the LAR, and minor to explore resources and make recommendations; and

(B) documents the CRCG referral in the discharge plan.

(g) Notice to the designated LMHA, LBHA, or LIDDA. At least 24 hours before an individual's planned discharge or ATP, and no later than 24 hours after an unexpected discharge, an SMHF or facility with a CPB notifies the designated LMHA, LBHA, or LIDDA of the anticipated or unexpected discharge and conveys the following information about the individual:

- (1) identifying information, including address;
- (2) legal status (e.g., regarding guardianship, charges pending, or custody if the individual is a minor);
- (3) the day and time the individual will be discharged or on an ATP;
- (4) the individual's destination after discharge or ATP;
- (5) pertinent medical information;
- (6) current medications;
- (7) behavioral data, including information regarding COPS&D; and
- (8) other pertinent treatment information, including the discharge plan.

(h) Discharge packet.

(1) At a minimum, a discharge packet must include:

- (A) the discharge plan;
- (B) referral instructions, including:
 - (i) SMHF or facility with a CPB contact person;
 - (ii) name of the designated LMHA, LBHA, or LIDDA continuity of care worker;
 - (iii) names of community resources and providers to whom the individual is referred, including contacts, appointment dates and times, addresses, and phone numbers;

(iv) a description of to whom or where the individual is released upon discharge, including the individual's intended residence (address and phone number);

(v) instructions for the individual, LAR, and primary care giver as applicable;

(vi) medication regimen and prescriptions, as applicable; and

(vii) dated signature of the individual or LAR and a member of the SMHF or facility with a CPB treatment team;

(C) copies of all available, pertinent, current summaries, and assessments; and

(D) the treating physician's orders.

(2) At discharge or ATP, the SMHF or facility with a CPB provides a copy of the discharge packet to the individual. Individuals may request additional records. If the requested records are reasonably likely to endanger the individual's life or physical safety, these records can be withheld. Documentation of the determination to withhold records is required in the individual's medical record.

(3) Within 24 hours after discharge or ATP, the SMHF or facility with a CPB sends a copy of the discharge packet to:

- (A) the designated LMHA, LBHA, or LIDDA; and
- (B) the providers to whom the individual is referred, including:

(i) an LMHA or LBHA network provider, if the LMHA or LBHA is responsible for ensuring the individual's services after discharge or while on an ATP;

(ii) an alternate provider, if the individual requested referral to an alternate provider; and

(iii) a county jail, if the individual will be taken to the county jail upon discharge.

(i) Unexpected Discharge.

(1) The SMHF or facility with a CPB and the designated LMHA, LBHA, or LIDDA must make reasonable efforts to provide discharge planning for an individual discharged unexpectedly.

(2) If there is an unexpected discharge, the facility social worker or a staff with an equivalent credential to a social worker must document the reason for not completing discharge planning activities in the individual's record.

(j) Transportation. An SMHF or facility with a CPB must:

(1) initiate and secure transportation in collaboration with an LMHA or LBHA to a planned location after an individual's discharge; and

(2) inform a designated LMHA, LBHA, or LIDDA of an individual's transportation needs after discharge or an ATP.

(k) Discharge summary.

(1) Within ten days after an individual's discharge, the individual's physician of the SMHF or facility with a CPB completes a written discharge summary for the individual.

(2) Within 21 days after an individual's discharge from a LMHA or LBHA the LMHA or LBHA must complete a written discharge summary for the individual.

(3) Written discharge summary includes:

(A) a description of the individual's treatment and their response to that treatment;

(B) a description of the level of care for services received;

(C) a description of the individual's level of functioning at discharge;

(D) a description of the individual's living arrangement after discharge;

(E) a description of the community services and supports the individual will receive after discharge;

(F) a final diagnosis based on the current edition of the DSM; and

(G) a description of the amount of medication available to the individual, if applicable.

(4) The discharge summary must be sent to the individual's:

(A) designated LMHA, LBHA, or LIDDA, as applicable; and

(B) providers to whom the individual was referred.

(5) Documentation of refusal. If the individual, the individual's LAR, or the individual's caregivers refuse to participate in the discharge planning, the circumstances of the refusal must be documented in the individual's record.

(l) Care after discharge. An individual discharged from an SMHF or facility with a CPB is eligible for:

(1) community transitional services for 90 days if referred to an LMHA or LBHA; or

(2) ongoing services.

§306.202. *Special Considerations for Discharge Planning.*

(a) Three Admissions Within 180 Days. An individual admitted to an SMHF or a facility with a CPB three times within 180 days is considered at risk for future admission to inpatient services. To prevent the unnecessary admissions to an inpatient facility, the designated LMHA or LBHA must:

(1) during discharge planning, review the individual's previous recovery or treatment plans to determine the effectiveness of the clinical services received;

(2) include in the recovery or treatment plan:

(A) non-clinical supports, such as those provided by a peer specialist or recovery coach, identified to support the individual's ongoing recovery; and

(B) recommendations for services and interventions from the individual's current or previous care plan(s) that support the individual's strengths and goals and prevent unnecessary admission to an SMHF or facility with a CPB;

(3) determine the availability and level of care "type, amount, scope and duration" of clinical and non-clinical supports, such as those provided by a peer specialist or recovery coach, that promote ongoing recovery and prevent unnecessary admission to an SMHF or facility with a CPB; and

(4) consider appropriateness of the individual's continued stay in the SMHF or facility with a CPB.

(b) Nursing Facility Referral or Admission.

(1) In accordance with 42 CFR Part 483, Subpart C, and as described in 40 TAC Chapter 19, Subchapter BB (relating to Nursing Facility Responsibilities Related to Preadmission Screening and Resident Review (PASRR)), a nursing facility must coordinate with the referring entity to ensure the referring entity screens the individual for admission to the nursing facility before the nursing facility admits the individual.

(2) As the referring entity, the SMHF or facility with a CPB must complete a PASRR Level I Screening and forward the completed form in accordance with §303.301 of this title (relating to Referring Entity Responsibilities Related to the PASRR Process).

(3) The LMHA or LBHA must conduct a PASRR Level II Evaluation in accordance with Chapter 303 of this title.

(4) If a nursing facility admits an individual on an ATP, the designated LMHA or LBHA must conduct and document, including justification for its recommendations, the activities described in paragraphs (5) and (6) of this subsection.

(5) The designated LMHA or LBHA must make at least one face-to-face contact with the individual at the nursing facility on an ATP. The contact must consist of:

(A) a review of the individual's record at the nursing facility; and

(B) discussions with the individual and LAR, if any, the nursing facility staff, and other staff who provide care to the individual regarding:

(i) the individual's needs and the care the individual is receiving;

(ii) the ability of the nursing facility to provide the appropriate care;

(iii) the provision of mental health services, if needed by the individual; and

(iv) the individual's adjustment to the nursing facility.

(6) Before the end of the initial ATP period described in §306.206(b)(2) of this subchapter (relating to Absence for Trial Placement), the designated LMHA or LBHA must recommend to the SMHF or facility with a CPB one of the following:

(A) discharging the individual if the LMHA or LBHA determines that:

(i) the nursing facility is capable and willing to provide appropriate care to the individual after discharge;

(ii) any mental health services needed by the individual are being provided to the individual while residing in the nursing facility; and

(iii) the individual and LAR, if any, agrees to the nursing facility admission;

(B) extending the individual's ATP period in accordance with §306.206(b)(3) of this subchapter;

(C) returning the individual to the SMHF or facility with a CPB in accordance with §306.205 of this subchapter (relating to Pass or Furlough from a State Mental Health Facility or a Facility with a Contracted Psychiatric Bed); or

(D) initiating involuntary admission to the SMHF or facility with a CPB in accordance with §306.176 (relating to Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility for Emergency Detention) and §306.177 (relating to Admission Criteria Under Order of Protective Custody or Court-ordered Inpatient Mental Health Services) of this subchapter.

(c) Assisted Living.

(1) An SMHF, facility with a CPB, LMHA, or LBHA may not refer an individual to an assisted living facility that is not licensed under the Texas Health and Safety Code, Chapter 247.

(2) As required by Texas Health and Safety Code §247.063(b), if an SMHF, facility with a CPB, LMHA, or LBHA gains knowledge of an assisted living facility not operated or licensed by the state, the SMHF, facility with a CPB, LMHA, or LBHA reports the name, address, and telephone number of the facility to HHSC Complaint and Incident Intake at 1-800-458-9858.

(d) Minors.

(1) To the extent permitted by medical privacy laws, the SMHF or facility with a CPB and designated LMHA or LBHA must make a reasonable effort to involve a minor's LAR or the LAR's designee in the treatment and discharge planning process.

(2) A minor committed to or placed in an SMHF or facility with a CPB under Texas Family Code, Chapter 55, Subchapter C or D, shall be discharged in accordance with the Texas Family Code, Chapter 55, Subchapter C or D as applicable.

(e) An individual suspected of having an ID. If an SMHF or facility with a CPB suspects an individual has an ID, the SMHF or facility with a CPB must notify the designated LMHA or LBHA continuity of care worker and the designated LIDDA to:

(1) assign a LIDDA continuity of care worker to the individual; and

(2) conduct an assessment in accordance with 40 TAC Chapter 5, Subchapter D (relating to Diagnostic Assessment).

(f) Criminal Code.

(1) Texas Code of Criminal Procedure, Chapter 46B: Incompetency to stand trial.

(A) The SMHF or facility with a CPB must discharge an individual committed under Texas Code of Criminal Procedure, Article 46B.102 (relating to Civil Commitment Hearing: Mental Illness), in accordance with Texas Code of Criminal Procedure, Article 46B.107 (relating to Release of Defendant after Civil Commitment).

(B) The SMHF or facility with a CPB must discharge an individual committed under Texas Code of Criminal Procedure, Article 46B.073 (relating to Commitment for Restoration to Competency), in accordance with Texas Code of Criminal Procedure, Article 46B.083 (relating to Supporting Commitment Information Provided by Facility or Program).

(C) For an individual committed under Texas Code of Criminal Procedure, Chapter 46B, discharged and returned to the committing court, the SMHF or facility with a CPB, within 24 hours after discharge, must notify the following of the discharge:

- (i) the individual's designated LMHA or LBHA; and
- (ii) the TCOOMMI.

(2) Texas Code of Criminal Procedure, Chapter 46C: Insanity defense. An SMHF or facility with a CPB must discharge an individual acquitted by reason of insanity and committed to an SMHF or facility with a CPB under Texas Code of Criminal Procedure, Chapter 46C, only upon order of the committing court in accordance with Texas Code of Criminal Procedure, Article 46C.268.

(g) Offenders with special needs following discharge from an SMHF or facility with a CPB. The LMHA or LBHA must comply with the requirements as defined by the LMHA's and LBHA's TCOOMMI contract for offenders with special needs.

(1) An LMHA or LBHA that receives a referral for an offender with special needs in the MH priority population from a county or city jail at least 24 hours before the individual's release must complete one of the following actions:

(A) if the offender with special needs is currently receiving LMHA or LBHA services, the LMHA or LBHA:

- (i) notifies the offender with special needs of the county or city jail's referral;
- (ii) arranges a face-to-face contact between the offender with special needs and a QMHP-CS to occur within 15 days after the individual's release; and
- (iii) ensures that the QMHP-CS, at the face-to-face contact, re-assesses the individual and arranges for appropriate services, including transportation needs at the time of release.

(B) if the individual is not currently receiving LMHA or LBHA services from the LMHA or LBHA that is notified of the referral, the LMHA or LBHA:

- (i) ensures that at the face-to-face contact required in subparagraph (A) of this paragraph, the QMHP-CS conducts a pre-admission assessment in accordance with §301.353(a) of this title (relating to Provider Responsibilities for Treatment Planning and Service Authorization); and
- (ii) complies with §306.161(b) of this subchapter (relating to Screening and Assessment), as appropriate; or

(C) if the LMHA or LBHA does not conduct a face-to-face contact with the individual, the LMHA or LBHA must document the reasons for not doing so in the individual's record.

(2) If an LMHA or LBHA is notified of the anticipated release from prison or a state jail of an offender with special needs in the MH priority population who is currently taking psychoactive medication(s) for a mental illness and who will be released with a 30-day supply of the psychoactive medication(s), the LMHA or LBHA must arrange a face-to-face contact between the individual and QMHP-CS within 15 days after the individual's release.

(A) If the offender with special needs is released from state prison or state jail after hours or the LMHA or LBHA is otherwise unable to schedule the face-to-face contact before the individual's release, the LMHA or LBHA makes a good faith effort to locate and contact the individual. If the designated LMHA or LBHA does not have a face-to-face contact with the individual within 15 days, the LMHA or LBHA must document the reasons for not doing so in the individual's record.

(B) At the face-to-face contact:

(i) the QMHP-CS with appropriate supervision and training must perform an assessment in accordance with §301.353(a) of this title and comply with §306.161(b) and (c) of this subchapter, as appropriate; and

(ii) if the LMHA or LBHA determines that the offender with special needs should receive services immediately, the LMHA or LBHA must arrange for the individual to meet with a physician or designee authorized by state law to prescribe medication before the individual requires a refill of the prescription.

(C) If the LMHA or LBHA does not conduct a face-to-face contact with the offender with special needs, the LMHA or LBHA must document the reasons for not doing so in the individual's record.

(3) If the offender with special needs is on parole or probation, the SMHF or facility with a CPB must notify a representative of TCOOMMI before the discharge of the individual known to be on parole or probation.

§306.203. Discharge of an Individual Voluntarily Receiving Treatment.

(a) An SMHF or facility with a CPB must discharge an individual voluntarily receiving treatment if the administrator or designee of the SMHF or facility with a CPB concludes that the individual can no longer benefit from inpatient services based on the physician's determination, as delineated in Division 5 of this subchapter (relating to Discharge and Absences from a State Mental Health Facility or Facility with a Contracted Psychiatric Bed).

(b) If a written request for discharge is made by an individual voluntarily receiving treatment or the individual's LAR:

(1) the SMHF or facility with a CPB must discharge the individual in accordance with Texas Health and Safety Code §572.004; and

(2) the individual or individual's LAR signs, dates, and documents the time on the discharge request.

(c) In accordance with Texas Health and Safety Code §572.004, if an individual informs a staff member of an SMHF or facility with a CPB of the individual's desire to leave the SMHF or facility with a CPB, the SMHF or facility with a CPB must:

(1) as soon as possible, assist the individual in creating the written request and obtaining the necessary signature; and

(2) within four hours after a written request is made known to the SMHF or facility with a CPB, notify:

(A) the treating physician; or

(B) another physician who is an SMHF or facility with a CPB staff member, if the treating physician is not available during that time period.

(d) Results of physician notification required by subsection (c)(3) of this section.

(1) In accordance with Texas Health and Safety Code §572.004(c) and (d):

(A) an SMHF or facility with a CPB, based on a physician's determination, must discharge an individual within the four-hour time period described in subsection (c)(2) of this section; or

(B) if the physician who is notified in accordance with subsection (c)(2) of this section has reasonable cause to believe that the individual may meet the criteria for court-ordered inpatient mental health services or emergency detention, the physician must examine the individual as soon as possible, but no later than 24 hours, after the request for discharge is made known to the SMHF or facility with a CPB.

(2) Reasonable cause to believe that the individual may meet the criteria for court-ordered inpatient mental health services or emergency detention.

(A) If a physician does not examine an individual who may meet the criteria for court-ordered inpatient mental health services or emergency detention within 24 hours after the request for discharge is made known to the SMHF or the facility with a CPB, the facility must discharge the individual.

(B) If a physician, in accordance with Texas Health and Safety Code §572.004(d), examines the individual as described in paragraph (1)(B) of this subsection and determines that the individual does not meet the criteria for court-ordered inpatient mental health services or emergency detention, the SMHF or the facility with a CPB discharges the individual upon completion of the examination.

(C) If a physician, in accordance with Texas Health and Safety Code §572.004(d), examines the individual as described in paragraph (1)(B) of this subsection and determines that the individual meets the criteria for court-ordered inpatient mental health services or emergency detention, the SMHF or the facility with a CPB, by 4:00 p.m. on the next business day:

(i) if the SMHF or facility with a CPB intends to detain the individual, to file an application and obtain a court order for further detention of the individual in accordance with Texas Health and Safety Code §572.004(d), the physician:

(I) files an application for court-ordered inpatient mental health services or emergency detention and obtains a court order for further detention of the individual;

(II) notifies the individual of such intention; and

(III) documents in the individual's record the reasons for the decision to detain the individual; or

(ii) discharges the individual.

(e) In accordance with Texas Health and Safety Code §572.004(i), after a written request from a minor individual admitted under §306.175(a)(1)(B) of this subchapter (relating to Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed

Authorized by an LMHA or LBHA or for a State Mental Health Facility), the SMHF or facility with a CPB must:

(1) notify the minor's parent, managing conservator, or guardian of the request and:

(A) if the minor's parent, managing conservator, or guardian objects to the discharge, the minor continues treatment as a patient receiving voluntary treatment; or

(B) if the minor's parent, managing conservator, or guardian does not object to the discharge, the minor individual is discharged; and

(2) document the request in the minor's record.

(f) In accordance with Texas Health and Safety Code §572.004(f)(1), an SMHF or facility with a CPB is not required to complete the requirements described in this section if the individual makes a written statement withdrawing the request for discharge.

§306.204. *Discharge of an Individual Involuntarily Receiving Treatment.*

(a) Discharge from emergency detention.

(1) Except as provided by §306.178 of this subchapter (relating to Voluntary Treatment Following Involuntary Admission) and in accordance with Texas Health and Safety Code §573.021(b) and §573.023(b), an SMHF or facility with a CPB immediately discharges an individual under emergency detention if:

(A) the SMHF administrator, administrator of the facility with a CPB, or designee concludes, based on a physician's determination, the individual no longer meets the criteria in §306.176(c)(1) of this subchapter (relating to Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility for Emergency Detention); or

(B) except as provided in paragraph (2) of this subsection:

(i) 48 hours has elapsed from the time the individual was presented to the SMHF or facility with a CPB; and

(ii) the SMHF or facility with a CPB has not obtained a court order for further detention of the individual.

(2) In accordance with Texas Health and Safety Code §573.021(b), if the 48-hour period described in paragraph (1)(B)(i) of this subsection ends on a Saturday, Sunday, or legal holiday, or before 4:00 p.m. on the next business day after the individual was presented to the SMHF or facility with a CPB, the SMHF or facility with a CPB detains the individual until 4:00 p.m. on such business day.

(b) Discharge under order of protective custody. Except as provided by §306.178 of this subchapter and in accordance with Texas Health and Safety Code §574.028, an SMHF or facility with a CPB immediately discharges an individual under an order of protective custody if:

(1) the SMHF administrator, facility with a CPB administrator, or designee determines that, based on a physician's determination, the individual no longer meets the criteria described in Texas Health and Safety Code §574.022(a);

(2) the SMHF administrator, facility with a CPB administrator, or designee does not receive notice that the individual's continued detention is authorized after a probable cause hearing held within the time period prescribed by Texas Health and Safety Code §574.025(b);

(3) a final order for court-ordered inpatient mental health services has not been entered within the time period prescribed by Texas Health and Safety Code §574.005; or

(4) an order to release the individual is issued in accordance with Texas Health and Safety Code §574.028(a).

(c) Discharge under court-ordered inpatient mental health services.

(1) Except as provided by §306.178 of this subchapter and in accordance with Texas Health and Safety Code §574.085 and §574.086(a), an SMHF or facility with a CPB immediately discharges an individual under a temporary or extended order for inpatient mental health services if:

(A) the order for inpatient mental health services expires; or

(B) the SMHF administrator, administrator of the facility with a CPB, or designee concludes that, based on a physician's determination, the individual no longer meets the criteria for court-ordered inpatient mental health services.

(2) In accordance with Texas Health and Safety Code §574.086(b), before discharging an individual in accordance with paragraph (1) of this subsection, the SMHF administrator, administrator of the facility with a CPB, or designee considers whether the individual should receive court-ordered outpatient mental health services in accordance with a modified order described in Texas Health and Safety Code §574.061.

(3) Individuals committed under Texas Code of Criminal Procedure, Chapter 46B or 46C may only be discharged as provided by §306.202(f) of this division (relating to Special Considerations for Discharge Planning).

(d) Discharge packet. An SMHF administrator, administrator of a facility with a CPB, or designee forwards a discharge packet, as provided in §306.201(h) of this division (relating to Discharge Planning), of any individual committed under the Texas Code of Criminal Procedure to the jail and the LMHA or LBHA in conjunction with state and federal privacy laws.

§306.205. *Pass or Furlough from a State Mental Health Facility or a Facility with a Contracted Psychiatric Bed.*

(a) In accordance with Texas Health and Safety Code §574.082, an SMHF administrator, administrator of a facility with a CPB, or designee may, in coordination with the designated LMHA or LBHA, authorize absences for an individual involuntarily admitted under court order for inpatient mental health services.

(1) If an individual's authorized absence is to exceed 72 hours, the SMHF or facility with a CPB notifies the committing court of the absence.

(2) The SMHF or facility with a CPB may not authorize an absence that exceeds the expiration date of the individual's order for inpatient mental health services.

(b) In accordance with Texas Health and Safety Code §574.083, an SMHF or facility with a CPB detains or readmits an individual if the SMHF administrator, administrator of the facility with a CPB, or the administrator's designee issues a certificate or affidavit establishing that the individual is receiving court-ordered inpatient mental health services and:

(1) the individual is absent without authority from the SMHF or facility with a CPB;

(2) the individual has violated the conditions of the absence; or

(3) the individual's condition has deteriorated to the extent that the individual's continued absence from the SMHF or facility with a CPB is inappropriate and there is a question of competency or willingness to consent to return, then the designated LMHA or SMHF must initiate involuntary admission in accordance with Texas Health and Safety Code, Chapter 573 or 574.

(c) In accordance with Texas Health and Safety Code §574.084, an individual's authorized absence that exceeds 72 hours may be revoked only after an administrative hearing held in accordance with this subsection.

(1) The SMHF or facility with a CPB conducts a hearing by a hearing officer who is a mental health professional not directly involved in treating the individual.

(2) The SMHF or facility with a CPB:

(A) holds an informal hearing within 72 hours after the individual returns to the facility;

(B) provides the individual and facility staff members an opportunity to present information supporting their position; and

(C) provides the individual the option to select another person or staff member to serve as the individual's advocate.

(3) Within 24 hours after the conclusion of the hearing, the hearing officer:

(A) determines if the individual violated the conditions of the authorized absence, the authorized absence was justified, or the individual's condition deteriorated to the extent the individual's continued absence was inappropriate; and

(B) renders the final decision in writing, including the basis for the hearing officer's decision.

(4) If the hearing officer's decision does not revoke the authorized absence, the individual may leave the SMHF or facility with a CPB pursuant to the conditions of the absence.

(5) The SMHF or facility with a CPB ensures the individual's record includes a copy of the hearing officer's report.

(d) Except in medical emergencies, only the committing criminal court may grant absences from a SMHF or facility with a CPB for individuals committed under Texas Code of Criminal Procedure, Chapter 46B or 46C.

§306.206. *Absence for Trial Placement.*

(a) An individual who is under consideration for discharge as described in §306.203 of this division (relating to Discharge of an Individual Voluntarily Receiving Treatment) or §306.204(c) of this division (relating to Discharge of an Individual Involuntarily Receiving Treatment), may leave the SMHF or facility with a CPB on ATP if the SMHF or facility with a CPB and the designated LMHA or LBHA agree that an ATP will be beneficial in implementing the individual's recovery or treatment plan. The designated LMHA or LBHA is responsible for monitoring the individual while on ATP.

(b) Time frames for ATP.

(1) An individual admitted under court-ordered inpatient mental health services may not be on ATP beyond the expiration date of the individual's order for inpatient mental health services.

(2) The initial ATP period for any individual may not exceed 30 days.

(3) The SMHF or facility with a CPB may extend an initial ATP period up to 30 days if:

- (A) requested by the designated LMHA or LBHA; and
- (B) clinically justified.

(4) Approval by the following persons is required for any ATP that exceeds 60 days:

- (A) the SMHF administrator or designee, or the administrator of the facility with a CPB or designee; and
- (B) the designated LMHA or LBHA executive director or designee.

(c) Only the committing criminal court may grant ATP from the SMHF or facility with a CPB for individuals committed under Texas Code of Criminal Procedure, Chapter 46B or 46C.

§306.207. Post Discharge or Absence for Trial Placement: Contact and Implementation of the Recovery or Treatment Plan.

The designated LMHA or LBHA is responsible for contacting the individual following discharge or ATP from an SMHF or a facility with a CPB and for implementing the individual's recovery or treatment plan in accordance with this section.

(1) LMHA or LBHA contact after discharge or ATP.

(A) The designated LMHA or LBHA makes face-to-face contact with an individual within seven days after discharge or ATP of an individual who is:

(i) discharged or on ATP from an SMHF or facility with a CPB and referred to the LMHA or LBHA for services or supports as indicated in the recovery or treatment plan;

(ii) discharged from an LMHA or LBHA-network provider of inpatient services and referred to the LMHA or LBHA for services or supports as indicated in the recovery or treatment plan;

(iii) discharged from an alternate provider of inpatient services and receiving LMHA or LBHA services from the designated LMHA or LBHA at the time of admission and who, upon discharge, is referred to the LMHA or LBHA for services or supports as indicated in the recovery or treatment plan;

(iv) discharged from the LMHA's or LBHA's crisis stabilization unit or any overnight crisis facility and referred to the LMHA or LBHA for services or supports as indicated in the discharge plan; or

(v) an offender with special needs discharged from an SMHF or facility with a CPB returning to jail.

(B) At the face-to-face contact after discharge required by subparagraph (A) of this paragraph, the designated LMHA or LBHA:

(i) re-assesses the individual;

(ii) ensures the provision of the services and supports specified in the individual's recovery or treatment plan by making the services and supports available and accessible as determined by the individual's level of care; and

(iii) assists the individual in accessing the services and supports specified in the individual's recovery or treatment plan.

(C) The designated LMHA or LBHA develops or reviews an individual's recovery or treatment plan in accordance with §301.353(e) of this title (relating to Provider Responsibilities for Treatment Planning and Service Authorization) and considers treatment recommendations in the SMHF or facility with a CPB's discharge plan

within ten business days after the face-to-face contact required by subparagraph (A) of this paragraph.

(D) The designated LMHA or LBHA makes a good faith effort to locate and contact an individual who fails to appear for a face-to-face contact required by subparagraph (A) of this paragraph. If the designated LMHA or LBHA does not have a face-to-face contact with the individual, the LMHA or LBHA documents the attempts made and reasons the face-to-face contact did not occur in the individual's record.

(2) For an individual whose recovery or treatment plan identifies the designated LMHA or LBHA as responsible for providing or paying for the individual's psychoactive medications, the designated LMHA or LBHA is responsible for ensuring:

(A) the provision of psychoactive medications for the individual; and

(B) the individual has an appointment with a physician or designee authorized by state law to prescribe medication before the earlier of the following events:

(i) the individual's supply of psychoactive medication from the SMHF or facility with a CPB has been depleted; or

(ii) the 15th day after the individual is on ATP or discharged from the SMHF or facility with a CPB.

(3) The designated LMHA or LBHA documents in an individual's record the LMHA's or LBHA's activities described in this section, and the individual's responses to those activities.

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

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DIVISION 6. TRAINING

26 TAC §306.221

STATUTORY AUTHORITY

The new section is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The new section implements Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§306.221. *Screening and Intake Assessment Training Requirements at a State Mental Health Facility and a Facility with a Contracted Psychiatric Bed.*

(a) Screening training. As required by Texas Health and Safety Code §572.0025(e), an SMHF or facility with a CPB staff member whose responsibilities include conducting a screening described in Division 3 of this subchapter (relating to Admission to a State Mental Health Facility or Facility with a Contracted Psychiatric Bed--Provider Responsibilities) must receive at least eight hours of training in the SMHF's or facility with a CPB's screening.

(1) The screening training must provide instruction regarding:

(A) obtaining relevant information about the individual, including information about finances, third-party coverage or insurance benefits, and advance directives;

(B) explaining, orally and in writing, the individual's rights described in 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services);

(C) explaining, orally and in writing, the SMHF's or facility with a CPB's services and treatment as they relate to the individual;

(D) explaining, orally and in writing, the existence, purpose, telephone number, and address of the protection and advocacy system established in Texas, pursuant to Texas Health and Safety Code §576.008; and

(E) determining whether an individual comprehends the information provided in accordance with subparagraphs (B) - (D) of this paragraph.

(2) Up to six hours of the following training may count toward the screening training required by this subsection:

(A) 25 TAC §417.515 (relating to Staff Training in Identifying, Reporting, and Preventing Abuse, Neglect, and Exploitation); and

(B) 25 TAC §404.165 (relating to Staff Training in Rights of Persons Receiving Mental Health Services).

(b) Intake assessment training. As required by Texas Health and Safety Code §572.0025(e), if an SMHF or facility with a CPB's internal policy permits an assessment professional to determine whether a physician should conduct an examination on an individual requesting voluntary admission, the assessment professional must receive at least eight hours of training in conducting an intake assessment pursuant to this subchapter.

(1) The intake assessment training must provide instruction regarding assessing and diagnosing in accordance with §301.353 of this title (relating to Provider Responsibilities for Treatment Planning and Service Authorization).

(2) An assessment professional must receive intake training:

(A) before conducting an intake assessment; and

(B) annually throughout the professional's employment or association with the SMHF or facility with a CPB.

(c) Documentation of training. An SMHF or facility with a CPB must document that each staff member and each assessment professional whose responsibilities include conducting the screening or intake assessment have successfully completed the training described in subsections (a) and (b) of this section, including:

(1) the date of the training;

(2) the length of the training session; and

(3) the name of the instructor.

(d) Performance in accordance with training. Each staff member and each assessment professional whose responsibilities include conducting the screening or intake assessment must perform the assessments in accordance with the training required by this section.

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

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CHAPTER 748. MINIMUM STANDARDS FOR
GENERAL RESIDENTIAL OPERATIONS
SUBCHAPTER D. REPORTS AND RECORD
KEEPING

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §748.301, new §748.301, amendments to §748.303 and §748.313, and new Division 6, Unauthorized Absences, consisting of new §§748.451, 748.453, 748.455, 748.457, 748.459, 748.461, and 748.463.

New §§748.301, 748.453, 748.455, 748.461, and 748.463; and amendments to §748.303 are adopted with changes to the proposed text as published in the December 27, 2019, issue of the *Texas Register* (44 TexReg 8200). These rules will be republished.

The repeal of §748.301; amendments to §748.313; and new §§748.451, 748.457, and 748.459 are adopted without changes to the proposed text as published in the December 27, 2019, issue of the *Texas Register* (44 TexReg 8200). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The repeal, amendments, and new sections will address the issue of unauthorized absences of children from General Residential Operations (GROs) by requiring GROs to take additional actions when a child leaves the operation without permission (unauthorized absence). Current rules require GROs to document when a child is absent and cannot be located for a specified timeframe, depending on the age and development level of the child. The repeal, amendments, and new sections will include additional requirements, such as: documenting each time a child has an unauthorized absence, regardless of the length of time the child is absent; maintaining an annual log of each unauthorized absence; debriefing the child after each unauthorized absence; conducting a triggered review for each child who has had three unauthorized absences within a 60-day timeframe, to examine alternatives and create a written plan to reduce the number of unauthorized absences; and conducting an evalua-

tion, every six months, of the frequency and patterns of unauthorized absences within each GRO.

COMMENTS

The 31-day comment period ended January 27, 2020. During this period, HHSC received comments regarding the proposed rules from seven commenters, including Upbring, Willow Bend Center, Texas Alliance for Child and Family Services, Disability Rights Texas, Texas Appleseed, Devereux Advanced Behavioral Health Texas, and the Texas Department of Family and Protective Services (DFPS). Several of the commenters had multiple comments. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Four commenters generally supported the intent and purpose of the rule changes, which further trauma informed practices for tracking and caring for children who run away from residential care.

Response: HHSC appreciates the support of the rules.

Comment: Two commenters generally commented on the new review process. Both commenters recommended a more robust process, which would include an outside review of reoccurring unauthorized absences. One of the commenters specifically recommended a review by DFPS specialists; making the annual summary log available to outside experts, regardless of whether the Child Care Licensing Department of HHSC (Licensing) requested the log; requiring outside experts to participate in triggered reviews; requiring a triggered review after two unauthorized absences (the commenter did not note a timeframe for the triggered review to occur) instead of after three unauthorized absences within a 60-day timeframe; and reporting triggered reviews to Licensing. The second commenter recommended that a more robust process include outside reviews to determine whether the operation has any undetected issues, address unmet needs or hidden abuse or neglect, and determine how unauthorized absences affect the child's service plan.

Response: HHSC disagrees with the comments and declines to revise the rules, including not revising the proposed requirement of a triggered review after three unauthorized absences within 60 days. However, HHSC understands that the triggered review process will be new and may require revisions in the future. The commenters may not understand the respective roles of Licensing and DFPS. Because Licensing's role is regulatory, Licensing must create a process whereby an operation is responsible for implementing actions that prevent future unauthorized absences, regardless of whether the operation cares for children who are in DFPS conservatorship. Additionally, Licensing does not regulate DFPS oversight of children in the role of a managing conservator. Regarding the comment that a DFPS specialist participate in the review, new §748.459 requires an operation to notify the parent of a child, which is defined as "a person who has legal responsibility for or legal custody of a child, including the managing conservator or legal guardian," at least two weeks before the triggered review. In addition to the triggered review described in these rules, DFPS has a process for a child in DFPS conservatorship where DFPS staff, the child, and other supports for the child meet. This meeting allows the child an opportunity to discuss how DFPS can support the child so unauthorized absences do not continue to occur (sometimes called a Recovery Round Table). With respect to the possibility of outside reviews, an operation cannot make an annual summary log available to outside experts since the logs are confidential because they contain the names of multiple children. Regarding

reporting triggered reviews to Licensing, the Licensing oversight of the process will occur through routine monitoring inspections and investigations and does not require the operation to report each triggered review to Licensing. DFPS will have an opportunity to monitor what transpires during a triggered review when DFPS is invited to attend in its role as the managing conservator of children.

Comment: Regarding §748.301(3), three commenters wanted further clarification regarding the definition of an "unauthorized absence." The concerns whether an operation must report a child as an unauthorized absence if the child is still on the operation's grounds, but not where the child is authorized to be; if the child is still within the eyesight of the operation's staff, even if the child is off of the operation's grounds; or if the staff lose sight of the child and the child is off the operation's grounds.

Response: HHSC agrees in part and disagrees in part with the comment. HHSC wrote the definition with some flexibility, because operations will have to exercise discretion based on the history of the child. The definition of an "unauthorized absence" has two parts. First, the child must be absent from the operation without permission. Second, staff cannot locate the child. Although an "operation" would include an operation's grounds, HHSC agrees to clarify that the child must be absent from "the grounds of" an operation and revises the rule accordingly. It is already sufficiently clear that staff can locate a child who is within their eyesight, so this would not be an unauthorized absence. Although the issue may be more complicated when a child is not within the eyesight of staff, operations can use their best judgment based on the totality of the circumstances on a case-by-case basis to determine if there is an unauthorized absence. For example, if a teenager is routinely late in returning to the operation from an extracurricular activity, the operation would likely take this routine into account when assessing the possibility of an unauthorized absence. HHSC declines to make any other revisions to the rule but will add to the Minimum Standards on the HHSC Provider webpage a Helpful Information box after the rule to further clarify the issue.

Comment: Regarding §748.303 generally, one commenter stated that the current reporting structure does not capture all relevant unauthorized absences, which could be instrumental in preventing future unauthorized absences. The commenter did not request any rule changes.

Response: It is true that operations do not currently report all unauthorized absences to Licensing, which is why HHSC proposed these rule changes. New §748.303(c), and other rule changes, will now require all operations to document any unauthorized absences that are not reported to Licensing, debrief the child after every unauthorized absence, have triggered reviews under certain circumstances, and have overall operation evaluations every six months.

Comment: Regarding §748.303(a)(6), one commenter stated that "being issued a ticket at school by law enforcement or any other citation that does not result in the child being detained" should not be excluded from being reported to Licensing and the child's parent (the definition of a parent also includes the managing conservator of the child, which in many instance is DFPS), because DFPS and the operation are poised to help improve service plans for youth and need to be aware of any involvement with law enforcement.

Response: HHSC did not propose this paragraph for change and declines to revise it at this time. However, Licensing will consider

the comment during the current comprehensive review project for Chapter 748. This will ensure the public has the opportunity to comment on any proposed change.

Comment: Regarding §748.303(a)(8) and (9), three commenters stated the timeframes for reporting unauthorized absences of children 6 - 12 years old to law enforcement should be changed from two hours to immediately, and for children 13 years old and older should be changed from six hours to immediately, but no later than two hours after the child is not on the operation's grounds. Two commenters want this absence reported even if the child is no longer missing.

Response: HHSC did not propose these paragraphs for change and declines to revise them at this time. However, Licensing will consider the comments during the current comprehensive review project for Chapter 748. This will ensure the public has the opportunity to comment on any proposed changes. Note: The timeframe for reporting unauthorized absences of children 13 years old and older was changed from 24 hours to six hours, in 2017.

Comment: Regarding §748.303(d)(1), one commenter stated that directing operations to report serious incidents of adult residents to law enforcement "as outlined in the chart above" is ambiguous because the chart discusses minors.

Response: HHSC did not propose this paragraph for change and declines to revise it at this time. However, Licensing will consider the comment during the current comprehensive review project for Chapter 748. This will ensure the public has the opportunity to comment on any proposed change.

Comment: Regarding §748.303(d)(2), one commenter stated that directing operations to report serious incidents of adult residents to the parent is only correct if the parent is the legally authorized representative. If not, and the adult resident is incapable of making decisions about their own care, the case should be reported to the Probate Court, or other appropriate court, for resolution.

Response: HHSC did not propose this paragraph for change and declines to revise it at this time. However, Licensing will consider the comment during the current comprehensive review project for Chapter 748. This will ensure the public has the opportunity to comment on any proposed change.

Comment: Regarding §748.303(e)(5), one commenter stated that §748.303(e)(5) and §749.503(e)(5) have slight variations in the wording, which causes the rule to be unclear and vague.

Response: HHSC agrees with the comment and is making the recommended revisions. Though HHSC did not propose this paragraph for change, the revisions are editorial and do not change the meaning of the rule.

Comment: Regarding §748.313(2), one commenter stated the documentation requirements for a short personal restraint that results in substantial physical injury should be consistent with the emergency behavior intervention documentation requirements in §748.2855.

Response: HHSC did not propose this paragraph for change and declines to revise it at this time. However, Licensing will consider the comment during the current comprehensive review project for Chapter 748. This will ensure the public has the opportunity to comment on any proposed change.

Comment: Regarding §748.453(a), one commenter wanted to know if HHSC will provide an outline or spreadsheet with the requirements of the annual summary log.

Response: HHSC will provide a sample form that includes the requirements for the annual summary log.

Comment: Regarding §748.453(a)(5), one commenter suggested adding the police report number to the annual summary log when law enforcement is contacted and adding an intake report number for unauthorized absences reported to Licensing or DFPS.

Response: HHSC agrees with the comment and revises the rule accordingly.

Comment: Regarding §748.455(a), one commenter wondered if the operation could use a Recovery Round Table held by DFPS in place of the required debriefing of a child.

Response: No revision to the rule is required. Though a DFPS Recovery Round Table may be similar to the required debriefing, the operation cannot use it in place of the debriefing because the Recovery Round Table does not have to be completed immediately, the requirements of the round table are not identical to the requirements of a debriefing, and the round table is not regulated by Licensing.

Comment: Regarding §§748.455(a)(2), 748.461(3), and 748.463(b)(1) and (c)(2), one commenter stated the most effective services that an operation provides are evidence-based, trauma informed supports that aim to address a child's behavioral symptoms prior to or during placement. The commenter stated that the strategies that a child can use to avoid future unauthorized absences, and those used in triggered reviews and overall evaluations, should be evidence-based and trauma informed.

Response: HHSC agrees in part and disagrees in part with the comment. An operation must already integrate trauma informed practices into the care, treatment, and management of each child (See §748.1337(a)). Accordingly, HHSC agrees that any strategies or alternatives used to prevent unauthorized absences, and the environment that supports positive and constructive behavior of children in care, must be trauma informed. HHSC revises the rules to make the requisite revisions regarding trauma informed care. However, determining whether these strategies or alternatives are evidence-based would be difficult if not impossible to verify; therefore, HHSC declines to revise the rules to include the term "evidence-based."

Comment: Regarding §748.455(a)(4), one commenter suggested an addition to the rule stating that if a child discloses that abuse or neglect occurred during an unauthorized absence, then the caregiver or other person conducting the debriefing should end the debriefing and report the allegation to DFPS.

Response: HHSC appreciates the commenter's sensitivity to the DFPS responsibility for investigating allegations of abuse and neglect. Accordingly, HHSC will add a helpful information box to the Minimum Standards on the HHSC Provider webpage to clarify that if a child discloses that abuse or neglect may have occurred during an unauthorized absence, the caregiver or other person conducting the debriefing must make a report to DFPS and not ask additional questions regarding the abuse and neglect. However, the caregiver or other person conducting the debriefing, must complete the remaining requirements of the debriefing.

Comment: Regarding §748.455(b), one commenter was against all children returning to routine activities after an unauthorized absence, because doing so would increase the risk of another unauthorized absence and send the message that there are no consequences for this high-risk behavior. The commenter suggested allowing for restriction of routine activities, for at least a few days, without a treatment team decision and up to 30 days with a treatment team review.

Response: HHSC disagrees with the comment and declines to revise the rule. Preventing a child from going back to routine activities does not meet the current requirement of trauma informed care. In addition, the rule already provides an exception when a caregiver determines and documents that a particular routine activity would be inappropriate because of the child's condition following an unauthorized absence, or something that occurred during the unauthorized absence.

Comment: Regarding §748.463, one commenter wanted to know if HHSC would provide a form for the six-month overall operation evaluation.

Response: HHSC will not provide a sample form, because an overall operation evaluation could be very different from one operation to another.

Comment: One commenter stated that the fiscal impact did not include any impact regarding the provider's and DFPS case worker's time involved in debriefings (§748.455) and triggered reviews (§748.459).

Response: HHSC disagrees with the comment and no revisions to the rule will be made. HHSC assumes that, as a best practice, all providers and DFPS caseworkers currently debrief a child after an unauthorized absence. During a workgroup meeting, this assumption was verified. The new rule (§748.455) does specify what a debriefing must consist of, but the rule does not contemplate that additional time will be required to complete the debriefing. HHSC costed out an operation's case manager's time in the fiscal impact for triggered reviews (§748.459). This rule also requires participation of the person that is designated to make decisions regarding the child's participation in childhood activities. This person may or may not be employed by the provider. If employed by the provider, the costs would be very similar to the case manager's costs. The participation of DFPS caseworkers is not mandatory. However, as DFPS is currently focusing resources on issues with unauthorized absences, it is anticipated that any additional duties can be absorbed within existing resources.

DIVISION 1. REPORTING SERIOUS INCIDENTS AND OTHER OCCURRENCES

26 TAC §748.301

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Human Resources Code (HRC), §42.042, which provides that the Executive Commissioner of HHSC shall adopt rules to carry out the provisions of HRC, Chapter 42.

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

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Karen Ray
Chief Counsel

Health and Human Services Commission

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For further information, please call: (512) 438-5559



DIVISION 1. REPORTING SERIOUS INCIDENTS AND OTHER OCCURRENCES

26 TAC §§748.301, 748.303, 748.313

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Human Resources Code (HRC), §42.042, which provides that the Executive Commissioner of HHSC shall adopt rules to carry out the provisions of HRC, Chapter 42.

§748.301. What do certain terms mean in this subchapter?

These terms have the following meanings in this subchapter:

(1) Serious incident--A non-routine occurrence that has or may have dangerous or significant consequences for the care, supervision, or treatment of a child. The different types of serious incidents are noted in §748.303 of this division (relating to When must I report and document a serious incident?).

(2) Triggered review of a child's unauthorized absences--A review of a specific child's pattern of unauthorized absences when the child has had three unauthorized absences within a 60-day timeframe.

(3) Unauthorized absence--A child is absent from the grounds of an operation without permission from a caregiver and cannot be located. This includes when an unauthorized person has removed the child from the operation.

§748.303. When must I report and document a serious incident?

(a) You must report and document the following types of serious incidents involving a child in your care. The reports must be made to the following entities, and the reporting and documenting must be within the specified timeframes:

Figure: 26 TAC §748.303(a)

(b) If there is a medically pertinent incident, such as a seizure, that does not rise to the level of a serious incident, you do not have to report the incident but you must document the incident in the same manner as for a serious incident, as described in §748.311 of this division (relating to How must I document a serious incident?).

(c) You must document an unauthorized absence that does not meet the reporting time requirements defined in subsection (a)(7) - (9) of this section within 24 hours after you become aware of the unauthorized absence. You must document the absence:

(1) In the same manner as for a serious incident, as described in §748.311 of this division; and

(2) Complete an addendum to the serious incident report to finalize the documentation requirements, if the child returns to an operation after 24 hours.

(d) If there is a serious incident involving an adult resident, you do not have to report the incident to Licensing, but you must document the incident in the same manner as a serious incident. You do have to report the incident to:

- (1) Law enforcement, as outlined in the chart above;
- (2) The parents, if the adult resident is not capable of making decisions about the resident's own care; and
- (3) Adult Protective Services through the Texas Abuse and Neglect Hotline if there is reason to believe the adult resident has been abused, neglected or exploited.

(e) You must report and document the following types of serious incidents involving your operation, an employee, a professional level service provider, contract staff, or a volunteer to the following entities within the specified timeframe:

Figure: 26 TAC §748.303(e)

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

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Karen Ray

Chief Counsel

Health and Human Services Commission

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DIVISION 6. UNAUTHORIZED ABSENCES

26 TAC §§748.451, 748.453, 748.455, 748.457, 748.459, 748.461, 748.463

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Human Resources Code (HRC), §42.042, which provides that the Executive Commissioner of HHSC shall adopt rules to carry out the provisions of HRC, Chapter 42.

§748.453. What documentation must be included in an annual summary log for a child who has an unauthorized absence?

(a) For each unauthorized absence during the relevant year, you must document the following information in an annual summary log:

- (1) The name, age, gender, and date of admission of the child who was absent;
- (2) The time and date the unauthorized absence was discovered;
- (3) How long the child was gone or if the child did not return;
- (4) The name of the caregiver responsible for the child at the time the child's absence was discovered;
- (5) The intake report number, if a report was made to Licensing or the Department of Family and Protective Services; and

(6) Whether law enforcement was contacted, including the name of any law enforcement agency that was contacted and the number of the police report, if applicable.

(b) You must maintain each annual summary log for five years.

(c) You must make the annual summary logs available to Licensing for review and reproduction, upon request.

§748.455. What are the requirements for debriefing a child after an unauthorized absence?

(a) After a child returns to an operation from an unauthorized absence, the caregiver, or other appropriate person, must conduct a debriefing with the child as soon as possible, but no later than 24 hours after the child's return. The purpose of the debriefing is for the child and the caregiver, or other appropriate person, to discuss the following:

- (1) The circumstances that led to the child's unauthorized absence;
- (2) The trauma informed strategies the child can use to avoid future unauthorized absences and how the operation can support those strategies;
- (3) The child's condition; and
- (4) What occurred while the child was away from the operation, including where the child went, who was with the child, the child's activities, and any other information that may be relevant to the child's health and safety.

(b) The caregiver must allow the child to return to routine activities, excluding any activity that the caregiver determines would be inappropriate because of the child's condition following the unauthorized absence or something that occurred during the unauthorized absence.

(c) The debriefing must be documented in the child's record, including any routine activity that would be inappropriate for the child to return to and the explanation for why the activity is inappropriate.

§748.461. What must a triggered review of a child's unauthorized absences include?

A triggered review of a child's unauthorized absences must include the following:

- (1) A review of the child's records documenting previous unauthorized absences, including previous debriefings;
- (2) A review of service plan elements identified in §748.1337(b)(1)(D) and (H) and, as applicable, §748.1337(b)(2) and (3) of this chapter (relating to What must a child's initial service plan include?);
- (3) An examination of trauma informed alternatives to minimize the unauthorized absences of the child; and
- (4) A written plan to reduce the unauthorized absences of the child, which you must document in the child's record.

§748.463. What is an overall operation evaluation for unauthorized absences?

(a) Every six months, you must conduct an overall operation evaluation for unauthorized absences that have occurred at your operation during that time period.

(b) The objectives of the evaluation are to:

- (1) Develop and maintain a trauma informed environment that supports positive and constructive behaviors by children in care; and

(2) Ensure the overall safety and well-being of children in care.

(c) The evaluation must include:

(1) The frequency and patterns of unauthorized absences of children in your operation; and

(2) Specific trauma informed strategies to reduce the number of unauthorized absences in your operation.

(d) You must maintain the results of each six-month overall operation evaluation for unauthorized absences for five years.

(e) You must make the results of each overall operation evaluation for unauthorized absences available to Licensing for review and reproduction, upon request.

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

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Karen Ray

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CHAPTER 749. MINIMUM STANDARDS FOR CHILD-PLACING AGENCIES

SUBCHAPTER D. REPORTS AND RECORD KEEPING

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §749.501, new §749.501, amendments to §749.503 and §749.513, and new Division 5, Unauthorized Absences, consisting of new §§749.590 - 749.596.

Amendments to §749.503 and new §§749.591, 749.592, 749.595, and 749.596 are adopted with changes to the proposed text as published in the December 27, 2019, issue of the *Texas Register* (44 TexReg 8205). These rules will be republished.

The repeal of §749.501; new §§749.501, 749.590, 749.593, and 749.594; and amendments to §749.513 are adopted without changes to the proposed text as published in the December 27, 2019, issue of the *Texas Register* (44 TexReg 8205). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The repeal, amendments, and new sections address the issue of unauthorized absences of children in foster homes by requiring child-placing agencies (CPAs) to take additional actions when a child leaves a foster home without permission (unauthorized absence). Current rules require CPAs to document when a child is absent and cannot be located for a specified timeframe, depending on the age and development level of the child. The repeal, amendments, and new sections will include additional requirements for a CPA, such as: documenting each time a child has an unauthorized absence, regardless of the length of time the child is absent; maintaining an annual log of each unauthorized absence; debriefing the child after each unauthorized absence;

conducting a triggered review for each child who has had three unauthorized absences within a 60-day timeframe, to examine alternatives and create a written plan to reduce the number of unauthorized absences; and conducting an evaluation, every six months, of the frequency and patterns of unauthorized absences from the CPA's foster homes.

COMMENTS

The 31-day comment period ended January 27, 2020. During this period, HHSC received comments regarding the proposed rules from five commenters, including Upbring, Texas Alliance for Child and Family Services, Disability Rights Texas, Texas Appleseed, and the Texas Department of Family and Protective Services (DFPS). Several of the commenters had multiple comments. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Four commenters generally supported the intent and purpose of the rule changes, which further trauma informed practices for tracking and caring for children who run away from residential care.

Response: HHSC appreciates the support of the rules.

Comment: Two commenters generally commented on the new review process. Both commenters recommended a more robust process, which would include an outside review of reoccurring unauthorized absences. One of the commenters specifically recommended a review by DFPS specialists; making the annual summary log available to outside experts, regardless of whether the Child Care Licensing Department of HHSC (Licensing) requested the log; requiring outside experts to participate in triggered reviews; requiring a triggered review after two unauthorized absences (the commenter did not note a timeframe for the triggered review to occur) instead of after three unauthorized absences within a 60-day timeframe; and reporting triggered reviews to Licensing. The second commenter recommended that a more robust process include outside reviews to determine whether there are any undetected issues, address unmet needs or hidden abuse or neglect, and determine how unauthorized absences affect the child's service plan.

Response: HHSC disagrees with the comments and declines to revise the rules, including not revising the proposed requirement of a triggered review after three unauthorized absences within 60 days. However, HHSC understands that the triggered review process will be new and may require revisions in the future. The commenters may not understand the respective roles of Licensing and DFPS. Because Licensing's role is regulatory, Licensing must create a process whereby a CPA is responsible for implementing actions that prevent future unauthorized absences, regardless of whether the children are in DFPS conservatorship. Additionally, Licensing does not regulate DFPS oversight of children in the role of a managing conservator. Regarding the comment that a DFPS specialist participate in the review, new §749.594 requires a CPA to notify the parent of a child, which is defined as "a person who has legal responsibility for or legal custody of a child, including the managing conservator or legal guardian," at least two weeks before the triggered review. In addition to the triggered review described in these rules, DFPS has a process for a child in DFPS conservatorship where DFPS staff, the child, and other supports for the child meet. This meeting allows the child an opportunity to discuss how DFPS can support the child, so unauthorized absences do not continue to occur (sometimes called a Recovery Round Table). With respect to the possibility of outside reviews, a CPA cannot make an an-

nual summary log available to outside experts since the logs are confidential because they contain the names of multiple children. Regarding reporting triggered reviews to Licensing, the Licensing oversight of the process will occur through routine monitoring inspections and investigations and does not require the CPA to report each triggered review to Licensing. DFPS will have an opportunity to monitor what transpires during a triggered review when DFPS is invited to attend in its role as the managing conservator of children.

Comment: Regarding §749.503 generally, one commenter stated that the current reporting structure does not capture all relevant unauthorized absences, which could be instrumental in preventing future unauthorized absences. The commenter did not request any rule changes.

Response: It is true that CPAs do not currently report all unauthorized absences to Licensing, which is why HHSC proposed these rule changes. New §749.503(c), and other rule changes, will now require all CPAs to document any unauthorized absences that are not reported to Licensing, debrief the child after every unauthorized absence, have triggered reviews under certain circumstances, and have overall agency evaluations every six months.

Comment: Regarding §749.503(a)(6), one commenter stated that "being issued a ticket at school by law enforcement or any other citation that does not result in the child being detained" should not be excluded from being reported to Licensing and the child's parent (the definition of a parent also includes the managing conservator of the child, which in many instances is DFPS), because DFPS, the CPA, and the foster parents are poised to help improve service plans for youth and need to be aware of any involvement with law enforcement.

Response: HHSC did not propose this paragraph for change and declines to revise it at this time. However, Licensing will consider the comment during the current comprehensive review project for Chapter 749. This will ensure the public has the opportunity to comment on any proposed change.

Comment: Regarding §749.503(a)(8) and (9), three commenters stated the timeframes for reporting unauthorized absences of children 6 - 12 years old to law enforcement should be changed from two hours to immediately, and for children 13 years old and older should be changed from six hours to immediately, but no later than two hours after the child is not at the foster home. Two commenters want this absence reported even if the child is no longer missing.

Response: HHSC did not propose these paragraphs for change and declines to revise them at this time. However, Licensing will consider the comments during the current comprehensive review project for Chapter 749. This will ensure the public has the opportunity to comment on any proposed changes. Note: The timeframe for reporting unauthorized absences for children 13 years old and older was changed from 24 hours to six hours, in 2017.

Comment: Regarding §749.503(d)(1), one commenter stated that directing CPAs to report serious incidents of adult residents to law enforcement "as outlined in the chart above" is ambiguous because the chart discusses minors.

Response: HHSC did not propose this paragraph for change and declines to revise it at this time. However, Licensing will consider the comment during the current comprehensive review project

for Chapter 749. This will ensure the public has the opportunity to comment on any proposed change.

Comment: Regarding §749.503(d)(2), one commenter stated that directing CPAs to report serious incidents of adult residents to the parent is only correct if the parent is the legally authorized representative. If not, and the adult resident is incapable of making decisions about their own care, the case should be reported to the Probate Court, our other appropriate court, for resolution.

Response: HHSC did not propose this paragraph for change and declines to revise it at this time. However, Licensing will consider the comment during the current comprehensive review project for Chapter 749. This will ensure the public has the opportunity to comment on any proposed change.

Comment: Regarding §749.503(e)(5), one commenter stated that §748.303(e)(5) and §749.503(e)(5) have slight variations in the wording, which causes the rule to be unclear and vague.

Response: HHSC agrees with the comment and is making the recommended revisions. Though HHSC did not propose this paragraph for change, the revisions are editorial and do not change the meaning of the rule.

Comment: Regarding §749.513(2), one commenter stated the documentation requirements for a short personal restraint that results in substantial physical injury should be consistent with the emergency behavior intervention documentation requirements in §749.2305.

Response: HHSC did not propose this paragraph for change and declines to revise it at this time. However, Licensing will consider the comment during the current comprehensive review project for Chapter 749. This will ensure the public has the opportunity to comment on any proposed change.

Comment: Regarding §749.591(a), one commenter wanted to know if HHSC will provide an outline or spreadsheet with the requirements of the annual summary log.

Response: HHSC will provide a sample form that includes the requirements for the annual summary log.

Comment: Regarding §749.591(a)(5), one commenter suggested adding the police report number to the annual summary log when law enforcement is contacted and adding an intake report number for unauthorized absences reported to Licensing or DFPS.

Response: HHSC agrees with the comment and revises the rule accordingly.

Comment: Regarding §749.592(a), one commenter wondered if a CPA could use a Recovery Round Table held by DFPS in place of the required debriefing of a child.

Response: No revision to the rule is required. Though a DFPS Recovery Round Table may be similar to the required debriefing, a CPA cannot use it in place of the debriefing, because the Recovery Round Table does not have to be completed immediately, the requirements of the round table are not identical to the requirements of a debriefing, and the round table is not regulated by Licensing.

Comment: Regarding §§749.592(a)(2), 749.595(3), and 749.596(b)(1) and (c)(2), one commenter stated the most effective services that a foster home or CPA provides are evidence-based, trauma informed supports that aim to address a child's behavioral symptoms prior to or during placement. The commenter stated that the strategies that a child can

use to avoid further unauthorized absences, and those used in triggered reviews and overall evaluations, should be evidence-based and trauma informed.

Response: HHSC agrees in part and disagrees in part with the comment. A CPA and foster home must already integrate trauma informed practices into the care, treatment, and management of each child (See §749.1309(a)). Accordingly, HHSC agrees that any strategies or alternatives used to prevent unauthorized absences, and the environment that supports positive and constructive behavior of children in care, must be trauma informed. HHSC revises the rules to make the requisite revisions regarding trauma informed care. However, determining whether these strategies or alternatives are evidence-based would be difficult, if not impossible to verify; therefore, HHSC declines to revise the rules to include the term "evidence-based."

Comment: Regarding §749.592(a)(4), one commenter suggested an addition to the rule stating that if a child discloses that abuse or neglect occurred during an unauthorized absence, then the foster parent or other person conducting the debriefing should end the debriefing and report the allegation to DFPS.

Response: HHSC appreciates the commenter's sensitivity to the DFPS responsibility for investigating allegations of abuse and neglect. Accordingly, HHSC will add a helpful information box to the Minimum Standards on the HHSC Provider webpage to clarify that if a child discloses that abuse or neglect may have occurred during an unauthorized absence, the foster parent, or other person conducting the debriefing, must make a report to DFPS and not ask additional questions regarding the abuse and neglect. However, the foster parent, or other person conducting the debriefing, must complete the remaining requirements of the debriefing.

Comment: Regarding §749.596, one commenter wanted to know if HHSC would provide a form for the six-month overall agency evaluation.

Response: HHSC will not provide a sample form, because an overall agency evaluation could be very different from one CPA to another.

Comment: One commenter stated that the fiscal impact did not include any impact regarding the provider's and the DFPS case worker's time involved in debriefings (§749.592) and triggered reviews (§749.594).

Response: HHSC disagrees with the comment. HHSC assumes that, as a best practice, all providers and DFPS caseworkers currently debrief a child after an unauthorized absence. During a workgroup meeting, this assumption was verified. The new rule (§749.592) does specify what a debriefing must consist of, but the rule does not contemplate that additional time will be required to complete the debriefing. HHSC costed out the child placement staff's time in the fiscal impact for triggered reviews (§749.594). The fiscal impact also indicated that for the 11 DFPS child-placing agencies, the DFPS foster and development (FAD) staff would be responsible for performing the new duties required under the new rules, and HHSC anticipates that the FAD staff time needs to perform these additional duties can be absorbed within existing resources. Finally, the participation of the DFPS caseworkers is not mandatory. However, as DFPS is currently focusing resources on issues with unauthorized absences, HHSC anticipates that any additional duties can be absorbed within existing resources.

Some minor editorial changes were made to §749.596(a), (c)(1), and (c)(2) to clarify that the discussion related to unauthorized absences from foster homes, and a cite was clarified at §749.503(e)(3).

DIVISION 1. REPORTING SERIOUS INCIDENTS AND OTHER OCCURRENCES

26 TAC §749.501

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Human Resources Code (HRC), §42.042, which provides that the Executive Commissioner of HHSC shall adopt rules to carry out the provisions of HRC, Chapter 42.

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

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26 TAC §§749.501, 749.503, 749.513

STATUTORY AUTHORITY

The new section and amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Human Resources Code (HRC), §42.042, which provides that the Executive Commissioner of HHSC shall adopt rules to carry out the provisions of HRC, Chapter 42.

§749.503. *When must I report and document a serious incident?*

(a) You must report and document the following types of serious incidents involving a child in your care. The reports must be made to the following entities, and the reporting and documenting must be within the specified timeframes:

Figure: 26 TAC §749.503(a)

(b) If there is a medically pertinent incident, such as a seizure, that does not rise to the level of a serious incident, you do not have to report the incident but you must document the incident in the same manner as for a serious incident, as described in §749.511 of this division (relating to How must I document a serious incident?).

(c) You must document an unauthorized absence that does not meet the reporting time requirements defined in subsection (a)(7) - (9) of this section within 24 hours after you become aware of the unauthorized absence. You must document the absence:

(1) In the same manner as for a serious incident, as described in §749.511 of this division; and

(2) Complete an addendum to the serious incident report to finalize the documentation requirements, if the child returns to a foster home after 24 hours.

(d) If there is a serious incident involving an adult resident, you do not have to report the incident to Licensing, but you must document the incident in the same manner as a serious incident. You do have to report the incident to:

(1) Law enforcement as outlined in the chart above;

(2) The parents, if the adult resident is not capable of making decisions about the resident's own care; and

(3) Adult Protective Services through the Texas Abuse and Neglect Hotline if there is reason to believe the adult resident has been abused, neglected or exploited.

(e) You must report and document the following types of serious incidents involving your agency, one of your foster homes, an employee, professional level service provider, contract staff, or a volunteer to the following entities within the specified timeframe:

Figure: 26 TAC §749.503(e)

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

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DIVISION 5. UNAUTHORIZED ABSENCES

26 TAC §§749.590 - 749.596

STATUTORY AUTHORITY

The new sections are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Human Resources Code (HRC), §42.042, which provides that the Executive Commissioner of HHSC shall adopt rules to carry out the provisions of HRC, Chapter 42.

§749.591. What documentation must be included in an annual summary log for a child who has an unauthorized absence?

(a) For each unauthorized absence during the relevant year, you must document the following information in an annual summary log:

(1) The name, age, gender, and date of admission of the child who was absent;

(2) The time and date the unauthorized absence was discovered;

(3) How long the child was gone or if the child did not return;

(4) The name of the caregiver responsible for the child at the time the child's absence was discovered;

(5) The intake report number, if a report was made to Licensing or the Department of Family and Protective Services; and

(6) Whether law enforcement was contacted, including the name of any law enforcement agency that was contacted and the number of the police report, if applicable.

(b) You must maintain each annual summary log for five years.

(c) You must make the annual summary logs available to Licensing for review and reproduction, upon request.

§749.592. What are the requirements for debriefing a child after an unauthorized absence?

(a) After a child returns to the foster home from an unauthorized absence, the foster parent, or other appropriate person, must conduct a debriefing with the child as soon as possible, but no later than 24 hours after the child's return. The purpose of the debriefing is for the child and the foster parent, or other appropriate person, to discuss the following:

(1) The circumstances that led to the child's unauthorized absence;

(2) The trauma informed strategies the child can use to avoid future unauthorized absences and how the foster parent can support those strategies;

(3) The child's condition; and

(4) What occurred while the child was away from the foster home, including where the child went, who was with the child, the child's activities, and any other information that may be relevant to the child's health and safety.

(b) The foster parent must allow the child to return to routine activities, excluding any activity that the foster parent determines would be inappropriate because of the child's condition following the unauthorized absence or something that occurred during the unauthorized absence.

(c) The debriefing must be documented in the child's record, including any routine activity that would be inappropriate for the child to return to and the explanation for why the activity is inappropriate.

§749.595. What must a triggered review of a child's unauthorized absences include?

A triggered review for a child's unauthorized absences must include the following:

(1) A review of the child's records documenting previous unauthorized absences, including previous debriefings;

(2) A review of service plan elements identified in §749.1309(b)(1)(D) and (H) and, as applicable, §749.1309(b)(2) and (3) of this chapter (relating to What must a child's initial service plan include?);

(3) An examination of trauma informed alternatives to minimize the unauthorized absences of the child; and

(4) A written plan to reduce the unauthorized absences of the child, which you must document in the child's record.

§749.596. What is an overall agency evaluation for unauthorized absences?

(a) Every six months, you must conduct an overall agency evaluation for unauthorized absences that have occurred at your foster homes during that time period.

(b) The objectives of the evaluation are to:

(1) Develop and maintain a trauma informed environment that supports positive and constructive behaviors by children in care; and

(2) Ensure the overall safety and well-being of children in care.

(c) The evaluation must include:

(1) The frequency and patterns of unauthorized absences of children from your foster homes; and

(2) Specific trauma informed strategies to reduce the number of unauthorized absences from your foster homes.

(d) You must maintain the results of each six-month overall agency evaluation for unauthorized absences for five years.

(e) You must make the results of each overall agency evaluation for unauthorized absences available to Licensing for review and reproduction, upon request.

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

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 20. STATEWIDE PROCUREMENT AND SUPPORT SERVICES

SUBCHAPTER E. STATEWIDE PROCUREMENT DIVISION SERVICES - TRAVEL AND VEHICLES

34 TAC §20.407, §20.408

The Comptroller of Public Accounts adopts amendments to §20.407, concerning definitions and §20.408, concerning exceptions to the use of contract travel services, with changes to the proposed text as published in the February 21, 2020, issue of the *Texas Register* (45 TexReg 1193). The rules will be republished.

The comptroller also adopts the change to the title of Subchapter E Special Categories of Contracting, Division 2, which changes the title from State Support Services - Travel and Vehicles to Statewide Procurement Division Services - Travel and Vehicles.

The amendments are adopted to clarify documentation requirements for state employees' use of travel services other than contract travel services.

The amendments to §20.407 add a definition of "overall cost of travel" that includes a number of elements that contribute to costs of employee travel.

The amendments to §20.408 clarify, in subsection (a), that state agencies may reimburse their employees for travel services other than contract travel services only if one or more specified exceptions apply; clarify, in subsection (b), the exception for lower overall cost of travel, which requires documentation and must be based on a consistent cost comparison methodology; clarify, in subsection (h), the scope of the emergency response exception; and require, in new subsection (j), documentation of necessity whenever an agency reimburses lodging costs at a rate that exceeds the maximum set in the regulations issued by the United States General Services Administration (GSA) for a particular location, mirroring the requirement in General Appropriations Act (House Bill 1, 2019), Article IX, §5.05(a)(2). The title of §20.408 is amended to indicate that this section addresses requirements for higher cost of travel.

The comptroller received comments from Tess Ludes-Meyers, on behalf of Texas Department of Transportation, asking if travelers reducing their meals to increase the maximum lodging reimbursement would need to document the exception described in subsection (j). The comptroller has added clarifying language in subsection (j) to state that an employee claiming less than the maximum meal allowance may apply the reduced amount to increase the maximum lodging reimbursement rate without triggering the requirement to document described in subsection (j); this aligns with the Texttravel policy administered by the comptroller's Fiscal Management Division.

The comptroller also received comments from Shelley Knight, on behalf of the Texas Commission on Law Enforcement, who noted that her comments primarily related to the comptroller's 971-M1 statewide contract for Lodging Services and Booking Tool, with some also applying to other statewide travel contracts. Ms. Knight commented that pricing changed at times on the statewide lodging contract and depending when booked may not always be the lowest cost. Ms. Ludes-Meyers also asked for exception (b), what contract travel services pricing should be used since lodging and rental vehicle pricing is available from multiple providers at different rates. The rule provides for the agency to develop its own cost comparison methodology for considering an exception on lower cost, however, price at the time of booking could be a suitable point to document comparison pricing. The comptroller's rental car contract pricing and lodging contract pricing at or below the GSA rates is established for state travelers to obtain suitable travel in an efficient manner without an exception being required.

Ms. Knight also noted that for agencies with no central reservations staff, employees are entrusted to their own discretion making travel arrangements individually or in coordination with others, and prior oversight would be cost prohibitive, therefore review occurs after the travel has occurred. The comptroller's statewide contracts are developed to provide flexibility and services for the diverse agencies that comprise Texas state government; the review of travel receipts and documents after travel, as well as booking by individual travelers is common, though not uniform, across state agencies. Specifically for lodging, individual travelers may book up to eight rooms concurrently to establish uniform pricing and efficient coordination of travel arrangements. If travelers wish for explanation or training in application of state travel rules, the comptroller's State Travel Management Program and Fiscal Management Expenditure Assis-

tance staffs are available to answer questions and provide training. Ms. Knight additionally commented on specific savings and practices employed by her agency's travelers to conserve state funds.

Ms. Knight's final comments noted that no other purchasing statute or rule instructs agencies to do a "cost comparison" before the expenditure is completed, and that allowing for shifting expenses in the cost comparison is too variable to predict. The comptroller notes that the "cost comparison" is required only when considering an exception to using a state contract; no cost comparison is required when booking a room directly off the contract that is at GSA rate or lower. The rule, current and proposed, allows travel obtained at lower overall cost to the state, and *encourages* state agencies to obtain lower priced travel that lowers the overall cost. By incorporating a definition of the concept of "lower overall cost of travel," agencies and their travelers may now consider the factors that contribute to that overall cost when determining if travel is efficiently secured by means other than the statewide travel contracts. The comptroller does not stipulate *lowest cost* of travel, or only the least expensive hotels, rental cars, flights or other travel options would ever be used, but allows agencies to consider non-cost exceptions for health and safety, proximity to duty station, travel time or other factors in selecting travel arrangements.

The comptroller also received comments from Linda Flores, on behalf of Texas Department of Motor Vehicles, noting that the rules better define the concept of "lower overall cost of travel"; that the General Appropriations Act already requires documentation for lodging reimbursement that exceeds the maximum GSA rate; that her agency has not utilized the exceptions for emergency response; and that because her agency's travel policy references §20.408 for valid exceptions, it is always current. Ms. Flores noted that the rule changes she addressed would have no impact on her agency.

The comptroller has responded to all who submitted comments within the 30-day comment period.

Following publication, the comptroller noted two errors in the proposed text, which the comptroller has now corrected. The comptroller has capitalized the word "God" in §20.407(3). The comptroller has capitalized the name of the "General Services Administration" in the title of §20.408(j).

The amendments are adopted under Government Code, §§403.011, which outlines the general powers of the comptroller, 572.051, which requires each state agency to adopt a written ethics policy, and 660.021, which authorizes the comptroller to adopt rules to efficiently and effectively administer this chapter related to state employee travel costs.

These amendments affect Government Code, §660.07.

§20.407. *Definitions.*

The following words and terms used in this division are defined as follows unless the context clearly indicates otherwise.

- (1) Contractor--An individual or entity under contract with comptroller for the provision of travel services.
- (2) Contract travel services--The travel services provided pursuant to comptroller contracts that guarantee prices and levels of services for all eligible entities and individuals.
- (3) Force majeure event--Any acts of God, war, riot, strike, or other event beyond the control of a contractor and that could not

reasonably have been anticipated or avoided and which, by the exercise of all reasonable due diligence, such contractor is unable to overcome.

(4) Official government business--Business required in the scope and course of the traveler's employment that is properly authorized by the employing governmental entity.

(5) Overall cost of travel--May include the actual costs to the state for travel, including flight or other mode of transport to the duty station, mileage, rental car, taxi, parking, tolls, lodging, meals in amounts less than or equal to the allowed per diem, and in some instances may also include travel time to duty station or other relevant factors directly related to the travel that are significant in the context of the overall cost of the travel event.

(6) State agency--Any department, commission, board, office, council, or other agency in the executive branch of state government created by the constitution or by statute that is required to use contract travel services pursuant to Government Code, §2171.055.

(7) State employee--Any person employed by a state agency, or an elected or appointed official.

(8) State travel credit card--A credit card issued to an individual or a governmental entity by a contract travel credit card contractor.

(9) State travel directory--A comptroller publication that lists current available contract travel services.

(10) Traveler--Any person eligible to use contract travel services, including those eligible pursuant to the comptroller's travel allowance guide.

§20.408. *Exceptions to the Use of Contract Travel Services and Higher Cost of Travel.*

(a) Exceptions to use of contract travel services. In accordance with these rules and applicable statutes, state agencies may allow their employees to use travel services other than contract travel services only if one or more of the exceptions in subsections (b) through (i) of this section apply. Nothing in this section affects or alters the authority of the comptroller regarding travel reimbursement or audit of travel transactions.

(b) Lower overall cost of travel. The state agency obtains lower priced travel services through the use of fourteen day or other advanced reservations programs, promotional price reductions, or any method that provides a lower overall cost of travel. When a state agency uses any travel services obtained at a lower overall cost than the contract travel services price, the exception must be documented by the agency. The agency should document and follow a consistent cost comparison methodology.

(c) Unavailability of contract travel services. The contract travel services are not available during the time or at the location necessary for the business purpose; or the contract travel service does not provide for the service required; or because the contractor is unable to provide the contract services due to a force majeure event.

(d) Special needs. The traveler's health, safety, physical condition, or disability requires accommodations, including medical emergency or other necessary services, not available from contract travel service contractors.

(e) Custodians of persons. The traveler has custody of a person pursuant to statute or court order and the traveler is required to provide a degree of security and safety that is not available from contract travel service contractors.

(f) In travel status. The traveler is in the course of travel and changes in scheduling render the use of contract travel services imprac-

tical or the appropriate travel services are not available. The traveler shall make reasonable efforts to secure rates equal to or lower than the contract travel service rates.

(g) Group program. The traveler is using a group program wherein reservations were made through a required source to obtain a particular rate or service.

(h) Emergency response. The traveler is responding to a public health or safety emergency situation and the use of contract travel services is not available or would result in an unacceptable delay.

(i) Legally required attendance. The traveler is required by a court, administrative tribunal, or other entity to appear at a particular time and place without sufficient notice to obtain contract travel services.

(j) Lodging reimbursement exceeding General Services Administration rates. Except when a state employee may claim less than the maximum meal reimbursement rate for a duty point and use the amount of the reduction to increase the maximum lodging reimbursement rate for the duty point, if a state agency reimburses lodging at a

rate exceeding the maximum set in the regulations issued by the United States General Services Administration for a particular location, the agency must document its determination that local conditions necessitate the higher rate for that location.

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

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