

# PROPOSED RULES

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

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

## TITLE 7. BANKING AND SECURITIES

### PART 6. CREDIT UNION DEPARTMENT

#### CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

##### SUBCHAPTER G. LENDING POWERS

###### 7 TAC §91.708

The Credit Union Commission (the Commission) proposes amendments to §91.708, relating to a credit union's utilization of appraisals on consumer real estate loans. The Commission proposes these amendments as a result of its regular rule review under Texas Government Code §2001.039 and Texas Finance Code §15.402, which authorizes the Commission to adopt reasonable rules for administering Texas Finance Code, Title 2, Chapter 15 and Title 3, Subtitle D.

The proposed amendments to §91.708 reflect amendments made to the National Credit Union Administrations Rules and Regulations Part 722 (12 CFR Part 722) to align with requirements of other depository financial services providers. The amended language increases the threshold at which licensed appraisals are required when underwriting consumer real estate loans. The proposed language requires consumer real estate loans at or exceeding \$400,000 to have an appraisal conducted by a state licensed appraiser, an increase from the current \$250,000 limit. The proposed amendment is necessary to maintain competitiveness with the federal credit union charter, and update credit union rules to the same standard applied to federal and state banking industries.

**FISCAL NOTE ON STATE AND LOCAL GOVERNMENTS.** John J. Kolhoff, Commissioner, has determined that for the first five-year period the proposed amendments are in effect, there are no reasonably foreseeable implications relating to cost or revenues of state or local governments, under Government Code §2001.024(a)(4), as a result of enforcing or administering these amendments, as proposed.

**PUBLIC BENEFIT/COST NOTE.** Mr. Kolhoff has determined, under Government Code §2001.024(a)(5), that for the first five-year period the amended rules are in effect, the public benefit of rule clarity will provide improved guidance to the industry. He further has determined there will be no probable economic cost to the credit union system or to persons required to comply with the rule.

**IMPACT ON LOCAL EMPLOYMENT OR ECONOMY.** There is no reasonably forecasted effect on local economy for the first five years that the proposed amendments are in effect. Therefore,

no economic impact statement, local employment impact statement, nor regulatory flexibility analysis is required under Texas Government Code §§2001.022 or 2001.024(a)(6).

**COST TO REGULATED PERSONS (COST-IN/COST-OUT).** This rule proposal is not subject to Texas Government Code §2001.0045, concerning increasing costs to regulated persons, because this agency is a Self-Directed Semi-Independent (SDSI) agency under Finance Code Chapter 16 and is exempt from that cost provision.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES.** Mr. Kolhoff has also determined that for each year of the first five years the proposed amendment is in effect, there will be no reasonably forecasted adverse economic effect on small businesses, micro-businesses, or rural communities as a result of implementing these amendments, and, therefore, no regulatory flexibility analysis, as specified in Texas Government Code §2006.002 is required.

**GOVERNMENT GROWTH IMPACT STATEMENT.** In compliance with Texas Government Code §2001.0221, the Board has prepared a government growth impact statement. Unless indicated below, for each year of the first five years that the rule will be in effect, the rule will not:

- create or eliminate a government program;
- require the creation of new employee positions or the elimination of existing employee positions;
- require an increase or decrease in future legislative appropriations to the agency;
- lead to an increase or decrease in the fees paid to the department;
- create new regulations;
- expand, limit or repeal existing regulation;
- increase or decrease the number of individuals subject to the rule's applicability;
- positively or adversely affect this state's economy.

**TAKINGS IMPACT ASSESSMENT.** No private real property interests are affected by this proposal, and the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action. Therefore, the rule does not constitute a taking under Texas Government Code §2007.043.

**ENVIRONMENTAL RULE ANALYSIS.** The proposed rule is not a "major environmental rule" as defined by Government Code §2001.0225. The proposed rule is not specifically intended to

protect the environment or to reduce risks to human health from environmental exposure. Therefore, a regulatory environmental analysis is not required.

**REQUEST FOR PUBLIC COMMENT.** Written comments on the proposed amendments may be submitted in writing to John J. Kolhoff, Commissioner, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699 or by email to CUD-Mail@ cud.texas.gov. To be considered, a written comment must be received on or before 5:00 p.m. on the 31st day after the date the proposal is published in the *Texas Register*.

**STATUTORY AUTHORITY.** The amendments are proposed pursuant to Texas Finance Code §15.402, which authorizes the Commission to adopt reasonable rules for administering Texas Finance Code, Title 2, Chapter 15 and Title 3, Subtitle D.

**STATUTORY SECTIONS AFFECTED.** The statutory provisions affected by the proposed amendments are contained in Texas Finance Code Chapter 15, and Title 3, Subtitle D specifically §§123.201 and 124.001.

§91.708. *Real Estate Appraisals or Evaluations.*

(a) Policies and Procedures. A credit union's board of directors is responsible for reviewing and adopting policies and procedures that establish and maintain an effective, independent real estate appraisal and evaluation program. A credit union's selection criteria for individuals who may perform appraisals or evaluations must provide for the independence of the individual performing the evaluation. That is, the individual has neither a direct nor indirect interest, financial or otherwise, in the property or transaction. The individual selected must also be competent to perform the assignment based upon the individual's qualifications, experience, and educational background. An individual may be an employee of a credit union if the individual qualifies under the conditions and requirements contained in Part 722 of the National Credit Union Administration Rules and Regulations.

(b) Loans Over \$400,000 [~~\$250,000~~]. For real estate loans in which the loan amount [~~of the loan~~] or extension of credit exceeds \$400,000 [~~\$250,000~~], the credit union shall obtain a professional appraisal report by a state certified or licensed appraiser. The appraisal report shall be in writing and conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice promulgated by the Appraisal Standards Board of the Appraisal Foundation, in Washington, D.C.

(c) Loans \$400,000 [~~\$250,000~~] or Less. For [a] real estate loans with a loan [~~an~~] amount [~~of the loan~~] or extension of credit of \$400,000 [~~\$250,000~~] or less, the services of a state certified or licensed appraiser is not necessary; however, the credit union must obtain an appropriate evaluation of real property collateral that is supported by a written estimate of market value either performed by a qualified individual who has demonstrated competency in performing evaluations or from tax appraisal data of a governmental entity.

(d) Right to Require an Appraisal. The commissioner may require an appraisal under this section, at the expense of the credit union, when the commissioner has reasonable cause to believe the value of the collateral is overstated.

(e) Existing Loans. In the case of renewal of a loan where there has been no obvious and material change in market conditions or physical aspects of the property that threatens the adequacy of the credit union's real estate collateral protection after the transaction, even with the advancement of additional funds, a written certification of current value by the original appraiser or an acceptable substitute shall satisfy this section.

(f) Other Appraisal Requirements. A credit union shall also comply with applicable real estate appraisal requirements contained within Part 722 of the National Credit Union Administration Rules and Regulations.

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

Filed with the Office of the Secretary of State on May 11, 2020.

TRD-202001840

John J. Kolhoff

Commissioner

Credit Union Department

Earliest possible date of adoption: June 21, 2020

For further information, please call: (512) 837-9236



## TITLE 13. CULTURAL RESOURCES

### PART 7. STATE PRESERVATION BOARD

#### CHAPTER 111. RULES AND REGULATIONS OF THE BOARD

##### 13 TAC §111.13

The State Preservation Board (Board) proposes amendments to 13 TAC §111.13, Exhibitions in the Capitol and Capitol Extension.

##### BACKGROUND AND SECTION-BY-SECTION ANALYSIS

For a number of years, the Board has overseen a program by which private individuals could "for a nominal fee and with an appropriate sponsor" exhibit displays in designated areas of the Capitol and Capitol Extension. By and large, this program has successfully allowed elected representatives to sponsor visual displays created by Texans for the education and edification of other Texans. There has, however, been occasional confusion about what types of displays were contemplated by the program, who is ultimately responsible for the content of those displays, and how those displays are connected to the State or state officials. While episodic, the Board has determined it best to address that confusion.

The amendments to §111.13 are designed to clarify that all future exhibits in the Capitol will be adopted and identified as government speech, including identifying its sponsor. The amendments change the heading's use of the term "exhibition" to "exhibit" to reflect the word usage throughout the amended rule; other similar typographical changes are made for consistent usage. They are not intended to be substantive changes unless described herein. The definition of public purpose (§111.13(a)(3)) clarifies what types of exhibits will be considered for adoption as government speech and expressly excludes exhibits that are sensationalistic, gruesome, obscene, or depictions of political controversy. The definition of State Official Sponsor (§111.13(a)(4)) clarifies that a qualified elected official may sponsor an exhibit proposed by his or her constituents, but that he or she is responsible for ensuring that the exhibit complies with all applicable rules. §111.13(b) is added to explicitly adopt the exhibit as government speech and to require that any exhibit in the Capitol be accompanied by a sign identifying the State Official Sponsor

and indicating the Board's approval. Because any exhibit will become government speech for the duration of its display, the current fee to obtain access to space within the Capitol is removed from what is now §111.13(c). However, individuals proposing an exhibit retain ownership of that exhibit and are responsible for costs of assembling, displaying, and removing the exhibit as well as (if necessary) providing additional security for a valuable exhibit. The criteria for consideration (§111.13(d)) are amended to make explicit that because all displays constitute the government's speech, the Board retains discretion to reject any exhibit as inappropriate for government speech. To be considered, all content of the exhibit (including any text) must be clearly disclosed to the Board, and the Sponsor must make a written statement that he or she has reviewed that content and concluded that it is consistent with the rules and proper for adoption as government speech. Consistent with the exhibit's adoption as government speech, the Board retains discretion to make any changes it deems appropriate to the exhibit. Finally, the amendments clarify that the scheduling and duration of the display of an exhibit (§111.13(e)) is at the discretion of the Board.

**FISCAL NOTE ON STATE AND LOCAL GOVERNMENTS.** Rod Welsh, Executive Director for the Board, has determined that for the first five-year period the proposed amendments are in effect, there are only minor implications relating to cost or revenues of the state, and none for local governments, under Texas Government Code §2001.024(a)(4), as a result of enforcing or administering these amendments as proposed. The state has received nominal amounts of fees during the time the Board has had this rule in place. As a result, the elimination of the fee will have a minor impact.

**PUBLIC BENEFIT/COST NOTE.** Mr. Welsh has determined, under Texas Government Code §2001.024(a)(5) that that for the first five-year period the rule amendments are in effect, the public benefit will be the elimination of any confusion regarding the person or persons responsible for any exhibits placed in the Capitol. Costs to the public will not be significantly changed by this amendment. At present, individuals who wish to place an exhibit in the Capitol must locate an eligible sponsor; pay a nominal fee to obtain access to the space; and bear all costs associated with creating, displaying, securing, and removing the exhibit. The only change is to remove the nominal fee. He further has determined there will be no probable economic cost to persons required to comply with the rule amendments because the rule amendment does not add fees or costs.

**IMPACT ON LOCAL EMPLOYMENT OR ECONOMY.** There is no effect on local economy for the first five years that the proposed amendments are in effect because this rule concerns the temporary display of exhibits in the Capitol, which is state property, and, therefore, it will have no impact on local economy. Therefore, no economic impact statement, local employment impact statement, nor regulatory flexibility analysis is required under Texas Government Code §§2001.022 or 2001.024(a)(6).

**COST TO REGULATED PERSONS (COST-IN/COST-OUT).** This rule proposal is not subject to Texas Government Code §2001.0045, concerning increasing costs to regulated persons, because, as described above in the public benefit and cost note, the proposed amendments do not impose a cost on regulated persons under Texas Government Code §2001.024, including another state agency, a special district, or a local government.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.** Mr. Welsh has also

determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments and, therefore, no regulatory flexibility analysis, as specified in Texas Government Code §2006.002 is required because the rule concerns only activities that occur in the Capitol and Capitol Extension.

**GOVERNMENT GROWTH IMPACT STATEMENT.** In compliance with Texas Government Code §2001.0221, the Board has prepared the following government growth impact statement. During the first five years the proposed rule is in effect, this proposed amendments: (1) will not create or eliminate a government program; (2) will not result in an increase or decrease in the number of agency employees; (3) will not require an increase or decrease in future legislative appropriations to the agency; (4) will not lead to an increase in fees paid to a state agency and will lead to only a minor decrease in fees paid to the Board because the fees to display exhibits in the Capitol were always nominal and have been limited in recent years by renovations in the Capitol that have limited space available for exhibitions; (5) will not create a new regulation; (6) will not repeal an existing regulation; and (7) will not result in an increase or decrease in the number of individuals subject to the rule; and (8) will not positively or adversely affect the state's economy because the amount of fees the Board received under the current program has always been minor and used to defray any cost with processing applications for the program rather than promote external economic activity.

**TAKINGS IMPACT ASSESSMENT:** The Board has determined that no private real property interests are affected by this proposal and the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

**ENVIRONMENTAL RULE ANALYSIS.** The proposed rule is not a "major environmental rule" as defined by Texas Government Code §2001.0225. The proposed rule is not specifically intended to protect the environment or to reduce risks to human health from environmental exposure. Therefore, a regulatory environmental analysis is not required.

**REQUEST FOR PUBLIC COMMENT.** Any comments or request for a public hearing may be submitted no later than 30 days after the publication of this notice to Rod Welsh, Executive Director, State Preservation Board, P.O. Box 13286, Austin, Texas, faxed to his attention at (512) 463-3372 or sent by email to Roderick.Welsh@tspb.texas.gov.

Emails should contain the words "Comment to Rule" in the subject heading.

**STATUTORY AUTHORITY AND SECTIONS AFFECTED.** The amendments are proposed pursuant to Texas Government Code §443.007, which authorizes the Board to adopt rules concerning the buildings, their contents, and their grounds; and Texas Government Code §443.018, which authorizes the Board to adopt rules that regulate the actions of visitors in the Capitol or on the grounds of the Capitol including rules that prohibit persons from attaching signs, banners, or other displays to a part of the Capitol or to a structure, including a fence, on the grounds of the Capitol except as approved by the board.

No other statutes, articles or codes are affected by the proposed amendments.

§111.13. *Exhibits [Exhibitions] in the Capitol and Capitol Extension*

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Exhibit [Exhibitions]--Any display of artwork, including paintings, sculptures, arts and crafts; photographs; public service and general interest presentations; and historical displays.

(2) Public areas of the Capitol and Capitol Extension--The hallways, entrances, vestibules, stairways, light courts, rotundas, and other areas adjacent to or ~~and~~ near the rotunda.

(3) Public purpose--The promotion of the public health, education, safety, ~~morals,~~ general welfare, security, and prosperity of all of the inhabitants or residents within the state, the sovereign powers of which are exercised to promote such public purpose or public business. The chief test of what constitutes a public purpose is that the public generally must have a direct interest in the purpose and the community at large is to be benefitted. This does not include exhibits that are inconsistent with the historic presence of the Capitol and Capitol Extension, including exhibits which are sensationalistic, gruesome, or obscene. It also does not include activities which depict subjects of a contemporary political controversy or ~~activities~~ which promote a specific viewpoint or issue and could be considered lobbying. Political rallies, receptions, and campaign activities are prohibited in the public areas of the Capitol and Capitol Extension.

(4) State official sponsor--The Governor, the Lieutenant Governor, the Speaker of the Texas House of Representatives, a Texas Senator, or member of the Texas House of Representatives may sponsor exhibits proposed by his or her constituents. The State Official Sponsor is responsible for determining that an exhibit meets all applicable rules. Potential exhibitors are advised to consult with their proposed Sponsor regarding whether additional rules apply.

(b) Any exhibit approved and scheduled pursuant to this section by the office of the State Preservation Board is hereby adopted as government speech, and shall be accompanied by a statement identifying the State Official Sponsor and indicating the approval of the office of the State Preservation Board.

(c) Fees and Costs. No fee is required from persons or entities that use the Capitol and Capitol Extension for an exhibit. However, the State Preservation Board may require any exhibitor to cover the direct and indirect costs to the state of the exhibit, including the costs of labor, materials, and utilities directly or indirectly attributable to the exhibit, including costs of assembling, displaying, and removing exhibits.

(d) Criteria for Exhibit Consideration.

(1) Exhibits may be approved and scheduled by the office of the State Preservation Board.

(2) Exhibits will not be considered for display unless they serve a public purpose as defined in subsection (a)(3) of this section.

(3) To be considered, a request must be accompanied by:

(A) a detailed description of the exhibit, including dimensions of the space required, how the exhibit will be displayed, and every word to be conveyed by the exhibit;

(B) a clear photograph of the entire exhibit, preferably as it will be displayed, or a scale drawing if a photograph is not available;

(C) a brief statement of the purpose of the exhibit; and

(D) statement of a State Official Sponsor as described in subsection (a)(4) of this section that the exhibit meets the criteria and is appropriate for adoption as government speech.

(4) Incomplete requests will not be considered.

(5) Exhibits must be tastefully exhibited. The office of the State Preservation Board reserves the right to require the exhibitor to make any changes to the exhibit.

(6) Exhibit space will be assigned at the discretion of the office of the State Preservation Board, considering factors such as the size, scope, and design of the exhibit. Exhibits will not be approved for display in the Capitol rotunda in order to maintain its historic presence.

(7) To be considered for display, an exhibit must be free-standing. Art and photographic exhibits must be secured to tripods, backdrops, or freestanding displays. Exhibits may not:

(A) hang from or attach to walls or railings;

(B) obstruct entrances;

(C) interrupt traffic flow through the building;

(D) damage walls, woodwork, or floors;

(E) obstruct the view or access to fire-fighting equipment or fire alarm pull stations; or

(F) involve the use of any flammable, hazardous, or odorous chemicals or materials, torches, or other open-flame illuminating devices or fires.

(8) Exhibits will not be considered for display as government speech in the Capitol or Capitol Extension if they:

(A) feature one individual's artwork for the purpose of commercially advertising that person's artwork;

(B) promote a commercial enterprise;

(C) have no public purpose; or

(D) have an illegal purpose.

(9) If other than routine security provided by Capitol police is needed for the exhibit, the exhibitor will bear such costs. The State of Texas, the State Preservation Board, or any employee of the State Preservation Board shall not be held liable in case of damage or loss to an exhibit while it is on display in the Capitol and Capitol Extension.

(e) Scheduling exhibits.

(1) Because exhibits in the Capitol and Capitol Extension are government speech, the State Preservation Board retains discretion regarding how long to display an exhibit. Exhibits typically are displayed for up to 5 working days.

(2) The office of the State Preservation Board may shorten or extend the display time for exhibits.

(3) No more than one exhibit will be approved for display on the same day in a designated area of the Capitol and Capitol Extension.

(4) A written request using State Preservation Board forms to display an exhibit must be received by the office of the State Preservation Board no later than two weeks prior to the first day of the time being requested.

~~[(b) Fee for use of Capitol and Capitol Extension. A fee is required from persons or entities that use the Capitol and Capitol Extension, for an exhibition. The fee is in an amount set by the office of the State Preservation Board designed to recover the estimated direct and indirect costs to the state of the exhibition, including the costs of labor, materials, and utilities directly or indirectly attributable to the exhibition. The fee is required in the office of the State Preservation Board no later than 24 hours prior to the exhibit installation.]~~

[(c) Criteria for Exhibition Approval.]

[(1) Exhibitions shall be approved and scheduled by the office of the State Preservation Board upon the recommendation of a state official sponsor as described in subsection (a)(4) of this section.]

[(2) Exhibitions must be for a public purpose as defined in subsection (a)(3) of this section.]

[(3) Request must be accompanied by:]

[(A) a detailed description of the exhibit, including dimensions of the space required, and how the exhibit will be displayed;]

[(B) a clear photograph of the entire exhibit, preferably as it will be displayed. A scale drawing may be submitted in lieu of a photograph if a photograph is not available;]

[(C) a brief statement of the purpose of the exhibit; and]

[(D) recommendation of a state official sponsor as described in subsection (a)(4) of this section.]

[(4) Incomplete requests will not be considered.]

[(5) Exhibits must be tastefully exhibited. Once erected, the office of the State Preservation Board reserves the right to require the exhibitor to make aesthetic changes to the exhibit.]

[(6) Exhibit space will be assigned based primarily on the size, scope, and design of the exhibit. Exhibitions will not be approved for display in the Capitol rotunda in order to maintain its historic presence.]

[(7) Exhibitors must bear all costs of assembling, displaying, and removing exhibits.]

[(8) All exhibits must be freestanding. Art and photographic exhibits must be secured to tripods, backdrops, or freestanding displays. Exhibits may not:]

[(A) hang from or attach to walls or railings;]

[(B) obstruct entrances;]

[(C) interrupt traffic flow through the building;]

[(D) damage walls, woodwork, or floors;]

[(E) obstruct the view or access to fire-fighting equipment or fire alarm pull stations; or]

[(F) involve the use of any flammable, hazardous, or odorous chemicals or materials, torches, or other open-flame illuminating devices or fires.]

[(9) Exhibits will not be considered for display in the Capitol and Capitol Extension if they: ]

[(A) feature one individual's artwork for the purpose of commercially advertising that person's artwork;]

[(B) promote a commercial enterprise;]

[(C) have no obvious public purpose; or]

[(D) have an illegal purpose.]

[(10) If other than routine security provided by Capitol police is needed for the exhibit, the exhibitor will bear such costs. The State of Texas, the State Preservation Board, or any employee of the State Preservation Board shall not be held liable in case of damage or loss to an exhibit while it is on display in the Capitol and Capitol Extension.]

[(d) Scheduling exhibits.]

[(1) Exhibits may be displayed for up to 5 working days.]

[(2) The office of the State Preservation Board may extend the display time for major exhibitions.]

[(3) No more than one exhibit will be approved for display on the same day in a designated area of the Capitol and Capitol Extension.]

[(4) A written request using State Preservation Board forms to display an exhibit must be received by the office of the State Preservation Board no later than two weeks prior to the first day of the time being requested.]

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

Filed with the Office of the Secretary of State on May 11, 2020.

TRD-202001851

Rod Welsh

Executive Director

State Preservation Board

Earliest possible date of adoption: June 21, 2020

For further information, please call: (512) 475-3616



## TITLE 16. ECONOMIC REGULATION

### PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

#### CHAPTER 97. MOTOR FUEL METERING AND QUALITY

The Texas Department of Licensing and Regulation (Department) proposes new rules at 16 Texas Administrative Code (TAC), Chapter 97, Subchapter A, §§97.1 - 97.3; Subchapter B, §§97.20 - 97.28; Subchapter C, §§97.40 - 97.43; Subchapter D, §§97.50 - 97.60; Subchapter E, §§97.70 - 97.74; and Subchapter F, §97.80, regarding the Motor Fuel Metering and Quality Program. These proposed changes are referred to as "proposed rules."

#### EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The proposed rules are necessary to implement Senate Bill (SB) 2119, 86th Legislature, Regular Session (2019), which transferred the Motor Fuel Metering and Quality Program (Program) from the Texas Department of Agriculture (TDA) to the Texas Commission of Licensing and Regulation (Commission) and the Department and which, effective September 1, 2020, creates new Texas Occupations Code, Chapter 2310, Motor Fuel Metering and Quality. The proposed rules are necessary to enable the Commission and the Department to administer and regulate the Program. The proposed rules are separate from, and are not to be confused with, the TDA rules located at 4 TAC, Chapters 5 and 12, regarding the Program, which are still in effect but will be repealed.

The Department established the Motor Fuel Metering and Quality Workgroup (Workgroup), authorized by SB 2119, Section 12, to advise the Department and TDA on the orderly transfer of the Program. The proposed rules were presented to and discussed with the Workgroup at its initial meeting on February 27, 2020,

and its members subsequently provided additional input in meetings of less than a quorum prior to this publication.

#### SECTION-BY-SECTION SUMMARY

The proposed rules create new Subchapter A to contain general provisions applicable to the chapter.

The proposed rules create new §97.1 to identify the statutory authority under which the proposed rules are to be promulgated.

The proposed rules create new §97.2 to establish definitions used in the chapter.

The proposed rules create new §97.3 to adopt by reference certain nationally recognized minimum standards incorporated into the chapter.

The proposed rules create new Subchapter B to contain provisions applicable to motor fuel metering devices.

The proposed rules create new §97.20 to establish the requirements for registration of devices.

The proposed rules create new §97.21 to establish the renewal requirements for device registrations.

The proposed rules create new §97.22 to establish the responsibilities of an owner or operator when there is a change to the number of registered devices.

The proposed rules create new §97.23 to establish the requirements for device performance reviews.

The proposed rules create new §97.24 to establish the requirements applicable to certificates of registration.

The proposed rules create new §97.25 to establish the requirements applicable to consumer information stickers.

The proposed rules create new §97.26 to establish the requirements applicable to devices that fail to comply with technical requirements.

The proposed rules create new §97.27 to establish the requirements applicable to devices that are condemned by the department.

The proposed rules create new §97.28 to establish the requirements for maintenance of records of device performance reviews.

The proposed rules create new Subchapter C to contain provisions applicable to the sale, delivery, and quality of motor fuel.

The proposed rules create new §97.40 to establish the requirements applicable to certificates of compliance for distributors, jobbers, suppliers, and wholesalers.

The proposed rules create new §97.41 to establish the requirements applicable to automotive fuel rating.

The proposed rules create new §97.42 to establish the requirements applicable to stop-sale orders.

The proposed rules create new §97.43 to establish the requirements applicable to the maintenance of fuel delivery records.

The proposed rules create new Subchapter D to contain the provisions applicable to service companies and service technicians.

The proposed rules create new §97.50 to establish the requirement of criminal history checks on applicants for service company licenses and service technician licenses.

The proposed rules create new §97.51 to establish device categories and types of maintenance activities that a service company or service technician may perform.

The proposed rules create new §97.52 to establish the requirements for a service company license.

The proposed rules create new §97.53 to establish the insurance requirements for a service company.

The proposed rules create new §97.54 to establish the renewal requirements for a service company license.

The proposed rules create new §97.55 to establish the requirements for a service technician license.

The proposed rules create new §97.56 to establish the renewal requirements for a service technician license.

The proposed rules create new §97.57 to establish the examination requirements for a service technician license.

The proposed rules create new §97.58 to establish the requirements applicable to test standards.

The proposed rules create new §97.59 to establish the responsibilities of a service technician to inspect for and report the presence of a skimmer.

The proposed rules create new §97.60 to establish the records maintenance requirements for service companies.

The proposed rules create new Subchapter E to contain provisions relating to fees.

The proposed rules create new §97.70 to establish device fees.

The proposed rules create new §97.71 to establish fees for distributors, jobbers, wholesalers, and suppliers.

The proposed rules create new §97.72 to establish fees for service companies.

The proposed rules create new §97.73 to establish fees for service technicians.

The proposed rules create new §97.74 to establish policies applicable to fees.

The proposed rules create new Subchapter F to contain fees relating to enforcement.

The proposed rules create new §97.80 to establish the authority of the Commission and the Department to institute enforcement proceedings to impose administrative penalties and sanctions for violations of applicable laws and rules.

#### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

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

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to the state as a result of enforcing or administering the proposed rules.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, revenue to the state will be affected as follows: (1) in the first year, an estimated loss in revenue of \$193,884; (2) in the second year, an estimated loss in revenue of \$191,544; (3) in the third year, an estimated loss in

revenue of \$189,204; (4) in the fourth year, an estimated loss in revenue of \$186,864; and (5) in the fifth year, an estimated loss in revenue of \$184,524.

The proposed rules will decrease the fuel quality fee for approximately:

- 114,949 devices that deliver multiple gasoline products per nozzle by \$1.50 per year;
- 15,170 devices that deliver a single gasoline product per nozzle by \$0.50 per year;
- 1,173 devices with a maximum flow rate greater than 100 gallons per minute (GPM) from \$1.00 per year to \$0; and
- 102 suppliers by \$200 per year.

The proposed rules will increase the fuel quality fee for approximately:

- 56,850 devices that deliver diesel or another non-gasoline product from a single nozzle by \$2.50 per year;
- 2,140 devices that deliver E85 ethanol fuel from a single nozzle by \$2.50 per year; and
- 8,437 motor fuel metering devices with a maximum flow rate of 20 GPM to 100 GPM by \$2.50 per year.

The proposed rules will decrease the registration fees for approximately:

- 8,437 devices with a maximum flow rate of 20 GPM to 100 GPM by \$15 per year; and
- 1,173 devices with a maximum flow rate greater than 100 GPM by \$25 per year.

The proposed rules will decrease the additional device category license fee by \$50 per year for service companies, of which approximately 41 companies currently hold registrations in a second device category, and no companies currently hold registrations in three categories.

The proposed rules will also create a \$30 license fee and a two-year license term for service technicians. The current population of approximately 725 service technicians hold five-year licenses issued by TDA. As their current licenses expire, service technicians will pay the license fee to renew their licenses with TDLR for a two-year license period, at the rate of approximately 145 renewals per year.

All other licenses and registrations, will transition from a one-year license or registration period to two years. Half of the population of each license or registration will pay an application fee for a two-year license in the first year. The other half of the population will pay an application fee for a two-year license in the following fiscal year.

The overall reduction in fees will result in a loss of revenue to the state in each of the first five years the proposed rules are in effect.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

#### PUBLIC BENEFITS

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be a decrease in fees for many registrants and licensees, an increase to two-year terms for most registrants and licensees, increased consumer protection resulting from criminal history background checks on service companies and service technicians, and enhanced clarity of language to help the public and regulated persons to better understand the program requirements.

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there will be a reduction in costs to some persons who are required to comply with the proposed rules. The total reduction in costs for a particular person will vary each year depending on which and how many of the following decreased fees are applicable to that person, including:

- the fuel quality fee for devices that deliver multiple gasoline products per nozzle (a decrease by \$1.50 per year);
- the fuel quality fee for devices that deliver a single gasoline product per nozzle (a decrease by \$0.50 per year);
- the fuel quality fee for devices with a maximum flow rate greater than 100 GPM (a decrease by \$1.00 per year);
- the registration fee for devices with a maximum flow rate of 20 GPM to 100 GPM (a decrease by \$15 per year);
- the registration fee for devices with a maximum flow rate greater than 100 GPM (a decrease by \$25 per year);
- the fuel quality fees for suppliers (a decrease by \$200 per year); and
- the additional device category license fee for service companies (a decrease by \$50 per year).

#### PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there will be additional costs to some persons who are required to comply with the proposed rules. The total additional costs for a particular person will vary each year depending on which and how many of the following increased fees are applicable to that person, including:

- the fuel quality fee for devices that deliver diesel or another non-gasoline product from a single nozzle (an increase by \$2.50 per year);
- the fuel quality fee for devices that deliver E85 ethanol fuel from a single nozzle (an increase by \$2.50 per year); and
- the fuel quality fee for devices with a maximum flow rate of 20 GPM to 100 GPM (an increase by \$2.50 per year).

There will also be an increase in costs to initial applicants and some renewal applicants for service technician licenses. Currently, applicants for an initial or renewal service technician license issued by TDA must take an examination per license category, at a cost of \$60 per category each time the exam is taken. The license must be renewed, and the exam(s) must be retaken every five years; there is no license fee. Under the proposed rules, applicants for initial or renewal two-year licenses issued by TDLR must pay a \$30 license fee, and only initial applicants must take the \$60 examination per device category. As a result, initial applicants in the first year the rules are in effect will pay the \$60 examination fee and a \$30 initial license fee in the first year

and will pay a \$30 license renewal fee in the third year, resulting in a total of \$60 in total increased costs over the first five years the proposed rule are in effect. Additionally, current licensees whose five-year licenses expire in the first year the proposed rules are in effect will pay \$30 license renewal fees in the first, third, and fifth years, resulting in a total of \$30 in total increased costs over the first five years the proposed rules are in effect.

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

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

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

The proposed rules do have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government; however, the proposed rules fall under the exception for rules that are necessary to implement legislation under §2001.0045(c)(9). Therefore, the agency is not required to take any further action under Government Code §2001.0045.

#### GOVERNMENT GROWTH IMPACT STATEMENT

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

1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the elimination of existing employee positions. Section 18.80, Article IX of the General Appropriations Act for the 2020-21 Biennium increased the number of full-time equivalent (FTE) employee positions at TDLR by 68.0 FTEs each year of the biennium. The section also decreased the number of FTEs at TDA by 35.9 FTEs each year, therefore new employee positions will be created at TDLR.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do require an increase or decrease in fees paid to the agency. The proposed rules will result in an increase in fees paid to the agency in the first year the proposed rules are in effect, due to the license and registration renewal fees paid in the first year. However, the overall reduction in program fees will result in a decrease in fees paid to the agency over the subsequent four years.
5. The proposed rules do create a new regulation. The proposed rules add requirements for criminal history background checks for service technicians and service companies, which are required by statute.

6. The proposed rules do expand, limit, or repeal an existing regulation. The proposed rules expand the current TDA rules by clarifying the statutory requirements for inspection, testing, and calibration. The proposed rules repeal certain requirements which no longer apply, as a result of the passage of SB 2119. For example, the procedures for consumer complaints are no longer applicable since TDLR is not prohibited from conducting inspections. The rules also repeal certain application requirements, such as a citizenship requirement for service company applicants.

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

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

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENTS

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

## SUBCHAPTER A. GENERAL PROVISIONS

### 16 TAC §§97.1 - 97.3

#### STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Business and Commerce Code, Chapter 607, and Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed rules.

#### §97.1. Authority.

This chapter is promulgated under the authority of the Texas Occupations Code, Chapters 51 and 2310.

#### §97.2. Definitions.

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

(1) ASTM--ASTM International; the national voluntary consensus standards organization formed for the development of

standards on characteristics and performance of materials, products, systems and services and the promotion of related knowledge.

(2) Code--The Texas Occupations Code, Chapter 2310, "Motor Fuel Metering and Quality."

(3) Commission--Texas Commission of Licensing and Regulation.

(4) Controlling person--an individual who:

(A) is a sole proprietor;

(B) is a general partner of a partnership;

(C) is a controlling person of a business entity that is a general partner of a partnership;

(D) possesses direct or indirect control of at least 25 percent of the voting securities of a corporation;

(E) is the president, the secretary, or a director of a corporation; or

(F) possesses the authority to set policy or direct the management of a business entity.

(5) Department--Texas Department of Licensing and Regulation.

(6) Device--A commercial weighing or measuring device used for motor fuel sales, also defined as a motor fuel metering device by §2310.001(7) of the Code.

(7) Device performance review (DPR)--The comprehensive inspection and testing of a motor fuel metering device to ensure it is calibrated and operating according to NIST and Manufacturer specifications.

(8) Gasoline--A liquid or combination of liquids blended together, offered for sale, sold, used, or capable of use as fuel for a gasoline-powered engine. The term includes gasohol, aviation gasoline, and blending agents, but does not include compressed natural gas, liquefied natural gas, racing gasoline, diesel fuel, aviation jet fuel, or liquefied gas, as defined in §162.001(29) of the Texas Tax Code.

(9) GPM--Gallons per minute.

(10) ISO--International Organization for Standardization; an independent, non-governmental organization that develops voluntary international standards to facilitate world trade by providing common standards among nations.

(11) LPG--Liquid petroleum gas.

(12) LPG meter--A meter used to deliver LPG for use as a motor fuel.

(13) Motor fuel--Gasoline, diesel fuel, gasoline blended fuel, compressed natural gas, liquefied natural gas, and other products that are offered for sale, sold, used, or capable of use as fuel for a gasoline-powered engine or a diesel-powered engine, as defined in §162.001(42) of the Texas Tax Code.

(14) NIST--The National Institute of Standards and Technology; a non-regulatory federal agency under the United States Department of Commerce, which certifies and provides standard reference materials used to perform instrument calibrations, verifies the accuracy of specific measurements and supports the development of new measurement methods.

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

(16) Test standard--A certified weight or measure used to test a device for accuracy.

§97.3. Adoption by Reference.

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

(1) Legal standards for weights and measures. NIST Handbook 44 (2020 Edition), "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices."

(2) Motor fuel quality testing standards.

(A) NIST Handbook 130 (2020 Edition), "Uniform Laws and Regulations in the Areas of Legal Metrology and Fuel Quality," as standard specifications for alcohol blends with the following modifications:

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

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

(B) ASTM D4814-20, "Standard Specification for Automotive Spark-Ignition Engine Fuel," as the standard specifications for gasoline with the following modification:

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

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

(C) ASTM D975-02, "Standard Specification for Diesel Fuel Oils" as the standard specifications for diesel motor fuels and renewable diesel fuels; and

(D) ASTM D5798-19b, "Standard Specification for Ethanol Fuel Blends for Flexible-Fuel Automotive Spark-Ignition Engines," as the standard specifications for E85 ethanol fuel.

(3) Automotive Fuel Rating. The testing methods, standards and specifications used to determine the automotive fuel rating shall be those prescribed by the most current editions of:

(A) ASTM D2699-19, "Standard Test Method for Research Octane Number of Spark-Ignition Engine Fuel;"

(B) ASTM D2700-19, "Standard Test Method for Motor Octane Number of Spark-Ignition Engine Fuel;" and

(C) ASTM D5599-18, "Standard Test Method for Determination of Oxygenates in Gasoline by Gas Chromatography and Oxygen Selective Flame Ionization Detection."

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

Filed with the Office of the Secretary of State on May 11, 2020.

TRD-202001857



## SUBCHAPTER B. MOTOR FUEL METERING DEVICES

### 16 TAC §§97.20 - 97.28

#### STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Business and Commerce Code, Chapter 607, and Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed rules.

#### §97.20. *Registration Required--Devices.*

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

(1) a completed application in a manner prescribed by the department;

(2) documentation of a device performance review in a manner acceptable to the department; and

(3) the fee required under §97.70.

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

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

(d) A change in the name or contact information for an owner or operator must be submitted to the department within 30 days.

(e) Device registrations are valid for two years from issuance of the certificate of registration and must be renewed every two years.

#### §97.21. *Registration Renewal--Devices.*

(a) To renew a device registration, an owner or operator must submit:

(1) a completed renewal application in a manner prescribed by the department;

(2) documentation of a device performance review in a manner prescribed by the department; and

(3) the fee required under §97.70.

(b) Documentation of calibration of a device with a maximum flow rate of 20 GPM or less may be submitted to meet the requirement in subsection (a)(2) for a renewal application that is submitted on or after September 1, 2020 and before December 1, 2020.

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

#### §97.22. *Registration Changes--Devices.*

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

(1) a change notice in a manner prescribed by the department;

(2) documentation of a device performance review for all new devices in a manner acceptable to the department; and

(3) the fee required under §97.70.

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

#### §97.23. *Device Performance Review Requirements.*

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

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

(1) performance testing;

(2) calibration, if necessary; and

(3) inspection of the device:

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

(B) to detect the presence of skimmers.

(c) A DPR report must be submitted by a service company within 10 business days of the DPR in a manner prescribed by the department.

(d) Effective date.

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

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

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

(B) Devices with a maximum flow rate of greater than 100 GPM; and

(C) LPG meters.

#### §97.24. *Certificate of Registration.*

(a) A current certificate of registration must be visibly displayed in an area that is accessible to the public.

(b) If an original or copy certificate is not legible or available to a consumer, it must be replaced within 30 days of the date the owner or operator discovers the condition.

#### §97.25. *Consumer Information Sticker.*

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

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

(c) A consumer information sticker must not be placed in a manner that affects the accuracy, readability, or lawful operation of a device.

(d) This section does not apply to a device on a transport vehicle.

§97.26. Device Out of Order.

An incorrect device shall be placed out of order by the department and may not be used until repairs are made by a licensed service company. Once the device has been brought into compliance with this chapter, the licensed service company may remove the "Out of Order" tag and release it for use.

§97.27. Condemned Devices.

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

§97.28. Device Records.

(a) A device performance review report shall be maintained for a period of two years at the location where the DPR was performed.

(b) All records required to be maintained shall be made available upon request by the department.

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

Filed with the Office of the Secretary of State on May 11, 2020.

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

Earliest possible date of adoption: June 21, 2020

For further information, please call: (512) 463-3671



## SUBCHAPTER C. SALE, DELIVERY, AND QUALITY OF MOTOR FUEL

### 16 TAC §§97.40 - 97.43

#### STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Business and Commerce Code, Chapter 607, and Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed rules.

§97.40. Distributor, Jobber, Supplier, Wholesaler--Certificate of Compliance.

(a) To be eligible for a certificate of compliance, a distributor, jobber, supplier, or wholesaler must:

(1) submit complete business, facility, and contact information in a manner prescribed by the department; and

(2) pay the fee required under §97.71.

(b) A certificate of compliance is valid for two years from the date of issuance by the department.

§97.41. Automotive Fuel Rating.

(a) A dealer must:

(1) post the automotive fuel rating (AFR) for each grade of motor fuel offered for sale as provided in 16 CFR Part 306.10; and

(2) not sell or offer to sell fuel that is less than the AFR posted on the dispenser.

(b) Motor fuel that has an AFR lower than the certification of the rating required under federal law may not be delivered or transferred.

§97.42. Stop-Sale Order.

(a) The executive director of the department may issue an order to stop sale of:

(1) motor fuel sold or offered for sale in violation of this chapter; or

(2) motor fuel sold or offered for sale by or through a device that is in violation of this chapter.

(b) Motor fuel subject to a stop-sale order may not be sold until the order has been discharged by a court pursuant to §2310.060 of the Code, or the executive director receives notice acceptable to the department that the motor fuel or device is in compliance with this chapter.

§97.43. Fuel Delivery Records.

(a) Dealers, distributors, jobbers, suppliers, and wholesalers must keep the following records for four years:

(1) all invoices, receipts, or other transmittal records of the purchase, sale, delivery, or distribution of motor fuel; and

(2) any record or other document related to the sampling and testing of motor fuel purchased, sold, delivered, or distributed.

(b) All delivery tickets and letters of certification related to automotive fuel rating must be maintained for one year.

(c) All records required to be maintained shall be made available upon request by the department or an authorized representative of the department.

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

Filed with the Office of the Secretary of State on May 11, 2020.

TRD-202001860

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**SUBCHAPTER D. SERVICE COMPANIES  
AND SERVICE TECHNICIANS**

**16 TAC §§97.50 - 97.60**

**STATUTORY AUTHORITY**

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Business and Commerce Code, Chapter 607, and Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed rules.

§97.50. Criminal History Check Required.

A criminal history check shall be conducted on an applicant for:

- (1) a service company license, including all controlling persons of the applicant; and
- (2) a service technician license.

§97.51. Device Maintenance Activities.

(a) A service company or service technician may perform device maintenance activities on one or more of the following device categories:

- (1) Low flow--devices with a maximum flow rate of 20 GPM or less;
- (2) High flow--devices with a maximum flow rate of greater than 20 GPM; or
- (3) LPG--LPG meters.

(b) Device maintenance activities include:

- (1) placing a device in service;
- (2) installing, calibrating, inspecting, testing, or repairing a device;
- (3) removing an out-of-order tag, lock, condemnation notice, or other form of use prohibition placed on a device by the department.

(c) An applicant may be licensed in more than one device category.

§97.52. Service Company License Requirements--General.

(a) To obtain a service company license, an applicant must submit:

- (1) a completed application in a manner prescribed by the department;

(2) proof of insurance acceptable to the department, as required under §97.53;

(3) proof of calibration of test standards in a manner prescribed by the department, as required in §97.58; and

(4) the fee required under §97.72.

(b) A sole proprietor may not perform or offer to perform device maintenance activities unless the sole proprietor:

(1) is exempt from holding a license under this section pursuant to §2310.154 of the Code; or

(2) holds:

(A) a service technician license issued by the department, or a service technician license issued under Subchapter I, Chapter 13, Texas Agriculture Code; and

(B) a service company license issued by the department, or a service company license issued under Subchapter I, Chapter 13, Texas Agriculture Code.

(c) A person licensed under this section or Subchapter I, Chapter 13, Texas Agriculture Code must comply with this chapter.

(d) A license issued under this section is valid for two years from the date of issuance and must be renewed every two years.

§97.53. Service Company License Requirements--Insurance.

(a) A service company must maintain at least the following minimum general liability insurance coverages at all times:

(1) \$25,000 per occurrence; or

(2) \$50,000 aggregate.

(b) Insurance must be obtained from an admitted company or an eligible surplus lines carrier, as defined in the Texas Insurance Code, Chapter 981, or other insurance companies that are rated by A.M. Best Company as B+ or higher.

§97.54. Service Company License Requirements--Renewal.

(a) To renew a service company license, an applicant must submit:

(1) a completed renewal application in a manner prescribed by the department;

(2) proof of insurance in a manner acceptable to the department, as required under §97.53;

(3) proof of calibration of test standards in a manner acceptable to the department, as required in §97.58; and

(4) the fee required under §97.72.

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

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

§97.55. Service Technician License Requirements--General.

(a) To obtain a service technician license, an applicant must:

(1) submit a completed application in a manner prescribed by the department;

(2) pass a written examination for each device category with a score of at least 70%, in accordance with §97.57; and

(3) pay the fee required under §97.72.

(b) An individual may not perform or offer to perform device maintenance activities unless the individual:

(1) is exempt from holding a license under this section pursuant to §2310.154 of the Code; or

(2) holds a service technician license issued by the department, or a service technician license issued under Subchapter I, Chapter 13, Texas Agriculture Code, and:

(A) is employed by a service company; or

(B) holds a service company license issued by the department, or a service company license issued under Subchapter I, Chapter 13, Texas Agriculture Code.

(c) An individual licensed under this section or Subchapter I, Chapter 13, Texas Agriculture Code must comply with this chapter.

(d) A license issued under this section is valid for two years from the date of issuance and must be renewed every two years.

§97.56. Service Technician License Requirements--Renewal.

(a) To renew a service technician license, an applicant must submit:

(1) a completed renewal application in a manner prescribed by the department; and

(2) the fee required under §97.72.

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

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

§97.57. Service Technician License Requirements--Examinations.

(a) The department shall review a completed application to determine an applicant's eligibility to take a service technician examination.

(b) A person taking an examination must comply with the department's examination requirements under Chapter 60, Subchapter E, of this title (relating to Examinations).

(c) Unauthorized assistance on an examination is grounds for denial, suspension, or revocation of a license and/or an administrative penalty.

§97.58. Test Standards.

(a) Test standards must be certified annually by a laboratory that is accredited to ISO 17025 standards. A service company must maintain at least one test standard per licensed device category as follows:

(1) Low flow: five-gallon or greater test measure or prover;

(2) High flow: prover with a capacity that exceeds the amount of liquid delivered by the device in one minute at the maximum flow rate;

(3) LPG: LPG prover.

(b) A test standard that becomes damaged must be taken out of operation immediately and recalibrated prior to use. A test standard that is beyond repair must be taken out of service permanently.

(c) A service company must maintain the minimum test standards per licensed device category at all times.

§97.59. Inspection for Payment Card Skimmers.

(a) In this section, "skimmer," "merchant," and "motor fuel dispenser" have the meanings assigned by §607.001 of the Texas Business and Commerce Code.

(b) A service technician must inspect for the presence of a skimmer:

(1) during a device performance review; and

(2) each time a motor fuel dispenser is opened to perform device maintenance activities.

(c) A service technician must report the finding of a skimmer:

(1) immediately to the merchant, as required by §607.053 of the Texas Business and Commerce Code; and

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

§97.60. Service Company Records.

(a) A service company must maintain device performance review reports for a period of two years from the date the DPR was performed.

(b) All records required to be maintained shall be made available upon request by the department or an authorized representative of the department.

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

Filed with the Office of the Secretary of State on May 11, 2020.

TRD-202001861

Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

Earliest possible date of adoption: June 21, 2020

For further information, please call: (512) 463-3671



## SUBCHAPTER E. FEES

### 16 TAC §§97.70 - 97.74

#### STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Business and Commerce Code, Chapter 607, and Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed rules.

§97.70. Device Fees.

(a) Registration Fees (initial and renewal):

(1) A device with a maximum flow rate of 20 GPM or less, delivering fuel from a single nozzle:

(A) multiple products (includes a fuel quality fee of \$21)--\$93;

(B) a single gasoline product (includes a fuel quality fee of \$7)--\$31; or

(C) a single diesel product, or a single product other than gasoline (includes a fuel quality fee of \$7)--\$31;

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

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

(4) An LPG meter--\$130.

(b) Consumer information sticker--\$1 per sticker.

§97.71. Distributor, Jobber, Wholesaler, and Supplier Fees.

(a) Fees:

(1) Distributor--\$80.

(2) Jobber--\$80.

(3) Wholesaler--\$80.

(4) Supplier--\$2600.

(b) Late fees do not apply to this section.

§97.72. Service Company Fees.

Service company license fees (initial and renewal):

(1) first device category--\$300; and

(2) each additional device category--\$200.

§97.73. Service Technician Fees.

Service technician license fees (initial and renewal): \$30.

§97.74. Fee Policy.

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

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

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

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

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## SUBCHAPTER F. ENFORCEMENT

### 16 TAC §97.80

#### STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 2310, which authorize the Commission,

the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department. The proposed rules are also proposed under Texas Government Code, Chapter 411, Subchapter F, and Texas Occupations Code, Chapters 51 and 53, which establish the Department's statutory authority to conduct criminal history background checks on an applicant for or a holder of a license, certificate, registration, title, or permit issued by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Business and Commerce Code, Chapter 607, and Texas Occupations Code, Chapters 51 and 2310. No other statutes, articles, or codes are affected by the proposed rules.

#### §97.80. Administrative Penalties and Sanctions.

If a person violates any provision of Texas Occupations Code, Chapters 51, or 2310, this chapter, or any rule or order of the executive director or commission, proceedings may be instituted to impose administrative penalties, administrative sanctions, or both in accordance with the provisions of Texas Occupations Code, Chapter 51, and 2310 and applicable agency rules.

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

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Brad Bowman

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## TITLE 19. EDUCATION

### PART 2. TEXAS EDUCATION AGENCY

#### CHAPTER 97. PLANNING AND ACCOUNTABILITY

##### SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

#### 19 TAC §97.1005

*(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §97.1005(b) is not included in the print version of the Texas Register. The figure is available in the on-line version of the May 22, 2020, issue of the Texas Register.)*

The Texas Education Agency (TEA) proposes an amendment to §97.1005, concerning results driven accountability. The proposed amendment would adopt in rule applicable excerpts of the 2020 Results Driven Accountability (RDA) Manual.

BACKGROUND INFORMATION AND JUSTIFICATION: House Bill (HB) 3459, 78th Texas Legislature, 2003, added the Texas Education Code (TEC), §7.027, limiting and redirecting monitoring done by the TEA to that required to ensure school district and charter school compliance with federal law and regulations; financial accountability, including compliance with grant re-

quirements; and data integrity for purposes of the Texas Student Data System Public Education Information Management System (TSDS PEIMS) and accountability under TEC, Chapter 39. Legislation passed in 2005 renumbered TEC, §7.027, to TEC, §7.028. To meet this monitoring requirement, the TEA developed the Performance Based Monitoring Analysis System (PB-MAS), later renamed as Results Driven Accountability in 2019, which is used in conjunction with other evaluation systems to monitor performance of certain populations of students and the program effectiveness of special programs in school districts and charter schools.

The TEA has adopted its PBMAS Manual in rule since 2005 and the RDA Manual in rule since 2019. The RDA Manual outlines a dynamic system that evolves over time, so the specific criteria and calculations for monitoring student performance and program effectiveness may differ from year to year. The intent is to update 19 TAC §97.1005 annually to refer to the most recently published RDA Manual.

The proposed amendment to 19 TAC §97.1005 would update the current rule by repealing the 2019 RDA Manual currently included as Figure: 19 TAC §97.1005(b) and replacing it with excerpts of the 2020 RDA Manual as Figure: 19 TAC §97.1005(b). The excerpts, Sections I-III, describe the specific criteria and calculations that will be used to assign 2020 RDA performance levels.

The 2020 RDA Manual includes several key changes from the 2019 framework. Revisions to the RDA framework include the following.

Overall, the format of the RDA manual has changed. Indicator grouping under three identified domains has created a shift in some indicators to be reordered and numbered. Domain I captures indicators of Academic Achievement; Domain II captures indicators of Post-Secondary Readiness; and Domain III captures indicators of Disproportionate Analysis.

TEA has consolidated and expanded its monitoring capacity for the special education program and the bilingual education, English as a second language, and English learner (BE/ESL/EL) program. Due to changes in monitoring structures and requirements for certain federal and state programs, and to eliminate duplication of monitoring selection processes, some program areas have been removed from the RDA report. These include career and technical education (CTE), Title I - Part A, and Title I - Part C (Education of Migratory Students). These programs continue to be monitored by other offices at TEA and through Every Student Succeeds Act (ESSA) reporting and requirements. The indicators that are removed from the manual were no longer used in making monitoring decisions. The remaining program areas for certain student populations captured under the former ESSA section of the 2019 RDA Manual will remain but are captured in the manual as other special populations (OSP) and contain indicators inclusive of students in foster care, experiencing homelessness, and military-connected.

#### *Bilingual Education, English as a Second Language, and English Learners (BE/ESL/ELs)*

In 2019, certain BE/ESL indicators were provided as "Report Only" due to various changes in the data sources and processing requirements and were not assigned indicator performance levels (PLs). For 2020, new cut points have been assigned that will allow for PLs to be assigned for the following indicators: BE/ESL/EL Indicator #1(i-v): BE STAAR 3-8 Passing Rate; BE/ESL/EL Indicator #2(i-v): ESL STAAR 3-8 Passing

Rate; BE/ESL/EL Indicator #6(i-iv): EL STAAR EOC Passing Rate; BE/ESL/EL Indicator #7: TELPAS Reading Beginning Proficiency Level Rate; and BE/ESL/EL Indicator #8: TELPAS Composite Rating Levels for Students in U.S. Schools Multiple Years.

Additionally for 2020, two new indicators are included as "Report Only" in the following: BE/ESL/EL Indicator #4: EL Dyslexia STAAR 3-8 Reading Passing Rate; and BE/ESL/EL Indicator #11: EL Dyslexia Representation (Ages 6-21).

#### *Other Special Populations (OSP)*

In 2019 certain student populations were reported under the ESSA section of the RDA manual. Title 1-A and migrant have been removed while students in foster care, experiencing homelessness, and military-connected will remain and be combined as OSP for reporting purposes and PL assignments. The decision to combine these three student populations for reporting and analysis is based on a high local educational agency (LEA) exclusion rate due to small size, an inability to meet minimum size requirements (MSR) within each of the student groups for PL assignments. Although PL assignments will be made at the combined OSP level, each of the three included separate student populations will be reported for disaggregated reporting but will not be assigned individual PLs.

LEAs that receive a PL 3 or PL 4 for any indicator in the 2020 RDA OSP report that would have otherwise not received a PL assignment in all three of the included student population groups for OSP will receive a Hold Harmless (HH) rating for the following indicators: OSP Indicator #1(i-v): OSP STAAR 3-8 Passing Rate; OSP Indicator #3(i-v): OSP STAAR EOC Passing Rate; OSP Indicator #4: OSP Graduation Rate; and OSP Indicator #5: OSP Annual Dropout Rate (Grades 7-12).

Additionally for 2020, two new indicators are included as "Report Only" in the following: OSP Indicator #2: OSP Dyslexia STAAR 3-8 Reading Passing Rate and OSP Indicator #6: OSP Dyslexia Representation (Ages 6-21).

#### *Special Education (SPED)*

To align with state and federal accountability calculation requirements in reporting the rate of students participating in the STAAR Alternate 2, SPED Indicator #5: SPED STAAR Alternate 2 Participation Rate has changed and now includes calculations for three reported subject areas: mathematics, science, and reading/ELA. This indicator will remain as a "Report Only" indicator.

Additionally for 2020, two new indicators are included as "Report Only" in the following: SPED Indicator #2: SPED Dyslexia STAAR 3-8 Reading Passing Rate and SPED Indicator #8: SPED Dyslexia Representation (Ages 6-21).

On March 16, 2020, Governor Greg Abbott waived the State of Texas Assessment of Academic Readiness (STAAR®) testing requirements for the 2019-2020 school year due to extensive school closures relating to the COVID-19 nationwide pandemic event. Indicators specific to STAAR® testing proficiency, participation, or other reliance on non-existing 2019-2020 STAAR® data will not receive 2020 RDA performance levels for those indicators. Texas's commitment to provide educators and parents with reliable information on student outcomes for mastery of grade-level content as measured on the STAAR® in future years will continue. However, for the 2019-2020 school year no data will be available for these indicators: BE/ESL/EL Indicators #1, #2, #3, #4, #5, #6, and #8; OSP Indicators #1, #2, and #3; and SPED Indicators #1, #2, #3, #4, and #5. When there is in-

sufficient data to make monitoring decisions, TEA will carry over its monitoring activities from the prior year.

**FISCAL IMPACT:** Matt Montano, deputy commissioner for special populations, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

**LOCAL EMPLOYMENT IMPACT:** The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

**SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT:** The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

**COST INCREASE TO REGULATED PERSONS:** The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

**TAKINGS IMPACT ASSESSMENT:** The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

**GOVERNMENT GROWTH IMPACT:** TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would create new regulations as required by federal law, limit some regulations by making some indicators be report-only, and repeal some regulations.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not expand an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

**PUBLIC BENEFIT AND COST TO PERSONS:** Mr. Montano has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be ensuring that rule language is based on current law and provides school districts with clarifications on the assignment of performance levels utilized in future district determination and status for monitoring and support assignments. There is no anticipated economic cost to persons who are required to comply with the proposal.

**DATA AND REPORTING IMPACT:** The proposal would have no data and reporting impact.

**PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS:** The TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

**PUBLIC COMMENTS:** The public comment period on the proposal begins May 22, 2020, and ends June 22, 2020. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About\\_TEA/Laws\\_and\\_Rules/Commissioner\\_Rules\\_\(TAC\)/Proposed\\_Commissioner\\_of\\_Education\\_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/). Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education

Agency, 1701 North Congress Avenue, Austin, Texas 78701. Public hearings on the proposal are scheduled for 1:00 p.m. on June 9 and 10, 2020. The public may participate in either or both the June 9 and June 10 hearings virtually by registering in advance for the meeting(s) at [https://zoom.us/join/zoom/register/tJlqduumqTwiE9aBg4Oz5ZGhc-Ff0rB\\_ZxyA](https://zoom.us/join/zoom/register/tJlqduumqTwiE9aBg4Oz5ZGhc-Ff0rB_ZxyA). After registering, you will receive a confirmation email containing information about joining the meeting(s). Both hearings will be recorded and made available publicly. Parties interested in testifying must pre-register online prior to 1 pm on the date of the applicable hearing and are encouraged to also send written testimony to [spedruler@tea.texas.gov](mailto:spedruler@tea.texas.gov). The hearing(s) will conclude once all who have registered have been given the opportunity to comment. Questions about the hearing should be directed to the Office of Special Populations (512) 463-9414.

**STATUTORY AUTHORITY.** The amendment is proposed under Texas Education Code (TEC), §7.021(b)(1), which authorizes the Texas Education Agency (TEA) to administer and monitor compliance with education programs required by federal or state law, including federal funding and state funding for those programs; TEC, §7.028, as amended by House Bill (HB) 3, and Senate Bill (SB) 2075, 86th Texas Legislature, 2019, authorizes the TEA to monitor as necessary to ensure school district and charter school compliance with federal law and regulations, financial integrity and data integrity. Section 7.028(a) also authorizes the TEA to monitor special education programs for compliance with state and federal laws. Section 7.028 also authorizes the agency to monitor school district and charter schools through its investigative process; TEC, §12.056, as amended by HB 3, 86th Texas Legislature, 2019, which requires that a campus or program for which a charter is granted under the TEC, Chapter 12, Subchapter C, is subject to any prohibition relating to the Public Education Information Management System (PEIMS) to the extent necessary to monitor compliance with the TEC, Chapter 12, Subchapter C, as determined by the commissioner; high school graduation under the TEC, §28.025; special education programs under the TEC, Chapter 29, Subchapter A; bilingual education under the TEC, Chapter 29, Subchapter B; and public school accountability under the TEC, Chapter 39, Subchapters B, C, D, F, and J, and Chapter 39A; TEC, §12.104, as amended by SB 11, SB 213, SB 372, HB 3, HB 1597, and HB 4170, 86th Texas Legislature, 2019, which states that a charter granted under the TEC, Chapter 12, Subchapter D, is subject to a prohibition, restriction, or requirement, as applicable, imposed by the TEC, Title 2, or a rule adopted under the TEC, Title 2, relating to the PEIMS to the extent necessary to monitor compliance with the TEC, Chapter 12, Subchapter D, as determined by the commissioner; high school graduation requirements under the TEC, §28.025; special education programs under the TEC, Chapter 29, Subchapter A; bilingual education under the TEC, Chapter 29, Subchapter B; discipline management practices or behavior management techniques under the TEC, §37.0021; public school accountability under the TEC, Chapter 39, Subchapters B, C, D, F, G, and J, and Chapter 39A; and intensive programs of instruction under the TEC, §28.0213; TEC, §29.001, as amended by HB 3, 86th Texas Legislature, 2019, which authorizes the TEA to effectively monitor all local educational agencies (LEAs) to ensure that rules relating to the delivery of services to children with disabilities are applied in a consistent and uniform manner, to ensure that LEAs are complying with those rules, and to ensure that specific reports filed by LEAs are accurate and complete; TEC, §29.0011(b), which authorizes the TEA to meet the requirements under (1) 20 U.S.C. Section 1418(d) and its implementing regulations to collect and

examine data to determine whether significant disproportionality based on race or ethnicity is occurring in the state and in the school districts and open-enrollment charter schools in the state with respect to the: (A) Identification of children as children with disabilities, including the identification of children as children with particular impairments; (B) Placement of children with disabilities in particular educational settings; and (C) Incidence, duration, and type of disciplinary actions taken against children with disabilities including suspensions or expulsions; or (2) 20 U.S.C. Section 1416(a)(3)(C) and its implementing regulations to address in the statewide plan the percentage of schools with disproportionate representation of racial and ethnic groups in special education and related services and in specific disability categories that results from inappropriate identification; TEC, §29.010(a), which authorizes the TEA to adopt and implement a comprehensive system for monitoring LEA compliance with federal and state laws relating to special education, including ongoing analysis of LEA special education data; TEC, §29.062, which authorizes the TEA to evaluate and monitor the effectiveness of LEA programs and apply sanctions concerning students with limited English proficiency; TEC, §29.066, which authorizes PEIMS reporting requirements for school districts that are required to offer bilingual education or special language programs to include the following information in the district's PEIMS report: (1) demographic information, as determined by the commissioner, on students enrolled in district bilingual education or special language programs; (2) the number and percentage of students enrolled in each instructional model of a bilingual education or special language program offered by the district; and (3) the number and percentage of students identified as students of limited English proficiency who do not receive specialized instruction; TEC, §29.182, which authorizes the State Plan for Career and Technology Education to ensure the state complies with requirements for supplemental federal career and technology funding; TEC, §39.051 and §39.052, which authorize the commissioner to determine criteria for accreditation statuses and to determine the accreditation status of each school district and open-enrollment charter school; TEC, §39.053, as amended by HB 330, HB 1051, and HB 4170, 86th Texas Legislature, 2019, which authorizes the commissioner to adopt a set of indicators of the quality of learning and achievement and requires the commissioner to periodically review the indicators for consideration of appropriate revisions; TEC, §39.054(b-1), which authorizes the TEA to consider the effectiveness of district programs for special populations, including career and technical education programs, when determining accreditation statuses; TEC, §39.0541, which authorizes the commissioner to adopt indicators and standards under the TEC, Chapter 39, Subchapter C, at any time during a school year before the evaluation of a school district or campus; TEC, §§39.056, 39.057, and 39.058, which authorize the commissioner to adopt procedures relating to monitoring reviews and special accreditation investigations; TEC, §39A.001, which authorizes the commissioner to take any of the actions authorized by the TEC, Chapter 39A, Subchapter A, to the extent the commissioner determines necessary if a school does not satisfy the academic performance standards under the TEC, §39.053 or §39.054, or based upon a special accreditation investigation; TEC, §39A.002, as amended by HB 4170, 86th Texas Legislature, 2019, which authorizes the commissioner to take certain actions if a school district becomes subject to commissioner action under the TEC, §39A.001; TEC, §39A.004, which authorizes the commissioner to appoint a board of managers to exercise the powers and duties of a school district's board of trustees if the district is subject to commissioner action under

the TEC, §39A.001, and has a current accreditation status of accredited-warned or accredited-probation; or fails to satisfy any standard under the TEC, §39.054(e); or fails to satisfy any financial accountability standard; TEC, §39A.005, which authorizes the commissioner to revoke school accreditation if the district is subject to the TEC, §39A.001, and, for two consecutive school years has received an accreditation status of accredited-warned or accredited-probation, failed to satisfy any standard under the TEC, §39.054(e), or has failed to satisfy a financial performance standard; TEC, §39A.007, which authorizes the commissioner to impose a sanction designed to improve high school completion rates if the district has failed to satisfy any standard under the TEC, §39.054(e), due to high school completion rates; TEC, §39A.051, which authorizes the commissioner to take action based on campus performance that is below any standard under the TEC, §39.054(e); and TEC, §39A.063, which authorizes the commissioner to accept substantially similar intervention measures as required by federal accountability measures in compliance with the TEC, Chapter 39A.

**CROSS REFERENCE TO STATUTE.** The amendment implements Texas Education Code, §§7.021, 7.028, 12.056, 12.104, 29.001, 29.0011(b), 29.010(a), 29.062, 29.066, 29.182, 39.051, 39.052, 39.053, 39.054(b-1), 39.0541, 39.056, 39.057, 39.058, 39A.001, 39A.002, 39A.004, 39A.005, 39A.007, 39A.051, and 39A.063.

*§97.1005. Results Driven Accountability.*

(a) In accordance with Texas Education Code, §7.028(a), the purpose of the Results Driven Accountability (RDA) framework is to evaluate and report annually on the performance of school districts and charter schools for certain populations of students included in selected program areas [~~: bilingual education/English as a Second Language, career and technical education, special education, and certain Title programs under federal law~~]. The performance of a school district or charter school is included on the RDA report [~~reported~~] through indicators of student performance and program effectiveness and corresponding performance levels established by the commissioner of education.

(b) The assignment of performance levels for school districts and charter schools in the 2020 [~~2019~~] RDA report is based on specific criteria and calculations, which are described in the 2020 [~~2019~~] RDA Manual provided in this subsection.

Figure: 19 TAC §97.1005(b)  
[~~Figure: 19 TAC §97.1005(b)~~]

(c) The specific criteria and calculations used in the RDA framework will be established annually by the commissioner of education and communicated to all school districts and charter schools.

(d) The specific criteria and calculations used in the annual RDA manual adopted for prior school years will remain in effect for all purposes, including accountability and performance monitoring, data standards, and audits, with respect to those school years.

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

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Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

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

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CHAPTER 109. BUDGETING, ACCOUNTING,  
AND AUDITING  
SUBCHAPTER B. TEXAS EDUCATION  
AGENCY AUDIT FUNCTIONS

**19 TAC §109.23**

The State Board of Education (SBOE) proposes an amendment to §109.23, concerning school district independent audits and agreed-upon procedures. The proposed amendment would reflect changes made by House Bill (HB) 1520, 86th Texas Legislature, 2019, which eliminated the requirement for out-of-state certified public accountancy (CPA) firms to be licensed in Texas.

**BACKGROUND INFORMATION AND JUSTIFICATION:** HB 1520, 86th Texas Legislature, 2019, updated Texas Occupations Code, §901.461, to eliminate the requirement for out-of-state CPA firms to be licensed in Texas. The amended statute took effect September 1, 2019.

The proposed amendment to §109.23 would reflect the changes to Texas Occupations Code, §901.461. Subsection (d)(1)(A) would be modified to allow an independent auditor hired by a school district to be associated with a CPA firm that has a current valid license issued by a state licensing agency from another state.

The SBOE approved the proposed amendment for first reading and filing authorization at its April 17, 2020 meeting.

**FISCAL IMPACT:** Leo Lopez, associate commissioner for school finance, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government required to comply with the proposal.

**LOCAL EMPLOYMENT IMPACT:** The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

**SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT:** The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis specified in Texas Government Code, §2006.002, is required.

**COST INCREASE TO REGULATED PERSONS:** The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

**TAKINGS IMPACT ASSESSMENT:** The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

**GOVERNMENT GROWTH IMPACT:** Texas Education Agency (TEA) staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would limit the effect of the rule by eliminating the requirement that out-of-state CPA firms must be licensed in Texas.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not expand or repeal an existing regulation; would

not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

**PUBLIC BENEFIT AND COST TO PERSONS:** Mr. Lopez has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be allowing an independent auditor hired by a school district to be associated with a CPA firm that has a current valid license issued by a state licensing agency from another state. There is no anticipated economic cost to persons who are required to comply with the proposal.

**DATA AND REPORTING IMPACT:** The proposal would have no new data and reporting impact.

**PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS:** TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

**PUBLIC COMMENTS:** The public comment period on the proposal begins May 22, 2020, and ends June 26, 2020. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About\\_TEA/Laws\\_and\\_Rules/SBOE\\_Rules\\_\(TAC\)/Proposed\\_State\\_Board\\_of\\_Education\\_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_of_Education_Rules/). Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in June-July 2020 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on May 22, 2020.

**STATUTORY AUTHORITY.** The amendment is proposed under Texas Education Code (TEC), §7.102(c)(32), which authorizes the State Board of Education (SBOE) to adopt rules concerning school district fiscal account audits and budgets; TEC, §44.001, which requires each school district to begin its fiscal year on July 1 or September 1 of each year, as determined by the board of trustees of the district; TEC, §44.007, which requires each school district to annually submit to Texas Education Agency (TEA) a report of its revenues and expenditures for the preceding fiscal year and authorizes the SBOE to prescribe the management, cost accounting, and financial information format to enable the board to monitor the funding process and determine educational system costs; TEC, §44.008, which authorizes the SBOE to establish the format and minimum requirements of the independent audit of school district fiscal accounts; and TEC, §44.010, which requires the school district budgets, fiscal reports, and audit reports filed with TEA to be reviewed and analyzed by TEA to determine whether all legal requirements have been met and to collect fiscal data needed in preparing school fiscal reports for the governor and the legislature.

**CROSS REFERENCE TO STATUTE.** The amendment implements Texas Education Code, §§7.102(c)(32), 44.001, 44.007, 44.008, and 44.010.

*§109.23. School District Independent Audits and Agreed-Upon Procedures.*

(a) A school district, governmental charter school, open-enrollment charter school, nonprofit service provider, county education district, or regional education service center must file with the Texas

Education Agency (TEA) an annual financial and compliance report and, if applicable, a state compensatory agreed-upon procedures report. These reports must be audited by an independent auditor, and the audit must be reviewed by the TEA, including review of auditors' working papers, in accordance with the Financial Accountability System Resource Guide, as adopted by reference in §109.41 of this title (relating to Financial Accountability System Resource Guide).

(b) The annual financial audit report and state compensatory agreed-upon procedures report are due 150 days after the end of the fiscal year.

(c) Auditors from the TEA must review independent audit reports. The commissioner's designee must resolve audit findings.

(d) The district or other educational entity must hire at its own expense an independent auditor to conduct an independent audit of its financial statements and provide an opinion on its annual financial and compliance report.

(1) The independent auditor must:

(A) be associated with a certified public accountancy (CPA) firm that has a current valid license issued by the Texas State Board of Public Accountancy or a state licensing agency from another state;

(B) be a certified public accountant with a current valid license issued by the Texas State Board of Public Accountancy, as required under the Texas Education Code, §44.008; and

(C) adhere to the generally accepted auditing standards (GAAS), adopted by the American Institute of CPAs (AICPA), as amended, and the generally accepted government auditing standards (GAGAS), adopted by the US Government Accountability Office, as amended.

(2) The CPA firm must:

(A) be a member of the AICPA Governmental Audit Quality Center (GAQC);

(B) adhere to GAQC's membership requirements; and

(C) collectively have the knowledge, skills, and experience to be competent for the audit being conducted, including thorough knowledge of the government auditing requirements and:

(i) Texas public school district environment; [ø]

(ii) public sector; or

(iii) nonprofit sector.

(e) If at any time the TEA division responsible for financial compliance reviews an audit firm's working papers and finds that the firm or the quality of the work does not meet the standards required as stated in subsection (d) of this section, the division may require the district or other educational entity to change its audit firm.

(f) To the extent that this section conflicts with any other rule regarding audits of school districts and other educational entities by independent auditors and the TEA, this section controls.

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

Filed with the Office of the Secretary of State on May 11, 2020.  
TRD-202001852

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: June 21, 2020

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

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**TITLE 22. EXAMINING BOARDS**

**PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS**

**CHAPTER 5. REGISTERED INTERIOR DESIGNERS**

**SUBCHAPTER I. DISCIPLINARY ACTION**

**22 TAC §5.183**

*Editor's note: On March 12, 2020, the Texas Board of Architectural Examiners filed a proposed amendment to 22 TAC §5.183 for publication in the March 27, 2020, issue of the Texas Register. Due to an error by the Texas Register, the proposal appeared in the online Texas Register database but not in the print version of the March 27, 2020, issue. Due to the error, the proposal is being reprinted in the May 22, 2020, issue.*

The Texas Board of Architectural Examiners (the board) proposes the amendment of Texas Administrative Code Part 1, Title 22 §5.183 (Violation by One Not a Registered Interior Designer).

This proposed rulemaking action would implement House Bill 2847 (86th Regular Session, 2019), which made two changes to the law governing the board's regulation of interior design. First, amendments to Tex. Occ. Code §1051.451 eliminated the Board's authority to impose administrative penalties against a nonregistrant for conduct related to the practice of interior design. Second, the bill repealed Tex. Occ. Code §1053.351, which previously made it a Class C misdemeanor criminal offense to knowingly violate Occupations Code §1053.151 (use, by a nonregistrant, of the term "registered interior designer" or words that imply a person is a registered interior designer) or a standard of conduct adopted under Occupations Code Chapter 1053 (the chapter regulating registered interior designers). Previously, the board adopted provisions under 22 TAC §5.183 implementing its former authority to impose administrative penalties against nonregistrants and addressing criminal prosecution as a potential remedy for violations of Chapter 1053. Therefore, it is necessary for the Board to engage in rulemaking to update these obsolete provisions.

The proposed amendments to 22 TAC §5.183(a) would repeal "criminal prosecution in a court of appropriate jurisdiction" and "imposition of an administrative penalty" as potential remedies for a nonregistrant who violates Occupations Code Chapter 1053 or 22 Texas Administrative Code Chapter 5. Additionally, "denial of registration as a Registered Interior Designer, if applicable," would be added as a potential remedy for the same, to clarify preexisting authority granted to the board under Tex. Occ. Code §1053.251(c).

Additionally, the proposed amendments to 22 TAC §5.183 would repeal subsections (c) and (d), as they describe the Board's procedures to impose an administrative penalty against a nonregistrant. In place of these provisions, amended subsection (c) is proposed. Proposed subsection (c) describes the procedure the

Board would use to issue a cease and desist order to a non-registrant who violates Occupations Code Chapter 1053 or 22 Texas Administrative Code Chapter 5. This amended rule and the process it adopts are based on preexisting authority of the Board contained in Tex. Occ. Code §1051.504. Adoption of this amendment would enable the Board to meet its statutory obligation under Tex. Occ. Code §1051.501 to ensure that enforcement action is taken against an individual who violates a law under the Board's jurisdiction.

Proposed 22 TAC §5.183(d) implements the statutory repeal of administrative penalties against nonregistrants, and states that, if a nonregistrant commits a violation that would otherwise result in an administrative penalty under the penalty matrices adopted by the board in 22 TAC §§5.187 and/or 5.242, the person would be subject to a remedy described in subsection (a) in lieu of an administrative penalty. Finally, the term "nonregistrant" has been substituted for "person who is not a registered interior designer" throughout proposed 22 TAC §5.183, as "nonregistrant" is a defined term in 22 TAC §5.5.

#### FISCAL NOTE

Lance Brenton, General Counsel, has determined that for the first five-year period the amended rules are in effect, the amendments will have no significant adverse fiscal impact upon state government, local government, or the Texas Board of Architectural Examiners. Any potential adverse fiscal impact to the state, local government, or the agency would be based on a loss of revenue which might otherwise be paid to state general revenue in the form of hypothetical future administrative penalties imposed against nonregistrants for conduct related to the practice of interior design. However, during the past five years, the agency has not imposed any administrative penalties against nonregistrants for conduct related to the practice of interior design. Rather, going back to the 2009 amendments to Occupations Code Chapter 1053 which adopted "registered interior designer" as the protected title, all merited complaints to the Board concerning nonregistrants have been closed with a written warning, and no administrative penalties have been issued. Given this history, the elimination of an administrative penalty as a potential remedy for nonregistrants relating to interior design is not expected to have any fiscal impact.

#### GOVERNMENT GROWTH IMPACT STATEMENT

During the first five years the proposed rule would be in effect, no government program would be created or eliminated. The legislation underlying this rulemaking action does not create new regulation; rather it modifies or eliminates existing regulations. The legislature's adoption of House Bill 2847 has eliminated two potential remedies for violations of laws and rules relating to interior design by nonregistrants. As such, the statute constitutes an easing of regulatory burdens, and this rulemaking action is an implementation of that action. The adoption of the proposed rule would not result in the creation or elimination of employee positions. Implementation of the proposed rule is not expected to require an increase or decrease in legislative appropriations to the agency. The proposed rule would not increase or decrease fees paid to the board. Finally, the proposed rule is not expected to have any impact on the state's economy.

#### PUBLIC BENEFIT/COST OF COMPLIANCE

Mr. Brenton has determined that, for the first five-year period the amended rule is in effect, the public benefit of the proposed rule change will be consistency between the board's rules and the legislature's mandate enacted in House Bill 2847. There are no

anticipated economic costs to persons required to comply with the proposed amendments.

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

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

#### TAKINGS IMPACT ASSESSMENT

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

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

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

As a self-directed semi-independent agency, Government Code §2001.0045 does not apply to rules adopted by the board.

#### CROSS REFERENCE TO STATUTE

The proposed amendment does not affect any other statute.

#### PUBLIC COMMENT

Comments may be submitted to Lance Brenton, General Counsel, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, TX 78711-2337.

#### STATUTORY AUTHORITY

The amendment to §5.183 is proposed under Tex. Occ. Code §1051.202, which provides the Texas Board of Architectural Examiners with authority to promulgate rules to implement Chapters 1051, 1052, and 1053 of the Texas Occupations Code. The amendment implements recent changes to Tex. Occ. Code §1051.451, which eliminated the Board's authority to impose administrative penalties against a nonregistrant for conduct related to the practice of interior design; and the recent repeal of Tex. Occ. Code §1053.351, which previously made it a Class C misdemeanor criminal offense to knowingly violate Occupations Code §1053.151 or a standard of conduct adopted under Occupations Code Chapter 1053.

*§5.183. Violation by One Not a Registered Interior Designer.*

(a) A Nonregistrant [person who is not a Registered Interior Designer] who violates Texas Occupations Code Chapter 1053 or this chapter [any of the laws or rules over which the Board has jurisdiction] is subject to any or all of the following:

- (1) judicial proceedings for injunctive relief;
- (2) issuance of a cease and desist order from the Board; or [criminal prosecution in a court of appropriate jurisdiction];

(3) denial of registration as a Registered Interior Designer, if applicable.

[(3) imposition of an administrative penalty;]

[(4) issuance of a cease and desist order from the Board.]

(b) In taking action against a Nonregistrant [person who is not a Registered Interior Designer], the Board may be represented by agency staff, the Texas Attorney General, by a county or district attorney, or by other counsel as necessary.

(c) The following process shall be used to issue a cease and desist order to a Nonregistrant:

(1) If the Executive Director determines that a Nonregistrant is violating, or has violated, Texas Occupations Code Chapter 1053 or this Chapter, the Executive Director may issue to the Nonregistrant a written notice describing the alleged violation and the Executive Director's intention to request that the Board issue a cease and desist order. The written notice shall offer the Nonregistrant an opportunity to request a hearing before an Administrative Law Judge at the State Office of Administrative Hearings.

(2) If the Nonregistrant does not request a hearing before the 22nd day after the date of receiving notice, the board may:

(A) issue a cease and desist order; and

(B) refer the violation to the attorney general for further action.

(3) If the Nonregistrant requests a hearing before the 22nd day after the date of receiving notice, the board shall hold the hearing at the State Office of Administrative Hearings not later than the 30th day after the date the board receives the request for the hearing. A hearing under this section is subject to Chapter 2001, Government Code.

(d) Notwithstanding any other law or rule, the Board shall not impose an administrative penalty against a Nonregistrant for a violation of Texas Occupations Code Chapter 1053 or this Chapter. If a Nonregistrant has committed a violation that would otherwise result in the imposition of an administrative penalty under Board Rules §5.187 and/or §5.242, the Board shall consider a remedy described in subsection (a) of this section in lieu of an administrative penalty.

[(e) The Executive Director may recommend and the Board may, after notice and an opportunity for hearing, impose an administrative penalty in the manner prescribed in Subchapter I of the Architects' Practice Act and otherwise as permitted by law and Board rules.]

[(d) A person charged with a violation may request a hearing to contest a proposed administrative penalty that has been recommended by the Executive Director:]

[(1) A request for a hearing must be received in the Board's office no later than the 20th day after the date the person receives notice that the Executive Director has recommended the imposition of an administrative penalty.]

[(2) The hearing shall be conducted by an Administrative Law Judge at the State Office of Administrative Hearings under provision of the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001, and this subchapter.]

[(e) If a person charged with a violation agrees to a proposed administrative penalty recommended by the Executive Director, the Board may approve the Executive Director's recommendation and order payment of the proposed penalty without a hearing.]

[(f) Within thirty (30) days after the date on which the Board's order imposing an administrative penalty or taking other final agency

action in a contested case proceeding becomes final, the person charged must pay the administrative penalty and otherwise ensure compliance with the terms set forth in the Board's Final Order or file a petition for judicial review with a district court in Travis County as provided by Subchapter G, Chapter 2001, Government Code.]

[(g) If the Executive Director determines that a Nonregistrant is violating, or has violated, a statutory provision or rule enforced by the Board, the Executive Director may:]

[(1) issue to the Nonregistrant a written notice describing the alleged violation and the Executive Director's intention to request that the Board impose administrative penalties and issue a cease and desist order. The written notice shall offer the Nonregistrant an opportunity to resolve all matters contained in the written notice by means of an agreed order or other instrument deemed appropriate by the Executive Director and of the Nonregistrant's ability to request an informal conference as well as of his or her right to request a hearing before an Administrative Law Judge at the State Office of Administrative Hearings; and]

[(2) take any other action and impose any other penalty described in this section or permitted by law. ]

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

Filed with the Office of the Secretary of State on March 12, 2020.

TRD-202001098

Lance Brenton

General Counsel

Texas Board of Architectural Examiners

Earliest possible date of adoption: April 26, 2020

For further information, please call: (512) 305-8519



## TITLE 30. ENVIRONMENTAL QUALITY

### PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

#### CHAPTER 111. CONTROL OF AIR POLLUTION FROM VISIBLE EMISSIONS AND PARTICULATE MATTER

##### SUBCHAPTER B. OUTDOOR BURNING

###### 30 TAC §111.209

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §111.209.

If adopted, amended §111.209 would be submitted to the United States Environmental Protection Agency as a revision to the State Implementation Plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rule

House Bill (HB) 2386, 85th Texas Legislature, 2017, amended Texas Health and Safety Code (THSC), §382.018(d), Outdoor Burning of Waste and Combustible Material. THSC, §382.018(d), states that the commission may not control or prohibit outdoor burning of waste consisting of trees, brush, grass, leaves, branches, trimmings, or other plant growth if

certain conditions have been met. Specifically, burning is allowed if the person burning the waste is doing so at a site designated for consolidated burning of waste generated from specific residential properties that is located in a county with a population of less than 50,000, located outside of a municipality, and is supervised at the time of the burning by an employee of a fire department and is acting in the scope of the person's employment. HB 2386 added the phrase "a volunteer firefighter acting in the scope of the firefighter's volunteer duties" to THSC, §382.018(d)(1)(D)(ii). The implementation of HB 2386 requires an amendment to §111.209(5) to include volunteer firefighters, acting within the scope of their duties, to fulfill the requirements for providing supervision of the burning of waste.

#### *Demonstrating Noninterference under Federal Clean Air Act, Section 110(l)*

The proposed revision to add volunteer firefighters acting in the scope of the firefighter's volunteer duties to §111.209(5) would not negatively impact the state's attainment of the particulate matter National Ambient Air Quality Standard (NAAQS), would not interfere with control measures for NAAQS compliance, and would not prevent reasonable further progress toward attainment of the particulate matter NAAQS.

The outdoor burning rules in Chapter 111, Subchapter B, are included in the SIP as part of the state's strategy for control of particulate matter emissions. The revision would not interfere with applicable requirements for attainment and for reasonable further progress toward attainment, or with other applicable requirements of the federal Clean Air Act. Allowing volunteer firefighters to supervise the burning of specific waste at a designated site should allow paid fire department employees to conduct more important duties. Furthermore, allowing volunteer firefighters to supervise these types of burning activities, would allow some counties that meet the population requirements, but might not have a paid firefighting department in the county, to conduct these types of previously approved SIP activities.

#### Section Discussion

##### *§111.209, Exception for Disposal Fires*

The commission proposes to amend §111.209(5) to add the phrase "or a volunteer firefighter" to the placard requirement in §111.209(5)(A). The commission also proposes to amend §111.209(5)(F) to add language that a volunteer firefighter acting in the scope of the firefighter's volunteer duties is allowed to directly supervise the burning of the waste material per the requirements in §111.209(5). Proposed rule language would also note that the volunteer firefighter is required to notify the appropriate commission regional office with a telephone or electronic facsimile notice, 24 hours in advance of any scheduled supervised burn, which is presently a requirement of a fire department employee that is planning to supervise a burn.

#### Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule would be in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule would implement HB 2386 by amending §111.209(5). The proposed rulemaking would add volunteer firefighters, acting within the scope of their duties, to fulfill the requirements for providing supervision of the burning of waste at a designated site. The site must be located outside of a

municipality and within a county with a population of less than 50,000.

#### Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rule would be in effect, the public benefit anticipated would be compliance with state law and an increase in the number of persons available to supervise these types of burns. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

#### Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking would not adversely affect a local economy in a material way for the first five years that the proposed rule would be in effect.

#### Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking would not adversely affect rural communities in a material way for the first five years that the proposed rule would be in effect.

#### Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule would be in effect.

#### Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule would not adversely affect a small or micro-business in a material way for the first five years the proposed rule would be in effect.

#### Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking would not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking would not create, expand, repeal, or limit an existing regulation, nor would the proposed rulemaking increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

#### Draft Regulatory Impact Analysis Determination

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

A "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely af-

fect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed amendment would add volunteer firefighters, acting within the scope of their duties, to fulfill the requirements for providing supervision of the burning of waste at a designated site. Therefore, the proposed amendment would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

In addition, an RIA is not required because the rule does not meet any of the four applicability criteria for requiring a regulatory analysis of a "Major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this rulemaking does not exceed an express requirement of state law and does not exceed a requirement of a delegation agreement or contract to implement a state or federal program. Finally, this rulemaking is not proposed solely under the general powers of the agency but is specifically authorized by the provisions cited in the

Statutory Authority section of this preamble.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct an RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of SB 633 was not large. This conclusion was based, in part, on the criteria set forth in SB 633 that exempted rules from the full RIA unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. The commission contends that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. Any impact the proposed rule may have is no greater than is necessary or appropriate to meet the requirements of the federal Clean Air Act

and, in fact, creates no additional impacts since the proposed rule does not exceed the requirement to attain and maintain the NAAQS. For these reasons, the proposed rule falls under the exception in Texas Government Code, §2001.0225(a), because it is required by, and does not exceed, federal law.

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

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission substantially complied with the requirements of Texas Government Code, §2001.0225.

The purpose of the proposed amendment is to add volunteer firefighters, acting within the scope of their duties, to fulfill the requirements for providing supervision of the burning of waste at a designated site. The proposed amendment is not developed solely under the general powers of the agency, but is authorized by specific sections of the THSC, Chapter 382 and the Texas Water Code, which are cited in the Statutory Authority section of this preamble. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part, or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or the Texas Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the

governmental action is not in effect with the market value of the property as if the governmental action is in effect.

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to adhere to the directives of the legislature. The proposed amendment intends to add volunteer firefighters, acting within the scope of their duties, to fulfill the requirements for providing supervision of the burning of waste at a designated site. The proposed rulemaking action would not create any additional burden on private real property. The proposed rulemaking action would not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also would not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking would not cause a taking under Texas Government Code, Chapter 2007.

#### Consistency with the Coastal Management Program

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

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and would have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### Effect on Sites Subject to the Federal Operating Permits Program

Chapter 111 contains applicable requirements for sites subject to the Federal Operating Permits Program. However, the proposed changes to Chapter 111 are so minor that they are not expected to require any revisions to federal operating permits or have any other significant effect on holders of federal operating permits.

#### Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on June 1, 2020, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle or remotely on the same day and time if necessary due to COVID-19 restrictions. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or

1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

#### Submittal of Comments

Written comments may be submitted to Andreea Vasile, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2019-124-111-CE. The comment period closes on June 23, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at [https://www.tceq.texas.gov/rules/propose\\_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Keith Sheedy, P.E., Program Support Section, at (512) 239-1556.

#### Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, General Powers, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; §5.103, Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.018, which authorizes the commission to control outdoor burning; and THSC, §382.085, which prohibits unauthorized air emissions.

The proposed amendment would implement THSC, §382.018, and House Bill 2386 (85th Texas Legislature, 2017).

#### §111.209. Exception for Disposal Fires.

Except as provided in Local Government Code, §352.082, outdoor burning is authorized for the following:

(1) domestic waste burning at a property designed for and used exclusively as a private residence, housing not more than three families, when collection of domestic waste is not provided or authorized by the local governmental entity having jurisdiction, and when the waste is generated only from that property. Provision of waste collection refers to collection at the premises where the waste is generated. The term "domestic waste" is defined in §101.1 of this title (relating to Definitions). Wastes normally resulting from the function of life within a residence that can be burned include such things as kitchen garbage, untreated lumber, cardboard boxes, packaging (including plastics and rubber), clothing, grass, leaves, and branch trimmings. Examples of wastes not considered domestic waste that cannot be burned, include such things as tires, non-wood construction debris, furniture, carpet, electrical wire, and appliances;

(2) diseased animal carcass burning when burning is the most effective means of controlling the spread of disease;

(3) veterinarians in accordance with Texas Occupations Code, §801.361, Disposal of Animal Remains;

(4) on-site burning of trees, brush, grass, leaves, branch trimmings, or other plant growth, by the owner of the property or any other person authorized by the owner, and when the material is generated only from that property:

(A) in a county that is part of a designated nonattainment area or that contains any part of a municipality that extends into a designated nonattainment area; if the plant growth was generated as a result of right-of-way maintenance, landclearing operations, and maintenance along water canals when no practical alternative to burning exists. Such burning is subject to the requirements of §111.219 of this title (relating to General Requirements for Allowable Outdoor Burning). Commission notification or approval is not required; or

(B) in a county that is not part of a designated nonattainment area and that does not contain any part of a municipality that extends into a designated nonattainment area; this provision includes, but is not limited to, the burning of plant growth generated as a result of right-of-way maintenance, landclearing operations, and maintenance along water canals. Such burning is subject to local ordinances that prohibit burning inside the corporate limits of a city or town and that are consistent with the Texas Clean Air Act, Chapter 382, Subchapter E, Authority of Local Governments, and the requirements of §111.219(3), (4), (6), and (7) of this title. Commission notification or approval is not required;[-]

(5) at a site designated for consolidated burning of waste generated from specific residential properties. A designated site must be located outside of a municipality and within a county with a population of less than 50,000. The owner of the designated site or the owner's authorized agent shall:

(A) post at all entrances to the site a placard measuring a minimum of 48 inches in width and 24 inches in height and containing, at a minimum, the words "DESIGNATED BURN SITE - No burning of any material is allowed except for trees, brush, grass, leaves, branch trimmings, or other plant growth generated from specific residential properties for which this site is designated. All burning must be supervised by a fire department employee or a volunteer firefighter. For more information call {PHONE NUMBER OF OWNER OR AUTHORIZED AGENT}." The placard(s) must be clearly visible and legible at all times;

(B) designate specific residential properties for consolidated burning at the designated site;

(C) maintain a record of the designated residential properties. The record must contain the description of a platted subdivision and/or a list of each property address. The description must be made available to commission or local air pollution control agency staff within 48 hours, if requested;

(D) ensure that all waste burned at the designated site consists of trees, brush, grass, leaves, branch trimmings, or other plant growth;

(E) ensure that all such waste was generated at specific residential properties for which the site is designated; and

(F) ensure that all burning at the designated site is directly supervised by an employee of a fire department who is part of the fire protection personnel, as defined by Texas Government Code, §419.021, and is acting in the scope of the person's employment, or a volunteer firefighter acting in the scope of the firefighter's volunteer duties. The fire department employee or volunteer firefighter shall notify the appropriate commission regional office with a telephone or elec-

tronic facsimile notice 24 hours in advance of any scheduled supervised burn. The commission shall provide the employee or volunteer firefighter with information on practical alternatives to burning. Commission approval is not required;

(6) crop residue burning for agricultural management purposes when no practical alternative exists. Such burning shall be subject to the requirements of §111.219 of this title and structures containing sensitive receptors must not be negatively affected by the burn. When possible, notification of the intent to burn should be made to the appropriate commission regional office prior to the proposed burn. Commission notification or approval is not required. This section is not applicable to crop residue burning covered by an administrative order; and

(7) brush, trees, and other plant growth causing a detrimental public health and safety condition burned by a county or municipal government at a site it owns upon receiving site and burn approval from the executive director. Such a burn can only be authorized when there is no practical alternative, and it may be done no more frequently than once every two months. Such burns cannot be conducted at municipal solid waste landfills unless authorized under §111.215 of this title (relating to Executive Director Approval of Otherwise Prohibited Outdoor Burning), and shall be subject to the requirements of §111.219 of this title.

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

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-1806



## TITLE 34. PUBLIC FINANCE

### PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

#### CHAPTER 20. STATEWIDE PROCUREMENT AND SUPPORT SERVICES

##### SUBCHAPTER A. GENERAL PROVISIONS

##### DIVISION 2. DEFINITIONS

##### 34 TAC §20.25

The Comptroller of Public Accounts proposes amendments to §20.25, concerning definitions.

These amendments are proposed to clarify the procurement rules in light of the restructure of the electric utility industry implemented with Senate Bill 7, 76th Legislature, 1999, and to provide clarity regarding the applicable procurement rules referenced in Chapter 20, Statewide Procurement and Support Services.

The restructure of the electric utility industry allowed for consumers' choice; therefore, the inclusion of the purchase of services from a retail electric provider in a deregulated market, as

described below, is proposed to clarify the procurement requirements applicable for such services in a competitive market and to help ensure state agencies comply with the purchasing requirements under Government Code, Title 10, Subtitle D.

The proposed amendment to §20.25, subsection (a), changes the generic reference from "these regulations" to "this chapter" to clarify that the reference is to Chapter 20 of this title. The amendments to subsection (b), adds definitions for: customer choice; public utility or utility; and retail electric provider. New paragraph (16) proposes the definition of "customer choice" as provided in Utilities Code, §31.002(4). New paragraph (46) proposes the definition of "public utility or utility" as provided in Utilities Code, §11.004. New paragraph (60) proposes the definition of "retail electric provider" as provided in Utilities Code, §31.002(17). Subsequent paragraphs are renumbered accordingly.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposal is in effect, the rule: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy.

Mr. Currah also has determined that the proposed amendment would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed amendment would benefit the public by conforming the rule to current statute. There would be no anticipated significant economic cost to the public. The proposed amended rule would have no significant fiscal impact on small businesses or rural communities.

Comments on the proposal may be submitted to Sarah Chacko, Comptroller of Public Accounts, at P.O. Box 13528 Austin, Texas 78711 or Sarah.Chacko@cpa.texas.gov. Comments must be received no later than 30 days from the date of publication of the proposals in the *Texas Register*.

These amendments are proposed under Government Code, §2155.0012 and §2156.0012, which authorize the comptroller by rule to efficiently and effectively administer state purchasing of goods and services.

These amendments implement Government Code, §§2151.003, 2155.001 and 2155.0011, which outline the general purchasing responsibility of the comptroller.

#### §20.25. Definitions.

(a) As used throughout this chapter [these regulations], words and terms defined in the State Purchasing and General Services Act, Government Code, Title 10, Subtitle D, and the Code Construction Act, Government Code, Chapter 311 shall have the same meaning as defined therein, and each word or term listed in this section shall have the meaning set forth herein, unless:

- (1) its use clearly requires a different meaning; or
- (2) a different definition is prescribed for a particular chapter or portion thereof.

(b) The following words and terms, when used in this section, shall have the following meaning unless the context clearly indicates otherwise.

(1) Act--The State Purchasing and General Services Act, Government Code, Title 10, Subtitle D, Chapter 2151, et seq, including any amendments thereto that may be made from time to time.

(2) Advisory groups--A group that advises and assists the standards and specification program in establishing specifications. The advisory group may include representatives from federal, state and local governments, user groups, manufacturers, vendors and distributors, bidders, associations, colleges, universities, testing laboratories, and others with expertise and specialization in particular product area.

(3) Agent of record--An employee or official designated by a qualified cooperative entity as the individual responsible to represent the qualified entity in all matters relating to the program.

(4) Approved products list--The list is also referred to as the approved brands list or qualified products list. It is a specification developed by evaluation of brands and models of various manufacturers and listing those determined to be acceptable to meet the minimum level of quality. Testing is completed in advance of procurement to determine which products comply with the specifications and standards requirements.

(5) Award--The act of accepting a bid, thereby forming a contract between the state and a bidder.

(6) Bid--An offer to contract with the state, submitted in response to a bid invitation issued by the comptroller.

(7) Bid deposit--A deposit required of bidders to protect the state in the event a low bidder attempts to withdraw its bid or otherwise fails to enter into a contract with the state. Acceptable forms of bid deposits are limited to: cashier's check, certified check, or irrevocable letter of credit issued by a financial institution subject to the laws of Texas and entered on the United States Department of the Treasury's listing of approved sureties; a surety or blanket bond from a company chartered or authorized to do business in Texas.

(8) Bidder--An individual or entity that submits a bid. The term includes anyone acting on behalf of the individual or other entity that submits a bid, such as agents, employees, and representatives.

(9) Blanket bond--A surety bond which provides assurance of a bidder's performance on two or more contracts in lieu of separate bonds for each contract. The amount for a blanket bond shall be established by the comptroller based on the bidder's annual level of participation in the state purchasing program.

(10) Brand name--A trade name or product name which identifies a product as having been made by a particular manufacturer.

(11) Centralized master bidders list (CMBL)--A list maintained by the comptroller containing the names and addresses of prospective bidders and catalog information systems vendors.

(12) Comptroller--The Comptroller of Public Accounts of the State of Texas or the designated and authorized representative of the Comptroller of Public Accounts of the State of Texas.

(13) Contract value or the value of a contract--The estimated dollar amount that a state agency may be obligated to pay pursuant to the contract and all executed and proposed amendments, extensions and renewals of the contract.

(14) Contractor--A vendor that contracts to provide goods or services to the state under the Act and all successors-in-interest to that contractor.

(15) Cooperative purchasing program--A program to provide purchasing services to qualified cooperative entities, as defined herein.

(16) Customer choice--Customer choice as the term is defined under Utilities Code, §31.002(4).

(17) [(16)] Debarment--An exclusion from contracting or subcontracting with state agencies on the basis of any cause set forth in the Act or these rules, commensurate with the seriousness of the offense, performance failure, or inadequacy to perform.

(18) [(17)] Director--The director of the division.

(19) [(18)] Distributor purchase--Purchase of repair parts for a unit of major equipment that are needed immediately or as maintenance contracts for laboratory/medical equipment.

(20) [(19)]  
Division--The organizational division within the office of the Comptroller of Public Accounts for the State of Texas performing the responsibilities identified in the Act for and under the direction of the comptroller.

(21) [(20)] Emergency procurement--A situation requiring the state agency to make the procurement more quickly to prevent a hazard to life, health, safety, welfare, or property or to avoid undue additional cost to the state.

(22) [(21)] Environmentally sensitive products--Products that protect or enhance the environment, or provide less risk to the environment than traditionally available products.

(23) [(22)] Equivalent product--A product that is comparable in performance and quality to the specified product.

(24) [(23)] Electronic State Business Daily (ESBD)--A business daily made available on the Internet at an electronic procurement marketplace to which state agencies post contract opportunities that will exceed \$25,000 in value.

(25) [(24)] Formal bid--A written bid submitted in a sealed envelope in accordance with a prescribed format, or an electronic data interchange transmitted to the comptroller in accordance with procedures established by the comptroller.

(26) [(25)] Group purchasing program--A purchasing program that offers discount prices to two or more state agencies, which is formed as a result of interagency or interlocal cooperation and follows all applicable statutory standards for purchases.

(27) [(26)] Historically Underutilized Business or HUB--A historically underutilized business as defined by Government Code, Chapter 2161 and Subchapter D, Division 1 of these rules.

(28) [(27)] Informal bid--An unsealed, competitive bid submitted by letter, telephone, or other means.

(29) [(28)] Invitation for bids (IFB)--A written request for submission of a bid; also referred to as a bid invitation.

(30) [(29)] Invoice--A document presented by a contractor for payment, which includes information necessary for payment processing, and is received by mail, hand delivery, electronically, or by facsimile transmission.

(31) [(30)] Late bid--A bid that is received at the place designated in the bid invitation after the time set for bid opening.

(32) [(31)] Level of quality--The ranking of an item, article, or product in regard to its properties, performance, and purity.

(33) [(32)] Local government--A county, municipality, special district, school district, junior college district, regional planning commission, or other political subdivision of the state pursuant to Local Government Code, §271.101.

(34) [(33)] Manufacturer's price list--A price list published in some form by the manufacturer and available to and recognized by the trade. The term does not include a price list prepared especially for a given bid.

(35) [(34)] Multiple award contract (as it applies to Multiple Award Schedule Contracts)--An award of a contract for an indefinite amount of one or more similar goods or services from a vendor.

(36) [(35)] Multiple award contract procedure--A purchasing procedure by which the comptroller establishes one or more levels of quality and performance and makes more than one award at each level.

(37) [(36)] Non-competitive purchase--A purchase of goods or services (also referred to as "spot purchase") that does not exceed the amount stated in §20.82 of this title (relating to Delegated Purchases).

(38) [(37)] Notice of award--A letter signed by the comptroller or the designee which awards and creates a term contract.

(39) [(38)] Open market purchase--A purchase of goods, usually of a specified quantity, made by buying from any available source in response to an open market requisition.

(40) [(39)] Performance bond--A surety bond which provides assurance of a bidder's performance of a certain contract. The amount for the performance bond shall be based on the bidder's annual level of potential monetary volume in the state purchasing program. Acceptable forms of bonds are those described in the definition for "bid deposit."

(41) [(40)] Perishable goods--Goods that are subject to spoilage within a relatively short time and that may be purchased by agencies under delegated authority.

(42) [(41)] Post-consumer materials--Finished products, packages, or materials generated by a business entity or consumer that have served their intended end uses, and that have been recovered or otherwise diverted from the waste stream for the purpose of recycling.

(43) [(42)] Pre-consumer materials--Materials or by-products that have not reached a business entity or consumer for an intended end use, including industrial scrap material, and overstock or obsolete inventories from distributors, wholesalers, and other companies. The term does not include materials and by-products generated from, and commonly reused within, an original manufacturing process or separate operation within the same or a parent company.

(44) [(43)] Prescribed form--The entry screens available in the ESBD.

(45) [(44)] Proprietary--Products or services manufactured or offered under exclusive rights of ownership, including rights under patent, copyright, or trade secret law. A product or service is proprietary if it has a distinctive feature or characteristic which is not shared or provided by competing or similar products or services.

(46) Public utility or utility--A public utility or utility as the term is defined under Utilities Code, §11.004.

(47) [(45)] Purchase orders--A document issued by a qualified ordering entity to make a purchase under a term contract issued by the comptroller by these rules.

(48) [(46)] Purchasing functions--The development of specifications, receipt and processing of requisitions, review of specifications, advertising for bids, bid evaluation, award of contracts, and inspection of merchandise received. The term does not include invoice, audit, or contract administration functions.

(49) [(47)] Qualified cooperative entity--An entity that qualifies for participation in the cooperative purchasing program and includes:

(A) a local government;

(B) a mental health and mental retardation community center identified in Government Code, §2155.202, that receive grants-in-aid under the provisions of Health and Safety Code, Chapter 534, Subchapter B;

(C) an assistance organization as defined in Government Code, §2175.001, that receive any state funds; and

(D) a political subdivision, as defined by Government Code, Chapter 791.

(50) [(48)] Qualified Ordering Entity--An entity that is either:

(A) a state agency; or

(B) a qualified cooperative entity that has registered with the comptroller to participate in the cooperative purchasing program as defined in Local Government Code, Subchapter D, §271.081.

(51) [(49)] Recycled material content--The portion of a product made with recycled materials consisting of pre-consumer materials (waste), post-consumer materials (waste), or both.

(52) [(50)] Recycled materials--Materials, goods, or products that contain recyclable material, industrial waste, or hazardous waste that may be used in place of raw or virgin materials in manufacturing a new product.

(53) [(51)] Recycled product--A product, including recycled steel that meets the requirements for recycled material content as prescribed by the rules established by the Texas Commission on Environmental Quality in consultation with the comptroller.

(54) [(52)] Registered agent--A representative designated by each state agency responsible for posting eligible procurement opportunities in the ESB.

(55) [(53)] Remanufactured product--A product that has been repaired, rebuilt, or otherwise restored to meet or exceed the original equipment manufacturer's (OEM) performance specifications; provided, however, the warranty period for a remanufactured product may differ from the OEM warranty period.

(56) [(54)] Request for proposal--A written request for offers concerning goods or services the state intends to acquire by means of the competitive sealed proposal procedure.

(57) [(55)] Requisition--

(A) Open market purchase requisition. An initiating request from an agency describing needs and requesting the comptroller to purchase goods or services to satisfy those needs.

(B) Term contract purchase requisition. A request from a qualified ordering entity for delivery of goods under an existing term contract.

(58) [(56)] Resolution--Document of legal intent adopted by the governing body of a qualified cooperative entity that evidences the qualified cooperative entity's participation in the cooperative purchasing program.

(59) [(57)] Respondent--A person that submits a response to a solicitation.

(60) Retail electric provider--A retail electric provider as the term is defined under Utilities Code, §31.002(17).

(61) [(58)] Reverse auction--A real time bidding procedure that is Internet dependent and which is conducted at a pre-scheduled time and Internet location in which multiple suppliers, anonymous to each other, submit bids for designated goods or services.

(62) [(59)] Schedule--A list of multiple award contracts from which agencies may purchase goods and services.

(63) [(60)] Sealed bid--A formal written bid.

(64) [(61)] Solicitation--An invitation for bids or a request for proposals or any other document issued by a state agency for the purpose of soliciting offers in any form from a vendor to sell goods or services to the state and that includes at a minimum the information identified in Government Code, §2155.083(g).

(65) [(62)] Specification--A concise statement of a set of requirements to be satisfied by a product, material or service, indicating whenever appropriate the procedures to determine whether the requirements are satisfied.

(66) [(63)] Standard specification--A description of what the purchaser requires and what a bidder or proposer must offer.

(67) [(64)] State agency--A state agency as the term is defined under Government Code, Title 10, §2151.002.

(68) [(65)] Successor-in-interest--Any business entity that acquires or otherwise obtains the controlling ownership of a business entity.

(69) [(66)] Tabulation of bids--The recording of bids and bidding data for purposes of bid evaluation and recordkeeping.

(70) [(67)] Term contract purchase--A purchase by a qualified ordering entity under a term contract, which established a source of supply for particular goods at a given price for a specified period of time.

(71) [(68)] Testing--An element of inspection involving the determination, by technical means, of the properties or elements of item(s) or component(s), including function operation.

(72) [(69)] Texas uniform standards and specifications--Standards and specifications prepared and published by the standards and specifications program of the comptroller.

(73) [(70)] Unit price--The price of a selected unit of a good or service, e.g., price per ton, per labor hour, or per foot.

(74) [(71)] Using agency--An agency of government that requisitions goods or services through the comptroller.

(75) [(72)] Vendor--A person that offers goods and services in the state.

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

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Don Neal

Chief Counsel, Operations and Support Legal Services Division

Comptroller of Public Accounts

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For further information, please call: (512) 475-0387



SUBCHAPTER B. PUBLIC PROCUREMENT  
AUTHORITY AND ORGANIZATION  
DIVISION 1. PRIMARY AND DELEGATED  
PROCUREMENT AUTHORITY

34 TAC §20.81

The Comptroller of Public Accounts proposes amendments to §20.81, concerning general purchasing provisions.

These amendments are proposed to clarify the procurement rules in light of the restructure of the electric utility industry implemented with Senate Bill 7, 76th Legislature, 1999, and to provide clarity regarding the applicable procurement rules referenced in Chapter 20, Statewide Procurement and Support Services.

The restructure of the electric utility industry allowed for consumers' choice, therefore, the inclusion of the purchase of services from a retail electric provider in a deregulated market, as described below, is proposed to clarify the procurement requirements applicable for such services in a competitive market and to help ensure state agencies comply with the purchasing requirements under Government Code, Title 10, Subtitle D.

The proposed amendments to §20.81 clarify that the purchase of services from a retail electric provider in an area with customer choice is subject to the procurement requirements under Government Code, Title 10, Subtitle D, and Chapter 20 of this title.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposal is in effect, the rule: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy.

Mr. Currah also has determined that the proposed amendment would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed amendment would benefit the public by conforming the rule to current statute. There would be no anticipated significant economic cost

to the public. The proposed amended rule would have no significant fiscal impact on small businesses or rural communities.

Comments on the proposal may be submitted to Sarah Chacko, Comptroller of Public Accounts, at P.O. Box 13528 Austin, Texas 78711 or Sarah.Chacko@cpa.texas.gov. Comments must be received no later than 30 days from the date of publication of the proposals in the *Texas Register*.

These amendments are proposed under Government Code, §2155.0012 and §2156.0012, which authorize the comptroller by rule to efficiently and effectively administer state purchasing of goods and services.

These amendments implement Government Code, §§2151.003, 2155.001, and 2155.0011, which outline the general purchasing responsibility of the comptroller.

§20.81. *General Purchasing Provisions.*

(a) Chapter 20 of this title applies~~[These rules apply]~~ to purchases of goods and services by the comptroller pursuant to the authority of the Act.

(b) Chapter 20 of this title applies~~[These rules apply]~~ to any state agency delegated the authority to purchase goods and services pursuant to the Act and these rules.

(c) A retail electric provider serving an area with customer choice is not a public utility. The purchase of retail electric service in an area with customer choice is subject to procurement requirements under the Act and Chapter 20 of this title.

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

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Don Neal

Chief Counsel, Operations and Support Legal Services Division

Comptroller of Public Accounts

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