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Appointments

Appointments for September 30, 2021

Appointed to the Work Group on Blockchain Matters, for a term to expire at the pleasure of the Governor, William H. "Bill" Henning of Fort Worth, Texas.

Appointed to the Work Group on Blockchain Matters, for a term to expire at the pleasure of the Governor, Carla L. Reyes of Allen, Texas (Ms. Reyes will serve as Chair).

Appointed ex officio to the Work Group on Blockchain Matters, for a term to expire at the pleasure of the Governor, Jennifer Buas of Dripping Springs, Texas.

Appointed ex officio to the Work Group on Blockchain Matters, for a term to expire at the pleasure of the Governor, Dan Teczar of Austin, Texas.

Appointments for October 1, 2021

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Kile B. Bate-man of Wichita Falls, Texas.

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Sereniah M. Brelan of Pflugerville, Texas.

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Deborah Healey Drago of Beaumont, Texas.

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Virginia "Ginny" Lewis Ford of Austin, Texas.

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Fedora Galasso of Austin, Texas.

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Jennifer Jarriel of Houston, Texas.

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Katherine T. "Kathy" Keane of San Angelo, Texas.

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Amy Ledbetter Parham of Buda, Texas.

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Adrianna Cuellar Rojas of Austin, Texas.

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Phillipa M. Williams of DeSoto, Texas.

Appointed pursuant to Government Code Section 535.055 to the Texas Nonprofit Council, for a term to expire October 1, 2024, Carol E. Zernial of San Antonio, Texas.

Greg Abbott, Governor

TRD-202103968  ♦  ♦  ♦  ♦
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 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING IMPLEMENTATION OF THE ACADEMIC CONTENT AREAS TESTING PROGRAM

DIVISION 3. SECURITY OF ASSESSMENTS, REQUIRED TEST ADMINISTRATION PROCEDURES AND TRAINING ACTIVITIES

19 TAC §101.3031

The Texas Education Agency (TEA) proposes an amendment to §101.3031, concerning required test administration procedures and training activities to ensure validity, reliability, and security of assessments. The proposed amendment would modify the rule to implement Senate Bill (SB) 1267, 87th Texas Legislature, Regular Session, 2021, which removed the requirement for annual security and test administration training for all test administration personnel.

BACKGROUND INFORMATION AND JUSTIFICATION: Section 101.3031 specifies that individuals with access to secure test materials must be school district or charter school employees who have received annual training in security and test administration procedures. With changes to Texas Education Code, §39.0304, introduced by SB 1267, 87th Texas Legislature, Regular Session, 2021, TEA may now only require the employee at each district campus who oversees the administration of assessment instruments to be trained annually. TEA will still require test administration personnel to receive initial training in security and test administration procedures, but the proposed amendment to §101.3031(a)(2)(D)(ii) would remove the requirement of annual training for personnel other than an employee overseeing assessment instrument administration at a campus.

FISCAL IMPACT: Lily Laux, deputy commissioner for school programs, 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 limit an existing regulation by limiting the individuals who are required to receive annual assessment training, thereby decreasing the number of individuals subject to the training.

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 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: Ms. Laux 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 potentially saving time for individuals who are no longer required to attend annual assessment security training. 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: 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 October 15, 2021, and ends November 15, 2021. 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 October 15, 2021. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Com-
missioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code, §39.0304, as amended by Senate Bill 1267, 87th Texas Legislature, Regular Session, 2021, which allows only the employee at each district campus who oversees the administration of assessment instruments to be trained annually in security and test administration procedures and allows that employee to require other personnel to be trained at their discretion.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §39.0304.


(a) Security and confidentiality.

(1) All assessment instruments included in the student assessment program are considered secure, and the contents of these tests, including student information used or obtained in their administration, are confidential.

(2) School districts and campuses, the superintendent and campus principals in each school district, open-enrollment charter schools and campuses, and the chief administrative officer and campus principals of each charter school shall:

(A) implement and ensure compliance with state test administration procedures and training activities;

(B) notify the Texas Education Agency (TEA) as soon as the school district or charter school becomes aware of any alleged or suspected violation of the security or confidential integrity of a test as listed in paragraph (3) of this subsection;

(C) report all confirmed testing violations to TEA within 10 working days of the school district or charter school becoming aware of the violation in accordance with the reporting process stipulated in the test administration materials;

(D) ensure that the only individuals with access to secure test materials are school district or charter school employees who have:

(i) met the requirements to participate in the student assessment program;

(ii) received [appropriate] training in test security and test administration procedures; and

(iii) signed an oath affirming they understand their obligation to maintain and preserve the security and confidentiality of all state assessments and student information, acknowledge their responsibility to report any suspected testing violation, and are aware of the range of penalties that may result from a violation of test security and confidentiality or a departure from test administration procedures; and

(E) ensure the security of the test materials by:

(i) verifying that all boxes of testing materials have been accounted for and match the school district or charter school shipping notices upon receipt from the state’s testing contractor(s);

(ii) requiring campuses to immediately inventory all testing materials received and to notify the school district or charter school testing coordinator of any shortages or discrepancies;

(iii) immediately notifying the state’s testing contractor(s) of any discrepancies between the materials received and the school district, charter school, and campus shipping notices;

(iv) placing test booklets and answer documents in secure, limited-access, locked storage when not in use;

(v) collecting and destroying any scratch paper, graph paper, or reference materials that students have written on, as well as any recordings, after the completion of a test administration;

(vi) requiring that all secure materials assigned to individual campuses have been accounted for and packaged in accordance with the procedures for returning materials as detailed in the test administration materials;

(vii) requiring that all test item image cards and photocopies or reproductions of secure test materials have been collected and returned to the school district or charter school testing coordinator for return to the testing contractor(s); and

(viii) maintaining inventory and shipping records for five years.

(3) Violations of the security and confidential integrity of a test include:

(A) directly or indirectly assisting students with responses to test questions;

(B) tampering with student responses;

(C) falsifying holistic ratings or student responses;

(D) viewing secure test content before, during, or after an administration unless specifically authorized by TEA or by the procedures outlined in the test administration materials;

(E) discussing or disclosing secure test content or student responses;

(F) altering students’ tests, either formally or informally;

(G) duplicating, recording, or electronically capturing confidential test content unless specifically authorized by TEA or by the procedures outlined in the test administration materials;

(H) responding to secure test questions;

(I) fraudulently exempting or preventing a student from participating in the administration of a required state assessment;

(J) receiving or providing unallowable assistance during calibration activities (e.g., taking notes, providing answer sheets, or sharing answers);

(K) encouraging or assisting an individual to engage in the conduct described in subparagraphs (A)-(J) of this paragraph or in any other serious violation of security and confidentiality;

(L) failing to report to an appropriate authority that an individual has engaged or is suspected of engaging in conduct described in subparagraphs (A)-(K) of this paragraph or in any other serious violation of security and confidentiality under this section;

(M) failing to implement sufficient procedures to prevent student cheating; and

(N) failing to implement sufficient procedures to prevent alteration of test documents by anyone other than the student.

(4) If a school district or charter school determines that a student has cheated or attempted to cheat on a state assessment either
by providing or receiving direct assistance, the school district or charter school shall invalidate the student's test results.

(5) Any violation of test security or confidential integrity may result in the TEA:

(A) invalidating student test results;

(B) referring certified educators to the State Board for Educator Certification for sanctions in accordance with Chapter 247 of this title (relating to Educators' Code of Ethics) and Chapter 249 of this title (relating to Disciplinary Proceedings, Sanctions, and Contested Cases); and

(C) lowering the school district's or charter school's accreditation status or a school district's, charter school's, or campus's accountability rating in accordance with Texas Education Code (TEC), §39.057(d), or appointment of a monitor, conservator, or management team to the school district or charter school in accordance with TEC, Chapter 39A.

(b) Test administration procedures. Test administration procedures shall be delineated in the test administration materials provided to school districts and charter schools annually. Districts and charter schools must comply with all of the applicable requirements specified in the test administration materials. Test administration materials shall include, but are not limited to, the following:

(1) general testing program information;

(2) procedures for maintaining the security and confidentiality of state assessments;

(3) procedures for test administration;

(4) responsibilities of personnel involved in test administration; and

(5) procedures for materials control.

(c) Training activities. School districts and charter schools shall ensure that test coordinators and administrators receive training to ensure that testing personnel have the necessary skills and knowledge required to administer assessment instruments in a valid, standardized, and secure manner.

(d) Records retention. As part of test administration procedures, the commissioner shall require school districts and charter schools to maintain records related to the security of assessment instruments for five years.

(e) Applicability. The required test administration procedures and training activities established annually in the test administration manuals and test security supplements for prior years remain in effect for all purposes with respect to the prior year to which they apply.

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 October 4, 2021.

TRD-202103907
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency

Earliest possible date of adoption: November 14, 2021

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

CHAPTER 153. SCHOOL DISTRICT PERSONNEL
SUBCHAPTER EE. COMMISSIONER’S RULES CONCERNING REGISTRY OF PERSONS NOT ELIGIBLE FOR EMPLOYMENT IN PUBLIC SCHOOLS

19 TAC §§153.1201, 153.1203, 153.1207, 153.1209, 153.1251

The Texas Education Agency (TEA) proposes amendments to §§153.1201, 153.1203, 153.1207, 153.1209, and 153.1251, concerning the registry of persons not eligible for employment in public schools. The proposed amendments would parallel the terms used in rule with the terms used in statute for clarity and ease of reference and implement Senate Bill (SB) 1356, 87th Texas Legislature, Regular Session, 2021.

BACKGROUND INFORMATION AND JUSTIFICATION: Under Texas Education Code, §§22.092(c)(5), 22.093(c)(1)(B), and 22.094(e)(2), the commissioner will add a person's name to the registry of persons who are not eligible to be employed by a Texas public school if the commissioner finds that the person "engaged in sexual contact with a student or minor." To match this wording in statute and thereby avoid confusion or misinterpretation, the proposed amendments would replace the term "sexual conduct" in §§153.1201, 153.1203, 153.1207, and 153.1251 with the term "sexual contact." The meaning and usage would remain the same.

The proposed amendments to §153.1201 and §153.1251 would add nonprofit teacher organizations to the definitions and to the list of entities that can request access to the registry of persons not eligible for employment in public schools. These proposed changes are necessary to implement SB 1356, 87th Texas Legislature, Regular Session, 2021, which requires that commissioner-approved nonprofit teacher organizations have the same access to the registry of persons not eligible for employment in public schools as public schools and private schools.

The proposed amendments to §§153.1203, 153.1207, and 153.1209 would include technical edits such as updating a cross reference title and removing unnecessary acronyms.

FISCAL IMPACT: Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, 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 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 a new or decrease in fees paid to the agency; would not create a new regulation; would not expand, limit, 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: Ms. Garcia 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 less confusing by aligning more closely with language in statute and allowing nonprofit teacher organizations to ensure that tutors they place in assignments with students are safe and eligible to work in Texas public schools. 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: 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 October 15, 2021, and ends November 15, 2021. 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 October 15, 2021. A form for submitting public comments on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §22.091, which sets out the definition of "other charter entity" for the rest of the subchapter; TEC, §22.092, as amended by Senate Bill 1356, 87th Texas Legislature, Regular Session, 2021, which requires the Texas Education Agency to maintain and make available a registry of persons who are not eligible to work in Texas public schools; sets out who will be included in the registry; requires that the agency provide equivalent access to the registry to public schools, private schools, and nonprofit teacher organizations; and grants the agency rulemaking authority as necessary to implement; TEC, §22.093, which requires superintendents or directors of Texas public schools to report certain misconduct by uncertified individuals to the commissioner of education; TEC, §22.094, which sets out the notice and hearing requirements for a person reported to the commissioner under TEC, §22.093, requires that the agency put information on the internet showing that a reported person is under investigation, and gives the commissioner rulemaking authority as necessary to implement; and TEC, §22.095, which requires that the agency develop and maintain an internet portal where the agency makes available the registry of persons ineligible to be employed in public schools and information about people who are under investigation by the commissioner.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§22.091, 22.092, and 22.093-22.095.

(a) Solicitation of sexual contact [conduct] --Deliberate or repeated acts that can be reasonably interpreted as the solicitation by an employee of a relationship with a student that is sexual in nature. Solicitation of sexual contact [conduct] is often characterized by a strong emotional or sexual attachment and/or by patterns of exclusivity but does not include appropriate relationships that arise out of legitimate contexts such as familial connections or lifetime acquaintance. The following acts, considered in context, may constitute prima facie evidence of the solicitation by an employee of sexual contact [conduct] with a student:
(1) behavior, gestures, expressions, or communications with a student that are unrelated to the employee's job duties and evidence a sexual intent or interest in the student, including statements of love, affection, or attraction. Factors that may be considered in determining the intent of such communications or behavior, include, without limitation:
   (A) the nature of the communications;
   (B) the timing of the communications;
   (C) the extent of the communications;
   (D) whether the communications were made openly or secretly;
   (E) the extent that the employee attempts to conceal the communications;
   (F) if the employee claims to be counseling a student, the commissioner of education may consider whether the employee's job duties included counseling, whether the employee reported the subject of the counseling to the student's guardians or to the appropriate school personnel, or, in the case of alleged abuse or neglect, whether the employee reported the abuse or neglect to the appropriate authorities; and
   (G) any other evidence tending to show the context of the communications between employee and student;
(2) making inappropriate comments about a student's body, creating or transmitting sexually suggestive photographs or images, or encouraging the student to transmit sexually suggestive photographs or images;
(3) making sexually demeaning comments to a student;
(4) making sexual references to a student;
(5) making comments about a student's potential sexual performance;
(6) requesting details of a student's sexual history;
(7) engaging in conversations regarding the sexual problems, preferences, or fantasies of either party;
(8) inappropriate hugging, kissing, or excessive touching;
(9) providing the student with drugs or alcohol;
violating written directives from school administrators regarding the employee's behavior toward a student;

(11) suggestions that a romantic relationship is desired after the student graduates, including post-graduation plans for dating or marriage; and

(12) any other acts tending to show that the employee solicited sexual contact [conduct] with a student.

(b) Abuse--This term has the meaning assigned by Texas Family Code, §261.001(1).

(c) Private school--A non-public school that offers a course of instruction for students in Texas in one or more grades from Prekindergarten-Grade 12 and is:

(1) accredited by an organization that is monitored and approved by the Texas Private School Accreditation Commission;

(2) listed in the National Center for Education Statistics database; or

(3) a child care provider that is licensed by the Texas Health and Human Services Commission.

(d) Employee--A person who is employed by a school district, district of innovation, charter school, service center, or shared services arrangement and does not hold a certification issued by the State Board for Educator Certification under Texas Education Code, Chapter 21, Subchapter B.

(e) Nonprofit teacher organization--An organization approved by the commissioner of education to participate in a tutoring program under Texas Education Code, §33.913.

§153.1203. Required Reporting by Administrators.

(a) A person who serves as the superintendent of a school district or district of innovation or the director of a charter school, regional education service center, or shared services arrangement shall notify the commissioner of education in writing by filing a report within seven business days of the date the person either receives a report from a principal under subsection (b) of this section or knew that an employee was terminated or resigned from employment and there is evidence that he or she committed any of the following acts:

(1) abused or otherwise committed an unlawful act with a student or minor; or

(2) was involved in a romantic relationship with or solicited or engaged in sexual contact [conduct] with a student or minor.

(b) A person who serves as principal in a school district, district of innovation, or charter school must notify the superintendent or director of the school district, district of innovation, or charter school no later than seven business days after an employee resigns or is terminated following an alleged incident of misconduct involving the conduct described in subsection (a)(1) and (2) of this section.

(c) A superintendent or director of a school district shall complete an investigation of an employee if there is reasonable cause to believe the employee may have engaged in misconduct described in subsection (a)(1) and (2) of this section despite the employee's resignation from district employment before completion of the investigation.

(d) A report filed under subsection (a) of this section must include:

(1) the name or names of any student or minor who is the victim of abuse or unlawful conduct by an employee; and

(2) the factual circumstances requiring the report and the subject of the report by providing the following available information:

(A) name and any aliases and certificate number, if any, or social security number;

(B) last known mailing address and home and daytime phone numbers;

(C) all available contact information for any alleged victim or victims;

(D) name or names and any available contact information of any relevant witnesses to the circumstances requiring the report;

(E) current employment status of the subject, including any information about proposed termination, notice of resignation, or pending employment actions; and

(F) involvement by a law enforcement or other agency, including the name of the agency.

(e) A report filed with the State Board for Educator Certification in compliance with Texas Education Code (TEC), §21.006, regarding a certified educator will be considered to have been filed with the commissioner as a report under this section on the date that the certification of the educator expires before the case is closed.

§153.1207. Request for Hearing.

(a) A person must submit a written request for a hearing before State Office of Administrative Hearings (SOAH) to Texas Education Agency (TEA) staff in accordance with §153.1221 of this title (relating to Filing or Serving Documents on the Texas Education Agency Staff or the Administrative Law Judge) within ten days after the person receives notice as described in §153.1205 of this title (relating to Persons Under Investigation).

(b) If a person does not timely request a hearing, the commissioner of education will issue a final order with a determination as to whether a preponderance of the evidence supports a conclusion that the person:

(1) abused or otherwise committed an unlawful act with a student or minor; or

(2) was involved in a romantic relationship with or solicited or engaged in sexual contact [conduct] with a student or minor.

§153.1209. Jurisdiction.

(a) A contested case commences under this subchapter when a notice of hearing in accordance with §153.1229 of this title (relating to Notice of Hearing) is properly served by the Texas Education Agency (TEA) staff on the person at the address included in the report under §153.1203 of this title (relating to Required Reporting by Administrators).

(b) The TEA staff shall refer the case to the State Office of Administrative Hearings (SOAH) if the TEA staff determines a person has timely requested a hearing pursuant to §153.1205 of this title (relating to Persons Under Investigation) and Texas Education Code (TEC), §22.094(c).

(c) Jurisdiction of the SOAH is determined by the administrative law judge under Texas Administrative Code, Title 1, Part 7, Chapter 155 (relating to Rules of Procedure), and this subchapter after the TEA staff have referred the case to the SOAH.

§153.1251. Notice of Placement on Registry.

(a) The person's name will be added to the registry of persons not eligible for employment in Texas public schools, in accordance with Texas Education Code, §22.092(c)(5), if the commissioner of education determines in a final order that the person:

(1) abused or otherwise committed an unlawful act with a student or minor; or
(2) was involved in a romantic relationship with or solicited or engaged in sexual contact with a student or minor.

(b) If known, the Texas Education Agency staff shall notify the employing school district of the commissioner’s final order placing the person’s name to the registry of persons not eligible for employment in public schools.

(c) Public and private schools in Texas and non-profit teacher organizations may request access to the registry of persons not eligible for employment in public schools.

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 October 4, 2021.
TRD-202103908
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: November 14, 2021
For further information, please call: (512) 475-1497

TITLE 22. EXAMINING BOARDS
PART 5. STATE BOARD OF DENTAL EXAMINERS
CHAPTER 101. DENTAL LICENSURE
22 TAC §101.14
The State Board of Dental Examiners (Board) proposes this amendment to 22 TAC §101.14, concerning exemption from licensure for certain military spouses. The proposed amendment lists what a military spouse must submit to establish residency in Texas, and the rule is proposed in accordance with House Bill 139 of the 87th Texas Legislature, Regular Session (2021), and Chapter 55, Texas Occupations Code.

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) the implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does expand an existing regulation; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state’s economy.

COST TO REGULATED PERSONS: This proposed rule does not impose a cost on a regulated person and, therefore, is not subject to Tex. Gov’t. Code §2001.0045.

Comments on the proposed amendment may be submitted to Casey Nichols, Executive Director, 333 Guadalupe Street, Suite 3-800, Austin, Texas 78701, by fax to (512) 649-2482, or by email to official_rules_comments@tsbde.texas.gov for 30 days following the date that the proposed rule is published in the Texas Register. To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or e-mailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

This proposed rule implements Chapter 55, Texas Occupations Code.


(a) The executive director of the Texas State Board of Dental Examiners must authorize a qualified military spouse to practice dentistry in Texas without obtaining a license in accordance with §55.0041(a), Texas Occupations Code. This authorization to practice is valid during the time the military service member to whom the military spouse is married is stationed at a military installation in Texas, but is not to exceed three years.

(b) In order to receive authorization to practice the military spouse must:

(1) hold an active license to practice dentistry in another state, territory, Canadian province, or country that:

(A) has licensing requirements that are determined by the board to be substantially equivalent to the requirements for certification in Texas; and

(B) is not subject to any restriction, disciplinary order, probation, or investigation;

(2) notify the board of the military spouse's intent to practice in Texas on a form prescribed by the board; and

(3) submit proof of the military spouse's residency in this state, a copy of the spouse's military identification card, and proof of the military member's status as an active duty military service member as defined by §437.001(1), Texas Government Code (relating to Definitions). To establish residency, the military spouse must submit:

(A) a copy of the permanent change of station order for the military service member to whom the spouse is married;

(B) a Texas address; and

(C) the name and address of the Texas military installation.
(c) While authorized to practice dentistry in Texas, the military spouse shall comply with all other laws and regulations applicable to the practice of dentistry in Texas.

(d) Once the board receives the form containing notice of a military spouse's intent to practice in Texas, the board will verify whether the military spouse's dental license in another state, territory, Canadian province, or country is active and in good standing. Additionally, the board will determine whether the licensing requirements in that jurisdiction are substantially equivalent to the requirements for licensure in Texas.

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 September 27, 2021.

TRD-202103836
Lauren Studdard
General Counsel
State Board of Dental Examiners
Earliest possible date of adoption: November 14, 2021
For further information, please call: (512) 305-8910

CHAPTER 103. DENTAL HYGIENE LICENSURE

22 TAC §103.10

The State Board of Dental Examiners (Board) proposes this amendment to 22 TAC §103.10, concerning exemption from licensure for certain military spouses. The proposed amendment lists what a military spouse must submit to establish residency in Texas, and the rule is proposed in accordance with House Bill 139 of the 87th Texas Legislature, Regular Session (2021), and Chapter 55, Texas Occupations Code.

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) the implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does not expand an existing regulation; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state's economy.

COST TO REGULATED PERSONS: This proposed rule does not impose a cost on a regulated person and, therefore, is not subject to Tex. Gov't. Code §2001.0045.

Comments on the proposed amendment may be submitted to Casey Nichols, Executive Director, 333 Guadalupe Street, Suite 3-800, Austin, Texas 78701, by fax to (512) 649-2482, or by email to official_rules_comments@tsbde.texas.gov for 30 days following the date that the proposed rule is published in the Texas Register. To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or e-mailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

This proposed rule implements Chapter 55, Texas Occupations Code.

§103.10. Exemption from Licensure for Certain Military Spouses.

(a) The executive director of the Texas State Board of Dental Examiners must authorize a qualified military spouse to practice dentistry in Texas without obtaining a license in accordance with §55.0041(a), Texas Occupations Code. This authorization to practice is valid during the time the military service member to whom the military spouse is married is stationed at a military installation in Texas, but is not to exceed three years.

(b) In order to receive authorization to practice the military spouse must:

1. hold an active dental hygienist license in another state, territory, Canadian province, or country that:

   (A) has licensing requirements that are determined by the board to be substantially equivalent to the requirements for certification in Texas; and

   (B) is not subject to any restriction, disciplinary order, probation, or investigation;

2. notify the board of the military spouse's intent to practice in Texas on a form prescribed by the board; and

3. submit proof of the military spouse's residency in this state, a copy of the spouse's military identification card, and proof of the military member's status as an active duty military service member as defined by §437.001(1), Texas Government Code (relating to Definitions). To establish residency, the military spouse must submit:

   (A) a copy of the permanent change of station order for the military service member to whom the spouse is married;

   (B) a Texas address; and

   (C) the name and address of the Texas military installation.
(c) While authorized to practice as a dental hygienist in Texas, the military spouse shall comply with all other laws and regulations applicable to the practice of dentistry in Texas.

(d) Once the board receives the form containing notice of a military spouse’s intent to practice in Texas, the board will verify whether the military spouse’s dental license in another state, territory, Canadian province, or country is active and in good standing. Additionally, the board will determine whether the licensing requirements in that jurisdiction are substantially equivalent to the requirements for licensure in Texas.

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 September 27, 2021.

TRD-202103837
Lauren Studdard
General Counsel
State Board of Dental Examiners

Earliest possible date of adoption: November 14, 2021
For further information, please call: (512) 305-8910

CHAPTER 108. PROFESSIONAL CONDUCT
SUBCHAPTER F. CONTRACTUAL AGREEMENTS

22 TAC §108.74

The State Board of Dental Examiners (Board) proposes a new rule, 22 TAC §108.74, concerning call coverage agreements. The proposed rule sets forth minimum requirements relating to a dentist’s provision of call coverage services for another dentist’s established patients, and is implemented pursuant to House Bill 2056 of the 87th Texas Legislature, Regular Session (2021), and Chapter 254, Texas Occupations Code.

FISCAL NOTE: Casey Nichols, Executive Director, has determined that for the first five-year period the proposed rule is in effect, the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

PUBLIC BENEFIT-COST NOTE: Casey Nichols has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the protection of public safety and welfare.

LOCAL EMPLOYMENT IMPACT STATEMENT: Casey Nichols has also determined that the proposed rule does not affect local economies and employment.

SMALL AND MICRO-BUSINESS, RURAL COMMUNITY IMPACT STATEMENT: Casey Nichols has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

GOVERNMENT GROWTH IMPACT STATEMENT: The Board has determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: (1) the rule does not create or eliminate a government program; (2) implementation of the proposed rule does not require the creation or elimination of employee positions; (3) the implementation of the proposed rule does not require an increase or decrease in future appropriations; (4) the proposed rule does not require an increase in fees paid to the agency; (5) the proposed rule does not create a new regulation; (6) the proposed rule does expand an existing regulation; (7) the proposed rule does not increase or decrease the number of individuals subject to it; and (8) the proposed rule does not positively or adversely affect the state’s economy.

COST TO REGULATED PERSONS: This proposed rule does not impose a cost on a regulated person and, therefore, is not subject to Tex. Gov’t. Code §2001.0045.

Comments on the proposed rule may be submitted to Casey Nichols, Executive Director, 333 Guadalupe Street, Suite 3-800, Austin, Texas 78701, by fax to (512) 649-2482, or by email to official_rules_comments@tsbe.texas.gov for 30 days following the date that the proposed rule is published in the Texas Register. To be considered for purposes of this rulemaking, comments must be: (1) postmarked or shipped by the last day of the comment period; or (2) faxed or e-mailed by midnight on the last day of the comment period.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

This proposed rule implements Chapter 254, Texas Occupations Code.

§108.74. Call Coverage Agreements.

(a) Purpose. The purpose of this rule is to set forth minimum requirements relating to a dentist’s provision of call coverage services for another dentist’s established patients.

(b) Scope. This rule applies to all dentists providing call coverage in Texas, regardless of the nature and scope of technology being used to provide care to patients through the call coverage relationship.

(c) Dentists may provide dental services through a call coverage agreement (CCA) to established patients of another dentist. The CCA may be oral or written.

(d) The covering dentist must provide to the patient’s dentist of record who is a party to the CCA a report about the dental intervention or advice provided. The parties to the CCA can determine the timing and method in which the report is provided and who should receive the report.

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 September 27, 2021.

TRD-202103838
Lauren Studdard
General Counsel
State Board of Dental Examiners

Earliest possible date of adoption: November 14, 2021
For further information, please call: (512) 305-8910

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PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 365. LICENSING AND REGISTRATION

22 TAC §§365.2, 365.4, 365.6, 365.10, 365.13, 365.16 - 365.18

The Texas State Board of Plumbing Examiners ("Board") proposes the repeal of: 22 Texas Administrative Code §§365.2, relating to Exemptions; 365.4, relating to Issuance of License, Registration or Endorsement; 365.6, relating to Expiration of License, Registration or Endorsement; 365.10, relating to Application for License, Registration or Endorsement after Revocation; 365.13, relating to Licensing or Registration of Individuals in Default on a Guaranteed Student Loan or in Arrears on Child Support Payments; 365.16, relating to Board Approval of Course Providers for Continuing Professional Education Programs; 365.17, relating to Board Approval of Course Instructors for Continuing Professional Education Programs; and 365.18, relating to Publishers of Course Materials for Continuing Professional Education Programs.

The Board published notice in the August 6, 2021, edition of the Texas Register (46 TexReg 4861) of its intent to review its rules in Chapter 365. Pursuant to the agency's review of its rules under Texas Government Code §2001.039, the Board has determined that the reasons for initially adopting these rules no longer exist as these rules largely restate what is already in statute rather than implementing, interpreting or prescribing law or policy.

Additionally, the reasons for initially adopting these rules no longer exist due to statutory amendments and repeals. Specifically, §365.2 is nearly identical to the Exemptions found in Subchapter B of the Plumbing license law §§1301.051-1301.058. Similarly, §365.4 restates §§1301.352, 1301.359 and 1301.401 of the Texas Occupations Code. Likewise, §365.6 essentially repeats §§1301.403, 1301.404 and 1301.405 of the Texas Occupations Code. Additionally, §365.10(a) - (c) is already covered in §1301.451, and §365.10(d) refers to the Enforcement Committee, which no longer exists as a result of House Bill (HB) 636 passed by the 87th Legislature, Regular Session (2021). Similarly, Senate Bill (SB) 37 passed by the 86th Legislature, Regular Session (2019) amended Texas Occupations Code §56.003 so that a licensing authority may not take disciplinary action against a person based on the person's default on a student loan or breach of a student loan repayment contract of scholarship contract. Accordingly the reasons for adopting §365.13(a) - (e) no longer exist. Additionally, §365.13(f) - (g) essentially restates the process described in §232.0135 of the Texas Family Code which makes its inclusion in rule redundant.

Finally, as a result of HB 636, the Board was granted explicit rule making authority to set the minimum curriculum standards and instructor standards for continuing education and training programs. Accordingly, amendments to §365.19 and §365.20 have been proposed to carry out that legislative directive. Notably, the Board was not granted explicit rule making authority by the legislature to regulate business entities or individuals that publish course materials or employ or contract with instructors. Accordingly, the Board has determined that §§365.16 - 365.18 are no longer necessary because amended rules §365.19 and §365.20 will ensure that continuing education and training programs meet minimum standards via the least restrictive means necessary.

Fiscal impact on State and Local Government

Lisa G. Hill, Executive Director, has determined that for the first five years the repeals are in effect, there are no foreseeable economic implications relating to costs or revenues of the state or local governments as a result of enforcing or administering the repeals.

Public Benefit

Lisa Hill, Executive Director, has determined that for each of the first five years the proposed repeals are in effect the public benefit anticipated as a result of the repeals will be streamlining the Board's processes and procedures.

Probable Economic Costs to Persons Required to Comply with the Rule

The Executive Director has further determined that for the first five years the repealed rules are in effect, there are no substantial costs anticipated as a result of the repealed rules.

One-for-One Rule Analysis

Given the rules do not have a fiscal note which imposes a cost on regulated persons, including another state agency, a special district, or local government, the Board asserts proposal and adoption of the repealed rules are not subject to the requirements of Government Code §2001.0045.

Government Growth Impact Statement

For each of the first five years the repealed rules are in effect, the agency has determined the following: (1) the repealed rules do not create or eliminate a government program; (2) implementation of the repealed rules do not require the creation of new employee positions or the elimination of existing employee positions; (3) implementation of the repealed rules do not require an increase or decrease in future legislative appropriations to the agency; (4) the repealed rules do not require an increase or decrease in fees paid to the agency; (5) the repealed rules do not create a new regulation; (6) the repealed rules do not expand existing regulations; (7) the repealed rules do not increase the number of individuals subject to it and (8) the repealed rules do not adversely affect this state's economy.

Local Employment Impact Statement

The Executive Director has determined that no local economies are substantially affected by the repealed rules, and, as such, the Board is exempted from preparing a local employment impact statement pursuant to Government Code §2001.022.

Fiscal Impact on Small and Micro-Businesses, and Rural Communities

The Executive Director has determined that the rule will not have an adverse effect on small or micro-businesses, or rural communities, because there are no substantial anticipated costs to persons who are required to comply with the repealed rules. As a result, the Board asserts preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, are not required.

Takings Impact Assessment

The Board has determined that there are no private real property interests affected by the repealed rules; thus, the Board asserts preparation of a takings impact assessment, as provided by Government Code §2007.043, is not required.

Environmental Rule Analysis
The Board has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure; thus, the Board asserts this proposal is not a "major environmental rule" as defined by Government Code §2001.0225. As a result, the Board asserts preparation of an environmental impact analysis, as provided by said §2001.0225, is not required.

Public Comments
Written comments regarding the repeal may be submitted by mail to Helen Kelley at P.O. Box 4200, Austin, Texas 78765-4200, or by email to rule.comment@tsbpe.texas.gov with the subject line “Rule Repeal.” All comments must be received within 30 days of publication of this proposal.

Statutory Authority
The repeal of §§365.2, 365.4, 365.6, 365.10, 365.13, 365.16, 365.17 and 365.18 are proposed under the authority of Texas Occupations Code §1301.251, which provides for the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Additionally, the repeal of §365.13 is proposed under the authority of Texas Occupations Code §56.003, which did away with a licensing authority's ability to take disciplinary action against a person based on the person's default on a student loan or breach of a student loan repayment contract of scholarship contract.

These proposed repeals affect the Plumbing License Law. No other statute is affected by these proposed repeals.

§365.2. Exemptions
§365.4. Issuance of License, Registration or Endorsement
§365.6. Expiration of License, Registration or Endorsement
§365.10. Application for License, Registration or Endorsement after Revocation
§365.13. Licensing or Registration of Individuals in Default on a Guaranteed Student Loan or in Arrears on Child Support Payments
§365.16. Board Approval of Course Providers for Continuing Professional Education Programs
§365.17. Board Approval of Course Instructors for Continuing Professional Education Programs
§365.18. Publishers of Course Materials for Continuing Professional Education Programs

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 October 1, 2021.
TRD-202103888
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: November 14, 2021
For further information, please call: (512) 936-5216

TITLE 34. PUBLIC FINANCE
PART 1. COMPTROLLER OF PUBLIC ACCOUNTS
CHAPTER 20. STATEWIDE PROCUREMENT AND SUPPORT SERVICES

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

34 TAC §20.82
The Comptroller of Public Accounts proposes amendments to §20.82, concerning delegated purchases.

The comptroller proposes to delegate certain purchases of professional memberships to state agencies by rule in subsection (a)(8). Requirements for these purchases will be contained in new subsection (d)(4). This delegation will apply only to purchases that are already authorized by law, and which also cannot be procured competitively.

The amendment aligns subsection (b)(4) with Government Code, §2155.264, as amended by Senate Bill 799, 87th Legislature, 2021.

The amendment adds subsection (b)(5) as a clear instruction for state agencies to retain justifications for their proprietary purchases. This requirement has appeared in the comptroller’s Procurement and Contract Management Guide since 2017.

The amendment adds subsection (b)(6) to allow state agencies to rely on a reasonable good faith estimate of cost in conducting delegated procurements. This concept has been expressed in the Comptroller’s Procurement and Contract Management Guide for a number of years, and is necessary to avoid wasteful repetition of effort by procurement staff if bids come in that unexpectedly exceed a procurement threshold. This new subsection recognizes that circumstances such as market conditions, resource limitations, or miscellaneous exigencies may affect an agency's ability to accurately estimate cost. Agencies are expected to reasonably select the most accurate method of estimating cost that is practicable under the circumstances, and to carry out that method in good faith.

Subsection (d)(1), regarding delegated purchases of goods, is revised and combined with former subsection (d)(4), regarding delegated purchases of services, to eliminate inconsistent wording of requirements. Deleted subsection (d)(4) referred incorrectly to "prepayment approval" by the comptroller, which is not a current practice, and contradicted the definition of contract value in this chapter, among other things. Subsection (d)(1)(B) restates the requirement of Government Code, §2155.083 to post solicitations on the Electronic State Business Daily and the requirement of Government Code, §2155.264 to solicit responses from vendors on the Centralized Master Bidders List. The requirement to attempt to provide a copy of a bid document to a vendor that previously held a contract has been deleted from subsection (d)(1)(B). That requirement is a recommended practice in the Comptroller’s Procurement and Contract Management Guide, but may not be appropriate in every procurement.

Amended subsection (d)(2) will clarify that emergency purchases of goods and services by state agencies are subject to post-payment audit, and state agencies are required to retain appropriate documentation to facilitate audits.

Subsection (e) is revised to more thoroughly describe the process for delegation of solicitations which are not delegated by statute or rule.
Subsection (f), concerning debarred vendors, is proposed for deletion so that the content can be reorganized as a new rule in Chapter 20, Subchapter G.

The entire rule has been revised for clarity and updated terminology. Use of the term "contract file" rather than "procurement file" will be consistent in the amended rule.

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 amended rule would have no significant fiscal impact on the state government, units of local government, or individuals. The new rule would benefit the public by conforming the rule to current statute and agency policy. There would be no anticipated significant economic cost to the public. The new rule would have no significant fiscal impact on small businesses or rural communities.

A public hearing will be held to receive comments on the proposed amendment. There is no physical location for this meeting. The meeting will be held at 10:30 a.m., Central Time, on November 9, 2021. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/tx-cpa/j.php?MTID=m8b957b7c9e61b42df9dcb2e5b3ed2ed5

To join the meeting by phone at (408) 418-9388, or computer or cell phone using the Webex app, use the access code 2483-537-5287. If prompted, for a password enter 34TAC20. Persons interested in providing comments at the public hearing may contact Gerard MacCrossan, Comptroller of Public Accounts, at Gerard.MacCrossan@cpa.texas.gov or by calling (512) 463-4468 by November 8, 2021.

In addition, comments on the proposal may be submitted to Guillermo Navarro, Comptroller of Public Accounts, at P.O. Box 13528 Austin, Texas 78711 or Guillermo.Navarro@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 regulation to efficiently and effectively administer state purchasing of goods and services.


§20.82. Delegated Purchases.

(a) General delegation. The [purchasing functions for the] purchase of the following goods and services is [are] delegated to state agencies:

1. one-time purchases of goods, including goods for resale, the estimated cost of which does [that do] not exceed $50,000;
2. emergency purchases;
3. purchases of perishable goods;
4. purchases of services, including services for resale, the estimated cost of which does not exceed $100,000;
5. purchases of publications directly from the publisher;
6. fuel, oil, and grease purchases; [and]
7. distributor purchases; [and]
8. professional memberships.

(b) Provisions generally applicable to delegated purchases.

1. Competitive bidding is not required for purchases of $10,000 ($5,000) or less.
2. All required solicitations of informal bids must be directed to vendors [obtained from sources] which normally offer for sale the goods and services [merchandise] being purchased.
3. Items purchased under delegated authority may not include [scheduled items] items available under a term or cooperative contract (unless purchased in quantities less than minimum ordering quantities of the [shown in] contract) or any item required by law to be purchased from a particular source.
4. The state agency [comptroller] must solicit formal bids from all eligible vendors on the central master bidders list (CMBL) when making purchases in excess of $25,000. [The comptroller waives the requirement for state agencies to solicit bids from all eligible vendors on the list when making purchases under subsection (a) of this section. State agencies must solicit from all eligible vendors on the CMBL when making service purchases in excess of $100,000 that the comptroller has delegated to an agency.]
5. The state agency must maintain documentation justifying a proprietary purchase in excess of $10,000. A solicitation for a proprietary purchase must indicate that it is proprietary and does not exceed the stated value.
6. An agency's cost estimate must be developed in good faith using a method that is reasonable under the circumstances.

(c) Withdrawal of delegated purchase authority. The comptroller will monitor [verify] compliance with established procedures for delegated purchases and may withdraw delegated purchase authority in whole or part from a state agency for continued violations after giving adequate warning. The comptroller will report to the governor, lieutenant governor, speaker of the house of representatives, and Legislative Budget Board the findings that a state agency has not followed the comptroller's rules or the laws related to the delegated purchases.

(d) Provisions applicable to particular delegated purchases.

1. Goods and services purchases. Purchases of goods and services may be made in accordance with the following provisions:

(A) State agencies must solicit [attempt to obtain] at least three informal bids, including at least [a minimum of] two bids from historically underutilized businesses (HUBs) [HUB LIST]), on all purchases of goods and services exceeding $10,000 (in excess of $5,000) and not exceeding [over] $25,000. State agencies must, to the extent possible, solicit bids from vendors on [meet competitive bidding requirements and may supplement the list of bidders obtained from] the CMBL and vendors [with potential bidders contained] in the HUB [HUB LIST Directory], which is maintained and accessible electronically on the comptroller's website. If a state agency is unable to locate two HUBs [from the comptroller's CMBL and HUB Directory or other available sources], it [the state agency] must make a note [written notation] in the contract [purchase file] of all reference sources used.
(B) For delegated purchases of goods and services estimated to cost more than $25,000, state agencies shall post a solicitation notice or notice of solicitation on the ESBD and, at a minimum, solicit formal bids from all eligible vendors within the NIGP classes and items designated for the procurement that are active on the CMBL. See §20.207 of this title (relating to Competitive Sealed Bidding), and §20.208 of this title (relating to Competitive Sealed Proposals). [State agencies must attempt to provide a copy of the bid to the last vendor who held the contract in addition to the informal bid requirement.]

(2) Emergency purchases. State agencies shall make [The comptroller will approve payment for] emergency purchases in accordance with the following provisions.

(A) At least three informal bids should be obtained whenever possible.

(B) For an emergency purchase of goods or services exceeding $25,000, a state agency must retain [send] a full written explanation of the emergency along with other documentation required by the comptroller in the contract file.

(C) A state [The] agency may contact the comptroller for advice and assistance in the handling of emergency purchases. [The comptroller may not approve an invoice for an emergency purchase unless the agency has complied with the foregoing requirements. This section does not apply to purchases made in accordance with Government Code, Chapter 418 (Texas Disaster Act of 1975).]

(3) Perishable goods. Purchases made under this authority must be obtained through competitive bids, and appropriate documentation must be retained in the contract file [forwarded to the comptroller].

(4) Services: Purchases of services estimated to cost no more than $100,000 per year per contract are delegated and must be obtained through a competitive selection process, and appropriate documentation must be forwarded to the comptroller for prepayment approval.

(A) A state agency is required to maintain documentation justifying proprietary purchases of services over $25,000 and for purchases expected to cost more than $25,000 per year.

(B) State agencies must attempt to obtain at least three informal bids, including a minimum of two bids from HUBs, on all service purchases in excess of $5,000 and not over $25,000. As a supplement to the CMBL, agencies may refer to the comptroller’s HUB Directory, which is maintained and accessible electronically, to locate HUBs in the agency’s geographic region. If an agency is unable to locate two HUBs from the comptroller’s HUB Directory or other available sources, the state agency must make a written notation in the purchase file of all reference sources used.

(C) For purchases of services estimated to cost more than $25,000 and less than $100,000, state agencies shall, as a minimum, solicit formal bids from all CMBL and HUB Directory vendors located in the state agency’s geographic region.

(D) For purchases of services estimated to cost more than $100,000 per year, the comptroller must review any proposed specifications or statements of work and determine whether the comptroller or the state agency should make the advertisement and award. The comptroller may determine that the service should be advertised to the entire CMBL, rather than to only those vendors within the state agency’s geographical area. If no competitive advantage would be obtained by having the comptroller make the advertisement and award, the comptroller may permit the state agency to do so as a delegated purchase.

(4) [55] Publications. A state agency may purchase publications directly from the publisher when such publications are not available through statewide contract or through competitive bidding. Direct purchase orders shall be made by following guidelines established by the comptroller. Examples of direct purchase include, but are not limited to:

(A) foreign publications;

(B) out-of-print or rare publications;

(C) back issues of magazines, journals, and newspapers;

(D) publications of professional societies;

(E) prepared films, tapes, and discs (audio, visual, or both);

(F) computer software;

(G) collections of any of the foregoing items, and microfilm or microfiche copies of any of the foregoing items; and

(H) Library of Congress cards.

(5) [66] Fuel, oil, and grease. A state agency may make fuel, oil, and grease purchases at service stations or in bulk. Fuel, oil, and grease purchases shall be made by following guidelines suggested by the comptroller. Non-competitive and emergency purchase procedures apply to purchases at service stations.

(6) [74] Distributor purchases. A state agency may make distributor purchases by following guidelines established by the comptroller. A state agency may purchase any of the following on a distributed purchase basis: consumable items; labor of any kind (see "service"); “will fit” parts (non-OEM); parts for stock; contract items; electrical parts for electric motors; electrical switch panel boards; electrical accessories.

(7) Professional memberships. A state agency may purchase professional memberships as described in Government Code, §2113.104 directly from a professional organization when such memberships are not available through competitive bidding, the administrative head of the agency, or that person’s designee, has approved the purchase, the purchase will serve a public purpose, and the agency will receive adequate consideration in exchange for the purchase.

(e) Specific delegations.

(1) The authority to grant specific delegations resides with the director. Upon request of a state agency, the director shall determine whether to delegate a procurement to a state agency or to carry out the procurement. [The application method, review process, delegation finding, and appeal process will be set forth by policy statement of the director.]

(2) A state agency shall submit its proposed specifications for goods and services and evaluation criteria to the division using a procedure specified by the division. Alternately, a state agency may request for the division to develop specifications and evaluation criteria.

(3) At a minimum, state agencies granted specific delegations shall meet the following criteria:

(A) [44] procurement audit standards set forth in §20.510 of this title (relating to Auditing of Purchase Related Documentation);

(B) [22] minimum training and certification standards established in §20.133 of this title (relating to Training and Certification
(C) [Footnote] approved processes and procedures for the specific type of delegation being requested. All processes and procedures are subject to the prior review, revision and approval of the director.

[A] Debarred vendors. State agencies shall ensure that debarred vendors do not participate in state contracting and will establish procedures to ensure awards are not made to debarred vendors.

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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34 TAC §20.84
The Comptroller of Public Accounts proposes amendments to §20.84, concerning advisory committees.

The committees referred to in the current rule have been automatically abolished by operation of Government Code, §2110.008. This amendment will eliminate incorrect information in the current rule, and replace it with updated information about the comptroller's consultation of stakeholders to provide input related to procurement matters.

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

A public hearing will be held to receive comments on the proposed amendment. There is no physical location for this meeting. The meeting will be held at 10:30 a.m., Central Time, on November 9, 2021. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/tx-cpa/j.php?MTID=m8b957b7c9e61b42df9dcb2e5b3ed2ed5
To join the meeting by phone at (408) 418-9388, or computer or cell phone using the Webex app, use the access code 2483-537-5287. If prompted, for a password enter 34TAC20. Persons interested in providing comments at the public hearing may contact Gerard Macrossan, Comptroller of Public Accounts, at Gerard.Macrossan@cpa.texas.gov or by calling (512) 463-4468 by November 8, 2021.

In addition, comments on the proposal may be submitted to Guillermo Navarro, Comptroller of Public Accounts, at P.O. Box 13528, Austin, Texas 78711 or Guillermo.Navarro@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.

The amendments implement Government Code, §2155.080 and §2155.081.

§20.84. Advisory Committees.

(a) [The comptroller establishes the purchasing advisory committees as set forth in subsections (c) and (d) of this section. Advisory committees shall comply with applicable requirements of Government Code, Chapter 2110 relating to State Agency Advisory Committees. The Advisory Committee on Procurement established under [shall also comply with specific statutory authority provided by] Government Code, §2155.080; and the Vendor Advisory Committee established under [shall also comply with specific statutory authority provided by] Government Code, §2155.081 have been automatically abolished by operation of Government Code, §2110.008(b)(2).

(b) The comptroller may, from time to time, solicit input related to procurement matters from representatives of vendors or vendor associations, state agencies or state agency committees, customer entities, or other stakeholders, either individually or in groups. An invitation to provide input, individually or as a group, shall not establish an advisory committee within the meaning of Government Code, Chapter 2110. [Advisory committees in subsections (c) and (d) of this section are authorized to carry out the following functions.]

[(1) Establish their own rules of operation.]
[(2) The director shall establish the size of the advisory committee, with the approval of the comptroller.]
[(3) The chair of a purchasing advisory committee shall provide to the director, or his designee, an annual report of the committee's activities.]
[(4) Annually, the director, or his designee, shall evaluate the committee's work, usefulness, and the costs related to the committee's existence, including the cost of the comptroller's office staff time spent in support of the committee's activities. The information developed in the evaluation shall be reported to the Legislative Budget Board biennially.]
[(5) Members of an advisory committee may not be reimbursed for expenses associated with conducting committee business, including travel expenses, unless otherwise authorized by the General Appropriations Act, Article IX, or approved by the governor and the Legislative Budget Board.]
[(6) An advisory committee established by the comptroller shall be abolished on the fourth anniversary of the first meeting of the advisory committee.]

[(A) unless the comptroller acts to continue or re-establish the committee in existence; and]
[(b)] unless a specific duration is prescribed by statute for the advisory committee to exist.

[(c)] If the comptroller acts to continue or re-establish the committee’s existence, it shall continue to exist for an additional four year term. Comptroller action to continue or re-establish a committee may include, without limitation, issuing a letter appointing or re-appointing committee members to an additional term.

[(c)] The Advisory Committee on Procurement shall be composed of officers or employees from the comptroller, from state agencies, including institutions of higher education, and from political subdivisions who are invited by the comptroller to serve on the committee. The officers and employees who serve on the committee shall be experienced in public purchasing, public finance, or possess other appropriate expertise to serve on the committee. The purpose of the Advisory Committee on Procurement is to represent before the comptroller the state agency purchasing community and the political subdivisions that use the comptroller’s purchasing services. The tasks of the committee are to:

[(1)] provide a method for state agencies and political subdivisions to bring issues to the attention of the comptroller;

[(2)] review issues brought forth by the comptroller;

[(3)] develop and make recommendations on improvements to the procurement process;

[(4)] review and comment on findings and recommendations related to purchasing that are made by state agency internal auditors or by the state auditor;

[(5)] develop an assessment of the committee, committee goals and measurable objectives; and

[(6)] participate in an annual review of committee activities and make recommendations about the future direction of the committee at the end of each fiscal year.

[(d)] The Vendor Advisory Committee shall be composed of employees from the comptroller and vendors who have done business with the state, and who are invited by the comptroller to serve on the committee. The comptroller shall invite a cross-section of the vendor community to serve on the committee, both large and small businesses and vendors who provide a variety of different goods and services to the state. The purpose of the Vendor Advisory Committee is to represent before the comptroller the vendor community, to provide information to vendors, and to obtain vendor input on state procurement practices. The tasks of the committee are to:

[(1)] obtain vendor input and develop and make recommendations on improvements to the procurement process;

[(2)] develop an assessment of the committee, committee goals and measurable objectives at the end of each fiscal year; and

[(3)] participate in an annual review of the committee’s activities and make recommendations about the future direction and continuity of the committee at the end of each fiscal year.

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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DIVISION 2. PUBLICIZING PROCUREMENT: CMBL, ESBD, AND VPTS

34 TAC §20.114

The Comptroller of Public Accounts proposes amendments to §20.114, concerning solicitation posting procedures. The section title is amended to include the name of the system it addresses, the “Electronic State Business Daily.”

Subsection (a) is amended to clarify that agencies must follow the comptroller’s procedures when posting documents and information. The amendments to subsection (b) will reflect that the comptroller maintains detailed posting instructions on its website, rather than in rule. Because all information required to post on the Electronic State Business Daily is included in the online instructions, subsections (c) and (d) are proposed for deletion.

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 amended rule would have no significant fiscal impact on the state government, units of local government, or individuals. The new rule would benefit the public by conforming the rule to current statute and agency policy. There would be no anticipated significant economic cost to the public. The new rule would have no significant fiscal impact on small businesses or rural communities.

A public hearing will be held to receive comments on the proposed amendment. There is no physical location for this meeting. The meeting will be held at 10:30 a.m., Central Time, on November 9, 2021. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/txcpa/j.php?MTID=m8b957b7c9e61b42df9dcb2e5b3ed2ed5

To join the meeting by phone at (408) 418-9388, or computer or cell phone using the Webex app, use the access code 2483-537-5287. If prompted, for a password enter 34TAC20. Persons interested in providing comments at the public hearing may contact Gerard MacCrossan, Comptroller of Public Accounts, at Gerard.MacCrossan@cpa.texas.gov or by calling (512) 463-4468 by November 8, 2021.

In addition, comments on the proposal may be submitted to Guillermo Navarro, Comptroller of Public Accounts, at P.O. Box 13528 Austin, Texas 78711 or Guillermo.Navarro@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.
The amendment implements Government Code, §2155.083.


(a) Each state agency must comply with the procedures established by the comptroller [described herein] when posting solicitation notices on the ESBD. The comptroller will provide an ESBD User's Manual with instructions for posting solicitations and awards on [on-line with written step-by-step instructions for accessing] the ESBD.

(b) Information for each solicitation must be [data] entered on [directly and electronically by the registered agent, via Internet access to the ESBD, using the prescribed electronic format in compliance with §20.214 of this title (relating to Notice and Information Posting Requirement). [The registered agent must enter the minimum required information as stated in §20.214 of this title (relating to Notice and Information Posting Requirement) using the on-line format provided by the comptroller in the ESBD.]

[(c)] The prescribed format will contain data fields for each of the required information items listed above. Contact information for the posting will automatically default to the information provided on the registered agent's registration form, but can be manually changed to reflect contact information on procurement solicitations for which the registered agent is not the contact.

[(d)] The registered agent/user must select the "Add this listing" option to complete the posting process. All required information must be entered for the system to accept the posting or by electronic file transfer.

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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DIVISION 3. CONTRACT MANAGEMENT GUIDE AND TRAINING

34 TAC §20.131
The Comptroller of Public Accounts proposes amendments to §20.131, concerning procurement manual and contract management guide. This amendment is to clarify and simply the rule. In subsection (b), the amendment provides that the comptroller may consult with the state auditor, state agencies, or other stakeholders to receive recommendations for improving the guide. Subsection (c) is proposed for deletion to streamline the rule.

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 amended rule would have no significant fiscal impact on the state government, units of local government, or individuals. The new rule would benefit the public by simplifying and clarifying the rule. There would be no anticipated significant economic cost to the public. The new rule would have no significant fiscal impact on small businesses or rural communities.

Comments on the proposal may be submitted to Guillermo Navarro, Comptroller of Public Accounts, at P.O. Box 13528 Austin, Texas 78711 or Guillermo.Navarro@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, §2262.051, which authorizes the comptroller to adopt rules to develop and periodically update a contract management guide.

The amendment implements Government Code, §2262.051.


(a) The comptroller shall develop and periodically update a procurement manual and contract management guide for use by state agencies.

(b) To prepare the guide, the comptroller shall consult with the attorney general and the Department of Information Resources. The comptroller may consult with the state auditor, state agencies, or other stakeholders. State agencies may submit, and the comptroller may consider, recommendations for improving the guide. [Subject to the approval by the legislative audit committee for inclusion in the audit plan under Government Code, §321.013(c), the comptroller may consult with the state auditor.]

[(c)] The guide shall include:

[(1)] information regarding the primary duties of a contract manager, including how to:

[(A)] develop and negotiate a contract;
[(B)] select a contractor; and
[(C)] monitor contractor and subcontractor performance under a contract.

[(2)] model provisions for state agency contracts that:

[(A)] distinguish between essential provisions that a state agency must include in a contract to protect the interests of this state and recommended provisions that a state agency may include in a contract;

[(B)] recognize the unique contracting needs of an individual state agency or program and provide sufficient flexibility to accommodate those needs, consistent with protecting the interests of this state;

[(C)] include maximum contract periods under which a new competitive solicitation is not necessary; and

[(D)] include the model contract management process developed under Government Code, §2262.104 and recommendations on the appropriate use of the model;

[(3)] recommended time frames under which a state agency may issue a competitive solicitation for a major contract in relation to the date on which the contract is to be executed.]
§20.133. Training and Certification Program.

(a) Purpose. The purpose of these rules is to provide a uniform procedure through which the division will train and certify individuals who conduct government procurement functions.

(b) Definitions. The following words and terms when used in this section shall have the following meanings.

(1) Purchasing--The receipt and processing of requisitions, development of specifications, development of scope of work, the issuance of purchase orders against existing cooperative or agency contracts, and the verification of the inspection of merchandise or receipt of services by the agency. The term does not include the development of solicitations and contract awards that must be posted to the Electronic State Business Daily or in the Texas Register.

(2) Contract development--The term applies to actions taken prior to contract execution, including the receipt and processing of requisitions, assessment of need, development and review of specifications, development and review of scopes of work, identification and selection of procurement methods, identification and preparation of evaluation criteria, preparation of and advertising solicitation documents, tabulation of respondent bids, evaluation of respondent proposals, negotiation of proposals, and the preparation and completion of contract award documents. The term does not include invoice or audit functions.

(3) Contract management--The term applies to actions taken following contract execution, including the assessment of risk, verification of contractor performance, monitoring compliance with deliverable and reporting requirements, enforcement of contract terms, monitoring and reporting of vendor performance, and ensuring that contract performance and practices are consistent with applicable rules, laws and the State of Texas Procurement Manual and Contract Management Guide.

(4) Procurement--The performance of any purchasing, contract development, or contract management functions.

(c) Training required.

(1) Purchasing requirements. A state agency employee must complete the division's Texas Purchasing Course to engage in purchasing functions on behalf of a state agency if the employee:

(A) has the job title of "purchaser";

(B) performs purchasing functions as 15% or more of their job functions; or

(C) makes a purchase in excess of $10,000 [$5,000].

(2) Certified Texas Contract Developer requirements.

(A) A state agency employee must be certified as a Certified Texas Contract Developer to engage in contract development functions on behalf of a state agency and issues a solicitation or contract award required to be posted to the Electronic State Business Daily or in the Texas Register:

(B) A Certified Texas Contract Developer may conduct purchasing functions.

(3) Certified Texas Contract Manager requirements. A state agency employee must be certified as a Certified Texas Contract Manager to engage in contract management functions on behalf of a state agency if the employee:

(A) has the job title of "contract manager" or "contract administration manager" or "contract technician";
(B) performs contract management functions as 50% or more of their job functions; or
(C) manages any contract in excess of $5,000,000.

(4) Certified Texas Contract Manager exemption. In accordance with Government Code, §656.052(h)(2), a contract manager whose contract management duties primarily relate to contracts described by Government Code, §2262.002(b) is exempt from the contract management certification requirements of this section.

(5) Licensed attorneys exemption. A licensed attorney employed by a state agency performing procurement or contract management functions described by this section is exempt from the certification requirements of this section.

(d) Eligible applicants. To be eligible to apply for and receive a certification, an applicant must be:

(1) a current Texas state or local government employee; or
(2) at the sole discretion of the director, a student:
   (A) currently enrolled in an accredited Texas university or community college; or
   (B) who has graduated within the last three years from an accredited Texas university or community college.

(e) Requirements to receive certification.

(1) To be a Certified Texas Contract Developer, an eligible applicant must:
   (A) complete the Texas Contract Developer Certification training course provided by the division;
   (B) complete the division approved Texas Contract Developer Certification examination with a score of 80% or higher;
   (C) have completed payment for the course and the examination; and
   (D) be issued a Texas Contract Developer Certification.

(2) To be a Certified Texas Contract Manager, an eligible applicant must:
   (A) complete the Texas Contract Manager Certification training course provided by the division;
   (B) complete the division approved Texas Contract Manager Certification examination with a score of 80% or higher;
   (C) have completed payment for the course and the examination; and
   (D) be issued a Texas Contract Manager Certification.

(f) Training completion. To complete any training required in this section, an eligible applicant must:

(1) register for the applicable training using the electronic registration provided by the division on the official comptroller website;
(2) provide documentation of eligibility acceptable to the director;
(3) attend the applicable training course; and
(4) receive confirmation of course completion from the director.

(g) Certification examinations.

(1) To take any certification examination required in this section, an eligible applicant must register to take the examination using the electronic registration provided by the division on the official comptroller website within:

   (A) three months of confirmation of completion of the applicable course by the director; or
   (B) the time period determined at the sole discretion of the director with documented extenuating circumstances not to exceed twelve months from confirmation of completion of the applicable course.

(2) If an applicant receives a score of less than 80% following completion of the course, the applicant shall have two additional attempts to obtain a score of 80% or higher during a time period not to exceed six months following completion of the course.

(3) If the applicant does not obtain a score of 80% or higher after three attempts, the applicant must retake the applicable training course prior to retaking the examination.

(h) Certification issuance.

(1) To be issued any certification in this section, eligible applicants must within three months of the issuance of examination completion with a score of 80% or higher, submit:

   (A) an application provided by the division on the official comptroller website; and
   (B) any other documents required by the director.

(2) If the director determines that all applicable requirements have been satisfied, a certification will be issued to the applicant.

(i) Continuing education.

(1) A procurement professional certified in this section must complete twenty-four hours of in-person or online continuing education every three years, one hour of which must be ethics, to maintain certification. Twenty-three hours of the required hours must be division-sponsored training and one hour may be an elective selected by the professional, subject to division approval. The ethics requirement must be satisfied by division-sponsored training.

(2) A procurement professional dual certified in this section must complete thirty-six hours of in-person or online continuing education every three years, one hour of which must be ethics, to maintain dual certification. Thirty-four hours of the required hours must be division-sponsored training and two hours may be elective courses selected by the professional, subject to division approval. The ethics requirement must be satisfied by division-sponsored training.

(3) A procurement professional certified in this section is required to take the Renewal Refresher course offered by division once every three years in order to maintain certification. The Renewal Refresher course does not count towards continuing education hours.

(4) The Renewal Refresher course must be completed no earlier than two years following the date of initial certification or last renewal. Renewal Refresher courses completed prior to two years following the date of initial certification or last renewal will not be considered applicable to the Renewal Refresher requirement.

(5) Division-sponsored or elective course continuing education will be counted as credit with the completion of the course and approval of the continuing education course credit application. The division will email a certificate of completion to the certified procurement professional upon approval of the continuing education course credit application. The same course may not be taken more than once per renewal period for credit.
Certification renewal.

(1) Certifications issued in this section expire three years following the date of issuance.

(2) Procurement professionals certified in this section must submit an application for certification renewal at least thirty calendar days prior to the expiration date of their certification.

(3) The application must include a certificate of completion of the applicable Renewal Refresher course, and certificates of completion of the division sponsored continuing education required under this rule.

(4) If a certified procurement professional allows the certification to expire, an extension may be requested within thirty calendar days from the date of expiration. If the division approves the extension, the certified procurement professional has sixty calendar days from the date of extension approval to complete the requirements for renewal. If the certified procurement professional does not complete the requirements during the extension period, the initial certification requirements must be completed to receive a new certification.

(5) Certifications awarded or renewed under previous requirements are valid until the date of first renewal.

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SUBCHAPTER C. PROCUREMENT METHODS AND CONTRACT FORMATION

DIVISION 2. PROCUREMENT METHODS

§20.207

The Comptroller of Public Accounts proposes amendments to §20.207, concerning competitive sealed bidding.

Subsection (a)(1) is amended to replace an outdated method by which a vendor requests a copy of a solicitation with the current methods of using the Electronic State Business Daily and the Centralized Master Bidders List. It incorporates the requirements of Government Code, §2155.075, as amended by Senate Bill 799, 87th Legislature, 2021.

Subsection (a)(10) is amended to remove incorrect or duplicative information. The comptroller may remove vendors from the Centralized Master Bidders List, but such removal is discretionary. This subject matter is covered in §20.107 of this title.

Subsection (a)(9) is amended to delete the instructions for posting and distributing notices of addenda. These instructions are being proposed for relocation into proposed revisions of §20.214 of this title, concerning notice and information posting and distribution and §20.215 of this title, concerning posting time requirements. Subsection (b)(9) is amended to clarify that an agency has discretion to determine whether a bid it receives without addenda is responsive to the solicitation.

Subsection (b)(10) is amended to eliminate an implied conflict with §20.209 of this title, concerning proprietary purchases. Proprietary purchases are expressly permitted by that rule. The revised rule recognizes that proprietary purchases may be accomplished through the competitive sealed bidding process.

Subsection (c) is amended to clarify the requirements for awarding a contract through the competitive sealed bids method.

The rule is amended throughout to clarify that it applies to the comptroller as well as other state agencies with authority to procure goods and services.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amended rule 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 rule's applicability; and will not positively or adversely affect this state's economy.

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

A public hearing will be held to receive comments on the proposed amendment. There is no physical location for this meeting. The meeting will be held at 10:30 a.m., Central Time, on November 9, 2021. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/txcpa/j.php?MTID=m8b957b7c9e61b42df9dcb2e5b3ed2ed5

To join the meeting by phone at (408) 418-9388, or computer or cell phone using the Webex app, use the access code 2483-537-5287. If prompted, for a password enter 34TAC20. Persons interested in providing comments at the public hearing may contact Gerard MacCrossan, Comptroller of Public Accounts, at Gerard.MacCrossan@cpa.texas.gov or by calling (512) 463-4468 by November 8, 2021.

In addition, comments on the proposal may be submitted to Guillermo Navarro, Comptroller of Public Accounts, at P.O. Box 13528 Austin, Texas 78711 or Guillermo.Navarro@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.

The amendment implements Government Code, §2155.061 and §2155.083.

§20.207. Competitive Sealed Bidding.

(a) Bid submission.
(1) A state agency shall: [Prospective bidders may request specific bid invitations from the comptroller at any time prior to the bid due date and time.]

   (A) solicit proposals under this subchapter by making available an invitation for bids that contains all the information needed to make a responsive bid, the factors other than price that will be used to determine best value for the state, and the criteria that will be used to evaluate factors other than price; and

   (B) give public notice of the invitation for bids on the ESBD and distribute notice to the CMBL in the manner provided in this subchapter.

(2) A bidder may withdraw its bid by written request at any time prior to the bid due date and time.

(3) A bid received after the bid due date and time established by the bid invitation is a late bid and will not be considered.

(4) A bid received which does not contain adequate bid identification information on the outside of the envelope will be opened to obtain such information and will then be processed as any other bid. If the incorrect information on the envelope causes the bid not to be considered in making an award, the bid will be considered invalid and rejected.

(5) Bids by facsimile are not allowed except under exceptional circumstances and with the written approval of the purchasing agency prior to the bid due date and time.

(6) An unsigned bid is not valid and will be disqualified.

(7) When formal bids are required, bids may not be taken or accepted by telephone.

(8) To claim a preference identified in Subchapter D, Division 2, of this chapter, a bidder shall mark the appropriate box on the preference form and provide sufficient documentation to demonstrate a determination that the bidder may receive the preference. If the appropriate box is not marked, a preference will not be granted unless other documents included in the bid [provide] sufficiently demonstrate that the bidder may receive the preference and is requesting the preference.

(9) [If an error is discovered in a bid invitation, or agency requirements change prior to the opening of a bid, the comptroller will transmit an addendum correcting or changing the specifications to all bidders originally listed on the Centralized Master Bidder List for that bid invitation.] Bids will not be rejected for failure to return an [the] addendum with the bid, if the change is noted on the bid or the product or service specification would not be changed by the addendum. It is the agency's discretion to determine whether the failure to attach an addendum renders the bid nonresponsive.

(10) By signing and submitting a bid to a state agency [the comptroller or to an agency acting under delegated purchasing authority], a bidder affirms that it has not given or offered any economic opportunity, employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the bid, and that it does not intend to give or offer any of the foregoing in the future. Signing a bid with a false statement shall void the bid and any resulting contract[; and the bidder shall be removed from all bidders lists at the comptroller or at the agency acting under delegated purchasing authority].

(b) Bid evaluation.

(1) A state agency [The comptroller] may accept or reject any bid or any part of a bid or waive minor technicalities in a bid, if doing so would be in the state's best interest.

(2) A bid price may not be altered or amended after the bid due date and time except to correct mathematical errors in extension.

(3) No increase in price will be considered after the bid due date and time. A bidder may reduce its price provided it is the lowest and best bidder and is otherwise entitled to the award.

(4) Bid prices are considered firm for acceptance for 30 days from the bid due date and time for open market purchases and 60 days for term contracts, unless otherwise specified in the invitation for bids.

(5) A bid containing a self-evident error may be withdrawn by the bidder prior to an award.

(6) Bid prices which are subject to unlimited escalation will not be considered. A bidder may offer a predetermined limit of escalation in its [his] bid and the bid will be evaluated on the basis of the full amount of the escalation.

(7) A bid containing a material failure to comply with the advertised specifications shall be rejected.

(8) All bids must be based on "F.O.B. destination" delivery terms unless otherwise specified.

(9) If requested in the invitation for bids, samples must be submitted or the bid will be rejected. A state agency may require samples when essential to the assessment of product quality during bid evaluation. A state agency is not required to return samples.

(10) When brand names are specified, bids on alternate brands will be considered if they otherwise meet specification requirements, unless the solicitation is designated as proprietary.

(11) Expedited payment discounts are acceptable but are not considered in making an award. All cash discounts offered will be taken if they are earned by the agency.

(12) No electrical item may be purchased unless the item meets applicable safety standards of federal and state law.

(c) Contract Award.

(1) All awards shall be made to the bidder that offers best value to the state, in compliance [complying] with the best value criteria [used] in the invitation for bids while [bid and] conforming to the advertised [product or service] specifications.

(2) In case of tie bids that [which] cannot be resolved by application of one or more preferences described in §20.306 of this title (relating to Preferences), an award may [shall] be made by drawing lots.

(3) A state agency shall document and retain the reasons for making an award in the contract file.

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
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Comptroller of Public Accounts
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34 TAC §20.208
The Comptroller of Public Accounts proposes amendments to §20.208 concerning competitive sealed proposals. These amendments are to align the procurement rules with Senate Bill 799, 87th Legislature, 2021, eliminate provisions that are not needed in rule, clarify the language used, and align with current best practices for procurement by competitive sealed proposals.

Subsection (a) is amended to revise and clarify when a state agency may follow the competitive sealed proposals procurement method to acquire goods or services. Paragraphs (2) and (3) in the current rule are proposed for deletion, because they duplicate language in the amendment of §20.82 regarding delegation of solicitations.

Subsection (b)(1) is amended to clarify publication and solicitation requirements, and to incorporate the requirements of Government Code, §2155.075 as amended by Senate Bill 799, 87th Legislature, 2021.

Subsection (c) is amended to provide that a state agency may not open proposals until the published deadline for submitting a proposal has passed, and shall maintain a list of respondents that submitted a proposal in response to each request for proposal. Subsection (d)(1) - (4) are amended for revision to clarify the requirements for negotiation of proposals.

Subsection (d)(5) is deleted because it merely restates a statutory provision and is not applicable to the vast majority of procurements by competitive sealed proposals. Subsection (e) is amended for revision to clarify requirements for contract award. Subsection (f) is deleted because the release of respondent lists shall be governed by the Public Information Act, as provided in Government Code, Chapter 552. Subsection (g) is deleted because the subject matter of comptroller guidance is more specifically addressed in §20.131, concerning the procurement manual and contract management guide.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amended rule 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 rule's applicability; and will not positively or adversely affect this state's economy.

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

A public hearing will be held to receive comments on the proposed amendment. There is no physical location for this meeting. The meeting will be held at 10:30 a.m., Central Time, on November 9, 2021. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/txcpa/j.php?MTID=m8b957b7c9e61b42df9dcb2e5b3e2dd5

To join the meeting by phone at (408) 418-9388, or computer or cell phone using the Webex app, use the access code 2483-537-5287. If prompted, for a password enter 34TAG20. Persons interested in providing comments at the public hearing may contact Gerard MacCrossan, Comptroller of Public Accounts, at Gerard.MacCrossan@cpa.texas.gov or by calling (512) 463-4468 by November 8, 2021.

Comments on the proposal may be submitted to Guillermo Navarro, Comptroller of Public Accounts, at P.O. Box 13528, Austin, Texas 78711 or Guillermo.Navarro@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. The amendments implement Government Code, §§2155.061, 2155.075, 2155.083, 2155.264, and Government Code, Chapter 2156, Subchapter C.

§20.208. Competitive Sealed Proposals.

(a) Availability of method.

[41] A [The comptroller or other] state agency may follow the [a procedure using] competitive sealed proposals procurement method to acquire goods or services if it [the comptroller or agency] determines that competitive sealed bidding and informal competitive bidding [for the purchase or type of purchase] are not practical or are disadvantageous to the state.

[2] A state agency shall send its proposal specifications and criteria to the division for approval or request the division to develop the proposal specifications and criteria.

[3] The division shall determine whether to delegated sole oversight of the acquisition to a state agency or to retain oversight of the procurement.

(b) Solicitation of proposals. A [The division or other] state agency shall:

(1) solicit proposals under this subchapter by making available a request for proposals that contains all the information needed to submit a responsive proposal, the factors other than price that will be used to determine best value for the state, and the criteria that will be used to evaluate factors other than price; and

(2) give public notice of the [a] request for proposals on the ESBD and distribute notice to the CMPL in the manner provided in [for requests for sealed bids under] this subchapter.

(c) Opening [and filing] of proposals; respondent list [public inspection]. A [The division or other] state agency may not open proposals until the published deadline for submitting a proposal has passed, and shall maintain a list of respondents that submitted a proposal in response to [received for] each request for proposal.

(d) Negotiation of proposals.

(1) A [The division or other] state agency may discuss acceptable or potentially acceptable proposals with a respondent [offeror(s)] to assess its [an offeror's] ability to meet the specifications of the solicitation [requirements]. When the division is carrying out a [managing the] request for proposals [process], it may [shall] invite a state [requisitioning] agency to participate in discussions with respondents [conducted under this section].

(2) After receiving a proposal but before making an award, a [the division or other] state agency may permit the respondent [offeror] to revise its [the] proposal one or more times to obtain the best and final offer.
(3) A [The division or other] state agency may not disclose information derived from proposals or discussions with a respondent to any [submitted from] competing respondent prior to award or cancellation of the solicitation [offers in conducting discussions under this section].

(4) A [The division or other] state agency shall provide each respondent that submitted an acceptable or potentially acceptable proposal [offeror] an equal opportunity to discuss and revise proposals.

[(g) In accordance with Government Code, §§2155.453, a state governmental entity that issues a request for proposals for technological products or services for homeland security or law enforcement purposes must allow a business entity to substitute the qualifications of its executive officers or managers for the qualifications required of the business entity in the request for proposals.]

(e) Contract award.

(1) A [The division or other] state agency may [shall make a written] award [or] a contract to the respondent [offeror] whose proposal offers the best value for the state,[ considering price, past vendor performance, vendor experience or demonstrated capability, and the evaluation factors in the request for proposals.]

(2) A [The division or other] state agency shall refuse all offers if none [of the offers submitted] is acceptable, and may refuse any offer that is not in the best interest of the state.

(3) A [The division or other] state agency shall determine which proposal offers the best value for the state in accordance with Government Code, §§2155.074, 2155.075 and 2156.125, as applicable.


[(h) Release of respondent list. After a contract is awarded, the list of respondents submitting proposals for the solicitation shall be released upon request and in compliance with Government Code, Chapter 552.]

[(e) Guidelines. The comptroller may promulgate and maintain guidelines for the conduct of and review of procurement transactions conducted using competitive sealed proposals.]

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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Comptroller of Public Accounts

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34 TAC §20.211

The Comptroller of Public Accounts proposes amendments to §20.211, concerning small purchases. This amendment would align the maximum value of a small purchase by a state agency in rule with Government Code, §2155.132, as amended by Senate Bill 799, 87th Legislature, 2021. The amendment provides that for purchases of goods which the purchasing agency estimates to be of a total value of less than $10,000 the purchasing agency shall conduct such procurements in compliance with the processes outlined in the state procurement manual and contract management guide described in §20.131 of this title.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amended rule 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 rule's applicability; and will not positively or adversely affect this state's economy.

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

A public hearing will be held to receive comments on the proposed amendment. There is no physical location for this meeting. The meeting will be held at 10:30 a.m., Central Time, on November 9, 2021. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/txcpa/j.php?MTID=m8b957b7c9e61b424d98bce5b5ed2ed5

To join the meeting by phone at (408) 418-9388, or computer or cell phone using the Webex app, use the access code 2483-537-5287. If prompted, for a password enter 34TAC20. Persons interested in providing comments at the public hearing may contact Gerard MacCrossan, Comptroller of Public Accounts, at Gerard.MacCrossan@cpa.texas.gov or by calling (512) 463-4468 by November 8, 2021.

Comments on the proposal may be submitted to Guillermo Navarro, Comptroller of Public Accounts, at P.O. Box 13528 Austin, Texas 78711 or Guillermo.Navarro@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 §2262.051, which authorize the comptroller by rule to efficiently and effectively administer state purchasing of goods and services and develop and periodically update a contract management guide.

The amendments implement Government Code, §2155.132 and §2262.052.

§20.211. Small Purchases.

For purchases of goods which the purchasing agency estimates to be of a total value of less than $10,000 [$5,000], the purchasing agency shall conduct such procurements in compliance [a manner consistent] with the processes outlined in the state procurement manual and [the] contract management guide described in §20.131 of this title (relating to Procurement Manual and Contract Management Guide).

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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34 TAC §20.214

The Comptroller of Public Accounts proposes amendments to §20.214, concerning notice and information posting requirements. These amendments are proposed to align the procurement rules with Senate Bill 799, 87th Legislature, 2021, eliminate provisions that are not needed in rule, clarify the language used, and align with current best practices. The term "response" is defined in Chapter 20, and the proposed revision will use that term consistent with its definition.

Subsection (a) is amended to provide that each state agency shall post its own notices or solicitations on the Electronic State Business Daily (ESBD). Subsection (b) is revised to more clearly outline the notice requirements for the ESBD. Subsection (b)(2) is amended for clarity. Subsection (b)(3) is revised to remove information about posting, posting time, and notifications of solicitation addenda. This information has been relocated, including in proposed §20.215 of this Title, concerning Posting Time Requirements. Subsection (b)(4) is deleted because vendors on the Centralized Master Bidders List will no longer have a responsibility to check the Electronic State Business Daily for addenda. Instead, it will be the responsibility of the agency to notify vendors on the Centralized Master Bidders List of each addendum.

New subsection (c) will require advance notice of intent to conduct high-value solicitations to be posted on the Electronic State Business Daily consistent with Government Code, §2155.051, as amended by SB 799, 87 Legislature, 2021.

New subsection (d) clarifies that a requirement to post information online is independent from and in addition to a requirement to distribute information to vendors.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amended rule 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 rule’s applicability; and will not positively or adversely affect this state’s economy.

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

A public hearing will be held to receive comments on the proposed amendment. There is no physical location for this meeting. The meeting will be held at 10:30 a.m., Central Time, on November 9, 2021. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/txcpa/j.php?MTID=m8b957b7c9e81b42df9dcbb2e5b3ed2ed5

To join the meeting by phone at (408) 418-9388, or computer or cell phone using the Webex app, use the access code 2483-537-5287. If prompted, for a password enter 34TAC20. Persons interested in providing comments at the public hearing may contact Gerard MacCrossan, Comptroller of Public Accounts, at Gerard.Maccrossan@cpa.texas.gov or by calling (512) 463-4468 by November 8, 2021.

Comments on the proposal may be submitted to Guillermo Navarro, Comptroller of Public Accounts, at P.O. Box 13528 Austin, Texas 78711 or Guillermo.Navarro@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.

The amendments implement Government Code, §§2155.075, 2155.083, and 2262.051.

§20.214. Notice and Information Posting and Distribution

(a) Each state agency shall [directly and electronically] post its own notices or solicitations on [solicitation packages for procurement contract opportunities using] the ESBD.

(b) Each state agency that issues a [procurement contract] solicitation estimated to exceed $25,000 [in value] shall post on the ESBD and issue to all bidders in the relevant categories and regions that were listed on the Centralized Master Bidders List at the time of the solicitation:[-]

(1) either [Either] the entire [bid or proposal] solicitation [package] or a notice that includes all information necessary to make a responsive response [bid, proposal, or other applicable expression of interest for the procurement contract], including the following minimum information required for each procurement as outlined in Government Code, §2155.083(g) and §2155.075:

(A) a brief description of the goods or services to be procured and any applicable NIGIP class and item code for the goods and services;

(B) the last date and time on which responses [bids, proposals, or other applicable expressions of interest] will be accepted;

(C) the estimated quantity of goods or services to be procured;

(D) the estimated date on which the goods or services to be procured will be needed; and

(E) the name, business mailing address, e-mail address, and business telephone number of the state agency employee a person may contact to inquire about all necessary information related to making a response; or [bid or proposal or other applicable expression of interest for the procurement contract.]

(2) a [A] notice when [the procurement contract has been awarded or when] the state agency has either awarded or decided not to award a contract resulting from the solicitation; and [makes the procurement].

(3) notice of each [Any] addendum to the [original procurement] solicitation, [must be posted no later than the next business day following its release to the public. The time and date for receiving solicitation responses should be changed to allow sufficient time for all recipients of the original procurement solicitation to receive and respond to the addendum prior to the time and date for receiving solicitation re-
posts, but the posting times set forth in this subchapter do not apply for addendums (that is, an addendum is not necessarily required to be posted for the full posting period applicable to the original solicitation). Each state agency is responsible for posting notices of addendums, if applicable, to each procurement solicitation. The state agency is also responsible for posting solicitation cancellation notices on the ESBD.

([4] It is the responsibility of the potential bidder or respondent to review the ESBD or contact the state agency prior to the bid or posting closing date to determine if an addendum has been issued.)

(c) At least two months before a state agency issues a solicitation estimated to exceed $20 million in value, it shall post a notice of intent to procure the goods and services to be solicited on the ESBD, including applicable NIGP class and item codes. The notice must appear on the ESBD for at least two months. This subsection does not apply to a solicitation issued by the comptroller under Government Code, §2155.061.

(d) Posting notices or information on the ESBD does not fulfill a requirement to distribute the posted material to vendors on the CMBL. A state agency that is required to distribute notices or information to vendors on the CMBL must do so by mail or email even if it posts the same notices or information on the ESBD.

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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34 TAC §20.215

The Comptroller of Public Accounts proposes amendments to §20.215, concerning posting time requirements.

Subsections (a) and (b) are amended for clarity, and to incorporate the minimum posting time requirement in Government Code, §2155.083(i). Subsection (c) is amended to address notices of award in addition to notices of cancellation. Subsection (d) is amended to specify the required posting time for solicitation addenda. Current subsection (e) is deleted because it merely restates Government Code, §2155.083(j), and to avoid any implication that the Statewide Procurement Division of the Comptroller has authority to declare a state agency contract void.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amended rule 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 rule's applicability; and will not positively or adversely affect this state's economy.

Mr. Currah also has determined that the proposed amended rule would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed amended rule would benefit the public by modernizing and con- forming the rule to current statute. There would be no significant anticipated 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 Guillermo Navarro, Comptroller of Public Accounts, at P.O. Box 13528, Austin, Texas 78711 or Guillermo.Navarro@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.

The amendments implement Government Code, §2155.083.

(a) Entire solicitation. If the state agency posts the entire solicitation package, including attachments, the solicitation must be posted until [for] the latest of:
(1) 14 calendar days after the date the solicitation package is first posted; or
(2) the date the state agency will no longer accept responses, which must be at least 14 calendar days after the date the solicitation package is first posted [bids, proposals, or other applicable expressions of interest for the procurement].
(b) Notice of solicitation [Notices]. If documents or attachments related to the solicitation must be obtained from another source, a notice of solicitation must be posted until [for] the latest of:
(1) 21 calendar days after the date the notice is first posted; or
(2) the date the state agency will no longer accept responses, which must be at least 21 calendar days after the date the notice is first posted [bids, proposals, or other applicable expressions of interest for the procurement].
(c) Notice of award or cancellation [Cancellation]. If the state agency awards the contract or decides not to make the procurement, the state agency must post a notice [amend the posting] to indicate the effective date of the cancellation or award within two business days of canceling or awarding the solicitation.
(d) Addenda or notices of addenda. Each addendum to a solicitation must be posted no later than the next business day after it was released to any potential bidder. If an addendum may require potential bidders to process and adjust to the information it contains in order to make a more appropriate response, the state agency must reasonably extend the time and date after which the state agency will no longer accept responses. The minimum posting time for an addendum ends on the same day as the minimum posting time of the corresponding solicitation. [A state agency may not award a contract and shall continue to accept bids or proposals or other applicable expressions of interest for the solicitation for at least 21 calendar days after the date the state agency first posted notice of the solicitation or 14 calendar days after the date the state agency first posted the entire bid or proposal solicitation package.]
([e] Contract void. A contract award is void if made by a state agency in violation of the applicable minimum required posting time or if no ESBD posting was made.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.
SUBCHAPTER E.  SPECIAL CATEGORIES OF CONTRACTING

DIVISION 2.  STATEWIDE PROCUREMENT DIVISION SERVICES - TRAVEL AND VEHICLES

34 TAC §20.406

The Comptroller of Public Accounts proposes amendments to §20.406, concerning purpose and applicability.

This rule is amended to add qualified cooperative entity to the list of the eligible entities that can use comptroller's contract travel services to be consistent with Government Code, §2171.055, as amended by Senate Bill 1122, 87th Legislature, 2021.

Senate Bill 1122 introduced the definition of qualified cooperative entity and its authorization to participate in the comptroller's contracts for travel services when engaged in official business. The inclusion of qualified cooperative entity is proposed to align comptroller's rules with statute and clarify applicable rules to travel services participants.

The amendments to subsection (b)(2) adds qualified cooperative entities as authorized participants in the comptroller's contracts for travel services.

Tom Currah, Chief Revenue Estimator, has determined that during the five years that the proposed amended rule 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 rule's applicability; and will not positively or adversely affect this state's economy.

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

A public hearing will be held to receive comments on the proposed amendment. There is no physical location for this meeting. The meeting will be held at 10:30 a.m., Central Time, on November 9, 2021. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/txcpa/j.php?MTID=m8b957b7c9e61b42fd9dcdb2e5b3ed2ed5

To join the meeting by phone at (408) 418-9388, or computer or cell phone using the Webex app, use the access code 2483-537-5287. If prompted, for a password enter 34TAC20. Persons interested in providing comments at the public hearing may contact Gerard MacCrossan, Comptroller of Public Accounts, at Gerard.MacCrossan@cpa.texas.gov or by calling (512) 463-4468 by November 8, 2021.

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

The amendments are proposed under the authority of Government Code, §2171.002.

The amendments implement Government Code, §2171.055.


(a)  Purpose.  This subchapter governs the use of contract travel services and state travel credit cards by state officials and employees and other eligible persons. Contract travel services may include state credit cards, travel agencies, airlines, vehicles, internet based reservation and ticketing, lodging and other modes and necessities of state business related travel. The purpose of this subchapter is to encourage travelers to obtain the lowest overall cost of travel services. These rules do not alter, amend or affect the requirements in Government Code, Chapter 660 relating to travel or the comptroller's statutes and rules.

(b)  Applicability.  This subsection defines the persons and entities eligible to use contract travel services.

(1)  State agencies.  State agency officials and employees, in the executive branch, shall use the contract travel services as required by this subchapter whenever those services provide the most efficient travel resulting in the total lowest cost. State agencies may and are encouraged to purchase travel services at rates lower than the contract travel services rates.

(2)  Other governmental entities.  Officers and employees of the following entities may, but are not required to, participate in the travel services pursuant to this subchapter. These entities may use contract travel services upon approval by the comptroller of their application for the use of contract travel services:

(A)  an institution of higher education as defined in Education Code, §61.003 when the entity uses travel agency services or when the services are purchased from funds other than general revenue or education or general funds as defined by Education Code, §51.009;

(B)  Employees Retirement System when the travel is paid from other than general revenue funds;

(C)  counties;

(D)  municipalities;

(E)  public junior colleges;

(F)  school districts;

(G)  emergency communication districts;  and

(H)  qualified cooperative entity as the term is defined under Government Code, § 2171.055; and

(I)  the supreme court, the court of criminal appeals, the courts of appeals, and other entities in the judicial branch.

(c)  Official government business.  Contract travel services shall be used only for official governmental business, unless the travel services contractor offers the same services for personal use.  No
contractor is required to allow the use of contract travel services for other than official governmental business.

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 October 4, 2021.
TRD-202103895
Don Neal
General Counsel, Operations and Support Legal Services
Comptroller of Public Accounts
Earliest possible date of adoption: November 14, 2021
For further information, please call: (512) 475-2220

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SUBCHAPTER F. CONTRACT MANAGEMENT
DIVISION 1. CONTRACT ADMINISTRATION
34 TAC §20.487

The Comptroller of Public Accounts proposes amendments to §20.487, regarding invoicing standards.

The amendment to subsection (a) clarifies the contractor’s responsibility to facilitate payment by submitting a detailed invoice. The amendment in subsection (b) provides that a state agency must notify a vendor of an error or disputed amount in an invoice submitted for payment no later than the 21st day after the agency receives the invoice, and shall include in the notice a detailed statement of the amount of the invoice which is disputed. The amendment also provides that state agencies may withhold up to 110% of any disputed amount from payment to the contractor. This aligns the rule with Government Code §2251.042 as amended by House Bill 1476, 87th Legislature, 2021.

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 new rule would have no significant fiscal impact on the state government, units of local government, or individuals. The new rule would benefit the public by conforming the rule to current statute and agency policy. There would be no anticipated significant economic cost to the public. The new rule would have no significant fiscal impact on small businesses or rural communities.

A public hearing will be held to receive comments on the proposed amendment. There is no physical location for this meeting. The meeting will be held at 10:30 a.m., Central Time, on November 9, 2021. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/txcpa/j.php?MTID=m8b957b7c9e61b42df9dcb2e5b3ed2ed5
To join the meeting by phone at (408) 418-9388, or computer or cell phone using the Webex app, use the access code 2483-537-5287. If prompted, for a password enter 34TAC20. Persons interested in providing comments at the public hearing may contact Gerard MacCrossan, Comptroller of Public Accounts, at Gerard.MacCrossan@cpa.texas.gov or by calling (512) 463-4468 by November 8, 2021.

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

This amendment is proposed under the authority of Government Code, §2251.003, to administer the state system of payments for goods and services.

The amendments implement Government Code, Chapter 2251.

§20.487. Invoicing Standards.

(a) To receive payment, a contractor must submit an invoice to the state agency receiving the goods or services. The invoice must include any information required by the customer agency, in addition to the following minimum information:

1. the contractor’s mailing and e-mail (if applicable) address;
2. the contractor’s telephone number;
3. the name and telephone number of a person designated by the contractor to answer questions regarding the invoice;
4. the state agency’s name, agency number, and delivery address;
5. the state agency’s purchase order number, if applicable;
6. the contract number or other reference number, if applicable;
7. a valid Texas identification number (TIN) issued by the comptroller;
8. a description of the goods or services, in sufficient detail to identify the order which relates to the invoice;
9. unit numbers corresponding to the amount of the invoice;
10. if submitting an invoice after receiving an assignment of a contract, the TIN of the original contractor and the TIN of the successor vendor;
11. other relevant information supporting and explaining the payment requested.

(b) A state agency must notify a vendor of an error or disputed amount in an invoice submitted for payment in accordance with a [Disputed invoices should be immediately returned to the contractor but not in no [event] later than the 21st day after the agency receives the invoice, and shall include in such notice a detailed statement of the amount of the invoice which is disputed. A state agency may withhold from payments no more than 110% of the disputed amount. When an [a correct and complete] invoice is received by the state agency, the state agency shall date stamp the invoice and maintain it with the other contract documents. A state agency may accept a partial delivery of goods or services and an invoice for payment of the portion of the goods or services delivered.

(c) A state agency may request payment for an invoice from the comptroller only after the state agency has:
The amendment is proposed under the authority of Government Code, §2262.055(b).

The amendment implements Government Code §2262.055.

§20.535. Filing Requirements.

(a) To be considered by the comptroller, a protest must be:

(1) in writing and contain:

(A) the specific rule, statute or regulation the protesting vendor alleges the solicitation, contract award or tentative award violated;

(B) a specific description of each action by the division that the protesting vendor alleges is a violation of the statutory or regulatory provision the protesting vendor identified in subparagraph (A) of this paragraph;

(C) a precise statement of the relevant facts including:

(i) sufficient documentation to establish that the protest has been timely filed;

(ii) a description of the adverse impact to the comptroller and the state; and

(iii) a description of the resulting adverse impact to the protesting vendor; 

(D) a statement of the argument and authorities that the protesting vendor offers in support of the protest;

(E) an explanation of the subsequent action the vendor is requesting; and

(F) a statement confirming that copies of the protest have been mailed or delivered to the using agency.

(2) signed by an authorized representative and the signature notarized;

(3) filed in the time period specified in this section; and

(4) mailed or delivered to:

(A) the comptroller; and

(B) the using agency.

(b) To be considered timely, the protest must be filed:

(1) by the end of the posted solicitation period, if the protest concerns the solicitation documents or actions associated with the publication of solicitation documents;

(2) by the day of the award of a contract resulting from the solicitation, if the protest concerns the evaluation or method of evaluation for a solicitation;

(3) no later than 10 days after the notice of award, if the protest concerns the award; or

(4) no later than 10 days after a vendor grade of lower than a C [or lower] is posted in the system, if the protest involves a grade assigned to a contractor in the vendor performance tracking system.

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 October 4, 2021.

TRD-202103898

Don Neal
General Counsel, Operations and Support Legal Services
Comptroller of Public Accounts

Earliest possible date of adoption: November 14, 2021

For further information, please call: (512) 475-2220

DIVISION 3. PROTESTS AND APPEALS

34 TAC §20.535

The Comptroller of Public Accounts proposes an amendment to §20.535, concerning filing requirements.

The amendment will make §20.535 consistent with Government Code, §2262.055. Currently, §20.535 permits protests to be filed when a grade of C or lower is posted in the vendor performance tracking system. However, Government Code, §2262.055 allows only vendors who receive a grade of lower than a C to protest. This amendment to subsection (b)(4) clarifies that only vendor grades of lower than a C may be protested, as provided in Government Code §2262.055.

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 new rule would have no significant fiscal impact on the state government, units of local government, or individuals. The new rule would benefit the public by conforming the rule to current statute and agency policy. There would be no anticipated significant economic cost to the public. The new rule would have no significant fiscal impact on small businesses or rural communities.

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

34 TAC §20.588

The Comptroller of Public Accounts proposes new §20.588, concerning effect of debarment. The new section will replace and restate former §20.82(f), which is simultaneously being proposed for deletion. This proposal would group the rule concerning effect of debarment with other rules concerning debarment in Subchapter G. This reorganization will promote uniformity of application and compliance by state agencies. The new proposal requires state agencies to ensure that vendors currently debarred by the comptroller do not participate in state contracting and require state agencies to establish procedures to implement this requirement. The new rule also provides that when a vendor is debarred, a state agency must terminate its contracts with the debarred vendor as soon as practicable considering such factors as a need to procure replacement goods and services from an alternate vendor.

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 new rule would have no significant fiscal impact on the state government, units of local government, or individuals. The new rule would benefit the public by conforming the rule to current agency policy and promoting uniformity of application and compliance by state agencies relating to debarment. There would be no anticipated significant economic cost to the public. The new rule would have no significant fiscal impact on small businesses or rural communities.

A public hearing will be held to receive comments on the proposed new rule. There is no physical location for this meeting. The meeting will be held at 10:30 a.m., Central Time, on November 9, 2021. To access the online public meeting by web browser, please enter the following URL into your browser: https://txcpa.webex.com/tx-cpa/j.php?MTID=m8b957b7c9e61b42df9dcb2e5b3ed2ed5

To join the meeting by phone at (408) 418-9388, or computer or cell phone using the WebEx app, use the access code 2483-537-5287. If prompted, for a password enter 34TAC20. Persons interested in providing comments at the public hearing may contact Gerard MacCrossan, Comptroller of Public Accounts, at Gerard.MacCrossan@cpa.texas.gov or by calling (512) 463-4468 by November 8, 2021.

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

The new section is proposed under Government Code, §2155.0012, which authorizes the comptroller by rule to efficiently and effectively administer state purchasing of goods and services.


State agencies shall ensure that vendors currently debarred by the comptroller do not participate in state contracting. Each agency shall establish procedures to ensure contracts are not awarded to, and purchases are not made from, debarred vendors. When a vendor is debarred, a state agency shall terminate its contracts with the debarred vendor as soon as practicable, considering such factors as a need to procure replacement goods and services from an alternate vendor.

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 October 4, 2021.

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Don Neal
General Counsel, Operations and Support Legal Services
Comptroller of Public Accounts
Earliest possible date of adoption: November 14, 2021
For further information, please call: (512) 475-2220

SUBCHAPTER I. STATE GRANT FUNDS MANAGEMENT

34 TAC §20.600

The Comptroller of Public Accounts proposes new §20.600, concerning denial of state grant funds for local entities that prohibit or discourage enforcement of public camping ban. The new section will be organized in new Subchapter I, titled State Grant Funds Management.

The new section is proposed to implement the requirements of Local Government Code, Chapter 364, as enacted by House Bill 1925 of the 87th Texas Legislature, 2021. The additions require state agencies to follow the new requirements concerning the denial of state grant funds to local entities that prohibit or discourage the enforcement of any public camping ban. The additions further mandate that local entities must disclose their status under this chapter when applying for state grant funds.

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 new rule would have no significant fiscal impact on the state government, units of local government, or individuals. The new rule would benefit the public by conforming the rule to current statute and agency policy. There would be no anticipated significant economic cost to the
public. The new rule would have no significant fiscal impact on small businesses or rural communities.

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

The new section is proposed under Local Government Code, §364.004(b), which authorizes the comptroller to adopt rules to implement Chapter 364.

The new section implements Local Government Code, §364.004, which describes new requirements applying to the distribution of state grant funds to local entities with respect to violations of Government Code, §364.002.

§20.600. Denial of State Grant Funds for Local Entities that Prohibit or Discourage Enforcement of Public Camping Ban.

(a) This section implements Local Government Code, §364.004 (Denial of State Grant Funds).

(b) This section applies to local entities applying for state grant funds and state agencies awarding state grant funds to local entities.

(c) The terms "local entity," "policy," and "public camping ban" in this section are defined as they are in Local Government Code, Title 11, §364.001.

(d) A local entity may not receive state grant funds, and state grant funds for the local entity must be denied, for the state fiscal year following the year in which a final judicial determination in an action brought by the Attorney General under Local Government Code, §364.003 is made that the entity has intentionally adopted or enforced a policy that prohibited or discouraged the enforcement of a public camping ban.

(e) A local entity applying for state grant funds must affirm in its application that it is not prohibited from receiving state grant funds under Local Government Code, §364.004.

(f) A local entity applying for state grant funds must disclose in its application whether the local entity has been sued by the Attorney General under Local Government Code, §364.003, and if so, the current posture of the lawsuit.

(g) In the event that a local entity receiving state grant funds is sued by the Attorney General under Local Government Code, §364.003 or such a case reaches a final judicial determination, the local entity must immediately disclose the lawsuit or judicial determination to all state agencies that oversee programs from which the entity currently receives state grant funds.

(h) A state agency that awards state grant funds must include appropriate assurances in grant applications and grant agreements to ensure that local entities comply with the provisions contained in this section. A state agency must document that the local entity has made such assurances before initiating any payment of state grant funds to the local entity.

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 October 4, 2021.
TRD-202103900
Don Neal
General Counsel, Operations and Support Legal Services
Comptroller of Public Accounts
Earliest possible date of adoption: November 14, 2021
For further information, please call: (512) 475-2220
The Texas Department of Licensing and Regulation withdraws the proposed amended §85.710, which appeared in the April 9, 2021, issue of the Texas Register (46 TexReg 2297).
ADOPTED RULES

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.307, §355.316

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.307, concerning Reimbursement Setting Methodology, and new §355.316, concerning Reimbursement Methodology for Pediatric Care Facilities. Section 355.307 and §355.316 are adopted without changes to the proposed text as published in the August 6, 2021, issue of the Texas Register (46 TexReg 4765). The rules will not be republished.

BACKGROUND AND JUSTIFICATION

The amendment and new section are necessary to comply with the 2022-23 General Appropriations Act, Senate Bill (S.B.) 1, 87th Legislature, Regular Session, 2021 (Article II, HHSC, Rider 40). This legislation requires HHSC to revise the reimbursement methodology for pediatric long-term care facilities to mirror that of Medicare reimbursement.

The amendment removes language related to the pediatric nursing facility rate methodology currently in §355.307(c)(1) - (c)(4) and moves it to new §355.316. The creation of new §355.316 improves clarity as it separates the pediatric care facility reimbursement methodology from the reimbursement methodology used for nursing facilities in general. The language in new §355.316 is updated to meet the requirements of the new reimbursement methodology.

The reimbursement methodology revision will lead to reimbursement rates that are calculated at higher levels than under the current methodology, leading to higher quality and greater access to care for medically fragile children in Texas.

COMMENTS

The 21-day comment period ended on August 27, 2021.

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

STATUTORY AUTHORITY

The amendment and new section are adopted under Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code Chapter 32.

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

Filed with the Office of the Secretary of State on September 29, 2021.

TRD-202103864

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Effective date: October 19, 2021

Proposal publication date: August 6, 2021

For further information, please call: (512) 424-6637

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TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 33. FEES

4 TAC §§33.1 - 33.4

The Texas Animal Health Commission (commission) in a duly noticed meeting on September 21, 2021, adopted amendments to Chapter 33, titled "Fees", of Title 4, Texas Administrative Code. The amendments are adopted without changes to the proposed text as published in the August 6, 2021, issue of the Texas Register (46 TexReg 4770). The rules will not be republished.

JUSTIFICATION FOR RULE ACTION

The amendments to Chapter 33 continue fee collection from Certificates of Veterinary Inspection to further commission services, activities, and programs protecting and promoting Texas animal agriculture. Additionally, the adoption of the rules improve readability and increase awareness of the electronic Certificate of Veterinary Inspection option as well as the third-party Certificates of Veterinary Inspection approved by the commission.

HOW THE RULES WILL FUNCTION

The adopted rules update terms and recognize modern technologies for obtaining Certificates of Veterinary Inspection.
Grammatical and editorial changes for improved readability are adopted in each section. Section 33.1, concerning Definitions, deletes "livestock market" as it is not used elsewhere in Chapter 33. Section 33.2, concerning Certificate of Veterinary Inspection, updates the rule by deleting the effect of certificates issues prior to 2005 and adding the option for electronic Certificates of Veterinary Inspections. Changes to §33.3 are non-substantive to improve readability. The new section, "Enforcement and Penalties", is adopted as §33.4 to clarify applicable penalties and violations.

SUMMARY OF COMMENTS RECEIVED AND COMMISSION RESPONSE

The 30-day comment period ended September 5, 2021. The commission did not receive any public comments during that time.

STATUTORY AUTHORITY

The Texas Animal Health Commission is vested by statute, §161.041(a), titled "Disease Control", to protect all livestock, exotic livestock, domestic fowl, and exotic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl.

Pursuant to §161.046, titled "Rules", the commission may adopt rules as necessary for the administration and enforcement of this chapter.

Pursuant to §161.112, titled "Rules", the commission shall adopt rules relating to the movement of livestock, exotic livestock, and exotic fowl from livestock markets and shall require tests, immunization, and dipping of those livestock as necessary to protect against the spread of communicable diseases.

Pursuant to §161.060, titled "Authority to Set and Collect Fees", the commission by rule may charge a fee for an inspection made by the commission.

Pursuant to §161.0601, titled "Certificates of Veterinary Inspection", the commission by rule may provide for the issuance, including electronically, of a Certificate of Veterinary Inspection by a veterinarian to a person transporting livestock, exotic livestock, domestic fowl, or exotic fowl. The commission by rule shall set and charge a fee for each Certificate of Veterinary Inspection provided to a veterinarian.

Pursuant to §161.148, titled "Administrative Penalty", the commission may impose an administrative penalty on a person who violates Chapter 161 or a rule or order adopted under Chapter 161. The penalty for a violation may be in an amount not to exceed $5,000, effective September 1, 2021.

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

Filed with the Office of the Secretary of State on October 1, 2021.

TRD-202103876
Mary Luedeker
General Counsel
Texas Animal Health Commission
Effective date: October 21, 2021
Proposal publication date: August 6, 2021
For further information, please call: (512) 719-0724

CHAPTER 45. REPORTABLE AND ACTIONABLE DISEASES

4 TAC §§45.1 - 45.4

The Texas Animal Health Commission in a duly noticed meeting on September 21, 2021, adopted amendments and new rules to Chapter 45, titled "Reportable and Actionable Diseases", in Title 4 of the Texas Administrative Code. Sections 45.1, 45.3 and 45.4 are adopted without changes, and those sections will not be republished. The commission is adopting §45.2 with changes, and this section will be republished. The amendments are adopted with changes to §45.2 as published in the Texas Register on August 6, 2021, (46 TexReg 4789). In consultation with the Department of State Health Services, the commission will add §45.2(c) to the chapter requiring "Diseases and agents of disease transmission in animals that are reportable to both the Texas Animal Health Commission and the Department of State Health Services in accordance with 25 TAC §97.3(b) may be reported to either agency, which will be forwarded to the other agency."

JUSTIFICATION FOR RULE ACTION

During the 87th Texas Legislative Session, Senate Bill 705 removed the statutorily prescribed list of diseases from which the commission is tasked with protecting all livestock, exotic livestock, domestic fowl, and exotic fowl as recommended by the Sunset Advisory Commission's review process. Instead of those statutorily prescribed disease lists, Senate Bill 705 amended Texas Agriculture Code §161.041, which now requires the commission adopt and periodically update rules listing the diseases that require control and eradication. The amended §161.041 also requires the commission to adopt and periodically update rules listing the diseases that the commission determines require reporting pursuant to Texas Agriculture Code §161.101. As such, the commission adopts the new title of Chapter 45 to "Reportable and Actionable Diseases" to accurately reflect which diseases are reportable to and actionable by the commission.

The rules will allow the commission to continue detecting and responding to diseases and agents of disease transmission that affect domestic and exotic livestock and fowl. The continued reporting requirements ensure the commission is timely notified to control the disease. In following the Sunset Advisory Commission's decision to prescribe the disease list by rule, the commission has more flexibility to prevent, manage, and eradicate reportable animal diseases. The adopted disease list also improves readability and reduces confusion by consolidating the number of disease lists and using more consistent and common disease names.

The purpose of the addition to §45.2(c) is to avoid repetitive efforts on the part of those required to report, and the content aligns with 25 TAC §97.5(b)(2). If an animal disease or agent of disease transmission is reportable to both the commission and the Department of State Health Services it may be reported to either agency and that agency will share the information with the other.

HOW THE RULES WILL FUNCTION

Section 45.1, concerning Definitions, amends definitions to align with §161.041 and §161.101 of the Texas Agriculture Code. Section 45.2, concerning Duty to Report, adds agents of disease transmission, updates terminology, and reorganizes which diseases must be reported to the commission pursuant to Texas
Agriculture Code §161.101. The scope of information a veterinarian must report to the commission is clarified, and one consolidated list of reportable and actionable diseases is adopted to reduce confusion and improve understanding. Section 45.4, concerning Enforcement and Penalties, is adopted to describe the scope of violations and respective penalties as prescribed by Chapter 161 of the Texas Agriculture Code.

SUMMARY OF COMMENTS RECEIVED AND COMMISSION RESPONSE

The 30-day comment period ended on September 5, 2021. The commission did not receive any public comments.

STATUTORY AUTHORITY

The amendments and additions are proposed under the following statutory authority in Chapter 161 of the Texas Agriculture Code.

The commission is vested by §161.041(a) to protect all livestock, exotic livestock, domestic fowl, and exotic fowl from diseases the commission determines require control or eradication. The commission is authorized pursuant to §161.041(b) to act to eradicate or control any disease or agent of disease transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl, regardless of whether the disease is communicable, even if the agent of transmission is an animal species not subject to the jurisdiction of the commission. The commission may adopt rules necessary to carry out those purposes. The commission shall adopt and periodically update rules listing the diseases that require control or eradication by the commission.

Pursuant to §161.046, titled "Rules", the commission may adopt rules as necessary for the administration and enforcement of Chapter 161, Texas Agriculture Code.

Pursuant to §161.101, titled "Duty to Report", a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal shall report to the commission the existence of diseases listed in rules adopted by the commission among livestock, exotic livestock, bison, domestic fowl, or exotic fowl. The commission shall adopt and periodically update rules listing the diseases that the commission determines require reporting under this section. Pursuant to Senate Bill 705, enacted by the 87th Texas Legislature, the disease list is removed and the commission is required to adopt the disease list by rule.

Pursuant to §161.145, titled "Veterinarian Failure to Report Diseased Animals", a veterinarian commits an offense if they willfully fail or refuse to comply with a provision of Subchapter F of Chapter 161 or with a rule adopted under Subchapter F.

Pursuant to §161.148, titled "Administrative Penalty", the commission may impose an administrative penalty on a person who violates Chapter 161 or a rule or order adopted under Chapter 161. The penalty for a violation may be in an amount not to exceed $5,000, effective September 1, 2021.

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

§45.2. Duty to Report.

(a) A veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal shall report the existence of the following diseases and agents of disease transmission among livestock, exotic livestock, domestic fowl, or exotic fowl to the commission within 24 hours after diagnosis, unless otherwise required, if the disease or agent of disease transmission is:

1. recognized by the United States Department of Agriculture as a foreign animal disease or a reportable animal disease;
2. the subject of a cooperative eradication program with the United States Department of Agriculture;
3. reportable to the World Organisation for Animal Health (OIE);
4. the subject of a state emergency, as declared by the Governor;
5. a disease or agent of disease transmission designated by the Texas Animal Health Commission in §45.3(c) of this chapter.

(b) In addition to reporting the existence of a disease under subsection (a) of this section, the veterinarian shall also report to the commission information, to the extent applicable, relating to:

1. the species and number of animals affected and exposed on the premises;
2. any clinical diagnosis or postmortem findings;
3. any death losses;
4. location of animals; and
5. animal(s) owner's and caretaker's name, address, and telephone number; and
6. name and telephone number of the veterinarian or other person in attendance.

(c) Diseases and agents of disease transmission in animals that are reportable to both the Texas Animal Health Commission and the Department of State Health Services in accordance with 25 TAC §97.3(b) may be reported to either agency, which will be forwarded to the other agency.

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

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Mary Luedeker
General Counsel
Texas Animal Health Commission
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For further information, please call: (512) 719-0724

CHAPTER 46. EXPORT-IMPORT FACILITIES
4 TAC §§46.1 - 46.6

The Texas Animal Health Commission (commission) in a duly noticed meeting on September 21, 2021, adopted new Chapter 46, titled "Export-Import Facilities", in Title 4 of the Texas Administrative Code, comprising §46.1, concerning Definitions; §46.2, concerning Duty to Report; §46.3, concerning Recordkeeping Requirements; §46.4, concerning Movement Restrictions; §46.5, concerning Right of Entry; and §46.6, concerning Enforcement and Penalties. Sections 46.1 - 46.3, 46.5, and 46.6 are adopted without changes to the proposed text as published in the August 6, 2021, issue of the Texas Register (46 TexReg 4794) and will not be republished. Section 46.4 is adopted with structural edits for clarity and is republished in this issue of the Texas Register.
JUSTIFICATION FOR RULE ACTION

The 87th Texas Legislature enacted House Bill 1958, relating to the regulation of livestock export-import processing facilities. House Bill 1958 created Section 161.0445 of the Texas Agriculture Code, which requires an owner or person in charge of an export-import facility to notify the commission not later than 24 hours after an animal received or held at the export-import facility is refused export out of this state or entry into another country. Sections 161.0445(c) and 161.0445(d) of the Texas Agriculture Code authorize the commission to require reporting and recordkeeping requirements and provisions governing the movement, inspection, testing, or treatment of animals.

The adoption of these rules will allow the commission to improve disease surveillance and control of high-risk animals at export-import facilities to better protect Texas animal agriculture. In the event a high-risk animal is refused export out of this state or into another country, the commission may respond quickly to mitigate such disease risks.

HOW THE RULES WILL FUNCTION

Section 46.1, concerning Definitions, defines relevant terms to aid understanding of the chapter. Section 46.2, concerning Duty to Report, requires the owner or person in charge of the export-import facility to report to the commission certain information concerning an animal refused from international trade within 24 hours of refusal. Section 46.3, concerning Recordkeeping Requirements, identifies the required information an export-import facility must record, maintain, and provide to the commission if an animal(s) is refused export out of this state or into another country. Section 46.4, concerning Movement Restrictions, restricts the movement of refused animals and animals in their shipment unless a commission representative permits movement on a VS Form 1-27. Section 46.5, concerning Right of Entry, clarifies the commission’s ability to enter a public or private export-import facility to examine records, inspect animals, or perform a duty pursuant to Chapter 161 of the Texas Agriculture Code. Section 46.6, concerning Enforcement and Penalties, describes the scope of violations and penalties as prescribed by Chapter 161 of the Texas Agriculture Code.

SUMMARY OF COMMENTS RECEIVED AND COMMISSION RESPONSE

The 30-day comment period ended on September 5, 2021. The commission received two comments. One comment was received by an individual who did not indicate support or opposition of the rule, the other by the Texas Southwestern Cattle Raisers Association who supports the rule adoption. To the extent the commission could determine, summaries of the comments relating to the rules and the commission’s response follows.

Comment: The individual commenter did not indicate support or opposition to the proposed rule; the commenter stated that Chapter 46 does not require animals to have access to water, food or shelter when they are detained at any Texas export-import facilities. The commenter suggested adding those requirements as the commission will provide a hotline for reporting.

Response: The comment is outside the scope of the proposed chapter. Instead, the commission is authorized to act to eradicate or control any disease or agent of disease transmission that affects livestock, exotic livestock, domestic fowl, or exotic fowl. As such, the commission is not modifying the content of the rules in response to this comment.

Comment: The Texas Southwestern Cattle Raisers Association stated their support for the adoption of Chapter 46 based on the increased protection the rules provide against diseases and pests that threaten cattle health and could impact beef supply by allowing the commission to receive notification when animals are rejected for export due to inadequate records, disease, or pest concerns.

Response: The commission respectfully agrees and is not modifying Chapter 46 in response to this comment.

STATUTORY AUTHORITY

The Texas Animal Health Commission is vested by statute, §161.041(a), titled "Disease Control", to protect all livestock, exotic livestock, domestic fowl, and exotic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl.

Pursuant to §161.0445, titled "Regulation of Export-Import Processing Facilities", the commission may, for disease or pest control purposes, adopt rules necessary to implement, administer, and enforce this section. The rules may include reporting and recordkeeping requirements and provisions governing the movement, inspection, testing, or treatment of animals.

Pursuant to §161.046, titled "Rules", the commission may adopt rules as necessary for the administration and enforcement of this chapter.

Pursuant to §161.047, titled "Entry Power", a commissioner or veterinarian or inspector employed by the commission may enter public or private property for the exercise of an authority or performance of a duty under Chapter 161.

Pursuant to §161.054, titled "Regulation of Movement of Animals; Exception", as a control measure, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. The commission is authorized, through §161.054(b), to prohibit or regulate the movement of animals into a quarantined herd, premises, or area. The Executive Director of the commission is authorized, through §161.054(d), to modify a restriction on animal movement, and may consider economic hardship.

Pursuant to §161.148, titled "Administrative Penalty", the commission may impose an administrative penalty on a person who violates Chapter 161 or a rule or order adopted under Chapter 161. The penalty for a violation may be in an amount not to exceed $5,000, effective September 1, 2021.

§46.4. Movement Restrictions.

Unless permitted for movement on a VS Form 1-27 by a commission representative, the owner or caretaker of an animal refused export out of this state or entry into another country shall not move the animal or animals in its shipment from the export-import facility if:

(1) the animal is refused for a disease or pest concern; or
(2) the animal or an animal in the shipment does not meet the commission’s applicable testing, entry, inspection, permit, identification, movement, or change of ownership requirements.
The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Mary Luedeker
General Counsel
Texas Animal Health Commission
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For further information, please call: (512) 719-0724

CHAPTER 53. MARKET REGULATION

4 TAC §§53.1, 53.3 - 53.6

The Texas Animal Health Commission (commission) in a duly noticed meeting on September 21, 2021, adopted amendments to §§53.1, Facilities; §§53.3, Quarantine; §§53.4, Market Identification; and §§53.5 Market Recordkeeping. The commission further adopted new §§53.6, Enforcement and Penalties. These amendments and new section are adopted without changes to the proposed text as published in the August 6, 2021, issue of the Texas Register (46 TexReg 4797), and will not be republished.

JUSTIFICATION FOR RULE ACTION

The purpose of the rule adoption is to continue disease surveillance, control, enhanced marketability, and quality assurance. The adopted rules also improve readability and compliance by clarifying and removing inconsistencies in existing regulations.

HOW THE RULES WILL FUNCTION

Section 53.1, concerning Facilities, clarifies that certain requirements are not limited to brucellosis testing and provides grammatical and editorial changes for accuracy. Section 53.2, concerning Release of Animals, is not changed. Section 53.3, concerning Quarantine, provides editorial amendments for improved readability. Section 53.4, concerning Market Identification, removes a cross-reference to a brucellosis program requirement that no longer exists; if the market elects to voluntarily test, the addition to this rule retains the market's responsibility to supply cattle ear tag and backtag identification to the veterinarian prior to relevant testing. Section 53.5, concerning Market Recordkeeping, clarifies and corrects the records a market must maintain according to existing commission rules and federal regulations. The section is reorganized to improve compliance and readability; no existing content is deleted. Section 53.6, concerning Enforcement and Penalties, describes the scope of violations and respective penalties as prescribed by Chapter 161 of the Texas Agriculture Code.

SUMMARY OF COMMENTS RECEIVED AND COMMISSION RESPONSE

The 30-day comment period ended on September 5, 2021. The commission received one comment from an individual who opposed §§53.1, 53.3 and 53.6. Of the comment received and to the extent the commission could determine, a summary of that comment and the commission's response is below.

Comment: The commenter requested the TAHC be permitted to place livestock, domestic fowl, or exotic fowl exposed to or infected with certain diseases in a sanctuary rather than slaught-tering those animals and ensure that the producer or livestock market, not the non-profit sanctuary, bears the cost of remediation.

The commenter also requested the TAHC not make special exceptions for businesses to sell diseased cattle, which includes carcinoma, through a livestock market if visual examination of the livestock is made by a TAHC agent or by the USDA - Food Safety and Inspection Service (FSIS).

The commenter also requested the TAHC require dealers to track downed cows and pigs so the state is able to track and record downed animals per livestock market considering each livestock market must provide a workspace for TAHC representatives.

Response: The comment is outside of the scope of the amended rule. As such, the commission is not amending Chapter 53 because of the comment, but will take suggestions under advisement for future rulemaking where applicable.

STATUTORY AUTHORITY

The Texas Animal Health Commission is vested by statute, §161.041(a), titled "Disease Control", to protect all livestock, exotic livestock, domestic fowl, and exotic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl.

Pursuant to §161.0415, titled "Disposal of Diseased or Exposed Livestock or Fowl", the commission may require by order the slaughter of livestock, domestic fowl, or exotic fowl exposed to or infected with certain diseases.

Pursuant to §161.0417, titled "Authorized Personnel for Disease Control", the commission must authorize a person, including a veterinarian, to engage in an activity that is part of a state or federal disease control or eradication program for animals.

Pursuant to §161.046, titled "Rules", the commission may adopt rules as necessary for the administration and enforcement of this chapter.

Pursuant to §161.049, titled "Dealer Records", a commission may require a livestock, exotic livestock, domestic fowl, or exotic fowl dealer to maintain records of all livestock, exotic livestock, domestic fowl, or exotic fowl bought and sold by the dealer. The commission may inspect and copy the records of a livestock, exotic livestock, domestic fowl, or exotic fowl dealer that relate to the buying and selling of those animals. The commission by rule shall adopt the form and content of the records maintained by a dealer. A dealer is a person engaged in the business of buying or selling animals in commerce on the person's own account; as an employee or agent of the vendor, the purchaser, or both; or on a commission basis. That does not include a person who buys or sells animals as part of the person's bona fide breeding, feeding, dairy, or stocker operations but does include livestock markets and commission merchants.

Pursuant to §161.054, titled "Regulation of Movement of Animals; Exception", the commission, by rule, may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. The commission is authorized, through §161.054(b), to
prohibit or regulate the movement of animals into a quarantined herd, premises, or area. The Executive Director of the commission is authorized, through §161.054(d), to modify a restriction on animal movement, and may consider economic hardship.

Pursuant to §161.056(a), titled "Animal Identification Program", the commission, to provide for disease control and enhance the ability to trace disease-infected animals or animals that have been exposed to disease, may develop and implement an animal identification program that is no more stringent than a federal animal disease traceability or other federal animal identification program.

Pursuant to §161.065, titled "Movement from Quarantined Area; Movement of Quarantined Animals", a person in violation of a quarantine may not move livestock, domestic animals, or domestic fowl in this state from any quarantined place in or outside this state; move quarantined livestock, domestic animals, or domestic fowl from the place in which they are quarantined; or move commodities or animals designated as disease carriers or potential disease carriers in this state from a quarantined place in or outside this state. The commission may provide for a written certificate or written permit authorizing the movement of commodities or animals from quarantined places or the movement of quarantined commodities or animals. If the commission finds animals that have been moved in violation of a quarantine established under this chapter, the commission shall quarantine the animals until they have been properly treated, vaccinated, tested, or disposed of in accordance with the rules of the commission.

Pursuant to §161.113, titled "Testing or Treatment of Livestock", the commission may establish rules regarding the tests, vaccination, and treatment of animals at livestock markets. Section 161.113(c) provides that the commission may require the owner or operator of the livestock market to furnish adequate chutes or holding pens or have access to other essential testing and dipping facilities within the immediate vicinity of the livestock market. Pursuant to Senate Bill 705, effective September 1, 2021, the commission may require the owner or operator of the livestock market to furnish adequate equipment or facilities or have access to essential equipment or facilities within the immediate vicinity of the livestock market.

Pursuant to §161.114, titled "Inspection of Livestock", an authorized inspector of the TAHC may examine livestock consigned to and delivered on the premises of a livestock market before the livestock are offered for sale. The inspector may require an animal be tested or vaccinated if necessary, which must occur before the animal is removed from the livestock market.

Pursuant to §161.115, titled "Entry Power", an agent of the commission is entitled to enter any livestock market to exercise authority or performance of a duty under Subchapter G of Chapter 161.

Pursuant to §161.116(b), titled "Sale or Delivery of Diseased Cattle", a person may not sell diseased cattle, which includes carcinoma, unless the cattle are sold through a livestock market where visual examination of livestock is made by an agent of the commission or by the USDA. Under §161.116(c), a person may not release diseased cattle from a livestock market unless the cattle are consigned directly to a federally approved terminal market or to a slaughtering establishment maintaining federal, state, or state-approved veterinary postmortem inspection; and accompanied by a certificate or permit issued by a TAHC or USDA representative naming the terminal market or slaughtering establishment.

Pursuant to §161.146, titled "Compliance with Livestock Market Regulation", an owner or operator of a livestock market must furnish adequate facilities, permit an agent of the commission to enter the market, exercise an authority, or perform a duty under Subchapter G of Chapter 161, Texas Agriculture Code.

Pursuant to §161.147, titled "Failure to Maintain Dealer Records", a person commits an offense if the person fails to maintain or permit the inspection of a record required under Section 161.049 of Chapter 161.

Pursuant to §161.148, titled "Administrative Penalty", the commission may impose an administrative penalty on a person who violates Chapter 161 or a rule or order adopted under Chapter 161. The penalty for a violation may be in an amount not to exceed $5,000, effective September 1, 2021.

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

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Mary Luedeker
General Counsel
Texas Animal Health Commission
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For further information, please call: (512) 719-0724

CHAPTER 55. SWINE
4 TAC §§55.1 - 55.5, 55.7, 55.9, 55.10

The Texas Animal Health Commission (commission) in a duly noticed meeting on September 21, 2021, adopted amendments to Chapter 55, §§55.1 - 55.5, 55.7, 55.9, and 55.10, in Title 4 of the Texas Administrative Code. These amendments are adopted without changes to the proposed text as published in the August 6, 2021, issue of the Texas Register (46 TexReg 4800). The rules will not be republished.

JUSTIFICATION FOR RULE ACTION

The adoption of these rules improves readability and clarifies existing swine regulations. The rules meet the requirements of Senate Bill 705 and Senate Bill 1997 amendments enacted by the 87th Texas Legislature and federal rules and standards.

HOW THE RULES WILL FUNCTION

In all adopted sections, editorial and grammatical changes are made. Section 55.1, concerning Testing Breeding Swine Prior to Sale or Change of Ownership, clarifies and updates several definitions as well as adds "TAHC Authorized Veterinarian" and clarifies that tested animals shall be officially identified. Section 55.2, concerning Restricted Use of Modified Live Virus Classical Swine Fever Vaccine, corrects the rule with regard to the use of the vaccine as well as changes the disease name pursuant to the Senate Bill 1997 enacted by the 87th Legislature. Section 55.3, concerning Feeding of Garbage Requirements and Garbage Feeding Facility Permit amends the title to better describe the section. The section is reorganized for improved readability. Section 55.4, concerning Livestock Markets Han-
The commission received one comment from an individual who opposed §§55.3, 55.4, and 55.7. Of the comment received and to the extent the commission could determine, the summary of the comment and the commission's response is below.

Comment: The commenter requested the TAHC restrict the feeding of garbage to pigs to continue disease reduction. The commenter also requested the TAHC not allow livestock markets and dealers in Texas to sell downed pigs; instead, humanely euthanize them for continued disease reduction. Additionally, the commenter stated that the TAHC should authorize only a licensed veterinarian to euthanize downed animals as opposed to hanging, shooting, or burying downed pigs alive. The commenter also asked the TAHC to not change "kill" to "slaughter" in 4 TAC §55.7.

Response: The suggested changes to §§55.3 and 55.4 are beyond the scope of the amended rules. The commission disagrees with the suggestion to retain "kill" in §55.7 because the definition of "slaughter" is narrower and consistent with the slaughter plant practices. The commission values the specificity and applicability the amended term "slaughter" provides in §55.7. As such, the commission is not modifying any content in response to the comment.

STATUTORY AUTHORITY

These rules are adopted pursuant to the following statutory authority found in Chapters 161 and 165 of the Texas Agriculture Code. The Texas Animal Health Commission is vested by statute, §161.041(a), titled "Disease Control", to protect all livestock, exotic livestock, domestic fowl, and exotic fowl from disease. The commission is authorized, through §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl.

Pursuant to §161.0412, titled "Regulation and Registration of Feral Swine Holding Facilities", the commission may require the regulation of feral swine holding facilities for disease control purposes. The commission may also require a person to register with the commission if the person confines feral swine in a holding facility for slaughter, sale, exhibition, hunting, or any other purpose specified by commission rule to prevent the spread of diseases.

Pursuant to §161.0417, titled "Authorized Personnel for Disease Control", a person, including a veterinarian, must be authorized by the commission to engage in an activity that is part of a state or federal disease control or eradication program for animals.
violates Chapter 161 or a rule or order adopted under Chapter 161. The penalty for a violation may be in an amount not to exceed $5,000, effective September 1, 2021.

Pursuant to §161.150, titled "Failure to Register Feral Swine Holding Facilities: Holding of Feral Swine", a person commits an offense if the person recklessly maintains a feral swine holding facility that is not registered under §161.0412 of the Texas Agriculture Code or as the owner or person in charge of a holding facility that is not registered under §161.0412 holds or permits another to hold feral swine in the holding facility.

Pursuant to §165.022, titled "Method of Disease Eradication", the commission shall adopt rules following notice and public hearing for the enforcement of cooperative programs for disease eradication, including rules providing for the manner, method, and system of eradicating swine diseases. Pursuant to Senate Bill 1997 enacted by the 87th Texas Legislature, effective September 1, 2021, the commission may by a two-thirds vote adopt rules that are more stringent than the federal minimum standards for cooperative programs.

Pursuant to §165.026, titled "Feeding Garbage to Swine", a person may not feed restricted garbage to swine or provide restricted garbage to any person for the purpose of feeding swine, except that a facility operated by the Texas Department of Criminal Justice may feed restricted garbage to swine if the garbage is properly treated in accordance with applicable federal requirements. A person may feed unrestricted garbage to swine only if the person first registers with and secures a permit from the commission. The commission may adopt rules for registration under this section, including rules providing for registration issuance, revocation, and renewal, disease tests, inspections, bookkeeping, and appropriate handling and treatment of unrestricted garbage. Registration with the commission shall be made on forms prescribed by the commission, and the commission shall furnish those forms on request.

Pursuant to §165.027, titled "Entry Power", a representative of the commission, including a member of the commission, is entitled to enter the premises of any person for the purpose of inspecting swine or the heating or cooking equipment required by Subchapter B, Chapter 165, or for the purpose of performing another duty under Subchapter B, Chapter 165. A person may not refuse to permit an inspection authorized by Subchapter B, Chapter 165.

Pursuant to §165.041, titled "General Penalty", a person commits an offense if the person violates a provision of Subchapter B, Chapter 165 or a rule adopted under that subchapter. An offense under this section is a Class C misdemeanor unless it is shown on the trial of the offense that the defendant has been previously convicted under this section, in which event the offense is a Class B misdemeanor. A person commits a separate offense for each day of violation.

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

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Mary Luedeker
General Counsel
Texas Animal Health Commission
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For further information, please call: (512) 719-0724

CHAPTER 59. GENERAL PRACTICES AND PROCEDURES

4 TAC §59.5

The Texas Animal Health Commission (commission) in a duly noticed meeting on September 21, 2021, adopted amendments to §59.5, concerning Public Information Act Requests, in Chapter 59, titled "General Practices and Procedures", in Title 4 of the Texas Administrative Code. This amendment is adopted without changes to the proposed text as published in the August 6, 2021, issue of the Texas Register (46 TexReg 4812), and will not be republished.

JUSTIFICATION FOR RULE ACTION

The commission adopted this section of Chapter 59 for greater transparency because the rule provides the public with several clear and accessible methods from which to choose to make a public information request. The rule also promotes consistency in the commission’s application of the Texas Public Information Act.

HOW THE RULE WILL FUNCTION

The adopted rule clarifies language on submitting public information requests and makes terminology more consistent. An amendment specifies that public information requests may be sent to one of the methods indicated on the agency’s website rather than by mail to the attention of the General Counsel to help ensure that any requests are promptly forwarded to the commission’s Public Information Coordinator. Another amendment relating to charges for public records removes an outdated reference and examples of records that may be furnished without charge and incorporates by reference the Office of the Attorney General’s (OAG) cost rules. Finally, the amendment regarding inspections of records clarifies when a member of the public may physically inspect records and allows for the denial of access under certain circumstances.

SUMMARY OF COMMENTS RECEIVED AND COMMISSION RESPONSE

The 30-day comment period ended on September 5, 2021. During that time, no public comments were received.

STATUTORY AUTHORITY

Section 59.5 of Title 4, Texas Administrative Code is adopted pursuant to the following authorities:

Texas Agriculture Code §161.046, titled "Rules", which authorizes the commission to adopt rules as necessary for the administration and enforcement of this chapter.

Texas Government Code §552.234, titled "Method of Making Written Request for Public Information", which authorizes the commission to approve one or more methods of delivery of requests for public information in addition to those required by statute and to designate one electronic mail address for receiving requests for public information.
Texas Government Code §552.261, titled "Charge for Providing Copies of Public Information", which authorizes the commission to charge for providing a copy of public information in an amount that reasonably includes all costs related to reproducing the public information, including costs of materials, labor and overhead.

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

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

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Mary Luedeker
General Counsel
Texas Animal Health Commission
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Proposal publication date: August 6, 2021
For further information, please call: (512) 719-0724

TITLE 28. INSURANCE

PART 6. OFFICE OF INJURED EMPLOYEE COUNSEL

CHAPTER 276. GENERAL ADMINISTRATION

SUBCHAPTER A. GENERAL PROVISIONS

28 TAC §§276.3 - 276.5

INTRODUCTION. The Office of Injured Employee Counsel (OIEC) adopts amendments to existing rules at 28 Texas Administrative Code (TAC), Chapter 276, Subchapter A, §§276.3 - 276.5. The adopted amendments update rules to ensure efficient agency operations; maintain consistency with statute; and simplify publication requirements. The amendments are adopted without changes to the proposed amendments published in the September 3, 2021, issue of the Texas Register (46 TexReg 5537). OIEC adopts amendments to §§276.3, 276.4, and 276.5.

REASONED JUSTIFICATION. OIEC identified a number of rules that required updates during the agency's rule review under Texas Government Code §2001.039, which requires a state agency to review each of its rules every four years. The agency identified rules that are outdated, inconsistent with statutory language, or fail to clarify the language and purpose of statutes.

The adopted amendment to §273.3, Rulemaking Petition, clarifies rules may be petitioned by an "interested person." This language is consistent with the language in Government Code §2001.021, Subchapter B.

The adopted amendment to §276.4, Sick Leave Pool, removes references to the "Deputy Public Counsel" and adds language reflecting the Public Counsel's discretion to designate a sick leave pool administrator under Government Code §661.002. This change is part of a general effort to remove functional job titles from agency rules.

The adopted amendment to §276.5, Employer's Notice of Ombudsman Program and First Responder Liaison to Employees, updates publication requirements under Labor Code §404.153 to eliminate language designating publication locations and font sizes. This change is part of a general effort to remove complexity from agency rules.

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

STATUTORY AUTHORITY. The Public Counsel adopts the amendments to §§276.3 - 276.5 as authorized under Labor Code §404.006 to adopt rules as necessary to implement Chapter 404 of the Labor Code.

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

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TRD-202103913
Gina McCauley
General Counsel
Office of Injured Employee Counsel
Effective date: October 24, 2021
Proposal publication date: September 3, 2021
For further information, please call: (512) 804-4194

SUBCHAPTER B. OMBUDSMAN PROGRAM

28 TAC §276.10

INTRODUCTION. The Office of Injured Employee Counsel (OIEC) adopts amendments to 28 Texas Administrative Code (TAC), Chapter 276, Subchapter B, §276.10. The proposed amendments update the rule to ensure efficient agency operations; maintain consistency with statute; and eliminate a license requirement.

The amendments are adopted without changes to the proposed text as published in the September 3, 2021, issue of the Texas Register (46 TexReg 5538). The rule will not be republished.

REASONED JUSTIFICATION. OIEC identified a number of rules that required updates during the agency's rule review under Texas Government Code §2001.039, which requires a state agency to review each of its rules every four years. The agency identified rules that are outdated, inconsistent with statutory language, or fail to clarify the language and purpose of statutes.

The proposed amendments to §276.10, Ombudsman Training and Continuing Education Program, remove §276.10(c)(2)(A) and §276.10(a)(1) regarding obtaining and maintaining a valid workers' compensation adjuster license and the associated continuing education requirement. The change follows state-wide efforts to reduce burdensome licensing requirements. These deletions will also require amending §276.10(a)(2), to remove references to continuing education for obtaining and retaining the adjusters' license. The proposed amendment to §276.10(c)(1)(B) will remove functional job titles.

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

STATUTORY AUTHORITY. The Public Counsel adopts the amendments to 28 TAC §276.10 as authorized under Labor Code §404.006 to adopt rules as necessary to implement Chapter 404 of the Labor Code.
The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 4, 2021.
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Gina McCauley
General Counsel
Office of Injured Employee Counsel
Effective date: October 24, 2021
Proposal publication date: September 3, 2021
For further information, please call: (512) 804-4194

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TITLE 34. PUBLIC FINANCE
PART 1. COMPTROLLER OF PUBLIC ACCOUNTS
CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES
34 TAC §3.340
The Comptroller of Public Accounts adopts amendments to §3.340, concerning qualified research, with changes to the proposed text as published in the April 16, 2021, issue of the Texas Register (46 TexReg 2555). The rule will be republished.

The comptroller amends this section to provide guidance regarding the research and development sales tax exemption.
Throughout the section, the comptroller adds titles to statutory citations and makes minor revisions to improve readability.
The comptroller received comments regarding the proposed amendments from: Shannon Rusing of Texas Oil & Gas Association (TXOGA); Dale Craymer of Texas Taxpayers and Research Association (TTARA); Patrick Reynolds of Council on State Taxation (COST); Shane Frank of alliantgroup, LP (alliantgroup); Michael Thompson of Ryan; Kreig Mitchell of Kreig Mitchell LLC; Ronnie Berry of Celanese Corporation (Celanese); and Jennifer Woodard of Associated General Contractors of Texas (AGC of Texas).
Ronnie Berry of Celanese and Jennifer Woodard of AGC of Texas requested a public hearing on the proposed amendments. The comptroller held the public hearing on Monday, June 28, 2021, at 9:00 a.m. in Room 170 of the Stephen F. Austin Building, Austin, Texas 77010. Benjamin Barmore of alliantgroup, Michael Thompson of Ryan, Alyssa Honnette of RSM, Dale Craymer of TTARA, Carolyn Labatt of Great South Texas Corporation (GSTC), and John Ferris of RealPage, Inc. (RealPage) testified at the hearing.
Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, and Shane Frank of alliantgroup each requested that the comptroller provide additional affirmative examples where a taxpayer qualified for the credit. These requests were for general examples, examples related to the Oil and Gas industry, and examples related to software development. The comptroller declines to provide additional examples in the rule because the current examples are sufficient.

Shane Frank and Benjamin Barmore of alliantgroup and Michael Thompson of Ryan commented that the proposed rule would eliminate entire industries from having any qualified research activities. The comptroller declines to modify the rule based on these comments. This is not the intent of the rule and there is no language in the rule that prevents a taxpayer from being engaged in qualified research based on the industry of the taxpayer.
The comptroller adds a new subsection (a)(1) to define the term "business component." The comptroller bases this term on Internal Revenue Code (IRC), §41(d)(2)(B) (Business component defined), with non-substantive changes. The comptroller renumbers subsequent paragraphs.
The comptroller amends the definition of "combined group" in renumbered subsection (a)(2) to remove unnecessary information and to add a cross-reference to §3.590 of this title (relating to Combined Reporting).
The comptroller adds new subsection (a)(4) to define the term "Four-Part Test." The comptroller derives this term from IRC, §41(d) (Qualified research defined) and the regulations applicable to that section.
The comptroller amends the definition of "Internal Revenue Code (IRC)" in renumbered paragraph (6) to explain that a regulation adopted after December 31, 2011 must require a taxpayer to apply that regulation to the 2011 federal income tax year to be included in this definition. The definition for IRC in Tax Code, §151.3182(a)(2) incorporates by reference Tax Code, §171.651 (Definitions). The definition of IRC in Tax Code, §171.651(1) states: "Internal Revenue Code' means the Internal Revenue Code of 1986 in effect on December 31, 2011, excluding any changes made by federal law after that date, but including any regulations adopted under that code applicable to the tax year to which the provisions of the code in effect on that date applied."
The current version of Treasury Regulation, §1.41-4 (Qualified research for expenditures paid or incurred in taxable years ending on or after Dec. 31, 2003), adopted on November 3, 2016, is an example of a regulation that does not fully apply to the 2011 federal income tax year. With respect to its applicability, Treasury Regulation, §1.41-4(e) provides: "Other than paragraph (c)(6) of this section, this section is applicable for taxable years ending on or after December 31, 2003. Subsection (c)(6) of this section is applicable for taxable years beginning on or after October 4, 2016. For any taxable year that both ends on or after January 20, 2015 and begins before October 4, 2016, the IRS will not challenge return positions consistent with all of paragraph (c)(6) of this section or all of paragraph (c)(6) of this section as contained in the Internal Revenue Bulletin (IRB) 2015-5 (see www.irs.gov/pub/irs-irbs/irb15-05.pdf). For taxable years ending before January 20, 2015, taxpayers may choose to follow either all of §1.41-4(c)(6) as contained in 26 CFR part 1 (revised as of April 1, 2003) and IRB 2001-5 (see www.irs.gov/pub/irs-irbs/irb01-05.pdf) or all of §1.41-4(c)(6) as contained in IRB 2002-4 (see www.irs.gov/pub/irs-irbs/irb02-04.pdf)." The first sentence quoted above shows that, other than paragraph (c)(6), the current version of Treasury Regulation, §1.41-4 applies to the 2011 federal income tax year. With respect to paragraph (c)(6), the second sentence quoted above shows that the current language in Treasury Regulation, §1.41-4(c)(6) does not apply to the 2011 federal income tax year. The fourth sentence quoted above allows taxpayers to choose one of two proposed regulations described in the Internal Revenue Bulletins incorporated by ref-
The proposed regulations referenced in those Internal Revenue Bulletins were not part of the Treasury Regulations in effect on December 31, 2011. Although the federal regulations allow taxpayers to choose whether they follow this prior IRS guidance, the options are not included in the term "Internal Revenue Code" because Treasury Regulation, §1.41-4(e) does not require taxpayers to follow either of those options.

Another example of a regulation that does not apply to the 2011 federal income tax year is Treasury Regulation, §1.174-2 (Definition of research and experimental expenditures), adopted July 21, 2014. With respect to its applicability, Treasury Regulation, §1.174-2(d) provides: "The eighth and ninth sentences of §1.174-2(a)(1); §1.174-2(a)(2); §1.174-2(a)(4); §1.174-2(a)(5); §1.174-2(a)(11) Example 3 through Example 10; §1.174-2(b)(4); and §1.174-2(b)(5) apply to taxable years ending on or after July 21, 2014. Taxpayers may apply the provisions enumerated in the preceding sentence to taxable years for which the limitations for assessment of tax has not expired." While the federal statute of limitations for the assessment of tax for the 2011 federal income tax year had not expired at the time this regulation was adopted, the provisions enumerated in this applicability provision are not included in the term "Internal Revenue Code" because the regulation does not require taxpayers to apply those provisions to the 2011 federal income tax year.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Michael Thompson of Ryan, Ronnie Berry of Celanese, Jennifer Woodard of AGC of Texas, Carolyn Labatt of GSTC, and John Ferris of RealPage suggested that the Treasury Regulations that taxpayers had the option to apply to the 2011 federal income tax year; such as Treasury Regulation, §1.41-4(c)(6) and Treasury Regulation, §1.174-2, should be included in the definition of "Internal Revenue Code." For the reasons described above, the comptroller declines this suggestion.

The comptroller amends the definition of "qualified research" in renumbered paragraph (7) to explain that qualified research must be research conducted in Texas and that qualified research must satisfy the Four-Part Test. The comptroller also deletes subparagraphs (A) and (B). The information currently found in these subparagraphs is included in the expanded discussion in new subsections (c) and (d) regarding the Four-Part Test and the exclusions from qualified research.

Shane Frank of alliantgroup and Michael Thompson of Ryan commented that the redefinition of qualified research is unnecessary, will cause confusion for taxpayers, and does not conform to IRC, §41. The comptroller declines to modify the rule based on these comments. The amendments to this definition are intended to provide additional guidance to taxpayers regarding how the definition of qualified research was incorporated into Texas law. The new definition is not intended to, and does not, conflict with the IRC that was incorporated into Texas law. Any part of the rule that does not have a direct basis in federal law was included to address ambiguities that were not addressed in IRC, §41 or any applicable Treasury Regulations.

The comptroller amends subsection (b) to add paragraphs (4) through (7). The comptroller adds paragraphs (4) and (5) to explain the requirement that property must be subject to depreciation in order to be eligible for the exemption. Paragraph (4) explains that the property qualifies for the exemption even if taxpayers do not actually depreciate the property. Paragraph (5) explains that property does not qualify for the exemption if it is not subject to depreciation in the form in which it was purchased, even if it is later used to create property that is subject to depreciation. Paragraph (5) contains an example illustrating this point. The comptroller adds paragraph (6) to explain that the taxpayer has the burden of proof to establish its entitlement to the exemption by clear and convincing evidence and that qualified research activities must be supported by contemporaneous business records. The comptroller adds paragraph (7) to explain that any determination by the IRS that a taxpayer is entitled to the federal research and development credit does not bind the comptroller when determining a taxpayer's eligibility for the exemption.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, Ronnie Berry of Celanese, and Jennifer Woodard of AGC of Texas, Alyssa Honnette of RSM, Carolyn Labatt of GSTC, and John Ferris of RealPage commented that the clear and convincing evidence standard is unnecessarily burdensome and suggested that the comptroller should apply the same burden of proof that is required for the federal income tax R&D credit. The comptroller declines this suggestion. The clear and convincing evidence standard is generally applicable to all sales tax exemptions and nothing in Tax Code, §151.3182 incorporates the federal burden of proof.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, Michael Thompson of Ryan, Ronnie Berry of Celanese, Jennifer Woodard of AGC of Texas, Alyssa Honnette of RSM, Carolyn Labatt of GSTC, and John Ferris of RealPage commented that the requirement to provide contemporaneous documentation is unnecessarily burdensome and suggested that the comptroller should require the same types of documentation that is required for the federal income tax R&D credit. The comptroller declines this suggestion. The requirement for contemporaneous documentation is generally applicable to all sales tax exemptions and nothing in Tax Code, §151.3182 incorporates the federal documentation requirements.

The comptroller adds new subsections (c) and (d) and reletters subsequent subsections.

In new subsection (c), the comptroller discusses the application of the Four-Part Test to explain the basic requirements for research activities to be qualified research. The comptroller bases this subsection primarily on IRC, §41(d) and Treasury Regulation, §1.41-4.

In paragraph (1), the comptroller describes the four individual components of the Four-Part Test: subparagraph (A) describes the Section 174 Test; subparagraph (B) describes the Discovering Technological Information Test; subparagraph (C) describes the Business Component Test; and subparagraph (D) describes the Process of Experimentation Test. In subparagraph (D), the comptroller provides several examples illustrating the Process of Experimentation Test.

Michael Thompson of Ryan and Kreig Mitchell of Kreig Mitchell PLLC suggested that services should be allowed to be business components and that subsection (c)(1)(C)(i) should be removed. The comptroller declines this suggestion. The term "business component" is defined by IRC, §41(d)(2)(B) as "any product, process, computer software, technique, formula, or invention which is to be--(i) held for sale, lease, or license, or (ii) used by the taxpayer in a trade or business of the taxpayer." Services do not fit within this definition. Concerns regarding taxpayers that provide services are addressed by this subsection by providing that a taxpayer may have qualified research activities for
research related to business components that are used to provide services.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, Michael Thompson of Ryan, Kreig Mitchell of Kreig Mitchell LLC, Ronnie Berry of Celanese, and Jennifer Woodard of AGC of Texas suggested that designs should be allowed to be business components and that subsection (c)(1)(C)(ii) should be removed. The comptroller declines this suggestion. The term "business component" is defined by IRC, §41(d)(2)(B) as "any product, process, computer software, technique, formula, or invention which is to be--(i)held for sale, lease, or license, or (ii)used by the taxpayer in a trade or business of the taxpayer." The commenters suggested that a "design" can be produced and is included in the term "product." The surplusage canon of statutory construction requires that statutory provisions not be read in a way that would render any word redundant. An interpretation of the term "product" that is broad enough to include the term "design" would also include the terms "process," "computer software," "technique," "formula," and "invention." Such an interpretation would render all those terms redundant. The commenters also suggested that excluding a design from being a business component is inconsistent with the applicable federal law because Treasury Regulation, §1.41-4 provided that uncertainty as to the appropriate design of a business component can be a qualifying uncertainty for the Section 174 Test, the Discovering Technological Information Test, and the Process of Experimentation Test. In the phrase "appropriate design of a business component" the word design does not refer to the business component itself, it is describing a quality of the business component.

Shane Frank of alliantgroup, Michael Thompson of Ryan, Ronnie Berry of Celanese, Jennifer Woodard of AGC of Texas, and Mike Williams of RSM suggested eliminating subsection (c)(1)(D)(vi). The comptroller declines the suggestion to eliminate this subsection but does modify it to address these concerns. The guidance in this subsection is a non-exhaustive list of factors that the comptroller considers when determining if a trial and error experimental method is qualifying systematic trial and error or non-qualifying simple trial and error. These factors do not affect the evaluation of a process of experimentation that does not consist of trial and error. This subsection also does not require a systematic trial and error process to satisfy all the enumerated factors.

Shane Frank of alliantgroup, Michael Thompson of Ryan, and Jennifer Woodard of AGC of Texas suggested reconsidering, eliminating, or modifying subsection (c)(1)(D)(vii)(V), Example 5 (related to the Process of Experimentation Test). The comptroller declines this suggestion. This example is intended to address common issues encountered in administering the R&D exemption.

Shane Frank of alliantgroup, Michael Thompson of Ryan, and Jennifer Woodard of AGC of Texas suggested reconsidering, eliminating, or modifying subsection (c)(1)(D)(vii)(VI), Example 6 (related to the Process of Experimentation Test). The comptroller declines the suggestion to eliminate this example because this example is intended to address common issues encountered in administering the R&D exemption. Jennifer Woodard of AGC of Texas commented that one sentence of this example could be read such that computer-aided simulation would not qualify as a process of experimentation. That was not the intent of this example because such activities are expressly allowed by the applicable Treasury Regulations. The example has been modified to address this concern.

Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, and Michael Thompson of Ryan suggested reconsidering, eliminating, or modifying subsection (c)(1)(D)(vii)(VII), Example 7 (related to the Process of Experimentation Test). The comptroller declines this suggestion. This example is intended to address common issues encountered in administering the R&D exemption. This example is also consistent with Treasury Regulation, §1.41-4(a)(8), Example 2, which provides that testing to determine if something works as specified by the manufacturer is an activity in the nature of routine or ordinary testing or inspection for quality control and is not qualified research.

Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, and Michael Thompson of Ryan suggested reconsidering, eliminating, or modifying subsection (c)(1)(D)(vii)(VIII), Example 8 (related to the Process of Experimentation Test). The comptroller declines the suggestion to eliminate this example because this example is intended to address common issues encountered in administering the R&D exemption. Dale Craymer of TTARA and Patrick Reynolds of COST suggested that this example may stand for the proposition that the Process of Experimentation Test requires evaluating multiple alternatives. That was not the intent of this example because such a requirement is not required by the IRC. The example has been modified to address this concern.

Michael Thompson of Ryan suggested eliminating or modifying subsection (c)(1)(D)(vii)(IX), Example 9 (related to the Process of Experimentation Test). The comptroller declines the suggestion to eliminate this example because this example is intended to address common issues encountered in administering the R&D exemption. Mr. Thompson suggested that this example may stand for the proposition that the information discovered by a process of experimentation must be completely new to the world. That was not the intent of this example because such a requirement is not required by the IRC. The example has been modified to address this concern.

In new paragraph (2), the comptroller explains that the Four-Part Test applies separately to each business component of the taxpayer.

In new paragraph (3), the comptroller explains that, if the whole business component does not meet the requirements of the Four-Part Test, the taxpayer may then shrink back the business component to the next most significant subset of elements of the business component. This process continues until the Four-Part Test is satisfied, or the most basic element of the product fails the Four-Part Test.

In new paragraph (4), the comptroller explains how the Four-Part Test applies to software development activities. The comptroller also identifies a list of software development activities that are likely to be qualified research and a list of software development activities that are unlikely to be qualified research. The explanation and lists in this paragraph are adapted from the Internal Revenue Service’s Audit Guidelines on the Application of Process of Experimentation for all Software.

Shane Frank of alliantgroup, Michael Thompson of Ryan, and Mike Williams and Alyssa Honnette of RSM suggested modifying or eliminating subsection (c)(4). The comptroller declines this suggestion. This subsection does not preclude any type of computer software from qualifying for the R&D exemption. It pro-
vides guidance regarding types of computer software development activities that are likely to qualify or unlikely to qualify, but also explicitly states that any computer software development activities that meet the requirements of the Four-Part Test qualify for the R&D exemption.

Michael Thompson of Ryan commented that subsection (c) conflicts with state law because it is not solely based on the IRC and Treasury Regulations. The comptroller declines to modify the rule in response to this comment. The applicable federal statutes and regulations are incorporated by reference into Tax Code, §151.3182, making them a part of that section. The comptroller has rulemaking authority under Tax Code, §111.002 (Comptroller’s Rules; Compliance; Forfeiture) to adopt rules for the enforcement of Tax Code, §151.3182. There is no part of subsection (c) that conflicts with the applicable federal statutes or regulations, anything in subsection (c) that is not based on those statutes and regulations is intended to resolve ambiguities in them to allow the comptroller to enforce Tax Code, §151.3182.

In new subsection (d), the comptroller lists activities that do not constitute qualified research. This list is based on IRC, §41(d)(4) and Treasury Regulation, §1.41-4(c) (Excluded activities). The discussion of the funded research exclusion is also based on Treasury Regulation, §1.41-4A(d) (Qualified research for taxable years beginning before January 1, 1986). This subsection contains examples for the research after commercial production exclusion and the adaptation of existing business components exclusion.

Shane Frank of alliantgroup suggested eliminating the list of activities that are deemed to be after commercial production, found in subsection (d)(1)(B). The comptroller declines this suggestion. This list is based primarily on Treasury Regulation, §1.41-4(c)(2)(ii)(A-F). The only item that is not found in Treasury Regulation, §1.41-4(c)(2)(ii)(A-F) is the inclusion of any activities that involve the use of an item for which the taxpayer claimed the manufacturing exemption under Tax Code, §151.318. To qualify for the manufacturing exemption, items used by a manufacturer must be used in or during the actual manufacturing, processing, or fabricating of tangible personal property for ultimate sale. If a taxpayer is engaged in manufacturing, processing, or fabricating tangible personal property for ultimate sale, that tangible personal property is ready for commercial sale or use or meets the basic functional and economic requirements of the taxpayer for the component’s sale or use.

Shane Frank of alliantgroup suggested that the examples found in subsection (d)(1)(E) are flawed. Mr. Frank provided one specific example of such a flaw: "For instance, Example 1 assumes that a newly designed belt that has never been used in an actual manufacturing process will work perfectly immediately upon integration in the taxpayer's production process. This rarely occurs." The comptroller declines to modify the rule based on this comment. The only specific issue identified relates to Example 1, an example directly based on Treasury Regulation, §1.41-4(c)(10) Example 1, which is incorporated by reference into Texas law.

Michael Thompson of Ryan suggested eliminating or modifying subsection (d)(1)(E)(iii), Example 3 (related to the Research After Commercial Production Exclusion). The comptroller declines the suggestion to eliminate this example because this example is intended to address common issues encountered in administering the R&D exemption. Mr. Thompson suggested that this example uses the term "design" in a way that conflicts with subsection (c)(1)(C)(ii) of this section and that the example does not distinguish research related to the development of a process to manufacture an item from the research related to the item itself. The example has been modified to use the term "design" consistently with subsection (c)(1)(C)(ii) of this section and to apply the example to the manufacturing process as well.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, and Michael Thompson of Ryan suggested eliminating or modifying subsection (d)(2)(F), Example 6 (related to the adaptation of an existing business component exclusion). The comptroller declines to eliminate this example, however, the comptroller does agree to modify the example to clarify that the research is not being excluded because the research was meant for a particular customer.

Shane Frank of alliantgroup suggested eliminating subsection (d)(2)(F)(1-3), Examples 1 through 3 (related to the adaptation of an existing business component exclusion). The comptroller declines this suggestion. These three examples are directly based on Treasury Regulation, §1.41-4(c)(10) Examples 3 through 5, which are incorporated by reference into Texas law. Mr. Frank suggested that these examples are "... especially problematic since the Treasury Department and IRS have previously instructed that the research after commercial production, adaptation, and duplication exclusions do not cover research activities that otherwise satisfy the requirements for qualified research." This statement is based on a statement in the supplementary information found in Treasury Decision 9104, 2004-1 C.B. 406, which was the treasury decision that adopted Treasury Regulation, §1.41-4. This supplementary information is not part of the text of Treasury Regulation, §1.41-4 and is not incorporated by reference into Texas law. The comptroller declines to interpret the research after commercial production, adaptation, and duplication exclusions such that they do not apply if the research activities otherwise satisfy the requirements for qualified research. The surpluses canon of statutory construction requires that statutory provisions not be read in a way that would render any word redundant. Such an interpretation would render all three of these exclusions redundant.

Michael Thompson of Ryan suggested that the comptroller should restate, verbatim, the guidance provided by the IRS in Treasury Decision 9786 (2016), which adopted Treasury Regulations regarding the Internal Use Software Exclusion. The comptroller declines this suggestion. IRC, §41(d)(4)(E) gives the IRS the authority to adopt regulations to create exceptions to the Internal Use Software Exclusion that are not found in the IRC. The comptroller does not have a similar grant of statutory authority to create exceptions to the Internal Use Software Exclusion.

At the public hearing, Dale Craymer of TTARA requested clarification of the comptroller's position with respect to the funded research exclusion. Subsection (d)(7), relating to the funded research exclusion, is based on the IRC applicable to the 2011 federal income tax year. This includes IRC, §41(d)(4)(H), Treasury Regulation, §1.41-4(c)(9), and Treasury Regulation, §1.41-4A(d). The comptroller intends subsection (d)(7) to be consistent with the text of those statutes and federal regulations. While federal court cases interpreting those statutes with respect to the federal income tax R&D credit are not binding authority for the Texas sales tax R&D exemption, they are persuasive authority and will be considered by the comptroller on a case-by-case basis.

The comptroller amends relettered subsection (e). In paragraph (5), the comptroller replaces the word "will" with the word "may"
to better reflect current comptroller practice concerning cancellation of a sales and use tax registration number before claiming a franchise tax research and development credit. In paragraph (6) the comptroller explains the effective date of cancellation for a registrant whose registration number is cancelled because of a failure to file an annual information report.

The comptroller amends relettered subsection (g), related to divergent use, to explain that divergent use applies to any item that the taxpayer uses for any purpose other than for use in qualified research, whether that use occurs before, during, or after the time when the taxpayer uses the item in qualified research.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Ronnie Berry of Celanese, Jennifer Woodard of AGC of Texas, Alyssa Honnette of RSM, and Carolyn Labatt of GSTC suggested that the amendments be applied prospectively. The comptroller disagrees that the additions or revisions in the adopted rule are retroactive changes in law. The additions or revisions are expositions of existing comptroller policy regarding Tax Code, §151.3182 (Certain Property Used in Research and Development Activities; Reporting of Estimates and Evaluation), a statute that was adopted by the Legislature in 2013, rather than changes. At the same time, these same commenters encouraged the comptroller's office to recognize Treasury Regulations that were adopted after the effective date of IRC, §41 as clarifications that should be applied retroactively to the 2011 federal income tax year, even when the IRS does not require that those regulations apply to the 2011 federal income tax year. As discussed in more detail above, with the exception of regulations that are not required to be applied to the 2011 federal income tax year, the comptroller does recognize Treasury Regulations that were adopted as clarifications. The comptroller does not view the amendments to this section any differently than the amendments to the Treasury Regulations that are applicable to the 2011 federal income tax year.

The comptroller amends relettered subsection (i) to explain that the provisions of this section, including the additions and revisions in the adopted rule, apply to the sale, storage, or use of tangible personal property occurring on or after January 1, 2014.

The amendments are adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2 (State Taxation).

The amendments implement Tax Code, §151.3182.

§3.340. Qualified Research.

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

(1) Business component--A business component is any product, process, computer software, technique, formula, or invention, which is to be held for sale, lease, or license, or used by the taxpayer in a trade or business of the taxpayer.

(2) Combined group--Taxable entities that are part of an affiliated group engaged in a unitary business and that are required to file a combined group report under Tax Code, §171.1014 (Combined Reporting: Affiliated Group Engaged in Unitary Business). For more information about combined groups, see §3.590 of this title (relating to Margin: Combined Reporting).

(3) Directly used in qualified research--Having an immediate use in qualified research activity, without an intervening or ancillary use.

(4) Four-Part Test--The test described in IRC, §41(d) (Qualified research defined) that determines whether research activities are qualified research. The four parts of the test are the Section 174 Test, the Discovering Technological Information Test, the Business Component Test, and the Process of Experimentation Test.

(5) Franchise tax research and development activities credit--A credit against franchise tax for qualified research activities that is allowed under Tax Code, Chapter 171, Subchapter M (Tax Credit for Certain Research and Development Activities).

(6) Internal Revenue Code (IRC)--The Internal Revenue Code of 1986 in effect on December 31, 2011, excluding any changes made by federal law after that date, but including any regulations adopted under the code applicable to the tax year to which the provisions of the code in effect on that date applied. A regulation adopted after December 31, 2011 is only included in this term to the extent that the regulation requires a taxpayer to apply the regulation to the 2011 federal income tax year.

(7) Qualified research--This term has the meaning given in IRC, §41(d), except that the research must be conducted in Texas. Qualified research activities must satisfy each part of the Four-Part Test.

(8) Registrant--A taxpayer who holds a Texas Qualified Research Registration Number issued by the comptroller.

(9) Registration number--The Texas Qualified Research Registration Number issued by the comptroller to a taxpayer who submits the Texas Registration for Qualified Research and Development Sales Tax Exemption form.

(10) Taxable entity--This term has the meaning given by Tax Code, §171.0002 (Definition of Taxable Entity).

(b) Depreciable tangible personal property used in qualified research.

(1) Subject to paragraph (2) of this subsection, the sale, storage, or use of tangible personal property is exempt from Texas sales and use tax if the property:

(A) has a useful life that exceeds one year;

(B) is subject to depreciation under:

(i) generally accepted accounting principles; or

(ii) IRC, §167 (Depreciation) or §168 (Accelerated cost recovery system); and

(C) is sold, leased, rented to, stored, or used by a taxpayer engaged in qualified research; and

(D) is directly used in qualified research. Depreciable tangible personal property is directly used in qualified research if it is used in the actual performance of activities that are part of the qualified research. For example, machinery, equipment, computers, software, tools, laboratory furniture such as desks, laboratory tables, stools, benches, and storage cabinets, and other tangible personal property used by personnel in the process of experimentation are directly used in qualified research. Tangible personal property is not directly used in qualified research if it is used in ancillary or support activities such as administration, maintenance, marketing, distribution, or transportation activities, or if it is used in activities excluded from qualified research. For example, machinery and equipment used by administrative, accounting, or clerical personnel are not directly used in qualified research.

(2) A taxpayer may not claim the exemption if that taxpayer will, as a taxable entity or as a member of a combined group,
claim a franchise tax research and development activities credit on a franchise tax report based on the accounting period during which the depreciable tangible personal property used in qualified research would first be subject to Texas sales or use tax.

(3) A claim for a carryforward of an unused franchise tax research and development activities credit under Tax Code, §171.659 (Carryforward) does not affect a taxpayer's ability, as a taxable entity or as a member of a combined group, to claim the sales and use tax exemption provided by paragraph (1) of this subsection.

(4) Property satisfies paragraph (1)(B) of this subsection if it is subject to depreciation under generally accepted accounting principles, IRC, §167, or IRC, §168 even if the taxpayer does not actually depreciate that property.

(5) Property satisfies paragraph (1) of this subsection only if it is tangible personal property subject to depreciation at the time a taxpayer purchases it. For example, assume a taxpayer Purchases tangible personal property that is not subject to depreciation. The taxpayer later incorporates that property into real property that is subject to depreciation. Although the real property with the incorporated tangible personal property is subject to depreciation, the tangible personal property, on its own, was never subject to depreciation. The tangible personal property does not satisfy paragraph (1) of this subsection because it was never subject to depreciation as tangible personal property.

(6) A taxpayer has the burden of establishing its entitlement to the exemption by clear and convincing evidence, including proof that the research activities meet the definition of qualified research and applying the shrink-back rule described in subsection (c)(3) of this section. All qualified research activities must be supported by contemporaneous business records.

(7) An Internal Revenue Service audit determination of eligibility for the federal research and development credit under IRC, §41 (Credit for increasing research activities), whether that determination is that the taxpayer qualifies or does not qualify for the federal research and development credit, is not binding on the comptroller's determination of eligibility for the exemption.

(c) Application of the Four-Part Test. Research activities must satisfy each part of the Four-Part Test, as described in paragraph (1) of this subsection, to be qualified research.

(1) Four-Part Test.

(A) Section 174 Test. Expenditures related to the research must be eligible to be treated as expenses under IRC, §174 (Research and experimental expenditures).

(i) Expenditures are eligible to be treated as expenses under IRC, §174, if the expenditures are incurred in connection with the taxpayer's trade or business and represent a research and development cost in the experimental or laboratory sense. Expenditures represent research and development costs in the experimental or laboratory sense if they are for activities intended to discover information that would eliminate uncertainty concerning the development or improvement of a product. Uncertainty exists if the information available to the taxpayer does not establish the capability or method for developing or improving the product or the appropriate design of the product.

(ii) For the purposes of this test, the term "product" includes any pilot model, process, formula, invention, technique, patent, or similar property, and includes products to be used by the taxpayer in its trade or business as well as products to be held for sale, lease, or license.

(B) Discovering Technological Information Test. The research must be undertaken for the purpose of discovering information that is technological in nature.

(i) Research is undertaken for the purpose of discovering technological information if it is intended to eliminate uncertainty concerning the development or improvement of a business component. Uncertainty exists if the information available to the taxpayer does not establish the capability or method for developing or improving the business component, or the appropriate design of the business component.

(ii) In order to satisfy the requirement that the research is technological in nature, the process of experimentation used to discover information must fundamentally rely on principles of the physical or biological sciences, engineering, or computer science. A taxpayer may employ existing technologies and may rely on existing principles of the physical or biological sciences, engineering, or computer science to satisfy this requirement.

(iii) A determination that research is undertaken for the purpose of discovering information that is technological in nature does not require that the taxpayer:

(I) seek to obtain information that exceeds, expands, or refines the common knowledge of skilled professionals in the particular field of science or engineering in which the taxpayer is performing the research; or

(II) succeed in developing a new or improved business component.

(C) Business Component Test. The application of the technological information for which the research is undertaken must be intended to be useful in the development of a new or improved business component of the taxpayer, which may include any product, process, computer software, technique, formula, or invention that is to be held for sale, lease, or license, or used by the taxpayer in a trade or business of the taxpayer.

(i) If a taxpayer provides a service to a customer, the service provided to that customer is not a business component because a service is not a product, process, computer software, technique, for-
mula, or invention. However, a product, process, computer software, technique, formula, or invention used by a taxpayer to provide services to its customers may be a business component.

(ii) A design is not a business component because a design is not a product, process, computer software, technique, formula, or invention. While uncertainty as to the appropriate design of a business component is a qualifying uncertainty for the Section 174 Test and the Discovering Technological information test, the design itself is not a business component. For example, the design of a structure is not a business component, although the structure itself may be a business component. Similarly, a blueprint or other plan used to construct a structure that embodies a design is not a business component.

(D) Process of Experimentation Test. Substantially all of the research activities must constitute elements of a process of experimentation for a qualified purpose. A process of experimentation is undertaken for a qualified purpose if it relates to a new or improved function, performance, reliability, or quality of a business component. Any research relating to style, taste, cosmetic, or seasonal design factors does not satisfy the Process of Experimentation Test.

(i) A process of experimentation is a process designed to evaluate one or more alternatives to achieve a result where the capability or the method of achieving that result, or the appropriate design of that result, is uncertain as of the beginning of the taxpayer's research activities.

(ii) A process of experimentation must:

(I) be an evaluative process and generally should be capable of evaluating more than one alternative; and

(II) fundamentally rely on the principles of the physical or biological sciences, engineering, or computer science and involve:

(a) the identification of uncertainty concerning the development or improvement of a business component;

(b) the identification of one or more alternatives intended to eliminate that uncertainty; and

(c) the identification and the conduct of a process of evaluating the alternatives through, for example, modeling, simulation, or a systematic trial and error methodology.

(iii) A taxpayer may undertake a process of experimentation if there is no uncertainty concerning the taxpayer's capability or method of achieving the desired result so long as the appropriate design of the desired result is uncertain as of the beginning of the taxpayer's research activities. Uncertainty concerning the development or improvement of the business component (e.g., its appropriate design) does not establish that all activities undertaken to achieve that new or improved business component constitute a process of experimentation.

(iv) The substantially all requirement of this subparagraph is satisfied only if 80% or more of a taxpayer's research activities, measured on a cost or other consistently applied reasonable basis constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality. The substantially all requirement is satisfied even if the remainder of a taxpayer's research activities with respect to the business component do not constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality.

(v) Non-experimental methods, such as simple trial and error, brainstorming, or reverse engineering, are not considered a process of experimentation.

(vi) The following are factors that may be considered in determining whether a trial and error methodology is experimental systematic trial and error or non-experimental simple trial and error. Evidence provided to determine the type of trial and error is not limited to these factors, nor is evidence of each factor required. These factors only apply to determining whether a process of experimentation is systematic trial and error. Systematic trial and error is not the only qualifying process of experimentation. These factors are:

(I) whether the person conducting the trial and error methodology stops testing alternatives once a single acceptable result is found or continues to find multiple acceptable results for comparison;

(II) whether all the results of the trial and error methodology are recorded for evaluation;

(III) whether there is a written procedure for conducting the trial and error methodology; and

(IV) whether there is a written procedure for evaluating the results of the trial and error methodology.

(vii) Examples.

(I) Example 1. A taxpayer is engaged in the business of developing and manufacturing widgets. The taxpayer wants to change the color of its blue widget to green. The taxpayer obtains several different shades of green paint from various suppliers. The taxpayer paints several sample widgets, and surveys its customers to determine which shade of green its customers prefer. The taxpayer's activities to change the color of its blue widget to green do not satisfy the Process of Experimentation Test because its activities are not undertaken for a qualified purpose. All of the taxpayer's research activities are related to style, taste, cosmetic, or seasonal design factors.

(II) Example 2. The taxpayer in Example 1 chooses one of the green paints. The taxpayer obtains samples of the green paint from a supplier and determines that it must modify its painting process to accommodate the green paint because the green paint has different characteristics from other paints it has used. The taxpayer obtains detailed data on the green paint from its paint supplier. The taxpayer also consults with the manufacturer of its paint spraying machines. The manufacturer informs the taxpayer that it must acquire new nozzles to operate with the green paint it wants to use because the current nozzles do not work with the green paint. The taxpayer tests the new nozzles against green paint, to ensure that they work as specified by the manufacturer of the paint spraying machines. The taxpayer's activities to modify its painting process are not qualified research. The taxpayer did not conduct a process of evaluating alternatives in order to eliminate uncertainty regarding the modification of its painting process. Rather, the manufacturer of the paint machines eliminated the taxpayer's uncertainty regarding the modification of its painting process. The taxpayer's activities to test the nozzles to determine if the nozzles work as specified by the manufacturer of the paint spraying machines are in the nature of routine or ordinary testing or inspection for quality control.

(III) Example 3. A taxpayer is engaged in the business of manufacturing food products and currently manufactures a large-shred version of a product. The taxpayer seeks to modify its current production line to permit it to manufacture both a large-shred version and a fine-shred version of one of its food products. A smaller, thinner shredding blade capable of producing a fine-shred version of the food product is not commercially available. Thus, the taxpayer must develop a new shredding blade that can be fitted onto its current production line. The taxpayer is uncertain concerning the design of the new shredding blade because the material used in its existing blade breaks when machined into smaller, thinner blades. The taxpayer engages in a systematic trial and error process of analyzing various blade designs.
and materials to determine whether the new shredding blade must be constructed of a different material from that of its existing shredding blade and, if so, what material will best meet its functional requirements. The taxpayer's activities to modify its current production line by developing the new shredding blade satisfy the Process of Experimentation Test. Substantially all of the taxpayer's activities constitute elements of a process of experimentation because it evaluated alternatives to achieve a result where the method of achieving that result, and the appropriate design of that result, were uncertain as of the beginning of the taxpayer's research activities. The taxpayer identified uncertainties related to the development of a business component, and identified alternatives intended to eliminate these uncertainties. Furthermore, the taxpayer's process of evaluating identified alternatives was technological in nature and was undertaken to eliminate the uncertainties.

(IV) Example 4. A taxpayer is in the business of designing, developing and manufacturing automobiles. In response to government-mandated fuel economy requirements, the taxpayer seeks to update its current model vehicle and undertakes to improve aerodynamics by lowering the hood of its current model vehicle. The taxpayer determines, however, that lowering the hood changes the air flow under the hood, which changes the rate at which air enters the engine through the air intake system, which reduces the functionality of the cooling system. The taxpayer's engineers are uncertain how to design a lower hood to obtain the increased fuel economy, while maintaining the necessary air flow under the hood. The taxpayer designs, models, simulates, tests, refines, and re-tests several alternative designs for the hood and associated proposed modifications to both the air intake system and cooling system. This process enables the taxpayer to eliminate the uncertainties related to the integrated design of the hood, air intake system, and cooling system. Such activities constitute 85% of its total activities to update its current model vehicle. The taxpayer then engages in additional activities that do not involve a process of evaluating alternatives in order to eliminate uncertainties. The additional activities constitute only 15% of the taxpayer's total activities to update its current model vehicle. In this case substantially all of the taxpayer's activities constitute elements of a process of experimentation because it evaluated alternatives to achieve a result where the method of achieving that result, and the appropriate design of that result, were uncertain as of the beginning of its research activities. The taxpayer identified uncertainties related to the improvement of a business component and identified alternatives intended to eliminate these uncertainties. Furthermore, the taxpayer's process of evaluating the identified alternatives was technological in nature and was undertaken to eliminate the uncertainties. Because 85% of the taxpayer's activities to update its current model vehicle constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality, all of its activities satisfy the Process of Experimentation Test.

(V) Example 5. A taxpayer is in the business of providing building and construction services, including the construction of warehouses, strip malls, office buildings, and other commercial structures. The taxpayer is engaged to construct a structure in a part of Texas where foundation problems are common. The taxpayer's engineers were uncertain how to design the structure to ensure stability of the structure's foundation because the taxpayer had never designed a structure in a similar location. The taxpayer's engineers used their professional experience and various building codes to determine how to design the foundation based on the conditions at the construction site. The engineers chose to use piles in the foundation. The taxpayer conducted a test pile on site to confirm whether this would work in the conditions present on the construction site. This test pile would become part of the foundation of the structure regardless of whether the engineers had to redesign the additional piles required for the foundation. The taxpayer's activities in using professional experience and business codes to design the foundation did not meet the Process of Experimentation Test because the activities did not resolve technological uncertainties through an experimental process. Constructing the test pile also did not meet the Process of Experimentation Test because it was not an evaluative process.

(VI) Example 6. A taxpayer is in the business of providing building and construction services, including the construction of warehouses, strip malls, office buildings, and other commercial structures. For one of its projects to construct an office building, the taxpayer was uncertain how to design the layout of the electrical systems. The taxpayer's employees held on-site meetings to discuss different options, such as running the wire under the floor or through the ceiling, but did not actually experiment by installing wire in different locations. The taxpayer used computer-aided simulation and modeling to produce the final electrical system layout. While in some cases computer-aided simulation and modeling may be an experimental process, in this case, it was not an experimental process because the taxpayer did not use the computer-aided simulation and modeling to evaluate different alternatives in a scientific manner. The taxpayer's activities did not satisfy the Process of Experimentation Test because it did not conduct an experimental process of evaluating alternatives to eliminate a technological uncertainty.

(VII) Example 7. A taxpayer is an oil and gas operator that recently acquired rights to drill in an area in which it had not previously operated. The taxpayer decided to use horizontal drilling in this area, but it had never drilled a horizontal well and was uncertain how to successfully execute the horizontal drilling. At the time the taxpayer began horizontal drilling, the technology to drill horizontal wells was established. The taxpayer selected technology from existing commercially available options to use in its horizontal drilling program. The taxpayer's activities did not satisfy the Process of Experimentation Test because evaluating commercially available options does not constitute a process of experimentation.

(VIII) Example 8. A taxpayer is an oil and gas operator that recently acquired rights to drill in an area in which it had not previously operated. The taxpayer decided to use horizontal drilling in this area. The taxpayer had drilled a horizontal well before in a different formation and at different depths. However, it had never drilled a horizontal well in this formation or at the required depths and was uncertain how to successfully execute the horizontal drilling. The taxpayer utilized its existing technology to perform its horizontal drilling operations in this area and the existing technology was successful. The taxpayer's activities did not satisfy the Process of Experimentation Test because the taxpayer merely used its existing technology and did not perform any experimentation to evaluate alternative any drilling methods.

(IX) Example 9. A taxpayer sought to discover cancer immunotherapies. The taxpayer was uncertain as to the appropriate design of the proteins to be used as a drug candidate. The taxpayer identified several alternative protein constructs and used a process to test them. The taxpayer's process involved testing the constructs using in vitro functional assays and binding assays, and either modifying the designs or discarding them and repeating the previous steps. The taxpayer took the resulting products from the in vitro testing and tested the drug candidate in living organisms. This process evaluated the various alternatives identified by the taxpayer. The taxpayer's activities satisfied the Process of Experimentation Test.

(2) Application of the Four-Part Test to business components. The Four-Part Test is applied separately to each business component of the taxpayer. Any plant process, machinery, or technique for commercial production of a business component is treated as a separate business component from the business component being produced.
(3) Shrink-back rule. The Four-Part Test is first applied at the level of the discrete business component used by the taxpayer in a trade or business of the taxpayer. If the requirements of the Four-Part Test are not met at that level, then they are applied at the next most significant subset of elements of the business component. This shrinking back of the product continues until either a subset of elements of the product that satisfies the requirements of the Four-Part Test is reached, or the most basic element of the product is reached and such element fails to satisfy any part of the Four-Part Test.

(4) Software development as qualified research. In determining if software development activities constitute qualified research, the comptroller shall consider the facts and circumstances of each activity.

(A) Application of Four-Part Test to software development activities.

(i) A taxpayer must prove that a software development activity is qualified research and meets all the requirements of the Four-Part Test under paragraph (1) of this subsection, even if the activity is likely to qualify as described in subparagraph (B) of this paragraph.

(ii) A taxpayer may prove that a software development activity described as unlikely to qualify in subparagraph (C) of this paragraph, is qualified research by providing evidence that the activity meets all the requirements of the Four-Part Test under paragraph (1) of this subsection.

(B) Software development activities likely to qualify. Types of activities likely to qualify include, but are not limited to:

(i) developing the initial release of an application software product that includes new constructs, such as new architectures, new algorithms, or new database management techniques;

(ii) developing system software, such as operating systems and compilers;

(iii) developing specialized technologies, such as image processing, artificial intelligence, or speech recognition; and

(iv) developing software as part of a hardware product where the software interacts directly with that hardware in order to make the hardware/software package function as a unit.

(C) Software development activities unlikely to qualify. Types of activities unlikely to qualify include, but are not limited to:

(i) maintaining existing software applications or products;

(ii) configuring purchased software applications;

(iii) reverse engineering of existing applications;

(iv) performing studies, or similar activities, to select vendor products;

(v) detecting flaws and bugs directed toward the verification and validation that the software was programmed as intended and works correctly;

(vi) modifying an existing software business component to make use of new or existing standards or devices, or to be compliant with another vendor's product or platform;

(vii) developing a business component that is substantially similar in technology, functionality, and features to the capabilities already in existence at other companies;

(viii) upgrading to newer versions of hardware or software or installing vendor-fix releases;

(ix) re-hosting or porting an application to a new hardware such as from mainframe to PC, or software platform, such as Windows to UNIX, or rewriting an existing application in a new language, such as rewriting a COBOL mainframe application in C++;

(x) writing hardware device drivers to support new hardware, such as disks, scanners, printers, or modems;

(xi) performing data quality, data cleansing, and data consistency activities, such as designing and implementing software to validate data fields, clean data fields, or make the data fields consistent across databases and applications;

(xii) bundling existing individual software products into product suites, such as combining existing word processor, spreadsheet, and slide presentation software applications into a single suite;

(xiii) expanding product lines by purchasing other products;

(xiv) developing interfaces between different software applications;

(xv) developing vendor product extensions;

(xvi) designing graphic user interfaces;

(xvii) developing functional enhancements to existing software applications/products;

(xviii) developing software as an embedded application, such as in cell phones, automobiles, and airplanes;

(xix) developing software utility programs, such as debuggers, backup systems, performance analyzers, and data recovery;

(xx) changing from a product based on one technology to a product based on a different or newer technology; and

(xxi) adapting and commercializing technology developed by a consortium or open software group.

(d) Excluded research activities. Qualified research does not include the activities described in this subsection.

1. Research after commercial production. Any research conducted after the beginning of commercial production of the business component.

(A) Activities are conducted after the beginning of commercial production of a business component if such activities are conducted after the component is developed to the point where it is ready for commercial sale or use or meets the basic functional and economic requirements of the taxpayer for the component's sale or use.

(B) The following activities are deemed to occur after the beginning of commercial production of a business component:

(i) preproduction planning for a finished business component;

(ii) tooling-up for production;

(iii) trial production runs;

(iv) troubleshooting involving detecting faults in production equipment or processes;

(v) accumulating data relating to production processes;

(vi) debugging flaws in a business component; and
(vii) any activities that involve the use of an item for which the taxpayer claimed the manufacturing exemption under Tax Code, §151.318.

(C) In cases involving development of both a product and a manufacturing or other commercial production process for the product, the research after commercial production exclusion applies separately for the activities relating to the development of the product and the activities relating to the development of the process. For example, even after a product meets the taxpayer's basic functional and economic requirements, activities relating to the development of the manufacturing process may still constitute qualified research, provided that the development of the process itself separately satisfies the requirements of this section, and the activities are conducted before the process meets the taxpayer's basic functional and economic requirements or is ready for commercial use.

(D) Clinical testing of a pharmaceutical product prior to its commercial production in the United States is not treated as occurring after the beginning of commercial production even if the product is commercially available in other countries. Additional clinical testing of a pharmaceutical product after a product has been approved for a specific therapeutic use by the Food and Drug Administration and is ready for commercial production and sale is not treated as occurring after the beginning of commercial production if such clinical testing is undertaken to establish new functional uses, characteristics, indications, combinations, dosages, or delivery forms for the product. A functional use, characteristic, indication, combination, dosage, or delivery form shall be considered new only if such functional use, characteristic, indication, combination, dosage, or delivery form must be approved by the Food and Drug Administration.

(E) Examples.

(i) Example 1. A taxpayer is a tire manufacturer and develops a new material to use in its tires. The taxpayer conducts research to determine the changes that will be necessary for it to modify its existing manufacturing processes to manufacture the new tire. The taxpayer determines that the new tire material retains heat for a longer period of time than the materials it currently uses for tires, and, as a result, the new tire material adheres to the manufacturing equipment during tread cooling. The taxpayer evaluates several alternatives for processing the treads at cooler temperatures to address this problem, including a new type of belt for its manufacturing equipment to be used in tread cooling. Such a belt is not commercially available. Because the taxpayer is uncertain of the belt design, it develops and conducts sophisticated engineering tests on several alternative designs for a new type of belt to be used in tread cooling until it successfully achieves a design that meets its requirements. The taxpayer then manufactures a set of belts for its production equipment, installs the belts, and tests the belts to make sure they were manufactured correctly. The taxpayer's research with respect to the design of the new belts to be used in its manufacturing of the new tire may be qualified research under the Four-Part Test. However, the taxpayer's expenses to implement the new belts, including the costs to manufacture, install, and test the belts were incurred after the belts met the taxpayer's functional and economic requirements and are excluded as research after commercial production.

(ii) Example 2. For several years, a taxpayer has manufactured and sold a particular kind of widget. The taxpayer initiates a new research project to develop a new or improved widget. The taxpayer's activities to develop a new or improved widget are not excluded from the definition of qualified research under this paragraph. The taxpayer's activities relating to the development of a new or improved widget constitute a new research project to develop a new business component and are not considered activities conducted after the beginning of commercial production.

(iii) Example 3. For the purposes of this example, assume that the taxpayer's development of its products and manufacturing processes satisfies the Four-Part Test described by subsection (c) of this section and is not otherwise excluded under this subsection. A taxpayer is a manufacturer of integrated circuits for use in specific applications. The taxpayer develops various integrated circuit devices and associated manufacturing processes. The taxable entity assembles various product configurations for testing. After an internal process of testing, the taxpayer delivers a sample quantity of the integrated circuit to a potential customer for further testing. At the time when the samples are delivered to the taxpayer's potential customer, the potential customer has not agreed to purchase any integrated circuits from the taxpayer. This process of testing by both the taxpayer and its potential customer continues until an acceptable product and manufacturing process to produce the product is achieved. At that point, the taxpayer and the potential customer enter an agreement for the delivery of an order of the integrated circuits. In some cases, no acceptable product or manufacturing process is achieved, and no agreement is reached with the potential customer. Research activities occurring prior to an agreement are not considered activities conducted after the beginning of commercial production because the integrated circuits were not yet ready for commercial use. Any research that occurs after an agreement is reached are excluded as activities conducted after the beginning of commercial production because the integrated circuits were ready for commercial use once the product and associated manufacturing process was accepted by the potential customer.

(2) Adaptation of existing business components. Activities relating to adapting an existing business component to a particular customer's requirement or need. This exclusion does not apply merely because a business component is intended for a specific customer. For example:

(A) Example 1. A taxpayer is a computer software development firm and owns a general ledger accounting software core program that it markets and licenses to customers. The taxpayer incurs expenditures in adapting the core software program to the requirements of one of its customers. Because the taxpayer's activities represent activities to adapt an existing software program to a particular customer's requirement or need, its activities are excluded from the definition of qualified research under this paragraph.

(B) Example 2. Assume that the customer from Example 1 pays the taxpayer to adapt the core software program to the customer's requirements. Because the taxpayer's activities are excluded from the definition of qualified research, the customer's payments to the taxpayer are not for qualified research and are not considered to be contract research expenses.

(C) Example 3. Assume that the customer from Example 1 uses its own employees to adapt the core software program to its requirements. Because the customer's employees' activities to adapt the core software program to its requirements are excluded from the definition of qualified research, the wages the customer paid to its employees do not constitute in-house research expenses.

(D) Example 4. A taxpayer manufactures and sells rail cars. Because rail cars have numerous specifications related to performance, reliability and quality, rail car designs are subject to extensive, complex testing in the scientific or laboratory sense. A customer orders passenger rail cars from the taxpayer. The taxpayer's rail car requirements differ from those of the taxpayer's other existing customers only in that the customer wants fewer seats in its passenger cars and a higher quality seating material and carpet that are commercially avail-
able. The taxpayer manufactures rail cars meeting the customer's requirements. The rail car sold to the customer was not a new business component, but merely an adaptation of an existing business component that did not require a process of experimentation. Thus, the taxpayer's activities to manufacture rail cars for the customer are excluded from the definition of qualified research because the taxpayer's activities represent activities to adapt an existing business component to a particular customer's requirement or need.

(E) Example 5. A taxpayer is a manufacturer and undertakes to create a manufacturing process for a new valve design. The taxpayer determines that it requires a specialized type of robotic equipment to use in the manufacturing process for its new valves. Such robotic equipment is not commercially available. Therefore, the taxpayer purchases existing robotic equipment for the purpose of modifying it to meet its needs. The taxpayer's engineers identify uncertainty that is technological in nature concerning how to modify the existing robotic equipment to meet its needs. The taxpayer's engineers develop several alternative designs, conduct experiments using modeling and simulation in modifying the robotic equipment, and conduct extensive scientific and laboratory testing of design alternatives. As a result of this process, the taxpayer’s engineers develop a design for the robotic equipment that meets its needs. The taxpayer constructs and installs the modified robotic equipment on its manufacturing process. The taxpayer's research activities to determine how to modify the robotic equipment it purchased for its manufacturing process are not considered an adaptation of an existing business component.

(F) Example 6. A taxpayer is an oil and gas operator and has been engaged in horizontal drilling for the past ten years. Recently, the taxpayer was hired by a customer to drill in a formation. The drilling objectives included targeting an interval within that formation for horizontal drilling. The taxpayer was uncertain about the successful execution of the horizontal drilling because it had not previously drilled a horizontal well in that formation. The taxpayer was also uncertain about the economic results from the targeted interval. The taxpayer drilled several horizontal wells before its customer was satisfied with the economic results. The taxpayer modified its existing horizontal drilling program based on these results. The taxpayer's activities to identify a horizontal drilling process are excluded from the definition of qualified research because the activities consisted of adapting an existing business component, its existing horizontal drilling process, and did not involve creating a new or improved business component.

(G) Example 7. For the purposes of this example, assume that the taxpayer's development of its products satisfies the Four-Part Test described by subsection (c) of this section and is not otherwise excluded under this subsection. A taxpayer is a manufacturer of rigid plastic containers. The taxpayer contracts with major food and beverage manufacturers to provide suitable bottle and packaging designs. The products designed by the taxpayer may be for repeat customers and the sizes and types of bottle may be similar to previous products. The development of each new product, and the production process necessary to produce the products at sufficient production volume, starts from new concept drawings developed by engineers. The taxpayer uses a qualifying process of experimentation to evaluate alternative concepts for the product and production processes. The taxpayer's activities related to both the product and the production process are not excluded from the definition of qualified research as an adaptation of an existing business component.

(3) Duplication of existing business component. Any research related to the reproduction of an existing business component, in whole or in part, from a physical examination of the business component itself or from plans, blueprints, detailed specifications, or publicly available information with respect to such business component. This exclusion does not apply merely because the taxpayer examines an existing business component in the course of developing its own business component.

(4) Surveys, studies, etc. Any efficiency survey; activity relating to management function or technique; market research, testing or development (including advertising or promotions); routine data collection; or routine or ordinary testing or inspection for quality control.

(5) Computer software. Any research activities with respect to internal use software.

(A) For the purposes of this paragraph, internal use software is computer software developed by, or for the benefit of, the taxpayer primarily for internal use by the taxpayer. A taxpayer uses software internally if the software was developed for use in the operation of the business. Computer software that is developed to be commercially sold, leased, licensed, or otherwise marketed for separately stated consideration to unrelated third parties is not internal use software.

(B) Software developed by a taxpayer primarily for internal use by an entity that is part of an affiliated group to which the taxpayer also belongs shall be considered internal use software for purposes of this paragraph.

(C) This exclusion does not apply to software used in:

(i) an activity that constitutes qualified research, or

(ii) a production process that meets the requirements of the Four-Part Test.

(D) The determination as to whether software is internal use software depends on the facts and circumstances existing at the beginning of the development of the software.

(6) Social sciences, etc. Any research in the social sciences, arts, or humanities.

(7) Funded research. Any research funded by any grant, contract, or otherwise by another person or governmental entity.

(A) Research is considered funded if:

(i) the taxpayer performing the research for another person retains no substantial rights to the results of the research; or

(ii) the payments to the researcher are not contingent upon the success of the research.

(B) For the purposes of determining whether a taxpayer retains substantial rights to the results of the research:

(i) Incidental benefits to the researcher from the performance of the research do not constitute substantial rights. For example, increased experience in a field of research is not considered substantial rights.

(ii) A taxpayer does not retain substantial rights in the research it performs if the taxpayer must pay for the right to use the results of the research.

(C) If a taxpayer performing research does not retain substantial rights to the results of the research, the research is considered funded regardless of whether the payments to the researcher are contingent upon the success of the research. In this case, all research activities are considered funded even if the researcher has expenses that exceed the amount received by the researcher for the research.

(D) If a taxpayer performing research does retain substantial rights to the results of the research and the research is considered funded under subparagraph (A)(ii) of this paragraph, the research...
is only funded to the extent of the payments and fair market value of any property that the taxpayer becomes entitled to by performing the research. If the expenses related to the research exceed the amount the researcher is entitled to receive, the research is not considered funded with respect to the excess expenses. For example, a taxpayer performs research for another person. Based on the contract, the research activities are considered funded under subparagraph (A)(ii) of this paragraph because payments to the researcher are not contingent on the success of the research. The taxpayer retains substantial rights to the results of the research. The taxpayer is entitled to $100,000 under the contract but spent $120,000 on the research activities. In this case, the researcher is considered funded with respect to $100,000 and is not considered funded with respect to $20,000.

(E) A taxpayer performing research for another person must identify any other person paying for the research activities and any person with substantial rights to the results of the research.

(F) All agreements, not only research contracts, entered into between the taxpayer performing the research and the party funding the research shall be considered in determining the extent to which the research is funded.

(G) The provisions of this paragraph shall be applied separately to each research project undertaken by the taxpayer.

(e) Texas Qualified Research and Development Exemption Registration. In order to claim an exemption under this section, a taxpayer must first register with the comptroller and obtain a registration number.

(1) Registration procedure. To obtain a registration number, a taxpayer must complete Form AP-234, Texas Registration for Qualified Research and Development Sales Tax Exemption, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form.

(A) The taxpayer requesting the registration number must certify that it will not, as a taxable entity or as a member of a combined group, claim a franchise tax research and development activities credit on a franchise tax report based on an accounting period during which it claims an exemption under subsection (b) of this section.

(B) The taxpayer requesting the registration number must provide all data and information required by the comptroller to administer the exemption and comply with Tax Code, §151.3182(e) (Certain Property Used in Research and Development Activities; Reporting of Estimates and Evaluation).

(2) Retroactive registration. A taxpayer may request that a registration number be given retroactive effect.

(A) A taxpayer may request that a registration number have retroactive effect by following the procedures required under paragraph (1) of this subsection and by completing an annual information report, described in paragraph (3) of this subsection, for each prior year for which the registration number is to be effective.

(B) The registration number may be made retroactive to the later of January 1, 2014, or a date requested by a registrant that is no more than four years prior to the date the registration is received, if the date requested is not within an accounting period during which the registrant, as a taxable entity or as a member of a combined group, claimed the franchise tax research and development activities credit.

(C) A registrant who is issued a retroactive registration number may file a claim for refund of Texas sales and use tax paid on purchases made on or after the later of January 1, 2014, or the effective date of the registration number, that qualify for exemption under subsection (b) of this section, in accordance with the requirements of §3.325 of this title (relating to Refunds and Payments Under Protest).

(D) A claim for a carryforward of an unused franchise tax research and development activities credit under Tax Code, §171.659 does not affect a taxpayer's ability, as a taxable entity or as a member of a combined group, to request a retroactive registration.

(3) Annual information report. A registrant must submit an annual information report for each calendar year its registration number is effective, irrespective of the date on which the original registration occurred.

(A) The registrant must provide all data and information required by the comptroller to administer the exemption and comply with Tax Code, §151.3182(c).

(B) The annual information report must be submitted electronically unless the comptroller issues a waiver. A registrant who cannot comply with this requirement due to hardship, impracticality, or other valid reason must submit a written request to the comptroller for a waiver of the requirement.

(C) The due date for the annual information report for the preceding calendar year is March 31. If March 31 falls on a Saturday, Sunday, or a legal holiday, the due date is the next business day.

(i) An annual information report filed electronically must be completed and submitted by 11:59 p.m. central time on the due date to be considered timely.

(ii) Reports submitted on paper must be postmarked on or before the due date to be considered timely.

(D) A registrant who fails to timely file an annual information report for its registration number will be given written notice of the failure to file. If an annual information report is not submitted within 60 days of the date of the notice of failure to file, the registration number will be cancelled by the comptroller in accordance with paragraph (5) of this subsection.

(4) Direct payment permit holders. A direct payment permit holder must obtain a registration number as required by paragraph (1) of this subsection in order to claim an exemption under this section. A direct payment permit holder with a registration number must file an annual information report for each year the number is effective as required by paragraph (3) of this subsection.

(5) Cancellation of registration number by the comptroller. The comptroller will cancel the registration number of a registrant who fails to comply with the provisions of this section. For example, the comptroller may cancel the registration number of a registrant who fails to file an annual information report or who claims the franchise tax research and development activities credit without first cancelling its registration number, as required by paragraph (8) of this subsection. The comptroller shall give written notice of the cancellation to the registrant. The notice may be personally served on the registrant or sent by regular mail to the registrant's address as shown in the comptroller's records. The former registrant may not claim an exemption under this section during the period when the registration number is cancelled. A former registrant that purchases an item under a cancelled registration number may be subject to a criminal penalty under Tax Code, §151.707 (Resale or Exemption Certificate; Criminal Penalty) and §3.287(d)(3) of this title (relating to Exemption Certificates).

(6) Effective date of cancellation. A registrant whose registration number is cancelled by the comptroller is responsible for remitting Texas sales and use tax, and penalty and interest from the date of purchase, on any items purchased tax-free pursuant to Tax Code, §151.3182 on or after the effective date of cancellation. In the case of
a registrant whose registration number is cancelled because of a failure to file an annual information report, the effective date of the cancellation is December 31 of the last year for which the registrant filed an annual information report. In the case of a registrant whose registration number is cancelled because the registrant, as a taxable entity or as a member of a combined group, claimed the franchise tax research and development activities credit, the effective date of cancellation is the beginning date of the accounting period covered by the franchise tax report on which the credit was claimed.

(7) Reinstatement following cancellation. A former registrant who has had its registration number cancelled by the comptroller may submit a request in writing to have the registration number reinstated.

(A) A former registrant whose registration number has been cancelled may request reinstatement of the number be given retroactive effect. The registrant must file an annual information report for each prior year for which the registration number is to be effective.

(B) A registration number will not be reinstated for periods during which the former registrant is not eligible for the exemption under this section.

(C) Before the comptroller will reinstate a registration number, the former registrant must remit any Texas sales and use taxes, as well as applicable penalties and interest from the date of purchase, on all purchases made tax-free under this section during periods when the registrant was not eligible for the exemption under this section.

(8) Cancellation of registration number by registrant. A registrant who has received a registration number and subsequently chooses to claim the franchise tax research and development activities credit must cancel the registration number. The registrant is responsible for remitting Texas sales and use tax, and penalty and interest from the date of purchase, on any items purchased tax-free under this section during any accounting periods covered by a franchise tax report on which the credit is claimed.

(f) Texas Qualified Research Sales and Use Tax Exemption Certificate. Beginning January 1, 2014, a retailer may accept a valid and complete Form 01-931, Texas Qualified Research Sales and Use Tax Exemption Certificate or any form promulgated by the comptroller or that succeeds such form, in lieu of Texas sales and use tax on the sale of depreciable tangible personal property that qualifies for exemption under subsection (b) of this section. To be valid and complete, a Texas Qualified Research Sales and Use Tax Exemption Certificate must bear the registration number issued to the registrant by the comptroller and must be signed by the registrant or the registrant’s authorized agent. Texas Qualified Research Sales and Use Tax Exemption Certificates are subject to the requirements of §3.287(d) of this title. A retailer must maintain a copy of the Texas Qualified Research Sales and Use Tax Exemption Certificate accepted in lieu of tax on a sale and all records supporting that transaction. Refer to §3.281 of this title (relating to Records Required; Information Required).

(g) Divergent use. When a registrant uses an item purchased under a valid Texas Qualified Research Sales and Use Tax Exemption Certificate in a taxable manner, the registrant is liable for payment of Texas sales and use tax, plus penalty and interest as applicable, based on the fair market rental value of the tangible personal property for the period of time used in the taxable manner. This subsection applies to an item that is used for any purpose other than for use in qualified research, whether that use occurs before, during, or after the time when the item is used in qualified research. Refer to Tax Code, §151.155 (Exemption Certificate).

(h) Refund of Texas sales and use tax paid on depreciable tangible personal property used in qualified research. A registrant with a valid registration number may file a claim for refund of Texas sales and use tax paid on purchases made on or after the later of January 1, 2014, or the effective date of the registration number, that qualify for exemption under subsection (b) of this section in accordance with the requirements of §3.325 of this title.

(i) Effective dates.

(1) The provisions of this section apply to the sale, storage, or use of tangible personal property occurring on or after January 1, 2014.

(2) The sales and use tax exemption for depreciable tangible personal property used in qualified research expires on December 31, 2026.

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

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Comptroller of Public Accounts
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SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.599

The Comptroller of Public Accounts adopts amendments to §3.599, concerning margin: research and development activities credit, with changes to the proposed text as published in the April 16, 2021, issue of the Texas Register (46 TexReg 2565). The comptroller amends this section to provide guidance regarding the franchise tax research and development activities credit.

Throughout the section, the comptroller adds titles to statutory citations and makes minor revisions to improve readability.

The comptroller received comments regarding the proposed amendments from: Shannon Rusing of Texas Oil & Gas Association (TXOGA); Dale Craymer of Texas Taxpayers and Research Association (TTARA); Patrick Reynolds of Council on State Taxation (COST); Shane Frank of alliantgroup, LP (alliantgroup); Michael Thompson of Ryan; Kreig Mitchell of Kreig Mitchell LLC; Ronnie Berry of Celanese Corporation (Celanese); Jennifer Woodard of Associated General Contractors of Texas (AGC of Texas); and Mike Williams of RSM US LLP (RSM).

Ronnie Berry of Celanese and Jennifer Woodard of AGC of Texas requested a public hearing on the proposed amendments. The comptroller held the public hearing on Monday, June 28, 2021, at 9:00 a.m. in Room 170 of the Stephen F. Austin Building, Austin, Texas 78701. Benjamin Barmore of alliantgroup, Michael Thompson of Ryan, Alyssa Hornette of RSM, Dale Craymer of TTARA, Carolyn Labatt of Great South Texas Corporation (GSTC), and John Ferris of RealPage, Inc. (RealPage) testified at the hearing.
Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Ronnie Berry of Celanese, Jennifer Woodard of AGC of Texas, Alyssa Honnette of RSM, and Carolyn Labatt of GSTC suggested that the amendments be applied prospectively. The comptroller disagrees that the additions or revisions in the adopted rule are retroactive changes in law. The additions or revisions are expositions of existing Comptroller policy regarding Tax Code, Chapter 171, Subchapter M (Tax Credit for Certain Research and Development Activities), a statute that was adopted by the Legislature in 2013, rather than changes. At the same time, these same commenters encouraged the Comptroller’s office to recognize Treasury Regulations that were adopted after the effective date of Internal Revenue Code (IRC), §41 as clarifications that should be applied retroactively to the 2011 federal income tax year. As discussed in more detail below, with the exception of regulations that are not required to be applied to the 2011 federal income tax year, the comptroller does recognize Treasury Regulations that were adopted as clarifications. The comptroller does not view the amendments to this section any differently than the amendments to the Treasury Regulations that are applicable to the 2011 federal income tax year.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, and Shane Frank of alliantgroup each requested that the comptroller provide additional affirmative examples where a taxable entity qualified for the credit. These requests were for general examples, examples related to the Oil and Gas industry, and examples related to software development. The comptroller declined to provide additional examples in the rule because the current examples are sufficient.

Shane Frank and Benjamin Barmore of alliantgroup and Michael Thompson of Ryan commented that the proposed rule would eliminate industries from having any qualified research activities. The comptroller declined to modify the rule based on these comments. This is not the intent of the rule and there is no language in the rule that prevents a taxable entity from being engaged in qualified research based on the industry of the taxable entity.

The comptroller amends subsection (b)(1) by deleting the term "affiliated group" and adding a new term, "business component." The comptroller deletes the term "affiliated group" because the definition of combined group refers to Tax Code, §171.1014 (Combined Reporting; Affiliated Group Engaged in Unitary Business), which provides sufficient guidance. The comptroller defines the term, "business component," and bases this term on IRC, §41(d)(2)(B) (Business component defined), with non-substantive changes.

The comptroller adds new paragraph (4) to define the term "Four-Part Test" and renumbers subsequent paragraphs. The comptroller derives this term from IRC, §41(d) (Qualified research defined) and the regulations applicable to that section.

The comptroller amends the definition of "Internal Revenue Code (IRC)" in renumbered paragraph (5) to explain that a regulation adopted after December 31, 2011 must require a taxable entity to apply that regulation to the 2011 federal income tax year to be included in this definition. The definition of IRC in Tax Code, §171.651(1) states: 'Internal Revenue Code' means the Internal Revenue Code of 1986 in effect on December 31, 2011, excluding any changes made by federal law after that date, but including any regulations adopted under that code applicable to the tax year to which the provisions of the code in effect on that date applied."

The current version of Treasury Regulation, §1.41-4 (Qualified research for expenditures paid or incurred in taxable years ending on or after Dec. 31, 2003), adopted on November 3, 2016, is an example of a regulation that does not fully apply to the 2011 federal income tax year. With respect to its applicability, Treasury Regulation, §1.41-4(e) provides: "Other than subsection (c)(6) of this section, this section is applicable for taxable years ending on or after December 31, 2003. Paragraph (c)(6) of this section is applicable for taxable years beginning on or after October 4, 2016. For any taxable year that both ends on or after January 20, 2015 and begins before October 4, 2016, the IRS will not challenge return positions consistent with all of subsection (c)(6) of this section or all of subsection (c)(6) of this section as contained in the Internal Revenue Bulletin (IBR) 2015-5 (see www.irs.gov/pub/irs-irbs/irb15-05.pdf). For taxable years ending before January 20, 2015, taxpayers may choose to follow either all of §1.41-4(c)(6) as contained in 26 CFR part 1 (revised as of April 1, 2003) and IRB 2001-5 (see www.irs.gov/pub/irs-irbs/irb01-05.pdf) or all of §1.41-4(c)(6) as contained in IRB 2002-4 (see www.irs.gov/pub/irs-irbs/irb02-04.pdf)."

The first sentence quoted above shows that, other than paragraph (c)(6), the current version of Treasury Regulation, §1.41-4 applies to the 2011 federal income tax year. With respect to subsection (c)(6), the second sentence quoted above shows that the current language in Treasury Regulation, §1.41-4(c)(6) does not apply to the 2011 federal income tax year. The fourth sentence quoted above allows taxable entities to choose one of two proposed regulations described in the Internal Revenue Bulletins incorporated by reference. The proposed regulations referenced in those Internal Revenue Bulletins were not part of the Treasury Regulations in effect on December 31, 2011. Although the federal regulations allow taxable entities to choose whether they follow this prior IRS guidance, the options are not included in the term "Internal Revenue Code" because Treasury Regulation, §1.41-4(e) does not require taxable entities to follow either of those options.

Another example of a regulation that does not apply to the 2011 federal income tax year is Treasury Regulation, §1.174-2 (Definition of research and experimental expenditures), adopted July 21, 2014. With respect to its applicability, Treasury Regulation, §1.174-2(d) provides: "The eighth and ninth sentences of §1.174-2(a)(1); §1.174-2(a)(2); §1.174-2(a)(4); §1.174-2(a)(5); §1.174-2(a)(11) Example 3 through Example 10; §1.174-2(b)(4); and §1.174-2(b)(5) applicable to taxable years ending on or after July 21, 2014. Taxpayers may apply the provisions enumerated in the preceding sentence to taxable years for which the limitations for assessment of tax has not expired."

While the federal statute of limitations for the assessment of tax for the 2011 federal income tax year had not expired at the time this regulation was adopted, the provisions enumerated in this applicability provision are not included in the term "Internal Revenue Code" because the regulation does not require taxable entities to apply those provisions to the 2011 federal income tax year.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Michael Thompson of Ryan, Ronnie Berry of Celanese, Jennifer Woodard of AGC of Texas, Carolyn Labatt of GSTC, and John Ferris of RealPage suggested that the Treasury Regulations that taxable entities had the option to apply to the 2011 federal income tax year, such as Treasury Regulation, §1.41-4(c)(6) and Treasury Regulation, §1.174-2, should be in-
cluded in the definition of "Internal Revenue Code." For the reasons described above, the comptroller declines this suggestion. The comptroller amends the definition of "qualified research" in renumbered paragraph (7) to explain that qualified research must satisfy the Four-Part Test.

Shane Frank of alliantgroup and Michael Thompson of Ryan commented that the redefinition of qualified research is unnecessary, will cause confusion for taxpayers, and does not conform to IRC, §41. The comptroller declines to modify the rule based on these comments. The amendments to this definition are intended to provide additional guidance to taxable entities regarding how the definition of qualified research was incorporated into Texas law. The new definition is not intended to, and does not, conflict with the IRC that was incorporated into Texas law. Any part of the rule that does not have a direct basis in federal law was included to address ambiguities that are not addressed in IRC, §41 or any applicable Treasury Regulations.

The comptroller amends the definition of "qualified research expense (QRE)" in renumbered paragraph (8) based on IRC, §41(b) (Qualified research expenses) and Treasury Regulation, §1.41-2 (Qualified research expenses). The amended definition of QREs does not limit the applicability of any provisions of IRC, §41(b) or Treasury Regulation, §1.41-2. Rather, the amended definition describes the basic requirements for an expense to be a QRE. QREs are the sum of all in-house research expenses and contract research expenses.

The comptroller adds subparagraph (A) to explain that in-house research expenses include wages paid to an employee for qualified services, supplies, and amounts paid to another person for the right to use computers. The comptroller adds clause (i) to explain that qualified services include engaging in qualified research, or the direct supervision or direct support of qualified research. In subclauses (I) through (III), the comptroller defines the terms "engaging in qualified research," "direct supervision," and "direct support."

The comptroller adds clause (ii) to explain that supplies include any tangible personal property other than land, improvements to land, or property of a character subject to the allowance for depreciation.

The comptroller adds clause (iii) to explain that certain items purchased without paying sales or use tax are not included in the definition of in-house research expenses. This is because certain sales or use tax exemptions require that the item be used in specific ways that are not compatible with the item’s use in qualified research. The comptroller provides two examples illustrating this clause.

Subclause (I) contains examples illustrating this clause. Item (a) identifies two sales or use tax exemptions which are excluded under this clause: the manufacturing exemption under Tax Code, §151.318 (Property Used in Manufacturing) and the sale for resale exemption under Tax Code, §151.302 (Sales for Resale). To qualify for the manufacturing exemption, items used by a manufacturer must be used in or during the actual manufacturing, processing, or fabricating of tangible personal property for ultimate sale. IRC, §41(d)(4)(A) excludes: "any research conducted after the beginning of commercial production of the business component." A taxable entity cannot claim both the franchise tax credit and sales tax exemption for the same purchases or activities. The sales tax manufacturing exemption applies to items used to produce items for ultimate sale to a customer, while the franchise tax R&D credit excludes items that are ready for commercial sale or use. Thus, a taxable entity cannot claim both the credit and exemption for the same activities. Furthermore, under Tax Code, §151.318(c)(3), the manufacturing exemption excludes "equipment or supplies used in research or development of new products." While this exclusion to the manufacturing exemption is not directly tied to the definition of qualified research applicable to the franchise tax R&D credit, it does indicate that the manufacturing exemption was not intended to apply to research and development activities. To qualify for the sale for resale exemption, an item must be purchased with the intent to resell it to someone else, either in the form or condition in which it is acquired or as an attachment to or an integral part of other tangible personal property or taxable service. See Tax Code, §151.006 ("Sale for Resale."). Items used in qualified research are not resold and do not qualify for the sale-for-resale exemption.

Item (-b-) identifies three types of purchases that are not excluded under this clause: purchases of water, Sulphur, and items for which sales or use tax was paid to another state. These items are not taxable for reasons unrelated to the use of the items so there is not an inherent conflict with these items being used in qualified research, unlike the manufacturing or resale exemptions.

Subclause (II) explains that if the item were actually used in qualified research after claiming an exemption, that item may be included as an in-house research expense if sales or use tax, penalty, and interest is paid on the item.

Dale Craymer of TTARA, Patrick Reynolds of COST, and Michael Thompson of Ryan commented that subsection (b)(8)(A)(iii) should be eliminated because purchasing items using a sales tax exemption should not result in those items being excluded from being supplies. The comptroller declines this suggestion. As described above, supplies only qualify for the franchise tax R&D credit if they are used in qualified research. Some sales tax exemptions are allowed for activities that cannot be qualified research.

The comptroller adds clause (iv) to explain that wages are defined by reference to IRC, §3401(a) (Definitions). The comptroller adds clause (v) to explain how to allocate wages between qualified services and nonqualified services when an employee performs both types of services. The comptroller adds clause (vi) to explain that if over 80% of the services an employee provides are qualified services, then all of the services provided by that employee are qualified services.

The comptroller adds subparagraph (B) to provide that contract research expenses are 65% of any amount paid by the taxable entity to another person for qualified research. In this subparagraph, the comptroller explains: the type of agreement that is necessary for an expense to be a contract research expense; that payments contingent upon the success of the research are not contract research expenses; that qualified research is performed on behalf of a taxable entity if that taxable entity has a right to the research results; and with respect to which report year the contract research expenses can be taken. The comptroller cross-references IRC, §41(b), which provides that the allowable percentage of contract research expenses can change in certain circumstances.

The comptroller deletes paragraph (10), which contained a definition for the term research and development credit. This term is only used once in the section, in subsection (j)(2)(A), which includes information concerning the January 1, 2008 repeal of Tax
Code, Chapter 171, Subchapter O (Tax Credit for Certain Research and Development Activities). This information sufficiently distinguishes the prior credit from the current credit without the need for a separate definition.

The comptroller adds new subsections (c) and (d) and reletters subsequent subsections.

In new subsection (c), the comptroller discusses the application of the Four-Part Test to explain the basic requirements for research activities to be qualified research. The comptroller bases this subsection primarily on IRC, §41(d) and Treasury Regulation, §1.41-4.

In new paragraph (1), the comptroller describes the four individual components of the Four-Part Test: subparagraph (A) describes the Section 174 Test; subparagraph (B) describes the Discovering Technological Information Test; subparagraph (C) describes the Business Component Test; and subparagraph (D) describes the Process of Experimentation Test. In subparagraph (D), the comptroller provides several examples illustrating the Process of Experimentation Test.

Michael Thompson of Ryan and Kreig Mitchell of Kreig Mitchell LLC suggested that services should be allowed to be business components and that subsection (c)(1)(C)(ii) should be removed. The comptroller declines this suggestion. The term "business component" is defined by IRC, §41(d)(2)(B) as "any product, process, computer software, technique, formula, or invention which is to be" (i) held for sale, lease, or license, or (ii) used by the taxpayer in a trade or business of the taxpayer." Services do not fit within this definition. Concerns regarding taxable entities that provide services are addressed by this subsection by providing that a taxable entity may have qualified research activities for research related to business components that are used to provide services.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, Michael Thompson of Ryan, Kreig Mitchell of Kreig Mitchell LLC, Ronnie Berry of Celanese, and Jennifer Woodard of AGC of Texas suggested that designs should be allowed to be business components and that subsection (c)(1)(C)(ii) should be removed. The comptroller declines this suggestion. The term "business component" is defined by IRC, §41(d)(2)(B) as "any product, process, computer software, technique, formula, or invention which is to be" (i) held for sale, lease, or license, or (ii) used by the taxpayer in a trade or business of the taxpayer." The commenters suggested that a "design" can be produced and is included in the term "product." The surplusage canon of statutory construction requires that statutory provisions not be read in a way that would render any word redundant. An interpretation of the term "product" that is broad enough to include the term "design" would also include the terms "process," "computer software," "technique," "formula," and "invention." Such an interpretation would render all those terms redundant. The commenters also suggested that excluding a design from being a business component is inconsistent with the applicable federal law because Treasury Regulation, §1.41-4 provided that uncertainty as to the appropriate design of a business component can be a qualifying uncertainty for the Section 174 Test, the Discovering Technological Information Test, and the Process of Experimentation Test. In the phrase "appropriate design of a business component" the word design does not refer to the business component itself, it is describing a quality of the business component.

Shane Frank of alliantgroup, Michael Thompson of Ryan, Ronnie Berry of Celanese, Jennifer Woodard of AGC of Texas, and Mike Williams of RSM suggested eliminating subsection (c)(1)(D)(vi). The comptroller declines the suggestion to eliminate this subsection but does modify it to address these concerns. The guidance in this subsection is a non-exhaustive list of factors that the comptroller considers when determining if a trial and error experimental method is qualifying systematic trial and error or non-qualifying simple trial and error. These factors do not affect the evaluation of a process of experimentation that does not consist of trial and error. This subsection also does not require a systematic trial and error process to satisfy all the enumerated factors.

Shane Frank of alliantgroup, Michael Thompson of Ryan, and Jennifer Woodard of AGC of Texas suggested reconsidering, eliminating, or modifying subsection (c)(1)(D)(vii)(V), Example 5 (related to the Process of Experimentation Test). The comptroller declines this suggestion. This example is intended to address common issues encountered in administering the R&D credit.

Shane Frank of alliantgroup, Michael Thompson of Ryan, and Jennifer Woodard of AGC of Texas suggested reconsidering, eliminating, or modifying subsection (c)(1)(D)(vii)(VI), Example 6 (related to the Process of Experimentation Test). The comptroller declines the suggestion to eliminate this example because this example is intended to address common issues encountered in administering the R&D credit. Jennifer Woodard of AGC of Texas commented that one sentence of this example could be read such that computer-aided simulation would not qualify as a process of experimentation. That was not the intent of this example because such activities are expressly allowed by the applicable Treasury Regulations. The example has been modified to address this concern.

Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, Michael Thompson of Ryan, and Mike Williams of RSM suggested reconsidering, eliminating, or modifying subsection (c)(1)(D)(vii)(VII), Example 7 (related to the Process of Experimentation Test). The comptroller declines this suggestion. This example is intended to address common issues encountered in administering the R&D credit. This example is also consistent with Treasury Regulation, §1.41-4(a)(8) Example 2, which provides that testing to determine if something works as specified by the manufacturer is an activity in the nature of routine or ordinary testing or inspection for quality control and is not qualified research.

Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, and Michael Thompson of Ryan suggested reconsidering, eliminating, or modifying subsection (c)(1)(D)(vii)(VIII), Example 8 (related to the Process of Experimentation Test). The comptroller declines the suggestion to eliminate this example because this example is intended to address common issues encountered in administering the R&D credit. Dale Craymer of TTARA and Patrick Reynolds of COST suggested that this example may stand for the proposition that the Process of Experimentation Test requires evaluating multiple alternatives. That was not the intent of this example because such a requirement is not required by the IRC. The example has been modified to address this concern.

Michael Thompson of Ryan suggested eliminating or modifying subsection (c)(1)(D)(vii)(IX), Example 9 (related to the Process of Experimentation Test). The comptroller declines the suggestion to eliminate this example because this example is intended to address common issues encountered in administering the
R&D credit. Mr. Thompson suggested that this example may stand for the proposition that the information discovered by a process of experimentation must be completely new to the world. That was not the intent of this example because such a requirement is not required by the IRC. The example has been modified to address this concern.

In new paragraph (2), the comptroller explains that the Four-Part Test applies separately to each business component of the taxable entity.

In new paragraph (3), the comptroller explains that, if the whole business component does not meet the requirements of the Four-Part Test, the taxable entity may then shrink back the business component to the next most significant subset of elements of the business component. This process continues until the Four-Part Test is satisfied, or the most basic element of the product fails the Four-Part Test.

In new paragraph (4), the comptroller explains how the Four-Part Test applies to software development activities. The comptroller also identifies a list of software development activities that are likely to be qualified research and a list of software development activities that are unlikely to be qualified research. The explanations and lists in this paragraph are adapted from the Internal Revenue Service's Audit Guidelines on the Application of Process of Experimentation for all Software.

Shane Frank of alliantgroup, Michael Thompson of Ryan, and Mike Williams and Alyssa Honnette of RSM suggested modifying or eliminating subsection (c)(4). The comptroller declines this suggestion. This subsection does not preclude any type of computer software from qualifying for the R&D credit. It provides guidance regarding types of computer software development activities that are likely to qualify or unlikely to qualify, but also explicitly states that any computer software development activities that meet the requirements of the Four-Part Test qualify for the R&D credit.

Michael Thompson of Ryan commented that subsection (c) conflicts with state law because it is not solely based on the IRC and Treasury Regulations. The comptroller declines to modify the rule in response to this comment. The applicable federal statutes and regulations are incorporated by reference into Tax Code, Chapter 171, Subchapter M, making them part of that Subchapter. The comptroller has rulemaking authority under Tax Code, §171.662 (Rules) and §111.002 (Comptroller's Rules; Compliance; Forfeiture) to adopt rules for the enforcement of Tax Code, Chapter 171, Subchapter M. There is no part of subsection (c) that conflicts with the applicable federal statutes or regulations, anything in subsection (c) that is not based on those statutes and regulations is intended to resolve ambiguities in them to allow the comptroller to enforce Tax Code, Chapter 171, Subchapter M.

In new subsection (d), the comptroller lists activities that do not constitute qualified research. This list is based on IRC, §41(d)(4) and Treasury Regulation, §1.41-4(c) (Excluded activities). The discussion of the funded research exclusion is also based on Treasury Regulation, §1.41-4A(d) (Qualified research for taxable years beginning before January 1, 1986). This subsection contains examples for the research after commercial production exclusion and the adaptation of existing business components exclusion.

Shane Frank of alliantgroup suggested eliminating the list of activities that are deemed to be after commercial production, found in subsection (d)(1)(B). The comptroller declines this suggestion. This list is based primarily on Treasury Regulation, §1.41-4(c)(2)(ii)(A-F). The only item that is not found in Treasury Regulation, §1.41-4(c)(2)(ii)(A-F) is the inclusion of any activities that involve the use of an item for which the taxable entity claimed the manufacturing exemption under Tax Code, §151.318. To qualify for the manufacturing exemption, items used by a manufacturer must be used in or during the actual manufacturing, processing, or fabricating of tangible personal property for ultimate sale. If a taxable entity is engaged in manufacturing, processing, or fabricating tangible personal property for ultimate sale, that tangible personal property is ready for commercial sale or use or meets the basic functional and economic requirements of the taxable entity for the component's sale or use.

Shane Frank of alliantgroup suggested that the examples found in subsection (d)(1)(E) are flawed. Mr. Frank provided one specific example of such a flaw: "For example, Example 1 assumes that a newly designed belt that has never been used in an actual manufacturing process will work perfectly immediately upon integration in the taxpayer's production process. This rarely occurs." The comptroller declines to modify the rule based on this comment. The only specific issue identified relates to Example 1, an example directly based on Treasury Regulation, §1.41-4(c)(10) Example 1, which is incorporated by reference into Texas law.

Michael Thompson of Ryan suggested eliminating or modifying subsection (d)(1)(E)(iii). Example 3 (related to the Research After Commercial Production Exclusion). The comptroller declines the suggestion to eliminate this example because this example is intended to address common issues encountered in administering the R&D credit. Mr. Thompson suggested that this example uses the term "design" in a way that conflicts with subsection (c)(1)(C)(ii) of this section and that the example does not distinguish research related to the development of a process to manufacture an item from the research related to the item itself. The example has been modified to use the term "design" consistently with subsection (c)(1)(C)(ii) of this section and to apply the example to the manufacturing process as well.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, and Michael Thompson of Ryan suggested eliminating or modifying subsection (d)(2)(F)(1) - (3), Examples 1 through 3 (related to the adaptation of an existing business component exclusion). The comptroller declines this suggestion. These three examples are directly based on Treasury Regulation, §1.41-4(c)(10) Examples 3 through 5, which are incorporated by reference into Texas law. Mr. Frank suggested that "these examples are especially problematic since the Treasury Department and IRS have previously instructed that the research after commercial production, adaptation, and duplication exclusions do not cover research activities that otherwise satisfy the requirements for qualified research." This statement is based on a statement in the supplementary information found in Treasury Decision 9104, 2004-1 C.B. 406, which was the treasury decision that adopted Treasury Regulation, §1.41-4. This supplementary information is not part of the text of Treasury Regulation, §1.41-4 and is not incorporated by reference into Texas law. The comptroller declines to interpret the research after commercial production, adapta-
tion, and duplication exclusions such that they do not apply if the research activities otherwise satisfy the requirements for qualified research. The surplusage canon of statutory construction requires that statutory provisions not be read in a way that would render any word redundant. Such an interpretation would render all three of these exclusions redundant.

Michael Thompson of Ryan suggested that the comptroller should restate, verbatim, the guidance provided by the IRS in Treasury Decision 9786 (2016), which adopted Treasury Regulations regarding the Internal Use Software Exclusion. Mike Williams of RSM similarly suggested the comptroller adopt the High Threshold of Innovation Test found in those Treasury Regulations. The comptroller declines these suggestions. IRC, §41(d)(4)(E) gives the IRS the authority to adopt regulations to create exceptions to the Internal Use Software Exclusion that are not found in the IRC. The comptroller does not have a similar grant of statutory authority to create exceptions to the Internal Use Software Exclusion.

At the public hearing, Dale Craymer of TTARA requested clarification of the comptroller's position with respect to the funded research exclusion. Subsection (d)(7), relating to the funded research exclusion, is based on the IRC applicable to the 2011 federal income tax year. This includes IRC, §41(d)(4)(H), Treasury Regulation, §1.41-4(c)(9), and Treasury Regulation, §1.41-4A(d). The comptroller intends subsection (d)(7) to be consistent with the text of those statutes and federal regulations. While federal court cases interpreting those statutes with respect to the federal income tax R&D credit are not binding authority for the Texas franchise tax R&D credit, they are persuasive authority and will be considered by the comptroller on a case-by-case basis.

The comptroller amends relettered subsection (e) by moving the current language to paragraph (1) and adding two new paragraphs. The comptroller adds new paragraph (2) to explain that the taxable entity has the burden of proof to establish its entitlement to, and value of, the credit by clear and convincing evidence. In subparagraph (A), the comptroller explains that all qualified research expenses must be connected to specific qualified research activities. In subparagraph (B), the comptroller explains that all qualified research expenses must be supported by contemporaneous business records. The comptroller defines these contemporaneous business records for wages, supplies, and contract research expenses, including a non-exhaustive list of examples for each type of expense. The comptroller adds new paragraph (3) to explain that any determination by the IRS that a taxable entity is entitled to the federal research and development credit does not bind the comptroller when determining a taxable entity's eligibility for the credit.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank and Benjamin Barmore of alliantgroup, Ronnie Berry of Celanese, Jennifer Woodard of AGC of Texas, Alyssa Honnette of RSM, Carolyn Labatt of GSTC, and John Ferris of RealPage commented that the requirement to provide contemporaneous documentation is unnecessarily burdensome and suggested that the comptroller should require the same types of documentation that is required for the federal income tax R&D credit. The comptroller declines this suggestion. The requirement for contemporaneous documentation is generally applicable to all franchise tax credits and nothing in Tax Code, Chapter 171, Subchapter M incorporates the federal documentation requirements.

The comptroller amends relettered subsection (g)(3) to change the term "this state" to "Texas."

The comptroller amends paragraph (5) to provide additional details regarding verification of prior year QREs when those prior years are outside of the statute of limitations.

The comptroller adds paragraph (6) to explain that if a taxable entity has any QREs under a higher education contract, then all of its QREs are included in the calculation at the higher rate allowed by paragraph (3) or (4) of subsection (g). This is the case even if not all of the QREs relate to higher education contracts.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, and Patrick Reynolds of COST suggested that the instructions for how combined groups should calculate their credit in proposed subsection (i) were not supported by the statute because the statute provides that the combined group is the taxable entity for the purposes of this credit. Shannon Rusing of TXOGA also suggested that the separate application of the higher education rate to different members of the combined group was similarly not supported by statute. At the public hearing held on this section, the comptroller requested comments on this issue. After careful consideration of this issue, the discussion at the public hearing, and all the comments received, the comptroller has modified subsection (i) as described below.

The comptroller restructures relettered subsection (i) into four paragraphs. The first sentence of the current subsection is now new paragraph (1). The second sentence of the current subsection is now in new paragraph (2). New paragraph (2) also explains that the total qualified research expenses of each member of the combined group shall be added together to determine the total credit claimed on the combined report. New paragraph (3) explains that a change in membership of the combined group results in a new taxable entity and the resulting combined group is not entitled to the carryforward of the credit because it is no longer the same taxable entity as the taxable entity that established the credit carryforward. New paragraph (3) also provides a list of six situations that will not be considered a change in the membership of the combined group. New paragraph (4) explains that the higher education rate described in relettered subsections (g)(3) - (4) applies to the combined group as a whole.

The comptroller amends relettered subsection (l) by adding paragraph (3) to explain that the comptroller may verify credit carryforwards by verifying the qualified research activities on which the credit that created the carryforward was based. This verification may occur even if the statute of limitations has expired for the report year on which the original credit was claimed. This verification will not result in an assessment of tax, penalty, or interest for any period for which the statute of limitations is closed, but may result in an adjustment to the credit carryforward for any periods for which the statute of limitations is open.

Shannon Rusing of TXOGA, Dale Craymer of TTARA, Patrick Reynolds of COST, Shane Frank of alliantgroup, Michael Thompson of Ryan, Ronnie Berry of Celanese, Jennifer Woodard of AGC of Texas, Alyssa Honnette of RSM, Carolyn Labatt of GSTC, and John Ferris of RealPage commented that the requirement to provide contemporaneous documentation is unnecessarily burdensome and suggested that the comptroller should require the same types of documentation that is required for the federal income tax R&D credit. The comptroller declines this suggestion. The requirement for contemporaneous documentation is generally applicable to all franchise tax credits and nothing in Tax Code, Chapter 171, Subchapter M incorporates the federal documentation requirements.

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The amendments are adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2 (State Taxation).

The amendments implement Tax Code, Chapter 171, Subchapter M.

§3.599. Margin: Research and Development Activities Credit.

(a) Effective dates.

(1) The provisions of this section apply to franchise tax reports originally due on or after January 1, 2014.

(2) These provisions expire on December 31, 2026. The credits allowed under this section cannot be established on a report originally due after December 31, 2026. The expiration does not affect the carryforward of a credit authorized under these provisions as provided in subsection (l) of this section and established on a report originally due prior to the expiration date of these provisions.

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

(1) Business component--A business component is any product, process, computer software, technique, formula, or invention, which is to be held for sale, lease, or license, or used by the taxable entity in a trade or business of the taxable entity.

(2) Combined group--Taxable entities that are part of an affiliated group engaged in a unitary business and that are required to file a combined group report under Tax Code, §171.1014 (Combined Reporting; Affiliated Group Engaged in Unitary Business).

(3) Controlling interest--

(A) For a corporation, either more than 50%, owned directly or indirectly, of the total combined voting power of all classes of stock of the corporation, or more than 50%, owned directly or indirectly, of the beneficial ownership interest in the voting stock of the corporation.

(B) For a partnership, association, trust, or other entity other than a limited liability company, more than 50%, owned directly or indirectly, of the capital, profits, or beneficial interest in the partnership, association, trust, or other entity.

(C) For a limited liability company, either more than 50%, owned directly or indirectly, of the total membership interest of the limited liability company or more than 50%, owned directly or indirectly, of the beneficial ownership interest in the membership interest of the limited liability company.

(4) Four-Part Test--The test described in IRC, §41(d) (Qualified research defined) that determines whether research activities are qualified research. The four parts of the test are the Section 174 Test, the Discovering Technological Information Test, the Business Component Test, and the Process of Experimentation Test.

(5) Internal Revenue Code (IRC)--The Internal Revenue Code of 1986 in effect on December 31, 2011, excluding any changes made by federal law after that date, but including any regulations that are later adopted under that code applicable to the tax year to which the provisions of the code in effect on that date applied. A regulation adopted after December 31, 2011 is only included in this term to the extent that the regulation requires a taxable entity to apply the regulation to the 2011 federal income tax year.

(6) Public or private institution of higher education--

(A) an institution of higher education, as defined by Education Code, §61.003 (Definitions); or

(B) a private or independent institution of higher education, as defined by Education Code, §61.003.

(7) Qualified research--This term has the meaning given in IRC, §41(d), except that the research must be conducted in Texas. Qualified research activities must satisfy each part of the Four-Part Test.

(8) Qualified research expense--This term has the meaning given in IRC, §41(b) (Qualified research expenses), except that the expense must be for qualified research conducted in Texas. IRC, §41(b) defines qualified research expenses as the sum of in-house research expenses and contract research expenses.

(A) In-house research expenses include any wages paid or incurred for qualified services performed by an employee; any amount paid or incurred for supplies used in the conduct of qualified research; and any amount paid or incurred to another person for the right to use computers in the conduct of qualified research.

(i) Qualified services include an employee either engaging in qualified research or engaging in the direct supervision or direct support of qualified research.

(I) For the purposes of this clause, the term "engaging in qualified research" means the actual conduct of qualified research. For example, a scientist conducting laboratory experiments could be engaging in qualified research.

(II) For the purposes of this clause, the term "direct supervision" means the immediate supervision (first-line management) of qualified research. For example, a research scientist who directly supervises laboratory experiments, but who may not actually perform experiments, could be directly supervising qualified research. "Direct supervision" does not include supervision by a higher-level manager to whom first-line managers report, even if that manager is a qualified research scientist.

(III) For the purposes of this clause, the term "direct support" means services in the direct support of either: Persons engaging in actual conduct of qualified research, or persons who are directly supervising persons engaging in the actual conduct of qualified research.

(-a-) Direct support of research includes, but is not limited to, the services of: a secretary for typing reports describing laboratory results derived from qualified research; a laboratory worker for cleaning equipment used in qualified research; a clerk for compiling research data; and a machinist for machining a part of an experimental model used in qualified research.

(-b-) Direct support of research activities does not include general administrative services, or other services only indirectly of benefit to research activities. For example, services of: payroll personnel in preparing salary checks of laboratory scientists; an accountant for accounting for research expenses; a janitor for general cleaning of a research laboratory; or officers engaged in supervising financial or personnel matters do not qualify as direct support of research. This is true whether general administrative personnel are part of the research department or in a separate department.

(-c-) Direct support does not include supervision. Supervisory services constitute "qualified services" only to the extent provided in subclause (II) of this clause.

(ii) Supplies are any tangible property other than land, improvements to land, or property of a character subject to the allowance for depreciation.
(iii) If a taxable entity claimed a sales or use tax exemption under Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) when it purchased a taxable item, and that exemption is for a use other than use in qualified research, the item is excluded from being an in-house research expense, even if it otherwise meets the definition of supplies in clause (ii) of this subparagraph. Exemptions or exclusions that are not based on the use of an item do not result in an exclusion from being an in-house research expense under this clause.

(I) For example:

(a-1) An item for which a taxable entity claimed the manufacturing exemption under Tax Code, §151.318 (Property Used in Manufacturing) or the sale for resale exemption under Tax Code, §151.302 (Sales for Resale) is excluded from being an in-house research expense under this clause.

(b-1) Water, sulphur, and items for which a taxable entity paid sales or use tax to another state are not subject to sales or use tax under Tax Code, §151.315 (Water), Tax Code, §151.3171 (Sulphur), and Tax Code, §151.303 (Previously Taxed Items: Use Tax Exemption or Credit), but are not excluded from being an in-house research expense under this clause.

(II) If an item is excluded from being an in-house research expense under this clause, and the taxable entity used that item in qualified research activities rather than the use for which the sales or use tax exemption was granted, the taxable entity may pay any sales or use tax, and any applicable penalty or interest, related to the purchase or use of the item. Once the applicable sales or use tax, penalty, and interest is paid, the taxable entity may include the cost of that item as an in-house research expense.

(iv) The term wages has the meaning given such term by IRC, §3401(a) (Wages). In the case of an employee within the meaning of IRC, §401(c)(1) (Self-employed individual treated as employee) the term wages includes the earned income as defined in IRC, §401(c)(2) (Earned income) of such employee. The term wages does not include any amount taken into account in determining the work opportunity credit under IRC, §51(a) (Determination of amount).

(v) If an employee performed both qualified services and nonqualified services, only wages for qualified services constitute an in-house research expense. Unless the taxable entity can demonstrate another method is more appropriate, the amount of wages that are in-house research expenses shall be determined by multiplying the total amount of wages paid to or incurred for the employee during the report year by the ratio of the total time actually spent by the employee in the performance of qualified services for the taxable entity to the total time spent by the employee in the performance of all services for the taxable entity during the report year.

(vi) Notwithstanding clause (v) of this subparagraph, if the ratio of the total time actually spent by an employee in the performance of qualified services for the taxable entity to the total time spent by the employee in the performance of all services for the taxable entity during the report year is greater than 80%, all services performed by that employee are considered qualified services.

(B) Contract research expenses are 65% of any amount paid or incurred by the taxable entity to any person, other than an employee of the taxable entity, for qualified research. If a taxable entity satisfies the requirements of IRC, §41(b)(3)(C) (Amounts paid to certain research consortia) or IRC, §41(b)(3)(D) (Amounts paid to eligible small businesses, universities, and Federal laboratories) the percentage of allowable contract research expenses is increased as provided by those subparagraphs.

(i) An expense is paid or incurred for qualified research only to the extent that it is paid or incurred pursuant to an agreement that:

(II) provides that research be performed on behalf of the taxable entity; and

(III) requires the taxable entity to bear the expense even if the research is not successful.

(ii) If an expense is paid or incurred by the taxable entity pursuant to an agreement under which payment is contingent on the success of the research, then the expense is not a contract research expense because the expense is considered paid for the product or result of the research rather than the performance of the research. This clause only applies to that portion of a payment that is contingent on the success of the research.

(iii) Qualified research is performed on behalf of the taxable entity if the taxable entity has a right to the research results, even if that right is not exclusive.

(iv) If any contract research expenses are paid or incurred during one report year for qualified research that is conducted in a subsequent report year, the expenses shall be treated as paid or incurred during the report year in which the qualified research is conducted.

(v) See IRC, §41(b) for special circumstances that change the percentage that applies to contract research expenses.

(9) Registration Number--The Texas Qualified Research Registration Number issued by the comptroller to a person who submits the Texas Registration for Qualified Research and Development Sales Tax Exemption form.

(10) Research and development activities credit (credit)--A credit against franchise tax for qualified research expenses that is allowed under Tax Code, Chapter 171, Subchapter M (Tax Credit for Certain Research and Development Activities).

(11) Tax period--The period on which a franchise tax report is based as provided by §3.584(c) of this title (relating to Margin: Reports and Payments).

(c) Application of the Four-Part Test. Research activities must satisfy each part of the Four-Part Test, as described in paragraph (1) of this subsection, to be qualified research.

(1) Four-Part Test.

(A) Section 174 Test. Expenditures related to the research must be eligible to be treated as expenses under IRC, §174 (Research and experimental expenditures).

(i) Expenditures are eligible to be treated as expenses under IRC, §174, if the expenditures are incurred in connection with the taxable entity's trade or business and represent a research and development cost in the experimental or laboratory sense. Expenditures represent research and development costs in the experimental or laboratory sense if they are for activities intended to discover information that would eliminate uncertainty concerning the development or improvement of a product. Uncertainty exists if the information available to the taxable entity does not establish the capability or method for developing or improving the product or the appropriate design of the product.

(ii) For the purposes of this test, the term "product" includes any pilot model, process, formula, invention, technique,
patent, or similar property, and includes products to be used by the taxable entity in its trade or business as well as products to be held for sale, lease, or license.

(iii) Expenditures for the following are not eligible to be treated as expenses under IRC, §174:

(I) land;

(II) depreciable property;

(III) the ordinary testing or inspection of materials or products for quality control;

(IV) efficiency surveys;

(V) management studies;

(VI) consumer surveys;

(VII) advertising or promotions;

(VIII) the acquisition of another's patent, model, production, or process; or

(IX) research in connection with literary, historical, or similar projects.

(B) Discovering Technological Information Test. The research must be undertaken for the purpose of discovering information that is technological in nature.

(i) Research is undertaken for the purpose of discovering technological information if it is intended to eliminate uncertainty concerning the development or improvement of a business component. Uncertainty exists if the information available to the taxable entity does not establish the capability or method for developing or improving the business component, or the appropriate design of the business component.

(ii) In order to satisfy the requirement that the research is technological in nature, the process of experimentation used to discover information must fundamentally rely on principles of the physical or biological sciences, engineering, or computer science. A taxable entity may employ existing technologies and may rely on existing principles of the physical or biological sciences, engineering, or computer science to satisfy this requirement.

(iii) A determination that research is undertaken for the purpose of discovering information that is technological in nature does not require that the taxable entity:

(I) seek to obtain information that exceeds, expands, or refines the common knowledge of skilled professionals in the particular field of science or engineering in which the taxable entity is performing the research; or

(II) succeed in developing a new or improved business component.

(C) Business Component Test. The application of the technological information for which the research is undertaken must be intended to be useful in the development of a new or improved business component of the taxable entity, which may include any product, process, computer software, technique, formula, or invention that is to be held for sale, lease, or license, or used by the taxable entity in a trade or business of the taxable entity.

(i) If a taxable entity provides a service to a customer, the service provided to that customer is not a business component because a service is not a product, process, computer software, technique, formula, or invention. However, a product, process, computer software, technique, formula, or invention used by a taxable entity to provide services to its customers may be a business component.

(ii) A design is not a business component because a design is not a product, process, computer software, technique, formula, or invention. While uncertainty as to the appropriate design of a business component is a qualifying uncertainty for the Section 174 Test and the Discovering Technological information test, the design itself is not a business component. For example, the design of a structure is not a business component, although the structure itself may be a business component. Similarly, a blueprint or other plan used to construct a structure that embodies a design is not a business component.

(D) Process of Experimentation Test. Substantially all of the research activities must constitute elements of a process of experimentation for a qualified purpose. A process of experimentation is undertaken for a qualified purpose if it relates to a new or improved function, performance, reliability, or quality of a business component. Any research relating to style, taste, cosmetic, or seasonal design factors does not satisfy the Process of Experimentation Test.

(i) A process of experimentation is a process designed to evaluate one or more alternatives to achieve a result where the capability or the method of achieving that result, or the appropriate design of that result, is uncertain as of the beginning of the taxable entity's research activities.

(ii) A process of experimentation must:

(I) be an evaluative process and generally should be capable of evaluating more than one alternative; and

(II) fundamentally rely on the principles of the physical or biological sciences, engineering, or computer science and involve:

(-a-) the identification of uncertainty concerning the development or improvement of a business component;

(-b-) the identification of one or more alternatives intended to eliminate that uncertainty; and

(-c-) the identification and the conduct of a process of evaluating the alternatives through, for example, modeling, simulation, or a systematic trial and error methodology.

(iii) A taxable entity may undertake a process of experimentation if there is no uncertainty concerning the taxable entity's capability or method of achieving the desired result so long as the appropriate design of the desired result is uncertain as of the beginning of the taxable entity's research activities. Uncertainty concerning the development or improvement of the business component (e.g., its appropriate design) does not establish that all activities undertaken to achieve that new or improved business component constitute a process of experimentation.

(iv) The substantially all requirement of this subparagraph is satisfied only if 80% or more of a taxable entity's research activities, measured on a cost or other consistently applied reasonable basis constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality. The substantially all requirement is satisfied even if the remainder of a taxable entity's research activities with respect to the business component do not constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality.

(v) Non-experimental methods, such as simple trial and error, brainstorming, or reverse engineering, are not considered a process of experimentation.
(vi) The following are factors that may be considered in determining whether a trial and error methodology is experimental systematic trial and error or non-experimental simple trial and error. Evidence provided to determine the type of trial and error is not limited to these factors, nor is evidence of each factor required. These factors only apply to determining whether a process of experimentation is systematic trial and error. Systematic trial and error is not the only qualifying process of experimentation. These factors are:

(I) whether the person conducting the trial and error methodology stops testing alternatives once a single acceptable result is found or continues to find multiple acceptable results for comparison;

(II) whether all the results of the trial and error methodology are recorded for evaluation;

(III) whether there is a written procedure for conducting the trial and error methodology; and

(IV) whether there is a written procedure for evaluating the results of the trial and error methodology.

(vii) Examples.

(I) Example 1. A taxable entity is engaged in the business of developing and manufacturing widgets. The taxable entity wants to change the color of its blue widget to green. The taxable entity obtains several different shades of green paint from various suppliers. The taxable entity paints several sample widgets, and surveys its customers to determine which shade of green its customers prefer. The taxable entity's activities to change the color of its blue widget to green do not satisfy the Process of Experimentation Test because its activities are not undertaken for a qualified purpose. All of the taxable entity's research activities are related to style, taste, cosmetic, or seasonal design factors.

(II) Example 2. The taxable entity in Example 1 chooses one of the green paints. The taxable entity obtains samples of the green paint from a supplier and determines that it must modify its painting process to accommodate the green paint because the green paint has different characteristics from other paints it has used. The taxable entity obtains detailed data on the green paint from its paint supplier. The taxable entity also consults with the manufacturer of its paint spraying machines. The manufacturer informs the taxable entity that it must acquire new nozzles that operate with the green paint it wants to use because the current nozzles do not work with the green paint. The taxable entity tests the new nozzles, using the green paint, to ensure that they work as specified by the manufacturer of the paint spraying machines. The taxable entity's activities to modify its painting process are not qualified research. The taxable entity did not conduct a process of evaluating alternatives in order to eliminate uncertainty regarding the modification of its painting process. Rather, the manufacturer of the paint machines eliminated the taxable entity's uncertainty regarding the modification of its painting process. The taxable entity's activities to test the nozzles to determine if the nozzles work as specified by the manufacturer of the paint spraying machines are in the nature of routine or ordinary testing or inspection for quality control.

(III) Example 3. A taxable entity is engaged in the business of manufacturing food products and currently manufactures a large-shred version of a product. The taxable entity seeks to modify its current production line to permit it to manufacture both a large-shred version and a fine-shred version of one of its food products. A smaller, thinner shredding blade capable of producing a fine-shred version of the food product is not commercially available. Thus, the taxable entity must develop a new shredding blade that can be fitted onto its current production line. The taxable entity is uncertain concerning the design of the new shredding blade because the material used in its existing blade breaks when machined into smaller, thinner blades. The taxable entity engages in a systematic trial and error process of analyzing various blade designs and materials to determine whether the new shredding blade must be constructed of a different material from that of its existing shredding blade and, if so, what material will best meet its functional requirements. The taxable entity's activities to modify its current production line by developing the new shredding blade satisfy the Process of Experimentation Test. Substantially all of the taxable entity's activities constitute elements of a process of experimentation because it evaluated alternatives to achieve a result where the method of achieving that result, and the appropriate design of that result, were uncertain as of the beginning of the taxable entity's research activities. The taxable entity identified uncertainties related to the development of a business component, and identified alternatives intended to eliminate these uncertainties. Furthermore, the taxable entity's process of evaluating identified alternatives was technological in nature and was undertaken to eliminate the uncertainties.

(IV) Example 4. A taxable entity is in the business of designing, developing and manufacturing automobiles. In response to government-mandated fuel economy requirements, the taxable entity seeks to update its current model vehicle and undertakes to improve aerodynamics by lowering the hood of its current model vehicle. The taxable entity determines, however, that lowering the hood changes the air flow under the hood, which changes the rate at which air enters the engine through the air intake system, which reduces the functionality of the cooling system. The taxable entity's engineers are uncertain how to design a lower hood to obtain the increased fuel economy, while maintaining the necessary air flow under the hood. The taxable entity designs, models, simulates, tests, refines, and re-tests several alternative designs for the hood and associated proposed modifications to both the air intake system and cooling system. This process enables the taxable entity to eliminate the uncertainties related to the integrated design of the hood, air intake system, and cooling system. Such activities constitute 85% of its total activities to update its current model vehicle. The taxable entity then engages in additional activities that do not involve a process of evaluating alternatives in order to eliminate uncertainties. The additional activities constitute only 15% of the taxable entity's total activities to update its current model vehicle. In this case substantially all of the taxable entity's activities constitute elements of a process of experimentation because it evaluated alternatives to achieve a result where the method of achieving that result, and the appropriate design of that result, were uncertain as of the beginning of its research activities. The taxable entity identified uncertainties related to the improvement of a business component and identified alternatives intended to eliminate these uncertainties. Furthermore, the taxable entity's process of evaluating the identified alternatives was technological in nature and was undertaken to eliminate the uncertainties. Because 85% of the taxable entity's activities to update its current model vehicle constitute elements of a process of experimentation that relates to a new or improved function, performance, reliability, or quality, all of its activities satisfy the Process of Experimentation Test.

(V) Example 5. A taxable entity is in the business of providing building and construction services, including the construction of warehouses, strip malls, office buildings, and other commercial structures. The taxable entity is engaged to construct a structure in a part of Texas where foundation problems are common. The taxable entity's engineers were uncertain how to design the structure to ensure stability of the structure's foundation because the taxable entity had never designed a structure in a similar location. The taxable entity's engineers used their professional experience and various building codes to determine how to design the foundation based on the conditions at the construction site. The engineers chose to use piles in the
foundation. The taxable entity constructed a test pile on site to confirm whether this would work in the conditions present on the construction site. This test pile would become part of the foundation of the structure regardless of whether the engineers had to redesign the additional piles required for the foundation. The taxable entity's activities in using professional experience and business codes to design the foundation did not meet the Process of Experimentation Test because the activities did not resolve technological uncertainties through an experimental process. Constructing the test pile also did not meet the Process of Experimentation Test because it was not an evaluative process.

(VI) Example 6. A taxable entity is in the business of providing building and construction services, including the construction of warehouses, strip malls, office buildings, and other commercial structures. For one of its projects to construct an office building, the taxable entity was uncertain how to design the layout of the electrical systems. The taxable entity's employees held on-site meetings to discuss different options, such as running the wire under the floor or through the ceiling, but did not actually experiment by installing wire in different locations. The taxable entity used computer-aided simulation and modeling to produce the final electrical system layout. While in some cases computer-aided simulation and modeling may be an experimental process, in this case, it was not an experimental process because the taxable entity did not use the computer-aided simulation and modeling to evaluate different alternatives in a scientific manner. The taxable entity's activities did not satisfy the Process of Experimentation Test because it did not conduct an experimental process of evaluating alternatives to eliminate a technological uncertainty.

(VII) Example 7. A taxable entity is an oil and gas operator that recently acquired rights to drill in an area in which it had not previously operated. The taxable entity decided to use horizontal drilling in this area, but it had never drilled a horizontal well and was uncertain how to successfully execute the horizontal drilling. At the time the taxable entity began horizontal drilling, the technology to drill horizontal wells was established. The taxable entity selected technology from existing commercially available options to use in its horizontal drilling program. The taxable entity's activities did not satisfy the Process of Experimentation Test because evaluating commercially available options does not constitute a process of experimentation.

(VIII) Example 8. A taxable entity is an oil and gas operator that recently acquired rights to drill in an area in which it had not previously operated. The taxable entity decided to use horizontal drilling in this area. The taxable entity had drilled a horizontal well before in a different formation and at different depths. However, it had never drilled a horizontal well in this formation or at the required depths and was uncertain how to successfully execute the horizontal drilling. The taxable entity utilized its existing technology to perform its horizontal drilling operations in this area and the existing technology was successful. The taxable entity's activities did not satisfy the Process of Experimentation Test because the taxable entity merely used its existing technology and did not perform any experimentation to evaluate any alternative drilling methods.

(IX) Example 9. A taxable entity sought to discover cancer immunotherapies. The taxable entity was uncertain as to the appropriate design of the proteins to be used as a drug candidate. The taxable entity identified several alternative protein constructs and used a process to test them. The taxable entity's process involved testing the constructs using in vitro functional assays and binding assays, and either modifying the designs or discarding them and repeating the previous steps. The taxable entity took the resulting products from the in vitro testing and tested the drug candidate in living organisms. This process evaluated the various alternatives identified by the taxable entity and did not satisfy the Process of Experimentation Test because the taxable entity's activities satisfied the Process of Experimentation Test.

(2) Application of the Four-Part Test to business components. The Four-Part Test is applied separately to each business component of the taxable entity. Any plant process, machinery, or technique for commercial production of a business component is treated as a separate business component from the business component being produced.

(3) Shrink-back rule. The Four-Part Test is first applied at the level of the discrete business component used by the taxable entity in a trade or business of the taxable entity. If the requirements of the Four-Part Test are not met at that level, then they are applied at the next most significant subset of elements of the business component. This shrinking back of the product continues until either a subset of elements of the product that satisfies the requirements of the Four-Part Test is reached, or the most basic element of the product is reached, and such element fails to satisfy any part of the Four-Part Test.

(4) Software development as qualified research. In determining if software development activities constitute qualified research, the comptroller will consider the facts and circumstances of each activity.

(A) Application of Four-Part Test to software development activities.

(i) A taxable entity must prove that a software development activity is qualified research and meets all the requirements of the Four-Part Test under paragraph (1) of this subsection, even if the activity is likely to qualify as described in subparagraph (B) of this paragraph.

(ii) A taxable entity may prove that a software development activity described as unlikely to qualify in subparagraph (C) of this paragraph, is qualified research by providing evidence that the activity meets all the requirements of the Four-Part Test under paragraph (1) of this subsection.

(B) Software development activities likely to qualify. Types of activities likely to qualify include, but are not limited to:

(i) developing the initial release of an application software product that includes new constructs, such as new architectures, new algorithms, or new database management techniques;

(ii) developing system software, such as operating systems and compilers;

(iii) developing specialized technologies, such as image processing, artificial intelligence, or speech recognition; and

(iv) developing software as part of a hardware product where the software interacts directly with that hardware in order to make the hardware/software package function as a unit.

(C) Software development activities unlikely to qualify. Types of activities unlikely to qualify include, but are not limited to:

(i) maintaining existing software applications or products;

(ii) configuring purchased software applications;

(iii) reverse engineering of existing applications;

(iv) performing studies, or similar activities, to select vendor products;

(v) detecting flaws and bugs directed toward the verification and validation that the software was programmed as intended and works correctly;
(vi) modifying an existing software business component to make use of new or existing standards or devices, or to be compliant with another vendor's product or platform;

(vii) developing a business component that is substantially similar in technology, functionality, and features to the capabilities already in existence at other companies;

(viii) upgrading to newer versions of hardware or software or installing vendor-fix releases;

(ix) re-hosting or porting an application to a new hardware such as from mainframe to PC, or software platform, such as Windows to UNIX, or rewriting an existing application in a new language, such as rewriting a COBOL mainframe application in C++;

(x) writing hardware device drivers to support new hardware, such as disks, scanners, printers, or modems;

(xi) performing data quality, data cleansing, and data consistency activities, such as designing and implementing software to validate data fields, clean data fields, or make the data fields consistent across databases and applications;

(xii) bundling existing individual software products into product suites, such as combining existing word processor, spreadsheet, and slide presentation software applications into a single suite;

(xiii) expanding product lines by purchasing other products;

(xiv) developing interfaces between different software applications;

(xv) developing vendor product extensions;

(xvi) designing graphic user interfaces;

(xvii) developing functional enhancements to existing software applications/products;

(xviii) developing software as an embedded application, such as in cell phones, automobiles, and airplanes;

(xix) developing software utility programs, such as debuggers, backup systems, performance analyzers, and data recovery;

(xx) changing from a product based on one technology to a product based on a different or newer technology; and

(xxi) adapting and commercializing technology developed by a consortium or open software group.

(d) Excluded research activities. Qualified research does not include the activities described in this subsection.

(1) Research after commercial production. Any research conducted after the beginning of commercial production of the business component.

(A) Activities are conducted after the beginning of commercial production of a business component if such activities are conducted after the component is developed to the point where it is ready for commercial sale or use or meets the basic functional and economic requirements of the taxable entity for the component's sale or use.

(B) The following activities are deemed to occur after the beginning of commercial production of a business component:

(i) preproduction planning for a finished business component;

(ii) tooling-up for production;

(iii) trial production runs;

(iv) troubleshooting involving detecting faults in production equipment or processes;

(v) accumulating data relating to production processes;

(vi) debugging flaws in a business component; and

(vii) any activities that involve the use of an item for which the taxable entity claimed the manufacturing exemption under Tax Code, §151.318.

(C) In cases involving development of both a product and a manufacturing or other commercial production process for the product, the research after commercial production exclusion applies separately for the activities relating to the development of the product and the activities relating to the development of the process. For example, even after a product meets the taxable entity's basic functional and economic requirements, activities relating to the development of the manufacturing process may still constitute qualified research, provided that the development of the process itself separately satisfies the requirements of this section, and the activities are conducted before the process meets the taxable entity's basic functional and economic requirements or is ready for commercial use.

(D) Clinical testing of a pharmaceutical product prior to its commercial production in the United States is not treated as occurring after the beginning of commercial production even if the product is commercially available in other countries. Additional clinical testing of a pharmaceutical product after a product has been approved for a specific therapeutic use by the Food and Drug Administration and is ready for commercial production and sale is not treated as occurring after the beginning of commercial production if such clinical testing is undertaken to establish new functional uses, characteristcs, indications, combinations, dosages, or delivery forms for the product. A functional use, characteristic, indication, combination, dosage, or delivery form shall be considered new only if such functional use, characteristic, indication, combination, dosage, or delivery form must be approved by the Food and Drug Administration.

(E) Examples.

(i) Example 1. A taxable entity is a tire manufacturer and develops a new material to use in its tires. The taxable entity conducts research to determine the changes that will be necessary for it to modify its existing manufacturing processes to manufacture the new tire. The taxable entity determines that the new tire material retains heat for a longer period of time than the materials it currently uses for tires, and, as a result, the new tire material adheres to the manufacturing equipment during tread cooling. The taxable entity evaluates several alternatives for processing the treads at cooler temperatures to address this problem, including a new type of belt for its manufacturing equipment to be used in tread cooling. Such a belt is not commercially available. Because the taxable entity is uncertain of the belt design, it develops and conducts sophisticated engineering tests on several alternative designs for a new type of belt to be used in tread cooling until it successfully achieves a design that meets its requirements. The taxable entity then manufactures a set of belts for its production equipment, installs the belts, and tests the belts to make sure they were manufactured correctly. The taxable entity's research with respect to the design of the new belts to be used in its manufacturing of the new tire may be qualified research under the Four-Part Test. However, the taxable entity's expenses to implement the new belts, including the costs to manufacture, install, and test the belts were incurred after the belts met the taxable entity's functional and economic requirements and are excluded as research after commercial production.
(ii) Example 2. For several years, a taxable entity has manufactured and sold a particular kind of widget. The taxable entity initiates a new research project to develop a new or improved widget. The taxable entity's activities to develop a new or improved widget are not excluded from the definition of qualified research under this paragraph. The taxable entity's activities relating to the development of a new or improved widget constitute a new research project to develop a new business component and are not considered activities conducted after the beginning of commercial production.

(iii) Example 3. For the purposes of this example, assume that the taxable entity's development of its products and manufacturing processes satisfies the Four-Part Test described by subsection (c) of this section and is not otherwise excluded under this subsection. A taxable entity is a manufacturer of integrated circuits for use in specific applications. The taxable entity develops various integrated circuit devices and associated manufacturing processes. The taxable entity assembles various product configurations for testing. After an internal process of testing, the taxable entity delivers a sample quantity of the integrated circuit to a potential customer for further testing. At the time when the samples are delivered to the taxable entity's potential customer, the potential customer has not agreed to purchase any integrated circuits from the taxable entity. This process of testing by both the taxable entity and its potential customer continues until an acceptable product and manufacturing process to produce the product is achieved. At that point, the taxable entity and the potential customer enter into an agreement for the delivery of an order of the integrated circuits. In some cases, no acceptable product or manufacturing process is achieved, and no agreement is reached with the potential customer. Research activities occurring prior to an agreement are not considered activities conducted after the beginning of commercial production because the integrated circuits were not yet ready for commercial use. Any research that occurs after an agreement is reached are excluded as activities conducted after the beginning of commercial production because the integrated circuits were ready for commercial use once the product and associated manufacturing process was accepted by the potential customer.

(2) Adaptation of existing business components. Activities relating to adapting an existing business component to a particular customer's requirement or need. This exclusion does not apply merely because a business component is intended for a specific customer. For example:

(A) Example 1. A taxable entity is a computer software development firm and owns a general ledger accounting software core program that it markets and licenses to customers. The taxable entity incurs expenditures in adapting the core software program to the requirements of one of its customers. Because the taxable entity's activities represent activities to adapt an existing software program to a particular customer's requirement or need, its activities are excluded from the definition of qualified research under this paragraph.

(B) Example 2. Assume that the customer from Example 1 pays the taxable entity to adapt the core software program to the customer's requirements. Because the taxable entity's activities are excluded from the definition of qualified research, the customer's payments to the taxable entity are not for qualified research and are not considered to be contract research expenses.

(C) Example 3. Assume that the customer from Example 1 uses its own employees to adapt the core software program to its requirements. Because the customer's employees' activities to adapt the core software program to its requirements are excluded from the definition of qualified research, the wages the customer paid to its employees do not constitute in-house research expenses.

(D) Example 4. A taxable entity manufactures and sells rail cars. Because rail cars have numerous specifications related to performance, reliability and quality, rail car designs are subject to extensive, complex testing in the scientific or laboratory sense. A customer orders passenger rail cars from the taxable entity. The customer's rail car requirements differ from those of the taxable entity's other existing customers only in that the customer wants fewer seats in its passenger cars and a higher quality seating material and carpet that are commercially available. The taxable entity manufactures rail cars meeting the customer's requirements. The rail car sold to the customer was not a new business component, but merely an adaptation of an existing business component that did not require a process of experimentation. Thus, the taxable entity's activities to manufacture rail cars for the customer are excluded from the definition of qualified research because the taxable entity's activities represent activities to adapt an existing business component to a particular customer's requirement or need.

(E) Example 5. A taxable entity is a manufacturer and undertakes to create a manufacturing process for a new valve design. The taxable entity determines that it requires a specialized type of robotic equipment to use in the manufacturing process for its new valves. Such robotic equipment is not commercially available. Therefore, the taxable entity purchases existing robotic equipment for the purpose of modifying it to meet its needs. The taxable entity's engineers identify uncertainty that is technological in nature concerning how to modify the existing robotic equipment to meet its needs. The taxable entity's engineers develop several alternative designs, conduct experiments using modeling and simulation in modifying the robotic equipment, and conduct extensive scientific and laboratory testing of design alternatives. As a result of this process, the taxable entity's engineers develop a design for the robotic equipment that meets its needs. The taxable entity constructs and installs the modified robotic equipment on its manufacturing process. The taxable entity's research activities to determine how to modify the robotic equipment it purchased for its manufacturing process are not considered an adaptation of an existing business component.

(F) Example 6. A taxable entity is an oil and gas operator and has been engaged in horizontal drilling for the past ten years. Recently, the taxable entity was hired by a customer to drill in a formation. The drilling objectives included targeting an interval within that formation for horizontal drilling. The taxable entity was uncertain about the successful execution of the horizontal drilling because it had not previously drilled a horizontal well in that formation. The taxable entity was also uncertain about the economic results from the targeted interval. The taxable entity drilled several horizontal wells before its customer was satisfied with the economic results. The taxable entity modified its existing horizontal drilling program based on these results. The taxable entity's activities to identify a horizontal drilling process are excluded from the definition of qualified research because the activities consisted of adapting an existing business component, its existing horizontal drilling process, and did not involve creating a new or improved business component.

(G) Example 7. For the purposes of this example, assume that the taxable entity's development of its products satisfies the Four-Part Test described by subsection (c) of this section and is not otherwise excluded under this subsection. A taxable entity is a manufacturer of rigid plastic containers. The taxable entity contracts with major food and beverage manufacturers to provide suitable bottle and packaging designs. The products designed by the taxable entity may be for repeat customers and the sizes and types of bottle may be similar to previous products. The development of each new product, and the production process necessary to produce the products at sufficient production volume, starts from new concept drawings developed by engineers. The taxable entity uses a qualifying process of experimen-
tation to evaluate alternative concepts for the product and production processes. The taxable entity's activities related to both the product and the production process are not excluded from the definition of qualified research as an adaptation of an existing business component.

(3) Duplication of existing business component. Any research related to the reproduction of an existing business component, in whole or in part, from a physical examination of the business component itself or from plans, blueprints, detailed specifications, or publicly available information with respect to such business component. This exclusion does not apply merely because the taxable entity examines an existing business component in the course of developing its own business component.

(4) Surveys, studies, etc. Any efficiency survey; activity relating to management function or technique; market research, testing or development (including advertising or promotions); routine data collection; or routine or ordinary testing or inspection for quality control.

(5) Computer software. Any research activities with respect to internal use software.

(A) For the purposes of this paragraph, internal use software is computer software developed by, or for the benefit of, the taxable entity primarily for internal use by the taxable entity. A taxable entity uses software internally if the software was developed for use in the operation of the business. Computer software that is developed to be commercially sold, leased, licensed, or otherwise marketed for separately considered use to unrelated third parties is not internal use software.

(B) Software developed by a taxable entity primarily for internal use by an entity that is part of an affiliated group to which the taxable entity also belongs shall be considered internal use software for purposes of this paragraph.

(C) This exclusion does not apply to software used in:

(i) an activity that constitutes qualified research, or

(ii) a production process that meets the requirements of the Four-Part Test.

(D) The determination as to whether software is internal use software depends on the facts and circumstances existing at the beginning of the development of the software.

(6) Social sciences, etc. Any research in the social sciences, arts, or humanities.

(7) Funded research. Any research funded by any grant, contract, or otherwise by another person or governmental entity.

(A) Research is considered funded if:

(i) the taxable entity performing the research for another person retains no substantial rights to the results of the research; or

(ii) the payments to the researcher are not contingent upon the success of the research.

(B) For the purposes of determining whether a taxable entity retains substantial rights to the results of the research:

(i) Incidental benefits to the researcher from the performance of the research do not constitute substantial rights. For example, increased experience in a field of research is not considered substantial rights.

(ii) A taxable entity does not retain substantial rights in the research it performs if the taxable entity must pay for the right to use the results of the research.

(C) If a taxable entity performing research does not retain substantial rights to the results of the research, the research is considered funded regardless of whether the payments to the researcher are contingent upon the success of the research. In this case, all research activities are considered funded even if the researcher has expenses that exceed the amount received by the researcher for the research.

(D) If a taxable entity performing research does retain substantial rights to the results of the research and the research is considered funded under subparagraph (A)(ii) of this paragraph, the research is only funded to the extent of the payments and fair market value of any property that the taxable entity becomes entitled to by performing the research. If the expenses related to the research exceed the amount the researcher is entitled to receive, the research is not considered funded with respect to the excess expenses. For example, a taxable entity performs research for another person. Based on the contract, the research activities are considered funded under subparagraph (A)(ii) of this paragraph because payments to the researcher are not contingent on the success of the research. The taxable entity retains substantial rights to the results of the research. The taxable entity is entitled to $100,000 under the contract but spent $120,000 on the research activities. In this case, the research is considered funded with respect to $100,000 and is not considered funded with respect to $20,000.

(E) A taxable entity performing research for another person must identify any other person paying for the research activities and any person with substantial rights to the results of the research.

(F) All agreements, not only research contracts, entered into between the taxable entity performing the research and the party funding the research shall be considered in determining the extent to which the research is funded.

(G) The provisions of this paragraph shall be applied separately to each research project undertaken by the taxable entity.

(e) Eligibility for credit.

(1) A taxable entity is eligible to claim a credit for the periods in which the taxable entity is engaged in qualified research and incurs qualified research expenses. The credit may be claimed on a franchise tax report for qualified research expenses incurred during the period on which the report is based.

(2) A taxable entity has the burden of establishing its entitlement to, and the value of, the credit by clear and convincing evidence, including proof that the research activities meet the definition of qualified research, the amount of any qualified research expenses, and applying the shrink-back rule described in subsection (c)(3) of this section.

(A) All qualified research expenses must be paid or incurred in connection with research activities that are qualified research.

(B) All qualified research expenses must be supported by contemporaneous business records.

(i) Contemporaneous business records for wages are records that were created and maintained during the period in which the taxable entity paid the employee to engage in qualified services. This includes, but is not limited to, payroll records, employee job descriptions, performance evaluations, calendars, and appointment books.

(ii) Contemporaneous business records for supplies are records that were created and maintained during the period in which
the supplies were purchased. This includes, but is not limited to, inventory records, invoices, purchase orders, and contracts.

(iii) Contemporaneous business records for contract research expenses are records that were created and maintained during the period in which the contract research expenses were paid or incurred. This includes, but is not limited to, contracts and invoices.

(3) An Internal Revenue Service audit determination of eligibility for the federal research and development credit under IRC, §41 (Credit for increasing research activities), whether that determination is that the taxable entity qualifies or does not qualify for the federal research and development credit, is not binding on the comptroller's determination of eligibility for the credit.

(f) Ineligibility for credit.

(1) A taxable entity is not eligible to claim a credit on a franchise tax report for qualified research expenses incurred during the period on which the report is based if the taxable entity, or a member of the combined group, if the taxable entity is a combined group, received an exemption from sales and use tax under Tax Code, §151.3182 (Certain Property Used in Research and Development Activities; Reporting of Estimates and Evaluation) during that period.

(2) A taxable entity that is not eligible to claim a credit under this subsection may carry forward an unused credit under subsection (l) of this section.

(g) Amount of credit.

(1) Qualified research expenses in Texas. Subject to subsection (h) of this section, and except as provided by paragraphs (2), (3), and (4) of this subsection, the credit allowed for any report equals 5.0% of the difference between:

(A) all qualified research expenses incurred during the period on which the report is based; and

(B) 50% of the average amount of all qualified research expenses incurred during the three tax periods preceding the period on which the report is based.

(2) Entities without qualified research expenses in each of the three preceding tax periods. Except as provided by paragraph (4) of this subsection, if the taxable entity has no qualified research expenses in one or more of the three tax periods preceding the period on which the report is based, the credit for the period on which the report is based equals 2.5% of the qualified research expenses incurred during that period.

(3) Qualified research expenses under a higher education contract. Subject to subsection (h) of this section, and except as provided by paragraph (4) of this subsection, if the taxable entity contracts with one or more public or private institutions of higher education for the performance of qualified research and the taxable entity incurs qualified research expenses in Texas under the contract during the period on which the report is based, then the credit for the report equals 6.25% of the difference between:

(A) all qualified research expenses incurred during the period on which the report is based; and

(B) 50% of the average amount of all qualified research expenses incurred during the three tax periods preceding the period on which the report is based.

(4) Entities with qualified research expenses under higher education contracts but without qualified research expenses in each of the three preceding tax periods. If the taxable entity incurs qualified research expenses in Texas under a contract with one or more public or private institutions of higher education for the performance of qualified research during the period on which the report is based, but the taxable entity has no qualified research expenses in one or more of the three tax periods preceding the period on which the report is based, then the credit for the period on which the report is based equals 3.125% of all qualified research expenses incurred during that period.

(5) Same method of computing qualified research expenses required. Notwithstanding whether the statute of limitations for claiming a credit under this section has expired for any tax period used in determining the average amount of qualified research expenses under paragraph (1)(B) or (3)(B) of this subsection, the determination of which research expenses are qualified research expenses for purposes of computing that average must be made in the same manner as that determination is made for purposes of paragraph (1)(A) or (3)(A) of this subsection. The comptroller may verify the qualified research expenses used to compute the prior year average, even if the statute of limitations for the prior year has expired. This verification will not result in an adjustment to tax, penalty, or interest for any report year for which the statute of limitations is closed.

(6) A taxable entity with any qualified research expenses under higher education contracts in a tax period may include all of its qualified research expenses in the calculations under paragraphs (3) and (4) of this subsection, even if not all of the qualified research expenses are related to higher education contracts. For taxable entities in a combined group, see subsection (i) of this section.

(h) Attribution of expenses following transfer of controlling interest.

(1) If a taxable entity acquires a controlling interest in another taxable entity, or in a separate unit of another taxable entity, during a tax period with respect to which the acquiring taxable entity claims a credit under this section, then the amount of the acquiring taxable entity's qualified research expenses equals the sum of:

(A) the amount of qualified research expenses incurred by the acquiring taxable entity during the period on which the report is based; and

(B) subject to paragraph (4) of this subsection, the amount of qualified research expenses incurred by the acquired taxable entity or unit during the portion of the period on which the report is based that precedes the date of the acquisition.

(2) A taxable entity that sells or otherwise transfers to another taxable entity a controlling interest in another taxable entity, or in a separate unit of a taxable entity, during a period on which a report is based may not claim a credit under this section for qualified research expenses incurred by the transferred taxable entity or unit during the period if:

(A) the taxable entity that makes the sale or transfer is ineligible for the credit under subsection (f) of this section; or

(B) the acquiring taxable entity claims a credit under this section for the corresponding period.

(3) If during any of the three tax periods following the period in which a sale or other transfer described by paragraph (2) of this subsection occurs, the taxable entity that sold or otherwise transferred the controlling interest reimburses the acquiring taxable entity for research activities conducted on behalf of the taxable entity that made the sale or other transfer, the amount of the reimbursement is:

(A) included as qualified research expenses incurred by the taxable entity that made the sale or other transfer for the tax period during which the reimbursement was paid, subject to paragraph (5) of this subsection; and
(B) excluded from the qualified research expenses incurred by the acquiring taxable entity for the tax period during which the reimbursement was paid.

(4) An acquiring taxable entity may not include on a report the amount of qualified research expenses otherwise authorized by paragraph (1)(B) of this subsection if the taxable entity that made the sale or other transfer described by paragraph (2) of this subsection received an exemption under Tax Code, §151.3182 during the portion of the period on which the acquiring taxable entity's report is based that precedes the date of the acquisition.

(5) A taxable entity that makes a sale or other transfer described by paragraph (2) of this subsection may not include on a report the amount of reimbursement otherwise authorized by paragraph (3)(A) of this subsection if the reimbursement is for research activities that occurred during a tax period in which the entity that makes a sale or other transfer received an exemption under Tax Code, §151.3182.

(i) Combined reporting.

(1) A credit under this section for qualified research expenses incurred by a member of a combined group must be claimed on the combined report for the group required by Tax Code, §171.1014.

(2) The combined group is the taxable entity for purposes of this section. The total qualified research expenses of each member of the combined group shall be added together to determine the total credit claimed on the combined report.

(3) If there is a change in membership of the combined group, the resulting combined group is a new taxable entity and the resulting combined group is not entitled to the carryforward of the credit under subsection (i) of this section because it is no longer the same taxable entity as the taxable entity that established the credit carryforward. For the purposes of this section, there is no change in membership of the combined group if:

(A) the common owner or owners of the members of the combined group changes without any change in the members of the combined group;

(B) the common owner or owners change without any change in the members of the combined group other than the addition of a newly-formed entity that is the new common owner;

(C) the combined group undergoes a corporate reorganization that does not result in any member entities leaving the combined group;

(D) two or more members of the combined group merge;

(E) one or more members of the combined group forms a new entity that is a member of the combined group; or

(F) one or more members of the combined group is terminated, dissolved, or otherwise loses its status as a legal entity.

(4) A combined group with any qualified research expenses under higher education contracts in a tax period may include all of its qualified research expenses in the calculations under subsection (g)(3) and (4) of this section, even if not all of the members of the combined group have qualified research expenses that are related to higher education contracts.

(j) Tiered partnership reporting.

(1) An upper tier entity and a lower tier entity may claim a credit under this section for qualified research expenses; however, an upper tier entity and a lower tier entity cannot claim a credit under this section for the same qualified research expense.

(2) An upper tier entity that includes the total revenue of a lower tier entity for purposes of computing its taxable margin as authorized by Tax Code, §171.1015 (Reporting for Certain Partnerships in Tiered Partnership Arrangement) may claim the credit under this section for qualified research expenses incurred by the lower tier entity to the extent of the upper tier entity's ownership interest in the lower tier entity.

(k) Limitation. The total credit claimed under this section for a report, including the amount of any carryforward credit under subsection (l) of this section, may not exceed 50% of the amount of franchise tax due for the report before any other applicable tax credits.

(l) Carryforward.

(1) If a taxable entity is eligible for a credit that exceeds the limitation under subsection (k) of this section, the taxable entity may carry the unused credit forward for not more than 20 consecutive reports.

(2) Research and development credits, including credit carryforwards, are considered to be used in the following order:

(A) a credit carryforward of unused research and development credits accrued under Tax Code, Chapter 171, Subchapter O (Tax Credit for Certain Research and Development Activities), before its repeal on January 1, 2008, and claimed as authorized by §3.593 of this title (relating to Margin: Franchise Tax Credits);

(B) a credit carryforward under this section; and

(C) a current year credit.

(3) If a taxable entity claims a carryforward on a report within the statute of limitations, the comptroller may verify that the credit that established the carryforward was based on qualified research activities, even if the statute of limitations for the year in which the credit was created has expired. This verification will not result in an adjustment to tax, penalty, or interest for any report year for which the statute of limitations has expired. The verification may result in an adjustment to the carryforward for all periods within the unexpired statute of limitations and for all future periods in which the taxable entity may claim the carryforward.

(4) For application of the carryforward to combined groups, see subsection (i)(3) of this section.

(m) Assignment prohibited. A taxable entity may not convey, assign, or transfer the credit allowed under this section to another entity unless all of the assets of the taxable entity are conveyed, assigned, or transferred in the same transaction.

(n) Application for credit.

(1) A taxable entity applies for the credit by claiming the credit on or with the franchise tax report for the period for which the credit is claimed. A taxable entity must also complete Form 05-178, Texas Franchise Tax Research and Development Activities Credits Schedule, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form.

(2) The comptroller may require a taxable entity that claims a credit under this section to provide all data and information required for the comptroller to evaluate the credit and to comply with Tax Code, §151.3182(e).

(o) Amending reports.

(1) If a report was originally due and filed after the effective date of this section and a credit allowed under this section was not claimed, a taxable entity may file an amended report within the statute of limitation to claim a credit, if the taxable entity or a member of its
combined group does not have an active Registration Number for that period. See §3.584 of this title for information about filing an amended report.

(2) If a taxable entity or member of the combined group has or had a Registration Number for a period for which it intends to claim a credit allowed under this section, the taxable entity or member of the combined group must submit a written request to cancel the registration before claiming a credit. The written request must contain the following information:

(A) the tax period(s) covered by the report for which it intends to claim a credit allowed under this section; and

(B) a statement whether any tax-exempt purchases were made. If tax-exempt purchases were made, include an original or amended sales and use tax report with tax due, penalty, and interest for the sales tax periods that cover the tax-exempt purchases.

(3) If a report was filed claiming a credit allowed under this section and the taxable entity later decides to claim a sales and use tax exemption under Tax Code, §151.3182, the taxable entity must:

(A) file an amended franchise tax report that does not claim the credit under this section and pay any tax, penalty, and interest due;

(B) apply for a Registration Number; and

(C) file a request for a sales and use tax refund for taxes paid on purchases under Tax Code, §151.3182.

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

Filed with the Office of the Secretary of State on October 4, 2021.

TRD-202103916
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
Effective date: October 24, 2021
Proposal publication date: April 16, 2021
For further information, please call: (512) 475-2220

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 15. TEXAS FORENSIC SCIENCE COMMISSION

CHAPTER 651. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES

SUBCHAPTER A. ACCREDITATION

37 TAC §651.7

The Texas Forensic Science Commission ("Commission") adopts an amendment to 37 Texas Administrative Code §651.207 without changes to the proposed text as published in the August 27, 2021, issue of the Texas Register (46 TexReg 5371), expanding the list of forensic practitioners eligible for the General Forensic Analyst Licensing Exam to include crime laboratory administration and management personnel, crime scene investigators and employees who perform latent print processing. The rule will not be republished. Currently, crime laboratory managers, crime scene investigators and employees performing only latent print processing are not eligible for the General Forensic Analyst Licensing Exam. The change permits crime laboratory managers, crime scene investigators and employees who only perform latent print processing, working in accredited forensic laboratories, to voluntarily take the exam if they wish. The amendment is necessary to reflect adoptions made by the Commission at its July 16, 2021 quarterly meeting. The adoption is made in accordance with the Commission's forensic analyst licensing authority under Code of Criminal Procedure, Article 38.01 §§ 3-a and 4-(a).

Summary of Comments. No comments were received regarding the amendments to this section.

Statutory Authority. The amendment is proposed under Code of Criminal Procedure, Article 38.01 §3-a, which directs the Commission to adopt rules necessary to implement Article 38.01, and §4-d(b) and (c), which authorizes the Commission to adopt rules providing, modifying, or removing accreditation exemptions.

Cross reference to statute. The proposal affects 37 Texas Administrative Code §651.7.

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

Filed with the Office of the Secretary of State on October 4, 2021.

TRD-202103901
Leigh Marie Tomlin
Associate General Counsel
Texas Forensic Science Commission
Effective date: October 24, 2021
Proposal publication date: August 27, 2021
For further information, please call: (512) 784-0037

SUBCHAPTER C. FORENSIC ANALYST LICENSING PROGRAM

37 TAC §651.207

The Texas Forensic Science Commission ("Commission") adopts an amendment to 37 Texas Administrative Code §651.207 without changes to the proposed text as published in the August 27, 2021, issue of the Texas Register (46 TexReg 5371), expanding the list of forensic practitioners eligible for the General Forensic Analyst Licensing Exam to include crime laboratory administration and management personnel, crime scene investigators and employees who perform latent print processing. The rule will not be republished. Currently, crime laboratory managers, crime scene investigators and employees performing only latent print processing are not eligible for the General Forensic Analyst Licensing Exam. The change permits crime laboratory managers, crime scene investigators and employees who only perform latent print processing, working in accredited forensic laboratories, to voluntarily take the exam if they wish. The amendment is necessary to reflect adoptions made by the Commission at its July 16, 2021 quarterly meeting. The adoption is made in accordance with the Commission’s forensic analyst licensing authority under Code of Criminal Procedure, Article 38.01 §§ 3-a and 4-(a).

Summary of Comments. No comments were received regarding the amendments to this section.
Statutory Authority. The amendment is adopted under Tex. Code Crim. Proc. art 38.01 §§ 3-a and 4-a.

Cross reference to statute. The adoption affects 37 Texas Administrative Code 651.207.

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

Filed with the Office of the Secretary of State on October 4, 2021.
TRD-202103905
Leigh Marie Tomlin
Associate General Counsel
Texas Forensic Science Commission
Effective date: October 24, 2021
Proposal publication date: August 27, 2021
For further information, please call: (512) 784-0037

37 TAC §651.209

The Texas Forensic Science Commission ("Commission") adopts an amendment to 37 Texas Administrative Code §651.209, concerning Forensic Analyst and Forensic Technician License Expiration and Reinstatement without changes to the text as published in the August 27, 2021, issue of the Texas Register (46 Tex Reg 5375). The amendment sets forth a process for forensic analyst license expiration and subsequent reinstatement under certain circumstances. Currently, the Commission does not have a license expiration policy to incentivize timely renewals. The rule changes establish a timeline for license expiration and explain the notice licensees will receive before license expiration. The amendments are necessary to reflect adoptions made by the Commission at its July 16, 2021 quarterly meeting. The adoption is made in accordance with the Commission's forensic analyst licensing authority under Code of Criminal Procedure, Article 38.01 §4-a, which directs the Commission to adopt rules to establish the qualifications for a forensic analyst license and the Commission's rulemaking authority under Code of Criminal Procedure, Article 38.01 §3-a, which directs the Commission to adopt rules necessary to implement Code of Criminal Procedure Article 38.01.

Summary of Comments. No comments were received regarding the amendments to this section.

Statutory Authority. The amendment is adopted under Code of Criminal Procedure, Article 38.01 §3-a, which directs the Commission to adopt rules necessary to implement Article 38.01, and Article 38.01 §4-a(d), which directs the Commission to adopt rules to establish the qualifications for a forensic analyst license.

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

Filed with the Office of the Secretary of State on October 4, 2021.
TRD-202103906
Leigh Marie Tomlin
Associate General Counsel
Texas Forensic Science Commission
Effective date: October 24, 2021
Proposal publication date: August 27, 2021
For further information, please call: (512) 784-0037

ADOPTED RULES  October 15, 2021  46 TexReg 7077
This section contains notices of state agency rule review as directed by the Texas Government Code, §2001.039. Included here are proposed rule review notices, which invite public comment to specified rules under review; and adopted rule review notices, which summarize public comment received as part of the review. The complete text of an agency’s rule being reviewed is available in the Texas Administrative Code on the Texas Secretary of State’s website.

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the website and printed copies of these notices may be directed to the Texas Register office.

Proposed Rule Reviews

Texas Commission on Fire Protection
Title 37, Part 13

The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 403, concerning Criminal Convictions and Eligibility for Certification. Chapter 403 consists of §403.1 Purpose, §403.3, Scope, §403.5, Access to Criminal History Record Information, §403.7, Criminal Convictions Guidelines, §403.9 Mitigating Factors, §403.11, Procedures for Suspension, Revocation, or Denial of a Certificate to Persons with Criminal Backgrounds, §403.15, Report of Convictions by an Individual or Department.

This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the Texas Register as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to deborah.cowan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the Texas Register in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202103870
Michael Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: October 1, 2021


This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the Texas Register as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to deborah.cowan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the Texas Register in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202103871
Michael Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: October 1, 2021

The Texas Commission on Fire Protection (commission) files this notice of intention to review and consider for re-adoption, revision, or repeal, Texas Administrative Code, Title 37, Part 13, Chapter 425, concerning Fire Service Instructors. Chapter 425 consists of §425.1 Minimum Standards for Fire Service Instructor Certification, §425.3,
The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to deborah.cowan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the Texas Register in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202103872
Michael Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: October 1, 2021


This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days following publication of this notice in the Texas Register as to whether the reason for the rule continues to exist.

The Texas Commission on Fire Protection, which administers these rules, believes that the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to deborah.cowan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the Texas Register in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202103874
Michael Wisko
Agency Chief
Texas Commission on Fire Protection
Filed: October 1, 2021


This review will be conducted pursuant to Texas Government Code §2001.039. The commission will accept comments for 30 days fol-
The Texas Commission on Fire Protection, which administers these rules, believes the reason for the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Mike Wisko, Agency Chief, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or by email to deborah.cowan@tcfp.texas.gov. Any proposed changes to the rules as a result of the review will be published in the Texas Register in compliance with Texas Government Code, Chapter 2001, and will be open for the required public comment period prior to final adoption or repeal by the commission.

TRD-202103875
Michael Wisko
Agency Chief
Texas Commission on Fire Protection
 Filed: October 1, 2021

**Adopted Rule Reviews**

**Texas Animal Health Commission**

**Title 4, Part 2**

The Texas Animal Health Commission adopts the review of 4 TAC Part 2, Chapters 33, 40, and 41. The review was conducted pursuant to Texas Government Code §2001.039. The commission finds that the reasons for initially adopting each rule continue to exist and readopts the rules.

Notice of Intent to Review Chapter 33, titled "Fees", Chapter 40, titled "Chronic Wasting Disease", and Chapter 41, titled "Fever Ticks" was published in the December 20, 2019, issue of the Texas Register (44 TexReg 8039). No comments were received regarding those reviews. In a duly noticed meeting on September 21, 2021, the Texas Animal Health Commission readopted existing rules in those chapters. Rule actions and amendments resulting from the review of Chapters 33 are contemporaneously published elsewhere in this issue of the Texas Register. Rule actions and amendments resulting from the review of Chapter 40 were published elsewhere in the October 8, 2021, issue of the Texas Register. The rules will not be republished.

TRD-202103887
Mary Luedeker
General Counsel
Texas Animal Health Commission
 Filed: October 1, 2021

The Texas Animal Health Commission adopts the review of 4 TAC Chapter 53. The review was conducted pursuant to Texas Government Code §2001.039. The commission found that the reasons for initially adopting the rules continue to exist and readopts the rules.

Notice of Intent to Review Chapter 53 was published in the December 20, 2019, issue of the Texas Register (44 TexReg 8039). One comment was received regarding the review. In a duly noticed meeting on September 21, 2021, the Texas Animal Health Commission readopted Chapter 53. Amendments resulting from the review of Chapter 53 are contemporaneously published elsewhere in this issue of the Texas Register. The rules will not be republished.

**SUMMARY OF COMMENTS RECEIVED AND COMMISSION RESPONSE**

The 30-day rule review comment period ended on January 20, 2020. During that time, the commission received one comment from the Livestock Marketing Association of Texas. To the extent the commission could determine, the commenter did not indicate support or opposition for the rule review. A summary of the comment relating to the rules and the commission's response follows:

Comment: The commenter suggested several amendments in response to part of the brucellosis program that no longer exists and market recordkeeping, specifically provisions in §§53.1, 53.3 and 53.4. The commenter also suggested the commission delete the following language from §53.5(a) and (b): "county of origin of cattle" and "age...breed, brand" as those are not currently recorded and are not relevant to market operations. Rather than the scope of such recordkeeping, the commenter considered owner and individual animal identification sufficient.

Response: The commission contemporaneously amended §§53.1, 53.3 and 53.4 to update the chapter based on the commission's review, so although the amendments address many of the comments, no changes were made directly in response to this comment. While the commission adopts the deletion of brucellosis-specific language in those provisions, other disease risks and disease control and eradication programs continue to exist that require adequate facilities and identification of animals tested. In response to §53.5, the commission did not adopt modifications because the existing scope of recordkeeping remains relevant for effective surveillance and animal disease traceability.

TRD-202103883
Mary Luedeker
General Counsel
Texas Animal Health Commission
 Filed: October 1, 2021

The Texas Animal Health Commission adopts the review of 4 TAC Chapter 55. The review was conducted pursuant to Texas Government Code §2001.039. The commission found that the reasons for initially adopting the rules continue to exist and readopts the rules.

Notice of Intent to Review Chapter 55 was published in the December 20, 2019, issue of the Texas Register (44 TexReg 8039). Two comments were received regarding the review. In a duly noticed meeting on September 21, 2021, the Texas Animal Health Commission readopted Chapter 55. Amendments resulting from the review of Chapter 55 are contemporaneously published elsewhere in this issue of the Texas Register.

**SUMMARY OF COMMENTS RECEIVED AND COMMISSION RESPONSE**

The 30-day rule review comment period ended on January 20, 2020. During that time, the Texas Animal Health Commission received two comments: one from Seaboard Foods and the other from an individual. Of the comments received and to the extent the commission could determine, Seaboard Foods opposed §§55.3, 55.4 and 55.9. The individual commenter did not indicate support or opposition to the review; the commenter suggested changes to §55.1 regarding testing requirements of breeding swine that may be sold at a livestock show. Summaries of the comments and the commission's responses follow:

Comment: Seaboard Foods commented on §55.3, concerning Feeding of Garbage, §55.4, concerning Livestock Markets Handling Swine, and §55.9, concerning Feral Swine. The first section discussed the disease risks associated with feeding garbage to swine, and if garbage feeding must exist, the commenter proposed amendments to minimize those risks. Specifically, the commenter addressed household food waste,
reporting and recordkeeping requirements, consequences of violations that result in exposing swine to uncooked garbage, and criteria for garbage feeding facility permits.

The second section addressed risks of slaughter swine at livestock markets. The commenter proposed time and movement constraints, commission action against foreign animal diseases, and updated identification to improve traceability thereby minimizing the risks of spreading disease and transmission among slaughter swine.

The third section addressed disease risks associated with feral swine. The commenter proposed prohibiting all movement of feral swine, except to slaughter, clarifying distance allowed between feral and domestic swine, and removing the provision that allows the reclassification of feral swine.

Response: In response to Seaboard Foods' first request, §165.026 of the Texas Agriculture Code clarifies that feeding garbage to swine applies to an individual who feeds unrestricted garbage from the individual's own household, farm, or ranch to swine owned by the individual. As such, the commission excludes household food waste from the definition of "unrestricted garbage" to follow the statutory exception, so the recommendation is beyond the scope of the rule.

Seaboard Foods also suggested prohibiting cooking over an open flame to minimize disease risks. The commission does not prescribe the method or manner of cooking garbage, but the Swine Health Protection Act (see 9 CFR §§166.1-166.15) requires garbage be heated uniformly at boiling (212°F) for 30 minutes. Garbage is also required to be agitated during cooking, except in steam cooking equipment, to ensure that the prescribed cooking temperature is maintained throughout the cooking container for the prescribed length of time. A garbage feeding facility holding a valid permit for garbage treatment is required to follow these cooking standards at a minimum, therefore, the commission interprets the commenter's suggestion to not cook over an open flame as an issue with uneven cooking, and the Swine Health Protection Act addresses the concern in 9 CFR §166.7.

Seaboard Foods advocated the adoption of enhanced recordkeeping requirements for both garbage feeding facilities and restaurants, grocery stores, and other food establishments that sell, give away or otherwise make garbage available to be fed to swine. A garbage feeding facility, as permitted by the commission, is required to generate and maintain a daily log. The log includes the cooking time and temperature, as well as other information, and a garbage feeding facility must make copies of the daily log available to commission personnel upon request. Additionally, the application requires facilities to list the waste source and the location of that source. As such, certain recordkeeping is already required of garbage feeding facilities, and the commission is not modifying the amended rule in response to this part of the comment, but will take the recommendations under advisement for future rulemaking.

Seaboard Foods also called for immediate quarantines and depopulation and disposal of immediate quarantines and sampling for violations that result in swine exposure to uncooked garbage. Pursuant to §165.026(d) of the Texas Agriculture Code, the commission or Executive Director may require the immediate quarantine and closure of a garbage feeding facility if the commission or Executive Director determines that the practice presents a danger to public health or the livestock industry, including any danger related to the transmission of a disease. Further, the new section of this chapter, §55.10, cites Chapter 161 of the Texas Agriculture Code to clarify that administrative, civil, or criminal penalties may apply to violations.

In the same part, Seaboard Foods called for the cost of sampling or depopulation and disposal to be at the licensee's expense with no indemnification. Pursuant to Texas Agriculture Code §161.058, the commission may pay an indemnity to the owner of livestock, domestic fowl, or exotic fowl exposed to or infected with a disease if the commission considers it necessary to eradicate the disease and to dispose of the exposed or diseased livestock, domestic fowl, or exotic fowl. The commission may also require a producer to pay for testing. As such, no modifications are made in response to these recommendations, but the commission will take the comment under advisement for future rulemaking.

Seaboard Foods' final suggestion in the first part of their comment called for additional criteria for garbage feeding facilities to hold a valid license. The commission is not modifying the rule at this time in response to the comment, but will take the recommendations listed under advisement for future rulemaking where applicable.

The second section of Seaboard Foods' comment called for the commission to amend the time slaughter swine can remain in the market, remove the ability to transfer slaughter swine to another livestock market, amend "hog cholera" to "classical swine fever", update approved identification to include PIN tags, and update and require a more permanent form of identification than a backtag to improve traceability. 4 TAC §55.4 closely aligns with 9 CFR §71.20. Specifically, 9 CFR §71.20(15) requires no feeder and breeding swine may remain in the livestock market for more than 72 hours and no slaughter swine may remain in the livestock market for more than 120 hours. Slaughter swine are only permitted to move to another slaughter market under certain conditions if they are not otherwise consigned for immediate slaughter.

The commission updated "hog cholera" to "classical swine fever" in accordance with Senate Bill 1997 as enacted by the 87th Legislature, so agrees with Seaboard Foods but did not modify the rule in direct response to the comment. In response to their suggestion for other forms of identification, the commission continues to follow the federal regulations and §53.4 that require a market to identify sows and boars over six months of age with an approved backtag. If a market tests swine, then an ear tag is also required upon testing. Other approved means or devices of identification for swine exist and may be applicable, but the requirements prescribed by this section are specific to what livestock markets handling swine must provide. As such, the commission is not modifying the content of this section, but will take the recommendations under advisement for future rulemaking as applicable.

Seaboard Foods' third part of the comment recommended removing §55.9(b)(1-7), addressing distance between feral swine and transitional swine (i.e. show pigs), removing §55.9(c)(2)(H) regarding where feral swine may be moved, and removing the section allowing the change in classification of feral swine. The commission allows limited feral swine movement pursuant to Chapter 161 of the Texas Agriculture Code that permits the operation of approved holding facilities and authorized hunting preserves, and has the authority to regulate feral swine movement as a disease control measure as well as regulate and require registration of feral swine holding facilities. Additionally, the commission addresses distance requirements between transitional (now termed "high-risk domestic swine") and feral swine in §55.9(c)(2)(B). The commission is not amending that distance requirement in this adoption, but will consider the issue in future rulemaking as applicable.

The commission allows feral swine transport to an approved holding facility or an authorized hunting preserve. Pursuant to §161.0412 of the Texas Agriculture Code, the commission may require a person who confines feral swine in a holding facility for slaughter, sale, exhibition, hunting, or any other purpose specified by commission rule to register with the commission. The purpose of that section is to prevent unregulated swine movement and thus disease. In 4 TAC §55.9(c), that person must apply for a feral swine holding facility permit and receive commission approval for each holding facility, and feral swine shall only be moved from the facility directly to an approved slaughter facility, an authorized hunting preserve, or another approved holding facility. The
commission is not modifying the feral swine programs or movement requirements in response to this part of Seaboard Foods' comment.

The commission determined allowing the change in classification from feral swine to domestic swine is preferable because §55.9(e) offers a person to change feral swine classification only if a rigorous test protocol is followed. The existence of that section provides a standard of criteria to change classification if a person elects to do so, and prevents unregulated feral swine reclassification without a protocol that could arise otherwise creating further disease risks. Therefore, the commission is not modifying §55.9(e) in response to this comment.

Comment: The second commenter discussed the commission's brucellosis and swine pseudorabies surveillance requirements for breeder swine at exhibitions, and correctly identified that testing is not required for swine entering Texas from swine brucellosis-free or pseudorabies-free Stage V states. The commenter asked for clarification of the swine entry requirements in 4 TAC §51.14 regarding swine entering Texas from another state for feeding, breeding, or exhibition purposes and why the testing requirement in 4 TAC §55.1 is only for swine prior to sale or change of ownership in Texas rather than swine sold or changing ownership in another state entering Texas. The commenter identified the difference between testing requirements for breeding swine for sale and breeding swine in exhibitions that do not involve a sale. The commenter requested the commission update the section and consider making testing requirements consistent among swine exhibitions, particularly for those swine that could change ownership.

Response: The commission requires testing prior to change of ownership to surveil swine diseases. The commission does not expect swine attending exhibitions to be from closed herds, and realizes exposure to disease from recent purchases, movements, or feral swine contact is possible. As such, the commission finds value in testing swine prior to change of ownership to assess disease risks before swine enter another herd. This provides valuable surveillance for Texas and mitigates the risk of disease introduction.

The commenter is correct in their interpretation of 4 TAC §51.14 that swine entering from another state are not required to be tested because all states are now brucellosis-free and Stage V pseudorabies free. However, the commission requires swine entering Texas for feeding, breeding, or exhibition purposes to have a Certificate of Veterinary Inspection (CVI). The CVI includes certification that the swine have not been exposed to or vaccinated for pseudorabies. Exhibition swine and out-of-state non-breeding swine entered into terminal shows are exempt from the brucellosis and pseudorabies requirements. As such, the entry requirements currently required for out-of-state swine by the commission are necessary to assess the current swine disease risks. Testing is required for in-state swine prior to sale or change of ownership for the same reasons provided above; to reduce disease risks from swine of unknown status before entering another herd or breeding. If swine are not at exhibition for sale or change of ownership, then no testing is required because the risks of disease and transmission of returning to a herd of origin are lower than changing ownership. As such, the commission is not modifying the content of §55.1 in response to the individual's comment.

TRD-202103886
Mary Luedeker
General Counsel
Texas Animal Health Commission
Filed: October 1, 2021

Texas Board of Nursing
Title 22, Part 11

In accordance with Government Code §2001.039, the Texas Board of Nursing (Board) filed a notice of intention to review and consider for re-adoption, re-adoption with amendments, or repeal, the following chapter contained in Title 22, Part 11, of the Texas Administrative Code, pursuant to the 2019 rule review plan adopted by the Board at its July 2018 meeting. The notice appeared in the September 3, 2021, edition of the Texas Register (46 TexReg 5597).

Chapter 227. Pilot Programs for Innovative Applications to Vocational and Professional Nursing Education, §§227.1 - 227.4.

The Board did not receive any public comments on the above rules. The Board has completed its review and has determined that the reasons for originally adopting the above rules continue to exist. The rules were also reviewed to determine whether they were obsolete, whether they reflected current legal and policy considerations and current procedures and practices of the Board, and whether they were in compliance with Texas Government Code Chapter 2001 (Texas Administrative Procedure Act). The Board finds that the rules are not obsolete, reflect current legal and policy considerations, current procedures and practices of the Board, and that the rules are in compliance with the Texas Administrative Procedure Act.

The Board readopts the rules in Chapter 227 without changes, pursuant to the Texas Government Code §2001.039 and Texas Occupations Code §301.151, which authorizes the Board to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act. This concludes the rule review of Chapter 227 under the 2019 rule review plan adopted by the Board.

TRD-202103953
John Vanderford
Assistant General Counsel
Texas Board of Nursing
Filed: October 5, 2021

Texas State Soil and Water Conservation Board
Title 31, Part 17

The Texas State Soil and Water Conservation Board (Board) has completed the review of Title 31, Texas Administrative Code, Part 17, Chapter 518, General Procedures, Subchapter A, Employee Training Rules, as required by the Texas Government Code §2001.039, Agency Review of Existing Rules. These rules were published for comment in the May 14, 2021, issue of the Texas Register (46 TexReg 3147).

Texas Government Code §2001.039 requires that each state agency review and re-adopt, re-adopt with amendments, or repeal the rules adopted by that agency under Texas Government Code, chapter 2001, subchapter B, Rulemaking. As required by §2001.039(e), this review is to assess whether the reasons for adopting or re-adopting the Board's General Procedures, Historically Underutilized Business Program rule continues to exist. The Board requested specific comments from interested persons on whether the reasons for adopting Title 31, Texas Administrative Code, Part 17, Chapter 518, General Procedures, Subchapter A, Employee Training Rules continues to exist. In addition, the Board welcomed comments on any modifications that would improve the rule.

The Board received no comments in response to its request for comment published in the May 14, 2021, issue of the Texas Register (46 TexReg 3147). After internal review, the Board determined that the rule effectively allows the Board to accomplish its functions as directed by the Legislature.

RULE REVIEW  October 15, 2021  46 TexReg 7083
The Board finds that the reasons for adopting Title 31, Texas Administrative Code, Part 17, Chapter 518, General Procedures, Subchapter A, Employee Training Rules, continue to exist and re-adopts the rule without amendments. Therefore, the Board re-adopts Chapter 518, General Procedures, Subchapter A, Employee Training Rules, in its entirety, under authority granted in Texas Agricultural Code §§ 201.020(a) and 203.012, which authorize the Board to adopt and enforce rules necessary for the performance of its functions as well as Texas Government Code §2001.039, which requires each state agency to review and re-adopt its rules every four years.

The Board hereby certifies that the rule in Chapter 518, General Procedures, Subchapter A, Employee Training Rules as re-adopted has been reviewed by legal counsel and found to be a valid exercise of the Board's legal authority. It is therefore ordered by the Texas State Soil and Water Conservation Board that Chapter 518, General Procedures, Subchapter A, Employee Training Rules, is hereby re-adopted under Texas Government Code §2001.039 with no changes.

TRD-202103867
Liza Parker
Policy Analyst/Legislative Liaison
Texas State Soil and Water Conservation Board
Filed: September 30, 2021

The Texas State Soil and Water Conservation Board (Board) has completed the review of Title 31, Texas Administrative Code, Part 17, Chapter 527, Removal of a District Director, as required by the Texas Government Code §2001.039, Agency Review of Existing Rules. These rules were published for comment in the May 14, 2021, issue of the Texas Register (46 TexReg 3147).

Texas Government Code §2001.039 requires that each state agency review and re-adopt, re-adopt with amendments, or repeal the rules adopted by that agency under Texas Government Code, Chapter 2001, Subchapter B, Rulemaking. As required by §2001.039(e), this review is to assess whether the reasons for adopting or re-adopting the Board's General Procedures, Historically Underutilized Business Program rule continues to exist. The Board requested specific comments from interested persons on whether the reasons for adopting Title 31, Texas Administrative Code, Part 17, Chapter 527, Removal of a District Director continues to exist. In addition, the Board welcomed comments on any modifications that would improve the rule.

The Board received no comments in response to its request for comment published in the May 14, 2021, issue of the Texas Register (46 TexReg 3147). After internal review, the Board determined that the rule effectively allows the Board to accomplish its functions as directed by the Legislature.

The Board finds that the reasons for adopting Title 31, Texas Administrative Code, Part 17, Chapter 527, Removal of a District Director, continue to exist and re-adopts the rule without amendments. Therefore, the Board re-adopts Chapter 527, Removal of a District Director, in its entirety, under authority granted in Texas Agricultural Code §§ 201.020(a) and 203.012, which authorize the Board to adopt and enforce rules necessary for the performance of its functions as well as Texas Government Code §2001.039, which requires each state agency to review and re-adopt its rules every four years.

The Board hereby certifies that the rule in Chapter 527, Removal of a District Director as re-adopted; has been reviewed by legal counsel and found to be a valid exercise of the Board's legal authority. It is therefore ordered by the Texas State Soil and Water Conservation Board that Chapter 527, Removal of a District Director, is hereby re-adopted under Texas Government Code §2001.039 with no changes.

TRD-202103866
Liza Parker
Policy Analyst/Legislative Liaison
Texas State Soil and Water Conservation Board
Filed: September 30, 2021
The Texas Register is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

State Auditor's Office
Request for Qualifications for Actuary Services
The State Auditor's Office invites proposals for qualifications for an actual specialist for the purposes of providing professional services regarding the actuarial soundness of the Texas Medicare managed care rates as determined by the Health and Human Services Commission's actuary as well as an analysis of key factors that affect the rates.

Detailed information regarding the solicitation and instructions for submitting a proposal can be found here -- ESBD Details (txsmartbuy.com). Responses are due by 5:00 p.m., November 1, 2021.

TRD-202103869
Lisa R. Collier
First Assistant State Auditor
State Auditor's Office
Filed: October 1, 2021

Office of Consumer Credit Commissioner
Notice of Rate Ceilings
The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005 and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/11/21 - 10/17/21 is 18% for Consumer/Agricultural/Commercial credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/11/21 - 10/17/21 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009 for the period of 10/01/21 - 10/31/21 is 18% for Consumer/Agricultural/Commercial credit through $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009 for the period of 10/01/21 - 10/31/21 is 18% for Commercial over $250,000.

1 Credit for personal, family or household use.
2 Credit for business, commercial, investment or other similar purpose.
3 For variable rate commercial transactions only.

TRD-202103950
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 5, 2021

Commission on State Emergency Communications
Notice Concluding Annual Review of 1 TAC §255.4
The Commission on State Emergency Communications (CSEC) published notice of its annual review of the definitions of the terms "local exchange access line" and "equivalent local exchange access line" in §255.4 in the August 13, 2021, issue of the Texas Register (46 TexReg 5067). CSEC is required by Health and Safety Code §771.063 to adopt by rule the foregoing definitions and to annually review these definitions "to address technical and structural changes in the provision of telecommunications and data services."

No comments were received regarding CSEC's notice of annual review.

CSEC has determined not to propose amendments to the definitions in §255.4, and to leave in effect the rule as adopted by CSEC in September 2007.

This concludes CSEC's annual review of §255.4.

TRD-202103865
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: September 29, 2021

Texas Commission on Environmental Quality
Agreed Orders
The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code, (TWC), §7.075. TWC, §7.075, requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075, requires that notice of the proposed orders and the opportunity to comment must be published in the Texas Register no later than the 30th day before the date on which the public comment period closes, which in this case is November 16, 2021. TWC, §7.075, also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on November 16, 2021. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission's enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075, provides that comments on the AOs shall be submitted to the commission in writing.

(2) COMPANY: Bills, David Ryan; DOCKET NUMBER: 2021-1183-WQ-E; IDENTIFIER: RN106017478; LOCATION: Cleveland, Liberty County; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §285.61(4), by failing to ensure that an authorization to construct has been issued prior to beginning construction of an on-site sewage facility; PENALTY: $175; ENFORCEMENT COORDINATOR: Mark Gamble, (512) 239-2587; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: Cesar Martinez; DOCKET NUMBER: 2020-1192-oss-E; IDENTIFIER: RN110870557; LOCATION: Pearland, Brazoria County; TYPE OF FACILITY: Collection Facility; RULES VIOLATED: 30 TAC §285.70(a), Texas Health and Safety Code, §341.011(5), and TWC, §26.121(a)(1), by failing to properly maintain an on-site sewage facility, resulting in an unauthorized discharge of wastewater into or adjacent to any water in the state; PENALTY: $2,250; ENFORCEMENT COORDINATOR: Caleb Olson, (817) 588-5856; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: City of Big Spring; DOCKET NUMBER: 2020-1540-PWS-E; IDENTIFIER: RN101394929; LOCATION: Big Spring, Howard County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.115(f)(1) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes based on the locational running annual average; and 30 TAC §290.117(c)(2)(B), (h), and (i)(1), by failing to collect lead and copper tap samples at the required 30 sample sites, have the samples analyzed and report the results to the executive director for the January 1, 2020 - December 31, 2020, monitoring period; PENALTY: $14,640; ENFORCEMENT COORDINATOR: Carlos Molina, (512) 239-2557; REGIONAL OFFICE: 9900 West IH-20, Suite 100, Midland, Texas 79706, (432) 570-1359.

(5) COMPANY: City of Shoreacres; DOCKET NUMBER: 2021-0416-PWS-E; IDENTIFIER: RN101208015; LOCATION: Shoreacres, Harrison County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.42(e)(3)(G), by failing to obtain an exception, in accordance with 30 TAC §290.39(l), prior to using blended water containing free chlorine and water containing chloramines; PENALTY: $50; ENFORCEMENT COORDINATOR: Samantha Duncan, (512) 239-2511; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: Cross Custom Homes LLC; DOCKET NUMBER: 2021-1282-WQ-E; IDENTIFIER: RN111290409; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Caleb Olson, (817) 588-5856; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: Dean Haws; DOCKET NUMBER: 2021-0530-MLM-E; IDENTIFIER: RN111225371; LOCATION: Gilmer, Upshur County; TYPE OF FACILITY: construction site; RULES VIOLATED: 30 TAC §281.25(a)(4), TWC, §26.121, and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge stormwater associated with construction activities; and 30 TAC §297.11 and TWC, §11.121, by failing to obtain authorization prior to diverting, impounding, storing, taking, or using state water; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Alyssa Loveday, (512) 239-5504; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(8) COMPANY: Freeport LNG Development, L.P.; DOCKET NUMBER: 2021-0917-AIR-E; IDENTIFIER: RN103196689; LOCATION: Quintana, Brazoria County; TYPE OF FACILITY: natural gas liquefaction plant; RULES VIOLATED: 30 TAC §116.115(c) and §122.143(4), New Source Review Permit Number 100114, Special Conditions Number 1, Federal Operating Permit Number O2878, General Terms and Conditions and Special Terms and Conditions Number 13, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $6,000; ENFORCEMENT COORDINATOR: MichaeLe Garza, (210) 403-4076; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(9) COMPANY: IFZA ENTERPRISES INC dba Snack Time Food Mart 2; DOCKET NUMBER: 2021-0726-PST-E; IDENTIFIER: RN102446010; LOCATION: La Porte, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b)(2), by failing to ensure that all underground storage tank recordkeeping requirements are met; and 30 TAC §334.49(c)(4)(C) and TWC, §26.3475(d), by failing to inspect and test the corrosion protection system for operability and adequacy of protection at a frequency of at least once every three years; PENALTY: $3,225; ENFORCEMENT COORDINATOR: Berenice Munoz, (915) 834-4976; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.


(11) COMPANY: KENDRICK OIL Co. dba Horseshoe 3; DOCKET NUMBER: 2021-0745-PST-E; IDENTIFIER: RN101434041; LOCATION: Big Spring, Howard County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every 30 days; PENALTY: $3,375; ENFORCEMENT COORDINATOR: Stephanie McCurley, (512) 239-2607; REGIONAL OFFICE: 9900 West IH-20, Suite 100, Midland, Texas 79706, (432) 570-1359.

(12) COMPANY: Lion Elastomers LLC; DOCKET NUMBER: 2021-0186-AIR-E; IDENTIFIER: RN100224799; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: styrene-butadiene rubber manufacturing plant; RULES VIOLATED: 30 TAC §116.115(c) and §122.143(4), New Source Review Permit Number 9908, Special Conditions Number 1, Federal Operating Permit Number O1224, General Terms and Conditions and Special Terms and Conditions Number 14, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $15,000; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.
(13) COMPANY: Mitsubishi Chemical America, Incorporated f/k/a Lucite International, Incorporated; DOCKET NUMBER: 2021-0805-AIR-E; IDENTIFIER: RN102736089; LOCATION: Nederland, Jefferson County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §101.20(3), 116.115(b)(2)(F) and (c), and 122.143(4), New Source Review Permit Numbers 19005 and PSDTX753, Special Conditions Number 1, Federal Operating Permit Number O1959, General Terms and Conditions and Special Terms and Conditions Number 14, and Texas Health and Safety Code, §382.085(b), by failing to comply with the maximum allowable emissions rate; PENALTY: $39,375; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 403-4077; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: NRG Texas LLC; DOCKET NUMBER: 2021-0528-AIR-E; IDENTIFIER: RN100888312; LOCATION: Thompsons, Fort Bend County; TYPE OF FACILITY: electric power generation plant; RULES VIOLATED: 30 TAC §101.20(3), 111.111(a)(1)(B), 116.115(c), and 122.143(4), New Source Review Permit Numbers 2348A, PSDTX901, and N033, Special Conditions Number 11, Federal Operating Permit (FOP) Number O74, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Number 11, and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent an excess opacity event; and 30 TAC §101.201(e) and §122.143(4), FOP Number O74, GTC and STC Number 2.F, and THSC, §382.085(b), by failing to submit an initial notification no later than 24 hours after the discovery of an excess opacity event; PENALTY: $2,601; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $1,040; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(15) COMPANY: Ramon Vela; DOCKET NUMBER: 2021-0560-MLM-E; IDENTIFIER: RN111231502; LOCATION: Perryton, Ochiltree County; TYPE OF FACILITY: unauthorized municipal solid waste site; RULES VIOLATED: 30 TAC §111.219(7) and Texas Health and Safety Code (THSC), §382.085(b), by failing to not cause, suffer, allow, or permit outdoor burning within the State of Texas; and 30 TAC §330.15(a), by failing to not cause, suffer, allow, or permit the unauthorized disposal of municipal solid waste; PENALTY: $36,324; ENFORCEMENT COORDINATOR: Stephanie McCurley, (512) 239-2607; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(16) COMPANY: Riverside Special Utility District; DOCKET NUMBER: 2021-0472-PWS-E; IDENTIFIER: RN101247948; LOCATION: Huntsville, Walker County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.45(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to provide a water purchase contract that authorizes a maximum daily purchase rate, or a uniform purchase rate in the absence of a specified daily purchase rate, plus the actual production capacity of the system of at least 0.6 gallons per minute per connection; PENALTY: $750; ENFORCEMENT COORDINATOR: Carlos Molina, (512) 239-2557; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(17) COMPANY: Saratoga Homes, Incorporated; DOCKET NUMBER: 2021-0708-WQ-E; IDENTIFIER: RN110782018; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: housing development; RULES VIOLATED: 30 TAC §305.125(1) and Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXR15739X, Part III, Section D.1 and Part IV, Section B.2(d), by failing to maintain a complete stormwater pollution prevention plan; 30 TAC §305.125(1) and TPDES General Permit Number TXR15739X, Part III, Section D.2, by failing to post the TCEQ site notice near the main entrance of the construction site; and 30 TAC §305.125(1) and TPDES General Permit Number TXR15739X, Part III, Section G, by failing to install and maintain best management practices at the site; PENALTY: $6,175; ENFORCEMENT COORDINATOR: Steven Van Landoningham, (512) 239-5717; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(18) COMPANY: Tiki Leasing Company, Ltd.; DOCKET NUMBER: 2021-0375-PWS-E; IDENTIFIER: RN101176444; LOCATION: Cove, Chambers County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.39(j) and Texas Health and Safety Code, §341.0351, by failing to notify the executive director prior to making any significant change or addition to the system's production, treatment, storage, pressure maintenance, or distribution facilities; PENALTY: $57; ENFORCEMENT COORDINATOR: Samantha Duncan, (512) 239-2511; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(19) COMPANY: TRI-CON, INCORPORATED dba Express Mart 25; DOCKET NUMBER: 2021-0585-PST-E; IDENTIFIER: RN101738656; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §26.3475(a) and §334.50(b)(2)(A)(i)(III), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.10(b)(2), by failing to assure that all underground storage tank recordkeeping requirements are met; PENALTY: $7,826; ENFORCEMENT COORDINATOR: John Fennell, (512) 239-2616; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(20) COMPANY: Weatherford U.S., L.P.; DOCKET NUMBER: 2021-0679-IWD-E; IDENTIFIER: RN102586088; LOCATION: Houston, Harris County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0004760000, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $5,062; ENFORCEMENT COORDINATOR: Stephanie Frederick, (512) 239-1001; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-202103919
Charmaine Backens
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: October 5, 2021

Enforcement Orders

An agreed order was adopted regarding Earnest Wayne Weatherford dba Houston Suburban Heights Mobile Home Park, Docket No. 2020-0339-PWS-E on October 5, 2021, assessing $7,251 in administrative penalties with $1,450 deferred. Information concerning any aspect of this order may be obtained by contacting Epifanio Villarreal, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Collin Park Marina, Inc., Docket No. 2020-1036-MWD-E on October 5, 2021, assessing $6,500 in administrative penalties with $1,300 deferred. Information concerning any aspect of this order may be obtained by contacting Ellen Ojeda, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

IN ADDITION October 15, 2021 46 TexReg 7087
An agreed order was adopted regarding Suva Sahit Investment LLC dba Mt. Pleasant Meat Co., Docket No. 2020-1195-PST-E on October 5, 2021, assessing $2,562 in administrative penalties with $512 deferred. Information concerning any aspect of this order may be obtained by contacting Stephanie Frederick, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding IACX Rock Creek LLC, Docket No. 2020-1305-AIR-E on October 5, 2021, assessing $6,880 in administrative penalties with $1,376 deferred. Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding 3S Leasing, LLC, Docket No. 2020-1374-PWS-E on October 5, 2021, assessing $725 in administrative penalties with $145 deferred. Information concerning any aspect of this order may be obtained by contacting Epi Villarreal, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Patriot Rental & Investment LLC, Docket No. 2020-1386-PWS-E on October 5, 2021, assessing $2,337 in administrative penalties with $467 deferred. Information concerning any aspect of this order may be obtained by contacting Samantha Salas, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding CONVERSE STAR GROCERY LLC, Docket No. 2020-1457-PST-E on October 5, 2021, assessing $5,939 in administrative penalties with $1,187 deferred. Information concerning any aspect of this order may be obtained by contacting Terrany Binford, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding GUL ENTERPRISES LLC dba Texaco Corner, Docket No. 2020-1477-PST-E on October 5, 2021, assessing $4,625 in administrative penalties with $925 deferred. Information concerning any aspect of this order may be obtained by contacting Courtney Atkins, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Stephen T Crow, Docket No. 2020-1524-WOC-E on October 5, 2021, assessing $175 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Aaron Vincent, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding CEE JAY’S, INC. dba B & B One Stop, Docket No. 2020-1538-PST-E on October 5, 2021, assessing $3,375 in administrative penalties with $675 deferred. Information concerning any aspect of this order may be obtained by contacting Courtney Atkins, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of New Deal, Docket No. 2020-1550-PWS-E on October 5, 2021, assessing $563 in administrative penalties with $112 deferred. Information concerning any aspect of this order may be obtained by contacting Miles Wehner, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Undine Texas, LLC, Docket No. 2020-1604-PWS-E on October 5, 2021, assessing $262 in administrative penalties with $52 deferred. Information concerning any aspect of this order may be obtained by contacting Miles Wehner, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding High Garden Enterprises, LLC dba Marshall Mart, Docket No. 2020-1606-PST-E on October 5, 2021, assessing $3,000 in administrative penalties with $600 deferred. Information concerning any aspect of this order may be obtained by contacting Courtney Atkins, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Valero Refining-Texas, L.P., Docket No. 2021-0007-AIR-E on October 5, 2021, assessing $6,750 in administrative penalties with $1,350 deferred. Information concerning any aspect of this order may be obtained by contacting Mackenzie Mehlmann, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Undine Texas, LLC, Docket No. 2021-0019-PWS-E on October 5, 2021, assessing $937 in administrative penalties with $187 deferred. Information concerning any aspect of this order may be obtained by contacting Julianne Matthews, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding 410 WATER SUPPLY CORPORATION, Docket No. 2021-0020-PWS-E on October 5, 2021, assessing $510 in administrative penalties with $102 deferred. Information concerning any aspect of this order may be obtained by contacting Carlos Molina, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Chris Hoedebecck, Docket No. 2021-0022-WR-E on October 5, 2021, assessing $350 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Caleb Olson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Rivers Recycling LLC, Docket No. 2021-0079-WQ-E on October 5, 2021, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Mark Gamble, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Erath County, Docket No. 2021-0121-WQ-E on October 5, 2021, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Harley Hobson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Ken Dietz Homes, Inc., Docket No. 2021-0122-WQ-E on October 5, 2021, assessing $875 in administrative penalties. Information concerning any aspect of this citation may be obtained by contacting Katelyn Tubbs, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was adopted regarding Ashlyn Homes, Inc., Docket No. 2021-0146-WQ-E on October 5, 2021, assessing $875 in administrative penalties. Information concerning any aspect of this citation may
be obtained by contacting Alyssa Loveday, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-202103967
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 6, 2021

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Notice of Application and Opportunity to Request a Public Meeting for a New Municipal Solid Waste Facility: Registration Application No. 40322

Application. The City of Haskell, P.O. Box 1003, Haskell, Texas 79521, has applied to the Texas Commission on Environmental Quality (TCEQ) for proposed Registration No. 40322, to construct and operate a Type V municipal solid waste transfer station. The proposed facility, City of Haskell Transfer Station, will be located at 5412 US Highway 380 E, Haskell, Texas 79521, in Haskell County. The Applicant is requesting authorization to transfer municipal solid waste that includes household waste, yard waste, commercial waste, Class II and Class III non-hazardous industrial waste, construction & demolition waste, and special waste. The registration application is available for viewing and copying at City Hall, located at 301 S. 1st Street, Haskell, Texas 79521, and may be viewed online at http://haskelexas-susa.com/3566-2/. The following link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice: https://arcgis.is/b4Pur. For exact location, refer to application.

Public Comment/Public Meeting. You may submit public comments or request a public meeting on this application. Written public comments or written requests for a public meeting must be submitted to the Office of the Chief Clerk at the address included in the information section below. If a public meeting is held, comments may be made orally at the meeting or submitted in writing by the close of the public meeting. A public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the development is to be located, or if there is a substantial public interest in the proposed development. The purpose of the public meeting is for the public to provide input for consideration by the commission, and for the applicant and the commission staff to provide information to the public. A public meeting is not a contested case hearing. The executive director will review and consider public comments and written requests for a public meeting submitted during the comment period. The comment period shall begin on the date this notice is published and end 30 calendar days after this notice is published. The comment period shall be extended to the close of any public meeting. The executive director is not required to file a response to comments.

Executive Director Action. The executive director shall, after review of an application for registration, determine if the application will be approved or denied in whole or in part. If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action and an explanation of the opportunity to file a motion to overturn the executive director's decision. The chief clerk shall mail this notice to the owner and operator, the public interest counsel, to adjacent landowners as shown on the required land ownership map and landowners list, and to other persons who timely filed public comment in response to public notice. Not all persons on the mailing list for this notice will receive the notice letter from the Office of the Chief Clerk.

Information Available Online. For details about the status of the application, visit the Commissioners’ Integrated Database (CID) at www.tceq.texas.gov/goto/cid. Once you have access to the CID using the above link, enter the registration number for this application, which is provided at the top of this notice.

Mailing List. If you submit public comments, you will be added to the mailing list for this application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. To be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

Agency Contacts and Information. All public comments and requests must be submitted either electronically at www14.tceq.texas.gov/epic/eComment/ or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. Please be aware that any contact information you provide, including your name, phone number, email address and physical address will become part of the agency's public record. For more information about this registration application or the registration process, please call the TCEQ's Public Education Program, Toll Free, at (800) 687-4040 or visit their webpage, www.tceq.texas.gov/permit. General information regarding the TCEQ can be found on our website at www.tceq.texas.gov/. Si desea información en español, púelte llamar al (800) 687-4040.

Further information may also be obtained from the City of Haskell at the address stated above or by calling Mr. Winston Stephens at (940) 864-2333.

TRD-202103954
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 5, 2021

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Notice of Application and Public Hearing for an Air Quality Standard Permit for a Concrete Batch Plant with Enhanced Controls: Proposed Air Quality Registration Number 166500

APPLICATION. Cowboys Ready Mix LLC, 24015 Interstate 10, Wallisville, Texas 77597-3032 has applied to the Texas Commission on Environmental Quality (TCEQ) for an Air Quality Standard Permit for Concrete Batch Plant with Enhanced Controls Registration Number 166500 to authorize the operation of two permanent concrete batch plants. The facility is proposed to be located at 6740 Highway 146, Dayton, Liberty County, Texas 77535. This application is being processed in an expedited manner, as allowed by the commission's rules in 30 Texas Administrative Code, Chapter 101, Subchapter J. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For exact location, refer to application. http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=29.981666&lng=-94.908888&zoom=13&type=r. This application was submitted to the TCEQ on September 15, 2021. The primary function of this plant is to manufacture concrete by mixing materials including (but not limited to) sand, aggregate, cement and water. The executive director has determined the application was technically complete on September 23, 2021.

PUBLIC COMMENT / PUBLIC HEARING. Public written comments about this application may be submitted at any time during the public comment period. The public comment period begins on the first
date notice is published and extends to the close of the public hearing. Public comments may be submitted either in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087, or electronically at www14.tceq.texas.gov/epic/eComment/. Please be aware that any contact information you provide, including your name, phone number, email address and physical address will become part of the agency's public record.

A public hearing has been scheduled, that will consist of two parts, an informal discussion period and a formal comment period. During the informal discussion period, the public is encouraged to ask questions of the applicant and TCEQ staff concerning the application, but comments made during the informal period will not be considered by the executive director before reaching a decision on the permit, and no formal response will be made to the informal comments. During the formal comment period, members of the public may state their comments into the official record. Written comments about this application may also be submitted at any time during the hearing. The purpose of a public hearing is to provide the opportunity to submit written comments or an oral statement about the application. The public hearing is not an evidentiary proceeding.

The Public Hearing is to be held:

Monday, November 15, 2021, at 6:00 p.m.

Members of the public who would like to ask questions or provide comments during the hearing may access the hearing via webcast by following this link: https://www.gotomeeting.com/webinar/join-webinar and entering Webinar ID 482-426-283. It is recommended that you join the webinar and register for the public hearing at least 15 minutes before the hearing begins. You will be given the option to use your computer audio or to use your phone for participating in the webinar.

Those without Internet access must call (512) 239-1201 at least one day prior to the hearing to register for the meeting and to obtain information for participating telephonically. Members of the public who wish to only listen to the hearing may call, toll free, (562) 247-8422 and enter access code 760-490-655.

Additional information will be available on the agency calendar of events at the following link: https://www.tceq.texas.gov/agency/decisions/hearings/calendar.html.

RESPONSE TO COMMENTS. A written response to all formal comments will be prepared by the executive director after the comment period closes. The response, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments and the response to comments will be posted in the permit file for viewing.

The executive director shall approve or deny the application not later than 35 days after the date of the public hearing, considering all comments received within the comment period, and base this decision on whether the application meets the requirements of the standard permit.

CENTRAL/REGIONAL OFFICE. The application will be available for viewing and copying at the TCEQ Central Office and the TCEQ Houston Regional Office, located at 5425 Polk Street, Suite H, Houston, Texas 77023-1452, during the hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, beginning the first day of publication of this notice.

INFORMATION. If you need more information about this permit application or the permitting process, please call the Public Education Program toll free at (800) 687-4040. Si desea información en español, puede llamar al (800) 687-4040.

Further information may also be obtained from Cowboy's Ready Mix, LLC, 24015 Interstate 10, Wallisville, Texas 77597-3032, or by calling Mrs. Lacretia White REM, Project Manager at (972) 768-9093.

Notice Issuance Date: September 30, 2021
TRD-202103903
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 4, 2021

PETITION.

Finch FP, Ltd. and Brian Edward Finch (Petitioners) filed a petition for the creation of Lakeview Municipal Utility District No. 2 of Ellis County (District) with the Texas Commission on Environmental Quality (TCEQ).

The petition states that: (1) the Petitioners hold title to a majority of the assessed value of the land to be included in the proposed District; (2) there are no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 209.355 acres located within Ellis County, Texas; (4) the proposed District is within the extraterritorial jurisdiction of the City of Waxahachie (City), Texas; and (5) although the City has not consented to the creation of the District, the Petitioners have satisfied the requirements of Texas Water Code (TWC) §54.016(b) and (c) and Texas Local Government Code (LGC) §42.042, so that the authorization for inclusion of the land in the proposed District may be assumed pursuant to the cited statutes.

The petition further states that the proposed District will (1) construct, purchase, acquire, improve, or extend inside or outside of its boundaries any and all works, improvements, facilities, plants, equipment, and appliances necessary or helpful to supply and distribute water for municipal, domestic, and commercial purposes; (2) collect, transport, process, dispose of and control domestic and commercial wastes; (3) gather, conduct, divert, abate, amend and control local storm water or other local harmful excesses of water in the District; (4) design, acquire, construct, finance, improve, maintain and operate macadamized, graveled or paved roads, and turnpikes, or improvements in aid of those roads; and (5) purchase, construct, acquire, improve, or extend inside or outside of its boundaries such additional facilities, systems, plants, and enterprises as shall be consonant with the purposes for which the District is created. It further states that the planned residential development of the area and the present and future inhabitants of the area will be benefited by the above-referenced work, which will promote the protection of the purity and sanitary condition of the State's waters and the public health and welfare of the community, thereby constituting a public necessity.

According to the petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioners, from the information available at this time, that the cost of said project will be approximately $35,605,000.

In accordance with LGC §42.042 and TWC §54.016, the Petitioners submitted a petition to the City, requesting the City's consent to the creation of the District. After more than 90 days passed without receiving consent, the Petitioners submitted a petition to the City to provide water or sewer services to the District. The 120-day period for reaching a mu-
CONTESTED CASE HEARING.

Considering directives to protect public health, the State Office of Administrative Hearings (SOAH) will conduct a preliminary hearing via Zoom videoconference. A Zoom meeting is a secure, free meeting held over the internet that allows video, audio, or audio/video conferencing.

10:00 a.m. - November 1, 2021
To join the Zoom meeting via computer:
https://soah-texas.zoomgov.com/
Meeting ID: 160 231 6683
Password: 0259MUD2
or
To join the Zoom meeting via telephone:
(669) 254-5252 or (646) 828-7666
Meeting ID: 160 231 6683
Password: 42121474
Visit the SOAH website for registration at: http://www.soah.texas.gov/
or call SOAH at (512) 475-4993.

The purpose of a preliminary hearing is to establish jurisdiction, name the parties, establish a procedural schedule for the remainder of the proceeding, and to address other matters as determined by the judge. The evidentiary hearing phase of the proceeding, which will occur at a later date, will be similar to a civil trial in state district court. The hearing will be conducted in accordance with Chapter 2001, Texas Government Code; Chapters 49 and 54, Texas Water Code; Chapter 395, Texas Local Government Code; TCEQ rules, including 30 Texas Administrative Code (TAC) Chapter 293; and the procedural rules of the TCEQ and SOAH, including 30 TAC Chapter 80 and 1 TAC Chapter 155. To participate in the hearing as a party, you must attend the hearing and show you would be affected by the petition in a way not common to members of the general public.

In accordance with 1 Texas Administrative Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at www.soah.texas.gov, or in printed format upon request to SOAH." INFORMATION.

For information concerning the hearing process, please contact the TCEQ Office of the Public Interest Counsel (MC 103), P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-6363. For additional information, contact the TCEQ Water Supply Division, Districts Section (MC 152), P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-4691. General information regarding the TCEQ can be found at our website at www.tceq.texas.gov

Persons with disabilities who plan to attend this hearing and who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-4993, at least one week prior to the hearing.
Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075, requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075, requires that notice of the opportunity to comment must be published in the Texas Register no later than the 30th day before the date on which the public comment period closes, which in this case is November 16, 2021. TWC, §7.075, also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission’s jurisdiction or the commission’s orders and permits issued in accordance with the commission’s regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission’s central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission’s central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on November 16, 2021. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorneys are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075, provides that comments on an AO shall be submitted to the commission in writing.

(1) COMPANY: Lone Star 259 Operating LLC dba Texan Stop 2; DOCKET NUMBER: 2021-0313-PST-E; TCEQ ID NUMBER: RN102228202; LOCATION: 244 North Main Street, Lone Star, Morris County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for releases in a manner that will detect a release at a frequency of at least once every 30 days; and 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the pressurized piping associated with the USTs - specifically, respondent had not conducted the annual line leak detector and piping tightness tests; PENALTY: $5,812; STAFF ATTORNEY: Charmaine Backens, Deputy Director, Litigation Texas Commission on Environmental Quality

Notice of Public Hearing and Opportunity for Comment on the Edwards Aquifer Protection Program

The Texas Commission on Environmental Quality (TCEQ or commission) conducts annual public hearings to receive comments from the public on actions the commission should take to protect the Edwards Aquifer from pollution, as required under Texas Water Code, §26.046. These annual public hearings are held by the Edwards Aquifer Protection Program and cover the TCEQ rules, found at Title 30, Texas Administrative Code, Chapter 213, which regulate development over the delineated contributing, recharge, and transition zones of the Edwards Aquifer. These annual public hearings assist the commission in its shared responsibility with local governments, such as cities, counties, and groundwater conservation districts, to protect the water quality of the aquifer. The TCEQ is specifically seeking feedback on the following topics related to the Edwards Aquifer Protection Program:

1) review of innovative technology applications;
2) regulation of aggregate production operations located over the Edwards Aquifer; and
3) input on compliance monitoring of best management practices following installation.

This year the hearing will be conducted as a SINGLE virtual hearing. The hearing will begin at 9:00 a.m. on Thursday, November 18, 2021, with an open question period at 8:30 a.m. via GoToWebinar.

Members of the public who would like to ask questions or provide comments during the hearing may access the hearing via webcast by following this link: https://www.gotomeeting.com/webinar/join-webinar and entering Webinar ID 982-381-875. It is recommended that you join the webinar and register for the public hearing at least 15 minutes before the hearing begins. You will be given the option to use your computer audio or to use your phone for participating in the webinar.

Those without internet access must call (512) 239-1201 at least one day prior to the hearing to register for the meeting and to obtain information for participating telephonically. Members of the public who wish to only listen to the hearing may call, toll free, (415) 930-5321 and enter access code 772-633-750.

Persons with disabilities who need special accommodations at the meeting should call the Office of the Chief Clerk at (512) 239-3300 or (800) RELAY-TX (TDD) at least five business days prior to the hearing.

This hearing will be structured for the receipt of oral or written comments by interested persons. There will be no open question and answer discussion during the hearing; however, agency staff members will be available to answer questions 30 minutes prior to and 30 minutes after
the conclusion of the hearing. All other comments must be received by 5:00 p.m., November 18, 2021.

Additional written comments submitted before or after the hearing should reference the Edwards Aquifer Protection Program and may be sent to Ms. Lillian Butler, Texas Commission on Environmental Quality, Austin Region, MC R11, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 339-3795, or emailed to eapp@tceq.texas.gov. For further information or questions concerning these hearings, please contact Ms. Butler, or visit: https://www.tceq.texas.gov/permitting/eapp/history.html.

TRD-202103951
Guy Henry
Deputy Director, Environmental Law
Texas Commission on Environmental Quality
Filed: October 5, 2021


The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

10:00 a.m. - November 4, 2021
To join the Zoom meeting via computer:
https://soah-texas.zoomgov.com/
Meeting ID: 160 280 0320
Password: LA28ix
or
To join the Zoom meeting via telephone dial:
(669) 254-5252 or (646) 828-7666
Meeting ID: 160 280 0320
Password: 422502

The purpose of the hearing will be to consider the Executive Director's First Amended Report and Petition mailed August 13, 2021, concerning assessing administrative penalties against and requiring certain actions of MAUKA WATER, LTD., for violations in Johnson County, Texas, of: Texas Health & Safety Code §341.0315(c); 30 Texas Administrative Code §290.45(b)(1)(D)(i); and TCEQ Default Order Docket No. 2017-1658-PWS-E, Ordering Provision No. 3.c.ii.

The hearing will allow MAUKA WATER, LTD., the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford MAUKA WATER, LTD., the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. Upon failure of MAUKA WATER, LTD., to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's First Amended Report and Petition, attached hereto and incorporated herein for all purposes.

MAUKA WATER, LTD., the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.


Further information regarding this hearing may be obtained by contacting Judy Bohr, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Vic McWherter, Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at www.tceq.texas.gov/goto/efilings or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.

In accordance with 1 Texas Administrative Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at www.soah.texas.gov, or in printed format upon request to SOAH."

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

Issued: October 5, 2021
TRD-202103955
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 5, 2021

Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of Neutze Properties, Ltd. dba Mr. Cartender Minit Mart #112: SOAH Docket No. 582-22-0255; TCEQ Docket No. 2021-0080-PST-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

10:00 a.m. - October 28, 2021
William P. Clements Building
300 West 15th Street, 4th Floor
Austin, Texas 78701

IN ADDITION  October 15, 2021  46 TexReg 7093
The purpose of the hearing will be to consider the Executive Director's Preliminary Report and Petition mailed July 6, 2021 concerning assessing administrative penalties against and requiring certain actions of NEUTZE PROPERTIES, LTD. dba Mr. Cartender Minit Mart #112, for violations in Medina County, Texas, of: Texas Water Code §26.3475(c)(1) and 30 Texas Administrative Code §334.7(d)(1) and (d)(3) and §334.50(b)(1)(A).

The hearing will allow NEUTZE PROPERTIES, LTD. dba Mr. Cartender Minit Mart #112, the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford NEUTZE PROPERTIES, LTD. dba Mr. Cartender Minit Mart #112, the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. Upon failure of NEUTZE PROPERTIES, LTD. dba Mr. Cartender Minit Mart #112 to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's Preliminary Report and Petition, attached hereto and incorporated herein for all purposes. NEUTZE PROPERTIES, LTD. dba Mr. Cartender Minit Mart #112, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Texas Water Code §7.054 and chs. 7 and 26 and 30 Texas Administrative Code chs. 70 and 334; Texas Water Code §7.058, and the Rules of Procedure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 Texas Administrative Code §70.108 and §70.109 and ch. 80, and 1 Texas Administrative Code ch. 155.

Further information regarding this hearing may be obtained by contacting Judy Bohr, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78771-3087, telephone (512) 259-3400. Information concerning your participation in this hearing may be obtained by contacting Vic McWherter, Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at www.tceq.texas.gov/goto/efilings or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78771-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.

In accordance with 1 Texas Administrative Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at www.soah.texas.gov, or in printed format upon request to SOAH."

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

Issued: September 29, 2021

TRD-202103902
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 4, 2021

Notice of Water Rights Application
Notices Issued October 01, 2021

APPLICATION NO. 21-3192A: Edwards Aquifer Authority, 900 Quincy Street, San Antonio, Texas 78215, Applicant, seeks to amend Certificate of Adjudication No. 21-3192 to increase the permitted impoundment capacity to 845 acre-feet, to increase the diversion rate to 400 cfs (179,532 gpm), and to authorize diversion of an additional 5,478 acre-feet of water per year for recharge purposes in Medina County. More information on the application and how to participate in the permitting process is given below. The application and fees were received on July 13, 2018. Additional information was received on October 24, November 16, 2018, and September 6, 2019. The application was declared administratively complete and filed with the Office of the Chief Clerk on September 24, 2019.

The Executive Director completed the technical review of the application and prepared an amendment. The draft amendment, if granted, will reflect special conditions including, but not limited to, streamflow restrictions. The application, technical memoranda, and Executive Director's draft amendment are available for viewing on the TCEQ web page at: https://www.tceq.texas.gov/permitting/water_rights/wr-permitting/view-wr-pend-apps.

Alternatively, you may request a copy of the documents by contacting the TCEQ Office of the Chief Clerk by phone at (512) 239-3300 or by mail at TCEQ OCC, Notice Team (MC-105), P.O. Box 13087, Austin, Texas 78711. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after newspaper publication of this notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[U/we] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit proposed conditions for the requested permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at https://www14.tceq.texas.gov/epic/eComment/ by entering ADJ 3192.
in the search field. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Public Education Program at (800) 687-4040. General information regarding the TCEQ can be found at our website at www.tceq.texas.gov. Si desea información en español, puede llamar al (800) 687-4040 o por el internet al http://www.tceq.texas.gov.

APPLICATION NO. 3444-A; Edwards Aquifer Authority, 900 Quincy Street, San Antonio, Texas 78215, Applicant, seeks to amend Water Use Permit No. 3444 to increase the impoundment capacity of an existing reservoir on Middle Verde Creek, Nueces River Basin by an additional 208 acre-feet, to authorize diversion of an additional 3,556 acre-feet of water per year for recharge purposes in Medina County and to increase the diversion rate to 30 cfs (13,465 gpm). More information on the application and how to participate in the permitting process is given below. The application and fees were received on July 13, 2018. Additional information was received on October 24, November 16, 2018, and September 6, 2019. The application was declared administratively complete and filed with the Office of the Chief Clerk on September 24, 2019. The Executive Director completed the technical review of the application and prepared an amendment. The draft amendment, if granted, would contain special conditions including, but not limited to, streamflow restrictions. The application, technical memorandum, and Executive Director's draft amendment are available for viewing on the TCEQ web page at: https://www.tceq.texas.gov/permitting/water_rights/wr-permitting/view-wr-pend-apps.

Alternatively, you may request a copy of the documents by contacting the TCEQ Office of the Chief Clerk by phone at (512) 239-3300 or by mail at TCEQ OCC, Notice Team (MC-105), P.O. Box 13087, Austin, Texas 78711. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after newspaper publication of this notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit proposed conditions for the requested permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at https://www14.tceq.texas.gov/epic/eComment/ by entering WRPERM 2956 in the search field. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Public Education Program at (800) 687-4040. General information regarding the TCEQ can be found at our website at www.tceq.texas.gov. Si desea información en español, puede llamar al (800) 687-4040 o por el internet al http://www.tceq.texas.gov.
The application and fees were received on July 13, 2018. Additional information was received on October 24, November 16, 2018, and September 6, 2019. The application was declared administratively complete and filed with the Office of the Chief Clerk on September 24, 2019.

The Executive Director completed the technical review of the application and prepared an amendment. The draft amendment, if granted, would contain special conditions including, but not limited to, streamflow restrictions. The application, technical memoranda, and Executive Director’s draft amendment are available for viewing on the TCEQ website at: https://www.tceq.texas.gov/permitting/water_rights/wr-permitting/view-wr-pend-apps

Alternatively, you may request a copy of the documents by contacting the TCEQ Office of the Chief Clerk by phone at (512) 239-3300 or by mail at TCEQ OCC, Notice Team (MC-105), P.O. Box 13087, Austin, Texas 78711. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after newspaper publication of this notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant’s name and permit number; (3) the statement “[/we] request a contested case hearing;” (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit proposed conditions for the requested permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at https://www14.tceq.texas.gov/epic/eComment/ by entering WRPERM 3551 in the search field. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address.

For additional information, individual members of the general public may contact the Public Education Program at (800) 687-4040. General information regarding the TCEQ can be found at our website at www.tceq.texas.gov. Si desea información en español, puede llamar al (800) 687-4040 o por el internet al http://www.tceq.texas.gov.

TRD-202103904
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 4, 2021

Texas Health and Human Services Commission

Public Notice: Amendment to the Texas Healthcare Transformation Quality Improvement Program (THTQIP) Waiver Under Section 1115 of the Social Security Act Effective October 1, 2021

The Health and Human Services Commission (HHSC) is submitting a request to the Centers for Medicare & Medicaid Services (CMS) to amend the Texas Healthcare Transformation Quality Improvement Program (THTQIP) waiver under section 1115 of the Social Security Act. The current waiver is approved through September 2030. The proposed effective date for this amendment is October 1, 2021.

HHSC is seeking approval of a one-year extension of the Delivery System Reform Incentive Payment (DSRIP) program. Authority for the DSRIP pool expires September 30, 2021. However, CMS offered to continue the program until September 30, 2022, and to accept an amendment request submitted less than 120 days prior to implementation.

Proposed Changes

HHSC is proposing an 1115 waiver amendment to extend DSRIP for one-year, Demonstration Year (DY) 11 (October 1, 2021 - September 30, 2022). DSRIP is designed to drive health system improvements and health outcomes quality; providers earn incentive payments for demonstrating achievement on selected outcome measures. The DY11 DSRIP pool amount will be the same as DY10 at $2,490,000,000. Current DSRIP providers will continue into DY11 with the same DSRIP valuations and measure selections as in DY10. However, current providers will have an opportunity to withdraw from the program. HHSC will propose new Category C measure goals for DY11.

According to CMS, the DY11 DSRIP pool is subject to a 20 percent reduction if HHSC does not report certain health equity measures. The health equity measures, data stratification, and timing of reporting will be proposed in the Waiver Special Terms and Conditions (STCs) and related attachments’ and finalized in negotiations with CMS.

The amendment to extend DSRIP for one-year aligns with the following three 1115 waiver objectives:

Support the development and maintenance of a coordinated care delivery system;

Improve outcomes while containing cost growth; and

Transition to quality-based payment systems across managed care and providers.

An additional year of DSRIP allows providers to continue delivery system reforms that increase access to health care, improve the quality of care, and enhance the health of Medicaid and low-income or uninsured individuals they serve.

Extending DSRIP will not provide new Medicaid benefits; DSRIP payments are earned incentives and not reimbursements for services.

Financial Analysis
The one-year extension of DSRIP will impact budget neutrality as these expenditures are considered Costs Not Otherwise Matchable (CNOM) by CMS and thus are counted as "with waiver" expenditures only. Texas must use achieved budget neutrality room under the demonstration for the extension; sufficient room is currently available to sustain the proposed extension.

**Evaluation Design**

The CMS-approved 1115 evaluation design focusing on demonstration years 7-11 culminates in a Draft Interim Evaluation Report due March 31, 2024, as required by STC 86, and includes one evaluation question, four hypotheses, and 22 corresponding measures examining whether DSRIP incentivized changes to transform the health care system. While the extension of DSRIP for an additional year does not directly impact existing DSRIP hypotheses or measures, it does present an opportunity to extend the study period for the DSRIP portion of the evaluation. HHSC will work with the external evaluator to assess the feasibility of including an additional year of DSRIP implementation in the Draft Interim Evaluation Report given data lags and the time required to write and route the Interim Evaluation Report.

The 1115 draft evaluation design submitted to CMS on July 14, 2021, includes a component on the new proposed state-directed payments (SDPs). The one-year extension of DSRIP may necessitate changes to the proposed analytic methods of the SDP component of the draft evaluation design due to the simultaneous operation of DSRIP and SDPs; however, the SDP component of the draft evaluation design is contingent on final CMS approval of the four new pending pre-prints (Comprehensive Hospital Increased Reimbursement Program, Texas Incentives for Physicians and Professional Services, Directed-Payment Program for Behavioral Health Services, and Rural Access to Primary and Preventive Services). Upon approval of the pending pre-prints and DSRIP extension, HHSC will reassess the SDP component of the draft evaluation design to ensure it reflects the approved program specifications and broader program environment.

**Enrollment, Cost Sharing and Service Delivery**

There is no anticipated impact on enrollment, and there will not be beneficiary cost sharing for this benefit.

An individual may obtain a free copy of the proposed waiver amendment, ask questions, obtain additional information, or submit comments by November 15, 2021, regarding this amendment by contacting Dawn M. Roland by U.S. mail, telephone, fax, or email. The addresses are as follows:

**U.S. Mail**
Texas Health and Human Services Commission
Attention: Dawn M. Roland, Waiver Coordinator, Policy Development Support
John H. Winters Building, East Tower, 701 W. 51st Street
Mail Code: H600
Austin, Texas 78751

**Email**
TX_Medicaid_Waivers@hhstexas.gov

**Telephone**
(512) 438-4366

**Fax**
(512) 438-3061
TRD-202103965

Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: October 6, 2021

Texas Department of Housing and Community Affairs

Notice of Funding Availability (NOFA): CDBG-CV Texas Community Resiliency Program

The Texas Department of Housing and Community Affairs (TDHCA) is pleased to announce a Notice of Funding Availability (NOFA) of $38 million in Community Development Block Grant CARES Act (CDBG-CV) funds for the Community Resiliency Program (CRP) for non-entitlement cities and counties to create, expand, or enhance public facilities that provide medical care, social services, and/or non-congregate housing and increase the community's long-term resiliency and ability to mitigate current and future coronavirus outbreaks. Further, because few rural and small metro areas have had the opportunity to implement mobile response units or emergency medical services that would have a positive impact on their capability to reach certain households, CRP funds allow for the purchase of equipment to increase capacity to carry out a public service which meets CDBG-CV eligibility.

Documents including the NOFA and the application are available at: www.tdhca.state.tx.us/CDBG-CARES.htm. The CRP application period is open from October 1, 2021, through 5:00 p.m., Austin local time, on November 30, 2021.

Subscribers to the Department's LISTSERV will receive notification that the NOFA is posted. Subscription to the Department's LISTSERV is available at http://maillist.tdhca.state.tx.us/listsubscribe.html?li=9mu0g2g&mtContainer=2&mnOwner=G38s2w2r2p.

Questions regarding the CRP NOFA and/or Application may be addressed to Rudy Bentancourt at (512) 475-4063 or Rudy.Bentancourt@tdhca.state.tx.us.

TRD-202103938

Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 5, 2021

Texas Department of Insurance

Company Licensing

Application for incorporation in the state of Texas for Asteya Insurance Company, a domestic life, accident and/or health company. The home office is in Dallas, Texas.

Application for incorporation in the state of Texas for GloriFi Reciprocal Insurance Exchange, a domestic Lloyds/Reciprocal. The home office is in Dallas, Texas.

Application for CEM Insurance Company, a foreign fire and/or casualty company, to change its name to Concert Insurance Company. The home office is in Deer Park, Illinois.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the Texas Register publication, addressed to the attention of Amy Garcia, 333 Guadalupe Street, MC 103-CL, Austin, Texas 78701.

TRD-202103963
Texas Parks and Wildlife Department

Notice of a Public Comment Hearing on an Application for a Sand and Gravel Permit

Magellan Crude Oil Pipeline Company, L.P. has applied to the Texas Parks and Wildlife Department (TPWD) for a General Permit pursuant to Texas Parks and Wildlife Code, Chapter 86 to remove or disturb up to 112 cubic yards of sedimentary material within the James River in Mason County. The purpose is to complete maintenance and repairs on an existing pipeline. The location is approximately 3.3 miles upstream of Eagle Ridge Road and 1.0 miles downstream of James River Road. Notice is being published and mailed pursuant to 31 TAC §69.105(d).

TPWD will hold a public comment hearing regarding the application at 11:00 a.m. on November 5, 2021. Due to COVID-19 transmission concerns with travelling and person-to-person gatherings, the public comment hearing will be conducted through remote participation. Potential attendees should contact Tom Heger at (512) 389-4583 or at tom.heger@tpwd.texas.gov for information on how to participate in the hearing remotely. The hearing is not a contested case hearing under the Texas Administrative Procedure Act. Oral and written public comment will be accepted during the hearing.

Written comments may be submitted directly to TPWD and must be received no later than 30 days after the date of publication of this notice in the Texas Register or a newspaper, whichever is later. A written request for a contested case hearing from an applicant or a person with a justiciable interest may also be submitted and must be received by TPWD prior to the close of the public comment period. Timely hearing requests shall be referred to the State Office of Administrative Hearings. Submit written comments, questions, requests to review the application, or requests for a contested case hearing to: Tom Heger, TPWD, by mail: 4200 Smith School Road, Austin, Texas 78744; fax (512) 389-4405; or e-mail tom.heger@tpwd.texas.gov.

TRD-202103940
James Murphy
General Counsel
Texas Parks and Wildlife Department
Filed: October 5, 2021

Public Utility Commission of Texas

Public Notice of Public Hearing on Proposed ERCOT Budget for 2022-2023 and Request for Comments

The staff of the Public Utility Commission of Texas (commission) will hold a public hearing regarding the proposed budget and System Administrative Fee (Fee) for 2022 through 2023 for the Electric Reliability Council of Texas (ERCOT) on Monday, November 15, 2021 at 9:30 a.m. in the Commissioners’ Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 38533, PUC Review of ERCOT Bud-

get, has been established for this proceeding. 16 Texas Administrative Code §25.363(d) (relating to ERCOT Budget and Fees), requires ERCOT to submit for commission review its board-approved budget, budget strategies, and staffing needs, with a justification for all expenses, capital outlays, additional debt, and staffing requirements.

The commission may approve, modify, or reject ERCOT’s proposed budget and budget strategies. Under Public Utility Regulatory Act (PURA) section 39.151, the proceeding to consider changes to ERCOT’s proposed budget or to authorize or set the range for the Fee is not a contested case. Additionally, under section 39.151, the commission can require ERCOT to prepare an annual or biennial budget. On September 21, 2021, ERCOT made a filing in Project Number 38533 entitled "ERCOT’s 2022/2023 Biennial Budget and System Administration Fee Submission." As part of its 2022 through 2023 budget, ERCOT proposes to keep the Fee set at $0.555 per MWh, which is the same Fee granted for 2021 through 2022.

Questions concerning the public hearing or this notice should be referred to Kasey Feldman-Thomason, General Counsel, (512) 936-7144. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1.

TRD-202103966
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Filed: October 6, 2021
How to Use the Texas Register

Information Available: The sections of the Texas Register represent various facets of state government. Documents contained within them include:

- **Governor** - Appointments, executive orders, and proclamations.
- **Attorney General** - summaries of requests for opinions, opinions, and open records decisions.
- **Texas Ethics Commission** - summaries of requests for opinions and opinions.
- **Emergency Rules** - sections adopted by state agencies on an emergency basis.
- **Proposed Rules** - sections proposed for adoption.
- **Withdrawn Rules** - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.
- **Adopted Rules** - sections adopted following public comment period.

**Texas Department of Insurance Exempt Filings** - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.


**Tables and Graphics** - graphic material from the proposed, emergency and adopted sections.

**Transferred Rules** - notice that the Legislature has transferred rules within the Texas Administrative Code from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the Texas Register is referenced by citing the volume in which the document appears, the words “TexReg” and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 46 (2021) is cited as follows: 46 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written “46 TexReg 2 issue date,” while on the opposite page, page 3, in the lower right-hand corner, would be written “issue date 46 TexReg 3.”

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the Texas Register office, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using Texas Register indexes, the Texas Administrative Code section numbers, or TRD number.

Both the Texas Register and the Texas Administrative Code are available online at: http://www.sos.state.tx.us. The Texas Register is available in an .html version as well as a .pdf version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The Texas Administrative Code (TAC) is the compilation of all final state agency rules published in the Texas Register. Following its effective date, a rule is entered into the Texas Administrative Code. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the TAC.

The TAC volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State’s website at http://www.sos.state.tx.us/tac.

The Titles of the TAC, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
26. Health and Human Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the TAC scheme, each section is designated by a TAC number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the Texas Administrative Code; TAC stands for the Texas Administrative Code; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to Update: To find out if a rule has changed since the publication of the current supplement to the Texas Administrative Code, please look at the Index of Rules.

The Index of Rules is published cumulatively in the blue-cover quarterly indexes to the Texas Register.

If a rule has changed during the time period covered by the table, the rule’s TAC number will be printed with the Texas Register page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

**TITLE 1. ADMINISTRATION**

**Part 4. Office of the Secretary of State**

**Chapter 91. Texas Register**

1 TAC §91.1. ...................................................... 950 (P)
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