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 strike-through indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 18. GENERAL RULES CONCERNING REPORTS

1 TAC §18.23, §18.24

The Texas Ethics Commission (the Commission) proposes amendments to Texas Ethics Commission rules in Chapter 18. Specifically, the Commission proposes amendments to §18.23, regarding Administrative Waiver of Fine, and §18.24, regarding General Guidelines for Other Administrative Waiver or Reduction of Fine.

Current rules concerning the administrative waiver process, which determine whether a filer is eligible for a waiver or reduction of a penalty for filing a report late, were created to afford a uniform and objective process by which all filers are adjudged against the same set of standards. The proposed amendments would make some improvements to this process. They would address uncertainties that arise when the rules are applied. A definition for what a "prior offense" means under the administrative waiver process has been added, which will assist filers in determining how they will not be eligible for a waiver or reduction of a late-filing penalty. The proposed amendment would allow the Executive Director to reconsider determinations if a filer files an appeal. These proposed amendments will also allow commission staff to determine whether a filer is eligible for a waiver or reduction of a late-filing penalty more efficiently and expeditiously. Simplifying the rules will allow the public to understand more clearly the rules by which the Commission uses in determining if a late-filing penalty is eligible for a waiver or reduction.

J.R. Johnson, General Counsel, has determined that for the first five-year period the proposed amended rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rules.

The General Counsel has also determined that for each year of the first five years the proposed amended rules are in effect, the public benefit will be consistency, simplicity and clarity in the Commission's rules that set out the administrative waiver process. There will not be an effect on small businesses, microbusinesses or rural communities. There is no anticipated economic cost to persons who are required to comply with the proposed amended rules.

The General Counsel has determined that during the first five years that the proposed amended rules are in effect, they will not: create or eliminate a government program; require the creation of new employee positions or the elimination of existing employee positions; require an increase in future legislative appropriations to the agency; require an increase or decrease in fees paid to the agency; expand, limit, or repeal an existing regulation; increase or decrease the number of individuals subject to the rules' applicability; or not positively or adversely affect this state's economy.

The Commission invites comments on the proposed amended rules from any member of the public. A written statement should be emailed to public_comment@ethics.state.tx.us, or mailed or delivered to Anne Temple Peters, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070. A person who wants to offer spoken comments to the Commission concerning the proposed amended rules may do so at any Commission meeting during the agenda item relating to the proposed amended rules. Information concerning the date, time, and location of Commission meetings is available by telephoning (512) 463-5800 or on the Commission's website at www.ethics.state.tx.us.

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

The amendments are proposed under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code.

The proposed amended rules affect Title 15 of the Election Code.

§18.23. Administrative Waiver of Fine.

(a) A filer may request the executive director to waive a late fine by submitting an affidavit to the executive director that states facts that establish that:

(1) - (5) (No change.)

(6) the filer of the campaign finance report:

(A) had filed all previous reports by the applicable deadline;

(B) had no new contributions, expenditures, or loans to report during the filing period; and

(C) filed the report no later than 30 days after the filer was notified that the report was [appeared to be] late;

(7) the filer reasonably relied on incorrect information given to the filer by the agency; or

(8) other administrative error by the agency.

(b) (No change.)

§18.24. General Guidelines for Other Administrative Waiver or Reduction of Fine.

(a) (No change.)
(b) For purposes of determining a waiver or reduction of a late fine under §18.25 and §18.26 of this title, a late report will be classified by report type, as follows:

(1) Any report that is not a critical report as defined under paragraph (2) of this subsection will be classified as Report Type I and considered under §18.25 of this title.

(2) A critical report will be classified as Report Type II and considered under §18.26 of this title. A "critical report" is:

(A) a campaign finance pre-election report due 30 days before an election;

(B) a campaign finance pre-election report due 8 days before an election;

(C) a runoff report;

(D) a daily special pre-election report required under §254.038 or §254.039, Election Code; or

(E) a semiannual report subject to the higher statutory fine under §254.042, Election Code; [or]

(F) a personal financial statement required under §572.027, Government Code, if the filer is a candidate with an opponent on the ballot in a primary election.

(c) For purposes of determining a waiver or reduction of a late fine under §18.25 and §18.26 of this title, a filer requesting a waiver or reduction of a late fine will be categorized by filer type, as follows:

(1) Category A includes candidates for and officeholders of the following offices and specific-purpose committees supporting candidates for and officeholders of the following offices:

(A) statewide office;

(B) legislative office;

(C) district judge;

(D) state appellate court justice;

(E) State Board of Education member; and

(F) Secretary of State.

(2) Category B includes all filers not categorized in Category A, as defined by paragraph (1) of this subsection, or Category C, as defined by paragraph (3) of this subsection. Examples of Category B filers include the following filer types:

(A) lobbyists;

(B) salaried non-elected officials;

(C) candidates for and officeholders of district attorney;

(D) candidates for and officeholders of political party chair; [and]

(E) political committees with $3,000 or more in annual activity in the calendar year in which the late report was due; and [and]

(F) a legislative caucus.

(3) Category C includes:

(A) unsalaried appointed board members and officials; and

(B) political committees with less than $3,000 in annual activity in the calendar year in which the late report was due.

(d) For purposes of a reduction of a late fine under §18.25 and §18.26 of this title, the following explanations will be accepted as showing good cause, but is not limited to, the following:

(1) The report was filed no later than three days after the date it was due [more than one date late].

(2) The filer filed the report within five days after first learning the report was late from a late notice sent by the commission. [The report was filed within seven days of receipt of a late notice.]

(3) The report was not a critical report and was prepared and placed in the mail on time but not postmarked by the deadline.

(4) The filer had technical difficulties after regular business hours, but the report was filed no later than [see] the next business day after [that] the commission's technical support staff fixed the technical difficulty [was at work].

(5) The filer's address changed and the filer did not receive notice of the filing deadline.

(6) There are no funds in the filer's campaign or officeholder account and the filer is unemployed.

(7) A first-time filer that is required to file campaign finance reports with a county filing authority and personal financial statements with the commission, who mistakenly files the personal financial statement with the county on the filing deadline and then correctly files with the commission within seven days of realizing the mistake.

(e) For purposes of determining whether a filer is eligible for a waiver or reduction of a late fine under §18.25 or §18.26 of this title, a prior offense is any prior late report in which a late-filing penalty was assessed except:

(1) the late-filing penalty for that prior late report was waived under Sections 18.23(a)(1) - (3) of this title; or

(2) no late notices were sent for that prior late report and the filer did not file a request that the late-filing penalty be waived or reduced for the prior late report.

(f) For purposes of a reduction of a late fine under §18.25 and §18.26 of this title, the following explanations will not be accepted as showing good cause:

(1) The filer did not know the report was due.

(2) The filer forgot or the person assigned by the filer to prepare the report forgot.

(3) The campaign was very time-consuming.

(4) The filer's job was very time-consuming.

(5) The filer was too overwhelmed by responsibilities to file the report on time.

(6) The filer was a candidate who lost an election and did not know to terminate his or her campaign treasurer appointment and file a final report.

(7) The filer left his or her position and did not know he or she was still required to file a report.

(8) A late fine that is reduced under §18.25 or §18.26 of this title will revert to the full amount originally assessed if the reduced fine is not paid within thirty (30) calendar days from the date of the letter informing the filer of the reduction.

(g) A filer may appeal a determination made under §18.25 or §18.26 of this title by submitting a request in writing to the commission.
(1) The request for appeal should state the filer's reasons for requesting an appeal, provide any additional information needed to support the request, and state whether the filer would like the opportunity to appear before the commission and offer testimony regarding the appeal.

(2) The Executive Director may review the appeal and reconsider the determination made under §18.25 or §18.26 of this title or set the appeal for a hearing before the commission.

(3) After hearing a request for appeal, the commission may affirm the determination made under §18.25 or §18.26 of this title or make a new determination based on facts presented in the appeal.

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 5, 2020.

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J.R. Johnson
General Counsel
Texas Ethics Commission
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For further information, please call: (512) 463-5800

CHAPTER 50. LEGISLATIVE SALARIES AND PER DIEM

1 TAC §50.1

The Texas Ethics Commission (the Commission) proposes amendments to the Texas Ethics Commission rule in Chapter 50. Specifically, the Commission proposes amendments to §50.1, regarding Legislative Per Diem.

The rule as amended would set the per diem for members of the legislature and the lieutenant governor at $224 for each day during the regular session and any special session.

J.R. Johnson, General Counsel, has determined that for the first five-year period the proposed amended rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rule. The fiscal implication for the state over the first five years will be $17,028,480, which may increase if one or more special sessions are called. Of that total amount, $228,060 is attributed to the increase in the amount of per diem under the proposed rule from the current rate of $221 to $224.

The General Counsel has also determined that for each year of the first five years the proposed amended rule is in effect, the public benefit will be a determination, in compliance with the Texas Constitution, of the per diem entitled to be received by each member of the legislature and the lieutenant governor under the Texas Constitution, Article III, §24, and Article IV, §17, during the regular session and any special session. There will not be an effect on small businesses, microbusinesses or rural communities. There is no anticipated economic cost to persons who are required to comply with the proposed amended rule.

The General Counsel has determined that during the first five years that the proposed amended rule is in effect, they will not: create or eliminate a government program; require the creation of new employee positions or the elimination of existing employee positions; require an increase in future legislative appropriations to the agency; require an increase or decrease in fees paid to the agency; expand, limit, or repeal an existing regulation; or increase or decrease the number of individuals subject to the rules' applicability.

The Commission invites comments on the proposed amended rule from any member of the public. A written statement should be emailed to public_comment@ethics.state.tx.us, or mailed or delivered to Anne Temple Peters, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070. A person who wants to offer spoken comments to the Commission concerning the proposed amended rule may do so at any Commission meeting during the agenda item relating to the proposed amended rule.

Information concerning the date, time, and location of Commission meetings is available by telephoning (512) 463-5800 or on the Commission's website at www.ethics.state.tx.us.

The amendments are proposed under Texas Government Code §571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code.

The proposed amended rule affects amendment affects the Texas Constitution, Article III, §24; Article III, §24a; and Article IV, §17.

§50.1 Legislative Per Diem.

(a) The legislative per diem is $224 [§224]. The per diem is intended to be paid to each member of the legislature and the lieutenant governor for each day during the regular session and for each day during any special session.

(b) If necessary, this rule shall be applied retroactively to ensure payment of the $224 [§224] per diem for 2021 [2019].

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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J.R. Johnson
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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER B. ESTABLISHMENT AND ADJUSTMENT OF REIMBURSEMENT RATES FOR MEDICAID

1 TAC §355.205

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes in Texas Administrative Code (TAC) Title 1, Part 15, Chapter 355, Subchapter B, new §355.205, concerning Rule for Emergency Temporary Reimbursement Rate Increases and Limitations on Use of Emergency Temporary Funds for Medicaid in Response to Novel Coronavirus (COVID-19).
BACKGROUND AND PURPOSE

The proposed new rule outlines the process by which HHSC will restrict eligible Medicaid providers from using temporarily increased reimbursement rates to increase hourly wages paid to direct care staff on an ongoing basis. In accordance with the contingencies placed upon use of the funds, use of the funds for staff compensation is limited to overtime payments, lump sum bonuses, bonuses for hazard pay, or other types of compensation that will not result in future reductions to hourly wages when the emergency temporary reimbursement rate increase is discontinued. Reimbursement rates were increased effective April 1, 2020, to ensure that these providers are able to purchase personal protective equipment, ensure adequate staff-to-client ratios, and take other necessary steps to serve clients individually rather than in congregate settings to protect the health and safety of the clients in their care.

This new rule is based on an existing emergency rule adopted in response to the COVID-19 pandemic: §355.205, Emergency Rule for Emergency Temporary Reimbursement Rate Increases and Limitations on Use of Emergency Temporary Funds for Medicaid in Response to Novel Coronavirus (COVID-19). The provisions of this new rule are the same as the emergency rule. Except for a minor edit in the title of the rule and a clarifying edit in the text, there are no changes.

SECTION-BY-SECTION SUMMARY

Proposed new §355.205(a) and (b) introduce the emergency reimbursement and outline eligibility criteria for the increases. Subsection (c) provides a deadline by which a provider must submit an electronic attestation or be subject to recoupment. Subsection (d) and (e) specify the reconciliation process and how overpayments will be recouped if a provider fails to submit the attestation required in subsection (c). Subsections (f) and (g) provide guidance on procedures in the event of a disallowance of federal funds and the termination of the emergency temporary rate increases.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, there will be no fiscal impact on state government because of enforcing and administering the rule.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rule will be in effect:

(1) the proposed rule will not create or eliminate a government program;
(2) implementation of the proposed rule will not affect the number of HHSC employee positions;
(3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;
(4) the proposed rule will not affect fees paid to HHSC;
(5) the proposed rule will create a new rule;
(6) the proposed rule will not expand, limit, or repeal existing rule;
(7) the proposed rule will not change the number of individuals subject to the rule; and
(8) HHSC has insufficient information to determine the proposed rule's effect on the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there is no adverse economic impact on small businesses, micro-businesses, and rural communities required to comply with the new rule as there is no requirement to alter current business practices. The attestation requirement is currently in place.

LOCAL EMPLOYMENT IMPACT

There is no anticipated negative impact on local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule is necessary to receive a source of federal funds and is necessary to protect the health, safety, and welfare of the residents of this state.

PUBLIC BENEFIT AND COSTS

Victoria Grady, Director of Provider Finance, has determined that for each year of the first five years the rule is in effect, the public will benefit from adoption of the new rule. The public benefit anticipated as a result of enforcing or administering the new rule is availability of temporary emergency rate increases for impacted providers in response to the Novel Coronavirus (COVID-19).

Trey Wood has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule as the rule does not impose any new fees or costs on those required to comply.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to HHSC Provider Finance Department emergency line at (512) 730-7401.

Written comments on the proposal may be submitted to the HHSC Provider Finance Department, Mail Code H-400, 4900 North Lamar Blvd., Austin, TX 78714-9030; by fax to (512) 730-7475; or by email to RateAnalysisDept@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) faxed or emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When faxing or emailing comments, please indicate "Comments on Proposed Rule 21R015" in the subject line.

STATUTORY AUTHORITY

The new rule is authorized by Texas Government Code §531.0055, which authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system; Texas Government Code
§531.033, which allows the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; 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 new rule affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.


(a) Introduction. The Texas Health and Human Services Commission (HHSC) uses the methodology described in this section to establish emergency temporary reimbursement rate increases while limiting use of the funds received by the provider through the increases. This section also describes the circumstances in which recoupments will be necessary for certain provider types or services during the COVID-19 federal public health emergency period. Provider types and services that are eligible for increased reimbursement rates under this section include:

(1) all provider types and services for which a reimbursement rate methodology is described in this chapter; and

(2) any other provider or service that is established in response to COVID-19.

(b) Eligibility. To receive and retain emergency temporary reimbursement rate increases from HHSC under this section:

(1) the provider must be enrolled as a Medicaid provider with HHSC;

(2) the provider must be actively providing and billing for services provided to fee-for-service Medicaid clients;

(3) the provider must agree not to use the reimbursement rate increases to increase hourly wages paid to direct care staff on an ongoing basis, and to limit use of the funds to overtime payments, lump sum bonuses, bonuses for hazard pay, or other types of compensation that will not result in future reductions to hourly wages when the emergency temporary reimbursement rate increase is discontinued; and

(4) HHSC must receive approval from Centers for Medicare & Medicaid Services (CMS) for the provider type or specific service to be reimbursed through this section.

(c) Attestation of agreement. The provider must submit an electronic attestation of agreement to comply with subsection (b)(3) of this section either within 90 days of the effective date of the reimbursement rate increase, or by September 30, 2020, whichever date is later.

(d) Reconciliation process. HHSC uses the methodology in this subsection to recoup the temporary emergency payments made under this section if a provider fails to submit the attestation of agreement under subsection (c) of this section.

(1) HHSC will reduce reimbursement rates for any claim for services to the amount that would have been paid to the provider absent the emergency temporary reimbursement rate increase.

(2) The provider's claims will be reprocessed at the lower reimbursement rate under paragraph (1) of this subsection and an account receivable will be established.

(3) The provider will be paid on a normal per claim basis after the equivalent amount of the account receivable has been collected by HHSC, or its designee.

(4) After 270 days from the date of the establishment of the account receivable under paragraph (1) of this subsection, HHSC will recoup any overpayments owed under paragraph (1) of this subsection by demanding immediate repayment of any outstanding amount.

(e) Overpayment.

(1) If payments under this section result in an overpayment to a provider, HHSC, or its designee, may recoup an amount equivalent to the overpayment.

(2) Payments made under this section may be subject to any adjustments for payments made in error or due to fraud, including, without limitation, adjustments made under the Texas Administrative Code, the Code of Federal Regulations, and state and federal statutes. HHSC, or its designee, may recoup an amount equal to any such adjustments from the providers in question. This section may not be construed to limit the independent authority of another federal or state agency or organization to recover from the provider for a payment made due to fraud.

(f) Disallowance of federal funds. If payments under this section are disallowed by CMS, HHSC may recoup the amount of the disallowance from providers that participated in the program associated with the disallowance. If the recoupment from a provider for such a disallowance results in a subsequent disallowance, HHSC will recoup the amount of that subsequent disallowance from the same entity.

(g) Termination of emergency temporary rate increases. HHSC will terminate the emergency temporary rate increases at the earlier of either the termination of the federally declared public health emergency, including any extensions, or at the time that HHSC determines rate increases are no longer necessary pursuant to §355.201(c)(3) of this chapter (relating to Establishment and Adjustment of Reimbursement Rates for Medicaid). However, HHSC will continue to enforce the reconciliation and recoupment processes described in subsections (d), (e), and (f) of this section after the termination of the temporary emergency rate increases.

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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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 730-7401

**: Title 22. Examining Boards

Part 35. Texas State Board of Examiners of Marriage and Family Therapists
CHAPTER 801. LICENSURE AND REGULATION OF MARRIAGE AND FAMILY THERAPISTS

SUBCHAPTER C. APPLICATIONS AND LICENSING

22 TAC §801.204

The Texas Behavioral Health Executive Council proposes new §801.204, relating to Licensing of Military Service Members, Military Veterans, and Military Spouses.

Overview and Explanation of the Proposed Rule. The proposed rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorize the Executive Council to administer and enforce Chapters 501-503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507.

If a rule will pertain to the qualifications necessary to obtain a license then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to licensing persons with criminal convictions as marriage and family therapists; therefore, the rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Examiners of Marriage and Family Therapists, in accordance with §502.1515 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose the rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Tex. Occ. Code and may propose the rule amendment.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Counsel, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity and consistency in the Executive Council's rules by aligning with current legal standards. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with the rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to the agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation, it clarifies a rule that was repealed so it may better align with current legal standards; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule’s applicability; and it does not positively or adversely affect the state’s economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas Behavioral Health Executive Council, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the Texas Register. Comments may also be submitted via fax to (512) 305-7701, or via email to Rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.
Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes the rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose the rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes the rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed the rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may propose the rule.

Lastly, the Executive Council proposes the rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§801.204. Licensing of Military Service Members, Military Veterans, and Military Spouses.

(a) An applicant for licensure under this section must comply with Council §882.60 of this title (relating to Special Provisions Applying to Military Service Members, Veterans, and Spouses).

(b) Licensed by another United States jurisdiction.

(1) If an applicant has been licensed as an LMFT in another United States jurisdiction for the two years immediately preceding the date the application is received, and has no disciplinary history, the academic (including the internship) and experience requirements shall be considered met.

(2) If an applicant has been licensed as an LMFT in another United States jurisdiction for less than two years immediately preceding the date the application is received, and has no disciplinary history, staff may grant one month of credit for every two months of independent marriage and family therapy practice toward any deficit in the academic internship or experience requirements.

(c) Upon request, an applicant must provide acceptable proof of current licensure issued by another jurisdiction. Upon request, the applicant must provide proof that the licensing requirements of that jurisdiction are substantially equivalent to the licensing requirements of this state.

(d) For an application for a license submitted by a verified military service member or military veteran, the applicant will receive credit towards any licensing or apprenticeship requirements, except an examination requirement, for verified military service, training, or education relevant to the occupation, unless she or she holds a restricted license issued by another jurisdiction or if he or she has a disqualifying criminal history as described by the Act, the Council Act, or Council rules.

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

Filed with the Office of the Secretary of State on October 8, 2020.
TRD-202004183
Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 305-7706

SUBCHAPTER D. SCHEDULE OF SANCTIONS

22 TAC §801.305

The Texas Behavioral Health Executive Council proposes amended §801.305, relating to Schedule of Sanctions.

Overview and Explanation of the Proposed Rule. The proposed amendment is being made so the schedule of sanctions better aligns with §801.302, regarding severity level and sanction guide.

If a rule will pertain to a schedule of sanctions then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153 of the Tex. Occ. Code. The proposed amendment pertains to a schedule of sanctions for marriage and family therapists; therefore, the rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Examiners of Marriage and Family Therapists, in accordance with §502.1515 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this amended rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Tex. Occ. Code and may propose the rule amendment.

Fiscal Note. Darrel D. Spinks, Executive Director of the Executive Counsel, has determined that for the first five-year period the proposed rule is in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rule. Additionally, Mr. Spinks has determined that enforcing or administering the rule does not have foreseeable implications relating to the costs or revenues of state or local government.

Public Benefit. Mr. Spinks has determined for the first five-year period the proposed rule is in effect there will be a benefit to licensees, applicants, and the general public because the proposed rule will provide greater clarity and consistency in the Executive Council’s rules. Mr. Spinks has also determined that for each year of the first five years the rule is in effect, the public
benefit anticipated as a result of enforcing the rule will be to help the Executive Council protect the public.

Probable Economic Costs. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no additional economic costs to persons required to comply with the rule.

Small Business, Micro-Business, and Rural Community Impact Statement. Mr. Spinks has determined for the first five-year period the proposed rule is in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Mr. Spinks has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities. Thus, the Executive Council is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Local Employment Impact Statement. Mr. Spinks has determined that the proposed rule will have no impact on local employment or a local economy. Thus, the Executive Council is not required to prepare a local employment impact statement pursuant to §2001.022 of the Tex. Gov't Code.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rule is necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Executive Council on licensees is not expected to increase.

Government Growth Impact Statement. For the first five-year period the proposed rule is in effect, the Executive Council estimates that the proposed rule will have no effect on government growth. The proposed rule does not create or eliminate a government program; it does not require the creation or elimination of employee positions; it does not require the increase or decrease in future legislative appropriations to the agency; it does not require an increase or decrease in fees paid to the agency; it does not create a new regulation but clarifies an existing rule; it does not expand an existing regulation; it does not increase or decrease the number of individuals subject to the rule’s applicability; and it does not positively or adversely affect the state’s economy.

Takings Impact Assessment. Mr. Spinks has determined that there are no private real property interests affected by the proposed rule. Thus, the Executive Council is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Request for Public Comments. Comments on the proposed rule may be submitted to Brenda Skiff, Executive Assistant, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Ste. 3-900, Austin, Texas 78701, within 30 days of publication of this proposal in the Texas Register. Comments may also be submitted via fax to (512) 305-7701, or via email to Rules@bhec.texas.gov.

The Executive Council specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Executive Council may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted; and finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See §2006.002(c) and (c-1) of the Tex. Gov't Code.

Statutory Authority. The rule is proposed under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council proposes the rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose the rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes the rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed the rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may propose the rule.

Lastly, the Executive Council proposes the rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

No other code, articles or statutes are affected by this section.

§801.305. Schedule of Sanctions.
The following standard sanctions shall apply to violations of Texas Occupations Code, Chapter 502 and 22 Texas Administrative Code, Part 35.

Figure 22 TAC §801.305

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 8, 2020.

TRD-202004185

Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists

Earliest possible date of adoption: November 22, 2020

For further information, please call: (512) 305-7706

45 TexReg 7518  October 23, 2020  Texas Register
TITLE 25. HEALTH SERVICES
PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 415. PROVIDER CLINICAL RESPONSIBILITIES--MENTAL HEALTH SERVICES

SUBCHAPTER C. USE AND MAINTENANCE OF DEPARTMENT OF STATE HEALTH SERVICES/DEPARTMENT OF AGING AND DISABILITY SERVICES DRUG FORMULARY

25 TAC §§415.101 - 415.111

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes the repeal of §415.101, concerning Purpose; §415.102, concerning Application; §415.103, concerning Definitions; §415.104, concerning General Requirements; §415.105, concerning Organization of DSHS/DADS Drug Formulary; §415.106, concerning Executive Formulary Committee; §415.107, concerning Responsibilities of the Executive Formulary Committee; §415.108, concerning Applying to Have a Drug Added to the Formulary; §415.109, concerning Changing the DSHS/DADS Drug Formulary; §415.110, concerning Prescribing Non-formulary Drugs; and §415.111, concerning Adverse Drug Reactions.

BACKGROUND AND PURPOSE

The proposed repeals are necessary to reflect the transition of programs from the Department of State Health Services (DSHS) to HHSC. Rules in Texas Administrative Code (TAC) Title 25, Part 1, Chapter 415, Subchapter C are repealed, updated, reorganized, and proposed in 26 TAC Chapter 306, Subchapter G. The new rules are proposed simultaneously elsewhere in this issue of the Texas Register.

SECTION-BY-SECTION

The proposed rule repeals delete the rules in 25 TAC Chapter 415, Subchapter C, to reorganize and update the rules to be relocated to 26 TAC Chapter 306, Subchapter G.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the repeals will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules are repealed:

(1) the proposed repeals will not create or eliminate a government program;
(2) implementation of the proposed repeals will not affect the number of HHSC employee positions;
(3) implementation of the proposed repeals will result in no assumed change in future legislative appropriations;
(4) the proposed repeals will not affect fees paid to HHSC;
(5) the proposed repeals will not create a new rule;
(6) the proposed repeals will repeal existing rules;
(7) the proposed repeals will not change the number of individuals subject to the rules; and
(8) the proposed repeals will not affect the state’s economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

The proposed repeals do not impose any additional costs on small businesses, micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed repeals will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these repeals because the repeals do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Timothy E. Bray, Associate Commissioner of State Hospitals, and Scott Schalchlin, Associate Commissioner of State Supported Living Centers, have determined that for each year of the first five years the repeals are in effect, the public will benefit from the elimination of rules that refer to an agency, Texas Department of Mental Health and Mental Retardation, that no longer exists.

Trey Wood has also determined that for the first five years the repeals are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner’s right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to HHSC, Health and Specialty Care System, Mail Code 619E, P.O. Box 13247, Austin, Texas 78711-3247, or by email to healthandspecialtycare@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rules 19R052 Drug Formulary" in the subject line.

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §533.0356 which allows the Executive Commissioner of HHSC to adopt rules to govern the operations
of local behavioral health authorities; §571.006, which provides the Executive Commissioner of HHSC with authority to adopt rules as necessary for the proper and efficient treatment of persons with mental illness; and §534.052, which requires the adoption of rules necessary and appropriate to ensure the adequate provision of mental health services through a local authority.


§415.101. Purpose.
§415.102. Application.
§415.103. Definitions.
§415.104. General Requirements.
§415.106. Executive Formulary Committee.
§415.108. Applying to Have a Drug Added to the Formulary.
§415.110. Prescribing Non-formulary Drugs.
§415.111. Adverse Drug Reactions.

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 6, 2020.
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Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 206-5084

TITLE 26. HEALTH AND HUMAN SERVICES
PART 1. HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 306. BEHAVIORAL HEALTH DELIVERY SYSTEM
SUBCHAPTER G. USE AND MAINTENANCE OF THE HEALTH AND HUMAN SERVICES COMMISSION PSYCHIATRIC DRUG FORMULY

26 TAC §§306.351 - 306.360

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §306.351, concerning Purpose; §306.352, concerning Application; §303.353, concerning Definitions; §306.354, concerning General Requirements; §306.355, concerning Organization of HHSC Psychiatric Drug Formulary; §306.356, concerning Responsibilities of the Psychiatric Executive Formulary Committee; §306.357, concerning Adding a Drug to the HHSC Psychiatric Drug Formulary; §306.358, concerning Changing the HHSC Psychiatric Drug Formulary; §306.359, concerning Prescribing Non-formulary Drugs; and §306.360, concerning Adverse Drug Reactions.

BACKGROUND AND PURPOSE

The purpose of the proposed new rules is to move HHSC rules in Texas Administrative Code (TAC) Title 25, Chapter 415, Subchapter C and 40 TAC Chapter 5, Subchapter C to 26 TAC Chapter 306, Subchapter G as part of consolidating HHSC rules. The rules are repealed, updated, and reorganized, as they have not been reviewed since 2002, and are placed in 26 TAC Chapter 306. The rule project workgroup has updated the rules for clarity using plain language where possible and to provide a simpler description of the composition and operation of the agency's formulary committee. The repeal of those rules is proposed simultaneously elsewhere in this issue of the Texas Register.

SECTIO-SECTION SUMMARY

Proposed §306.351 states the purpose of the new subchapter.
Proposed §306.352 provides that the rules apply to the listed facilities.
Proposed §306.353 provides the definitions used in the subchapter.
Proposed §306.354 describes the general requirements for the HHSC Psychiatric Drug Formulary.
Proposed §306.355 describes how drugs will be listed in the HHSC Psychiatric Drug Formulary, recommended doses, limitations, and provides that the Interim Formulary Update confirms to the same form as the formulary.
Proposed §306.356 lists the responsibilities of the Psychiatric Executive Formulary Committee (PEFC), which includes recommending standards of drugs, periodically reviewing the drugs listed in the formulary, and considering applications submitted to have drugs added to the formulary.
Proposed §306.357 provides the procedures for applying to have a drug added to the formulary.
Proposed §306.358 provides that changes to the formulary is based on need, effectiveness, risk, and cost and the formulary is updated and published once a year, at a minimum.
Proposed §306.359 provides the procedure for prescribing a non-formulary drug.
Proposed §306.360 provides that each local authority develop written policies and procedures to report adverse drug reactions and HHSC will develop policies and procedures for HHSC facilities.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

(1) the proposed rules will not create or eliminate a government program;
(2) implementation of the proposed rules will not affect the number of HHSC employee positions;
The communities.

LOCAL

MUTUALITY

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

The proposed rules do not apply to small or micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Timothy E. Bray, Associate Commissioner of State Hospitals, and Scott Schalchlin, Associate Commissioner of State Supported Living Centers, have determined that for each year of the first five years the rules are in effect, the public benefit will be rules that reference the correct agency, HHSC.

Trey Wood has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules. The proposed rules codify and combine existing agency practices under 26 TAC. There is no requirement for providers to alter current business practices.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to HHSC, Health and Specialty Care System, Mail Code 619E, P.O. Box 13247, Austin, Texas 78711-3247, or by email to healthandspecialtycare@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate “Comments on Proposed Rules 19R052 Drug Formulary” in the subject line.

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055 which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Health and Safety Code §533.0356 which allows the Executive Commissioner of HHSC to adopt rules to govern the operations of local behavioral health authorities; §571.006 which provides that the Executive Commissioner of HHSC with authority to adopt rules as necessary for the proper and efficient treatment of persons with mental illness; §534.052, which requires the adoption of rules necessary and appropriate to ensure the adequate provision of mental health services through a local authority; §591.004 which provides that the Executive Commissioner of HHSC shall adopt rules to implement the Persons with an Intellectual Disability Act; and §533A.0355 which provides that the Executive Commissioner of HHSC shall adopt rules establishing the roles and responsibilities of local intellectual and developmental disability authorities.


§306.351. Purpose.

The purpose of this subchapter is to require the use and maintenance of the Texas Health and Human Services Commission (HHSC) Psychiatric Drug Formulary.

§306.352. Application.

(a) This subchapter applies to HHSC facilities, HHSC-funded community behavioral health centers (including substance use treatment providers), local authorities, and their respective contractors for medications and medication-related services funded by HHSC. The HHSC Psychiatric Drug Formulary in its entirety applies to all HHSC facilities in all circumstances except when HHSC transfers an individual to a general hospital to receive non-mental health acute care services.

(b) HHSC facilities and local authorities are responsible for drafting contracts with their contractors that provide HHSC-funded medications and medication-related services to ensure that contractors comply with this subchapter.

§306.353. Definitions.

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

(1) Adverse drug reaction—Any response to a drug that is noxious and unintended and occurs at doses normally used in humans.

(2) Contractor—An entity that provides HHSC-funded mental health services pursuant to a contract with a service system component or HHSC.

(3) Drug entity—A specific chemical compound and all its pharmaceutically equivalent salt forms that are used in the diagnosis, cure, mitigation, treatment or prevention of disease.

(4) Emergency—A situation in which it is immediately necessary to administer medication to an individual to prevent:

(A) imminent probable death or substantial bodily harm to the individual because the individual:
(i) overtly or continually is threatening or attempting to commit suicide or serious bodily harm; or

(ii) is behaving in a manner that indicates that the individual is unable to satisfy the individual's need for nourishment, essential medical care, or self-protection; or

(B) imminent serious physical or emotional harm to others as indicated by threats, attempts, or other acts the individual overtly or continually makes or commits.

(5) HHSC--Texas Health and Human Services Commission.

(6) HHSC facility--A facility operated by HHSC, including state hospitals and state supported living centers.

(7) HHSC Psychiatric Drug Formulary--A listing by nonproprietary name of all drugs approved for use by service system components and their contractors that is updated annually, at a minimum.

(8) Individual--Any person receiving services from a service system component or contractor.

(9) Interim Formulary Update--An update to the HHSC Psychiatric Drug Formulary, which is incorporated into the HHSC Psychiatric Drug Formulary.

(10) Local authority--A local mental health authority designated in accordance with Texas Health and Safety Code, §533.035(a), a local behavioral health authority designated in accordance with Texas Health and Safety Code, §533.0356, and a local intellectual and developmental disability authority designated in accordance with Texas Health and Safety Code §533A.035(a).

(11) Mental health services--Any services concerned with the diagnosis, treatment, and care of individuals for a mental illness (known as serious emotional disturbance in reference to children and adolescents), which may be accompanied by a co-occurring diagnosis.

(12) PEFC--Psychiatric Executive Formulary Committee. A committee composed of representatives from the state hospitals, state supported living centers, community behavioral health entities, and others as selected by the state hospitals associate commissioner in consultation with the state supported living center associate commissioner, the behavioral health services associate commissioner, and the intellectual and developmental services associate commissioner. The committee is responsible for the formulation of broad professional policies regarding the administration, handling, use, administration, and all other matters relating to the use of drugs and devices in an HHSC facility, local authority, and their respective contractors for medications and medication-related services funded by HHSC.

(13) Pharmacy and Therapeutics Committee--An HHSC facility committee composed of physicians, pharmacists, registered nurses, and others as selected by the facility head, or their designee, that assists in the formulation of broad professional policies regarding the evaluation, selection, distribution, handling, use, administration, and all other matters relating to the use of drugs and devices in the facility.

(14) Practitioner--A person who acts within the scope of a professional license to prescribe, distribute, administer, or dispense a prescription drug or device, (e.g., a physician, registered nurse, advanced practice registered nurse, physician assistant, licensed vocational nurse, pharmacist, or dentist).

(15) Reserve drug--A formulary drug with specific guidelines for use as described in the HHSC Psychiatric Drug Formulary.

(16) Service system component--HHSC, an HHSC facility, and a local authority.


(a) HHSC maintains a closed formulary (HHSC Psychiatric Drug Formulary) that lists drugs approved by the PEFC for use by service system components and their contractors.

(b) A drug is not available for general use by service system components or their contractors unless it is approved by the PEFC. Drugs not listed in the HHSC Psychiatric Drug Formulary or Interim Formulary Update may not be used except under the limited circumstances described in §306.359 of this subchapter (relating to Prescribing Non-formulary Drugs).

(c) The use of formulary drugs in unusual clinical situations or the use of unusual drug combinations must be accompanied by written justification in the individual's medical record. Additional clinical consultation in these situations should occur as deemed necessary by the prescribing physician.

(d) Reserve drugs may be prescribed for use outside the guidelines described in the formulary if the prescription is justified in the individual's medical record and reviewed in audits of reserve drug use conducted by the service system component as clinically indicated.

(e) Drug research conducted at an HHSC facility is governed by 25 TAC Chapter 414, Subchapter P (relating to Research in TDMHMR Facilities). Local authorities conducting drug research must comply with all applicable state and federal laws, rules, and regulations, including 45 CFR Part 46, as required by §301.325 of this title (relating to Rights and Protection).


(a) Drugs are listed in the HHSC Psychiatric Drug Formulary by their nonproprietary names. The list is based on a modified format of the American Hospital Formulary Service Drug Information and includes an alphabetical index. The use of proprietary names, which may follow in parentheses, is for information purposes only and is not meant to be an endorsement. Cost comparisons and prescribing information are provided as determined necessary by the PEFC. The HHSC Psychiatric Drug Formulary provides tables summarizing the recommended dosage ranges for the psychotropic drugs for clinician reference. These tables are intended as guidelines and are not intended to replace other references or the clinician's clinical judgment. Clinicians should consult the approved Food and Drug Administration product labeling or other clinical resources on the appropriate prescribing of psychoactive medications. The HHSC Psychiatric Drug Formulary notes limitations recommended by the PEFC regarding the use of a drug, including specific limitations or guidelines for the use of a reserve drug.

(b) The Interim Formulary Update conforms to the same format as the HHSC Psychiatric Drug Formulary and shall be incorporated into the annual HHSC Psychiatric Drug Formulary.

§306.356 Responsibilities of the Psychiatric Executive Formulary Committee.

(a) The PEFC maintains and updates the HHSC Psychiatric Drug Formulary by:

(1) recommending standards of drug use that discourage unnecessary duplication of therapeutic alternatives and encourage the highest standards of medical and pharmacy practice;

(2) periodically reviewing the drugs listed in the formulary to ensure consistency with need, effectiveness, risk, and cost;

(3) consulting with experts in clinical pharmacy, pharmacology, and other medical specialties as necessary to objectively assess drugs under consideration; and

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(4) considering the applications submitted in accordance with §306.357 of this subchapter (relating to Adding a Drug to the HHSC Psychiatric Drug Formulary) or as:
(A) presented by committee members; or
(B) submitted by other qualified persons at the invitation of the PEFC chairperson.
(b) The PEFC may make other recommendations concerning drug use and policy.
(c) Approval of a drug entity for inclusion in the HHSC Psychiatric Drug Formulary does not imply approval of all formulations for that drug. The PEFC designates the formulations that are allowed for general use by service system components and their contractors.
(d) Approval of a drug formulation constitutes approval of all brands of the product that have been proven to be bioequivalent as listed in the then-current Approved Drug Products with Therapeutic Equivalence Evaluations, published by the United States Food and Drug Administration.
(e) For a drug entity that has known bioequivalency problems, the PEFC may limit its use to a specific brand based on objective clinical pharmacokinetic data.

§306.357. Adding a Drug to the HHSC Psychiatric Drug Formulary.
(a) Applying to have a drug added to the HHSC Psychiatric Drug Formulary:
(1) Any member of the PEFC, any service system component practitioner, or any contract practitioner may apply to have a drug added to the HHSC Psychiatric Drug Formulary by completing the New Drug Application form found in the HHSC Psychiatric Drug Formulary on the HHSC Psychiatric Formulary website;
(2) Include the following with the New Drug Application form:
(A) published articles in biomedical literature that substantiate the efficacy and safety of the proposed drug;
(B) information on the advantages of the proposed drug compared with similar formulary drugs;
(C) a list of formulary drugs that the proposed drug would replace or supplement; and
(D) cost effectiveness data.
(b) Submitting the application.
(1) An HHSC facility practitioner or HHSC facility contract practitioner shall submit the application to the facility’s pharmacy and therapeutics committee for approval. If the committee approves the application, the committee forwards the application to the PEFC.
(2) A non-facility service system component practitioner or non-facility service system component contract practitioner shall submit the application to the component’s clinical/medical director or designee who determines if the application is appropriate and complete, and if so, shall forward the application to the PEFC.
(3) A member of the PEFC shall submit the application directly to the PEFC.
(c) Considering the application. The PEFC considers the drug application and shall:
(1) approve the proposed drug’s inclusion and, if appropriate, approve audit criteria and recommend dosage guidelines;
(2) approve the proposed drug on a trial basis for a specified period of time;
(3) approve the proposed drug as a reserve drug, with guidelines;
(4) postpone the decision until a later meeting; or
(5) deny the proposed drug's inclusion.

(a) Changes to the HHSC Psychiatric Drug Formulary are based on need, effectiveness, risk, and cost as contained in current and unbiased biomedical literature.
(b) The HHSC Psychiatric Drug Formulary is updated and published once a year, at a minimum. Quarterly updates to the HHSC Psychiatric Drug Formulary, if any, will be listed in an Interim Formulary Update.

§306.359. Prescribing Non-formulary Drugs.
(a) Non-formulary drugs may be prescribed:
(1) if no formulary drug exists that is as safe or effective in the specified situation;
(2) if a limited trial of the drug appears to be safer or more effective than any drug listed in the formulary and the prescribing practitioner anticipates applying to have the drug added to the formulary;
(3) if the course of therapy established prior to the individual’s admission to the facility where he or she is being treated would be interrupted; or
(4) in an emergency.
(b) Each local authority shall develop and enforce written policies and procedures for monitoring and approving the prescribing of non-formulary drugs by its practitioners and contract practitioners.
(c) HHSC shall develop and enforce written policies and procedures for monitoring and approving the prescribing of non-formulary drugs by HHSC facility practitioners and facility contract practitioners.

§306.360. Adverse Drug Reactions.
(a) Each local authority shall develop written policies and procedures for reporting adverse drug reactions to the Food and Drug Administration.
(b) HHSC shall develop written policies and procedures for HHSC facilities for reporting adverse drug reactions to the Food and Drug Administration.

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 6, 2020.
TRD-202004161
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 206-5084

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE
CHAPTER 9. TITLE INSURANCE
SUBCHAPTER A. BASIC MANUAL OF RULES, RATES AND FORMS FOR THE WRITING OF TITLE INSURANCE IN THE STATE OF TEXAS

28 TAC §9.1

The Department of Insurance (TDI) proposes to amend 28 TAC §9.1 to adopt by reference an amended version of the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas (Basic Manual). The amendment to the Basic Manual updates Form T-51, Purchaser/Seller Insured Closing Service Letter (Form T-51) to implement House Bill 1614, 86th Legislature, Regular Session (2019).

EXPLANATION. Form T-51, which is part of the Basic Manual, is an insured closing letter that protects the buyer or seller if escrow funds are lost because of fraud or dishonesty by a title agent. Under Insurance Code §2702.002, Form T-51 can only be given if the sales price of real estate is more than the maximum amount for a covered claim under the Texas Title Insurance Guaranty Act (Guaranty Act).

The amendment to Form T-51 updates the minimum sales prices that can be covered under the form. The update is necessary to implement a change made by HB 1614.

HB 1614 amended Insurance Code §2602.256 to increase the maximum amount for a covered claim under the Guaranty Act from $250,000 to $500,000. The rule amendment updates Form T-51 to show $500,000 as the new threshold amount for coverage.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. David Muckerheide, assistant director of the Property and Casualty Lines Office, has determined that during each year of the first five years the proposed amendment is in effect, there will be no measurable fiscal impact on state and local governments as a result of enacting or administering the sections, other than that imposed by the statute. Mr. Muckerheide made this determination because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments. Mr. Muckerheide does not anticipate any measurable effect on local employment or the local economy because of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendment is in effect, Mr. Muckerheide expects that enacting the proposed amendment will have the public benefit of ensuring that TDI's rules conform to Insurance Code §2602.256, which HB 1614 amended to increase the maximum amount for a covered claim under the Guaranty Act, and Insurance Code §2702.002, which ties the threshold amount for coverage under Form T-51 to the maximum covered claim amount under the Guaranty Act.

Mr. Muckerheide expects that the proposed amendment will not increase the cost of compliance with Insurance Code §2702.002 because the amendment does not impose requirements beyond those in the statute. Insurance Code §2702.002 requires that the insured closing letter be used only if the amount of the transaction exceeds the limit established by the Guaranty Act. As a result, any cost associated with the amended Form T-51 results from statutory requirements and not from the proposed amendment.

Additionally, Mr. Muckerheide expects that while the proposed amendment will necessitate updating a form, it will not impose an economic cost on those required to comply with the amendment. All title forms used in Texas are promulgated by TDI, and title agents and underwriters subscribe to software vendors that electronically update any form changes and provide the most current form. There is typically no additional charge to update forms. Therefore, the proposed rule amendment does not impose a cost on regulated persons.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed amendment will not have an adverse economic effect on small or micro businesses, or on rural communities. As discussed in the Public Benefit and Cost Note section, the cost attributable to this proposal is the cost to update the amended form. The update requires only a minor change to the form to make the form consistent with statutory changes. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.045. TDI has determined that the proposed amendment will not impose a cost on regulated persons. Also, no additional rule amendments would be required under Government Code §2001.045 because the proposed amendment to Form T-51 is necessary to implement legislation. The proposed rule implements Insurance Code §2602.256, as amended by House Bill 1614, and Insurance Code §2702.002.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:
- will not create or eliminate a government program;
- will not require the creation of new employee positions or eliminate existing 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 create a new regulation;
- will not expand, limit, or repeal an existing regulation;
- will not increase or decrease the number of individuals subject to the rule’s applicability; and
- will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner’s right to property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI will consider any written comments on the proposal that are received by TDI no later than 5:00 p.m., Central Time, on November 23, 2020. Send your comments to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78711-2040.
To request a public hearing on the proposal, submit a request before the end of the comment period and separate from any comments to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78711-2040. The request for public hearing must be received by TDI no later than 5:00 p.m., Central Time, on November 23, 2020. If TDI holds a public hearing, TDI will consider written and oral comments presented at the hearing.


Insurance Code §2702.002 requires that insured closing and settlement letters be issued in the form and manner prescribed by the Commissioner.

Insurance Code §2551.003 authorizes the Commissioner to adopt rules that are necessary for the business of title insurance.

Insurance Code §36.001 authorizes the Commissioner to adopt any rules necessary to implement the powers and duties of the department under the Insurance Code and laws of this state.

CROSS-REFERENCE TO STATUTE. Section 9.1 implements Insurance Code §2602.256, as amended by HB 1614, and Insurance Code §2702.002.

§9.1. Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.
The Texas Department of Insurance adopts by reference the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas as amended, effective February 1, 2021 [March 2, 2019]. The document is available from the Texas Department of Insurance, Mail Code 104-PC, P.O. Box 149104, Austin, Texas 78711-2040. The document is also available on the TDI website at www.tdi.texas.gov, and by email from ChiefClerk@tdi.texas.gov.

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 6, 2020.
TRD-202004145
James Person
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 676-6587

CHAPTER 19. LICENSING AND REGULATION OF INSURANCE PROFESSIONALS
SUBCHAPTER R. UTILIZATION REVIEWS FOR HEALTH CARE PROVIDED UNDER A HEALTH BENEFIT PLAN OR HEALTH INSURANCE POLICY


The Texas Department of Insurance proposes to amend 28 TAC §§19.1702, 19.1705, 19.1709 - 19.1711, and 19.1716 - 19.1718, concerning utilization reviews for health care that is provided under a health benefit plan or a health insurance policy. These amendments implement House Bill 1584, HB 2486, HB 3041, and Articles 2 and 3 of Senate Bill 1742, all enacted by the 86th Legislature, Regular Session (2019).

EXPLANATION. Amending §§19.1702, 19.1705, 19.1709 - 19.1711, and 19.1716 - 19.1718 aligns the rules with statute and with one another, and it implements HB 1584, HB 2486, HB 3041, and SB 1742. All of these bills include statutory changes relating to utilization reviews for health care.

HB 1584 prohibits a health benefit plan that provides coverage for stage-four, advanced metastatic cancer and associated conditions (stage-IV cancer) from requiring the enrollee to fail to successfully respond to a different drug or prove history of failure of a different drug before providing coverage of a prescription drug that is consistent with best practices; supported by peer-reviewed, evidence-based literature; and approved by the United States Food and Drug Administration.

HB 2486 specifies preauthorization requirements for employee benefit plans or health policies that provide dental benefits.

HB 3041 requires health benefit plan issuers that are subject to Insurance Code Chapter 1222 and that require preauthorization as a condition of payment to provide a preauthorization renewal process that allows a provider to request renewal of an existing preauthorization at least 60 days before it expires. It also requires insurers receiving a request to renew an existing preauthorization to review the request and issue a determination before the existing preauthorization expires, if practicable.

SB 1742 includes provisions requiring the following:

--a shorter response time for a health maintenance organization (HMO) to provide certain information concerning the preauthorization process to a participating physician or provider who requests it,

--a shorter response time for a preferred or exclusive provider health benefit plan issuer to provide certain information concerning the preauthorization process to a preferred provider who requests it,

--requirements for HMOs and preferred or exclusive provider health benefit plan issuers (collectively, health benefit plan issuers) to post certain preauthorization information on their websites, and

--new requirements utilization review agents (URAs) must meet.

The proposed amendments to the sections are described in the following paragraphs.

Section 19.1702. Applicability. A proposed amendment to §19.1702(b) adds Insurance Code Chapter 1222 and Chapter 1451, Subchapter E to the list of Insurance Code provisions that apply to the rules in 28 TAC Chapter 19, Subchapter R.

In addition, nonsubstantive punctuation and grammatical changes that reflect updates to statutory language are made to §19.1702(a)(1) to change existing rule text to say “the medical necessity, the appropriateness, or the experimental or investigational nature.”

Section 19.1705. General Standards of Utilization Review. A proposed amendment to §19.1705(a) adds a requirement that the physician who reviews and approves a URA’s utilization review plan be licensed to practice medicine in Texas.

The proposed amendments to §19.1705(b) designates the existing text as paragraph (1). Proposed paragraphs (2) and (3) are
added to prohibit a health benefit plan that provides coverage for stage-IV cancer from requiring that an enrollee with stage-IV cancer fail to successfully respond to a different drug or prove history of failure of a different drug before the plan provides coverage for certain prescription drugs.

In addition, nonsubstantive punctuation and grammatical changes that reflect updates to statutory language are made to §19.1705(d) to change existing rule text to say "the medical necessity, the appropriateness, or the experimental or investigational nature."

Section 19.1709. Notice of Determinations Made in Utilization Review. As proposed to be amended, the section is revised to provide timeframes for requesting renewal of an existing preauthorization and issuing the determination on the request.

The amendments add new subsection (b), which provides that health benefit plan issuers that require preauthorization as a condition for payment must provide a renewal process that allows for the renewal of a preauthorization to be requested at least 60 days before the existing preauthorization expires. The subsections that follow new subsection (b) are redesignated as appropriate to reflect the addition of the new subsection.

The amendments also add new paragraph (4) to redesignated subsection (e). Proposed new §19.1709(e)(4) requires that a URA review a request to renew a preauthorization and make and issue a determination before the existing preauthorization expires, if practicable.

Section 19.1710. Requirements Prior to Issuing an Adverse Determination. The proposed amendments to §19.1710 are nonsubstantive punctuation and grammatical changes that reflect updates to statutory language in the first paragraph of §19.1710 to change existing rule text to say "the medical necessity, the appropriateness, or the experimental or investigational nature."

Section 19.1711. Written Procedures for Appeal of Adverse Determinations. The proposed amendments to §19.1711(a)(6) add text to clarify that the requirements of the paragraph concerning review by a particular type of specialty provider are available to the health care provider either when appealing an adverse determination or after an adverse determination appeal has been denied. The proposed amendments to paragraph (6) also revise text to clarify that the health care provider merely needs to request a particular type of specialty provider review the case and is no longer required to provide good cause in writing for the request.

The proposed amendments to §19.1711(a)(7) revise text to clarify that the requirement to have a method for expedited appeals applies in regard to denial of another service if the requesting health care provider includes a written statement with supporting documentation that the service is necessary to treat a life-threatening condition or prevent serious harm to the patient.

In addition, nonsubstantive punctuation and grammatical changes that reflect updates to statutory language are made to §19.1711(a)(5) to change existing rule text to say "the medical necessity, the appropriateness, or the experimental or investigational nature." Another nonsubstantive grammatical change was made to §19.1711(a)(7) to move the placement of existing rule text "is available" to improve the rule's clarity.

Section 19.1716. Specialty URA. The proposed amendments to §19.1716 revise subsections (b) and (d) to specify that utilization review of specialty health care services must be conducted by a health care provider licensed or authorized in Texas to provide the specialty health care service being reviewed.

In addition, nonsubstantive punctuation and grammatical changes that reflect updates to statutory language are made to §19.1716(f), changing existing rule text to say "the medical necessity, the appropriateness, or the experimental or investigational nature."

Section 19.1717. Independent Review of Adverse Determinations. The proposed amendment to §19.1717(a) revises a reference to §19.1709(d)(3), changing it to §19.1709(e)(3) to reflect the proposed redesignation of subsection (d) as (e) in that section. In addition, a nonsubstantive punctuation change is made to §19.1717(c) to reflect TDI's current rule drafting style that "internet" not be capitalized.

Section 19.1718. Preauthorization for Health Maintenance Organizations and Preferred Provider Benefit Plans. The proposed §19.1718(c) revises the deadline for health benefit plan issuers that use a preauthorization process to provide a list of the medical care and health care services that require preauthorization as well as information about the preauthorization process to preferred providers who request this information, changing the deadline from the 10th to the fifth working day after the date a request is made, for consistency with the provisions of SB 1742. In addition, it replaces the "and" in existing text with "or" to reflect a change in statutory language so that the subsection applies to health benefit plan issuers that use a preauthorization process for "medical care or health care services."

The amendments add new subsection (j) to address the posting of preauthorization requirements for medical and health care services. This subsection requires an HMO or a preferred provider benefit plan that uses a preauthorization process for medical care or health care services to make the requirements and information about the preauthorization process readily accessible to enrollees, physicians, health care providers, and the general public by posting the requirements and information on the HMO's or the preferred provider benefit plan's public internet website. The subsection describes requirements applicable to the preauthorization requirements and information; it addresses how an HMO or preferred provider benefit plan should handle licensed, proprietary, or copyrighted material; it addresses changes to preauthorization requirements; it provides a remedy for noncompliance with the subsection; and it specifies that the provisions of the subsection may not be waived, voided, or nullified by contract.

The amendments add new subsection (k), to address preauthorizations for employee benefit plans or health policies that provide dental benefits. The subsection addresses applicability of relevant definitions to prior authorization for dental care services under an employee benefit plan or health insurance policy. The subsection also addresses what an employee benefit plan or health insurance policy provider or issuer must provide to a dentist in a written prior authorization of benefits for a dental care service. The subsection also addresses what an employee benefit plan or health insurance policy provider or issuer must provide in a denial of a dental care service.

The amendments add new subsection (l), to address preauthorization requests to renew existing preauthorizations. The subsection specifies requirements that apply if preauthorization is required as a condition of payment for a medical or health care service, stating that a preauthorization renewal process must be provided that allows the renewal of an existing preauthorization.
to be requested by a physician or health care provider at least 60 days before the date the preauthorization expires. The sub-
section also states that if a request from a physician or health care provider to renew an existing preauthorization is received before an existing preauthorization expires, the request must be reviewed and a determination indicating whether the medical or health care service is preauthorized issued before the existing preauthorization expires, if practicable.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATE-
MENT. Debra Diaz-Lara, director of the Managed Care and Quality Assurance Office, has determined that during each year of the first five years the proposed amendments are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the sections, other than that imposed by statute. This determination was made because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Ms. Diaz-Lara does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments are in effect, Ms. Diaz-Lara expects that enforcing the proposed amendments will have the public benefits of ensuring that TDI's rules conform with statutory changes regarding preauthorization and utilization reviews adopted by HB 1584, HB 2486, HB 3041 and SB 1742.

Ms. Diaz-Lara expects that the proposed amendments will not increase the cost of compliance with HB 1584, HB 2486, HB 3041 and SB 1742 because they do not impose requirements beyond those explicitly provided for in the statutes and do not include any discretionary decisions or interpretations by TDI.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEX-
IBILITY ANALYSIS. TDI has determined that the proposed amendments will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities. This is because the proposed amendments implement the statutory changes adopted in HB 1584, HB 2486, HB 3041, and SB 1742. Regardless of whether TDI adopts the proposed amendments, small or micro businesses are required to comply with the statutes. The proposed amendments do not go beyond the explicit statutory requirements and do not include any discretionary decisions or interpretations by TDI. The proposed amendments do not apply to any rural communities. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal does not impose a cost on regulated persons and no additional rule amendments are required under Government Code §2001.0045 because the proposed amendments to §§19.1702, 19.1705, 19.1709 - 19.1711, 19.1716 - 19.1718 do not go beyond the requirements provided in the legislation they implement and do not include any discretionary interpretations or decisions. The proposed rule amendments implement the following provisions:

--Insurance Code §§843.348, 843.3481 - 3483, 1301.135, 1301.1351 - 1353, 4201.151, 4201.206, 4201.356, 4201.357, and 4201.453, as added or amended by SB 1742.

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments are in effect the proposed rule:

- will not create or eliminate a government program;
- will not require the creation of new employee positions or the elimination of existing 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 create a new regulation;
- will expand an existing regulation and will not limit or repeal an existing regulation;
- will not increase or decrease the number of individuals subject to the rule's applicability; and
- will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI will consider any written comments on the proposal that are received by TDI no later than 5:00 p.m. Central Time, on November 23, 2020. Send your comments to Chief Clerk@tdi.texas.gov; or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

To request a public hearing on the proposal, submit a request before the end of the comment period, and separate from any comments, to Chief Clerk@tdi.texas.gov; or to the Office of the Chief Clerk, MC 112-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. The request for a public hearing must be received by the department no later than 5:00 p.m. Central Time, on November 23, 2020. If TDI holds a public hearing, TDI will consider written and oral comments presented at the hearing.


Insurance Code §843.151 allows the Commissioner to adopt reasonable rules as necessary and proper to implement Insurance Chapter 843, addressing HMOs.

Insurance Code §1301.007 provides that the Commissioner adopt rules as necessary to implement Chapter 1301 addressing preferred provider plans.

Insurance Code §4201.003 allows the Commissioner to adopt rules to implement Chapter 4201 addressing URAs.

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

CROSS-REFERENCE TO STATUTE. The amendments to §19.1702 implement Insurance Code §§1222.0003, 1222.0004, and 1451.208.

The amendments to §19.1705 implement Insurance Code §4201.151 and §1369.213.

The amendments to §19.1709 implement Insurance Code §1222.0003 and §1222.0004.

The amendments to §19.1710 implement Insurance Code §4201.206.

The amendments to §19.1711 implement Insurance Code §4201.356 and §4201.357.

The amendments to §19.1713 implement Insurance Code §4201.151 and §1369.213.


§19.1702.  Applicability.

(a) Limitations on applicability. Except as provided in Insurance Code Chapter 4201, this subchapter applies to utilization review performed under a health benefit plan or a health insurance policy.

(1) This subchapter does not apply to utilization review performed under workers' compensation insurance coverage.

(2) This subchapter does not apply to a person who provides information to an enrollee; an individual acting on behalf of an enrollee; or an enrollee's physician, doctor, or other health care provider about scope of coverage or benefits, and does not determine the medical necessity, or appropriateness, or the experimental or investigational nature of health care services.

(b) Applicability of other law. In addition to the requirements of this subchapter, provisions of Insurance Code Chapter 843, concerning Health Maintenance Organizations; Insurance Code Chapter 1222, concerning Preauthorization for Medical or Health Care Service; Insurance Code Chapter 1301, concerning Preferred Provider Benefit Plans; Insurance Code Chapter 1352, concerning Brain Injury; [and] Insurance Code Chapter 1369, concerning Benefits Related to Prescription Drugs and Devices and Related Services; and Insurance Code Chapter 1451, Subchapter E, concerning Dental Care Benefits in Health Insurance Policies or Employee Benefit Plans, apply to this subchapter.

§19.1705.  General Standards of Utilization Review.

(a) Review of utilization review plan. The utilization review plan must be reviewed and approved by a physician licensed to practice medicine in Texas and conducted under standards developed and periodically updated with input from both primary and specialty physicians, doctors, and other health care providers, as appropriate.

(b) Special circumstances.

(1) A utilization review determination must be made in a manner that takes into account special circumstances of the case [into account] that may require deviation from the norm stated in the screening criteria or relevant guidelines. Special circumstances include, but are not limited to, an individual who has a disability, acute condition, or life-threatening illness.

(2) If coverage is available for stage-four advanced, metastatic cancer and associated conditions, as defined by Insurance Code §1369.211, the URA cannot require, before coverage of a prescription drug, that the enrollee:

(A) fail to successfully respond to a different drug; or

(B) prove a history of failure of a different drug.

(3) Paragraph (2) of this subsection only applies to a drug the use of which is:

(A) consistent with best practices for the treatment of stage-four advanced, metastatic cancer or an associated condition, as defined by Insurance Code §1369.211;

(B) supported by peer-reviewed, evidence-based literature; and

(C) approved by the United States Food and Drug Administration.

(c) Screening criteria. Each URA must utilize written screening criteria that are evidence-based, scientifically valid, outcome-focused, and that comply with the requirements in Insurance Code §4201.153. The screening criteria must also recognize that if evidence-based medicine is not available for a particular health care service provided, the URA must utilize generally accepted standards of medical practice recognized in the medical community.

(d) Referral and determination of adverse determinations. Adverse determinations must be referred to and may only be determined by an appropriate physician, doctor, or other health care provider with appropriate credentials under §19.1706 of this title (relating to Requirements and Prohibitions Relating to Personnel) to determine the medical necessity, the appropriateness, or the experimental or investigational nature[s] of health care services.

(e) Delegation of review. A URA, including a specialty URA, may delegate the utilization review to qualified personnel in a hospital or other health care facility in which the health care services to be reviewed were, or are, to be provided. The delegation does not relieve the URA of full responsibility for compliance with this subchapter and Insurance Code Chapter 4201, including the conduct of those to whom utilization review has been delegated.

(f) Complaint system. The URA must develop and implement procedures for the resolution of oral or written complaints initiated by enrollees, individuals acting on behalf of the enrollee, or health care providers concerning the utilization review. The URA must maintain records of complaints for three years from the date the complaints are filed. The complaints procedure must include a requirement for a written response to the complainant by the agent within 30 calendar days. The written response must include TDI's address, toll-free telephone number, and a statement explaining that a complainant is entitled to file a complaint with TDI.


(a) Notice requirements. A URA must send written notification to the enrollee or an individual acting on behalf of the enrollee and the enrollee's provider of record, including the health care provider who rendered the service, of a determination made in a utilization review.

(b) Renewal of existing preauthorizations. If a health benefit plan issuer subject to Insurance Code Chapter 1222 requires preauthorization as a condition of payment for a medical or health care service, the URA must provide a preauthorization renewal process that allows a physician or health care provider to request renewal of an existing preauthorization at least 60 days before the date the preauthorization expires.
(c) [¶6] Required notice elements. In all instances of a prospective, concurrent, or retrospective utilization review determination, written notification of the adverse determination by the URA must include:

1. the principal reasons for the adverse determination;
2. the clinical basis for the adverse determination;
3. a description or the source of the screening criteria that were utilized as guidelines in making the determination;
4. the professional specialty of the physician, doctor, or other health care provider that made the adverse determination;
5. a description of the procedure for the URA's complaint system as required by §19.1705 of this title (relating to General Standards of Utilization Review);
6. a description of the URA's appeal process, as required by §19.1711 of this title (relating to Written Procedures for Appeal of Adverse Determination);
7. a copy of the request for a review by an IRO form, available at www.tdi.texas.gov [www.tdi.texas.gov/forms];
8. notice of the independent review process with instructions that:

   A. request for a review by an IRO form must be completed by the enrollee, an individual acting on behalf of the enrollee, or the enrollee's provider of record and be returned to the insurance carrier or URA that made the adverse determination to begin the independent review process; and
   
   B. the release of medical information to the IRO, which is included as part of the independent review request for a review by an IRO form, must be signed by the enrollee or the enrollee's legal guardian; and

9. a description of the enrollee's right to an immediate review by an IRO and of the procedures to obtain that review for an enrollee who has a life-threatening condition or who is denied the provision of prescription drugs or intravenous infusions for which the patient is receiving benefits under the health insurance policy.

(d) [¶7] Determination concerning an acquired brain injury. In addition to the notification required by this section, a URA must comply with this subsection in regard to a determination concerning an acquired brain injury as defined by §21.3102 of this title (relating to Definitions). Not later than three business days after the date an individual requests utilization review or requests an extension of coverage based on medical necessity or appropriateness, a URA must provide notification of the determination through a direct telephone contact to the individual making the request. This subsection does not apply to a determination made for coverage under a small employer health benefit plan.

(e) [¶8] Prospective and concurrent review.

1. Favorable determinations. The written notification of a favorable determination made in utilization review must be mailed or electronically transmitted as required by Insurance Code §4201.302.

2. Preauthorization numbers. A URA must ensure that preauthorization numbers assigned by the URA comply with the data and format requirements contained in the standards adopted by the U.S. Department of Health and Human Services in 45 C.F.R. §162.1102, (relating to Standards for Health Care Claims or Equivalent Encounter Information Transaction), based on the type of service in the preauthorization request.

(3) Required time frames. Except as otherwise provided by the Insurance Code, the time frames for notification of the adverse determination begin from the date of the request and must comply with Insurance Code §4201.304. A URA must provide the notice to the provider of record or other health care provider not later than one hour after the time of the request when denying post-stabilization care subsequent to emergency treatment as requested by a provider of record or other health care provider. The URA must send written notification within three working days of the telephone or electronic transmission.

(4) Required timeframe for preauthorization renewal requests. A URA must review a request to renew a preauthorization for a medical or health care service and make and issue a determination before the existing preauthorization expires, if practicable. The determination must indicate whether the medical or health care service is preauthorized.

(f) [¶9] Retrospective review.

1. The URA must develop and implement written procedures for providing the notice of adverse determination for retrospective utilization review, including the time frames for the notice of adverse determination, that comply with Insurance Code §4201.305 and this section.

2. When a retrospective review of the medical necessity, appropriateness, or the experimental or investigational nature of the health care services is made in relation to health coverage, the URA may not require the submission or review of a mental health therapist's process or progress notes that relate to the mental health therapist's treatment of an enrollee's mental or emotional condition or disorder. This prohibition extends to requiring an oral, electronic, facsimile, or written submission or rendition of a mental health therapist's process or progress notes. This prohibition does not preclude requiring submission of:

   A. an enrollee's mental health medical record summary; or
   
   B. medical records or process or progress notes that relate to treatment of conditions or disorders other than a mental or emotional condition or disorder.

§19.1710. Requirements Prior to Issuing an Adverse Determination. In any instance in which the URA is questioning the medical necessity, the appropriateness, or the experimental or investigational nature of the health care services prior to the issuance of an adverse determination, the URA must afford the provider of record a reasonable opportunity to discuss the plan of treatment for the enrollee with a physician. The discussion must include, at a minimum, the clinical basis for the URA's decision and a description of documentation or evidence, if any, that can be submitted by the provider of record that, on appeal, might lead to a different utilization review decision.

1. The URA must provide the URA's telephone number so that the provider of record may contact the URA to discuss the pending adverse determination.

2. The URA must maintain, and submit to TDI on request, documentation that details the discussion opportunity provided to the provider of record, including the date and time the URA offered the opportunity to discuss the adverse determination, the date and time that the discussion, if any, took place, and the discussion outcome.

§19.1711. Written Procedures for Appeal of Adverse Determinations.

(a) Appeal of prospective or concurrent review adverse determinations. Each URA must comply with its written procedures for appeals. The written procedures for appeals must comply with Insurance
Code Chapter 4201, Subchapter H, concerning Appeal of Adverse Determination, and must include provisions that specify the following:

(1) Time frames for filing the written or oral appeal, which may not be less than 30 calendar days after the date of issuance of written notification of an adverse determination.

(2) An enrollee, an individual acting on behalf of the enrollee, or the provider of record may appeal the adverse determination orally or in writing.

(3) An appeal acknowledgement letter must:

(A) be sent to the appealing party within five working days from receipt of the appeal;
(B) acknowledge the date the URA received the appeal;
(C) include a list of relevant documents that must be submitted by the appealing party to the URA; and
(D) include a one-page appeal form to be filled out by the appealing party when the URA receives an oral appeal of an adverse determination.

(4) Appeal decisions must be made by a physician who has not previously reviewed the case.

(5) In any instance in which the URA is questioning the medical necessity, the appropriateness, or the experimental or investigational nature, of the health care services prior to issuance of adverse determination, the URA must afford the provider of record a reasonable opportunity to discuss the plan of treatment for the enrollee with a physician. The provision must require that the discussion include, at a minimum, the clinical basis for the URA's decision.

(6) If an appeal is requested or denied and, within 10 working days from the request or denial, the health care provider requests [set forth in writing good cause for having] a particular type of specialty provider review the case, the appeal or the decision denying the appeal [denial] must be reviewed by a health care provider in the same or similar specialty that typically manages the medical, dental, or specialty condition, procedure, or treatment under discussion for review of the adverse determination. The specialty review must be completed within 15 working days of receipt of the request. The provision must state that notification of the appeal under this paragraph must be in writing.

(7) In addition to the written appeal, a method for expedited appeals is available for denials of emergency care, [denials, denials of care for life-threatening conditions, denials of] continued stays for hospitalized enrollees, or [denials of] prescription drugs or intravenous infusions for which an enrollee is receiving benefits under the health insurance policy; [and] adverse determinations of a step therapy protocol exception request under Insurance Code §1369.0546; or a denial of another service if the requesting health care provider includes a written statement with supporting documentation that the service is necessary to treat a life-threatening condition or prevent serious harm to the patient [is available]. The provision must state that:

(A) the procedure must include a review by a health care provider who has not previously reviewed the case and who is of the same or a similar specialty as the health care provider that typically manages the medical condition, procedure, or treatment under review;
(B) an expedited appeal must be completed based on the immediacy of the medical or dental condition, procedure, or treatment, but may in no event exceed one working day from the date all information necessary to complete the appeal is received; and
(C) an expedited appeal determination may be provided by telephone or electronic transmission but must be followed with a letter within three working days of the initial telephonic or electronic notification.

(8) After the URA has sought review of the appeal of the adverse determination, the URA must issue a response letter to the enrollee or an individual acting on behalf of the enrollee, and the provider of record, explaining the resolution of the appeal. If there is an adverse determination of the appeal, the letter must include:

(A) a statement of the specific medical, dental, or contractual reasons for the resolution;
(B) the clinical basis for the decision;
(C) a description of or the source of the screening criteria that were utilized in making the determination;
(D) the professional specialty of the physician who made the determination;
(E) notice of the appealing party's right to seek review of the adverse determination by an IRO under §19.1717 of this title (relating to Independent Review of Adverse Determinations);
(F) notice of the independent review process;
(G) a copy of a request for a review by an IRO form; and
(H) procedures for filing a complaint as described in §19.1705(f) of this title (relating to General Standards of Utilization Review).

(9) A statement that the appeal must be resolved as soon as practical, but, under Insurance Code §4201.359 and §1352.006, in no case later than 30 calendar days after the date the URA receives the appeal from the appealing party referenced under paragraph (3) of this subsection.

(10) In a circumstance involving an enrollee's life-threatening condition or the denial of prescription drugs or intravenous infusions for which the enrollee is receiving benefits under the health insurance policy, the enrollee is entitled to an immediate appeal to an IRO and is not required to comply with procedures for an appeal of the URA's adverse determination.

(b) Appeal of retroactive review adverse determinations. A URA must maintain and make available a written description of the appeal procedures involving an adverse determination in a retroactive review. The written procedures for appeals must specify that an enrollee, an individual acting on behalf of the enrollee, or the provider of record may appeal the adverse determination orally or in writing. The appeal procedures must comply with:

(1) Chapter 21, Subchapter T, of this title (relating to Submission of Clean Claims), if applicable;
(2) Section 19.1709 of this title (relating to Notice of Determinations Made in Utilization Review), for retrospective utilization review adverse determination appeals; and
(3) Insurance Code §4201.359.

(c) Appeals concerning an acquired brain injury. A URA must comply with this subsection in regard to a determination concerning an acquired brain injury as defined by §21.3102 of this title (relating to Definitions). Not later than three business days after the date on which an individual requests utilization review or requests an extension of coverage based on medical necessity or appropriateness, a URA must provide notification of the determination through a direct telephone
contact to the individual making the request. This subsection does not apply to a determination made for coverage under a small employer health benefit plan.

§19.1716. Specialty URA.

(a) Application. To be certified or registered as a specialty URA, an applicant must submit to TDI the application, information, and fee required in §19.1704 of this title (relating to Certification or Registration of URAs).

(b) Same specialty required. A specialty URA must conduct utilization review under the direction of a health care provider who is of the same specialty as the agent and who is licensed or otherwise authorized to provide the specialty health care service in Texas [by a state licensing agency in the United States]. To conduct utilization review, a specialty URA must be of the same specialty as the health care provider who ordered the service. For example, when conducting utilization review of prescription drugs prescribed by a physician with a specialty in neurological surgery, the specialty URA must be a physician with a specialty in neurological surgery.

(c) Rule requirements. A specialty URA is subject to the requirements of this subchapter, except for the following provisions:

(1) Section 19.1705(a) of this title (relating to General Standards of Utilization Review);

(2) Section 19.1706(a), (c), and (d) of this title (relating to Requirements and Prohibitions Relating to Personnel);

(3) Section 19.1710 of this title (relating to Requirements Prior to Issuing Adverse Determination); and

(4) Section 19.1711(a)(4) - (6) of this title (relating to Written Procedures for Appeal of Adverse Determination).

(d) Utilization review plan. A specialty URA must have its utilization review plan, including appeal requirements, reviewed by a health care provider of the appropriate specialty who is licensed or otherwise authorized to provide the specialty health care service in Texas, and the plan must be implemented under standards developed with input from a health care provider of the appropriate specialty who is licensed or otherwise authorized to provide the specialty health care service in Texas. The specialty URA must have written procedures to ensure that these requirements are implemented.

(e) Requirements of employed or contracted physicians, doctors, other health care providers, and personnel.

(1) Physicians, doctors, other health care providers, and personnel employed by or under contract with the specialty URA to perform utilization review must be appropriately trained, qualified, and currently licensed.

(2) Personnel conducting specialty utilization review must hold an unrestricted license, an administrative license issued by a state licensing board, or be otherwise authorized to provide health care services by a licensing agency in the United States.

(f) Reasonable opportunity for discussion. In any instance in which a specialty URA questions the medical necessity, the appropriateness, or the experimental or investigational nature of the health care services, the health care provider of record must, prior to the issuance of an adverse determination, be afforded a reasonable opportunity to discuss the plan of treatment for the patient and the clinical basis for the decision of the URA with a health care provider of the same specialty as the URA. The discussion must include, at a minimum, the clinical basis for the specialty URA's decision and a description of documentation or evidence, if any, that can be submitted by the provider of record that, on appeal, might lead to a different utilization review decision.

(1) The specialty URA's telephone number must be provided to the provider of record so that the provider of record may contact the specialty URA to discuss the pending adverse determination. For a retrospective utilization review, the specialty URA must allow the provider of record five working days to respond orally or in writing.

(2) The specialty URA must maintain, and submit to TDI on request, documentation that details the discussion opportunity provided to the provider of record, including the date and time the specialty URA offered the opportunity to discuss the adverse determination; the date and time that the discussion, if any, took place; and the discussion outcome.

(g) Appeal. The decision in any appeal of an adverse determination by a specialty URA must be made by a physician or other health care provider who has not previously reviewed the case and who is of the same specialty as the specialty URA that made the adverse determination.


(a) Notification for life-threatening conditions. For life-threatening conditions, notification of adverse determination by a URA must be provided within the timeframes specified in §19.1709(c)(3) [§19.1709(c)(3)] of this title (relating to Notice of Determinations Made in Utilization Review).

(1) At the time of notification of the adverse determination, the URA must provide to the enrollee or individual acting on behalf of the enrollee, and to the enrollee's provider of record, the notice of the independent review process and a copy of the request for a review by an IRO form. The notice must describe how to obtain independent review of the adverse determination.

(2) The enrollee, individual acting on behalf of the enrollee, or the enrollee's provider of record must determine the existence of a life-threatening condition on the basis that a prudent layperson possessing an average knowledge of medicine and health would believe that the enrollee's disease or condition is a life-threatening condition.

(b) Appeal of adverse determination involving life-threatening condition. Any party who receives an adverse determination involving a life-threatening condition or whose appeal of an adverse determination is denied by the URA may seek review of that determination or denial by an IRO assigned under Insurance Code Chapter 4202 and Chapter 12 of this title (relating to Independent Review Organizations).

(c) Independent review involving life-threatening and non life-threatening conditions. A URA, or insurance carrier that made the adverse determination, must notify TDI within one working day from the date the request for an independent review is received. The URA, or insurance carrier that made the adverse determination, must submit the completed request for a review by an IRO form to TDI through TDI's internet [internet] website.

(1) Assignment of IRO. TDI will, within one working day of receipt of a complete request for independent review, randomly assign an IRO to conduct an independent review and notify the URA, payor, IRO, the enrollee or individual acting on behalf of the enrollee, enrollee's provider of record, and any other providers listed by the URA as having records relevant to the review of the assignment.

(2) Payor and URA compliance. The payor and URA must comply with the IRO's determination with respect to the medical ne-
(3) Costs of independent review. The URA must pay for the independent review and may recover costs associated with the independent review from the payor.


(a) The words and terms defined in Insurance Code Chapter 1301 and Chapter 843 have the same meaning when used in this section, except as otherwise provided by this subchapter, unless the context clearly indicates otherwise.

(b) An HMO or preferred provider benefit plan that requires preauthorization as a condition of payment to a preferred provider must comply with the procedures of this section for determinations of medical necessity, appropriateness, or the experimental or investigational nature of care for those services the HMO or preferred provider benefit plan identifies under subsection (c) of this section.

(c) An HMO or preferred provider benefit plan that uses a preauthorization process for medical care or health care services must provide to each contracted preferred provider, not later than the fifth [fourth] working day after the date a request is made, a list of medical care and health care services that allows a preferred provider to determine which services require preauthorization and information concerning the preauthorization process.

(d) An HMO or preferred provider benefit plan must issue and transmit a determination indicating whether the proposed medical or health care services are preauthorized. This determination must be issued and transmitted once a preauthorization request for proposed services that require preauthorization is received from a preferred provider. The HMO or preferred provider benefit plan must respond to a request for preauthorization within the following time periods:

   (1) For services not included under paragraphs (2) and (3) of this subsection, a determination must be issued and transmitted not later than the third calendar day after the date the request is received by the HMO or preferred provider benefit plan. If the request is received outside of the period requiring the availability of appropriate personnel as required in subsections (e) and (f) of this section, the determination must be issued and transmitted within three calendar days from the beginning of the next time period requiring appropriate personnel.

   (2) If the proposed medical or health care services are for concurrent hospitalization care, the HMO or preferred provider benefit plan must issue and transmit a determination indicating whether proposed services are preauthorized within 24 hours of receipt of the request, followed within three working days after the transmittal of the determination by a letter notifying the enrollee or the individual acting on behalf of the enrollee and the provider of record of an adverse determination. If the request for medical or health care services for concurrent hospitalization care is received outside of the period requiring the availability of appropriate personnel as required in subsections (e) and (f) of this section, the determination must be issued and transmitted within 24 hours from the beginning of the next time period requiring appropriate personnel.

   (3) If the proposed medical care or health care services involve post-stabilization treatment, or a life-threatening condition as defined in §19.1703 of this title (relating to Definitions), the HMO or preferred provider benefit plan must issue and transmit a determination indicating whether proposed services are preauthorized within the time appropriate to the circumstances relating to the delivery of the services and the condition of the enrollee, but in no case to exceed one hour from receipt of the request. If the request is received outside of the period requiring the availability of appropriate personnel as required in subsections (e) and (f) of this section, the determination must be issued and transmitted within one hour from the beginning of the next time period requiring appropriate personnel. The determination must be provided to the provider of record. If the HMO or preferred provider benefit plan issues an adverse determination in response to a request for post-stabilization treatment or a request for treatment involving a life-threatening condition, the HMO or preferred provider benefit plan must provide to the enrollee or individual acting on behalf of the enrollee, and the enrollee's provider of record, the notification required by §19.1717(a) and (b) of this title (relating to Independent Review of Adverse Determinations).

   (e) A preferred provider may request a preauthorization determination via telephone from the HMO or preferred provider benefit plan. An HMO or preferred provider benefit plan must have appropriate personnel as described in §19.1706 of this title (relating to Requirements and Prohibitions Relating to Personnel) reasonably available at a toll-free telephone number to provide the determination between 6:00 a.m. and 6:00 p.m., Central Time, Monday through Friday on each day that is not a legal holiday and between 9:00 a.m. and noon, Central Time, on Saturday, Sunday, and legal holidays. An HMO or preferred provider benefit plan must have a telephone system capable of accepting or recording incoming requests after 6:00 p.m., Central Time, Monday through Friday and after noon, Central Time, on Saturday, Sunday, and legal holidays and must acknowledge each of those calls not later than 24 hours after the call is received. An HMO or preferred provider benefit plan providing a preauthorization determination under subsection (d) of this section must, within three calendar days of receipt of the request, provide a written notification to the preferred provider.

   (f) An HMO providing routine vision services or dental health care services as a single health care service plan is not required to comply with subsection (e) of this section with respect to those services. An HMO providing routine vision services or dental health care services as a single health care service plan must:

   (1) have appropriate personnel as described in §19.1706 of this title reasonably available at a toll-free telephone number to provide the preauthorization determination between 8:00 a.m. and 5:00 p.m., Central Time, Monday through Friday on each day that is not a legal holiday;

   (2) have a telephone system capable of accepting or recording incoming requests after 5:00 p.m., Central Time, Monday through Friday and all day on Saturday, Sunday, and legal holidays, and must acknowledge each of those calls not later than the next working day after the call is received; and

   (3) when providing a preauthorization determination under subsection (d) of this section, within three calendar days of receipt of the request, provide a written notification to the preferred provider.

   (g) If an HMO or preferred provider benefit plan has preauthorized medical care or health care services, the HMO or preferred provider benefit plan may not deny or reduce payment to the physician or provider for those services based on medical necessity, appropriateness, or the experimental or investigational nature of care unless the physician or provider has materially misrepresented the proposed medical or health care services or has substantially failed to perform the preauthorized medical or health care services.

   (h) If an HMO or preferred provider benefit plan issues an adverse determination in response to a request made under subsection (d) of this section, a notice consistent with the provisions of §19.1709 of this title (relating to Notice of Determinations Made in Utilization Review) and §19.1710 of this title (relating to Requirements Prior to Issuing Adverse Determination) must be provided to the enrollee or an
individual acting on behalf of the enrollee, and the enrollee's provider of record. An enrollee, an individual acting on behalf of the enrollee, or the enrollee's provider of record may appeal any adverse determination under §19.1711 of this title (relating to Written Procedures for Appeal of Adverse Determination).

(i) This section applies to an agent or other person with whom an HMO or preferred provider benefit plan contracts to perform utilization review, or to whom the HMO or preferred provider benefit plan delegates the performance of preauthorization of proposed medical or health care services. Delegation of preauthorization services does not limit in any way the HMO or preferred provider benefit plan's responsibility to comply with all statutory and regulatory requirements.

(ii) The provisions in this subsection apply to an HMO or a preferred provider benefit plan that uses a preauthorization process for medical or health care services.

(iii) An HMO or a preferred provider benefit plan must make the requirements and information about the preauthorization process readily available to enrollees, physicians, health care providers, and the general public by posting the requirements and information on the HMO's or the preferred provider benefit plan's public internet website.

(iv) The preauthorization requirements and information described by paragraph (1) of this section must:

(A) be posted:

(i) conspicuously in a location on the public internet website that does not require the user to login or input personal information to view the information; except as provided by paragraph (3) or (4) of this subsection;

(ii) in a format that is easily searchable; and

(iii) in a format that uses design and accessibility standards defined in Section 508 of the U.S. Rehabilitation Act;

(B) except for the screening criteria under subparagraph (D)(iii) of this paragraph, be written:

(i) using plain language standards, such as the Federal Plain Language Guidelines found on www.PlainLanguage.gov; and

(ii) in language that aims to reach a 6th to 8th grade reading level, if the information is for enrollees and the public;

(C) include a detailed description of the preauthorization process and procedure; and

(D) include an accurate and current list of medical or health care services for which the HMO or the preferred provider benefit plan requires preauthorization that includes the following information specific to each service:

(i) the effective date of the preauthorization requirement;

(ii) a list or description of any supporting documentation that the HMO or preferred provider benefit plan requires from the physician or health care provider ordering or requesting the service to approve a request for that service;

(iii) the applicable screening criteria, which may include Current Procedural Terminology codes and International Classification of Diseases codes; and

(iv) statistics regarding the HMO's or the preferred provider benefit plan's preauthorization approval and denial rates for the service in the preceding calendar year, including statistics in the following categories:

(I) physician or health care provider type and specialty, if any;

(II) indication offered;

(III) reasons for request denial;

(IV) denials overturned on internal appeal;

(V) denials overturned by an independent review organization; and

(VI) total annual preauthorization requests, approvals, and denials for the service.

(3) This subsection may not be construed to require an HMO or a preferred provider benefit plan to provide specific information that would violate any applicable copyright law or licensing agreement. To comply with a posting requirement described by paragraph (2) of this subsection, an HMO or a preferred provider benefit plan may, instead of making that information publicly available on the HMO's or the preferred provider benefit plan's public internet website, supply a summary of the withheld information sufficient to allow a licensed physician or other health care provider, as applicable for the specific service, who has sufficient training and experience related to the service to understand the basis for the HMO's or the preferred provider benefit plan's medical necessity or appropriateness determinations.

(4) If a requirement or information described by paragraph (1) of this subsection is licensed, proprietary, or copyrighted material that the HMO or the preferred provider benefit plan has received from a third party with which the HMO or preferred provider benefit plan has contracted, to comply with a posting requirement described by paragraph (2) of this subsection, the HMO or the preferred provider benefit plan may, instead of making that information publicly available on the HMO's or the preferred provider benefit plan's public internet website, provide the material to a physician or health care provider who submits a preauthorization request using a nonpublic secured internet website link or other protected, nonpublic electronic means.

(5) The provisions in this paragraph apply when an HMO or a preferred provider benefit plan makes changes to preauthorization requirements.

(A) Except as provided by subparagraph (B) of this paragraph, not later than the 60th day before the date a new or amended preauthorization requirement takes effect, an HMO or a preferred provider benefit plan must provide notice of the new or amended preauthorization requirement and disclose the new or amended requirement in the HMO's or the preferred provider benefit plan's newsletter or network bulletin, if any, and on the HMO's or the preferred provider benefit plan's public internet website.

(B) For a change in a preauthorization requirement or process that removes a service from the list of medical and health care services requiring preauthorization or amends a preauthorization requirement in a way that is less burdensome to enrollees or participating physicians or health care providers, an HMO or a preferred provider benefit plan must provide notice of the change in the preauthorization requirement and disclose the change in the HMO's or the preferred provider benefit plan's newsletter or network bulletin, if any, and on the HMO's or the preferred provider benefit plan's public internet website not later than the 5th day before the date the change takes effect.

(C) Not later than the fifth day before the date a new or amended preauthorization requirement takes effect, an HMO or a
preferred provider benefit plan must update its public internet website to disclose the change to the HMO's or the preferred provider benefit plan's preauthorization requirements or process and the date and time the change is effective.

(6) In addition to any other penalty or remedy provided by law, an HMO or a preferred provider benefit plan that uses a preauthorization process for medical or health care services that violates this subsection with respect to a required publication, notice, or response regarding its preauthorization requirements, including by failing to comply with any applicable deadline for the publication, notice, or response, must provide an expedited appeal under Insurance Code §4201.357 for any health care service affected by the violation.

(7) The provisions of this subsection may not be waived, voided, or nullified by contract.

(k) The provisions of this subsection apply to dental care services under an employee benefit plan or health insurance policy that require prior authorization.

(1) In this subsection, the definitions in Texas Insurance Code §1451.201 for "dental care service," "employee benefit plan," and "health insurance policy" apply.

(2) In this subsection, "prior authorization" means a written and verifiable determination that one or more specific dental care services are covered under the patient's employee benefit plan or health insurance policy and are payable and reimbursable in a specific stated amount, subject to applicable coinsurance and deductible amounts. The term includes preauthorization and similar authorization. The term does not include "predetermination" as that term is defined by Insurance Code §1451.207(c).

(3) For services for which a prior authorization is required, on request of a patient or treating dentist, an employee benefit plan or health insurance policy provider or issuer must provide to the dentist a written prior authorization of benefits for a dental care service for the patient. The prior authorization must include a specific benefit payment or reimbursement amount. Except as provided by paragraph (4) of this subsection, the plan or policy provider or issuer may not pay or reimburse the dentist in an amount that is less than the amount stated in the prior authorization.

(4) An employee benefit plan or health insurance policy provider or issuer that preauthorizes a dental care service under paragraph (3) of this subsection may deny a claim for the dental care service or reduce payment or reimbursement to the dentist for the service only if:

(A) the denial or reduction is in accordance with the patient's employee benefit plan or health insurance policy benefit limitations, including an annual maximum or frequency of treatment limitation, and the patient met the benefit limitation after the date the prior authorization was issued;

(B) the documentation for the claim fails to reasonably support the claim as preauthorized;

(C) the preauthorized dental service was not medically necessary based on the prevailing standard of care on the date of the service, or is subject to denial under the conditions for coverage under the patient's plan or policy in effect at the time the service was preauthorized, because of a change in the patient's condition or because the patient received additional dental care after the date the prior authorization was issued;

(D) a payor other than the employee benefit plan or health insurance policy provider or issuer is responsible for payment of the claim;

(E) the dentist received full payment for the preauthorized dental care service on which the claim is based;

(F) the claim is fraudulent;

(G) the prior authorization was based wholly or partly on a material error in information provided to the employee benefit plan or health insurance policy provider or issuer by any person not related to the provider or the issuer; or

(H) the patient was otherwise ineligible for the dental care service under the patient's employee benefit plan or health insurance policy and the plan or policy issuer did not know, and could not reasonably have known, that the patient was ineligible for the dental care service on the date the prior authorization was issued.

(i) If a health benefit plan issuer subject to Insurance Code Chapter 1222 requires preauthorization as a condition of payment for a medical or health care service, the health benefit plan issuer must provide a preauthorization renewal process that allows a physician or health care provider to request renewal of an existing preauthorization at least 60 days before the date the preauthorization expires. When practicable, a URA must review and issue a determination on a renewal request before the existing preauthorization expires if the URA receives the request before the existing preauthorization expires. The determination must indicate whether the medical or health care service is preauthorized.

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 9, 2020.
TRD-202004214
James Person
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 676-6584

TITLE 30. ENVIRONMENTAL QUALITY
PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHAPTER 328. WASTE MINIMIZATION AND RECYCLING
SUBCHAPTER K. GOVERNMENTAL ENTITY RECYCLING AND PURCHASING OF RECYCLED MATERIALS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to repeal §328.203 and §328.204; and simultaneously proposes new §328.203 and §328.204.

Background and Summary of the Factual Basis for the Proposed Rules
The proposed rulemaking implements Texas Health and Safety Code (THSC), §§361.425 and §§361.426 to exempt certain governmental entities from compliance with recycling requirements. THSC, §§361.425 and §§361.426 require that governmental enti-
ties establish a recycling program, create procedures for a recycling program, and give preferences in purchasing to products made of recyclable materials if applicable criteria are met.

The proposed rulemaking would apply to governmental entities pertaining to purchasing preferences for products made of recyclable materials. The proposed rules would also provide an exemption available to governmental entities, if compliance with the recycling program or purchasing preferences would create a hardship for the governmental entity.

Section by Section Discussion

The commission proposes to repeal existing §328.203 and §328.204 in order to restructure and provide order and clarity to the provisions within Chapter 328, Subchapter K.

§328.203, Purchasing Preference for Recycled Materials

The commission proposes new §328.203 to require certain governmental entities to give preference to purchasing products made of recycled materials. New §328.203 includes the same language as repealed §328.204.

§328.204, Exemptions

The commission proposes new §328.204 to provide specific exemptions that are allowed under the rule as well as opportunities for an exemption request due to a hardship. New §328.204 includes the same language as repealed §328.203.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules. This rulemaking reorders sections within Chapter 328.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be improved readability of the Texas Administrative Code. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

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

Rural Communities Impact Assessment

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

Small Business and Micro-Business Assessment

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

Small Business Regulatory Flexibility Analysis

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

Government Growth Impact Statement

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

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. New §328.203 and §328.204 are proposed to restructure and provide order and clarity to the provisions within Subchapter K.

In addition, a regulatory impact analysis is not required because the proposed rulemaking does not meet any of the applicability criteria for requiring a regulatory analysis of a "Major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program, or; 4) adopt a rule solely under the general authority of the commission. Proposed new §328.203 and §328.204 do not exceed an express requirement of state law, federal law, or a requirement of a delegation agreement and were not developed solely under the general powers of the agency but are authorized by specific sections of the THSC that are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007.
The commission’s preliminary assessment indicates Texas Government Code, Chapter 2007, does not apply.

Under Texas Government Code, §2007.002(5), taking means: (A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

Promulgation and enforcement of the proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rulemaking is to restructure and provide order and clarity to the provisions within Subchapter K. The proposed rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these proposed rules would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

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

Announcement of Virtual Hearing

The commission will hold a virtual public hearing on this proposal on November 17, 2020, at 10:00 a.m. Central Standard Time. The virtual hearing is structured for the receipt of oral comments by interested persons. Individuals who register may present oral statements when called upon in order of registration. Open discussion will not be permitted during the virtual hearing; however, agency staff members will be available to discuss the proposal 30 minutes prior to and after the virtual hearing via the Team Live Event Q&A chat function.

Persons who do not have internet access or who have special communication or other accommodation needs who plan to attend the hearing should contact Sandy Wong, General Law Division at (512) 239-1802 or (800) RELAY-TX (TDD) to register. Accommodation requests should be made as far in advance as possible.

Registration

The hearing will be conducted remotely using an internet meeting service. Individuals who plan to attend the hearing and want to provide oral comments or want their attendance on record must register by November 13, 2020. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on November 16, 2020, to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at: https://teams.microsoft.com/l/meetup-join/19%3ameeting_MjY1NDBkNzctNDFiMi00MzQ0LThiNTEyTn00OTE2Xz4%00thread.v2?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bc9da80ba%22%2c%22Oid%22%3a%22ab3b64-6a49-48c6-af8-8255e80ab0ac%22%2c%22IsBroadcastMeeting%22%3atrue%7d.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to fax4808@tceq.texas.gov. Electronic comments may be submitted at: https://www6.tceq.texas.gov/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2020-041-328-AD. The comment period closes on November 24, 2020. Please only choose one form of submittal when submitting written comments.

Copies of the proposed rulemaking can be obtained from the commission’s website at https://www.tceq.texas.gov/rules/proposal_adopt.html. For further information, please contact Calen Roome, Public Education Unit, (512) 239-4621.

30 TAC §328.203, §328.204

Statutory Authority

The rules are repealed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The proposed rules are also repealed under Texas Health and Safety Code (THSC), §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste; THSC, §361.425, which provides that the commission shall adopt rules for administering governmental entity recycling programs; and THSC, §361.426, which provides that the commission shall adopt rules for administering governmental entity preferences for recycled products.

The proposed repealed rules implement TWC, §§5.102, 5.103, and 5.105 and THSC, §§361.024, 361.425, and 361.426.

§328.203. Exemptions.

§328.204. Purchasing Preference for Recycled Materials.
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 9, 2020.
The new rules are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §§5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The new rules are also proposed under Texas Health and Safety Code (THSC), §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste; THSC, §361.425, which provides that the commission shall adopt rules for administering governmental entity recycling programs; and THSC, §361.426, which provides that the commission shall adopt rules for administering governmental entity preferences for recycled products.

The proposed new rules implement TWC, §§5.102, 5.103, and 5.105 and THSC, §§361.024, 361.425, and 361.426.


A state agency, state court, or judicial agency not subject to Texas Government Code, Title 10, Subtitle D, and a county, municipality, school district, junior or community college, or special district shall give preference in purchasing to products made of recycled materials if the products meet applicable specifications as to quality and quality and the average price of the product is not more than 10% greater than the price of comparable nonrecycled products. Preferences will be applied in accordance with state procurement statutes and rules.

§328.204. Exemptions.

(a) This subchapter does not apply to:

(1) a school district with a student enrollment of less than 10,000 students; and

(2) a municipality with a population of less than 5,000, if compliance with this subchapter would create a hardship.

(b) A governmental entity may exclude one or more recyclable materials from their program if the commission finds that:

(1) a recycling program for a recyclable material is not available through their solid waste provider; or

(2) the inclusion of a recyclable material would create a hardship.

(c) A governmental entity may request additional consideration from the commission if compliance with this subchapter would create a hardship.

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 9, 2020.

TRD-202004206
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality

Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 239-2678

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TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 63. BOARD OF TRUSTEES

34 TAC §63.3, §63.4

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) Chapter 63, concerning Board of Trustees, by amending §63.3 (Election of Trustees (Nomination Process)) and §63.4 (Election of Trustees (Ballot)).

ERS is a constitutional trust fund established as set forth in Article XVI, §67, Texas Constitution, and further organized pursuant to Title 8, Tex. Gov't Code, as well as 34 Texas Administrative Code, §§61.1 et seq.

Section 63.3, concerning Election of Trustees (Nomination Process), is proposed to be amended to allow ERS to collect required signatures for potential candidates for election to the ERS Board of Trustees through a secure and efficient electronic verification process in addition to the current paper-based process and to allow for the use of personal identifiers that are not based on social security numbers. Section 63.4, concerning Election of Trustees (Ballot), is proposed to be amended to make its language consistent with the language of §63.3.

GOVERNMENT GROWTH IMPACT STATEMENT

ERS has determined that during the first five-year period the amended rule will be in effect:

(1) the proposed rule amendments will not create or eliminate a government program;

(2) implementation of the proposed rule amendments will not require the creation of new employee positions or eliminate existing employee positions;

(3) implementation of the proposed rule amendments will not require an increase or decrease in future legislative appropriations to the agency;

(4) the proposed rule amendments will not require an increase or decrease in fees paid to the agency;

(5) the proposed rule amendments will not create a new rule or regulation;

(6) the proposed rule amendments will not expand, limit, or repeal an existing rule or regulation;
(7) the proposed rule amendments will not increase or decrease the number of individuals subject to the rule’s applicability; and

(8) the proposed rule amendments will not positively or adversely affect the state’s economy.

Mr. Keith Yawn, Director of Strategic Initiatives, has determined that for the first five-year period the rules are in effect, there will be no fiscal implication for state or local government or local economies as a result of enforcing or administering the rules; and small businesses, micro-businesses, and rural communities will not be affected. The proposed rule amendments do not constitute a taking. Mr. Yawn has also determined that, to his knowledge, there are no known anticipated economic effects to persons who are required to comply with the rules as proposed, and the proposed rule amendments do not impose a cost on regulated persons.

Mr. Yawn also determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of adopting and complying with the rules would be to clarify the ability of ERS to put a process in place to allow potential candidates for election to the ERS Board of Trustees to collect required signatures through an electronic verification process in addition to the current paper-based process.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, Deputy Executive Director and General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.texas.gov. The deadline for receiving comments is November 23, 2020, at 10:00 a.m.

The amendments are proposed under Tex. Gov’t Code §815.102, which provides authorization for the ERS Board of Trustees to adopt rules necessary for the administration of the funds of the retirement system and regarding the transaction of any other business of the Board.

No other statutes are affected by the proposed amendments.

§63.3. Election of Trustees (Nomination Process).

Names may be placed in nomination for the office of trustee of the Employees Retirement System of Texas (system) in the following manner.

(1) A candidate, or his or her agency, must file a petition on a form approved by the system requesting the candidate’s name to be placed in nomination. The petition must be signed by 300 or more persons qualified to vote in the trustee election. The system will accept up to 600 signatures from each candidate.

(2) The signature of each person on a petition must be accompanied by that person’s printed or typed name, ZIP Code, and any other information requested by the system to confirm the signer’s identity [the last four digits of the person’s social security number]. No person may sign a petition for more than one candidate. To do so will cause the signatures of the person to be disqualified on all petitions.

(3) Blank petition forms may be reproduced and utilized provided the reproduction is an exact replica of the original document.

(4) Petitions must be received in the system offices on or before the close of business (3 p.m.) of a specific weekday set by the trustees. Signatures on petitions received after that time will not be counted.

(5) [45] Only those names of candidates whose petitions comply with this section will be presented on the ballot.

(6) [23] The board shall establish deadlines and other dates related to trustee elections [adopt a calendar governing the conduct of each trustee election]. Blank petitions shall be made available [distributed] by the system [to state agencies] at least 25 calendar days in advance of the deadline [return due date] established by the board. [trustees. Blank petitions will also be available to any requesting person.]

§63.4. Election of Trustees (Ballot).

(a) The order of names on the ballot will be set by drawing. All nominated candidates or their representatives are entitled to be present at the drawing. The time and location of the drawing will be set by the system.

(b) All candidates must submit within the time frame established by the system any information requested by the system for presentation on the ballot. Such information may include, but is not limited to:

(1) name as it is to appear on the ballot;

(2) current classification/exempt title and position as a state employee;

(3) name of current employing state agency; and

(4) other information the system determines may be helpful to persons qualified to vote in the election.

(c) In addition to the information required in subsection (b) of this section, the candidate shall provide, within the time frame provided by the system, his or her state agency mailing address, a statement of qualifications and position on system issues consisting of 250 words or less, and such additional information as the system may request. This information, in addition to that which will appear on an election ballot, will be made available to the electorate through a special system newsletter devoted to the trustee election process. This special edition of the newsletter will be made available to the electorate at the beginning of each election and will describe restrictions on the use of state funds to influence the outcome of any election.

(d) The system may contract with an election administrator to implement and monitor the election process. Balloting may be conducted electronically or in combination with a printed ballot.

(e) The system/election administrator will, at least 25 days in advance of the close of each election established by the election calendar, make ballots available to eligible voters. Upon request of the candidate, the system/election administrator will provide 500 ballots without preprinted names to each candidate.

(f) The system/election administrator will provide a 24-hour toll-free telephone line which eligible voters may use to request a printed ballot.

(g) Electronic ballots must [will] be completed and submitted to the system/election administrator in accordance with the instructions contained in the electronic voting format.

(h) Each candidate may designate one (1) person to observe the ballot counting process. No observer will be permitted to see complete ballots which indicate the identity of a voter and voter's candidate selection. No observer will be permitted to challenge the validity of ballots or disrupt the counting process in any way.
(i) The system/election administrator will disqualify ballots which do not meet the requirements and instructions specified in the electronic format or printed on the ballot.

(j) The Board, or its designee, shall certify the result of the election.

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 8, 2020.

TRD-202004186
Paula A. Jones
Deputy Executive Director and General Counsel
Employees Retirement System of Texas

Earliest possible date of adoption: November 22, 2020
For further information, please call: (877) 275-4377

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 9. PUBLIC SAFETY COMMUNICATIONS

SUBCHAPTER C. AMBER ALERT NETWORK FOR ABDUCTED CHILDREN

37 TAC §§9.21, 9.22, 9.24

The Texas Department of Public Safety (the department) proposes amendments to §§9.21, 9.22, and 9.24, concerning AMBER Alert Network For Abducted Children. The amendments to these rules reflect the removal of the graphic in §9.22 and the rule text indicates the request form for the alert now resides on the department's website. The acronym "Amber" has also been changed in the subchapter title and throughout the rule text to all caps.

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period these rules are in effect, the public benefit anticipated as a result of these rules will be publication of the new form for the AMBER Alert Network and notification of its new location on the department's website.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

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

Comments on this proposal may be submitted to Chief Dale Avant, Texas Department of Public Safety, Intelligence and Counterterrorism Division, P.O. Box 4087, Austin, Texas 78773. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.353(b), which authorizes the director to adopt rules to ensure proper implementation of the alert.

Texas Government Code, §411.352 - §411.358 is affected by this proposal.


The AMBER [Amber] Alert Network was developed as a statewide emergency response system for abducted children. The network is designed to be activated in instances involving true child abductions. Activation of the network outside the established criteria will ultimately cause the public to disregard the notifications and the system will lose effectiveness. In order to maintain a high level of effectiveness, the department and local law enforcement must ensure that the circumstances justifying activation are accurately evaluated in order to implement the network in a responsible manner. AMBER [Amber] Alert activations must be limited to those instances where the statutory criteria for activation are clearly established by the specific facts of the case.

§9.22. Local Law Enforcement Responsibility:

A local law enforcement agency with jurisdiction over the investigation of an abducted child may submit a request for activation of the AMBER [Amber] Alert Network. The request must be submitted using the appropriate Texas Department of Public Safety (DPS) form, available on the DPS website [on DPS Form MP-24]. A local law enforcement agency may submit the form after it has verified that all statutory criteria for activation are clearly established by the specific facts of the case.

[Figure: 37 TAC §9.22]


AMBER [Amber] Alert Network activations and deactivations are [will be] made according to the procedures specified in the current Statewide Texas AMBER [Amber] Alert Network Plan.

PROPOSED RULES  October 23, 2020  45 TexReg 7539
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 12, 2020.

TRD-202004224
D. Phillip Adkins
General Counsel
Texas Department of Public Safety

Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 424-5848

SUBCHAPTER D. SILVER ALERT NETWORK
37 TAC §9.32, §9.34

The Texas Department of Public Safety (the department) proposes amendments to §9.32 and 9.34, concerning Silver Alert Network. The amendments to these rules reflect the removal of the graphic in §9.32 and the rule text indicates the request form for the alert now resides on the department's website. Additionally, rule text has been modified from "Silver Alert standard operating procedures" to "Silver Alert standard guidelines".

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period these rules are in effect, the public benefit anticipated as a result of this rule will be publication of the new form for the Silver Alert Network and notification of its new location on the department's website.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

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

Comments on this proposal may be submitted to Chief Dale Avant, Texas Department of Public Safety, Intelligence and Counterterrorism Division, P.O. Box 4087, Austin, Texas 78773. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.383(b), which authorizes the director to adopt rules to ensure proper implementation of the alert.

Texas Government Code, §411.381 - §411.389 is affected by this proposal.

§9.32. Local Law Enforcement Responsibility.
A local law enforcement agency with jurisdiction over the investigation of a missing person may submit a request for activation of the Silver Alert Network. The request must be submitted using the appropriate Texas Department of Public Safety (DPS) form, available on the DPS website. [The request must be submitted on the Silver Alert Request Form (TDEM 36).] A local law enforcement agency may submit the form after it has verified that all statutory criteria for activation are clearly established by the specific facts of the case. Local law enforcement shall provide documentation of a diagnosed impaired mental condition with the request for activation.

[Figure: 37 TAC §9.22]

§9.34. Activation and Deactivation.
Silver Alert Network activations and deactivations are [will be] made according to the procedures specified in the current Silver Alert standard operating guidelines [procedures].

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 12, 2020.

TRD-202004225
D. Phillip Adkins
General Counsel
Texas Department of Public Safety

Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 424-5848

SUBCHAPTER E. ENDANGERED MISSING PERSONS ALERT
37 TAC §9.42, §9.44

The Texas Department of Public Safety (the department) proposes amendments to §9.42 and §9.44, concerning Endangered Missing Persons Alert. The amendments to these rules reflect the removal of the graphic in §9.44 and the rule text indicates the request form for the alert now resides on the department's website. Additional modifications include
changing "Endangered Missing Person Alert standard operating procedures" to "Endangered Missing Person Alert standard guidelines". Sections 411.351 - 411.359 cover both AMBER and Endangered Missing Person Alerts. Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period this rules are in effect, the public benefit anticipated as a result of these rules will be publication of the new form for the Endangered Missing Persons Alert Network and notification of its' new location on the department's website. The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

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

Comments on this proposal may be submitted to Chief Dale Avant, Texas Department of Public Safety, Intelligence and Counterterrorism Division, P.O. Box 4087, Austin, Texas 78773. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.353(b), which authorizes the director to adopt rules to ensure proper implementation of the alert.

Texas Government Code, §411.351 - §411.359 is affected by this proposal.

§9.42. Local Law Enforcement Responsibility.

A local law enforcement agency with jurisdiction over the investigation of a missing person may submit a request for activation of the Endangered Missing Persons Alert Network. The request must be submitted using the appropriate Texas Department of Public Safety (DPS) form, available on the DPS website. [The request must be submitted on the Endangered Missing Persons Alert Request Form, provided by the department.] If a local law enforcement agency determines to notify the department, the local law enforcement agency shall submit the form after it has verified that all criteria for activation are clearly established by the specific facts of the case. Local law enforcement shall provide documentation of a diagnosed intellectual disability with the request for activation.

[Figure: 37 TAC §9.42]

§9.44. Activation and Deactivation. Endangered Missing Persons Alert Network activations and deactivations are [will be] made according to the procedures specified in the current Endangered Missing Persons Alert standard operating guidelines [procedures].

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 12, 2020.

TRD-202004226
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 424-5848

SUBCHAPTER G. BLUE ALERT NETWORK

37 TAC §9.82, §9.84

The Texas Department of Public Safety (the department) proposes amendments to §9.82 and 9.84, concerning Blue Alert Network.

The amendments to these rules reflect the removal of the graphic in §9.82 and the rule text indicates the request form for the alert now resides on the department's website. Additionally, rule text has been modified from "Blue Alert standard operating procedures" to "Blue Alert standard guidelines".

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period these rules are in effect, the public benefit anticipated as a result of these rules will be publication of the new form for the Blue Alert Network and notification of its new location on the department's website.
The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

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

Comments on this proposal may be submitted to Chief Dale Avant, Texas Department of Public Safety, Intelligence and Counterterrorism Division, P.O. Box 4087, Austin, Texas 78773. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.443(b), which authorizes the director to adopt rules to ensure proper implementation of the alert.

Texas Government Code, §411.441 - §411.449 is affected by this proposal.

§9.82. Local Law Enforcement Responsibility.
A local law enforcement agency with jurisdiction over the investigation of a killed or a seriously injured officer may submit a request for activation of the Blue Alert network. The request must be submitted using the appropriate Texas Department of Public Safety (DPS) form, available on the DPS website. [The request must be submitted on the Blue Alert Request Form TDEM-52.] A local law enforcement agency may submit the form after it has verified that all statutory criteria for activation are clearly established by the specific facts of the case. Local law enforcement shall provide a detailed description of the missing suspect and, if applicable, any available portion of the license plate number of a motor vehicle used by the suspect. [Figure: 37 TAC §9.82]

§9.84. Activation and Deactivation.
Blue Alert network activations and deactivations are [will be] made according to the procedures specified in the current Blue Alert standard operating guidelines [procedures].

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 12, 2020.

TRD-202004228
D. Phillip Adkins
General Counsel
Texas Department of Public Safety

Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 422-5848

SUBCHAPTER H. CAMO ALERT NETWORK

37 TAC §§9.91 - 9.95

The Texas Department of Public Safety (the department) proposes new §§9.91 - 9.95, concerning Camo Alert Network. These rules are necessitated because the 86th Texas Legislature enacted HB 833 which created the Camo Alert Network.

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period these rules are in effect, the public benefit anticipated as a result of these rules will be publication of the new form for the Camo Alert Network and notification of its' new location on the department's website.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

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

Comments on this proposal may be submitted to Chief Dale Avant, Texas Department of Public Safety, Intelligence and Counterterrorism Division, P.O. Box 4087, Austin, Texas 78773. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.463(b), which authorizes the director to adopt rules to ensure proper implementation of the alert.

Texas Government Code, §411.463 - §411.469 is affected by this proposal.

§9.91. Purpose of Camo Alert Network.
(a) The Camo Alert Network is a statewide emergency response system for registered missing military members, whose whereabouts are unknown, who have registered for the network, and suffer from a mental illness, including post-traumatic stress disorder or a traumatic brain injury. Military members can access the registration form on the Texas Department of Public Safety (DPS) website.

(b) In order to maintain a high level of effectiveness, the department and local law enforcement must accurately evaluate the circumstances according to established criteria to justify activation of the network.

(c) The department has complete discretion in making the final determination about the activation of the Camo Alert Network. Clearly established facts of the case will limit those instances where the statutory criteria for activation are not met.

The terms in this section have the following meanings when used in this subchapter unless the context clearly indicates otherwise:

1. Mental illness—A mental condition or disorder as defined by the current version of the Diagnostic and Statistical Manual as a clinically significant behavioral, or psychological syndrome or pattern that occurs in an individual and that is associated with present distress or disability or with a significantly increased risk of suffering death, pain, disability or an important loss of freedom. This condition must present a significant level of impairment that poses a credible threat to the individual’s health and safety or the health and safety of another individual.

2. Military member—Has the meaning assigned by Texas Government Code, §411.461(3).

§9.93. Local Law Enforcement Responsibility.
A local law enforcement agency with jurisdiction over the investigation of a missing person requests activation by submitting the DPS form, available on the DPS website. A local law enforcement agency may submit the form after it has verified the facts of the case meet the alert activation criteria. Local law enforcement shall verify documentation of a diagnosed mental illness with the request for activation.

§9.94. Department Responsibility.
The department shall review a request for activation to confirm that the request meets the statutory criteria for activation. The department will not activate the network until the local law enforcement agency has clearly established that all statutory criteria for activation are satisfied.

§9.95. Activation and Deactivation.
Camo Alert Network activations and deactivations are made according to the procedures specified in the current Camo Alert standard operating guidelines.

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 12, 2020.

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

SUBCHAPTER I. COORDINATED LAW ENFORCEMENT ADULT RESCUE (CLEAR) ALERT NETWORK
37 TAC §§9.101 - 9.105
The Texas Department of Public Safety (the department) proposes new §§9.101 - 9.105, concerning Coordinated Law Enforcement Adult Rescue (CLEAR) Alert Network. These rules are necessitated because the 86th Texas Legislature enacted HB 1769 which created the CLEAR Alert Network.

Suzy Whittenton, Assistant Director, Finance, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period these rules are in effect, the public benefit anticipated as a result of these rules will be publication of the new form for the CLEAR Alert Network and notification of its' new location on the department's website.

The department has determined this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

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

Comments on this proposal may be submitted to Chief Dale Avant, Texas Department of Public Safety, Intelligence and Counterterrorism Division, P.O. Box 4087, Austin, Texas 78773. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.463(b), which authorizes the director to adopt rules to ensure proper implementation of the alert.

Texas Government Code, §411.463 - §411.469 is affected by this proposal.


(a) The Coordinated Law Enforcement Adult Rescue (CLEAR) Alert Network ("network") is a statewide emergency response system for missing adults 18 to 64 years of age whose whereabouts are unknown and are in imminent danger of bodily injury or death, or the disappearance is involuntary.

(b) In order to maintain a high level of effectiveness, the department and local law enforcement must accurately evaluate the circumstances according to established criteria to justify activation.

(c) The department has complete discretion in making the final determination about the activation of the CLEAR Alert Network. Clearly established facts of the case will limit those instances where the statutory criteria for activation are not met.

§9.102. Definitions.
The terms in this section have the following meanings when used in this subchapter unless the context clearly indicates otherwise:

(1) Bodily injury--Has the meaning assigned by Penal Code, §1.07.

(2) Imminent danger--Ready to take place, near at hand, impending, hanging threateningly over one's head, menacingly near.

§9.103. Local Law Enforcement Responsibility.

A local law enforcement agency with jurisdiction over the investigation of a missing person requests activation by submitting the appropriate Texas Department of Public Safety (DPS) form, available on the DPS website. A local law enforcement agency may submit the form after it has verified the facts of the case meet the alert activation criteria.

The department shall review a request for activation to confirm that the request meets the statutory criteria for activation. The department will not activate the network until the local law enforcement agency has clearly established that all statutory criteria for activation are satisfied.


CLEAR Alert Network activations and deactivations will be made according to the procedures specified in the current CLEAR Alert standard operating guidelines.

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

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 5. PROVIDER CLINICAL RESPONSIBILITIES--INTELLECTUAL DISABILITY SERVICES

SUBCHAPTER C. USE AND MAINTENANCE OF DRUG FORMULARY

40 TAC §§5.101 - 5.114
The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes the repeal of §§5.101, concerning Purpose; §§5.102, concerning Application; §§5.103, concerning Definitions; §§5.104, concerning General Requirements; §§5.105, concerning Organization of TDMHR Drug Formulary; §§5.106, concerning Executive Formulary Committee; §§5.107, concerning Responsibilities of the Executive Formulary Committee; §§5.108, concerning Applying to Have a Drug Added to the Formulary; §§5.109, concerning Changing the TDMHR Drug Formulary; §§5.110, concerning Prescribing Non-formulary Drugs; §§5.111, concerning Adverse Drug Reactions; §§5.112, concerning Exhibit; §§5.113, concerning References; and §§5.114, concerning Distribution.

BACKGROUND AND PURPOSE

The proposed repeals are necessary to reflect the transition of programs from the Department of Aging and Disability Services to HHSC. Rules in Texas Administrative Code (TAC) Title 40, Part 1, Chapter 5, Subchapter C are repealed, updated, reorganized, and proposed in 26 TAC Chapter 306, Subchapter G. The new rules are proposed simultaneously elsewhere in this issue of the Texas Register.

SECTION-BY-SECTION

The proposed rule repeals delete the rules in 40 TAC Chapter 5, Subchapter C, to reorganize and update the rules to be relocated to 26 TAC Chapter 306, Subchapter G.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the repeals will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules are repealed:
(1) the proposed repeals will not create or eliminate a government program;
(2) implementation of the proposed repeals will not affect the number of HHSC employee positions;
(3) implementation of the proposed repeals will result in no assumed change in future legislative appropriations;
(4) the proposed repeals will not affect fees paid to HHSC;
(5) the proposed repeals will not create a new rule;
(6) the proposed repeals will repeal existing rules;
(7) the proposed repeals will not change the number of individuals subject to the rules; and
(8) the proposed repeals will not affect the state’s economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

The proposed repeals do not impose any additional costs on small businesses, micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed repeals will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these repeals because the repeals do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Timothy E. Bray, Associate Commissioner of State Hospitals, and Scott Schalchlin, Associate Commissioner of State Supported Living Centers, have determined that for each year of the first five years the repeals are in effect, the public will benefit from elimination of rules that refer to an agency that no longer exists.

Trey Wood has also determined that for the first five years the repeals are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner’s right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to HHSC, Health and Specialty Care System, Mail Code 619E, P.O. Box 13247, Austin, Texas 78711-3247, or by email to healthandspecialtycare@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the Texas Register. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be post-marked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate “Comments on Proposed Rules 19R052 Drug Formulary” in the subject line.

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Health and Safety Code §591.004 which provides that the Executive Commissioner of HHSC shall adopt rules to implement the Persons with an Intellectual Disability Act; and §533A.0355 which provides that the Executive Commissioner of HHSC shall adopt rules establishing the roles and responsibilities of local intellectual and developmental disability authorities.


§5.101. Purpose.
§5.102. Application.
§5.103. Definitions.
§5.104. General Requirements.
§5.106. Executive Formulary Committee.
§5.107. Responsibilities of the Executive Formulary Committee.
§5.108. Applying to Have a Drug Added to the Formulary.
§5.110. Prescribing Non-formulary Drugs.
§5.111. Adverse Drug Reactions.
§5.112. Exhibit.
§5.113. References.
§5.114. Distribution.

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 6, 2020.
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Karen Ray
Chief Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 206-5084

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 800. GENERAL ADMINISTRATION
SUBCHAPTER L. WORKFORCE DIPLOMA PILOT PROGRAM

40 TAC §§800.500 - 800.505
The Texas Workforce Commission (TWC) proposes the following new subchapter to Chapter 800, relating to General Administration:
Subchapter L. Workforce Diploma Pilot Program, §§800.500 - 800.505.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

Senate Bill (SB) 1055, 86th Texas Legislature, Regular Session (2019), added new Chapter 317 to the Texas Labor Code, requiring TWC, in consultation with the Texas Education Agency (TEA), to create and administer a Workforce Diploma Pilot Program (Program). As outlined in Texas Labor Code, Chapter 317, the Program will allow eligible high school diploma--granting entities to be reimbursed for helping adult students obtain high school diplomas and industry-recognized credentials and develop technical career-readiness and employability skills.

SB 1055 stipulates that Texas Labor Code, Chapter 317 expires on September 1, 2025, and requires TWC to develop rules that:

--outline the application process to become a qualified provider;
--define the minimum performance standards for qualified providers, which include a graduation rate of at least 50 percent and a program cost per graduate of $7,000 or less for the previous calendar year; and
--develop formulas to make the appropriate calculations to determine the graduation rate and program cost per graduate.

SB 1055 includes the stipulation that TWC "is required to implement a provision of this Act only if the legislature appropriates money specifically for that purpose. If the legislature does not appropriate money specifically for that purpose, the Texas Workforce Commission may, but is not required to, implement a provision of this Act using other appropriations available for that purpose." TWC is developing rules to implement the Program upon allocation of funds for its implementation.

New Chapter 800, Subchapter L, Workforce Diploma Pilot Program, provides the rules for implementing new Texas Labor Code, Chapter 317, as added by SB 1055.

On June 23, 2020, TWC's three-member Commission (Commission) approved a policy concept for the required rule development for the Program under Texas Labor Code, Chapter 317. The policy concept included rule language for the Commission's future consideration and was published in the July 3, 2020, issue of the Texas Register (45 TexReg 4574) for a 30-day public comment period. The comment period ended on August 3, 2020, and TWC did not receive any comments. The rule language provided in this proposal reflects the rule language included in the published policy concept, with a few minor changes.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER L. WORKFORCE DIPLOMA PILOT PROGRAM

TWC proposes new Subchapter L:

§800.500. Purpose

New §800.500 provides the purpose of the Program, which is to reimburse qualified providers that provide assistance to adult students to obtain high school diplomas and attain industry-recognized credentials and to develop technical career-readiness and employability skills, to the extent that funding is available for this purpose.

§800.501. Definitions

New §800.501 provides the following definitions for Subchapter L:

--"Academic resiliency" is a student's ability to persist and academically succeed despite adversity.

--"Academic skill intake assessment" is a formal and/or informal assessment used at intake to gather information on a student's current knowledge and skills in specific academic areas (for example, literacy and numeracy). That information is then used to determine the student's appropriate instructional level as well as accommodations and/or remediation that the student needs.

--"Career Pathway" is a combination of rigorous and high-quality education, training, and other services that:

--aligns with the skill needs of industries in the economy of the state or regional economy involved;
--prepares an individual to be successful in any of a full range of secondary or postsecondary education options;
--includes counseling to help an individual achieve his or her education and career goals;
--includes, as appropriate, education offered concurrently with, and in the same context as, workforce preparation activities and training for a specific occupation or occupational cluster;
--organizes education, training, and other services to meet the particular needs of an individual in a manner that accelerates his or her educational and career advancement to the extent practicable;
--enables an individual to attain a secondary school diploma or its recognized equivalent, and at least one recognized postsecondary credential; and
--helps an individual enter or advance within a specific occupation or occupational cluster (29 USC §3102, Definitions).

--"Eligible participant" is an individual who is over the age of compulsory school attendance prescribed by Texas Education Code, §25.085 and who, as required by TWC:

--is a Texas resident;
--lacks a high school diploma;
--is authorized to work in the United States; and
--is able to work immediately upon graduation from the Program.

--"Employability skills certification program" refers to a certification in general skills that are necessary for success in the labor market at all employment levels and in all industry sectors. Employability skills include problem-solving, collaboration, organization, and adaptability.

--"Half credit" is based on the Carnegie Unit, which refers to the standard award of credit given for a course that lasts one semester. When determining credits, qualified providers should consider instructional time plus the amount of time that the student would take to complete the coursework in a high school semester or academic year. In traditional education models, a student typically attends a class for 55 to 60 minutes a day for four or five days a week, in addition to studying independently.

--"High school diploma" is a credential awarded by an entity based on completion of all state graduation requirements as outlined in Texas Education Code, §28.025 and §39.023 and 19 Texas Administrative Code (TAC) Chapter 74, Curriculum Requirements, and Chapter 101, Assessment.
"Industry-recognized credential" is a state-approved credential that verifies an individual’s qualifications and competence and is issued by a third party with the relevant authority to issue such credentials (US Department of Labor, 2010). Industry-recognized credentials offered by qualified providers must align with TWC’s mission to target high-growth, high-demand, and emerging occupations that are crucial to state and local workforce economies and must reflect the target occupations for the local workforce development areas (workforce areas) in which services will be provided. Qualified providers may also reference the list of industry-based certifications for public school accountability that TEA publishes.

"Learning Plan Development" is the process by which an individualized learning plan is developed after student intake; it is maintained through coaching and mentoring.

"One credit" is based on the Carnegie Unit, which refers to the standard award credit given for a course that lasts a full academic year. When determining credits, qualified providers should consider instructional time plus the amount of time that the student would take to complete the coursework in a high school semester or academic year. In traditional education models, a student typically attends a class for 55 to 60 minutes a day for four or five days a week in addition to studying independently.

"Program" refers to the Workforce Diploma Pilot Program set forth in Texas Labor Code, Chapter 317.

"Qualified provider" that may participate in the Program and receive reimbursement is a provider that:

--is a public, nonprofit, or private entity that is:

--authorized under the Texas Education Code or other state law to grant a high school diploma, or

--accredited by a regional accrediting body, as established by the US Secretary of Education pursuant to 20 USCS §1099b, Recognition of Accrediting Agency or Association;

--has at least two years of experience providing dropout reengagement services to adult students, including recruitment, learning plan development, and proactive coaching and mentoring, leading to the obtainment of a high school diploma;

--is equipped to:

--provide:

--academic skill intake assessment and transcript evaluations;

--remediation coursework in literacy and numeracy;

--a research-validated academic resiliency assessment and intervention;

--employability skills development aligned to employer needs;

--career pathways coursework;

--preparation for the attainment of industry-recognized credentials; and

--career placement services; and

--develop a learning plan that integrates academic requirements and career goals; and

--offers a course catalog that includes all courses necessary to meet high school graduation requirements in Texas, as authorized under 19 TAC Chapter 74, Subchapter B, Graduation Requirements.

"Regional accrediting body" must meet the criteria established by the US Secretary of Education pursuant to 20 USCS §1099b, Recognition of Accrediting Agency or Association, and appear on the US Secretary of Education’s list of federally recognized accrediting agencies in the Federal Register as stated in 34 CFR §602.2. A copy of the list may be obtained from the US Department of Education.

§800.502. Request for Qualifications and List of Qualified Providers

New §800.502 describes the Program’s Request for Qualifications (RFQ) provisions, as outlined in Texas Labor Code, Chapter 317, to the extent that TWC funding is available.

Texas Labor Code, Chapter 317 requires TWC to publish an RFQ no later than October 15th of each year to identify Program providers. New §800.502 outlines the application process for qualified providers as follows:

TWC will identify qualified providers to participate in the Program through a statewide RFQ process conducted in accordance with state requirements.

Potential providers will apply directly to TWC using the RFQ process, and, once identified as a qualified provider, must meet all deadlines, requirements, and guidelines set forth in the published RFQ.

TWC will publish a list of qualified providers by November 15th of each year to participate in the Program the next calendar year.

Each provider on the qualified provider list will be eligible to receive monthly reimbursements for this Program based on monthly invoices submitted to TWC, as prescribed in the RFQ’s terms.

Each year, TWC will review and update the list of qualified providers. Qualified providers that do not meet the minimum performance standards outlined in §800.503 will be placed on probation for the remainder of the calendar year. Failure to meet both minimum performance standards for two consecutive years will result in disqualification from the Program.

TWC’s determinations in the RFQ process will be based on the affirmation of the qualified provider to effectively perform all services and activities outlined in Texas Labor Code, Chapter 317.

§800.503. Minimum Performance Standards

As required by Texas Labor Code, Chapter 317, new §800.503 describes the minimum performance standards needed for qualified providers to remain on the qualified provider list.

New §800.503(a) states that the minimum performance standards for the calendar year must include a:

--graduation rate of at least 50 percent; and

--program cost per graduate of $7,000 or less.

New §800.503(b) provides the requirements for TWC actions if a qualified provider fails to maintain minimum performance standards. Section 800.503(b) requires TWC to annually review data from each participating provider to ensure that the services offered by the provider are meeting the minimum performance standards. If TWC determines that a provider did not meet the minimum performance standards in the previous calendar year, TWC shall place the provider on probationary status for the remainder of the current calendar year.
New §800.503(c) requires TWC to remove any provider that does not meet the minimum performance standards for two consecutive calendar years from the published provider list, as authorized by Texas Labor Code, §317.005.

§800.504. Graduation Rate and Graduate Cost Formulas

As required by Texas Labor Code, Chapter 317, new §800.504(a) and (b) describe the formulas for calculating the graduation rate and Program cost per graduate.

Graduation rate is defined as and determined by dividing the number of students who received a high school diploma from the qualified provider by the number of students for whom the qualified provider sought and received reimbursements.

New §800.504(b) provides the Program cost per graduate formula as the product of the number of students who received a high school diploma during the previous calendar year multiplied by $7,000; that product may not exceed the total annual cost (reimbursements paid) to the qualified provider for the total number of services provided.

§800.505. Reimbursement Rates

New §800.505 provides the reimbursement amounts that a qualified provider may receive (to the extent that funding is available). Pursuant to Texas Labor Code, §317.006, those reimbursement rates will be as follows:

--$250 for completion of a half credit
--$250 for completion of an employability skills certification program equal to at least one credit or the equivalent
--$250 for the attainment of an industry-recognized credential requiring not more than 50 hours of training
--$500 for the attainment of an industry-recognized credential requiring at least 50 but not more than 100 hours of training
--$750 for the attainment of an industry-recognized credential requiring more than 100 hours of training
--$1,000 for the obtaining of a high school diploma

Additionally, §800.505 clarifies that a provider may not be reimbursed twice for one attainment of an industry-recognized credential.

PART III. IMPACT STATEMENTS

Chris Nelson, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated cost reductions to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to individuals required to comply with the rules.

There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural communities as a result of enforcing or administering the rules.

Based on the analyses required by Texas Government Code, §2001.024, TWC has determined that the requirement to repeal or amend a rule, as required by Texas Government Code, §2001.0045, does not apply to this rulemaking.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the US Constitution or the Texas Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The Commission completed a Takings Impact Analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to outline requirements of the Program under Texas Labor Code, Chapter 317 and

--outline the application process to become a qualified provider;
--describe the minimum performance standards for qualified providers, which include a graduation rate of at least 50 percent and a Program cost per graduate of $7,000 or less for the previous calendar year; and
--develop formulas to make the appropriate calculations to determine graduation rate and program cost per graduate.

The proposed rulemaking action will not create any additional burden on private real property or affect private real property in a manner that would require compensation to private real property owners under the US Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Government Growth Impact Statement

TWC has determined that during the first five years the rules will be in effect:

--the rules will not create or eliminate a government program;
--implementation of the rules will not require the creation or elimination of employee positions;
--implementation of the rules will not require an increase or decrease in future legislative appropriations to TWC;
--the rules will not require an increase or decrease in fees paid to TWC;
--the rules will not create a new regulation;
--the rules will not expand, limit, or eliminate an existing regulation;
--the rules will not change the number of individuals subject to the rules; and
--the rules will not positively or adversely affect the state's economy.

Economic Impact Statement and Regulatory Flexibility Analysis

TWC has determined that the proposed rules will not have an adverse economic impact on small businesses or rural communities, as the proposed rules place no requirements on small businesses or rural communities.

Mariana Vega, Director, Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Courtney Arbour, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to provide guidance on implementing a Workforce Diploma Pilot Program in Texas.

TWC hereby certifies that the proposal has been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, TWC sought the involvement of Texas’ 28 Local Workforce Development Boards (Boards). TWC provided the policy concept for the new rules to the Boards for consideration and review on June 23, 2020. TWC also conducted a conference call with Board executive directors and Board staff on June 26, 2020, and then on July 2, 2020, with AEL grant recipients to discuss the Policy Concept and comment period.

The policy concept was published in the Texas Register for a 30-day comment period that ended on August 3, 2020. During the proposed rulemaking process, TWC considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWCPolicyComments@twc.state.tx.us. Comments must be received no later than 30 days from the date this proposal is published in the Texas Register.

The rules are proposed under Texas Labor Code, §§301.0015 and 302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules implement the requirements of Texas Labor Code, Chapter 317.

§800.500. Purpose.

The purpose of the Workforce Diploma Pilot Program is to reimburse qualified providers that provide assistance to adult students to obtain high school diplomas and attain industry-recognized credentials and to develop technical career readiness and employability skills to the extent that funding is available for this purpose.

§800.501. Definitions.

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

(1) Academic resiliency—A student’s ability to persist and to academically succeed despite adversity.

(2) Academic skill intake assessment—A formal and/or informal assessment used at intake to gather information on a student’s current knowledge and skills in specific academic areas (for example, literacy and numeracy). That information is then used to determine the student’s appropriate instructional level as well as accommodations and/or remediation that the student needs.

(3) Career Pathway—A combination of rigorous and high-quality education, training, and other services that:

(A) aligns with the skill needs of industries in the economy of the state or regional economy involved;

(B) prepares an individual to be successful in any of a full range of secondary or postsecondary education options;

(C) includes counseling to support an individual in achieving the individual’s education and career goals;

(D) includes, as appropriate, education offered concurrently with, and in the same context as, workforce preparation activities and training for a specific occupation or occupational cluster;

(E) organizes education, training, and other services to meet the particular needs of an individual in a manner that accelerates the educational and career advancement of the individual to the extent practicable;

(F) enables an individual to attain a secondary school diploma or its recognized equivalent, and at least one recognized postsecondary credential; and

(G) helps an individual enter or advance within a specific occupation or occupational cluster (29 USC §3102, Definitions).

(4) Eligible participant—An individual who is over the age of compulsory school attendance, as prescribed by Texas Education Code, §25.085, and as required by the Agency, must:

(A) be a Texas resident;

(B) lack a high school diploma;

(C) be authorized to work in the United States; and

(D) be able to work immediately upon graduation from the program.

(5) Employability skills certification program—Refers to a certification in general skills that are necessary for success in the labor market at all employment levels and in all industry sectors. Employability skills include problem-solving, collaboration, organization, and adaptability.

(6) Half credit—The standard award of credit given for a course that lasts one semester, and which is based on the Carnegie Unit. When determining credits, qualified providers should consider instructional time plus the amount of time that the student would take to complete the coursework in a high school semester or academic year. In traditional education models, a student typically attends a class for 55 to 60 minutes a day for four or five days a week in addition to studying independently.

(7) High school diploma—A credential awarded by an entity, based on completion of all state graduation requirements as outlined in Texas Education Code, §§28.025 and §39.023 and 19 TAC Chapter 74 (relating to Curriculum Requirements) and Chapter 101 (relating to Assessment).

(8) Industry-recognized credential—A state-approved credential verifying an individual’s qualifications and competence and is issued by a third party with the relevant authority to issue such credentials (US Department of Labor, 2010). Industry-recognized credentials
§1099b, Recognition of Accrediting Agency or Association, and appear on the US Secretary of Education's list of federally recognized accrediting agencies in the Federal Register; as stated in 34 CFR §602.2. A copy of the list may be obtained from the US Department of Education.

§800.502. Request for Qualifications and List of Qualified Providers.
(a) The Agency shall identify qualified providers to participate in the Program through a statewide Request for Qualifications (RFQ) process conducted in accordance with state requirements. The Agency will publish an RFQ no later than October 15th of each year to identify Program providers.

(b) Potential providers will apply directly to the Agency using the RFQ process, and, once identified as a qualified provider, must meet all deadlines, requirements, and guidelines set forth in the published RFQ.

(c) The Agency will publish a list of qualified providers no later than November 15th of each year to participate in the Program the next calendar year.

(d) Each provider on the qualified provider list will be eligible to receive monthly reimbursements for this Program based on monthly invoices submitted to the Agency, as prescribed in the RFQ's terms.

(e) Each year, the Agency shall review and update the list of qualified providers. Qualified providers that do not meet the minimum performance standards outlined in §800.503 of this subchapter will be placed on probation for the remainder of the calendar year. Failure to meet both minimum performance standards for two consecutive years will result in disqualification from the Program.

(f) The Agency's determinations in the RFQ process will be based on the affirmation of the qualified provider to effectively perform all services and activities outlined in Texas Labor Code, Chapter 317.

§800.503. Minimum Performance Standards.
(a) The minimum performance standards for the calendar year must include:

(1) a graduation rate, as defined in §800.504(a) of this subchapter, of at least 50 percent; and

(2) a program cost per graduate of $7,000 or less, as calculated pursuant to §800.504(b) of this subchapter.

(b) Each year, the Agency shall review data from each participating provider to ensure that the services offered by the provider are meeting the minimum performance standards. If the Agency determines that a provider did not meet the minimum performance standards in the previous calendar year, the Agency shall place the provider on probationary status for the remainder of the current calendar year.

(c) The Agency shall remove any provider that does not meet the minimum performance standards for two consecutive calendar years from the provider list published under Texas Labor Code, §317.005.

§800.504. Graduation Rate and Graduate Cost Formulas.
(a) Graduation rate is defined as and determined by dividing the number of students who received a high school diploma from the qualified provider by the number of students for which the qualified provider sought and received reimbursements.

(b) The Program cost per graduate formula is determined as the product of the number of students who received a high school diploma the previous calendar year multiplied by $7,000; the product may not exceed the total annual cost (reimbursements paid) to the qualified provider for the total number of services provided.
§800.505. Reimbursement Rates.

(a) The reimbursement amounts that a qualified provider may receive, to the extent that funding is available, shall be as follows:

(1) $250 for completion of a half credit;
(2) $250 for completion of an employability skills certification program equal to at least one credit or the equivalent;
(3) $250 for the attainment of an industry-recognized credential requiring not more than 50 hours of training;
(4) $500 for the attainment of an industry-recognized credential requiring at least 50 but not more than 100 hours of training;
(5) $750 for the attainment of an industry-recognized credential requiring more than 100 hours of training; and
(6) $1,000 for the obtainment of a high school diploma.

(b) A provider shall not be reimbursed more than one time for one attainment of an industry-recognized credential.

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 7, 2020.
TRD-20-2004172
Dawn Cronin
Director, Workforce Program Policy
Texas Workforce Commission
Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 689-9855

CHAPTER 809. CHILD CARE SERVICES

The Texas Workforce Commission (TWC) proposes amendments to the following sections of Chapter 809, relating to Child Care Services:
Subchapter A. General Provisions, §809.2
Subchapter B. General Management, §§809.12, 809.13, 809.16, 809.18, and 809.19
Subchapter E. Requirements to Provide Child Care, §809.91 and §809.93
Subchapter G. Texas Rising Star Program, §§809.130 - 809.134

TWC proposes the following new sections to Chapter 809, relating to Child Care Services:
Subchapter B. General Management, §809.22
Subchapter E. Requirements to Provide Child Care, §809.96
Subchapter G. Texas Rising Star Program, §809.136

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 809 rule changes is to implement a contracted slots option for child care services, clarify the allowable uses of Child Care Quality (CCQ) funds, update how the parent co-payment is determined, align the child transfer policy with industry practices, and implement changes to Texas Rising Star policy based on recommendations that arose from the Texas Rising Star four-year review.

House Bill 680

House Bill 680 (HB 680), 86th Texas Legislature, Regular Session (2019), amended the Texas Government Code and the Texas Labor Code regarding TWC's Child Care program. To fully implement HB 680 requirements, Chapter 809 requires amendments to clarify allowable uses of Local Workforce Development Boards' (Boards) CCQ funds to allow Boards to engage in child care provider contract agreements for reserved slots, and to allow direct referrals for eligible children participating in recognized public/private partnerships.

Allowable Uses of Boards' Child Care Quality Funds

HB 680, Section 1 amends Texas Government Code, §2308.317, by adding a new subsection requiring each Board, to the extent practicable, to ensure that any professional development for child care providers, directors, and employees using the Board's assigned quality improvement funds:
--be used toward the requirements for a credential, certification, or degree program; and
--meet the Texas Rising Star program's professional development requirements.

Section 809.16, Quality Improvement Activities, outlines rules related to quality improvement activities that are allowable for Boards. Section 809.16 currently allows Boards to expend quality funds on any quality improvement activity described in 45 Code of Federal Regulations (CFR) Part 98. TWC proposes requiring Boards to align expenditures for child care professional development with applicable state statute and the activities described in the Child Care Development Fund (CCDF) State Plan.

Child Care Provider Contract Agreements

HB 680, Section 5 adds Texas Labor Code, §302.0461, Child Care Provider Contract Agreements, allowing Boards to contract with child care providers to provide subsidized child care. This is congruent with §658E(c)(2)(A) of the Child Care and Development Block Grant (CCDBG) Act of 2014, which authorizes states to offer financial assistance for child care services through grants and contracts. Specific guidance from the US Department of Health and Human Services' Office of Child Care confirms that:
"States can award grants and contracts to providers in order to provide financial incentives to offer care for special populations, require higher quality standards, and guarantee certain numbers of slots to be available for low-income children eligible for Child Care and Development Fund (CCDF) financial assistance. Grants and contracts can provide financial stability for child care providers by paying in regular installments, paying based on maintenance of enrollment, or paying prospectively rather than on a reimbursement basis."

HB 680 requires that any such contract includes the number of slots reserved by a provider for children who participate in the subsidized child care program.

To be eligible for a contract, HB 680 requires that a child care provider be a Texas Rising Star 3- or 4-star provider and meet one of the following priorities:
--Be located in an area:  

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-where the number of children under age six with working parents is at least three times greater than the capacity of licensed child care providers in the area; or

-determined by TWC to be underserved with respect to child care providers

--Have a partnership with local school districts to provide prekindergarten (pre-K)

--Have a partnership with Early Head Start (EHS) or Head Start (HS)

--Have an increased number of places reserved for infants and toddlers by high-quality child care providers

--Satisfy a priority identified in the Board’s plan

HB 680 also requires that Boards choosing to contract with providers submit a report to TWC no later than six months after entering into the contract, and every six months thereafter, determining the contract's effect on the following:

--Financial stability of providers participating in the contract

--Availability of high-quality child care options for participants in TWC's subsidy program

--Number of high-quality providers in any part of the local workforce development area (workforce area) with a high concentration of families with a need for child care

--Percentage of children participating in TWC’s subsidized child care program at each Texas Rising Star provider in the Board's workforce area

In December 2019, TWC's Child Care & Early Learning Division assembled a workgroup consisting of TWC staff, Board staff, and Board child care services contractor staff to discuss implementation recommendations related to contracted slots. Recommendations from the contracted slots workgroup informed the revisions described.

Reserved Slots

Currently, §809.93(g) prohibits a Board or its child care contractor from paying providers for holding spaces (slots) open. However, if a Board chooses to contract with child care providers for a specific number of spaces, also known as a Contracted Slots model, the Board would continue payment for reserved slots during the transition time between one child leaving and another child being placed in the slot. TWC proposes allowing transition times to hold slots open for another child participating in the subsidy program and requiring the slots to be filled one month following the month of the vacancy. Adding new §809.96 to define the child care provider contract agreement rules and requirements will clarify the policy and require that Boards choosing to use contracted slots include the program in the Board plan.

Waiting Lists and Priorities

TWC prioritizes services for veterans and foster youth and former foster children in accordance with Texas Labor Code, §302.152 and Texas Family Code, §264.121(a)(3). When providing child care subsidies, Boards are required to prioritize these groups, subject to the availability of funds. Furthermore, §809.18 requires Boards to maintain waiting lists for families that are waiting for child care services. Because HB 680 authorizes Boards to contract with child care providers to reserve a set number of child care slots, the contracted slots workgroup has identified complications with continuing to use the current waiting list system for filling open slots for providers with contracts.

Currently, the Board’s waiting list for the subsidy voucher system is for the entire workforce area. Families are contacted in order of priority to select any participating provider in the Board’s workforce area. Section 809.43 details the priority groups as follows:

The first priority group is assured child care services and includes children of parents eligible for the following:

--Choices child care

--Temporary Assistance for Needy Families Applicant child care

--Supplemental Nutrition Assistance Program Employment and Training child care

--Transitional child care

The second priority group is served subject to the availability of funds and includes the following, in the order of priority:

1. Children requiring protective services child care
2. Children of a qualified veteran or qualified spouse
3. Children of a foster youth
4. Children experiencing homelessness
5. Children of parents on military deployment whose parents are unable to enroll in military-funded child care assistance programs
6. Children of teen parents
7. Children with disabilities

The third priority group includes any other priority adopted by the Board.

With a Contracted Slots model, the slots need to be filled quickly to avoid Boards paying for vacant reserved slots. TWC proposes allowing families to indicate ZIP code preferences for location of child care and prioritizing children with preferences matching ZIP codes with an available contracted slot.

Eligible Geographic Locations

One of the qualifying priorities identified in HB 680 to allow contracted slots is that the child care provider be located in an area of high need and low capacity, that is, an area:

--where the number of children under age six with working parents is at least three times greater than the capacity of licensed child care providers in the area; or

--that TWC has determined to be "underserved with respect to child care providers."

TWC proposes using data from the state demographer to analyze and publish annual information about geographic areas that meet the requirements described in HB 680 and requiring Boards to use this data to identify providers that are in areas of high need and low capacity.

Direct Referrals from Public Prekindergarten and Head Start/Early Head Start Partnerships

HB 680 explicitly authorizes contracts for Texas Rising Star providers engaged in partnerships with public pre-K or HS/EHS. Additionally, HB 3, 86th Texas Legislature, Regular Session (2019), supports expansion of pre-K partnerships.

Children served through these partnerships are dually enrolled in both early childhood programs. When a child is dually enrolled in child care services and either public pre-K or HS/EHS, part of the cost to CCDF is offset. Through these partnerships, eligible
children can receive the full-day, full-year care that working parents require at a lower cost to the Child Care Services program. Eligible children served through these partnerships receive early care and education from multiple funding sources. However, each funding source prioritizes certain populations slightly differently (such as a low-income individual, a foster child or child of a foster youth, a veteran or active duty service member, a child with a disability, or a child experiencing homelessness).

These variations can lead to mismatches of when a child is able to access services despite being simultaneously eligible for both programs in a partnership. Operationally, not being able to combine funding for dually eligible children can impact the enrollment efficiency and financial stability of the partnership and limit TWC's ability to implement the contracted slots agreements provisions of HB 680 and to support the pre-K partnership provisions of HB 3.

Chapter 809 does not currently allow for a separate path for enrolling eligible children who are directly referred from a partnering program. Because of this structure, eligible children from partnering programs must be placed on a Board's waiting list despite the federal, state, and local policies that support partnerships and dual enrollment.

TWC proposes creating a separate path for enrollment to support more stable partnerships, maximize available funding to serve more children, and provide improved customer service to participating families.

With a separate enrollment path for partnership direct referrals, services for eligible children who are in TWC's second or third priority group, as defined in §809.43, Priority for Child Care Services, would still be served subject to the availability of funding. Additionally, if the number of referrals from a partnership exceeds the subsidized spots available at a single partnership site, §809.43 would be applied, and any children who did not receive subsidized care through the referring partnership would be placed on the Board's waiting list.

Parent Share of Cost for Part-Time Referrals

A technical change is needed related to how the parent co-payment is determined. Families participating in child care subsidies are responsible for a co-payment, known in Texas as the "parent share of cost," that covers a portion of their child's care and education. Boards assess the parent share of cost on a sliding-fee scale based on income, family size, and other appropriate factors to ensure that the cost is affordable and is not a barrier to families receiving services.

The CCDBG Act of 2014 led to significant changes in the administration of child care services in Texas. In September 2016, TWC adopted amendments to Chapter 809 to align with the new federal requirements and §809.19, Assessing the Parent Share of Cost, was affected. In compliance with federal requirements and guidance, TWC amended §809.19 to limit the basis of the sliding-fee scale to family size and income, including the number of children in care.

With this rule change, Boards were no longer able to offer "discounts" for part-time care, as doing so could have been perceived as using the cost of care or amount of subsidy payment to determine parent share of cost.

The CCDF State Plan template for Federal Fiscal Years 2019 - 2021 (released after the final federal rule) allows the number of hours the child is in care, in addition to the family's income and size, to be considered when determining parent share of cost.

TWC proposes reducing the financial burden on families that need part-time child care by authorizing Boards to assess the parent share of cost at the full-time rate and allow reductions for families with part-time referrals. If a child's referral changes from part-time to full-time care, the family will no longer qualify for the reduction and must revert to the original parent share of cost assessment amount.

Child Transfer Policies

The CCDBG Act includes provisions to ensure equal access to child care for families receiving subsidies, as compared to families that do not receive subsidies. To support equal access, the final federal rule, 45 CFR §98.45(3), requires states to ensure that payments for subsidized child care "reflect generally accepted payment practices of child care providers that serve children who do not receive CCDF subsidies." Additionally, 45 CFR §98.45(5) requires states to ensure that child care providers receive prompt notice of changes to a family's status, which may impact payment.

Providers commonly have policies for private-pay families that require families to give notice before withdrawing their child from the program. Typically, these policies range from two weeks to a full month. These waiting periods help providers to manage their enrollment efficiently and ensure that they have adequate time to fill empty spots.

Section 809.13(c)(10) requires Boards to establish a policy for transfer of a child from one provider to another. However, the rule does not require Boards to establish a waiting period for families that request to transfer a child.

TWC proposes requiring Boards to institute a waiting period as part of their transfer policy to support better alignment with CCDBG and greater stability for subsidy providers.

Texas Rising Star Four-Year Review Recommendations

Texas Government Code, §2308.3155(b)(2) requires TWC to adopt a timeline and a process for regularly reviewing and updating the Texas Rising Star quality standards. The statute also requires TWC's consideration of input from interested parties regarding the quality standards.

To meet this requirement, on February 23, 2016, TWC's three-member Commission (Commission) adopted §809.130(e)(1), which requires staff to facilitate a review of the Texas Rising Star guidelines every four years.

Beginning in May 2019, TWC convened a workgroup to review the Texas Rising Star guidelines and recommend revisions. The workgroup included early learning program directors from around the state, early childhood advocacy organization representatives, professional development providers, Board staff, and representatives from TWC, the Texas Education Agency, the Texas Health and Human Services Commission's (HHSC) Child Care Regulation Division (formerly Child Care Licensing (CCL)), and the State Center for Early Childhood, Children's Learning Institute (CLI).

Over an eight-month period, the workgroup met regularly to review the Texas Rising Star guidelines in detail and to engage in a collaborative effort to improve guidelines' standards. On January 21, 2020, the Commission approved the publication of the workgroup’s recommendations for public comment. During February 2020, TWC partnered with Boards to host seven public
stakeholder meetings across the state. Throughout the review process, TWC also provided the public with a website to view materials related to the review and a dedicated email address to offer input.

The revisions in this proposed rule consider the recommendations of the workgroup as well as stakeholder input received during public meetings or provided to TWC in writing.

Workforce Registry

The Texas Early Childhood Professional Development System (TECPDS) includes the Workforce Registry (WFR), a web-based system for early childhood professionals to track their experience, education, and training. The WFR offers benefits to programs and teachers by streamlining record-keeping of staff qualifications and professional development. The WFR:

-- reduces reliance on paper files and ensures reliable access to an employee's professional development records;
-- allows teachers to easily share their training records and to see a holistic view of their portfolio of training and education;
-- reduces administrative costs and simplifies processes for directors and owners;
-- facilitates validation of compliance with CCL standards and documentation of Texas Rising Star points; and
-- allows for more efficient and strategic professional development planning.

TWC proposes integrating the WFR into Texas Rising Star, requiring programs applying for certification to agree to participate in the WFR and encourage their staff to participate as well. For all programs, adopting and maintaining use of the WFR will be included in ongoing technical assistance and Continuous Quality Improvement Plans (CQIPs).

During public stakeholder meetings, many child care providers expressed concerns that the WFR could allow competitors to "steal" staff. TWC notes that the WFR does not have a searchable database of teachers or their qualifications. A teacher's record is only available to others when the teacher actively makes it available to a specified provider--typically the teacher's current employer. Additionally, based on comments received, TWC requested that the WFR be modified to no longer include job postings. This functionality is duplicative of the TWC-funded WorkInTexas.com online job-matching portal.

Creating a Pre-Star Provider Designation

TWC proposes a new Pre-Star provider definition in §809.2(18), and a requirement that all CCL-regulated subsidy providers be designated as Pre-Star in §809.91(a)(1). Pre-Star designations are outside of the statutorily defined Texas Rising Star quality-based rating system set forth in Texas Government Code, §2308.3155 and will not receive an enhanced reimbursement rate. Programs wishing to enter the Texas Rising Star system and apply for star-level certification must first meet Pre-Star designation. Pre-Star designations are based upon a child care program's demonstration that they do not have significant licensing findings, as set forth in the Screening Criteria for Subsidized Child Care and defined in the CCDF State Plan.

Continuous Quality Improvement Framework

Another recommendation from the Texas Rising Star four-year review was that TWC develop a framework for CQIPs and require certified programs to engage in a formal CQIP process.

Early childhood programs and their mentors use CQIPs to identify areas for program and staff improvement. The Texas Rising Star CQIP framework will provide targeted technical assistance and customized coaching to set specific improvement goals and monitor progress.

New Training and Certification Requirements for Texas Rising Star Staff

TWC currently defines requirements for educational background, work experience, and minimum annual training hours for Texas Rising Star mentors and assessors. However, there are no uniform training requirements for mentors or assessors to learn the standards, how to consistently measure them, or how to coach programs to improve.

The four-year review recommendations include new requirements for Texas Rising Star assessor and mentor training and certification to ensure valid and consistent star-level certifications across all Texas Rising Star programs and to improve mentoring and coaching to support the CQIP framework.

Based on these recommendations, TWC proposes that assessors be required to take the Texas Rising Star standards training and to obtain the Texas Rising Star Assessment Certification. Additionally, TWC proposes that assessors be required to pass quarterly reliability checks.

TWC also proposes more robust training requirements for mentors. Increasing the number of programs that attain and retain higher levels of quality will require strong mentoring support, and successful implementation of a CQIP framework will depend on skillful coaching from Texas Rising Star mentors. Specifically, TWC proposes requiring mentors to take the Texas Rising Star standards training and to participate in competency-based professional development designed to improve coaching practices.

Streamlining and Reweighting Categories of Texas Rising Star Measures

Section 809.130 defines the five categories of Texas Rising Star measures defined by previous Texas Rising Star guidelines development efforts. Texas Rising Star categories currently are:

1. Director and Staff Qualifications and Training, (2) Caregiver-Child Interactions, (3) Curriculum, (4) Nutrition and Indoor and Outdoor Activities, and (5) Parent Involvement and Education.

Many of the current measures are repetitive across categories or not well-correlated to the category being measured. TWC proposes reorganizing measures under the following four categories: (1) Director and Staff Qualifications and Training, (2) Teacher-Child Interactions, (3) Program Administration, and (4) Indoor/Outdoor Environments.

TWC also proposes changing the relative weight of each category in recognition of the categories that are most closely correlated with child outcomes. The workgroup specifically recognized the importance of teacher-child interactions in child development, also noting that the TWC-funded “Strengthening Texas Rising Star Implementation Study” established validity and reliability for measures within this category. TWC proposes that the teacher-child interactions category be assigned a weight of 40 percent, with the remaining three categories weighted at 20 percent each.

Impact of Certain Deficiencies on Texas Rising Star Certification

Section 809.132 defines the impact of certain child care licensing deficiencies on programs’ Texas Rising Star certification status. Certain deficiencies or accumulation of total deficiencies may
result in a decrease in star level or loss of certification. Because enhanced reimbursement rates are tied to star-level certification, the result can be a significant reduction in reimbursements for affected programs.

Stakeholders, including early learning program directors, have observed that financial instability is a barrier to maintaining and increasing quality. The workgroup recommended providing Texas Rising Star programs that receive certain licensing deficiencies with an opportunity to remedy those deficiencies within a six-month probationary period. The workgroup also recommended increasing technical assistance for programs at risk of losing or dropping their Texas Rising Star certification level. Stakeholders that commented on the revisions strongly supported these recommendations.

A review of Texas Rising Star data from 2017 to 2019 showed that almost half of the 300 programs that lost a star level or dropped out of Texas Rising Star did so due to licensing deficiencies. Eighty percent of star-level drops were due to licensing deficiencies, and of those programs that lost their Texas Rising Star certification completely, 54 percent became disqualified for certification due to licensing deficiencies.

TWC proposes a revised structure for considering licensing deficiencies for both new Texas Rising Star applicants and existing certified programs. The revised structure will continue to provide a high level of accountability for the most critical licensing issues, but will also provide opportunities for providers to correct issues that are less correlated with the quality of care children receive.

Minimum Eligibility Requirements for Providers Serving CCDF Subsidized Children

Under federal regulations 45 CFR §98.30(g) regarding Parental Choice, the Administration for Children and Families explicitly states to establish policies that requires subsidy providers to meet higher standards of quality, as long as those requirements do not effectively limit parental choice. TWC proposes a new Pre-Star provider designation, indicating those child care programs that demonstrate that they do not have significant licensing findings. Pre-Star designations are outside of the statutorily defined Texas Rising Star quality-based rating system and will not receive an enhanced reimbursement rate. As previously described, programs that meet the criteria for Pre-Star, and would like to enter the Texas Rising Star quality rating improvement system, are eligible to apply for star-level certification.

The Pre-Star designation reviews a provider’s licensing findings, as is currently done through the Texas Rising Star Screening Form that is included in the Texas Rising Star guidelines. The new Screening Criteria for Subsidized Child Care criteria have been adopted and included in a proposed amendment of the CCDF State Plan, which is available for public comment in conjunction with these proposed rules (see meeting materials for October 6, 2020 Commission Meeting). Additionally, based on feedback from the four-year review, the total number of licensing deficiencies allowed has increased from 10 to 15.

TWC will establish a five-year timeline for all subsidy providers to achieve at least a Pre-Star designation. TWC will develop a plan to roll out this requirement across the state and will codify the details of this plan in the CCDF State Plan. TWC’s rollout plan will consider potential supply challenges, such as those in rural areas of the state which face a potential shortage of child care providers.

During regional stakeholder meetings, many commenters supported this strategy as an effort to ensure that public funds are being invested in child care programs that do not have significant issues with basic licensing requirements and to create a framework for placing these programs on a path to higher quality. At the same time, a few stakeholders also expressed concerns regarding the cost of administering a new Pre-Star designation. TWC notes that the Pre-Star designation may be determined through an automated process that reviews a program’s licensing history, as published by Child Care Regulation, and automatically makes the determination of whether a provider may be designated as Pre-Star. Therefore, this proposed change does not require a significant investment of staff resources. Additionally, TWC is also considering the implementation of a continuous quality improvement framework to enhance mentoring and coaching; these resources would be available to Pre-Star programs that would like to enter the state’s quality rating improvement system and apply for star-level certification.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS

TWC proposes the following amendments to Subchapter A:

§809.2. Definitions

Section 809.2 is amended to add a definition for “Pre-Star provider.”

SUBCHAPTER B. GENERAL MANAGEMENT

TWC proposes the following amendments to Subchapter B:

§809.12. Board Plan for Child Care Services (Includes New Regulations)

Section 809.12 is amended to require Boards to include their strategies to use contracted slots agreements, if applicable, in their plans.

§809.13. Board Policies for Child Care Services (Includes New Regulations)

Section 809.13 is amended to require Boards to develop:

--a two-week waiting period policy for a child to transfer to a new provider;

--policies and procedures for contracted slots agreements, if applicable; and

--policies supporting direct referrals from recognized pre-K or HS/EHS partnerships.

§809.16. Quality Improvement Activities

Section 809.16 is amended to allow Boards to expend child care funds on any quality improvement activity described in applicable state laws and the CCDF State Plan.

§809.18. Maintenance of a Waiting List

Section 809.18 is amended to add an allowable exemption from the waiting list for children who are referred directly from a recognized pre-K or HS/EHS partnership to a child care provider to receive services in the contracted partnership program.

§809.19. Assessing the Parent Share of Cost
Section 809.19 is amended to allow Boards to implement a policy to reduce the parent share of cost amount assessed pursuant to §809.19(a)(1)(B) upon the child's referral for part-time care.

§809.22. Partnership Direct Referrals (New Regulation)
New §809.22 adds a requirement for Boards to establish policies and procedures to enroll eligible children who are directly referred by recognized pre-K or HS/EHS partnerships and exempting these children from the waiting list.

SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

TWC proposes the following amendments to Subchapter E:

§809.91. Minimum Requirements for Providers (Includes New Regulations)
Section 809.91(a)(1) is amended to reference new subsection (g), which requires that all CCL-regulated child care providers be designated as Pre-Star based upon meeting TWC's Screening Criteria for Subsidized Child Care. The Screening Criteria for Subsidized Child Care is proposed for removal in §809.131(a) and (b) as a Texas Rising Star eligibility requirement.

Section 809.91 is also amended to add new subsection (h) to provide additional details regarding Pre-Star designations. The Screening Criteria for Subsidized Child Care will be defined in the CCDF State Plan, as will a statewide rollout plan. TWC will carefully consider how to implement the new requirement for all subsidy providers to be Pre-Star designated to ensure that parent choice is not impacted. TWC plans to roll out this requirement over a five-year period; this is intended to provide child care programs with ample time to ensure that they can attain Pre-Star designation. The new Screening Criteria for Subsidized Child Care criteria are included in a proposed amendment of the CCDF State Plan, which is available for public comment in conjunction with these proposed rules (see meeting materials for October 6, 2020 Commission meeting). The rollout plan will be developed as a future State Plan Amendment.

§809.93. Provider Reimbursement
Section 809.93 is amended to add the option for Boards to pay child care providers for holding spaces open if they have a valid contracted slots agreement.

§809.96. Contracted Slots Agreements (New Regulation)
New §809.96 adds detailed requirements for Boards that use contracted slots agreements.

SUBCHAPTER G. TEXAS RISING STAR PROGRAM

TWC proposes the following amendments to Subchapter G:

§809.130. Short Title and Purpose
Section 809.130(d)(1) is amended to denote that Texas Rising Star measures align with the following four categories:
--Director and Staff Qualifications and Training
--Teacher-Child Interactions
--Program Administration
--Indoor/Outdoor Environments

§809.131. Eligibility for the Texas Rising Star Program (Includes New Regulations)

Section 809.131 is amended to remove §809.131(b), as all CCL-regulated subsidy providers will now be required to be designated as Pre-Star under proposed §809.91(a)(1). Additionally, §809.131 is amended to require Texas Rising Star applicants to agree to participate in the WFR and to encourage staff to create accounts within the WFR.

§809.132. Impact of Certain Deficiencies on Texas Rising Star Certification (Includes New Regulations)
Section 809.132 is amended to add compliance requirements for current Texas Rising Star providers and amends the consequences of certain child care licensing deficiencies for certified Texas Rising Star programs and applicants.

§809.133. Application and Assessments for the Texas Rising Star Program (Includes New Regulations)
Section 809.133 is amended to require all programs to participate in the creation of an online-generated CQIP that focuses on growth and evolving adherence to higher-quality standards and to require Boards to ensure that CQIPs are implemented and supported as described in the Texas Rising Star guidelines.

§809.134. Minimum Qualifications for Texas Rising Star Staff (Includes New Regulations)
Section 809.134 is amended to require all Texas Rising Star staff to complete the Texas Rising Star standards training, require Texas Rising Star assessors to attain and maintain the Texas Rising Star Assessor Certification, and require Texas Rising Star mentors to pursue the coaching micro-credential through the attainment of competency badges over a time period defined by TWC.

Section 809.134 is also amended to move §809.134(d) and (e) to new §809.136.

§809.136. Roles and Responsibilities of Texas Rising Star Staff
New §809.136 defines the separate roles and responsibilities of Texas Rising Star assessors and mentors, including separation of roles; cross-functional collaboration and coordination; and mandated reporting requirements related to observed licensing violations.

New §809.136(4) and (5) clarify the separation of roles and professional development of Texas Rising Star staff.

PART III. IMPACT STATEMENTS

Chris Nelson, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated cost reductions to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to individuals required to comply with the rules.
There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural communities as a result of enforcing or administering the rules.

Based on the analyses required by Texas Government Code, §2001.024, TWC has determined that the requirement to repeal or amend a rule, as required by Texas Government Code, §2001.0045, does not apply to this rulemaking.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the US Constitution or the Texas Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The Commission completed a Takings Impact Analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to implement a contracted slots option for child care services, update the allowable uses of CCQ funds, update how the parent co-payment is calculated, update the child transfer policy, and implement changes to Texas Rising Star policy as recommended by the Texas Rising Star four-year review.

The proposed rulemaking action will not create any additional burden on private real property. The proposed rulemaking action will not affect private real property in a manner that would require compensation to private real property owners under the US Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Government Growth Impact Statement

TWC has determined that during the first five years the amendments will be in effect:

--the amendments will not create or eliminate a government program;
--implementation of the amendments will not require the creation or elimination of employee positions;
--implementation of the amendments will not require an increase or decrease in future legislative appropriations to TWC;
--the amendments will not require an increase or decrease in fees paid to TWC;
--the amendments will create new regulations;
--the amendments will expand existing regulations;
--the amendments will not limit or eliminate an existing regulation;
--the amendments will not change the number of individuals subject to the rules; and

--the amendments will not positively or adversely affect the state's economy.

Economic Impact Statement and Regulatory Flexibility Analysis

TWC has determined that the proposed rules will not have an adverse economic impact on small businesses or rural communities, as the proposed rules place no requirements on small businesses or rural communities.

Mariana Vega, Director, Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Reagan Miller, Director, Child Care & Early Learning, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to increase access to high quality child care for Texans.

TWC hereby certifies that the proposal has been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, TWC sought the involvement of Texas' 28 Boards. TWC provided the policy concept regarding these rule amendments to the Boards for consideration and review on June 23, 2020, for the policy concept relating to contracted slots; July 14, 2020, for the policy concept relating to Texas Rising Star; and July 21, 2020, for the policy concept relating to child transfers. TWC also conducted conference calls to discuss the policy concepts with Board executive directors and Board staff: on June 19, 2020, for the policy concept relating to contracted slots; and July 17, 2020, for the policy concepts relating to Texas Rising Star and child transfers. During the rulemaking process, TWC considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §809.2

The rules are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules implement changes made to Texas Labor Code Chapter 302 and Texas Government Code, Chapter 2308, in a manner that comports with the existing requirements of 45 CFR Part 98.

§809.2. Definitions.

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

(1) Attending a job training or educational program—An individual is attending a job training or educational program if the individual:

(A) is considered by the program to be officially enrolled;

(B) meets all attendance requirements established by the program; and

(C) is making progress toward successful completion of the program as determined by the Board upon eligibility redetermination as described in §809.42(b) of this chapter.
(2) Child--An individual who meets the general eligibility requirements contained in this chapter for receiving child care services.

(3) Child care contractor--The entity or entities under contract with the Board to manage child care services. This includes contractors involved in determining eligibility for child care services, contractors involved in the billing and reimbursement process related to child care subsidies, as well as contractors involved in the funding of quality improvement activities as described in §809.16 of this chapter.

(4) Child Care Licensing (CCL)--Division responsible for protecting the health, safety, and well-being of children who attend or reside in regulated child care facilities and homes. Previously a division of the Texas Department of Family and Protective Services (DFPS), CCL is now part of the Texas Health and Human Services Commission (HHSC).

(5) Child care services--Child care subsidies and quality improvement activities funded by the Commission.

(6) Child care subsidies--Commission-funded child care reimbursements to an eligible child care provider for the direct care of an eligible child.

(7) Child experiencing homelessness--A child who is homeless, as defined in the McKinney-Vento Act (42 USC 11434(a)), Subtitle VII-B, §725.

(8) Child with disabilities--A child who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Major life activities include, but are not limited to, caring for oneself; performing manual tasks; walking; hearing; seeing, speaking, or breathing; learning; and working.

(9) Educational program--A program that leads to:

(A) a high school diploma;

(B) a Certificate of High School Equivalency; or

(C) a postsecondary degree from an institution of higher education.

(10) Excessive unexplained absences--More than 40 unexplained absences within a 12-month eligibility period as described in §809.78(a)(3) of this chapter.

(11) Family--Two or more individuals related by blood, marriage, or decree of court, who are living in a single residence and are included in one or more of the following categories:

(A) two [Two] individuals, married--including by common-law, and household dependents; or

(B) a [A] parent and household dependents.

(12) Household dependent--An individual living in the household who is [one of the following]:

(A) an [An] adult considered a dependent of the parent for income tax purposes;

(B) a [A] child of a teen parent; or

(C) a [A] child or other minor living in the household who is the responsibility of the parent.

(13) Improper payments--Any payment of Child Care Development Fund (CCDF) [CCDE] grant funds that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements governing the administration of CCDF grant funds and includes payments:

(A) to an ineligible recipient;

(B) for an ineligible service;

(C) for any duplicate payment; and

(D) for services not received.

(14) Job training program--A program that provides training or instruction leading to:

(A) basic literacy;

(B) English proficiency;

(C) an occupational or professional certification or license; or

(D) the acquisition of technical skills, knowledge, and abilities specific to an occupation.

(15) Listed family home--A family home, other than the eligible child's own residence, that is listed, but not licensed or registered with, CCL pursuant to Texas Human Resources Code §42.052(c).

(16) Military deployment--The temporary duty assignment away from the permanent military installation or place of residence for reserve components of the single military parent or the dual military parents. This includes deployed parents in the regular military, military reserves, or National Guard.

(17) Parent--An individual who is responsible for the care and supervision of a child and is identified as the child's natural parent, adoptive parent, stepparent, legal guardian, or person standing in loco parentis (as determined in accordance with Commission policies and procedures). Unless otherwise indicated, the term applies to a single parent or both parents.

(18) Pre-Star provider--A designation for subsidy providers licensed or registered by CCL, based on meeting the Screening Criteria for Subsidized Child Care, which is further defined in the CCDF State Plan.

(19) [48] Protective services--Services provided when:

(A) a child is at risk of abuse or neglect in the immediate or short-term future and the child's family cannot or will not protect the child without DFPS Child Protective Services (CPS) intervention;

(B) a child is in the managing conservatorship of DFPS and residing with a relative or a foster parent; or

(C) a child has been provided with protective services by DFPS within the prior six months and requires services to ensure the stability of the family.

(20) [49] Provider--A provider is defined as:

(A) a regulated child care provider as defined in paragraph (21) of this section §§809.2(20);

(B) a relative child care provider as defined in paragraph (22) of this section §§809.2(21); or

(C) a listed family home as defined in paragraph (15) of this section §§809.2(15), subject to the requirements in §809.91(b) of this chapter.

(21) [20] Regulated child care provider--A provider caring for an eligible child in a location other than the eligible child's own residence that is:

(A) licensed by CCL;

(B) registered with CCL; or


45 TexReg 7558   October 23, 2020   Texas Register
(22) [213] Relative child care provider--An individual who is at least 18 years of age, and is, by marriage, blood relationship, or court decree, the child’s [one of the following]:

(A) [The child’s] grandparent;
(B) [The child’s] great-grandparent;
(C) [The child’s] aunt;
(D) [The child’s] uncle; or
(E) [The child’s] sibling (if the sibling does not reside in the same household as the eligible child).

(23) [223] Residing with--Unless otherwise stipulated in this chapter, a child is considered to be residing with the parent when the child is living with, and physically present with, the parent during the time period for which child care services are being requested or received.

(24) [223] Teen parent--A teen parent (teen) is an individual 18 years of age or younger, or 19 years of age and attending high school or the equivalent, who has a child.


(26) [255] Texas Rising Star provider [Provider]--A provider certified as meeting the Texas Rising Star [TRS] program standards. Texas Rising Star [TRS] providers are certified as a [one of the following]:

(A) 2-Star Program Provider;
(B) 3-Star Program Provider; or
(C) 4-Star Program Provider.

(27) [261] Working--Working is defined as:

(A) activities for which one receives monetary compensation such as a salary, wages, tips, and commissions; or
(B) participation in Choices or Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T) activities.

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 9, 2020.
TRD-202004210
Dawn Cronin
Director, Workforce Program Policy
Texas Workforce Commission

Earliest possible date of adoption: November 22, 2020
For further information, please call: (512) 689-9855

SUBCHAPTER B. GENERAL MANAGEMENT
40 TAC §§809.12, 809.13, 809.16, 809.18, 809.19, 809.22

The rules are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWCC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWCC services and activities.

The proposed rules implement changes made to Texas Labor Code Chapter 302 and Texas Government Code, Chapter 2308, in a manner that comports with the existing requirements of 45 CFR Part 98.


(a) A Board shall, as part of its Texas Workforce Development Board Plan (Board plan), develop, amend, and modify the Board plan to incorporate and coordinate the design and management of the delivery of child care services with the delivery of other workforce employment, job training, and educational services identified in Texas Government Code, §2308.304, [§2308.251] et seq., as well as other workforce training and services included in the One-Stop Service Delivery Network.

(b) The goal of the Board plan is to coordinate workforce training and services, to leverage private and public funds at the local level, and to fully integrate child care services for low-income families with the network of workforce training and services under the administration of the Boards.

(c) Boards shall design and manage the Board plan to maximize the delivery and availability of safe and stable child care services that assist families seeking to become independent from, or who are at risk of becoming dependent on, public assistance while parents are either working or attending a job training or an educational program.

(d) A Board shall include in the Board plan any strategies to use contracted slots agreements, as described in §809.96 of this chapter, including any local priorities and how contracted slots agreements will help increase access to high-quality care for targeted communities and population.

§809.13. Board Policies for Child Care Services.

(a) A Board shall develop, adopt, and modify its policies for the design and management of the delivery of child care services in a public process in accordance with Chapter 802 of this title.

(b) A Board shall maintain written copies of the policies that are required by federal and state law, or as requested by the Commission, and make such policies available to the Commission and the public upon request.

(c) At a minimum, a Board shall develop policies related to:

(1) how the Board determines that the parent is making progress toward successful completion of a job training or educational program, as described in §809.2(1) of this chapter;

(2) maintenance of a waiting list, as described in §809.18(b) of this subchapter;

(3) assessment of a parent share of cost, as described in §809.19(a)(1) of this subchapter, including:

(A) provisions for a parent's failure to pay the parent share of cost, including the reimbursement of providers, as a program violation that is subject to early termination of child care services within a 12-month eligibility period; and

(B) criteria for determining the affordability of the parent share of cost, as described in §809.19(d) and [c] (e) of this subchapter;

(4) maximum reimbursement rates, as provided in §809.20 of this subchapter, including policies related to reimbursement of providers that offer transportation;

(5) family income limits, as described in Subchapter C of this chapter (relating to Eligibility for Child Care Services);
(6) provision of child care services to a child with disabil-
ities under the age of 19, as described in §809.41(a)(1)(B) of this chapter;

(7) minimum activity requirements for parents, as described in §809.48 and §809.50 of this chapter;

(8) time limits for the provision of child care while the parent is attending an educational program, as described in §809.41(b) of this chapter;

(9) Board priority groups, as described in §809.43(a) of this chapter;

(10) transfer of a child from one provider to another, as described in §809.71(3) of this chapter, including a waiting period of two weeks before the effective date of a transfer, except in cases in which the provider is subject to a CCL action, as described in §809.94 of this chapter, or on a case-by-case basis by the Board;

(11) providers charging the difference between their published rate and the Board’s reimbursement rate as provided in §809.92(d) of this chapter;

(12) procedures for fraud fact-finding as provided in §809.111 of this chapter; [and]

(13) policies and procedures to ensure that appropriate corrective actions are taken against a provider or parent for violations of the automated attendance requirements specified in §809.115(d) and [–]

(e) of this chapter;[–]

(14) policies and procedures for contracted slots agreements as described in §809.96 of this chapter, if the Board opts to enter into such agreements; and

(15) supporting direct referrals from recognized pre-K or HS/EHS partnerships, as described in §809.22 of this subchapter.

§809.16. Quality Improvement Activities.

(a) Child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, [General Administration]), Subchapter B of this title (relating to Allocations) [Allocation and Funding], and specifically §800.58(2) of this title (relating to Child Care), including local public transferred funds and local private donated funds, as provided in §809.17 of this subchapter, to the extent they are used for nondirect care quality improvement activities, may be expended on any quality improvement activity described in 45 CFR Part 98, any applicable state laws, and the CCDF State Plan.

(b) Boards must ensure compliance with 45 CFR Part 98 regarding construction expenditures, as follows:

(1) State and local agencies and sectarian agencies or organizations.

(A) Funds shall not be expended for the purchase or improvement of land, or for the purchase, construction, or permanent improvement of any building or facility.

(B) Funds may be expended for minor remodeling, and for upgrading child care facilities to ensure that providers meet state and local child care standards, including applicable health and safety requirements.

(2) Sectarian agencies or organizations.

(A) The prohibitions in paragraph (1) of this subsection apply.

(B) Funds may be expended for minor remodeling only if necessary to bring the facility into compliance with the health and safety requirements established pursuant to 45 CFR Part 98.

(c) Expenditures certified by a public entity, as provided in §809.17(b)(3) of this subchapter, may include expenditures for any quality improvement activity described in 45 CFR Part 98.

§809.18. Maintenance of a Waiting List.

(a) A Board shall ensure that a list of parents waiting for child care services, because of the lack of funding or lack of providers, is maintained and available to the Commission upon request.

(b) A Board shall establish a policy for the maintenance of a waiting list that includes, at a minimum:

(1) the process for determining that the parent is potentially eligible for child care services before placing the parent on the waiting list; and

(2) the frequency in which the parent information is updated and maintained on the waiting list.

(c) A Board may exempt children from the waiting list who are directly referred from a recognized pre-K or HS/EHS partnership as described in §809.22 of this subchapter to a child care provider to receive services in the contracted partnership program, which is subject to the availability of funding and the availability of subsidized slots at the partnership site.


(a) For child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, [General Administration]), Subchapter B of this title (relating to Allocations) [ Allocation and Funding], and specifically, §800.58 of this title (relating to [–] Child Care), including local public transferred funds and local private donated funds, as provided in §809.17 of this subchapter, the following shall apply.

(1) A Board shall set a parent share of cost policy that assesses the parent share of cost in a manner that results in the parent share of cost:

(A) being assessed to all parents, except in instances when an exemption under paragraph (2) of this subsection applies;

(B) being an amount determined by a sliding fee scale based on the family's size and gross monthly income, including a possible reexamination of the sliding fee scale if there are frequent terminations for lack of payment pursuant to subsection (e) of this section, which also may consider the number of children in care;

(C) being an amount that is affordable and does not result in a barrier to families receiving assistance;

(D) being assessed only at the following times:

(i) initial eligibility determination;

(ii) 12-month eligibility redetermination;

(iii) upon the addition of a child in care;

(iv) upon a parent's report of a change in income, family size, or number of children in care that would result in a reduced parent share of cost assessment; and

(v) upon resumption of work, job training, or education activities following temporary changes described in §809.51(a)(2) of this chapter, and upon resumption of work, job training, or education activities during the three-month continuation of care period described in §809.51(c) of this chapter; and

(E) not increasing above the amount assessed at initial eligibility determination or at the 12-month eligibility redetermination based on the factor in subparagraph (B) of this paragraph, except upon
the addition of a child in care as described in subsection (a)(3) [subsection (a)(1)(C)(iii)] of this paragraph [section].

(2) Parents who are one or more of the following are exempt from paying the parent share of cost:

(A) Parents who are participating in Choices or who are in Choices child care described in §809.45 of this chapter;

(B) Parents who are participating in SNAP E&T services or who are in SNAP E&T child care described in §809.47 of this chapter;

(C) Parents of a child receiving Child Care for Children Experiencing Homelessness as described in §809.52 of this chapter; or

(D) Parents who have children who are receiving protective services child care pursuant to §809.49 and §809.54(c) of this chapter, unless DFPS assesses the parent share of cost.

(3) Teen parents who are not covered under exemptions listed in paragraph (2) of this subsection shall be assessed a parent share of cost. The teen parent's share of cost is based solely on the teen parent's income and size of the teen's family as defined in §809.2 of this chapter.

(b) For child care services funded from sources other than those specified in subsection (a) of this section, a Board shall set a parent share of cost policy based on a sliding fee scale. The sliding fee scale may be the same as or different from the provisions contained in subsection (a) of this section.

(c) A Board shall establish a policy regarding reimbursement of providers when parents fail to pay the parent share of cost.

(d) A Board shall establish a policy regarding termination of child care services within a 12-month eligibility period when a parent fails to pay the parent share of cost. The Board's policy must include:

(1) A requirement to evaluate and document each family's financial situation for extenuating circumstances that may affect affordability of the assessed parent share of cost pursuant to paragraph (2) of this subsection, and a possible temporary reduction pursuant to subsection (g) of this section before the Board or its child care contractor may terminate care under this section;

(2) General criteria for determining affordability of a Board's parent share of cost, and a process to identify and assess the circumstances that may jeopardize a family's self-sufficiency under subsection (g) of this section;

(3) Maintenance of a list of all terminations due to failure to pay the parent share of cost, including family size, income, family circumstances, and the reason for termination, for use when conducting evaluations of affordability, as required under paragraph (4) of this subsection; and

(4) The Board's definition of what constitutes frequent terminations and its process for assessing the general affordability of the Board's parent share of cost schedule, pursuant to subsection (e) of this section.

(e) A Board with frequent terminations of care for lack of payment of the parent share of cost must reexamine its sliding fee scale and adjust it to ensure that fees are not a barrier to assistance for families at certain income levels.

(f) A Board that does not have a policy to reimburse providers when parents fail to pay the parent share of cost may establish a policy to require the parent to pay the provider before the family can be reetermined eligible for future child care services.

(g) The Board or its child care contractor may review the assessed parent share of cost for a possible temporary reduction if there are extenuating circumstances that jeopardize a family's self-sufficiency. The Board or its child care contractor may temporarily reduce the assessed parent share of cost if warranted by these circumstances. Following the temporary reduction, the parent share of cost amount immediately prior to the reduction shall be reinstated.

(h) If the parent is not covered by an exemption as specified in subsection (a)(2) of this section, then the Board or its child care contractor shall not waive the assessed parent share of cost under any circumstances.

(i) If the parent share of cost, based on family income and family size, is calculated to be zero, then the Board or its child care contractor shall not charge the parent a minimum share of cost amount.

(j) A Board may establish a policy to reduce the parent share of cost amount assessed pursuant to subsection (a)(1)(B) of this section upon the parent's selection of a Texas Rising Star [TRS]--[-] certified provider. Such Board policy shall ensure:

(1) That the parent continue to receive the reduction if:

(A) the Texas Rising Star [TRS] provider loses Texas Rising Star [TRS] certification; or

(B) the parent moves or changes employment within the workforce area and no Texas Rising Star [TRS]--[-] certified providers are available to meet the needs of the parent's changed circumstances; and

(2) That the parent no longer receives the reduction if the parent voluntarily transfers the child from a Texas Rising Star [TRS]--[-] certified provider to a non-Texas Rising Star [TRS]--[-] certified provider.

(k) A Board may establish a policy to reduce the parent share of cost amount assessed pursuant to subsection (a)(1)(B) of this section upon the child's referral for part-time care. Such Board policy shall ensure that:

(1) The parent no longer receives the reduction if the referral is changed to full-time care; and

(2) A parent qualifies for a reduction in parent share of cost for both selecting a Texas Rising Star--certified provider (as defined in subsection (i) of this section) and a child's part-time care referral will receive the greater of the two discounts.

§809.22 Direct Referrals to Recognized Partnerships.

(a) A recognized partnership is a partnership that:

(1) Exists between a child care provider and one of the following:

(A) a public school prekindergarten provider;

(B) a local education agency; or

(C) a Head Start/Early Head Start program; and

(2) Requires both parties to have entered into an agreement, such as a memorandum of understanding, and serves some number of children under age six who are dually enrolled in both programs.

(b) A Board shall establish policies and procedures to enroll eligible children who are directly referred by a recognized partnership.

(c) A Board's policy shall exempt children directly referred from a recognized partnership from the Board's waiting list, subject to the availability of funding and the availability of subsidized slots at the partnership site.
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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Dawn Cronin
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Texas Workforce Commission

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For further information, please call: (512) 689-9855

SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

40 TAC §§809.91, 809.93, 809.96

The rules are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules implement changes made to Texas Labor Code Chapter 302 and Texas Government Code, Chapter 2308, in a manner that comports with the existing requirements of 45 CFR Part 98.

§809.91. Minimum Requirements for Providers.

(a) A Board shall ensure that child care subsidies are paid only to:

   (1) regulated child care providers as described in §809.2 of this chapter, subject to the requirements in subsection (g) of this section;
   (2) relative child care providers, as described in §809.2 of this chapter, subject to the requirements in subsection (e) of this section; or
   (3) at the Board's option, child care providers licensed in a neighboring state, subject to the following requirements:

   (A) Boards shall ensure that the Board's child care contractor reviews the licensing status of the out-of-state provider every month, at a minimum, to confirm the provider is meeting the minimum licensing standards of the state;
   (B) Boards shall ensure that the out-of-state provider meets the requirements of the neighboring state to serve CCDF-subsidized children; and
   (C) The provider shall agree to comply with the requirements of this chapter and all Board policies and Board child care contractor procedures.

(b) A Board shall not prohibit a relative child care provider that has been listed with CCL and meets the minimum requirements of this section from being an eligible relative child care provider.

(c) Except as provided by the criteria for Texas Rising Star Program certification, a Board or the Board's child care contractor shall not place requirements on regulated providers that:

   (1) exceed Pre-Star designation requirements or the state licensing requirements stipulated in Texas Human Resources Code, Chapter 42; or
   (2) have the effect of monitoring the provider for compliance with state licensing requirements stipulated in Texas Human Resources Code, Chapter 42.

(d) When a Board or the Board's child care contractor, in the course of fulfilling its responsibilities, gains knowledge of any possible violation regarding regulatory standards, the Board or its child care contractor shall report the information to the appropriate regulatory agency.

(e) For relative child care providers to be eligible for reimbursement for Commission-funded child care services, the following applies:

   (1) Relative child care providers shall list with CCL; however, pursuant to 45 CFR §98.41(e), relative child care providers listed with CCL shall be exempt from the health and safety requirements of 45 CFR §98.41(a).
   (2) A Board shall allow relative child care providers to care for a child in the child's home (in-home child care) only for the following:

      (A) A child with disabilities as defined in §809.2 of this chapter, and his or her siblings;
      (B) A child under 18 months of age and his or her siblings;
      (C) A child of a teen parent; and
      (D) When the parent's work schedule requires evening, overnight, or weekend child care in which taking the child outside of the child's home would be disruptive to the child.
   (3) A Board may allow relative in-home child care for circumstances in which the Board's child care contractor determines that other child care provider arrangements are not available in the community.

   (f) Boards shall ensure that subsidies are not paid for a child at the following child care providers:

      (1) Except for foster parents authorized by DFPS pursuant to §809.49 of this chapter, licensed child care centers, including before-or-after-school programs and school-age programs, in which the parent or his or her spouse, including the child's parent or stepparent, is the director or assistant director, or has an ownership interest; or
      (2) Licensed, registered, or listed child care homes where the parent also works during the hours his or her child is in care.
   (g) Regulated child care providers, except those operated and monitored by the US military, must meet Pre-Star provider designation unless exempted under requirements of subsection (h)(3) of this section.
   (h) Pre-Star provider designations and exemptions are defined in the Commission-approved CCDF State Plan and include:

      (1) minimum Pre-Star criteria required for each provider type;
      (2) a progressive statewide roll out plan to require Pre-Star designation for receipt of subsidies; and
      (3) limited provider exemption criteria to ensure parent choice is not negatively impacted by the Pre-Star requirements.

§809.93. Provider Reimbursement.

(a) A Board shall ensure that reimbursement for child care is paid only to the provider.
§809.96. Contracted Slots Agreements.

(a) In this section, the term "contracted slots agreement" is defined as a Board entering into a contract with a child care provider to reserve a specific number of places, or slots, for children participating in the child care subsidy program. This contract shall:

(1) define the number of slots to be reserved by age group (infant, toddler, preschool, or school-age); and

(2) meet the eligibility requirements as described in subsection (e) of this section.

(b) Boards may enter into a contracted slots agreement with providers that agree to provide subsidized child care services to eligible children residing in the Board's workforce area.

(c) A Board that enters into a contracted slots agreement shall include this strategy in the Board Plan, as described in §809.12 of this chapter.

(d) Each contract between a Board and a provider must identify the number of places (slots) to be reserved for children participating in the child care subsidy program.

(e) To be eligible for a contract, a child care provider must be a Texas Rising Star 3-star or 4-star provider and meet one of the following priorities:

(1) located:

(A) where the number of children under age six with working parents is at least three times greater than the capacity of licensed child care providers in the area, based on data published annually by the Commission; or

(B) in an underserved area that has been identified by a Board as having an inadequate supply of child care in accordance with the parameters described in the CCDF State Plan.

(2) have a partnership with local school districts to provide pre-K services;

(3) have a partnership with EHS or HS;

(4) increase the number of places reserved for infants and toddlers by high-quality child care providers; and

(5) satisfy a priority identified in the Board's plan, as described in §809.12 of this chapter.

(f) A Board that enters into a contracted slots agreement may continue payment for reserved slots during times of transition between the time that one child leaves the program and another child is placed in the slot. The period of continued payment shall adhere to the Board's policy for contracted slots agreements, as described in §809.13(c)(14) of this chapter, and may not exceed one month following the month of the vacancy.

(g) Except for children directly referred from recognized partnerships, as described in §809.22 of this chapter, to fill open reserved slots, Boards shall contact families in order of the Board's waiting list:

(1) that requested care in the ZIP code where the provider with the open reserved slot is located, and

(2) whose child is in the age group for which a slot is available.

(h) In accordance with Commission guidelines, Boards that enter into contracted slots agreements shall submit a report to the Commission within six months of entering into a contract, determining the contract's effect on the:

(1) financial stability of providers participating in the contract;

(2) availability of high-quality child care options available to participants in the Commission's subsidy program;

(3) number of high-quality providers in any part of the workforce area with a high concentration of families that need child care;

(4) percentage of children participating in the Commission's subsidized child care program at each Texas Rising Star provider in the workforce area; and

(5) additional information as requested by the Commission.

(i) A Board shall resubmit the report every six months from the due date of the Board's initial report to the Commission.
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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SUBCHAPTER G. TEXAS RISING STAR PROGRAM

40 TAC §§809.130 - 809.134, 809.136

The rules are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules implement changes made to Texas Labor Code Chapter 302 and Texas Government Code, Chapter 2308, in a manner that comports with the existing requirements of 45 CFR Part 98.

§809.130. Short Title and Purpose.

(a) The rules contained in this subchapter may be cited as the Texas Rising Star [TRS] Program rules.

(b) The purpose of the Texas Rising Star [TRS] Program rules is to interpret and implement Texas Government Code, §2308.3155(b), which requires [requiring] the Commission to establish rules to administer the Texas Rising Star [TRS] program, including guidelines for rating a child care provider for Texas Rising Star [TRS] certification.

(c) The Texas Rising Star [TRS] Program rules identify the organizational structure and categories of, and the scoring factors that shall be included in, the Texas Rising Star [TRS] guidelines.

(d) The Texas Rising Star [TRS] guidelines for rating a child care provider shall:

1. describe measures for the Texas Rising Star [TRS] program that contain, at a minimum, measures for child care providers regarding:
   (A) director and staff qualifications and training;  
   (B) teacher [caregiver]-child interactions;  
   (C) program administration; and [curriculum;]
   (D) indoor/outdoor activities; and
   [E] parent involvement and education;  
2. specify measures that:
   (A) must be met in order for a provider to be certified at each star level; and  
   (B) are observed and have points awarded through on-site assessments; and  
3. specify the scoring methodology and scoring thresholds for each star level.

(e) The Texas Rising Star [TRS] guidelines:

1. shall be reviewed and updated by the Commission at a minimum of every four years in conjunction with the rule review of Chapter 809, conducted pursuant to Texas Government Code, §2001.039, and the Texas Rising Star [TRS] guidelines review shall:
   (A) consider input from stakeholders; and
   (B) include at least one public hearing held prior to submitting the stakeholder input to the Commission;
2. shall be adopted by the Commission subject to the requirements of the Texas Open Meetings Act; and
3. [also] may be reviewed and amended as determined necessary by the Commission in accordance with the requirements of the Texas Open Meetings Act.

§809.131. Eligibility for the Texas Rising Star [TRS] Program.

[Trs] A child care provider is eligible to apply for the Texas Rising Star [TRS] program if the provider has a current agreement to serve Commission-subsidized children and:

1. has a permanent (nonexpiring) license or registration from CCL;
2. has at least 12 months of licensing history with CCL, and is not on:
   (A) corrective action with a Board pursuant to Subchapter F of this chapter;
   (B) a “Notice of Freeze” with the Commission pursuant to Texas Labor Code, Chapter 213 [of the Texas Labor Code] (Enforcement of the Texas Unemployment Compensation Act) or Chapter 61 [of the Texas Labor Code] (Payment of Wages); or
   (C) meets the requirements to be designated as a Pre-Star provider as specified in §802.2(18) of this chapter.
3. has director and teaching staff registered in the Texas Early Childhood Professional Development System Workforce Registry; or
4. is regulated by and in good standing with the US Military.
5. [Trs] is regulated by and in good standing with the US Government.

[Trs] A child care facility is not eligible to apply for the TRS program if, during the most recent 12-month CCL licensing history, the provider had:

1. any of the critical licensing deficiencies listed in the TRS guidelines;
2. five or more of the high or medium-high licensing deficiencies listed in the TRS guidelines; or
3. 10 or more total licensing deficiencies of any type.


(a) A Texas Rising Star [TRS] provider shall lose Texas Rising Star [TRS] certification if the provider:

1. is placed on corrective action with a Board pursuant to Subchapter F of this chapter;
2. is under a “Notice of Freeze” with the Commission pursuant to Chapter 213 of the Texas Labor Code (Enforcement of the Texas Unemployment Compensation Act) or Chapter 61 of the Texas Labor Code (Payment of Wages);
(3) is placed on corrective or adverse action by CCL; [or]

(4) had 15 or more total high or medium-high weighted licensing deficiencies [of any type] during the most recent 12-month licensing history;

(5) had more than four probationary impacts during its three-year probationary period;

(6) had a consecutive third probationary impact; or

(7) is cited for specified CCL minimum standards regarding weapons and ammunition.

(b) Texas Rising Star [TRS] providers with any of the specified "star level drop" [critical] licensing deficiencies listed in the Texas Rising Star [TRS] guidelines during the most recent 12-month CCL licensing history shall be placed on a six-month Texas Rising Star probationary period. Furthermore shall have the following consequences:

(1) reduction of one star [one-star] level for each deficiency cited, so a 4-star certified provider [Star Program Provider] is reduced to a 3-star provider [Star Program Provider], a 3-star provider [Star Program Provider] is reduced to a 2-star provider [Star Provider]; or

(2) a 2-star provider [Star Provider] loses certification.

(c) Texas Rising Star [TRS] providers with any of the specified "probationary" licensing deficiencies [five or more of the high or medium high] deficiencies listed in the Texas Rising Star [TRS] guidelines during the most recent 12-month CCL licensing history shall be placed on a six-month Texas Rising Star probationary period. Furthermore shall lose a star level with a 2-Star Program Provider losing certification.

(1) Texas Rising Star providers on a six-month Texas Rising Star probationary period that are cited by CCL for any additional specified probationary deficiencies within the probationary period shall be placed on a second, consecutive probation and lose a star level, with a 2-star certified provider losing certification;

(2) if CCL does not cite any additional specified probationary deficiencies during the probationary period, the provider can be removed from probation status; and

(3) if any additional specified probationary deficiencies are cited by CCL during the second probationary period, the Texas Rising Star provider shall lose certification.

(d) Texas Rising Star [TRS] providers with 10 to 14 total high or medium-high weighted licensing deficiencies [of any type] during the most recent 12-month CCL licensing history shall be placed on a six-month Texas Rising Star [TRS] program probationary period. Furthermore include:

(1) Texas Rising Star [TRS] providers on a six-month probationary period that are cited [probation] by CCL within the probationary period for any additional high or medium-high weighted [of the same] deficiencies shall be placed on a second, consecutive probation and lose a star level, with a 2-star provider [Star Program Provider] losing certification;

(2) if no additional high or medium-high weighted deficiencies are cited by CCL during the probationary period, the provider can be removed from probation status [if any new deficiencies not to exceed 14 total deficiencies—are cited by CCL during the first probationary period, a second six-month probationary period shall be established effective upon the date of final CCL determination of the deficiencies]; and

(3) if any new high or medium-high weighted deficiencies—not to exceed 14 total deficiencies—are cited by CCL during the second six-month probationary period, a provider shall lose Texas Rising Star [TRS] certification.

(e) Providers losing a star level due to licensing deficiencies shall be reinstated at the former star level if no citations described in subsections (b) - (d) of this section [§§809.132(b) - (d)] occur within the six-month reduction time frame.

(f) Providers losing Texas Rising Star [TRS] certification shall be eligible to reapply for certification after six months following the loss of the certification, as long as no [current] deficiencies described in subsections (b) - (d) of this section [are re-cited and no additional licensing deficiencies] are cited during the disqualification period.

§§809.133. Application and Assessments for the Texas Rising Star [TRS] Program.

(a) Texas Rising Star certification [TRS program] applicants must complete:

(1) an orientation on the Texas Rising Star [TRS] guidelines, including an overview of the:

(A) Texas Rising Star [TRS] program application process;

(B) Texas Rising Star [TRS] program measures; and

(C) Texas Rising Star [TRS] program assessment process;

(2) the creation of a continuous quality improvement plan; and

(3) [ (2)] a Texas Rising Star [TRS] program self-assessment tool.

(b) Boards shall ensure that:

(1) written acknowledgment of receipt of the application and self-assessment is sent to the provider;

(2) within 20 days of receipt of the application, the provider is sent an estimated time frame for scheduling the initial assessment;

(3) an assessment is conducted for any provider that meets the eligibility requirements in §809.131 of this subchapter and requests to participate in the Texas Rising Star [TRS] program; and

(4) Texas Rising Star [TRS] certification is granted for any provider that is assessed and verified as meeting the Texas Rising Star [TRS] provider certification criteria set forth in the Texas Rising Star [TRS] guidelines.

(c) Boards shall ensure that Texas Rising Star [TRS] assessments are conducted as follows:

(1) On-site assessment of 100 percent of the provider classrooms at the initial assessment for Texas Rising Star [TRS] certification and at each scheduled recertification; and

(2) Recertification of all certified Texas Rising Star [TRS] providers every three years.

(d) Boards shall ensure that certified Texas Rising Star [TRS] providers are monitored on an annual basis and the monitoring includes:

(1) at least one announced on-site visit; and

(2) a review of the provider’s licensing compliance as described in [new] §809.132 of this subchapter.

(e) Boards shall ensure compliance with the process and procedures in the Texas Rising Star [TRS] guidelines for conducting as-
assessments of nationally accredited child care facilities and child care facilities regulated by the US Military.

(f) Boards shall ensure compliance with the process and procedures in the Texas Rising Star [TRS] guidelines for conducting assessments of certified Texas Rising Star [TRS] providers that have a change of ownership, move, or expand locations.

(g) Boards shall ensure compliance with the process and procedures in the Texas Rising Star guidelines for implementing and supporting a continuous quality improvement framework.

§809.134. Minimum Qualifications for Texas Rising Star Staff [TRS Assessors and Mentors].

(a) Boards shall ensure that Texas Rising Star staff meet the minimum requirements in subsections (b) - (g) of this section.

(b) Texas Rising Star staff shall meet the minimum education requirements as follows:

(1) Bachelor's degree from an accredited four-year college or university in early childhood education, child development, special education, child psychology, educational psychology, elementary education, or family consumer science;

(2) Bachelor's degree from an accredited four-year college or university with at least 18 credit hours in early childhood education, child development, special education, child psychology, educational psychology, elementary education, or family consumer science with at least 12 credit hours in child development; or

(3) Associate's degree in early childhood education, child development, special education, child psychology, educational psychology, elementary education, or family consumer science with two years of experience as a director in an early childhood program, with preference given to experience with a provider that is accredited or Texas Rising Star [TRS] certified.

(c) The Commission may grant a waiver of no more than two years to obtain the minimum education requirements in subsection (b) of this section if a Board can demonstrate that no applicants in its workforce area meet the minimum education requirements.

(d) Texas Rising Star staff shall meet the minimum work experience requirements of one year of full-time early childhood classroom experience in a child care, EHS [Early Head Start], HS [Head Start], or pre-K [prekindergarten] through third-grade school program.

[e] Boards shall ensure that if an individual performs the duties of both an assessor and a mentor, the individual providing TRS mentoring services to a provider does not act as the assessor of that same provider when determining TRS certification.

[c] Boards shall ensure that TRS assessors and mentors are required to complete annual professional development and continuing education consistent with the Texas Rising Star annual minimum training hours requirement for a TRS certified child care center director.

[e] Texas Rising Star staff shall meet the background check requirement consistent with Chapter 745 of this title.

(f) Texas Rising Star staff shall demonstrate:

(1) knowledge of best practices in early childhood education; and

(2) understanding of early childhood evaluations, observations, and assessment tools for both teachers and children.

(g) Texas Rising Star staff shall meet the following training and certification criteria:

(1) All staff must complete the Texas Rising Star standards training, as described in the Texas Rising Star guidelines.

(2) All assessors must attain and maintain the Texas Rising Star Assessor Certification, as described in the Texas Rising Star guidelines.

(3) All mentors must attain mentor micro-credentialing, as described in the Texas Rising Star guidelines.

§809.136. Roles and Responsibilities of Texas Rising Star Staff. Boards shall ensure that Texas Rising Star staff members comply with their assigned responsibilities, as applicable.

(1) A mentor is defined as a designated staff member who helps providers obtain, maintain, or achieve higher star levels of certification.

(2) An assessor is defined as a designated staff member who assesses and monitors providers that obtain, maintain, and achieve higher levels of quality.

(3) Dual-role staff is defined as designated staff members who assume the role of the assessor and mentor.

(4) If an individual performs the duties of both an assessor and a mentor, the individual providing Texas Rising Star mentoring services to a provider does not act as the assessor of that same provider when determining Texas Rising Star certification.

(5) Texas Rising Star staff members are required to complete annual professional development and continuing education consistent with the Texas Rising Star annual minimum training hours requirement for a Texas Rising Star--certified child care center director.

(6) Per the Texas Family Code, §261.101, Texas Rising Star staff members are mandated reporters when observing serious incidents as described in the Texas Rising Star guidelines. 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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Dawn Cronin
Director, Workforce Program Policy
Texas Workforce Commission

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For further information, please call: (512) 689-9855

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CHAPTER 823. INTEGRATED COMPLAINTS, HEARINGS, AND APPEALS

The Texas Workforce Commission (TWC) proposes amendments to the following sections of Chapter 823, relating to Integrated Complaints, Hearings, and Appeals:

Subchapter A. General Provisions, §§823.1 - 823.4
Subchapter B. Board Complaint and Appeal Procedures, §§823.10 - 823.14
Subchapter C. Agency Complaint and Appeal Procedures, §§823.20 - §823.22 and §823.24
Subchapter D. Agency-Level Decisions, Reopenings, and Rehearings, §§823.30 - §823.32
TWC proposes the following new section of Chapter 823, relating to Integrated Complaints, Hearings, and Appeals:

§823.10. Board-Level Complaints

Section 823.10 is amended to clarify and update language consistent with WIOA and current TWC terminology.

§823.11. Determinations

Section 823.11 is amended to reflect changes from the WIA program name to the current WIOA program name with related section updates.

§823.12. Board Informal Resolution Procedure

Section 823.12 is amended to provide clarity by changing “Boards” to “Each Board.”

§823.13. Board Reviews

Section 823.13 is amended to reflect that Boards conduct reviews rather than hearings and the section title is changed from “Board Hearings” to “Board Reviews.”

Section 823.13 is also amended to distinguish Board processes from Agency processes and to indicate that Board reviews are conducted by Board adjudicators and hearings are conducted by Agency hearing officers. The amendments also update the mailing address for submitting appeals to the Agency.


Section 823.14 is amended to reflect that individuals handling Board-level complaints are adjudicators and that the process by which they resolve disputes is called Board review.

SUBCHAPTER C. AGENCY COMPLAINT AND APPEAL PROCEDURES

TWC proposes the following amendments to Subchapter C:

§823.20. State-Level Complaints

Section 823.20 is amended to update the mailing address for submitting appeals made directly to the Agency.

§823.21. Hearings

Section 823.21 is amended to update the WIOA program name and to state that parties may request accommodations for Board reviews and Agency hearings.

§823.22. Postponement and Continuance

Section 823.22 is amended to give Agency hearing officers the ability to postpone or continue hearings using their best judgment.

§823.24. Hearing Procedures

Section 823.24 is amended to remove language indicating that would provide transcripts of hearing recordings if a party pays the cost. The Agency does not transcribe hearings.

SUBCHAPTER D. AGENCY-LEVEL DECISIONS, REOPENINGS, AND REHEARINGS

TWC proposes the following amendments to Subchapter D:

§823.30. Hearing Decision

Section 823.30 is amended to specify the number of days a hearing officer has to issue a written decision in WIOA-related cases. Section 823.30 is also amended to add language indicating that the Agency may take continuing jurisdiction over an Agency decision for the purposes of reconsidering issues and taking additional evidence, in addition to issuing a corrected decision. The section is also amended to clarify that representatives and ob-
servers who attended a hearing need to be listed in the Agency's decision.

§823.31. Petition for Reopening

Section 823.31 is amended to update the name of the process by which a party requests that a hearing be reopened to petition. Additionally, the section is amended to state that a party must show good cause for failure to appear at the hearing and that timeliness rules in Chapter 823 apply to the petition.

§823.32. Motion for Rehearing and Decision

Section 823.32 is amended to align with Motion for Rehearing rules for other programs within the Agency which to require a Motion for Rehearing to meet certain criteria. The section is also amended to clarify that the Agency hearing officer may take certain actions in relation to that motion.

§823.34. Federal Appeals

New §823.34 implements 20 CFR §836.00, relating to participants' and interested or affected parties' right to appeal local-level decisions and final Agency decisions to the US Secretary of Labor.

PART III. IMPACT STATEMENTS

Chris Nelson, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated cost reductions to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to individuals required to comply with the rules.

There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural communities as a result of enforcing or administering the rules.

Based on the analyses required by Texas Government Code, §2001.024, TWC has determined that the requirement to repeal or amend a rule, as required by Texas Government Code, §2001.0045, does not apply to this rulemaking.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or the Texas Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. The Commission completed a Takings Impact Analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to specify the parties and programs to which Chapter 823 applies and does not apply, establish a distinction between state-level hearing officers and individuals who handle complaints at the Board level, align Chapter 823 with WIOA, and implement 20 CFR §836.00 relating to participants' and interested or affected parties' right to appeal local-level decisions and TWC's final decisions to the US Secretary of Labor.

The proposed rulemaking action will not create any additional burden on private real property or affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Government Growth Impact Statement

TWC has determined that during the first five years the amendments will be in effect:

--the amendments will not create or eliminate a government program;

--implementation of the amendments will not require the creation or elimination of employee positions;

--implementation of the amendments will not require an increase or decrease in future legislative appropriations to TWC;

--the amendments will not require an increase or decrease in fees paid to TWC;

--the amendments will not create a new regulation;

--the amendments will not expand, limit, or eliminate an existing regulation;

--the amendments will not change the number of individuals subject to the rules; and

--the amendments will not positively or adversely affect the state's economy.

Economic Impact Statement and Regulatory Flexibility Analysis

TWC has determined that the rules will not have an adverse economic impact on small businesses or rural communities, as these rules place no requirements on small businesses or rural communities.

Marina Vega, Director, Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Clay Cole, Director, Unemployment Insurance Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to ensure that the rules set forth in Chapter 823 align with WIOA, which replaced WIA.

Courtney Arbour, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing
the rules will be to ensure that the rules set forth in Chapter 823 align with WIOA, which replaced the WIA.

TWC hereby certifies that the proposal has been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, TWC sought the involvement of Texas’ 28 Boards. TWC provided the concept paper regarding these rule amendments to the Boards for consideration and review on June 23, 2020. TWC also conducted a conference call with Board executive directors and Board staff on June 26, 2020, to discuss the concept paper. During the rulemaking process, TWC considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWCPolicyComments@twc.state.tx.us. Comments must be received no later than 30 days from the date this proposal is published in the Texas Register.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§823.1 - 823.4

The rules are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules implement the appeal, complaint, and grievance provisions set forth in Texas Labor Code, Title 4, Subtitle B, Section 301.192, Texas Human Resources Code Section 44.002, as well as those set forth in 29 USC 3241 and 29 USC 3152.

§823.1. Short Title and Purpose.

(a) This chapter provides an appeals process to the extent authorized by federal and state law and by rules administered by the Texas Workforce Commission (Agency).

(b) This section applies only to complaints or determinations regarding federal- or state-funded workforce services administered by the Agency or Local Workforce Development Boards (Boards), as follows:

(1) Child care;
(2) Temporary Assistance for Needy Families (TANF) Choices;
(3) Supplemental Nutrition Assistance Program (SNAP) Employment and Training (E&T) [Food Stamp Employment and Training (FSE&T)];
   (4) [Project Reintegration of Offenders (Project RIO)];
   (5) [Workforce Innovation and Opportunity Act (WIOA) adult, dislocated worker, and youth programs [Workforce Investment Act (WIA) Adult, Dislocated Worker, and Youth]; and
   (6) [Eligible Training Providers (ETPs) [ETP]] receiving [WIOA [WIA]] funds or other funds for training services.

(c) Determinations or complaints relating to the following matters are not governed by this chapter:

(1) Across-the-board reductions of services, benefits, or assistance to a class of recipients;
(2) Matters governed by hearing procedures otherwise provided for in this title;
(3) Alleged violations of nondiscrimination and equal opportunity requirements;
(4) Denial of benefits as related to mandatory work requirements for individuals receiving TANF and SNAP E&T [FSE&T] services and is administered through the Texas Health and Human Services Commission (HHSC);
(6) Services provided by the Commission pursuant to Texas Labor Code §301.023, relating to Complaints Against [the] Commission; [az]
(7) Alleged criminal violations of any services referenced in subsection (b) of this section; [§§823.1(b)]
(8) Disputes between contractors and Boards;
(9) Contract disputes; or
(10) Any other determination or complaint not listed in subsection (b) of this section.

§823.2. Definitions.

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

1. Adverse action--Any denial or reduction in benefits or services to a party or [including] displacement of an individual from current employment by a Workforce Solutions Office [Texas Workforce Center] customer.

2. Agency decision--The written finding issued by an Agency hearing officer following a hearing before that hearing officer.

3. Appeal--A written request for a review filed with the Board or the Agency by an individual [a person] in response to a determination or decision.

4. Board adjudicator--An impartial individual designated by the Board to participate in informal dispute resolutions and to review and issue Board decisions.

5. (4) Board decision--The written finding issued by a Board adjudicator [hearing officer] following a hearing before that adjudicator [hearing officer] in response to an appeal or complaint.

6. (5) Complaint--A written statement alleging a violation of any law, regulation, or rule relating to any federal- or state-funded workforce service covered by this chapter.

7. (6) Determination--A written order [statement] issued to a Workforce Solutions Office [Texas Workforce Center] customer by a Board, its designee, or the Agency relating to an adverse action, or to a provider or contractor relating to denial or termination of eligibility under programs administered by the Agency or a Board listed in §823.1(b) of this subchapter (relating to Short Title and Purpose).

8. (7) Hearing officer--An impartial individual designated by [either the Board or] the Agency to conduct hearings and issue [administrative] decisions.

9. (8) Informal resolution--Any procedure that results in an agreed final settlement between all parties to a complaint.
(10) [49] Party—An individual [A person] who files a complaint or who appeals a determination or the entity against which the complaint is filed or that issued the determination.

§823.3. [Agency and Board] Timeliness.

(a) A properly addressed determination or decision is final for all purposes unless the party to whom it is mailed files an appeal no later than 14 [the fourteenth] calendar days [day] after the mailing date.

(b) Each party to a complaint, adjudication, or [an] appeal shall promptly notify, in writing, the Board, Board's designee, or the Agency with which the complaint or appeal was filed of any change of mailing address. Determinations and decisions shall be mailed to the new [this] address.

(1) A copy of the determination or decision must be mailed to a properly designated party representative in order for it to become final.

(2) The Board or Agency is responsible for making an address change only if the Board or Agency is specifically directed by the party to mail subsequent correspondence to the new address.

(3) If the Board, Board's designee, or Agency addresses a document incorrectly, but the party receives the document, the time frame for filing an appeal shall begin as of the actual date of receipt by the party, whether or not the party receives the document within the appeal time frame set forth in subsection (a) of this section. However, this does not apply if the party fails to provide a current address or provides an incorrect address.

(c) A determination or decision mailed to a party shall be presumed to have been delivered if the document was mailed as specified in subsection (b) of this section.

(1) A determination or decision shall not be presumed to have been delivered:

(A) if there is tangible evidence of nondelivery, such as being returned to the sender by the US [U.S.] Postal Service; or

(B) if credible and persuasive evidence is submitted to establish nondelivery or delayed delivery to the proper address.

(2) If a party provides the Board or Agency with an incorrect mailing address, a mailing to that address shall be considered a proper mailing, even if there is proof that the party never received the document.

(d) A complaint or an appeal shall be in writing. Complaints or appeals may be filed electronically only if filed in a form approved by the Agency in writing. The filing date for a complaint or an appeal shall be:

(1) the postmark [postmarked] date or the postal meter date (where there is only one or the other);

(2) the postmark [postmarked] date, if there is both a postmark date and a postal meter date;

(3) the date the document was delivered to a common carrier, which is equivalent to the postmark [postmarked] date;

(4) three business days before receipt by the Board or Agency, if the document was received in an envelope bearing no legible postmark, postal meter date, or date of delivery by a common carrier;

(5) the date of the document itself, if the document date is fewer than three days earlier than the date of receipt and if the document was received in an envelope bearing no legible postmark, postal meter date, or date of delivery by a common carrier;

(6) the date of the document itself, if the mailing envelope containing the complaint or appeal is lost after delivery to the Board or Agency. If the document is undated, the filing date shall be deemed to be three business days before receipt by the Board or Agency; or

(7) the date of receipt by the Board or Agency, if the document was filed by fax.

(e) Credible and persuasive testimony under oath, subject to cross-examination, may establish a filing date that is earlier than the dates established under subsection (d) of this section. A party shall be allowed to establish a filing date earlier than a postal meter date or the date of the document itself only upon a showing of extremely credible and persuasive evidence. Likewise, when a party alleges that a complaint or appeal has been filed that the Board or Agency has never received, the party must present [extremely] credible and persuasive evidence to support the allegation.

(f) A decision or determination shall not be deemed final if a party shows that a representative of the Board, the Board's designee, or Agency has given misleading information on appeal rights to the party. The party shall specifically establish:

(1) how the party was misled; or

(2) what misleading information the party was given, and, if possible, by whom the party was misled.

(g) There is no good cause exception to the timeliness rules.

§823.4. Representation.

A [each] party may authorize a [hearing] representative to assist with participating in an informal resolution or in presenting a complaint or an appeal on behalf of the party under this chapter. The Agency or Board may require the authorization to be in writing. On behalf of the party, the [hearing] representative may exercise any of the party's rights under this chapter.

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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Texas Workforce Commission
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SUBCHAPTER B. BOARD COMPLAINT AND APPEAL PROCEDURES

40 TAC §§823.10 - 823.14

The rules are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules implement the appeal, complaint, and grievance provisions set forth in Texas Labor Code, Title 4, Subtitle B, Section 301.192, Texas Human Resources Code Section 44.002, as well as those set forth in 29 USC 3241 and 29 USC 3152.

§823.10. Board-Level Complaints.
(a) Individuals [Persons] who may file a complaint include:

1. Workforce Solutions Office [Texas Workforce Center] customers;
2. other interested individuals [persons] affected by the One-Stop Service Delivery System, [Networks] including subrecipients and eligible training providers; and
3. previously employed individuals who believe they were displaced by a Workforce Solutions Office [Texas Workforce Center] customer participating in work-based services such as subsidized employment, work experience, or workfare.

(b) Complaints shall be in writing and filed within 180 calendar days of the alleged violation.

(c) The complaint shall include:

1. the complainant's [party's] name and current mailing address; and
2. a brief statement of the alleged violation stating [identifying] the facts on which the complaint is based.

(d) Each Board shall ensure that information about complaint procedures is provided to individuals, eligible training providers, and subrecipients. The information provided shall be presented in such a manner as to be understood by the affected individuals, including youth, individuals with disabilities, and individuals with limited English proficiency. This information shall be:

1. posted in a conspicuous public location at each Workforce Solutions Office [Texas Workforce Center];
2. provided in writing to any customer;
3. made available in writing to any individual upon request; and
4. placed in each Workforce Solutions Office [Texas Workforce Center] customer's file.

§823.11. Determinations.

(a) A determination affecting the type and level of services or benefits to be provided by a Board or its designee shall be promptly provided to any individual [person] directly affected.

(b) The determination shall include the following:

1. a [A] brief statement of the adverse action;
2. the [The] mailing date of the determination;
3. an [An] explanation of the individual's right to an appeal;
4. the [The] procedures for requesting informal resolution with the Board and for filing an appeal to the Board, including applicable time frames as required in §823.3 of this chapter (Timeliness);
5. the [The] right to have a [hearing] representative, including legal counsel; and
6. the [The] address and fax number to which a request for informal resolution or appeal may be sent [or fax number to send the appeal].

(c) Boards shall allow training service providers [of training services] the opportunity to appeal a determination related to the:

1. denial of eligibility as a training provider under WIOA, §122(b), (c), or (d) [WIA §122(b), (c), or (d)];
2. termination of eligibility as a training provider or other action under WIOA, §122(f) [WIA §122(f)]; or
3. denial of eligibility as a training provider of on-the-job or customized training by the operator of a Workforce Solutions Office [Texas Workforce Center] under WIOA, §122(h) [WIA §122(h)].

(d) An individual who [A person that] receives a determination from a Board or a Board's designee may file an appeal with the Board requesting a review of the determination. The appeal must be submitted in writing, be filed within 14 calendar days of the mailing date of the determination, and include the party's proper mailing address.


(a) Each Board [Boards] shall provide an opportunity for informal resolution of a complaint or appeal.

(b) Informal resolution may include, but is not limited to:

1. informal meetings with case managers or their supervisors;
2. second reviews of the case file;
3. telephone calls or conference calls to the affected parties;
4. in-person interviews with all affected parties; or
5. written explanations or summaries of the laws or regulations involved in the complaint.

§823.13. Board Reviews [Hearings].

(a) If the informal resolution procedure results in a final agreement between the parties, no hearing shall be held.

(b) If no [final] informal resolution is reached, Boards shall provide an opportunity for a formal review [hearing] to resolve an appeal or complaint.

(c) Either a final agreement resulting from an informal resolution or a hearing and Board decision shall be completed within 60 calendar days of the original filing of the appeal or complaint.

(d) Boards shall provide a process that allows an individual alleging a labor standards violation to submit a complaint to a binding arbitration procedure[1] if a collective bargaining agreement covering the parties to the complaint so provides.

(e) Within 60 calendar days of the filing of the appeal or complaint, the Board shall send the parties a decision setting forth the results of the hearing. The decision shall be issued by a Board adjudicator, [hearing officer, shall] include findings of fact and conclusions of law, and [shall] provide information about appeal rights to the parties.

(f) If no Board decision is mailed within the 60 calendar-day time frame described in subsection (e) of this section, or if any party disagrees with a timely Board decision, a party may file an appeal with the Agency.

(g) An appeal to the Agency shall be filed in writing by mail, fax, or hand delivery with the TWC Commission Appeals Department at its state office, 101 E. 15th Street, CA Hearings Unit, Room 678, Austin, Texas, 78778, or faxed to the number provided in the determination or decision [Appeals, Texas Workforce Commission 101 East 15th St., Room 410, Austin, Texas 78778-0001.] within 14 calendar days after the mailing date of the Board's decision. If the Board does not issue a decision within 60 calendar days of the date of the filing of the original appeal or complaint, an appeal to the Agency must be filed no later than 90 calendar days after the filing date of the original appeal or complaint.

(a) Each Board shall establish written policies to handle complaints and appeals of determinations, provide the opportunity for informal resolution, and conduct reviews in compliance with this subchapter for individuals, eligible training providers, and other individuals affected by the One-Stop Service Delivery System, including subrecipients.

(b) A Board shall maintain written copies of these policies and make them available to the Agency, Workforce Solutions Office customers, and other interested individuals upon request. A Board shall require that its subrecipients provide these policies to Workforce Solutions Office customers and other interested individuals upon request.

(c) At a minimum, a Board shall develop and approve policies to:

1. develop and approve policies to ensure that determinations are provided as specified in §823.11 of this subchapter (relating to Determinations);
2. develop and approve policies to ensure that information about complaint procedures is available as described in §823.10(d) of this subchapter (Board-Level Complaints);
3. notify individuals that complaints must be submitted in writing and set forth the facts on which the complaint is based, and notify them of the time limit in which to file a complaint;
4. maintain a complaint log and all complaint-related materials in a secure file for a period of three years after final resolution;
5. designate an individual to be responsible for investigating, documenting, monitoring, and following up on complaints;
6. inform individuals of the:
   A. right to file a complaint;
   B. right to appeal a determination;
   C. opportunity for informal resolution and a Board review;
   D. time frame in which to either reach informal resolution or to issue a Board decision; and
   E. right to file an appeal to the Agency, including providing information on where to file the appeal;
7. designate adjudicators to conduct Board hearings, document actions taken, and render decisions; and
8. ensure that complaints remanded from the Agency to the Board for resolution are handled in a timely fashion and follow established Board policies and time frames.

(d) Complaints filed directly with the Agency may be remanded to the appropriate Board to be processed in accordance with the Board’s policies for resolving complaints.

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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Texas Workforce Commission

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SUBCHAPTER C. AGENCY COMPLAINT AND APPEAL PROCEDURES

40 TAC §§823.20 - 823.22, 823.24

The rules are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules implement the appeal, complaint, and grievance provisions set forth in Texas Labor Code, Title 4, Subtitle B, Section 301.192, Texas Human Resources Code Section 44.002, as well as those set forth in 29 USC 3241 and 29 USC 3152.

§823.20. State-Level Complaints.

(a) A Workforce Solutions Office customer or other interested individual affected by the statewide One-Stop Service Delivery System, including service providers that allege a noncriminal violation of the requirements of any federal- or state-funded workforce services, may file a complaint with the Agency.

(b) Complaints shall be in writing and filed within 180 calendar days of the alleged violation. The complaint shall include the party’s name, current mailing address, and a brief statement of the alleged violation identifying the facts on which the complaint is based.

(c) The complaint shall be filed with the TWC Commission Appeals Department at its state office, 101 E. 15th Street, CA Hearings Unit, Room 678, Austin, Texas, 78778 [TWC Appeals, Texas Workforce Commission, 101 East 15th St., Room 410, Austin, Texas 78778-0001].

(d) The Agency shall provide an opportunity for informal resolution.

(e) If the informal resolution procedure results in a final agreement between the parties, no hearing shall be held.

(f) If no final informal resolution is reached, the complaint shall be promptly set for a hearing and a decision shall be issued in accordance with the procedures for appeals under this subchapter.

(g) Complaints filed directly with the Agency may be remanded to the appropriate Board to be processed in accordance with the Board’s hearing policies.

§823.21. Hearings [Setting a Hearing].

(a) A WIOA-funded training provider or other provider certified by the Agency and later found to be ineligible to receive funding as a training provider may file an appeal directly with the Agency.

(b) Upon receipt of an appeal from a Board decision, an appeal pursuant to subsection (a) of this section, or if no informal resolution of a complaint is successfully reached pursuant to §823.20 of this subchapter (relating to State-Level Complaints), the Agency shall promptly assign a hearing officer and mail a notice of hearing to the parties and/or their designated representatives. The hearing shall be
set and held promptly and in no case later than as provided by applicable statute or rule.

(c) The notice of hearing shall be in writing and include a:
   (1) statement of the date, time, place, and nature of the hearing;
   (2) statement of the legal authority under which the hearing is to be held; and
   (3) short and plain statement of the issues to be considered during the hearing.

(d) The notice of hearing shall be issued at least 10 calendar days before the date of the hearing unless a shorter period is permitted by statute.

(e) Hearings shall be conducted by telephonic means, unless an in-person hearing is required by applicable statute or the Agency determines that an in-person hearing is necessary.

(f) Parties may request accommodations, including interpreters, through the hearing officer or Agency staff [needing special accommodations, including the need for a bilingual or sign language interpreter, shall make this request before the hearing is set; if possible, or as soon as practical].

§823.22. Postponement and Continuance.

(a) The hearing officer shall use his or her best judgment to determine when to grant a continuance of postponement of a hearing in order to secure all the evidence that is necessary and to be fair to the parties [may grant a postponement of a hearing for good cause at a party’s request. Except in emergencies or unusual circumstances confirmed by a telephone call or other means, no postponements shall be granted within two days of the scheduled hearing].

(b) Before the hearing, requests for a continuance or a postponement of a hearing may be made informally, either orally or in writing, to the hearing officer.

   (1) There is insufficient evidence upon which to make a decision;
   (2) a party needs additional time to examine evidence presented at the hearing;
   (3) the hearing officer considers it necessary to enter into evidence additional information or testimony;
   (4) an in-person hearing is necessary for proper presentation of the evidence; or
   (5) any other reason deemed appropriate by the hearing officer.

(c) The hearing officer shall advise the parties of the reason for the continuance and of any additional information required. At the continuance, the parties shall have an opportunity to rebut any additional evidence.

§823.24. Hearing Procedures.

(a) General Procedure. All hearings shall be conducted de novo. The hearing shall be conducted informally and in such manner as to ascertain the substantive rights of the parties. The hearing officer shall develop the evidence. All issues relevant to the appeal shall be considered and addressed.

   (1) Presentation of Evidence. The parties to an appeal may present evidence that is material and relevant, as determined by the hearing officer. In conducting a hearing, the hearing officer shall actively develop the record on the relevant circumstances and facts to resolve all issues. To be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing. A party has the right to object to evidence offered at the hearing by the hearing officer or other parties.

   (2) Examination of Witnesses and Parties. The hearing officer shall examine parties and any witnesses under oath and shall allow cross-examination to the extent the hearing officer deems necessary to afford the parties due process.

   (3) Additional Evidence. The hearing officer, with or without notice to any of the parties, may take additional evidence deemed necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.

   (4) Appropriate Hearing Behavior. All parties shall conduct themselves in an appropriate manner. The hearing officer may expedite any individual, including a party, who fails to correct behavior the hearing officer identifies as disruptive. After an expulsion, the hearing officer may proceed with the hearing and render a decision.

(b) Records.

   (1) The hearing record shall include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits.

   (2) The hearing record shall be maintained in accordance with federal or state law.

   (3) Confidentiality of information contained in the hearing record shall be maintained in accordance with federal and state law.

   (4) Upon request, a party has the right to obtain a copy of the hearing record, including recordings of the hearing and file documents at no charge. [However, a party requesting a transcript of the hearing record shall pay the costs of the transcription.]

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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SUBCHAPTER D. AGENCY-LEVEL DECISIONS, REOPENINGS, AND REHEARINGS
40 TAC §§823.30 - 823.32, 823.34

The rules are proposed under Texas Labor Code, §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules implement the appeal, complaint, and grievance provisions set forth in Texas Labor Code, Title 4, Subtitle B, Section 301.192, Texas Human Resources Code
Section 44.002, as well as those set forth in 29 USC 3241 and 29 USC 3152.

§823.30. Hearing Decision.

(a) Following the conclusion of the hearing, the hearing officer shall promptly issue a written decision on behalf of the Agency. Decisions issued on state-level complaints and grievances, or appeals of local-level complaints and grievances, made pursuant to provisions of WIOA, must be issued within 60 calendar days of the filing of the complaint, grievance or appeal, whichever comes later.

(b) The Agency decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing. The Agency decision shall include:

(1) a list of the individuals who appeared at the hearing, including representatives and observers;

(2) the findings of fact and conclusions of law reached on the issues; and

(3) the affirmation, reversal, or modification of a determination or Board decision.

(c) Unless a party files a timely motion for rehearing, the Agency may assume continuing jurisdiction to reconsider the issues on appeal, take additional evidence, and issue a corrected decision [to modify or correct a hearing decision] until the expiration of 14 calendar days from the mailing date of the hearing decision.


(a) If a party fails to appear for a hearing, the hearing officer may hear and record the evidence of the party present and the witnesses, if any, and shall proceed to decide the appeal on the basis of the record unless there appears to be good reason for continuing the hearing. A copy of the decision shall be promptly mailed to the parties with an explanation of the manner in which, and time within which, a request for reopening may be submitted. [If a party does not appear for an Agency hearing, the party has the right to request a reopening of the hearing within 14 calendar days from the date the Agency decision is mailed.]

(b) A party that fails to appear at a hearing may, within 14 calendar days from the date the decision is mailed, petition in writing for a new hearing before the hearing officer. The petition should identify the party requesting the reopening and explain the reason for the failure to appear. The timeliness rules in §823.3 of this chapter (relating to Timeliness) apply to the petition. The petition shall be granted if it appears to the hearing officer that the petitioner has shown good cause for the petitioner's failure to appear at the hearing. [The motion shall be in writing and detail the reason for failing to appear at the hearing.]

(c) The hearing officer may schedule a hearing on whether to grant the reopening.

(d) The hearing officer may deny the petition if no good cause is alleged for the party's nonappearance at the prior hearing. [The motion may be granted if it appears to the hearing officer that the party has shown good cause for failing to appear at the hearing.]

§823.32. Motion for Rehearing and Decision.

(a) A party has 14 calendar days from the date the decision is mailed to file a motion for rehearing. A rehearing may be granted only for the presentation of new evidence.

(b) Motions for rehearing shall be in writing and allege the new evidence to be considered. The appellant must show a compelling reason why the [new] evidence was not presented at the hearing and explain how consideration of the evidence would alter the outcome of the case.

(c) If the hearing officer determines that the motion does not meet the criteria in subsection (b) of this section, the hearing officer may issue a decision indicating that they have not been met and that no hearing will be set on the motion.

(d) [If the hearing officer determines that the appellant has met the requirements of subsection (b) of this section, the hearing officer shall grant the motion and schedule a hearing to consider the new evidence on the record [alleged, new evidence warrants a rehearing, a rehearing shall be scheduled at a reasonable time and place].]

(e) [The hearing officer shall issue a written decision following the hearing to consider the evidence on the Motion for Rehearing.]

(f) [After the hearing on the Motion for Rehearing, the hearing officer shall issue a written decision granting or denying the Motion for Rehearing and may affirm, reverse, leave in effect, void, or modify the prior decision. [The hearing officer may also issue a decision denying a motion for rehearing.]]

§823.34. Federal Appeals.

(a) Participants and interested or affected parties have a right to appeal to the US Secretary of Labor when decisions are not issued within the time prescribed or when an adverse final Agency decision is issued.

(b) The US Secretary of Labor will investigate appeals under the following circumstances:

(1) A decision on a grievance or complaint has not been reached:

(A) within 60 calendar days of receipt of the grievance or complaint; or

(B) within 60 calendar days of receipt for appeal of a local level grievance and either party appeals to the US Secretary of Labor; or

(2) A state level decision on a grievance or complaint has been reached and the party to which such decision is adverse appeals to the US Secretary of Labor.

(c) Participants and interested or affected parties that wish to appeal to the US Secretary of Labor must adhere to the following time parameters:

(1) Appeals that are based on subsection (b)(1) of this section must be filed within 120 calendar days of filing the grievance or timely appeal with the state.

(2) Appeals that are based upon subsection (b)(2) of this section must be filed within 60 calendar days of receipt of the state-level decision.

(d) Appeals to the US Secretary of Labor must be submitted by certified mail with a return receipt requested. In addition to sending an appeal to the US Secretary of Labor, the party must also simultaneously provide a copy of the appeal to the opposing party and the US Department of Labor Employment and Training Administration regional administrator.

(e) This federal appeals process applies solely to noncriminal grievances and complaints under WIOA, Title I.

(f) This process does not apply to filing appeals regarding discrimination, or denial or termination of training provider eligibility, for inclusion on the Texas Eligible Training Provider List.
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 7, 2020.

TRD-202004176

Dawn Cronin
Director, Workforce Program Policy
Texas Workforce Commission

Earliest possible date of adoption: November 22, 2020

For further information, please call: (512) 689-9855

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