PROPOSED RULES

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

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

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER E. POST AWARD AND ASSET MANAGEMENT REQUIREMENTS

10 TAC §§10.400 - 10.408

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter E, Post Award and Asset Management Requirements, §§10.400 - 10.408. The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

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


1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous re-adoption making changes to an existing activity, concerning the post award activities of Low Income Housing Tax Credit (LIHTC) and other Department-funded multifamily Developments.

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

3. The proposed repeal does not require additional future legislative appropriations.

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

5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The proposed action will repeal an existing regulation but is associated with the simultaneous re-adoption making changes to an existing activity, Post Award and Asset Management Requirements.

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

8. The proposed repeal will not negatively or positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

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

2. This rule relates to the procedures for the handling of post award and asset management activities of multifamily developments awarded funds through various Department programs. Other than in the case of a small or micro-business that is an owner or a party to one of the Department's properties, no small or micro-businesses are subject to the rule. If a small or micro-business is such an owner or participant, the new rule provides for a more clear, transparent process for doing so and do not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the proposed rule because this rule is applicable only to the owners or operators of properties in the Department's portfolio, not municipalities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed repeal does not contemplate nor authorize a taking by the Department; therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect on local employment, as the repealed rule will be replaced with a similar rule; therefore no local employment impact statement is required to be prepared for the rule.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..."
Considering that no impact is expected on a statewide basis, there are also no “probable” effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the proposed repeal of this rule is in effect, the public benefit anticipated as a result of the repealed sections will be unaffected as the repealed rule will be replaced with a similar rule. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments, as the repealed rule will be replaced with a similar rule.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019, to November 8, 2019, to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Laura DeBellas, Asset Management Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email to laura.debellas@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time November 8, 2019.

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov’t Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§10.400. Purpose.

§10.401. General Commitment or Determination Notice Requirements and Documentation.

§10.402. Housing Tax Credit and Tax Exempt Bond Developments.

§10.403. Review of Annual HOME/NSP and National Housing Trust Fund Rents.

§10.404. Reserve Accounts.

§10.405. Amendments and Extensions.


§10.407. Right of First Refusal.

§10.408. Qualified Contract Requirements.

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 14, 2019.

TRD-201903745

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: November 24, 2019

For further information, please call: (512) 475-3357

10 TAC §§10.400 - 10.408

The Texas Department of Housing and Community Affairs (the “Department”) proposes new 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter E, Post Award and Asset Management Requirements, §§10.400 - 10.408. The purpose of the proposed new section is to assist in reviewing and ensuring the long-term affordability and safety of multifamily rental housing Developments in the Department's portfolio as required under Tex. Gov't Code §§2306.185 and 2306.186, perform the functions of processing amendments and ownership transfers as required under §§2306.6712 and 2306.6713, and perform essential functions required under various federal program (HOME, NSP, NHTF, Exchange, TCAP) rules and under Section 42 of the Internal Revenue Code.

The updating of the rule through the proposed new section will further clarify language and requirements on which questions are often received, correct references to processes, other rules, forms, or attachments that have been updated, reduce stakeholder reporting burdens of duplicative materials at 10% Test and cost certification submission, implement internal audit recommendations and federal requirements for the cost certification process, create more efficiency in the creation of Special Reserve Account Agreements and release of Special Reserve funds, reduce the number of notification and non-material amendments related to changes in guarantors, revise requirements for annual rent reviews and Community Housing Development Organization (CHDO) certifications to clarify current Department practice and meet federal requirements, add additional notification requirements to Right of First Refusal documentation based on previous public comment and stakeholder input at roundtables, and remove requirements regulating broker fees and Department approvals of brokers under Qualified Contract requirements.

Tex. Gov’t Code §2001.0045(b) does not apply to the rule proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

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

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV’T CODE §2001.0221.

1. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed rulemaking would be in effect, the proposed rule does not create or eliminate a government program, but relates to the re-adoption making changes to an existing activity, concerning the post award activities of Low Income Housing Tax Credit (LIHTC) and other Department-funded multifamily Developments.

2. The proposed new rule does not require a change in work that would require the creation of new employee positions. While some additional work by the Department will be required associated with the additional annual rent reviews of TCAP-RF funded Developments, review of CHDO packages for any new CHDO or CHDO certified prior to 2016, review of NHTF cost certification forms, and review of additional documentation requested as part of ROFR notification requirements, the Department anticipates handling this additional work with existing staff resources. The
rule changes do not reduce work load such that any existing employee positions could be eliminated.

3. The proposed rule changes do not require additional future legislative appropriations.

4. The proposed rule changes do not result in an increase in fees paid to the Department. However, the Department does anticipate a nominal decrease in fees paid to the Department through the reduction of requests for non-material amendments to add guarantors where guarantors are also the General Contractors or are only providing guaranties during the construction period.

5. The proposed rule is not creating a new regulation, but is replacing a rule being repealed simultaneously to provide for revisions. The proposed rule can be considered to "expand" certain existing regulations related to Cost Certifications in §10.402(j)(3)(B), Review of Annual Rent Approvals in §10.403, Ownership Transfers in §10.406(f)(2), Right of First Refusal documentation in §10.407(c)(3), and Preliminary Qualified Contract Requests in §10.408(c)(2)(D). All of these additions, other than those made in the Right of First Refusal documentation, are necessary in order to observe and clarify requirements from the Department's Internal Auditor, certain federal programs, and Tex. Gov't Code. In the case of the additional items added to required documentation under Right of First Refusal, the Department is responding to external comment and input requesting that these items be added in order to further the Department's directive under Tex. Gov't Code §2306.256 of developing policies and implementing a program to preserve affordable housing in the state of Texas. Specifically, external comment was received during the 2019 rules cycle that communicated the concern that ROFR was not being successfully applied and that without robust notification and advertising, TDHCA's notifications of ROFR postings were not adequately reaching prospective, qualified buyers interested in preserving affordable housing that might otherwise terminate its affordability through the Qualified Contract process.

6. The proposed rule is not repealing an existing regulation but will limit notifications to the Department and the submission of non-amendments for guarantors where guarantors are not long-term parties to the transaction, will remove certain requirements related to broker approvals and fees under Qualified Contract rules, and will revise and update processes and required documentation to remove unnecessary redundancies and promote efficiency for stakeholders and internal staff related to Special Reserve, 10% Test, and Cost Certification requirements.

7. The proposed rule will not increase or decrease the number of individuals subject to the rule's applicability. Though the proposed rule in §10.403, Review of Annual HOME/NSP and National Housing Trust Fund Rents, has been revised to specifically include TCAP-RF recipients, TCAP recipients were already previously included in the rule's applicability through the reference to Multifamily Direct Loan funds used as HOME match.

8. The proposed rule will not negatively or positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

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

2. This rule relates to the procedures for the handling of post award and asset management activities of multifamily Developments awarded funds through various Department programs. Other than in the case of a small or micro-business that is an owner or a party to one of the Department's properties, no small or micro-businesses are subject to the rule. If a small or micro-business is such an owner or participant, the new rule provides for a more clear, transparent process for doing so and do not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the proposed rule because this rule is applicable only to the owners or operators of properties in the Department's portfolio, not municipalities.

3. The Department has determined that because this rule relates only to the process in use for the post award and asset management activities of the Department's portfolio, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed rule does not contemplate nor authorize a taking by the Department; therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the proposed rule as to its possible effects on local economies and has determined that for the first five years the proposed rule will be in effect there will be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule. Additionally, because this rule only provides for administrative processes required of properties in the Department's portfolio, no activities under this rule would support additional local employment opportunities. Alternatively, the rule would also not cause any negative impact on employment.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that no impact is expected on a statewide basis, there are also no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the proposed rule sections will be increased efficiency and clarity in post award requirements as well as more robust notifications to local governments, housing authorities, and tenant associations when Owners of Developments with a LURA including a Right of First Refusal requirement submit a notice of intent to sell and post for ROFR. The possible economic cost to individuals required to comply with the proposed section will be the nominal difference in the cost of materials and/or staff time between providing a letter or emailed notice of intent to tenants at the Development and the Department (along with its list of qualified buyers) and providing additional letters or emailed notices of intent under the proposed rule to additional tenant organizations, mayors or elected members of the governing body of the municipalities in which the Development is located as applicable, the presiding officer of the governing body of the county in which the Development is located, and the local housing authority.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for
each year of the first five years the new section is in effect, enforcing or administering the proposed rule does not have any foreseeable implications related to costs or revenues of the state or local government, as the costs to administer any additional proposed requirements will potentially be offset by efficiency gains in other revised processes and will otherwise be absorbed by current Department resources.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019 to November 8, 2019 to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Laura DeBellas, Asset Management Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email to laura.debellas@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time November 8, 2019.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§10.400. Purpose.

(a) The purpose of this subchapter is to establish the requirements governing the post award and asset management activities associated with awards of multifamily Development assistance pursuant to Tex. Gov't Code, Chapter 2306 and its regulation of multifamily funding provided through the Texas Department of Housing and Community Affairs (the "Department") as authorized by the legislature. This subchapter is designed to ensure that Developers and Development Owners of low-income Developments that are financed or otherwise funded through the Department maintain safe, decent and affordable housing for the term of the affordability period. Therefore, unless otherwise indicated in the specific section of this subchapter, any uncorrected issues of noncompliance outside of the corrective action period or outstanding fees (related to the Development subject to the request) owed to the Department, must be resolved to the satisfaction of the Department before a request for any post award activity described in this subchapter shall be acted upon.

(b) The capitalized terms in this subchapter shall have the meaning as defined in this title in Chapter 1 relating to Administration, Chapter 2 relating to Enforcement, Chapter 10 relating to Uniform Multifamily Rules, Chapter 11 relating to the Qualified Action Plan, Chapter 12 relating to the Multifamily Housing Revenue Bond Rules, Chapter 13 relating to the Multifamily Direct Loan Rule, Tex. Gov't Code Chapter 2306, Internal Revenue Code (the Code) §42, the HOME Final Rule, the NHTF Interim Rule, and other federal or Department rules, as applicable.

§10.401. General Commitment or Determination Notice Requirements and Documentation.

(a) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount in accordance with §42(m)(2)(A) or where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established by the Department and the Board.

(b) All Commitments or Determination Notices, whether reflected in the Commitment or Determination Notice or not, are made subject to full compliance with all applicable provisions of law and the Department's rules, all provisions of Commitment and Contract, satisfactory completion of underwriting, and satisfactory resolution of any conditions of underwriting, award, and administrative deficiencies.

(c) The Department shall notify, in writing, the mayor, county judge, or other appropriate official of the municipality or county, as applicable, in which the Development is located informing him/her of the Board’s issuance of a Commitment Notice, as applicable.

(d) The Department may cancel a Commitment, Determination Notice or Carryover Allocation prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or completion of construction with respect to a Development and/or apply administrative penalties if:

(1) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to meet any of the conditions of such Commitment, Determination Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Application process for the Development;

(2) Any material statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Application ineligible for funding pursuant to Chapter 11, Subchapter C of this title (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules) if such event had occurred prior to issuance of the Commitment, Determination Notice or Carryover Allocation; or

(4) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to comply with this chapter or other applicable Department rules, procedures, or requirements of the Department.

§10.402. Housing Tax Credit and Tax Exempt Bond Developments.

(a) Commitment. For Competitive HTC Developments, the Department shall issue a Commitment to the Development Owner which shall confirm that the Board has approved the Application and state the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) and the determination that the Development satisfies the requirements of this chapter and other applicable Department rules. The Commitment shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Commitment, pays the required fee specified in §11.901 of this title (relating to Fee Schedule, Appeals, and other Provisions), and satisfies any conditions set forth therein by the Department. The Commitment expiration date may not be extended.

(b) Determination Notices. For Tax Exempt Bond Developments, the Department shall issue a Determination Notice which shall confirm the Board’s determination that the Development satisfies the requirements of this chapter as applicable and other applicable Department rules in accordance with the §42(m)(1)(D) of the Internal Revenue Code (the Code). The Determination Notice shall also state the Department's determination of a specific amount of housing tax credits that the Development may be eligible for, subject to the requirements set forth in the Department's rules, as applicable. The Determination Notice shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Determination Notice, pays the required fee specified in Chapter 11, Subchapter E of this title, and satisfies any conditions set forth therein by the Department. The Determination Notice expiration date may not be extended. The Determination Notice will be rescinded if the Tax Exempt Bonds are not closed within the timeframe provided for by the Board on its approval of the
Determination Notice, by the expiration of the Certificate of Reservation associated with the Determination Notice, or if there are material changes to the financing or Development as determined by the Department pursuant to its rules and any conditions of approval included in the Board approval or underwriting report.

(c) Tax Credit Amount. The amount of tax credits reflected in the IRS Form(s) 8609 may be greater or less than the amount set forth in the Determination Notice based upon the Department’s determination as to the tax credit set forth in the Determination Notice. Any increase of tax credits will only be permitted if it is determined necessary by the Department, as required by §42(m)(2)(D) of the Code through the submission of the Cost Certification package. Increases to the amount of tax credits that exceed 110% of the amount of credits reflected in the Determination Notice must be approved by the Board. Increases to the amount of tax credits that do not exceed 110% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director or designee and are subject to the Credit Increase Fee as described in Chapter 11, Subchapter E of this title (relating to Fee Schedule, Appeals, and other Provisions).

(d) Documentation Submission Requirements at Commitment of Funds. No later than the expiration date of the Commitment (or no later than December 31 for Competitive HTC Applications, whichever is earlier) or Determination Notice, the documentation described in paragraphs (1) - (6) of this subsection must be provided. Failure to provide these documents may cause the Commitment or Determination Notice to be rescinded:

1. For entities formed outside the state of Texas, evidence that the entity filed a Certificate of Application for foreign qualification in Texas, a Franchise Tax Account Status from the Texas Comptroller of Public Accounts, and a Certificate of Fact from the Office of the Secretary of State. If the entity is newly registered in Texas and the Franchise Tax Account Status or Certificate of Fact are not available, a statement can be provided to that effect;

2. For Texas entities, a copy of the Certificate of Filing for the Certificate of Formation from the Office of the Secretary of State; a Certificate of Fact from the Secretary of State, and a Franchise Tax Account Status from the Texas Comptroller of Public Accounts. If the entity is newly registered and the Certificate of Fact and the Franchise Tax Account Status are not available, a statement can be provided to that effect;

3. Evidence that the signers of the Commitment or Determination Notice have sufficient authority to sign on behalf of the Applicant in the form of a corporate resolution which indicates the sub-entity in Control consistent with the entity contemplated and described in the Application;

4. Evidence of final zoning that was proposed or needed to be changed pursuant to the Development plan;

5. Evidence of satisfaction of any conditions identified in the Credit Underwriting Analysis Report, any conditions from the Executive Award Review and Advisory Committee as provided for in Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), or any other conditions of the award required to be met at Commitment or Determination Notice; and

6. Documentation of any changes to representations made in the Application subject to §10.405 of this subchapter (relating to Amendments and Extensions);

7. For Applications underwritten with a property tax exemption, documentation must be submitted in the form of a letter from an attorney identifying the statutory basis for the exemption and indicating that the exemption is reasonably achievable, subject to appraisal district review. Additionally, any Development with a proposed Payment in Lieu of Taxes (PILOT) agreement must provide evidence regarding the statutory basis for the PILOT and its terms.

(e) Post Bond Closing Documentation Requirements. Regardless of the issuer of the bonds, no later than 60 calendar days following closing on the bonds, the Development Owner must submit the documentation in paragraphs (1) - (5) of this subsection.

1. Training certificate(s) from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager has attended and passed at least five hours of Fair Housing training. The certificate(s) must not be issued after the two years from the date of submission and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates;

2. A training certificate from a Department approved "architect and engineer Fair Housing trainer" showing that the lead architect or engineer responsible for certifying compliance with the Department's accessibility and construction standards has attended and passed at least five hours of Fair Housing training. The certificate must not be issued after the two years from the date of submission and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates;

3. Evidence that the financing has closed, such as an executed settlement statement;

4. A confirmation from the Compliance Division evidencing receipt of the CMTS Filing Agreement form pursuant to §10.607(a) of this chapter; and

5. An initial construction status report consisting of items (1) through (5) of §10.402(h) of this subchapter (relating to Construction Status Reports).

(f) Carryover (Competitive HTC Only). All Developments which received a Commitment, and will not be placed in service and receive IRS Form(s) 8609 in the year the Commitment was issued, must submit the Carryover documentation, in the form prescribed by the Department in the Carryover Manual, no later than the Carryover Documentation Delivery Date as identified in §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) of the year in which the Commitment is issued pursuant to §42(h)(1)(C) of the Code.

1. Commitments for credits will be terminated if the Carryover documentation has not been received by this deadline, unless an extension has been approved. This termination is subject to right of appeal directly to the Board, and if so determined by the Board, immediately upon final termination by the Board, staff is directed to award the credits to other qualified Applicants on the approved waiting list.

2. If the interim or permanent financing structure, syndication rate, amount of debt or syndication proceeds are finalized but different at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be re-evaluated by the Department for a reduction of credit or change in conditions.

3. All Carryover Allocations will be contingent upon the Development Owner providing evidence that they have and will maintain Site Control through the 10% Test or through the anticipated closing date, whichever is earlier. For purposes of this paragraph, any
changes to the Development Site acreage between Application and Car-
ryover must be addressed by written explanation or, as appropriate, in
accordance with §10.405 of this subchapter (relating to Amendments
and Extensions).

(4) Confirmation of the right to transact business in Texas,
evidenced by the Franchise Tax Account Status (the equivalent of
the prior Certificate of Account Status) from the Texas Comptroller
of Public Accounts and a Certificate of Fact from the Office of the
Secretary of State must be submitted with the Carryover Allocation.

(g) 10% Test (Competitive HTC Only). No later than July
1 of the year following the submission of the Carryover Allocation
Agreement or as otherwise specified in the applicable year's Qualified
Allocation Plan, documentation must be submitted to the Department
verifying that the Development Owner has expended more than 10%
of the Development Owner's reasonably expected basis, pursuant to
§42(h)(1)(E)(i) and (ii) of the Code and Treasury Regulations, 26 CFR
§1.42-6. The Development Owner must submit, in the form prescribed
by the Department, documentation evidencing paragraphs (1) - (7) of
this subsection, along with all information outlined in the Post Award
Activities Manual. Satisfactory of the 10% Test will be contingent upon
the submission of the items described in paragraphs (1) - (7) of this
subsection as well as all other conditions placed upon the Application
in the Commitment. Requests for an extension will be reviewed on a
case by case basis as addressed in §10.405(c) of this subchapter and
§112.2 of this title, as applicable, and a point deduction evaluation will
be completed in accordance with Tex. Gov't Code §2306.6710(b)(2)
and §11.9(f) of this title. Documentation to be submitted for the 10%
Test includes:

(1) An Independent Accountant's Report and Taxpayer's
Basis Schedule form. The report must be prepared on the accounting
firm's letterhead and addressed to the Development Owner or an Affili-
ate of the Development Owner. The Independent Accountant's Report
and Taxpayers Basis Schedule form must be signed by the Develop-
ment Owner. If, at the time the accountant is reviewing and preparing
their report, the accountant has concluded that the taxpayer's reason-
ably expected basis is different from the amount reflected in the Car-
ryover allocation agreement, then the accountant's report should reflect
the taxpayer's reasonably expected basis as of the time the report is be-
ing prepared;

(2) Any conditions of the Commitment or Real Estate
Analysis underwriting report due at the time of 10% Test submission;

(3) Evidence that the Development Owner has purchased,
transferred, leased, or otherwise has ownership of the Development
Site. The Development Site must be identical to the Development Site
that was submitted at the time of Application submission. For pur-
poses of this paragraph, any changes to the Development Site acreage
between Application and 10% Test must be addressed by written ex-
planation or, as appropriate, in accordance with §10.405 of this subchapter
(relating to Amendments and Extensions);

(4) A current survey or plat of the Development Site, pre-
pared and certified by a duly licensed Texas Registered Professional
Land Surveyor. The survey or plat must clearly delineate the flood
plain boundary lines and show all easements and encroachments;

(5) For New Construction, Reconstruction, and Adaptive
Reuse Developments, a certification from a Third Party civil engineer
or architect stating that all necessary utilities will be available at the
Development Site and that there are no easements, licenses, royalties,
or other conditions on or affecting the Development that would mate-
rially or adversely impact the ability to acquire, develop, and operate
as set forth in the Application. Copies of supporting documents may
be required by the Department;

(6) For the Development Owner and on-site or regional
property manager, training certificate(s) from a Department approved
"property owner and manager Fair Housing trainer" showing that the
Development Owner and on-site or regional property manager attended
and passed at least five hours of Fair Housing training. For archi-
tects and engineers, training certificate(s) from a Department approved "ar-
chitect and engineer Fair Housing trainer" showing that the lead archi-
tect or engineers responsible for certifying compliance with the Depart-
ment's accessibility and construction standards has attended and passed
at least five hours of Fair Housing training. Certifications required un-
der this paragraph must not be older than two years from the date of
submission of the 10% Test Documentation, and must verify that all
parts or phases of the offered training have been completed; two cer-
tificates supplied for the same part or phase of an offered training will
not be counted towards the four hour required minimum, even if they
were attended on different dates; and

(7) A Certification from the lender and syndicator identi-
fying all known Guarantors. If identified Guarantors have changed
from the Guarantors or Principals identified at the time of Application,
a non-material amendment may be required in accordance with
§10.405 of this subchapter (relating to Amendments and Extensions),
and the new Guarantors or Principals must be reviewed in accordance
with Chapter 1, Subchapter C of this title (relating to Previous Partici-
pation).

(h) Construction Status Report (All Multifamily Develop-
ments). All multifamily developments must submit a construction
status report. Construction status reports shall be due by the tenth day
of the month following each reporting quarter's end (January, April,
July, and October) and continue on a quarterly basis until the entire
Development is complete as evidenced by one of the following: Cer-
tificates of occupancy for each building, the Architect's Certificate(s)
of Substantial Completion (AIA Document G704 or equivalent form)
for the entire Development, the final Application and Certificate for
Payment (AIA Document G702 and G703), or an equivalent form
approved for submission by the construction lender and/or investor.
For Competitive Housing Tax Credit Developments, the initial report
must be submitted no later than October 10th following the year of
award (this includes Developments funded with HTC and TDHCA
Multifamily Direct Loans), and for Developments awarded under
the Department's Multifamily Direct Loan programs only, the initial
report must be submitted 90 calendar days after loan closing. For
Tax Exempt Bond Developments, the initial construction status report
must be submitted as part of the Post Bond Closing Documentation
due no later than 60 calendar days following closing on the bonds as
described in §10.402(e) of this section (relating to Post Bond Closing
Documentation Requirements). The initial report for all multifamily
Developments shall consist of the items identified in paragraphs
(1) - (6) of this subsection, unless stated otherwise. All subsequent
reports shall contain items identified in subparagraphs (4) - (6) of this
paragraph and must include any changes or amendments to items in
subparagraphs (1) - (3) if applicable:

(1) The executed partnership agreement with the investor
or, for Developments receiving an award only from the Department's
Direct Loan Programs, other documents setting forth the legal struc-
ture and ownership. If identified Guarantors or Principals of a Guarantor
entity were not already identified as a Principal of the Owner, Devel-
oper, or Guarantor at the time of Application, a non-material amend-
ment must be requested in accordance with §10.405 of this subchapter,
and the new Guarantors and all of its Principals, as applicable, must
be reviewed in accordance with Chapter 1, Subchapter C of this title
(relating to Previous Participation and Executive Award Review and
Advisory Committee);
(2) The executed construction contract for the General Contractor, prime subcontractor(s) and Affiliates or Related Party subcontractor(s);

(3) The construction loan agreement. If the loan has not closed, the anticipated closing date must be provided and, upon closing, the agreement must be provided to the Department;

(4) The most recent Application and Certificate for Payment (AIA Document G702 and G703) certified by the Architect of Record (or equivalent form approved for submission by the construction lender and/or investor) for the General Contractor, prime subcontractor(s) and Affiliates or Related Party subcontractor(s); and

(5) All Third Party construction inspection reports not previously submitted. If the lender and/or investor does not require third party construction inspection reports, the Development Owner must hire a third party inspector to perform these inspections on a quarterly basis and submit the reports to the Department. Third Party construction inspection reports must include, at a minimum, a discussion of site conditions as of the date of the site visit, current photographs of the construction site exterior and interior of buildings, an estimated percentage of construction completion as of the date of the site visit, identification of construction delays and other relevant progress issues, if any, and the anticipated construction completion date;

(6) Minority Owned Business Report (HTC only) showing the attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses as required and further described in Tex. Gov't Code §2306.6734.

(i) LURA Origination.

(1) The Development Owner must request origination of the HTC LURA as directed in the Post Award Activities Manual. The Department will draft a LURA for the Development Owner that will impose the income and rent restrictions identified in the Department's final underwriting report and other representations made in the Application, including but not limited to specific commitments to provide tenant services, to lease to Persons with Disabilities, and/or to provide specific amenities. After origination, the Department executed LURA and all exhibits and addendums will be sent to the Development Owner to execute and record in the real property records for the county in which the Development is located. A copy of the fully executed, recorded LURA must be returned to the Department no later than the end of the first year of the Credit Period. In general, no Housing Tax Credits are allowed to be issued for a building unless there is a properly executed and recorded LURA in effect at the end of the first year of the Credit Period. Nothing in this section negates a Development Owner's responsibility for full compliance with §42(h)(6) of the Code. The Department will not issue IRS Form(s) 8609 until it receives a copy of the fully executed, recorded LURA.

(2) LURAs for Direct Loan awardees will be prepared by the Department’s Legal Division and executed at loan closing.

(j) Cost Certification (Competitive and Non-Competitive HTC, and related activities only). The Department conducts a feasibility analysis in accordance with §42(m)(2)(C)(i)(III) of the Code and Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) to make a final determination on the allocation of Housing Tax Credits. The requirements for cost certification include those identified in paragraphs (1) - (3) of this subsection.

(1) Development Owners must file cost certification documentation no later than January 15 following the first year of the Credit Period, as defined in §42(f)(1) of the Code.

(2) The Department will evaluate the cost certification documentation and notify the Development Owner of any additional required documentation needed to complete the review. The Department reserves the right to request additional documents or certifications as it deems necessary or useful in the determination of the Development's eligibility for a final Housing Tax Credit allocation amount. Any communication issued to the Development Owner pertaining to the cost certification documentation may also be sent to the syndicator.

(3) IRS Form(s) 8609 will not be issued until the conditions as stated in subparagraphs (A) - (G) of this paragraph have been met. The Development Owner has:

(A) Provided evidence that all buildings in the Development have been placed in service by:

(i) December 31 of the year the Commitment was issued;

(ii) December 31 of the second year following the year the Carryover Allocation Agreement was executed; or

(iii) the approved Placed in Service deadline;

(B) Provided a complete final cost certification package in the format prescribed by the Department. As used herein, a complete final cost certification package means a package that meets all of the Department's criteria with all required information and exhibits listed in clauses (i) - (xxv) of this subparagraph, and pursuant to the Post Award Activities Manual. If any item on this list is determined to be unclear, deficient, or inconsistent with the cost certification review completed by the Department, a Request for Information (RFI) will be sent to the Development Owner.

(i) Owner's signed and notarized Statement of Certification verifying the CPA firm's licenses and validity, including any restrictions;

(ii) Owner Summary & Organization Charts for the Owner, Developer, and Guarantors;

(iii) Evidence of Qualified Nonprofit or CHDO Participation;

(iv) Certification and evidence of Historically Underutilized Business (HUB) Participation;

(v) Development Team List;

(vi) Development Summary with Architect's Certification;

(vii) Development Change Documentation;

(viii) As Built Survey;

(ix) A copy of the fully executed Closing Statement for each parcel of land and/or buildings purchased and included in the Development;

(x) Development Owner's Title Policy for the Development;

(xi) Title Policy Update;

(xii) Placement in Service;

(xiii) Evidence of Placement in Service;

(xiv) Architect's Certification of Completion Date and Date Ready for Occupancy (for Developments located in areas where Certificates of Occupancy (COs) are not issued by a local government or rehabilitation Developments that cannot provide COs);
Auditor's Certification of Acquisition/Rehabilitation Placement in Service Election;

Independent Auditor's Report;

Independent Auditor's Report of Bond Financing;

Development Cost Schedule;

Contractor's Application for Final Payment (G702/G703) for the General Contractor, all prime subcontractors, Affiliated Contractors, and Related Party Contractors;

Additional Documentation of Offsite Costs;

Rent Schedule;

Utility Allowances;

Annual Operating Expenses;

30 Year Rental Housing Operating Pro Forma;

Current Operating Statement in the form of a trailing twelve month statement;

Current Rent Roll;

Summary of Sources and Uses of Funds;

Final Limited Partnership Agreement with all amendments and exhibits;

All Loan Agreements and Promissory Notes (except for Agreements and Notes issued directly by the Department);

Architect's Certification of Accessibility Requirements;

Development Owner Assignment of Individual to Compliance Training;

TDHCA Compliance Training Certificate (not older than two years from the date of cost certification submission);

TDHCA Final Inspection Clearance Letter or evidence of submitted final inspection request to the Compliance Division (IRS Form(s) 8609 will not be issued without a TDHCA Final Inspection Clearance Letter);

As required by 24 CFR §93.406(b) and the Multifamily Direct Loan Rule §13.11 (relating to Post-Award Requirements), for NHTF Developments layered with HTCs, a separate, additional cost certification form completed by an independent, licensed, certified public accountant of all Development costs (including project costs), subject to the conditions and limitations set forth in the executed Direct Loan Contract; and

Other Documentation as Required, including but not limited to conditions to be satisfied at cost certification as reflected in the Development's latest Underwriting Report;

Informed the Department of and received written approval for all amendments, extensions, and changes in ownership relating to the Development in accordance with §10.405 of this subchapter (relating to Amendments and Extensions) and §10.406 of this subchapter (relating to Ownership Transfers (§2306.6713));

Paid all applicable Department fees, including any past due fees;

Met all conditions noted in the Department underwriting report, Determination Notice, and Commitment;

Corrected all issues of noncompliance, including but not limited to noncompliance status with the LURA (or any other document containing an Extended Low-income Housing Commit-ment) or the program rules in effect for the subject Development, as described in this chapter. Developments in the corrective action period and/or with any uncorrected issues of noncompliance outside of the corrective action period will not be issued IRS Form(s) 8609s until all events of noncompliance are corrected or otherwise approved by the Executive Director or designee;

Completed an updated underwriting evaluation in accordance with Chapter 11, Subchapter D of this title based on the most current information at the time of the review.

§10.403. Review of Annual HOME, NSP, TCAP-RF, and National Housing Trust Fund Rents.

(a) Applicability. For participants of the Department's Multifamily HOME and NSP Direct Loan program, where Commitment of Funds occurred on or after August 23, 2013, the Department is required by 24 CFR §92.252(d) and for all National Housing Trust Fund (NHTF) participants by 24 CFR §93.302(c)(2), to review and approve or disapprove HOME/NSP/NHTF rents on an annual basis. The Department is also required by 24 CFR §92.219 and §92.252(d)(4) to approve rents where Multifamily Direct Loan funds (including TCAP-RF) are used as HOME match. Development Owners must submit documentation for the review of HOME/NSP/NHTF/TCAP-RF rents by no later than July 1st of each year as further described in the Post Award Activities Manual.

(b) Documentation for Review. The Department will furnish a rent approval request packet for this purpose that will include a request for Development information and an Owner's proposed rent schedule and will require submission of a current rent roll or unit status report, a copy of information used to determine gross Direct Loan rents, and utility allowance information. The Department may request additional documentation to perform a determination, as needed, including but not limited to annual operating statements, market surveys, or other information related to determining whether rents are sufficient to maintain the financial viability of a project or are in compliance with maximum rent limits.

(c) Review Process. Rents will be approved or disapproved within 30 days of receipt of all items required to be submitted by the Development Owner, and will be issued in the form of a signed letter from the Asset Management Division. Development Owners must keep copies of all approval letters on file at the Development site to be reviewed at the time of Compliance Monitoring reviews.

(d) Compliance. Development Owners for whom this section is applicable are subject to compliance under §10.622 of this chapter (relating to Special Rules Regarding Rents and Limit Violations) and may be subject to penalties under §10.625 of this chapter (relating to Events of Noncompliance). Approval of rents by the Asset Management Division will be limited to a review of the documentation submitted and will not guarantee compliance with the Department's rules or otherwise absolve an Owner of any past, current, or future non-compliance related to Department rules, guidance, Compliance Monitoring visits, or any other rules or guidance to which the Development or its Owner may be subject.

§10.404. Reserve Accounts.

(a) Replacement Reserve Account (§2306.186). The Department will require Development Owners to provide regular maintenance to keep housing sanitary, safe and decent by establishing and maintaining a reserve for replacement account for the Development in accordance with Tex. Gov't Code, §2306.186. The reserve account must be established, in accordance with paragraphs (3), (4), (5), and (6) of
this subsection, and maintained through annual or more frequent regularly scheduled deposits, for each Unit in a Development of 25 or more rental Units regardless of the amount of rent charged for the Unit. If the Department is processing a request for loan modification or other request under this subchapter and the Development does not have an existing replacement reserve account or sufficient funds in the reserve to meet future capital expenditure needs of the Development as determined by a history of uncorrected UPCS violations, ongoing issues related to keeping housing sanitary, safe, and decent, an account balance below the annual reserve deposit amount as specified in this section, or as indicated by the number or cost of repairs included in a third party Physical Needs Assessment (PNA), the Development Owner will be required to establish and maintain a replacement reserve account or review whether the amount of regular deposits to the replacement reserve account can be increased, regardless of the number of Units at the Development. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section. The duties of the Development Owner under this section cease on the date of a change in ownership of the Development; however, the subsequent Development Owner of the Development is subject to the requirements of this section and any additional or revised requirements the Department may impose after reviewing a Development’s compliance history, a PNA submitted by the Owner, or the amount of reserves that will be transferred at the time of any property sale.

(1) The LURA requires the Development Owner to begin making annual deposits to the replacement reserve account on the later of the:

(A) Date that occupancy of the Development stabilizes as defined by the First Lien Lender or, in the absence of a First Lien Lender other than the Department, the date the Property is at least 90% occupied; or

(B) The date when the permanent loan is executed and funded.

(2) The Development Owner shall continue making deposits into the replacement reserve account until the earliest of the:

(A) Date on which the owner suffers a total casualty loss with respect to the Development or the date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(B) Date on which the Development is demolished;

(C) Date on which the Development ceases to be used as a multifamily rental property; or

(D) End of the Affordability Period specified by the LURA, or if an Affordability Period is not specified and the Department is the First Lien Lender, then when the Department’s loan has been fully repaid or as otherwise agreed by the Owner and Department.

(3) If the Department is the First Lien Lender with respect to the Development or if the establishment of a Reserve Account for repairs has not been required by the First Lien Lender or Bank Trustee, each Development Owner receiving Department assistance for multifamily rental housing shall deposit annually into a separate, Development-specific Reserve Account through the date described in paragraph (2) of this subsection:

(A) For New Construction Developments, not less than $250 per Unit. Withdrawals from such account will be restricted for up to five years following the date of award except in cases in which written approval from the Department is obtained relating to casualty loss, natural disaster, reasonable accommodations, or demonstrated financial hardship (but not for the construction standards required by the NOFA or program regulations); or

(B) For Adaptive Reuse, Rehabilitation and Reconstruction Developments, the greater of the amount per Unit per year either established by the information presented in a Scope and Cost Review in conformance with Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) or $300 per Unit per year.

(4) For all Developments, a PNA must be conducted at intervals that are consistent with requirements of the First Lien Lender, other than the Department. If the Department is the First Lien Lender, or the First Lien Lender does not require a Third Party PNA, a PNA must be conducted at least once during each five year period beginning with the 11th year after the awarding of any financial assistance from the Department. PNAS conducted by the Owner at any time or for any reason other than as required by the Department in the year beginning with the 11th year of award must be submitted to the Department for review within 30 days of receipt by the Owner.

(5) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond trust indenture or tax credit syndication, the Development Owner shall comply with the lesser of the replacement reserve requirements of the First Lien Lender or the requirements in paragraph (3) of this subsection. In addition, the Department should be listed as a party to receive notice under any replacement reserve agreement entered into by the Development Owner. The Development Owner shall submit on an annual basis, within the Department’s required Development Owner’s Financial Certification packet, requested information regarding:

(A) The reserve for replacement requirements under the first lien loan agreement (if applicable) referencing where those requirements are contained within the loan documents;

(B) Compliance with the first lien lender requirements outlined in subparagraph (A) of this paragraph;

(C) If the Owner is not in compliance with the lender requirements, the Development Owner’s plan of action to bring the Development in compliance with all established reserve for replacement requirements; and

(D) Whether a PNA has been ordered and the Owner’s plans for any subsequent capital expenditures, renovations, repairs, or improvements.

(6) Where there is no First Lien Lender but the allocation of funds by the Department and Tex. Gov’t Code, §2306.186 requires that the Department oversee a Reserve Account, the Development Owner shall provide at their sole expense an escrow agent acceptable to the Department to act as Bank Trustee as necessary under this section. The Department shall retain the right to replace the escrow agent with another Bank Trustee or act as escrow agent at a cost plus fee payable by the Development Owner due to breach of the escrow agent’s responsibilities or otherwise with 30 days prior notice of all parties to the escrow agreement.

(7) Penalties and Non-Compliance. If the Development Owner fails to comply with the replacement reserve account requirements stated herein, and request for extension or waiver of these requirements is not approved by the Department, then a penalty of up to $200 per dwelling Unit in the Development and/or characterization of the Development as being in default with this requirement, may be imposed:

(A) A Reserve Account, as described in this section, has not been established for the Development;
(B) The Department is not a party to the escrow agreement for the Reserve Account, if required;

(C) Money in the Reserve Account:
   (i) is used for expenses other than necessary repairs, including property taxes or insurance; or
   (ii) falls below mandatory annual, monthly, or Department approved deposit levels;

(D) Development Owner fails to make any required deposits;

(E) Development Owner fails to obtain a Third-Party PNA as required under this section or submit a copy of a PNA to the Department within 30 days of receipt; or

(F) Development Owner fails to make necessary repairs in accordance with the Third Party PNA or §10.621 of this chapter (relating to Property Condition Standards).

(8) Department-Initiated Repairs. The Department or its agent may make repairs to the Development within 30 calendar days of written notice from the Department if the Development Owner fails to complete necessary repairs indicated in the submitted PNA or identified by Department physical inspection. Repairs may be deemed necessary if the Development Owner fails to comply with federal, state, and/or local health, safety, or building code requirements. Payment for necessary repairs must be made directly by the Development Owner through a replacement Reserve Account established for the Development under this section. The Department or its agent will be allowed to produce a Request for Bids to hire a contractor to complete and oversee necessary repairs. On a case-by-case basis, the Department may determine that the money in the Reserve Account may be used for expenses other than necessary repairs, including property taxes or insurance, if:

(A) Development income before payment of return to Development Owner or deferred Developer Fee is insufficient to meet operating expense and debt service requirements; or

(B) Development income after payment of operating expenses, but before payment of return to Development Owner or deferred developer fee is insufficient to fund the mandatory deposit levels.

(C) In the event of subparagraph (A) or (B) of this paragraph, funds withdrawn must be replaced from Cash Flow after payment of Operating Expenses but before return to Development Owner or deferred Developer Fee until the mandatory deposit level is replenished. The Department reserves the right to re-evaluate payments to the reserve, increase such payments or require a lump sum deposit to the reserve, or require the Owner to enter into a separate Reserve Agreement if necessary to protect the long term feasibility of the Development.

(9) Exceptions to Replacement Reserve Account. This section does not apply to a Development for which the Development Owner is required to maintain a Reserve Account under any other provision of federal or state law.

(10) In the event of paragraph (7) or (8) of this subsection, the Department reserves the right to require by separate Reserve Agreement a revised annual deposit amount and/or require Department concurrence for withdrawals from the Reserve Account to bring the Development back into compliance. Establishment of a new Bank Trustee or transfer of reserve funds to a new, separate and distinct account may be required if necessary to meet the requirements of such Agreement. The Agreement will be executed by the Department, Development Owner, and financial institution representative.

(b) Lease-up Reserve Account. A lease-up reserve funds start-up expenses in excess of the revenue produced by the Development prior to stabilization. The Department will consider a reasonable lease-up reserve account based on the documented requirements from a third-party lender, third-party syndicator, or the Department. During the underwriting at the point of the Cost Certification review, the lease-up reserve may be counted as a use of funds only to the extent that it represents operating shortfalls net of escrows for property taxes and property insurance. Funds from the lease-up reserve used to satisfy the funding requirements for other reserve accounts may not be included as a use of funds for the lease-up reserve. Funds from the lease-up reserve distributed or distributable as cash flow to the Development Owner will be considered and restricted as developer fee.

(c) Operating Reserve Account. At various stages during the application, award process, and during the operating life of a Development, the Department will conduct a financial analysis of the Development's total development costs and operating budgets, including the estimated operating reserve account deposit required. For example, this analysis typically occurs at application and cost certification review. The Department will consider a reasonable operating reserve account deposit in this analysis based on the needs of the Development and requirements of third-party lenders or investors. The amount used in the analysis will be the amount described in the project cost schedule or balance sheet, if it is within the range of two to six months of stabilized operating expenses plus debt service. The Department may consider a greater amount proposed or required by the Department, any superior lien lender, or syndicator, if the detail for such greater amount is reasonable and well documented. Reasonable operating reserves in this chapter do not include capitalized asset management fees, guaranty reserves, or other similar costs. In no instance will operating reserves exceed 12 months of stabilized operating expenses plus debt service (exclusive of transferred replacement reserves for USDA or HUD financed rehabilitation transactions). Operating reserves are generally for the term of the permanent loan. In no instance will operating reserves released within five years be included as a cost.

(d) Special Reserve Account. If the funding program requires or allows for the establishment and maintenance of a Special Reserve Account for the purpose of assisting residents at the Development with expenses associated with their tenancy, this will be established in accordance with a written agreement with the Development Owner.

(1) The Special Reserve Account is funded through a one-time payment or annually through an agreed upon percentage of net cash flow generated by the Development, excess development funds at completion as determined by the Department, or as otherwise set forth in the written agreement. For the purpose of this account, net cash flow is defined as funds available from operations after all expenses and debt service required to be paid have been considered. This does not include a deduction for depreciation and amortization expense, deferred developer fee payment, or other payments made to Related Parties or Affiliates, except as allowed by the Department for property management. Proceeds from any refinancing or other fund raising from the Development will be considered net cash flow for purposes of funding the Special Reserve Account unless otherwise approved by the Department. The account will be structured to require Department concurrence for withdrawals.

(2) All disbursements from the account must be approved by the Department.

(3) The Development Owner will be responsible for setting up a separate and distinct account with a financial institution acceptable to the Department. A Special Reserve Account Agreement will
be drafted by the Department and executed by the Department and the Development Owner.

(4) The Development Owner must make reasonable efforts to notify tenants of the existence of the Special Reserve Account and how to submit an application to access funds from the Special Reserve. Documentation of such efforts must be kept onsite and made available to the Department upon request.

(e) Other Reserve Accounts. Additional reserve accounts may be recognized by the Department as necessary and required by the Department, superior lien lender, or syndicator.

§10.405. Amendments and Extensions.

(a) Amendments to Housing Tax Credit (HTC) Application or Award Prior to Land Use Restriction Agreement (LURA) recording or amendments that do not result in a change to the LURA (§2306.6712). The Department expects the Development Owner to construct or rehabilitate, operate, and own the Development consistent with the representations in the Application. The Department must receive notification of any amendments to the Application. Regardless of development stage, the Board shall re-evaluate a Development that undergoes a material change, as identified in paragraph (3) of this subsection at any time after the initial Board approval of the Development (§2306.6731(b)). The Board may deny an amendment request and subsequently may rescind any Commitment or Determination Notice issued for an Application, and may reallocate the credits to other Applicants on the waiting list.

(1) Requesting an amendment. The Department shall require the Applicant to file a formal, written request for an amendment to the Application. Such request must include a detailed explanation of the amendment request and other information as determined to be necessary by the Department, and the applicable fee as identified by the Department in Chapter 11, Subchapter E of this title (relating to Fee Schedule) in order to be received and processed by the Department. Department staff will evaluate the amendment request to determine if the change would affect an allocation of Housing Tax Credits by changing any item that received points, significantly affecting the most recent underwriting analysis, or by materially altering the Development as further described in this subsection.

(2) Notification Items. The Department must be notified of the changes described in subparagraphs (A) - (F) of this paragraph. The changes identified are subject to staff agreement based on a review of the amendment request and any additional information or documentation requested. Notification items will be considered satisfied when an acknowledgment of the specific change(s) is received from the Department.

(A) Changes to Development Site acreage required by the City or other local governmental authority, or changes resulting from survey discrepancies, as long as such change does not also result in a modification to the residential density of more than 5%;

(B) Minor modifications to the site plan that will not significantly impact development costs, including, but not limited to, relocation or rearrangement of buildings on the site (as long as the number of residential and non-residential buildings remains the same), and movement, addition, or deletion of ingress/egress to the site;

(C) Increases or decreases in net rentable square footage or common areas that do not result in a material amendment under §10.405(a)(4) of this section;

(D) Changes in amenities that do not require a change to the recorded LURA and do not negatively impact scoring, including changes to outdated amenities that could be replaced by an amenity with equal benefit to the resident community;

(E) Changes in Developers or Guarantors (notifications for changes in Guarantors that are also the General Contractor or are only providing guaranties during the construction period are not required) with no new Principals (who were not previously checked by Previous Participation review that retain the natural person(s) used to meet the experience requirement in Chapter 11 of this title (relating to Required Documentation for Application Submission); and

(F) Any other amendment not identified in paragraphs (3) and (4) of this subsection.

(3) Non-material amendments. The Executive Director or designee may administratively approve all non-material amendments, including, but not limited to:

(A) Any amendment that is determined by staff to exceed the scope of notification acknowledgement, as identified in paragraph (2) of this subsection but not to rise to a material alteration, as identified in paragraph (4) of this subsection;

(B) Changes in the natural person(s) used to meet the experience requirement in Chapter 11, §11.204(6) of this title provided that an appropriate substitute has been approved by the Multifamily Division prior to receipt of the amendment request (relating to Required Documentation for Application Submission);

(C) Changes in Developers or Guarantors (excluding changes in Guarantors that are also the General Contractor or are only providing guaranties during the construction period) not addressed in §10.405(a)(2)(E). Changes in Developers or Guarantors will be subject to Previous Participation requirements as further described in Chapter 11 of this title and the credit limitation described in §11.4(a) of this title; and

(D) For Exchange Developments only, requests to change elections made on line 8(b) of the IRS Form(s) 8609 to group buildings together into one or more multiple building projects. The request must include an attached statement identifying the buildings in the project. The change to the election may only be made once during the Compliance Period.

(4) Material amendments. Amendments considered material pursuant to paragraph (4) of this subsection must be approved by the Board. When an amendment request requires Board approval, the Development Owner must submit the request and all required documentation necessary for staff’s review of the request to the Department at least 45 calendar days prior to the Board meeting in which the amendment is anticipated to be considered. Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department’s website and the Applicant will be notified of the posting (§2306.6717(a)(4)). Material Amendment requests may be denied if the Board determines that the modification proposed in the amendment would materially alter the Development in a negative manner or would have adversely affected the selection of the Application in the Application Round. Material alteration of a Development includes, but is not limited to:

(A) A significant modification of the site plan;

(B) A modification of the number of Units or bedroom mix of units;

(C) A substantive modification of the scope of tenant services;

(D) A reduction of 3% or more in the square footage of the Units or common areas;
(E) A significant modification of the architectural design of the Development;

(F) A modification of the residential density of at least 5%;

(G) A request to implement a revised election under §42(g) of the Code prior to filing of IRS Form(s) 8609;

(H) Exclusion of any requirements as identified in Chapter 11, Subchapter B of this title (relating to Site and Development Requirements and Restrictions) and Chapter 11, Subchapter C of this title (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules); or

(I) Any other modification considered material by the staff and therefore required to be presented to the Board as such.

(5) Amendment requests will be denied if the Department finds that the request would have changed the scoring of an Application in the competitive process such that the Application would not have received a funding award or if the need for the proposed modification was reasonably foreseeable or preventable by the Applicant at the time the Application was submitted, unless good cause is found for the approval of the amendment.

(6) This section shall be administered in a manner that is consistent with §42 of the Code. If a Development has any uncorrected issues of noncompliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such noncompliance or outstanding payment must be resolved to the satisfaction of the Department before a request for amendment will be acted upon.

(7) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants identified in the Application and Credit Underwriting Analysis Report at the time of award and as approved by the Board, the procedure described in subparagraphs (A) and (B) of this paragraph will apply to the extent such request is not prohibited based on statutory and/or regulatory provisions;

(A) For amendments that involve a reduction in the total number of Low-Income Units, or a reduction in the number of Low-Income Units at any rent or income level, as approved by the Board, evidence noted in either clause (i) or (ii) of this subparagraph must be presented to the Department to support the amendment.

(i) In the event of a request to implement (rent to a household at an income or rent level that exceeds the approved AMI limits established by the minimum election within the Development's Application or LURA) a revised election under §42(g) of the Code prior to an Owner's submission of IRS Forms 8609 to the IRS, Owners must submit updated information and exhibits to the Application as required by the Department and all lenders and the syndicator must submit written acknowledgement that they are aware of the changes being requested and confirm any changes in terms as a result of the new election; or

(ii) For all other requests for reductions in the total number of Low-Income Units or reductions in the number of Low-Income Units at any rent or income level, prior to issuance of IRS Forms 8609 by the Department, the lender and syndicator must submit written confirmation that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request; however, any affirmative recommendation to the Board is contingent upon concurrence from Department staff that the Unit adjustment is necessary for the continued financial feasibility of the Development; and

(B) If it is determined by the Department that the loss of low-income targeting points would have resulted in the Application not receiving an award in the year of allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all Persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for 24 months from the time that the amendment is approved.

(b) Amendments to the LURA. Department approval shall be required for any amendment to a LURA in accordance with this section. An amendment request shall be submitted in writing, containing a detailed explanation of the request, the reason the change is necessary, the good cause for the change, financial information related to any financial impact on the development, information related to whether the necessity of the amendment was reasonably foreseeable at the time of application, and other information as determined to be necessary by the Department, along with any applicable fee as identified in Chapter 11, Subchapter E of this title (relating to Fee Schedule, Appeals, and other Provisions). The Department may order or require the Development Owner to order a Market Study or appraisal at the Development Owner's expense. If a Development has any uncorrected issues of non-compliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such non-compliance or outstanding payment must be resolved to the satisfaction of the Department, before a request for amendment will be acted upon. The Department will not approve changes that would violate state or federal laws including the requirements of §42 of the Code, 24 CFR Part 92 (HOME Final Rule), 24 CFR Part 93 (NHTF Intern Rule), Chapter 1 of this title (relating to Administrative Requirements), Chapter 11 of this title (relating to Qualified Allocation Plan), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), Chapter 13 of this title (relating to Multifamily Direct Loan Rule), Tex. Gov't Code, Chapter 2306, and the Fair Housing Act. For Tax-Exempt Bond Developments, compliance with their Regulatory Agreement and corresponding bond financing documents. Prior to staff taking a recommendation to the Board for consideration, the procedures described in paragraph (3) of this subsection must be followed.

(1) Non-Material LURA Amendments. The Executive Director or designee may administratively approve all LURA amendments not defined as Material LURA Amendments pursuant to paragraph (2) of this subsection. A non-material LURA amendment may include but is not limited to:

(A) HUB participation removal. Removal of a HUB participation requirement will only be processed as a non-material LURA amendment after the issuance of 8609s and requires that the Department find that:

(i) the HUB is requesting removal of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(ii) the participation by the HUB has been substantive and meaningful, or would have been substantive or meaningful had the HUB not defaulted under the organizational documents of the Development Owner, enabling it to realize not only financial benefit but to acquire skills relating to the ownership and operating of affordable housing; and

(iii) where the HUB will be replaced as a general partner or special limited partner that is not a HUB and will sell its ownership interest, an ownership transfer request must be submitted as described in §10.406 of this subchapter;
(B) A change resulting from a Department work out arrangement as recommended by the Department's Asset Management Division; or

(C) A correction of error.

(2) Material LURA Amendments. Development Owners seeking LURA amendment requests that require Board approval must submit the request and all required documentation necessary for staff's review of the request to the Department at least 45 calendar days prior to the Board meeting at which the amendment is anticipated to be considered. Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting. (§2306.6717(a)(4)). The Board must consider the following material LURA amendments:

(A) Reductions to the number of Low-Income Units;
(B) Changes to the income or rent restrictions;
(C) Changes to the Target Population;
(D) The removal of material participation by a Non-profit Organization as further described in §10.406 of this subchapter;
(E) A change in the Right of First Refusal period as described in amended §2306.6726 of the Tex. Gov't Code;
(F) Any amendment that affects a right enforceable by a tenant or other third party under the LURA; or
(G) Any LURA amendment deemed material by the Executive Director.

(3) Prior to staff taking a recommendation to the Board for consideration, the Development Owner must provide notice and hold a public hearing regarding the requested amendment(s) at least 15 business days prior to the scheduled Board meeting where the request will be considered. Development Owners will be required to submit a copy of the notification with the amendment request. If a LURA amendment is requested prior to issuance of IRS Forms 8609 by the Department, notification must be provided to the recipients described in subparagraphs (A) - (E) of this paragraph. If an amendment is requested after issuance of IRS Forms 8609 by the Department, notification must be provided to the recipients described in subparagraph (A) - (B) of this paragraph.

(A) Each tenant of the Development;
(B) The current lender(s) and investor(s);
(C) The State Senator and State Representative of the districts whose boundaries include the Development Site;
(D) The chief elected official for the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction); and
(E) The county commissioners of the county in which the Development Site is located (if the Development Site is located outside of a municipality).

(4) Contents of Notification. The notification must include, at a minimum, all of the information described in subparagraphs (A) - (D) of this paragraph.

(A) The Development Owner's name, address and an individual contact name and phone number;
(B) The Development's name, address, and city;
(C) The change(s) requested; and

(D) The date, time and location of the public hearing where the change(s) will be discussed.

(5) Verification of public hearing. Minutes of the public hearing and attendance sheet must be submitted to the Department within three business days after the date of the public hearing.

(6) Approval. Once the LURA Amendment has been approved administratively or by the Board, as applicable, Department staff will provide the Development Owner with a LURA amendment for execution and recording in the county where the Development is located.

(c) HTC Extensions. Extensions must be requested if the original deadline associated with Carryover, the 10% Test (including submission and expenditure deadlines), construction status reports, or cost certification requirements will not be met. Extension requests submitted at least 30 calendar days in advance of the applicable deadline will not be required to submit an extension fee as described in §11.901 of this title. Any extension request submitted fewer than 30 days in advance of the applicable deadline or after the applicable deadline will not be processed unless accompanied by the applicable fee. Extension requests will be approved by the Executive Director or designee, unless, at staff's discretion it warrants Board approval due to extenuating circumstances stated in the request. The extension request must specify a requested extension date and the reason why such an extension is required. If the Development Owner is requesting an extension to the Carryover submission or 10% Test deadline(s), a point deduction evaluation will be completed in accordance with Tex. Gov't Code, §2306.6710(b)(2), and §11.9(f) of this title (relating to Factors Affecting Scoring and Eligibility in current and future Application Rounds). Therefore, the Development Owner must clearly describe in their request for an extension how the need for the extension was beyond the reasonable control of the Applicant/Development Owner and could not have been reasonably anticipated. Carryover extension requests will not be granted an extended deadline later than December 1st of the year the Commitment was issued.


(a) Ownership Transfer Notification. All multifamily Development Owners must provide written notice and a completed Ownership Transfer packet, if applicable, to the Department at least 45 calendar days prior to any sale, transfer, or exchange of the Development or any portion of or Controlling interest in the Development. Except as otherwise provided herein, the Executive Director's prior written approval of any such transfer is required. The Executive Director may not unreasonably withhold approval of the transfer requested in compliance with this section.

(b) Exceptions. The following exceptions to the ownership transfer process outlined herein apply:

(1) A Development Owner shall be required to notify the Department but shall not be required to obtain Executive Director approval when the transferee is an Affiliate of the Development Owner with no new Principals or the transferee is a Related Party who does not Control the Development and the transfer is being made for estate planning purposes.

(2) Transfers that are the result of an involuntary removal of the general partner by the investment limited partner do not require advance approval but must be reported to the Department as soon as possible due to the sensitive timing and nature of this decision. In the event the investment limited partner has proposed a new general partner or will permanently replace the general partner, a full Ownership Transfer packet must be submitted.
(3) Changes to the investment limited partner, non-Controlling limited partner, or other non-Controlling partners affiliated with the investment limited partner do not require Executive Director approval. A General Partner's acquisition of the interest of the investment limited partner does not require Executive Director approval, unless some other change in ownership is occurring as part of the same overall transaction.

(4) Changes resulting from foreclosure do not require advance approval but acquiring parties must notify the Department as soon as possible of the revised ownership structure and ownership contact information.

(c) General Requirements.

(1) Any new Principal in the ownership of a Development must be eligible under §11.202 of Subchapter C (relating to Ineligible Applicants and Applications). In addition, Principals will be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee).

(2) Changes in Developers or Guarantors must be addressed as non-material amendments to the application under §10.405 of this subchapter.

(3) To the extent an investment limited partner or its Affiliate assumes a Controlling interest in a Development Owner, such acquisition shall be subject to the Ownership Transfer requirements set forth herein. Principals of the investment limited partner or Affiliate will be considered new Principals and will be reviewed as stated under paragraph (1) of this subsection.

(4) Simultaneous transfer or concurrent offering for sale of the General Partner's and Limited Partner's control and interest will be subject to the Ownership Transfer requirements set forth herein and will trigger a Right of First Refusal, if applicable.

(d) Transfer Actions Warranting Debarment. If the Department determines that the transfer, involuntary removal, or replacement was due to a default by the General Partner under the Limited Partnership Agreement, or other detrimental action that put the Development at risk of failure or the Department at risk for financial exposure as a result of non-compliance, staff will refer the matter to the Enforcement Committee for debarment consideration pursuant to §2.401 of this title (relating to Enforcement, Debarment from Participation in Programs Administered by the Department). In addition, a record of transfer involving Principals in new proposed awards will be reported and may be taken into consideration in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), prior to recommending any new financing or allocation of credits.

(e) Transfers Prior to 8609 Issuance or Construction Completion. Prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or the completion of construction (for all Developments funded through other Department programs) an Applicant may request an amendment to its ownership structure to add Principals. The party(ies) reflected in the Application as having Control must remain in the ownership structure and retain Control, unless approved otherwise by the Executive Director. A development sponsor, General Partner or Development Owner may not sell the Development in whole or voluntarily end their Control prior to the issuance of 8609s.

(f) Nonprofit Organizations. If the ownership transfer request is to replace a nonprofit organization within the Development ownership entity, the replacement nonprofit entity must adhere to the requirements in paragraph (1) or (2) of this subsection.

(1) If the LURA requires ownership or material participation in ownership by a Qualified Nonprofit Organization, and the Development received Tax Credits pursuant to §42(h)(5) of the Code, the transferee must be a Qualified Nonprofit Organization that meets the requirements of §42(h)(5) of the Code and Tex. Gov't Code §2306.6706, if applicable, and can demonstrate planned participation in the operation of the Development on a regular, continuous, and substantial basis.

(2) If the LURA requires ownership or material participation in ownership by a nonprofit organization or CHDO, the Development Owner must show that the transferee is a nonprofit organization or CHDO, as applicable, that complies with the LURA. If the transferee has been certified as a CHDO by TDHCA prior to 2016 or has not previously been certified as a CHDO by TDHCA, a new CHDO certification package must be submitted for review. If the transferee was certified as a CHDO by TDHCA after 2016, provided no new federal guidance or rules concerning CHDO have been released and the proposed ownership structure at the time of review meets the requirements in 24 CFR Part 92, the CHDO may instead submit a CHDO Self-Certification form with the Ownership Transfer package.

(3) Exceptions to §10.406(f)(1)-(2) may be made on a case by case basis if the Development (for MFDL) is past its Federal Affordability Period or (for HTC Developments) is past its Compliance Period, was not reported to the IRS as part of the Department's Nonprofit Set Aside in any HTC Award year, and follows the procedures outlined in §10.405(b)(1) - (5) of this subchapter (relating to LURA Amendments that require Board Approval). The Board must find that:

(A) The selling nonprofit is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(B) The participation by the nonprofit was substantive and meaningful during the full term of the Compliance Period but is no longer substantive or meaningful to the operations of the Development; and

(C) The proposed purchaser is an affiliate of the current Owner or otherwise meets the Department's standards for ownership transfers.

(g) Historically Underutilized Business (HUB) Organizations. If a HUB is the general partner or special limited partner of a Development Owner and it determines to sell its ownership interest, after the issuance of 8609's, the purchaser of that partnership interest or the general or special limited partner is not required to be a HUB as long as the procedure described in §10.405(b)(1) of this chapter (relating to Non-Material LURA Amendments) has been followed and approved.

(h) Documentation Required. A Development Owner must submit documentation requested by the Department to enable the Department to understand fully the facts and circumstances pertaining to the transfer and the effects of approval or denial. Documentation must be submitted as directed in the Post Award Activities Manual, which includes but is not limited to:

(1) A written explanation outlining the reason for the request;

(2) Ownership transfer information, including but not limited to the type of sale, terms of any new financing introduced as a result of the transfer, amount of Development reserves to transfer in the event of a property sale, and the prospective closing date;

(3) Pre and post transfer organizational charts with TINs of each organization down to the level of natural persons in the ownership structure as described in §11.204(13)(A) of Subchapter C of this title (relating to Required Documentation for Application Submission).
(4) A list of the names and contact information for transferees and Related Parties;

(5) Previous Participation information for any new Principal as described in §11.204(13)(B) of this title (relating to Required Documentation for Application Submission);

(6) Agreements among parties associated with the transfer;

(7) Owners Certifications with regard to materials submitted as further described in the Post Award Activities Manual;

(8) Detailed information describing the organizational structure, experience, and financial capacity of any party holding a controlling interest in any Principal or Controlling entity of the prospective Development Owner;

(9) Evidence and certification that the tenants in the Development have been notified in writing of the proposed transfer at least 30 calendar days prior to the date the transfer is approved by the Department. The ownership transfer approval letter will not be issued until this 30 day period has expired;

(10) Any required exhibits and the list of exhibits related to specific circumstances of transfer or Ownership as detailed in the Post Award Activities Manual.

(i) Once the Department receives all necessary information under this section and as required under the Post Award Activities Manual, staff shall initiate a qualifications review of a transferee, in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter and §11.202 of this title (relating to Ineligible Applicants and Applications).

(j) Credit Limitation. As it relates to the Housing Tax Credit amount further described in §11.4(a) of this title (relating to Tax Credit Request and Award Limits), the credit amount will not be applied in circumstances described in paragraphs (1) and (2) of this subsection:

(1) In cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(2) In cases where the general partner is being replaced if the award of credits was made at least five years prior to the transfer request date.

(k) Penalties, Past Due Fees and Underfunded Reserves. The Development Owner must comply with any additional documentation requirements as stated in Subchapter F of this chapter (relating to Compliance Monitoring) and Subchapter G of this chapter (relating to Affirmative Marketing and Written Policies and Procedures). The Development Owner on record with the Department will be liable for any penalties or fees imposed by the Department (even if such penalty can be attributable to the new Development Owner) unless an ownership transfer has been approved by the Department. In the event a transferring Development has a history of uncorrected UPCS violations, ongoing issues related to keeping housing sanitary, safe, and decent, an account balance below the annual reserve deposit amount as specified in §10.404(a) (relating to Replacement Reserve Accounts), or that appears insufficient to meet capital expenditure needs as indicated by the number or cost of repairs included in a PNA or SCR, the prospective Development Owner may be required to establish and maintain a replacement reserve account or increase the amount of regular deposits to the replacement reserve account by entering into a Reserve Agreement with the Department. The Department may also request a plan and timeline relating to needed repairs or renovations that will be completed by the departing and/or incoming Owner as a condition to approving the Transfer. A PNA or SCR may be requested if one has not already been received under §10.404 of this section (relating to Reserve Accounts).

(l) Ownership Transfer Processing Fee. The ownership transfer request must be accompanied by the corresponding ownership transfer fee as outlined in §11.901 of this title (relating to Fee Schedule, Appeals, and other Provisions).

§10.407. Right of First Refusal.

(a) General. This section applies to Development Owners that agreed to offer a Right of First Refusal (ROFR) to a Qualified Entity or as applicable a Qualified Nonprofit Organization, as memorialized in the applicable LURA. For the purposes of this section a Qualified Nonprofit Organization also includes an entity 100% owned by a Qualified Nonprofit Organization pursuant to §42(h)(5)(C) of the Code and operated in a similar manner. The purpose of this section is to provide administrative procedures and guidance on the process and valuation of properties under the LURA. All requests for ROFR submitted to the Department, regardless of existing regulations, must adhere to this process.

(1) The Development Owner may market the Property for sale and sell the Property to a Qualified Entity, or as applicable a Qualified Nonprofit Organization without going through the ROFR process outlined in this section unless otherwise restricted or prohibited and only in the following circumstances:

(A) The LURA includes a 90-day ROFR and the Development Owner is selling to a Qualified Nonprofit Organization;

(B) The LURA includes a two year ROFR and the Development Owner is selling to a Qualified Nonprofit Organization that meets the definition of a Community Housing Development Organization (CHDO) under 24 CFR Part 92, as approved by the Department; or

(C) The LURA includes a 180-day ROFR, and the Development Owner is selling to a Qualified Entity that meets the definition of a CHDO under 24 CFR Part 92, or that is controlled by a CHDO, as approved by the Department. Where the Development Owner is not required to go through the ROFR process, it must go through the ownership transfer process in accordance with §10.406 of this subchapter.

(2) A ROFR request must be made in accordance with the LURA for the Development. If there is a conflict between the Development's LURA and this subchapter, every effort will be made to harmonize the provisions. If the conflict cannot be resolved, requirements in the LURA will supersede this subchapter. If there is a conflict between the Development's LURA and Tex. Gov't Code Chapter 2306, every effort will be made to harmonize the provisions. A Development Owner may request a LURA amendment to make the ROFR provisions in the LURA consistent with Tex. Gov't Code Chapter 2306 at any time.

(3) If a LURA includes the ROFR provision, the Development Owner may not request a Preliminary Qualified Contract (if such opportunity is available under the applicable LURA and §10.408) until the requirements outlined in this section have been satisfied.

(4) The Department reviews and approves all ownership transfers pursuant to §10.406 of this subchapter. Thus, if a proposed purchaser is identified in the ROFR process, the Development Owner and proposed purchaser must complete the ownership transfer process. A Development Owner may not transfer a Development to a Qualified Nonprofit Organization or Qualified Entity that is considered an ineligible entity under the Department's rules. In addition, ownership transfers to a Qualified Entity or as applicable a Qualified Nonprofit Organization pursuant to the ROFR process are subject to Chapter 1,
Subchapter C of this title (relating to Previous Participation and Execu-
tive Award Review and Advisory Committee).

(5) Satisfying the ROFR requirement does not terminate
the LURA or the ongoing application of the ROFR requirement to any
subsequent Development Owner.

(6) If there are multiple buildings in the Development, the
end of the 15th year of the Compliance Period will be based upon the
date the last building(s) began their credit period(s). For example, if
five buildings in the Development began their credit periods in 2005
and one in 2006, the 15th year would be 2020. The ROFR process is
triggered upon:

(A) The Development Owner's determination to sell the
Development to an entity other than as permitted in paragraph (1) of
this subsection; or

(B) The simultaneous transfer or concurrent offering
for sale of a General Partner's and limited partner's interest in the
Development Owner's ownership structure.

(7) The ROFR process is not triggered if a Development
Owner seeks to transfer the Development to a newly formed entity:

(A) That is under common control with the Develop-
ment Owner; and

(B) The primary purpose of the formation of which is to
facilitate the financing of the rehabilitation of the Development using
assistance administered through a state financing program.

(8) This section applies only to a Right of First Refusal
memorialized in the Department's LURA. This section does not autho-
rize a modification of any other agreement between the Development
Owner and a Qualified Nonprofit Organization or Qualified Entity. The
enforceability of a contractual agreement between the Development
Owner and a Qualified Nonprofit Organization or Qualified Entity may
be impacted by the Development Owner's commitments at Application
and recorded LURA.

(b) Right of First Refusal Offer Price. There are two gen-
eral expectations of the ROFR offer price identified in the outstanding
LURAs. The descriptions in paragraphs (1) and (2) of this subsection
do not alter the requirements or definitions included in the LURA but
provide further clarification as applicable:

(1) Fair Market Value is established using either a current
appraisal (completed within three months prior to the ROFR request
and in accordance with §11.304 of this title (relating to Appraisal Rules
and Guidelines)) of the Property or an executed purchase offer that the
Development Owner would like to accept. In either case the documen-
tation used to establish Fair Market Value will be part of the ROFR
property listing on the Department's website. The purchase offer must
contain specific language that the offer is conditioned upon satisfac-
tion of the ROFR requirement. If a subsequent ROFR request is made
within six months of the previously approved ROFR posting, the lesser
of the prior ROFR posted value or new appraisal/purchase contract
amount must be used in establishing Fair Market Value;

(2) Minimum Purchase Price, pursuant to §42(i)(7)(B) of
the Code, is the sum of the categories listed in (A) and (B) of this
paragraph:

(A) The principal amount of outstanding indebtedness
secured by the project (other than indebtedness incurred within the five
year period immediately preceding the date of said notice); and

(B) All federal, state, and local taxes incurred or
payable by the Development Owner as a consequence of such sale.
If the Property has a minimum Applicable Fraction of less than one,
the offer must take this into account by multiplying the purchase
price by the applicable fraction and the fair market value of the
non-Low-Income Units. Documentation submitted to verify the Min-
imum Purchase Price calculation will be part of the ROFR property
listing on the Department's website.

(c) Required Documentation. Upon establishing the ROFR of-
fer price, the ROFR process is the same for all types of LURAs. To
proceed with the ROFR request, documentation must be submitted as
directed in the Post Award Activities Manual, which includes:

(1) ROFR fee as identified in §11.901 of this title (relating
to Fee Schedule, Appeals, and other Provisions);

(2) A notice of intent to the Department;

(3) Certification that the Development Owner has pro-
vided, to the best of their knowledge and ability, a notice of intent to
all additional required persons and entities in subparagraph (A) of this
paragraph and that such notice includes, at a minimum the information
in subparagraph (B) of this paragraph:

(A) Copies of the letters or emailed notices provided to
all persons and entities listed in clauses (i) to (vi) of this subparagraph
as described above and applicable to the Development at the time of
the submission of the ROFR documentation must be attached to the
Certification:

(i) All tenants and tenant organizations, if any, of the
Development;

(ii) Mayor of the municipality (if the Development
is within a municipality or its extraterritorial jurisdiction);

(iii) All elected members of the Governing Body of
the municipality (if the Development Site is within a municipality or
its extraterritorial jurisdiction);

(iv) Presiding officer of the Governing Body of the
county in which the Development is located;

(v) The local housing authority, if any; and

(vi) All qualified buyers maintained on the Depart-
ment's list of qualified buyers.

(B) Letters must include, at a minimum, all of the infor-
mation required in clauses (i) to (vii) of this subparagraph and must not
contain any statement that violates Department rules, statute, Code, or
federal requirements:

(i) The Development's name, address, city, and
county;

(ii) The Development Owner's name, address, indi-
vidual contact name, phone number, and email address;

(iii) Information about tenants' rights to purchase the
Development through the ROFR;

(iv) The date that the ROFR notice period expires;

(v) The ROFR offer price;

(vi) A physical description of the Development, in-
cluding the total number of Units and total number of Low-Income
Units; and

(vii) Contact information for the Department staff
overseeing the Development's ROFR application.

(4) Documentation evidencing any contractual ROFR be-
tween the Development Owner and a Qualified Nonprofit Organization
or Qualified Entity, along with evidence that such Qualified Nonprofit
Organization or Qualified Entity is in good standing in the state of its organization;

(5) Documentation verifying the ROFR offer price of the Property:

(A) If the Development Owner receives an offer to purchase the Property from any buyer other than a Qualified Entity or Qualified Nonprofit Organization that the Development Owner would like to accept, the Development Owner may execute a sales contract, conditioned upon satisfaction of the ROFR requirement, and submit the executed sales contract to establish fair market value; or

(B) If the Development Owner of the Property chooses to establish fair market value using an appraisal, the Development Owner must submit an appraisal of the Property completed during the last three months prior to the date of submission of the ROFR request, establishing a value for the Property in compliance with Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) in effect at the time of the request. The appraisal should take into account the existing and continuing requirements to operate the Property under the LURA and any other restrictions that may exist. Department staff will review all materials within 30 calendar days of receipt. If, after the review, the Department does not agree with the fair market value proposed in the Development Owner's appraisal, the Department may order another appraisal at the Development Owner's expense; or

(C) If the LURA requires valuation through the Minimum Purchase Price calculation, submit documentation verifying the calculation of the Minimum Purchase Price as described in subsection (b)(2) of this section regardless of any existing offer or appraised value;

(6) Description of the Property, including all amenities and current zoning requirements;

(7) Copies of all documents imposing income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Property;

(8) A current title commitment or policy not older than six months prior to the date of submission of the ROFR request;

(9) The most recent Physical Needs Assessment, pursuant to Tex. Gov't Code §2306.186(e) conducted by a Third-Party. If the PNA/SCR identifies the need for critical repairs that significantly impact habitability and tenant safety, the identified repairs and replacements must be resolved to the satisfaction of the Department before the Development will be considered eligible to proceed with a Right of First Refusal Request;

(10) Copy of the monthly operating statements, including income statements and balance sheets for the Property for the most recent 12 consecutive months (financial statements should identify amounts held in reserves);

(11) The three most recent consecutive annual operating statements (audited would be preferred);

(12) Detailed set of photographs of the Property, including interior and exterior of representative units and buildings, and the Property's grounds;

(13) Current and complete rent roll for the entire Property; and

(14) If any portion of the land or improvements is leased for other than residential purposes, copies of the commercial leases.

(d) Posting and offers. Within 30 business days of receipt of all required documentation, the Department will review the submitted documents and notify the Development Owner of any deficiencies. During that time, the Department will notify any Qualified Entity or as applicable any Qualified Nonprofit Organization identified by the Development Owner as having a contractual ROFR of the Development Owner’s intent to sell. Once any deficiencies are resolved and the Development Owner and Department come to an agreement on the ROFR offer price of the Property, the Department will list the Property for sale on the Department’s website and contact entities on the buyer list maintained by the Department to inform them of the availability of the Property at a price as determined under this section. The Department will notify the Development Owner when the Property has been listed. The ROFR posting period commences on the date the Property is posted for sale on the Department’s website. During the ROFR posting period, a Qualified Nonprofit Organization or Qualified Entity can submit an offer to purchase as follows:

(1) if the LURA requires a 90 day ROFR posting period with no priority for any particular kind of Qualified Nonprofit Organization or tenant organization, any Qualified Nonprofit Organization or tenant organization may submit an offer to purchase the property.

(2) If the LURA requires a two year ROFR posting period, a Qualified Nonprofit Organization may submit an offer to purchase the Property as follows:

(A) During the first six months of the ROFR posting period, only a Qualified Nonprofit Organization that is a Community Housing Development Organization (CHDO) under 24 CFR Part 92, or that is 100% owned by a CHDO, as approved by the Department, may submit an offer;

(B) During the next six months of the ROFR posting period, only a Qualified Nonprofit Organization as described by Tex. Gov’t Code §2306.6706, or that is 100% owned by a Qualified Nonprofit Organization as described by Tex. Gov’t Code §2306.6706, or a tenant organization may submit an offer; and

(C) During the final 12 months of the ROFR posting period, any Qualified Nonprofit Organization may submit an offer.

(3) If the LURA requires a 180-day ROFR posting period a Qualified Entity may submit an offer to purchase the Property as follows:

(A) During the first 60 days of the ROFR posting period, only a Qualified Entity that is a CHDO under 24 CFR Part 92, or that is controlled by CHDO, as approved by the Department, may submit an offer;

(B) During the second 60 days of the ROFR posting period, only a Qualified Entity as described by Tex. Gov’t Code §2306.6706, or that is controlled by a Qualified Entity as described by Tex. Gov’t Code §2306.6706, or a tenant organization such may submit an offer;

(C) During the final 60 days of the ROFR posting period, any Qualified Entity may submit an offer.

(4) If the LURA does not specify a required ROFR posting timeframe, or, is unclear on the required ROFR posting timeframe, and the required ROFR value is determined by the Minimum Purchase Price method, any Development that received a tax credit allocation prior to September 1, 1997, is required to post for a 90-day ROFR period and any Development that received a tax credit allocation on or after September 1, 1997, and until September 1, 2015, is required to post for a two year ROFR, unless the LURA is amended under §10.405(b), or after September 1, 2015 is required to post for a 180-day ROFR period as described in Tex. Gov’t Code, §2306.6726.

(e) Acceptance of offers. A Development Owner may accept or reject any offer received during the ROFR posting period; provided
however, that to the extent the LURA gives priority to certain classifications of Qualified Nonprofit Organizations or Qualified Entities to make offers during certain portions of the ROFR posting period, the Development Owner can only negotiate a purchase contract with such classifications of entities during their respective periods. For example, during the CHDO priority period, the Development Owner may only accept an offer from and enter into negotiations with a Qualified Nonprofit Organization or Qualified Entity in that classification. A property may not be transferred under the ROFR process for less than the Minimum Purchase Price, but if the sequential negotiation created by statute yields a higher price, the higher price is permitted.

(f) Satisfaction of ROFR.

(1) A Development Owner that has posted a Property under the ROFR process is deemed to have satisfied the ROFR requirements in the following circumstances:

(A) The Development Owner does not receive any bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(B) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined not to be the fault of the Development Owner, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(C) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(D) An offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period at or above the posted ROFR offer price; or

(2) A Development Owner with a LURA that identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR will satisfy the ROFR if:

(A) The identified beneficiary is in existence and conducting business;

(B) The Development Owner offers the Development to the identified beneficiary pursuant to the terms of the ROFR;

(C) If the ROFR includes a priority for a certain type of Qualified Entity (such as a CHDO) to have the first opportunity make an offer to acquire the Development, the identified beneficiary meets such classification; and

(D) The identified entity declines to purchase the Development in writing, and such evidence is submitted to and approved by the Department.

(g) Non-Satisfaction of ROFR. A Development Owner that has posted a Property under the ROFR process does not satisfy the ROFR requirements in the following circumstances:

(1) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), and the Development Owner does not accept the offer;

(2) The LURA identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR, and such entity no longer exists or is no longer conducting business and the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers;

(3) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and then fails to accept any of such other offers;

(4) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, and such failure is determined to be the fault of the Development Owner;

(5) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), and the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers; or

(6) An offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), and the Development Owner fails to accept any of such offers.

(h) Activities Following ROFR.

(1) If a Development Owner satisfies the ROFR requirement pursuant to subsection (f)(1) - (2) of this section, it may request a Preliminary Qualified Contract (if such opportunity is available under §10.408) or proceed with the sale to an entity that is not a Qualified Nonprofit Organization or Qualified Entity at or above the ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation).

(2) Following notice that the ROFR requirement has been met, if the Development Owner does not post the Property for Qualified
Contract in accordance with §10.408 or sell the Property to an entity that is not a Qualified Nonprofit Organization or Qualified Entity within 24 months of the Department's written indication that the ROFR has been satisfied, the Development Owner must follow the ROFR process for any subsequent transfer.

(3) If the Department determines that the ROFR requirement has not been met during the ROFR posting period, the Owner may not re-post under this provision at a ROFR offer price that is higher than the originally posted ROFR offer price until 24 months has expired from the Department's written indication that the ROFR has not been satisfied. The Development Owner may market the Property for sale and sell the Property to a Qualified Nonprofit Organization or Qualified Entity during this 24 month period in accordance with subsection (a)(1) of this section.

(i) Sale and closing.

   (1) Prior to closing a sale of the Property, the Development Owner must obtain Department approval of the transfer through the ownership transfer process in accordance with §10.406 of this chapter (relating to Ownership Transfers (§2306.6713)). The request should include, among other required transfer documents outlined in the Post Award Activities Manual, the final settlement statement and final sales contract with all amendments.

   (2) If the closing price is materially less than the ROFR offering price or the terms and conditions of the sale change materially from what was submitted in the ROFR posting, in the Department's sole determination, the Development Owner must go through the ROFR process again with a revised ROFR offering price equal to the reduced closing price or adjusted terms and conditions based upon the revised terms, before disposing of the Property.

(j) Appeals. A Development Owner may appeal a staff decision in accordance with §11.902 of this title (relating to Appeals Process).

§10.408. Qualified Contract Requirements.

(a) General. Pursuant to §42(h)(6) of the Code, after the end of the 14th year of the Compliance Period, the Development Owner of a Development utilizing Housing Tax Credits can request that the allocating agency find a buyer at the Qualified Contract Price. If a buyer cannot be located within one year, the Extended Use Period will expire. This section provides the procedures for the submittal and review of a Qualified Contract Request.

(b) Eligibility. Development Owners who received an award of credits on or after January 1, 2002, are not eligible to request a Qualified Contract prior to the 30 year anniversary of the date the property was placed in service (§2306.185); if the property's LURA indicates a commitment to an Extended Use Period beyond 30 years, the Development Owner is not eligible to request a Qualified Contract until the expiration of the Extended Use Period. Development Owners awarded credits prior to 2002 may submit a Qualified Contract Request at any time after the end of the year preceding the last year of the Initial Affordability Period, provided it is not precluded by the terms of the LURA, following the Department's determination that the Development Owner is eligible. The Initial Affordability Period starts concurrently with the credit period, which begins at placement-in-service or is deferred until the beginning of the next tax year, if there is an election. Unless the Development Owner has elected an Initial Affordability Period longer than the Compliance Period, as described in the LURA, this can commence at any time after the end of the 14th year of the Compliance Period. References in this section to actions which can occur after the 14th year of the Compliance Period shall refer, as applicable, to the year preceding the last year of the Initial Affordability Period, if the Development Owner elected an Initial Affordability Period longer than the Compliance Period.

   (1) If there are multiple buildings placed in service in different years, the end of the Initial Affordability Period will be based upon the date the last building placed in service. For example, if five buildings in the Development began their credit periods in 2005 and one began in 2006, the 15th year would be 2020.

   (2) If a Development received an allocation in multiple years, the end of the Initial Affordability Period will be based upon the last year of a multiple allocation. For example, if a Development received its first allocation in 2004 and a subsequent allocation and began the credit period in 2006, the 15th year would be 2020.

(c) Preliminary Qualified Contract Request. All eligible Development Owners must file a Preliminary Qualified Contract Request.

   (1) In addition to determining the basic eligibility described in subsection (b) of this section, the pre-request will be used to determine that:

      (A) The Development does not have any uncorrected issues of noncompliance outside the corrective action period;

      (B) There is a Right of First Refusal (ROFR) connected to the Development that has been satisfied;

      (C) The Compliance Period under the LURA has expired; and

   (2) In order to assess the validity of the pre-request, the Development Owner must submit:

      (A) Preliminary Request Form;

      (B) Qualified Contract Pre-Request fee as outlined in §11.901 of this title (relating to Fee Schedule);

      (C) Copy of all regulatory agreements or LURAs associated with the Property (non-TDHC);

      (D) Copy of a Physical Needs Assessment, conducted by a Third Party, that is no more than 12 months older than the request date. If the PNA identifies the need for critical repairs that significantly impact habitability and tenant safety, the identified repairs and replacement must be resolved to the satisfaction of the Department before the Development will be considered eligible to submit a Qualified Contract Request.

   (3) The pre-request will not bind the Development Owner to submit a Request and does not start the One Year Period (1YP). A review of the pre-request will be conducted by the Department within 90 days of receipt of all documents and fees described in paragraph (2) of this subsection. If the Department determines that this stage is satisfied, a letter will be sent to the Development Owner stating that they are eligible to submit a Qualified Contract (QC) Request.

   (d) Qualified Contract Request. A Development Owner may file a QC Request any time after written approval is received from the Department verifying that the Development Owner is eligible to submit the Request.

      (1) Documentation that must be submitted with a Request is outlined in subparagraphs (A) - (P) of this paragraph:

      (A) A completed application and certification;

      (B) The Qualified Contract price calculation worksheets completed by a licensed Third-Party certified public accountant (CPA). The CPA shall certify that they have reviewed annual partnership tax returns for all years of operation, loan documents for all secured debt, and partnership agreements. They shall also certify
that they are not being compensated for the assignment based upon a predetermined outcome;

(C) A thorough description of the Development, including all amenities;

(D) A description of all income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Development;

(E) A current title report;

(F) A current appraisal with the effective date within six months of the date of the QC Request and consistent with Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy);

(G) A current Phase I Environmental Site Assessment (and Phase II, if necessary) with the effective date within six months of the date of the QC Request and consistent with Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy);

(H) A copy of the most recent Physical Needs Assessment of the property conducted by a Third Party, if different from the assessment submitted during the preliminary qualified contract request, consistent with Chapter 11, Subchapter D of this title;

(I) A copy of the monthly operating statements for the Development for the most recent 12 consecutive months;

(J) The three most recent consecutive annual operating statements (audited would be preferred) for the Development;

(K) A detailed set of photographs of the Development, including interior and exterior of representative units and buildings, and the property’s grounds;

(L) A current and complete rent roll for the entire Development;

(M) A certification that all tenants in the Development have been notified in writing of the request for a Qualified Contract. A copy of the letter used for the notification must also be included;

(N) If any portion of the land or improvements is leased, copies of the leases;

(O) The Qualified Contract Fee as identified in §11.901 of this title (relating to Fee Schedule); and

(P) Additional information deemed necessary by the Department.

(2) Unless otherwise directed by the Department pursuant to subsection (g) of this section, the Development Owner shall contract with a broker to market and sell the Property. The Department may, at its sole discretion, notify the Owner that the selected Broker is not approved by the Department. The fee for this service will be paid by the seller, not to exceed 6% of the QC Price.

(3) Within 90 days of the submission of a complete Request, the Department will notify the Development Owner in writing of the acceptance or rejection of the Development Owner's QC Price calculation. The Department will have one year from the date of the acceptance letter to find a Qualified Purchaser and present a QC. The Department's rejection of the Development Owner's QC Price calculation will be processed in accordance with subsection (e) of this section and the 1YP will commence as provided therein.

(e) Determination of Qualified Contract Price. The QC Price calculation is not the same as the Minimum Purchase Price calculation for the ROFR. The CPA contracted by the Development Owner will determine the QC Price in accordance with §42(h)(6)(F) of the Code taking the following into account:

(1) Outstanding indebtedness secured by, or with respect to, the building;

(2) Distributions to the Development Owner of any and all cash flow, including incentive management fees, capital contributions not reflected in outstanding indebtedness or adjusted investor equity, and reserve balance distributions or future anticipated distributions, but excluding payments of any eligible deferred developer fee. These distributions can only be confirmed by a review of all prior year tax returns for the Development;

(3) All equity contributions will be adjusted based upon the lesser of the consumer price index or 5% for each year, from the end of the year of the contribution to the end of year fourteen or the end of the year of the request for a QC Price if requested at the end of the year or the year prior if the request is made earlier than the last year of the month; and

(4) These guidelines are subject to change based upon future IRS Rulings and/or guidance on the determination of Development Owner distributions, equity contributions and/or any other element of the QC Price.

(f) Appeal of Qualified Contract Price. The Department reserves the right, at any time, to request additional information to document the QC Price calculation or other information submitted. If the documentation does not support the price indicated by the CPA hired by the Development Owner, the Department may engage its own CPA to perform a QC Price calculation and the cost of such service will be paid for by the Development Owner. If a Development Owner disagrees with the QC Price calculated by the Department, a Development Owner may appeal in writing in accordance with §11.901(5) of this title (relating to Fee Schedule). A meeting will be arranged with representatives of the Development Owner, the Department and the CPA contracted by the Department to attempt to resolve the discrepancy. The 1YP will not begin until the Department and Development Owner have agreed to the QC Price in writing. Further appeals can be submitted in accordance with §11.902 of this title (relating to Appeals Process (§2306.0321; §2306.6715)).

(g) Marketing of Property. By submitting a Request, the Development Owner grants the Department the authority to market the Development and provide Development information to interested parties. Development information will consist of pictures of the Development, location, amenities, number of units, age of building, etc. Development Owner or broker contact information will also be provided to interested parties. The Development Owner is responsible for providing staff any requested information to assist with site visits and inspections. Marketing of the Development will continue until such time that a Qualified Contract is presented or the 1YP has expired. Notwithstanding subsection (d)(2) of this section, the Department reserves the right to contract directly with a Third Party in marketing the Development. Cost of such service, including a broker's fee, will be paid for by the existing Development Owner. The Department must have continuous cooperation from the Development Owner. Lack of cooperation will cause the process to cease and the Development Owner will be required to comply with requirements of the LURA for the remainder of the Extended Use Period. Responsibilities of the Development Owner include but are not limited to the items described in paragraphs (1) - (3) of this subsection. The Development Owner must:

(1) Allow access to the Property and tenant files;

(2) Keep the Department informed of potential purchasers; and

(3) Notify the Department of any offers to purchase.
(h) Presentation of a Qualified Contract. If the Department finds a Qualified Purchaser willing to present an offer to purchase the property for an amount at or above the QC Price, the Development Owner may accept the offer and enter into a commercially reasonable form of earnest money agreement or other contract of sale for the property and provide a reasonable time for necessary due diligence and closing of the purchase. If the Development Owner chooses not to accept the QC offer that the Department presents, the QC request will be closed and the possibility of terminating the Extended Use Period through the Qualified Contract process is eliminated; the Property remains bound by the provisions of the LURA for the remainder of the Extended Use Period. If the Development Owner decides to sell the development for the QC Price pursuant to a QC, the purchaser must complete all requirements of an ownership transfer request and be approved by the Department prior to closing on the purchase, but the consummation of such a sale is not required for the LURA to continue to bind the Development for the remainder of the Extended Use Period.

(1) The Department will attempt to procure a QC only once during the Extended Use Period. If the transaction closes under the contract, the new Development Owner will be required to fulfill the requirements of the LURA for the remainder of the Extended Use Period.

(2) If the Department fails to present a QC before the end of the 1YP, the Department will file a release of the LURA and the Development will no longer be restricted to low-income requirements and compliance. However, in accordance with §42(h)(6)(E)(ii) of the Code, for a three year period commencing on the termination of the Extended Use Period, the Development Owner may not evict or displace tenants of Low-Income Units for reasons other than good cause and will not be permitted to increase rents beyond the maximum tax credit rents. Additionally, the Development Owner should submit to the Department a request to terminate the LURA and evidence, in the form of a signed certification and a copy of the letter, to be approved by the Department, that the tenants in the Development have been notified in writing that the LURA will be terminated and have been informed of their protections during the three year time frame.

(3) Prior to the Department filing a release of the LURA, the Development Owner must correct all instances of noncompliance at the Development.

(i) Compliance Monitoring during Extended Use Period. For Developments that continue to be bound by the LURA and remain affordable after the end of the Compliance Period, the Department will monitor in accordance with the applicable requirements in Subchapters F and G of this chapter (relating to Uniform Multifamily 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 14, 2019.
TRD-201903746
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 475-3357

CHAPTER 13. MULTIFAMILY DIRECT LOAN RULE

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 13, Multifamily Direct Loan Rule, §§13.1 - 13.13. The purpose of the proposed repeal is to provide for clarification of the existing rule through new rulemaking action.

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

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV’T CODE §2001.0221.

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, administration of the Multifamily Direct Loan Program.

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

3. The proposed repeal does not require additional future legislative appropriations.

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

5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, administration of the Multifamily Direct Loan Program.

7. The proposed repeal will not increase nor decrease the number of individuals subject to the rule’s applicability.

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

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV’T CODE §2006.002.

The Department has evaluated this proposed repeal and determined that the proposed repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV’T CODE §2007.043. The proposed repeal does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV’T CODE §2001.024(a)(6).

The Department has evaluated the proposed repeal as to its possible effects on local economies and has determined that for the first five years the proposed repeal would be in effect there would be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

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e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be increased clarity and improved access to the Multifamily Direct Loan funds. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019, to November 14, 2019, to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Andrew Sinnott, Multifamily Direct Loan Administrator, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email htc.public-comment@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m. Austin local time NOVEMBER 14, 2019.

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed repealed sections affect no other code, article, or statute.

§13.1. Purpose. 
§13.2. Definitions. 
§13.3. General Loan Requirements. 
§13.5. Award Process. 
§13.7. Maximum Funding Requests. 
§13.10. Development and Unit Requirements. 
§13.11. Post-Award Requirements. 
§13.12. Pre-Closing Amendments to Direct Loan Terms. 
§13.13. Post-Closing Amendments to Direct Loan Terms.

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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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-1676


The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 13, Multifamily Direct Loan Rule, §§13.1 - 13.13. The purpose of the proposed new sections is to provide compliance with Tex. Gov't Code §2306.111 and to update the rules to: clarify program requirements in multiple sections, codify in rule practices of the division, and change citations to align with changes to other multifamily rules. In general, most changes proposed are corrective in nature, intended to gain consistency with state or federal rules, delete duplicative language or provisions, correct or update rule references, and clarify language or processes to more adequately communicate the language or process. Changes that do not fall within these general categories are proposed in: §13.4(a)(1)(A), related to the Supportive Housing/Soft Repayment Set-Aside; §13.5(h), related to Eligibility Criteria (and Determinations); §13.6(6), related to Tenant Populations with Special Housing Needs; §13.8(c)(9), related to Criteria for Construction-to-Permanent Loans; §13.8(b), related to Closing Memo to Underwriting Report; §13.8(g), related to Pass-Through Loans; and §13.13(c), related to Executive Amendments.

Tex. Gov't Code §2001.0045(b) does not apply to the rules proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

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


Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rules would be in effect:

1. The proposed rules do not create or eliminate a government program, but relate to the readoption of these rules which makes changes to an existing activity, administration of the Multifamily Direct Loan (MFDL) Program.

2. The proposed new rules do not require a change in work that would require the creation of new employee positions nor are the rules changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The proposed rules do not require additional future legislative appropriations.

4. The proposed rules will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The proposed rules are not creating new regulations, except that they are replacing rules being repealed simultaneously to provide for revisions.

6. The proposed rules will not expand, limit, or repeal an existing regulation.

7. The proposed rules will not increase nor decrease the number of individuals subject to the rule's applicability; and

8. The proposed rule will not negatively nor positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or
micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.111.

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

2. This rule relates to the procedures for multifamily direct loan applications and award through various Department fund sources. Other than in the case of a small or micro-business that is an applicant for such a loan product, no small or micro-businesses are subject to the rule. It is estimated that approximately 200 small or micro-businesses are such applicants; for those entities the new rule provides for a more clear, transparent process for applying for funds and does not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the proposed rule because this rule is applicable only to direct loan applicants for development of properties, which are not generally municipalities. The fee for applying for a Multifamily Direct Loan product is $1,000, unless the Applicant is a nonprofit that provides supportive services or the Applicant is applying for Housing Tax Credits in conjunction with Multifamily Direct Loan funds, in which case the application fee may be waived. These fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing.

There are 1,296 rural communities potentially subject to the proposed rule for which the economic impact of the rule is projected to be $0. 10 TAC Chapter 13, relating to Multifamily Direct Loan rule, places no financial burdens on rural communities, as the costs associated with submitting an Application are born entirely by private parties. In an average year the volume of applications for MFDL resources that are located in rural areas is approximately 15. In those cases, a rural community securing a loan will experience an economic benefit, including, potentially, increased property tax revenue from a multifamily Development.

3. The Department has determined that because there are rural MFDL awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive MFDL awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed rule does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule may provide a possible positive economic effect on local employment in association with this rule since MFDL Developments, layered with housing tax credits, often involve a typical minimum investment of $10 million in capital, and more commonly an investment from $20 million to $30 million. Such a capital investment has direct, indirect, and induced effects on the local and regional economies and local employment. However, because the exact location of where program funds or developments are directed is not determined in rule, and is driven by real estate demand, there is no way to predict during rulemaking where these positive effects may occur. Furthermore, while the Department believes that any and all impacts are positive, that impact is not able to be quantified for any given community until MFDL awards and LIHTCs (Low Income Housing Tax Credits) are actually awarded to a proposed Development, given the unique characteristics of each proposed multifamily Development.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that significant construction activity is associated with any MFDL Development layered with LIHTC and each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rule on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive MFDL awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections will be improved clarity of program requirements in multiple sections, codification in rule practices of the division, and change citations to align with changes to other multifamily rules. There will not be any economic cost to any individuals required to comply with the new sections because this rule does not have any new requirements that would cause additional costs to applicants.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new sections are in effect, enforcing or administering the new sections does not have any foreseeable implications related to costs or revenues of the state or local governments because it does not have any new requirements that would cause additional costs to applicants.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019, to November 14, 2019, to receive input on the proposed new sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Andrew Sinnott, Multifamily Direct Loan Administrator, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email htc.public-comment@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time NOVEMBER 14, 2019.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§13.1. Purpose.

(a) Authority. The rules in this chapter apply to the funds provided to Multifamily Developments through the Multifamily Direct Loan Program (MFDL or Direct Loan Program) by the Texas Department of Housing and Community Affairs (the Department). Notwithstanding anything in this chapter to the contrary, loans and grants issued to finance the Development of multifamily rental housing are subject to the requirements of the laws of the State of Texas, including but not
limited to Tex. Gov't Code, Chapter 2306 (sometimes referred to as the State Act), and federal law pursuant to the requirements of Title II of the Cranston-Gonzalez National Affordable Housing Act, Division B, Title III of the Housing and Economic Recovery Act (HERA) of 2008 - Emergency Assistance for the Redevelopment of Abandoned and Foreclosed Homes, Section 1497 of the Dodd-Frank Wall Street Reform and Consumer Protection Act: Additional Assistance for Neighborhood Stabilization Programs, Title I of the Housing and Economic Recovery Act of 2008, Section 1131 (Public Law 110-289), and the implementing regulations 24 CFR Part 91, Part 92, Part 93, and Part 570 as they may be applicable to a specific fund source. The Department is authorized to administer Direct Loan Program funds pursuant to Tex. Gov't Code, Chapter 2306, Subchapter I, Housing Finance Division.

(b) General. This chapter applies to an award of MFDL funds by the Department and establishes the general requirements associated with the application and award process for such funds. Applicants pursuing MFDL assistance from the Department are required to certify, among other things, that they have familiarized themselves with all applicable rules that govern that specific program including, but not limited to this chapter, Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), and Chapter 10 of this title (relating to Uniform Multifamily Rules), Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan (QAP)) and Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules) will apply if MFDL funds are layered with those other Department programs. The Applicant is also required to certify that it is familiar with any other federal, state, or local financing sources that it identifies in its Application. Any conflict with rules, regulations, or statutes will be resolved on a case by case basis that allows for compliance with all requirements. Conflicts that cannot be resolved may result in Application ineligibility, with the right to an Appeal as further provided in 10 TAC §11.7 of this title (relating to Appeals Process) or 10 TAC §11.920 of this title (relating to Appeals Process), as applicable.

(c) Waivers. Requests for waivers of any program rules or requirements must be made in accordance with 10 TAC §11.207 of this title (relating to Waiver of Rules), and as further limited by the rules in this chapter. In no instance will the Department consider a waiver request that would violate federal program requirements or state or federal statute, as further provided in paragraphs (1) through (3) of this subsection.

(1) Waivers for Layered Developments. For Direct Loan Developments contemporaneously layered with Competitive Housing Tax Credits, the Board may not waive any provision of the Notice of Funding Availability (NOFA). The Board may not waive rules that are federally required, or that have been incorporated as a required part of the Department's Consolidated or One Year Action Plan (OYAP) to the U.S. Department of Housing and Urban Development (HUD);

(2) Waivers for Non-Layered Developments. For Direct Loan Developments not contemporaneously layered with Competitive Housing Tax Credits, an Applicant may request that the Department amend its NOFA, amend its Consolidated or One Year Action Plan (OYAP), or ask HUD to grant a waiver of its regulations. If the Applicant's request is approved by the Department's Governing Board, the Application Acceptance Date will then be the date the Department completes the amendment process, or receives a waiver from HUD. If this date occurs after the NOFA closes, the Applicant will be required to apply, and the Direct Loan awardee (pre Loan closing) may be required to reapply under a new or otherwise open NOFA; and

(3) Waivers under Closed NOFAs. The Board may not waive any portion of a closed NOFA prior to Construction Completion. Thereafter, the Board may only waive any portion of a closed NOFA as part of an approved Asset Management Division work out. Allowable Post-Closing Amendments are described in 10 TAC §13.13, relating to Post-Closing Amendments to Direct Loan Terms.

(d) Eligibility and Threshold Requirements. Applications for Multifamily Direct Loan funds must meet all applicable eligibility and threshold requirements of Chapter 11 of this title (relating to the Qualified Allocation Plan (QAP)), unless otherwise excepted in this rule or NOFA.

§13.2. Definitions.
The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Tex. Gov't Code, Chapter 2306, §§141, 142, and 145 of the Internal Revenue Code, 24 CFR Part 91, Part 92, Part 93, and 2 CFR Part 200, and Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), Chapter 10 of this title (relating to Uniform Multifamily Rules), and Chapter 11 of this title (relating to Qualified Allocation Plan).

(1) Application Acceptance Date--The date the MFDL Application is considered received by the Department as described in this chapter, in Chapter 11 of this title (relating to Qualified Allocation Plan), or in the NOFA.

(2) Construction Completion--That necessary title transfer requirements and construction work have been performed and the following documents have been issued for the Development: certificate(s) of occupancy (if new construction), Certificate of Substantial Completion (AIA Form G704) or Form HUD-92485 for instances in which a federally insured HUD loan is being utilized, and a Final Construction Inspection Letter from Department staff. In addition, for Developments not layered with Housing Tax Credits, Construction Completion means all corrections requested as a result of the Department's Final Construction Inspection were cleared as evidenced by receipt of the Closed Final Construction Inspection Letter.

(3) Community Housing Development Organization (CHDO)--A private nonprofit organization that has experience developing and/or owning affordable rental housing and that meets the requirements in 24 CFR Part 92 for purposes of receiving HOME funds under the CHDO Set-Aside. In addition, a member of a CHDO's board cannot be a Principal of the Development beyond their role as a board member of the CHDO or be an employee of the development team, and may not receive financial benefit other than reimbursement of expenses from the CHDO (e.g., a voting board member cannot also be a paid executive).

(4) Deobligated Funds--The funds released by the Development Owner or recovered by the Department canceling a Contract or award involving some or all of a contractual financial obligation between the Department, and a Development Owner or Applicant.

(5) Federal Affordability Period--The period commencing on the date of Construction Completion and ending on the date which is the required number of years as defined by the federal program from the date of Construction Completion.

(6) HOME Match-Eligible Unit--A Unit in the Development that is not assisted with HOME Program funds, but would qualify as eligible for Match under 24 CFR Part 92 unless otherwise identified by the provisions in the Notice of Funding Availability (NOFA), TCAP Repayment Funds (TCAP RF) and matching contribution on Neighborhood Stabilization Program (NSP) and National Housing Trust Fund (NHTF) Developments must meet all criteria to be classified as HOME-Match Eligible Units.

(7) Housing Contract System (HCS)--The electronic information system established by the Department for tracking, funding,
and reporting Department Contracts and Developments. The HCS is primarily used for Direct Loan Programs administered by the Department.

(8) Land Use Restriction (LURA) Term--The period commencing on the effective date of the LURA and ending on the date which, at a minimum, is the greater of the loan term or 30 years. The LURA may include the Federal Affordability Period, in addition to the State Affordability Period requirements and State restrictive criteria.

(9) Matching contribution (Match)--A contribution to a Development from nonfederal sources that may be in one or more of the forms provided in subparagraphs (A) through (E) of this paragraph:

(A) Cash contribution (grant), except for cash contributions made by investors in a limited partnership or other business entity subject to pass through tax benefits in a tax credit transaction or owner equity (including Deferred Developer Fee and General Partner advances);

(B) Reduced fees or donated labor from certain eligible contractors, subcontractors, architects, attorneys, engineers, excluding any contributions from a party related to the Developer or Owner;

(C) Net present value of yield foregone from a below market interest rate loan as described in HUD Community Planning and Development (CPD) Notice 97-03;

(D) Waived or reduced fees or taxes from cities or counties not related to the Applicant in connection with the proposed Development; or

(E) Donated land or land sold by an unrelated third party at a price below market value, as evidenced by a third party appraisal.

(10) Relocation Plan--A residential anti-displacement and relocation assistance plan for which subparagraphs (A) and (B) of this paragraph apply:

(A) Includes provisions consistent with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. §§4601-4655), implementing regulations at 49 CFR Part 24, and policy guidance in Real Estate Acquisition and Relocation Policy and Guidance (HUD Handbook 1378) and the TDHCA Relocation Handbook; and in some HOME and NSP funded Developments Section 104(d) of the Housing and Community Development Act of 1974 (as amended), and 24 CFR Part 42 (as modified for NSP); and

(B) Is in form and substance consistent with requirements of the Department.

(11) Section 234 Condominium Housing Basic Mortgage Limits (Section 234 Condo Limits)--The per-unit subsidy limits for all MFDL funding. These limits take into account whether or not a Development is elevator served and any local conditions that may make development of multifamily housing more or less expensive in a given metropolitan statistical area. If the high cost percentage adjustment applicable to the 234 Condo Limits for HUD's Fort Worth Multifamily Hub is applicable for all Developments that TDHCA finances through the MFDL Program, then confirmation of that applicability will be included in the applicable NOFA.

(12) Site and Neighborhood Standards--HUD requirements for new construction or reconstruction Developments funded by NHTF (24 CFR §93.150) or new construction Developments in HOME (24 CFR §92.202). Proposed Developments that are unable to comply with requirements in 24 CFR §983.57(c)(2) and (3) will not be eligible for HOME or NHTF.

(13) State Affordability Period--The LURA Term as described in the MFDL contract and loan documents and as required by the Department in accordance with the State Act which is usually an additional period after the Federal Affordability Period.

(14) Surplus Cash--Except when the first lien mortgage is a federally insured HUD mortgage which shall be subject to HUD's surplus cash definition, Surplus Cash is any cash remaining:

(A) After the payment of:

(i) All sums due or currently required to be paid under the terms of any superior lien;

(ii) All amounts required to be deposited in the reserve funds for replacement;

(iii) Operating expenses actually incurred by the borrower for the Development during the period with an appropriate adjustment for an allocable share of property taxes and insurance premiums;

(iv) Recurring maintenance expenses actually incurred by the borrower for the Development during the period; and

(v) All other obligations of the Development approved by the Department; and

(B) After the segregation of an amount equal to the aggregate of all special funds required to be maintained for the Development; and

(C) Excluding payment of:

(i) All sums due or currently required to be paid under the terms of any subordinate liens against the property;

(ii) Any development fees that are deferred including those in eligible basis; and

(iii) Any payments or obligations to the borrower, ownership entities of the borrower, related party entities; any payment to the management company exceeding 5% of the effective gross income; incentive management fee; asset management fees; or any other expenses or payments that shall be negotiated between the Department and borrower.

§13.3. General Loan Requirements.

(a) Funding Availability. Direct Loan funds may be made available through a NOFA or other similar governing document that includes the basic Application and funding requirements.

(b) Oversourced Developments. Direct Loan funds may not be contracted if an underwriting report issued by the Department's Real Estate Analysis Division concludes the Development does not need all or part of the MFDL funding for which it has applied because it is oversourced, and for which a timely appeal has been completed, as further provided in 10 TAC §1.7 of this title (relating to Appeals Process) or 10 TAC §11.902 of this title (relating to Appeals Process), as applicable.

(c) Funding Sources. Direct Loan funds are composed of annual HOME and National Housing Trust Fund (NHTF) allocations from HUD, repayment of TCAP or TCAP-RF loans, HOME Program Income, NSP1 Program Income (NSP1 PI or NSP), and any other similarly encumbered funding that may become available by the Department's Governing Board's (Board) action, except as otherwise noted in this chapter. Similar funds include any funds that are identified by the Board to be loaned or granted for the development of multifamily property and are not governed by another chapter in this title, with the exception of State funds appropriated for a specific purpose.
(d) Eligible and Ineligible Activities.

(1) Eligible Activities. Direct Loan funds may be used for the predevelopment, acquisition, new construction, reconstruction, rehabilitation, or preservation of affordable housing with suitable amenities, including real property acquisition, site improvements, conversion, demolition, or operating cost reserves, subject to applicable HUD guidance. Other expenses, such as financing costs, relocation expenses of any displaced persons, families, businesses, or organizations may be included. MFDL funds may be used to assist Developments previously awarded by the Department when approved by specific action of the Board. Eligible Activities may have fund source restrictions, or be restricted by a NOFA.

(2) Ineligible Activities. Direct Loan funds may not be used for Adaptive Reuse Developments. MFDL Developments layered with Housing Tax Credits that have elected the income averaging election under Section 42(g)(1)(C) of the Internal Revenue Code may not have more than 15% Market Rate Units.

(e) Ineligible Costs. All costs associated with the Development and known by the Applicant must be disclosed as part of the Application. Costs ineligible for reimbursement with Direct Loan funds in accordance with 24 CFR Part 91, Part 92, Part 93, Part 570, and 2 CFR Part 200, as federally required or identified in the NOFA, include but are not limited to:

(1) Offsite costs;
(2) Stored Materials;
(3) Site Amenities;
(4) Detached Community Buildings;
(5) Carports and/or garages;
(6) Parking garages;
(7) Swimming pools;
(8) Commercial Space costs;
(9) Reserve accounts not related to NHTF;
(10) TDHCA fees;
(11) Syndication and organizational costs;
(12) Delinquent fees, taxes, or charges;
(13) Costs incurred more than 24 months prior to the effective date of the Direct Loan Contract, unless the Application is awarded TCAP RF;
(14) Costs that have been allocated to or paid by another fund source, including but not limited to: Deferred Developer Fee, contingency, and general partner loans and advances;
(15) Deferred Developer Fee;
(16) Bond fees;
(17) Community Facility spaces that are not for the exclusive use of tenants and their guests;
(18) The portion of soft costs that are allocated to support ineligible hard costs; and
(19) Other costs limited by Award or NOFA, or as established by the Board.


(a) Set-Asides. Specific types of Activities or Developments for which a portion of MFDL funds may be reserved in a NOFA will be grouped in Set-Asides. The Soft Repayment Set-Aside, CHDO Set-Aside, and General Set-Aside, as described in this section, are fixed Set-Asides that will be included in the annual NOFA (except if CHDO requirements are waived or reduced by HUD). The remaining Set-Asides described in this section are flexible Set-Asides and are applicable only if identified in a NOFA; flexible Set-Asides are not required to be programmed on an annual basis. The amount of a single award may be credited to multiple Set-Asides, in which case the credited portion of funds may be repositioned into an oversubscribed Set-Aside prior to a defined collapse deadline. Applications under any and all Set-Asides may or may not be layered with other Department Multifamily programs except as provided in this section or as determined by the Board to address unique circumstances not addressed by these rules.

(i) Fixed Set-Asides:

(A) Soft Repayment Set-Aside. The Soft Repayment Set-Aside will be funded primarily with NHTF allocations received by the Department. The Soft Repayment Set-Aside is reserved for developments with providing Supportive Housing and/or extremely low-income and rent restrictions that would not exist otherwise. Soft repayment loans may be structured as deferred payable, deferred forgivable, or Surplus Cash flow loans at an interest rate as low as zero percent. It is the responsibility of the Applicant to account for any Eligible Basis and/or taxable event implications when requesting any of the potential loan structures available in this set-aside. Applicants seeking to qualify under this set-aside must propose Developments that meet either the requirements of clause (i) or (ii) of this subparagraph:

(i) The Supportive Housing requirements in 10 TAC §11.1(d)(12) including the underwriting considerations for Supportive Housing Developments in 10 TAC §11.302(g)(3) of this title (relating to Underwriting and Loan Policy); or

(ii) The requirements in subclauses (I) - (IV) of this clause, for which all Units assisted with MFDL funds:

(I) Must be available for households earning 30% AMI or less and have rents no higher than the rent limits for extremely low-income tenants in 24 CFR §93.302(b);

(II) May not also be receiving any project-based subsidy;

(III) May not be receiving tenant-based voucher or tenant-based rental assistance, to the extent that there are other available Units within the Development that the voucher-holder may occupy; and

(IV) May not be restricted to 30% AMI or less by Housing Tax Credits, or any other fund source.

(B) CHDO Set-Aside. Unless waived or reduced by HUD, a portion of the Department's annual HOME allocation, will be set aside for eligible CHDOs meeting the requirements of the definition of Community Housing Development Organization in 24 CFR §92.2 and §13.2(4) of this chapter (relating to Definitions). Applicants under the CHDO Set-Aside must be proposing to develop housing on Development Sites located outside Participating Jurisdictions (PJ), unless the award is made within a Persons with Disabilities (PWD) set-aside, or the requirement under Tex. Gov't Code §2306.111(1) has been waived by the Governor as the result of a disaster declaration. CHDO funds are typically available as fully-repayable amortizing debt consistent with §13.8 of this chapter (relating to Loan Structure and Underwriting Requirements). In instances where an application submitted under the CHDO Set-Aside also would qualify under the Soft Repayment Set-Aside, funds under this Set-Aside may be structured in accordance with the Soft Repayment Set-Aside requirements. A grant for CHDO operating expenses may be awarded in conjunction with an
award of MFDL funds under this Set-Aside in accordance with 24 CFR §92.208. Applications under the CHDO Set-Aside may not have a for profit special limited partner within the ownership organization chart.

(C) General Set-Aside. The General Set-Aside is for all other applications that do not meet the requirements of the Soft Repayment, CHDO, or Flexible Set-Asides, if any. A portion of the General Set-Aside may be reallocated into the CHDO Set-Aside in order to fully fund a CHDO award that exceeds the remaining amount in the Set-Aside.

(2) Flexible Set-Asides:

(A) 4% HTC and Bond Layered Set-Aside. The 4% and Bond Layered Set-Aside is reserved for Applications layered with 4% Housing Tax Credits and Private Bond funds where the Development Owner does not meet the definition of a CHDO, but that the Application does meet all other MFDL requirements.

(B) Persons with Disabilities (PWD) Set-Aside. The PWD Set-Aside is reserved for Developments restricting Units for residents who meet the requirements of Tex. Gov’t Code §2306.111(c)(2) while not exceeding the number of Units limited by 10 TAC §1.15 of this title (relating to the Integrated Housing Rule). MFDL funds will be awarded in a NOFA for the PWD Set-Aside only if sufficient funds are available to award at least one Application within a Participating Jurisdiction under Tex. Gov’t Code §2306.111(c)(1).

(C) 9% HTC Layered Set-Aside. The 9% Layered Set-Aside is reserved for Applications that are layered with 9% Housing Tax Credits that do not meet the definition of CHDO, but that do meet all other MFDL requirements. Awards under this set-aside are dependent on the concurrent award of a 9% HTC allocation; however, an allocation of 9% HTC does not ensure that a sufficient amount of MFDL funds will be available for award.

(D) Additional Set-Asides may be developed, subject to Board approval, to meet the requirements of specific funds sources, or address Department priorities. To the extent such Set-Asides are developed, they will be reflected in a NOFA or other similar governing document.

(b) Regional Allocation and Collapse. All funds received directly from HUD in the annual NOFA will be allocated to regions and potentially subregions based on a Regional Allocation Formula (RAF) within the applicable Set-Asides (unless the funds have already been through a RAF). The RAF methodology may differ by fund source. HOME funds will be allocated in accordance with Tex. Gov’t Code Chapter 2306. The end date for the RAF will be identified in the NOFA, but in no instance shall it be less than 30 days from the date a link to the Board approved NOFA or NOFA Amendment is published on the Department’s website.

(1) After expiration of the RAF, remaining funds within each respective Set-Aside may collapse on an end date identified in the NOFA. All Applications received prior to these collapse period deadlines will continue to hold their priority unless they are withdrawn, terminated, suspended, or funded.

(2) Funds remaining after expiration of the Set-Asides on the end date identified in the NOFA, which have not been requested in the form of a complete Application, may be made available statewide on a first-come first-served basis to Applications submitted after the collapse dates, as further described in the NOFA.

(3) In instances where the RAF would result in regional or subregional allocations insufficient to fund an Application, the Department may use an alternative method of distribution, including an early collapse, revised formula or other methods as approved by the Board, and reflected in the NOFA.

(c) Priorities for the Annual NOFA. Complete Applications received during the period of the RAF will be prioritized for review and recommendation to the Board, if funds are available both in the region and in the Set-Aside under which the Application is received. If insufficient funds are available in a region to fund all Applications then the oversubscribed Applications will be evaluated only after the RAF and/or Set-Aside collapse and in accordance with the additional priority levels in this subsection, unless an Application received earlier is withdrawn or terminated. If insufficient funds are available within a region or Set-Aside, the Applicant may request to be considered under another Set-Aside if they qualify, prior to the collapse. Applications will be reviewed and recommended to the Board if funds are available in accordance with the order of prioritization described in paragraphs (1) - (3) of this subsection.

(1) Priority 1. Applications not layered with current year 9% Housing Tax Credits (HTC) that are received prior to the Market Analysis Delivery Date as described in 10 TAC §11.2 of this title (relating to Program Calendar for Housing Tax Credits). Priority 1 Applications may be prioritized based on score within their respective Set-Aside for a certain time period, for certain populations, or for certain geographical areas, as further described in the NOFA.

(2) Priority 2. Applications layered with current year 9% HTC will be prioritized based on their recommendation status and score for an HTC allocation under the provisions of the Qualified Allocation Plan (QAP). All Priority 2 Applications will be deemed received on the Market Analysis Delivery Date identified in Chapter 11 of this title, relating to the QAP. Priority 2 applications will be recommended for approval of the MFDL award at the same meeting when the Board approves the 9% HTC allocations. Applications for 9% HTC allocations are not guaranteed the availability of MFDL funds, as further provided in §13.5(f) of this chapter (relating to Award Process).

(3) Priority 3. Applications that are received after the Market Analysis Delivery Date identified in the QAP will generally have a first come first served basis for any remaining funds, until the final deadline identified in the annual NOFA. However, the NOFA may describe an additional prioritization period for certain populations, or for certain geographical areas. Applications layered with 9% HTC that are on the waitlist after the late July Board meeting will be considered Priority 3 Applications; if the Applicant receives an allocation later in the year, the Application Acceptance date will be the date the Commitment Notice is issued, and MFDL funds are not guaranteed to be available.

(d) Other Priorities. The Board may set additional priorities for the annual NOFA, and for one time or special purpose NOFAs.

§13.5. Award Process.

(a) Notice of Funding Availability (NOFA). All MFDL funds from the annual allocation will be distributed pursuant to the terms of a published NOFA that provides the specific collapse dates and deadlines as well as set-aside and RAF amounts applicable to the MFDL program, along with scoring criteria, priorities, award limits, and other Application information. Other funds may be distributed by NOFA or through other lawful methods approved by the Board. Set-asides, RAFs, and total funding amounts may increase or decrease in accordance with the provisions herein without further Board action as long as the NOFA itself did not require Board action.

(b) Applications. MFDL Applicants must follow the applicable requirements in 10 TAC Chapter 11 Subchapter C (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules).

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(c) Application Acceptance Date. Applications will be considered received on the business day of receipt, unless a different time period is described in the Department’s rules or NOFA. If an Application is received after 5:00 p.m., Austin local time, it will be determined to have been received on the following business day. Applications received on a non-business day will be considered received on the next day the Department is open. Applications will be considered complete at the time all Application materials, required third party reports and application fee(s) are received by the Department. Within certain Set-Asides or priorities, the date of receipt may be fixed, regardless of the earlier actual date a complete Application is received, if so specified in the Department’s rules or NOFA. If multiple Applications have the same Application Acceptance Date, in the same region (as applicable), and within the same Set-Aside, then score and tiebreaker factors, as described in §13.6 of this chapter (relating to Selection Criteria) for MFDL or 10 TAC §11.17 and §11.9 of this title (relating to Tie Breaker Factors and Competitive HTC Selection Criteria, respectively) for Applications layered with 9% HTC, will be used to determine the Application’s rank.

(d) Market Analysis. Applications proposing Rehabilitation that request MFDL as the only source of Department funding may be exempted from the Market Analysis requirement in 10 TAC §11.205(2) (relating to Required Third Party Reports) if the Development’s rent rolls for the most recent six months reflect occupancy of at least 80% of all habitable Units.

(e) Environmental Clearance. All Applicants for MFDL funds must include the following language in the purchase contract or site control agreement: "Notwithstanding any other provision of this Contract, Purchaser shall have no obligation to purchase the Property, and no transfer of title to the Purchaser may occur, unless and until the Department has provided Purchaser and/or Seller with a written notification that: (A) It has completed a federally required environmental review and its request for release of federal funds has been approved and, subject to any other Contingencies in this Contract, (i) the purchase may proceed, or (ii) the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property; or (B) It has determined that the purchase is exempt from federal environmental review and a request for release of funds is not required.”

(f) Oversubscribed Funds for 9% HTC-Layered Applications. Should MFDL funds be oversubscribed in a Set-Aside or for a fund source that has geographic limitations within a Set-Aside, Applications concurrently requesting 9% HTC will be notified and may amend their Application to accommodate another fund source and make changes that still meet threshold requirements in 10 TAC Chapter 11 of this title (relating to Qualified Allocation Plan (QAP)), and Chapter 13 of this title (relating to Multifamily Direct Loan Rule), and do not impact scoring under 10 TAC Chapter 11 of this title. The Department will provide notice to all impacted Applicants in the case of over-subscription, which will include a deadline for response. If MFDL funds become available between the Market Analysis Delivery Date, and the last Board meeting in July, they will not be reserved for 9% HTC-layered Applications, unless the reservation is described in the NOFA.

(g) Source of Direct Loan Funds. When determining the source of funds that an Application will receive when recommended for an award, the Department will select sources of funds for recommended Applications, as provided in paragraphs (1) - (4) of this subsection.

(1) The Department will generally select the recommended source of funds to award to an Application in the order described in subparagraphs (A) - (C) of this paragraph, which may be limited by the type of activity an Application is proposing or the proposed Development Site of an Application:

(A) Federal funds with commitment and expenditure deadlines will be selected first;

(B) Federal funds that do not have commitment and expenditure deadlines will be selected next; and

(C) Nonfederal funds that do not have commitment and expenditure deadlines will be selected last; however,

(2) The Department may also consider repayment risk or ease of compliance with other fund sources when assigning the source of funds to recommend for award to an Application;

(3) The Department may move to the next fund source prior to exhausting another selection; and

(4) The Department will make the final decision regarding the fund source to be recommended for an award (within a Set-Aside that has multiple fund sources), and this recommendation may be not be appealed.

(h) Eligibility Criteria and Determinations. The Department will evaluate Applications received under the Annual NOFA for eligibility and threshold pursuant to the requirements of this chapter and Chapter 11 of this title (relating to the Qualified Allocation Plan). The Department may terminate the Application if there are changes at any point prior to MFDL loan closing that would have had an adverse effect on the score and ranking order of the Application that would have resulted in the Application being ranked in this subsection another Application received prior to the subject Application.

(1) Applicants requesting MFDL as the only source of Department funds must meet the Experience Requirement as provided in either subparagraph (A) or (B) of this paragraph:

(A) The Experience Requirement as provided in §11.204(6) of this title (relating to Required Documentation for Application Submission); or

(B) Alternatively by providing the acceptable documentation listed in §11.204(6)(i)-(ix) of this title (relating to Required Documentation for Application Submission ) evidencing the successful development, and at least five years of the successful operation, of a project or projects with at least twice as many affordability restricted Units as requested in the Application.

(2) The Executive Director or authorized designee must make eligibility determinations for Applications for Developments that meet the criteria in subparagraph (A) or (B) of this paragraph regardless of available fund sources:

(A) Received an award of funds for the Development from the Department within 15 years preceding the Application Acceptance Date; or

(B) Started or completed construction, and are not proposing acquisition or rehabilitation.

(3) An Application that requires an eligibility determination must identify that fact prior to, or in their Application so that an eligibility determination may be made subject to the Applicant’s appeal rights under 10 TAC §11.902, or 10 TAC §1.7 of this title, both relating to Appeals Process, as applicable. A finding of eligibility under this section does not guarantee an award. Applications requiring eligibility determinations generally will not be funded with HOME, or NSP funds.

(A) Requests under this subsection will not be considered more than 60 calendar days prior to the first Application Accep-
tance Date published in the NOFA, for the Set-Aside in which the Applicant plans to apply.

(B) Criteria for consideration include clauses (i) - (iii) of this subparagraph:

(i) Evidence of circumstances beyond the Applicant’s control that could not have been prevented with appropriate due diligence; or

(ii) Force Majeure events (not including weather events); and

(iii) Evidence that no further exceptional conditions exist that will delay or cause further cost increases.

(C) Criteria for consideration shall not include weather events, typical construction or financing delays.

(D) Applications for Developments that previously received an award from the Department in within 15 years preceding the Application Acceptance Date will be evaluated at no more than the amount of Developer Acceptance Date proposed the last time that the Department published an Underwriting Report. MFDL funds may not be used to fund increased Developer Fee, regardless of the allowability of the increase under other Department rules.

(i) Effective rules and contractual terms. The contractual terms of an award will be governed by and reflect the rules in effect at the time of Application; however, any changes in federal requirements will be reflected in the contractual terms. Further provided, that if after award, prior to execution of such Contract, there are new rules in effect, the Direct Loan awardee may elect to be governed by the new rules, provided the Application would continue to have been eligible for award under the rules in effect at the time of Application.


The criteria identified in paragraphs (1) - (6) of this section will be used in the evaluation and ranking of Applications if other Applications have the same Application Acceptance Date, within the same Set-Aside, and having the same prioritization. There is no rounding of numbers in this section, unless rounding is explicitly indicated for that particular calculation or criteria. The scoring items used to calculate the score for a 9% HTC-Layered Application will be utilized for scoring for an MFDL Application, and evaluated in the same manner, except as specified in this section. Scoring criteria in Chapter 11 of this title (relating to Qualified Allocation Plan (QAP)) will always be superior to Scoring Criteria in this chapter if an MFDL Application is also concurrently requesting 9% HTC:

(1) Opportunity Index. Applicants eligible for points under TAC §11.9(c)(4) (relating to the Opportunity Index) (7 points).

(2) Resident Services. Applicants eligible for points under TAC §11.9(c)(3)(A) (relating to Resident Services) (10 points) and Applicants eligible for points under TAC §11.9(c)(3)(B) (relating to Resident Services) (1 point).

(3) Underserved Area. Applicants eligible for points under TAC §11.9(c)(5) (relating to Underserved Area) (up to 5 points).

(4) Subsidy per Unit. An Application that caps the per MFDL eligible cost per Unit subsidy limit below Section 234 Condo Limits or HUD 221(d)(4) statutory limits (as applicable) for all Direct Loan Units regardless of Unit size at:

(A) $100,000 per MFDL eligible cost per Unit (4 points).

(B) $80,000 per MFDL eligible cost per Unit (8 points).

(5) Rent Levels of Residents. Except for Applications submitted under the Soft Repayment Set-Aside, an Application may qualify to receive up to 13 points for placing the following rent and income restrictions on the proposed Development for the Federal and State Affordability Periods. These Units must not be restricted to 30% or less of AMI (Area Median Income) by another fund source; however, layering on other HTC Units may be considered for scoring purposes.

(A) At least 20% of all low-income Units at 30% or less of AMI (13 points);

(B) At least 10% of all low-income Units at 30% or less of AMI, or, for a Development located in a Rural Area, 7.5% of all low-income Units at 30% or less of AMI (12 points); or

(C) At least 5% of all low-income Units at 30% or less of AMI (7 points).

(6) Tie-breaker. In the event that two or more Applications receive the same number of points based on the scoring criteria in §13.6, staff will recommend for award the Application that proposes the greatest percentage of 30% AMI MFDL Units within the Development that would convert to households at 15% AMI in the event of a tie as represented in the Tiebreaker Certification submitted at the time of Application.

§13.7. Maximum Funding Requests and Minimum Number of MFDL Units.

(a) Maximum Funding Request. The maximum funding request for an Application will be identified in the NOFA, and may vary by development type, set-aside, or fund source.

(b) Maximum New Construction or Reconstruction Per-Unit Subsidy Limits. While more restrictive per-Unit subsidy caps are allowable and incentivized as point scoring items in §13.6 of this chapter (relating to Scoring Criteria), the per-Unit subsidy limit for a Development will be determined by the Department as the 234 Condo limits with the applicable high cost percentage adjustment in effect at the start date of the NOFA, which are the maximum MFDL eligible cost per-Unit subsidies that an Applicant may use to determine the amount of MFDL funds combined with other federal funds that may subsidize a Unit.

(c) Maximum Rehabilitation Per-Unit Subsidy Limits. The MFDL eligible cost per-Unit to rehabilitate a Development may not exceed the HUD 221(d)(4) statutory limits, subject to high cost factors.

(d) Minimum Number of MFDL Units. The minimum required number of MFDL Units will be determined by the MFDL per-Unit subsidy limits and the cost allocation analysis, which will ensure the amount of MFDL Units as a percentage of total Units is equal to or greater than the percentage of MFDL funds requested as a percentage of total eligible MFDL Development costs.


(a) Loan Structures. Except for awards made under the Soft Repayment Set-Aside, all Multifamily Direct Loans awarded under the annual NOFA will be underwritten as fully repayable (must pay) at an interest rate specified in the NOFA and approved by the Board, and a 30-year amortization with a loan term that matches the term of any superior loans (within six months) at the time of Application. If the Department determines that the Development does not support this structure, the Department may recommend an alternative that makes the Development feasible under all applicable sections of this chapter and 10
TAC §11.302 (relating to Underwriting Rules and Guidelines), or may conclude the Development is infeasible and recommend denial. The interest rate, amortization period, and term for the loan will be fixed by the Board at the time of award, and can only be amended prior to loan closing by the process in 10 TAC §13.12 (relating to Pre-Closing Amendments to Direct Loan Terms).

(b) Closing Memo to Underwriting Report. Any changes to the total development cost, expenses, income, and/or other sources of funds from time of the publication of the initial Underwriting Report at the time of award to the time of loan closing, must be reevaluated by Real Estate Analysis staff, who will typically publish a Closing Memo to the Underwriting Report, and may recommend changes to the principal amount and/or the repayment structure for the Multifamily Direct Loan that will allow the Department to mitigate any increased risk or to ensure that the Development is not oversubsidized. Where the Department determines such risk is not adequately mitigated, the award may be terminated or reconsidered by the Board. Increases in the principal amount or scheduled payment amounts of any superior loans that cause the total Debt Coverage Ratio (DCR) to decrease by more than .05 require approval by the Board. If the changes cause the total DCR to no longer comply with §11.302 of this title (relating to Underwriting Rules and Guidelines), the award may be subject to termination.

(c) Criteria for Construction-to-Permanent Loans. Direct Loans awarded through the Department must adhere to the following criteria as identified in paragraphs (1) - (9) of this subsection if being requested as construction-to-permanent loans, for which the interest rate will be specified in the NOFA and approved by the Board:

(1) The construction term for MFDL loans shall be coterminous with any superior construction loan(s), but no greater than 36 months. In the event the MFDL loan is the only loan with a construction term, the construction term shall be 24 months;

(2) No interest will accrue during the construction term;

(3) The permanent term for MFDL loans at the time of award shall be no less than 10 years and no greater than 40 years and the amortization schedule shall be 30 years. The Department's loan must mature at the same time or within six months of the shortest term of any senior debt so long as neither exceeds 40 years and six months;

(4) Amortized loans shall be structured with a regular monthly payment beginning on the first day of the 25th full month following the actual date of loan closing and continuing for the loan term;

(5) If the first lien mortgage is a federally insured HUD mortgage, the Department may approve a loan structure with annual payments beginning the following year after the end of the construction term payable from surplus cash flow as defined by HUD provided that the DCR, inclusive of the loan, continues to meet the requirements in this title;

(6) If the proposed first lien is a federally insured HUD mortgage that requires the Direct Loan to be subject to 75% of surplus cash flow as defined by HUD, staff will require the debt service coverage ratio on both the HUD insured loan and the Department's loan - as restricted to 75% of Surplus Cash Flow - to continue to meet the minimum 1.15 DCR in accordance with 10 TAC §11.302(d)(4)(D) (relating to Acceptable Debt Coverage Ratio Range), and may require payment of the remaining 25% from other sources;

(7) Loans shall be secured with a deed of trust with a permanent lien position that is superior to any other sources for financing including hard repayment debt that is in an amount less than or equal to the Direct Loan amount and superior to any other sources that have soft repayment structures, non-amortizing balloon notes, have deferred forgivable provisions, or in which the lender has an identity of interest with any member of the Development Team. Parity liens may only be considered with USDA Rural Development;

(8) If the Direct Loan amounts are more than 50% of the Total Housing Development Cost, except for Developments also financed through the USDA §515 program, the Application must include documents identified in either subparagraphs (A) or (B) of this paragraph:

(A) A letter from a Third Party Certified Public Accountant verifying the capacity of the Applicant, Developer, or Development Owner to provide at least 10% of the Total Housing Development Cost as a short term loan for the Development;

(B) Evidence of a line of credit or equivalent tool in the sole determination of the Department equal to at least 10% of the Total Housing Development Cost from a financial institution that is available for use during the proposed Development activities; and

(9) If the Direct Loan is the only source of permanent Department funding for the Development, the Development Owner must provide all items required in subparagraphs (A) and (B) of this paragraph:

(A) Equity in an amount not less than 10% of Total Housing Development Costs; however,

(i) An Applicant for Direct Loan funds may request Board approval to have an equity requirement of less than 10% that would not have to meet the waiver requirements in 10 TAC §11.207 of this title (relating to Waiver of Rules). The request must specify the proposed equity that will be provided and provide support for why that reduced level of equity will be sufficient to provide reasonable assurance that such owner will be able to complete construction and stabilization timely; and

(ii) "Sweat equity" or other forms of equity that cannot be readily accessed will not be allowed to count toward the equity requirement; and

(B) Evidence submitted through the Application Submission Process that shows the Direct Loan amount is not greater than 80% of the Total Housing Development Costs.

(d) Evaluations. All Direct Loan Applicants in which third-party financing entities are part of the sources of funding must include a pro forma and lender approval letter evidencing review of the Development and the Principals as described in 10 TAC §11.9(e)(1) of this title (relating to Competitive HTC Selection Criteria). Where no third-party financing exists, the Department reserves the right to procure a third-party evaluation which will be required to be prepaid by the Applicant.

(e) Criteria for Construction Only Loans. Direct Loans through the Department must adhere to the following criteria as identified in paragraphs (1) - (3) of this subsection if being requested as construction only loans:

(1) The term of the construction loan must be coterminous with any superior construction loan(s), but no greater than 36 months. In the event that the Direct Loan is the only construction loan, the term may not exceed 24 months;

(2) The interest rate will be specified in the NOFA and approved by the Board; and

(3) Up to 50% of the construction loan may be advanced at loan closing should there be sufficient costs to reimburse that amount.
(f) Criteria for Permanent Refinance Loans. If the Department's Loan will repay existing debt, the first payment will be due the month after the month of loan closing, unless the Board approves another date.

(g) Pass-Through Loans. Department funds may not be used as pass-through financing. The Department's Borrower must be the Development Owner.


All Developments financed with Direct Loans will be required to meet at a minimum the applicable requirements in Chapter 11 of this title relating to the Qualified Allocation Plan. In addition, Developments must meet all applicable state and local codes, ordinances, and standards; the 2015 International Existing Building Code (IEBC) or International Building Code (IBC), as applicable. Should IEBC be more restrictive than local codes, or should local codes not exist, then the Development must meet the requirements imposed by IEBC or IBC, as applicable. Developments must also meet the requirements in paragraphs (1) - (5) of this section:

(1) Third-Party Recommendations. Recommendations made in §11.305 of this title (relating to the Environmental Site Assessment) and §11.306 of this title (relating to any Scope of Work and Cost Review) with respect to health and safety issues, life expectancy of major systems (structural support; roofing; cladding and weatherproofing; plumbing; electrical; and heating, ventilation, and air conditioning) must be implemented;

(2) Lead and Asbestos Testing. For properties originally constructed prior to 1978, the Scope of Work and Cost Review and scope of work must be provided to the party conducting the lead-based paint and/or asbestos testing, and the Development Owner must implement the mitigation recommendations of the testing report;

(3) Broadband Infrastructure. The broadband infrastructure requirements described in 24 CFR §92.251(a)(2)(vi) or (b)(1)(x) for HOME, NSP, or TCAP RF; or 24 CFR §93.301(a)(2)(vi) or 24 CFR §93.301(b)(2)(vi) for NHTF, as applicable;

(4) Properties in Catastrophe Areas. Developments located in the designated catastrophe areas specified in 28 TAC §5.4008 (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After September 1, 1998, and before February 1, 2003) must comply with 28 TAC §5.4011 (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After January 1, 2008); and

(5) Minimum Construction Standards. Rehabilitation Developments funded with federal sources may also be required to meet Minimum Rehabilitation Standards, as required by HUD.

§13.10. Development and Unit Requirements.

(a) Proportionality. The bedroom/bathroom/amenities and square footages for Direct Loan Units must be comparable to the bedroom/bathroom/amenities and square footages for the total number of Units in the Development based on the amount of Direct Loan funds requested as a percentage of total MFDL eligible costs. As a result of this requirement, the Department will use the Proration Method as the Cost Allocation Method in accordance with CPD Notice 16-15, except as described in subsection (b) of this section. Additionally, the amount of Direct Loan funds requested cannot exceed the per-unit subsidy limit described in this chapter or the applicable NOFA. Direct Loan Units must be provided as a percentage of each Unit Type, in proportion to the percentage of total costs included in the Direct Loan.

(b) Floating Units. For HOME, NSP, and TCAP RF, Direct Loan Units must float throughout the Development unless the Development also contains public housing Units that will receive Operating Fund or Capital Fund assistance under Section 9 of the 1937 Act as defined in 24 CFR §5.100. For NHTF, Direct Loan Units must float throughout the Development, except as prohibited by 24 CFR §93.203. Floating Direct Loan Units may only float among the Units as described in the Direct Loan Contract and Direct Loan LURA, or as specifically approved in writing by the Department.

(c) Unit Match Requirements.

(1) For a Development funded with NSP and/or NHTF, a required matching contribution will result in at least one HOME Match-Eligible Unit, in addition to the NSP and/or NHTF Units.

(2) For a Development funded with HOME, a required matching contribution may or may not result in a HOME Match-Eligible Unit, beyond the Department's HOME assisted Units.

(3) For a Development funded with TCAP RF in the annual NOFA, a matching contribution in addition to the Match that the Department counts from the TCAP RF investment will result in some amount of TCAP RF assisted Units being considered HOME Match-Eligible Units.

(d) Minimum Affordability Period. The minimum affordability period for all Direct Loan Units awarded under a NOFA will match the greater of the term of the loan, or 30 years unless a lesser period is approved by the Board. The Department reserves the right to extend the Affordability Period for Developments that fail to meet Program requirements.

(e) Restricted Units. If the Department is the only source of permanent funding for the Development by virtue of equity from HTC and MFDL funding, all Units must be income and rent restricted under a combination of HTC and Direct Loan LURAs, regardless of the amount of deferred Developer Fee as a permanent source. If the MFDL funding is the only source of permanent funding for the Development, all Units must be income and rent restricted by the Direct Loan LURA, and all costs must be MFDL eligible, regardless of the amount of deferred Developer Fee as a permanent source.

(f) Income Levels Committed at Time of Application. If the Direct Loan funds are used in a 9% or 4% HTC-Layered Development that is electing Income Averaging to qualify under IRC §42, the Direct Loan Units required by the LURA must continue to be provided at the income levels committed at the time of Application. Unit designations may not change to meet Income Averaging requirements.

§13.11. Post-Award Requirements.

(a) Direct Loan awardees must satisfactorily complete the following Post-Award Requirements after the Board approval date. If a Direct Loan award is declined by the Direct Loan awardee and returned after Board approval, or if the Direct Loan awardee or Affiliates fail to timely enter into the Contract, close the loan, begin and complete construction, or leave a portion of the Direct Loan award unexpended, penalties may apply under 10 TAC §11.9(f) (relating to Competitive HTC Selection Criteria), and/or the Department may prohibit the Applicant and all Affiliates from applying for MFDL funds for a period of two years.

(b) Extensions to the benchmarks in paragraphs (1) through (4) and (7) of this subsection may only be approved by the Executive Director or authorized designee in accordance with 10 TAC §13.12 (relating to Pre-Closing Amendments to Direct Loan Terms) or 10 TAC §13.13 of this chapter (relating to Post-Closing Amendments to Direct Loan Terms), as applicable.
(1) Award Letter and Loan Term Sheet (ALLTS). If provided, Direct Loan awardees must execute and return to the Department an Award Letter and Loan Term Sheet provided by the Department within 15 calendar days after receipt. The ALLTS will be conditional in nature, and provide a basic outline of the terms and conditions approved by the Board.

(2) Environmental Clearance. In order to obtain environmental clearance, Direct Loan awardees must submit a fully completed environmental review (if applicable) including any applicable reports to the Department within 90 calendar days of the Board approval date. If the awardee was contemporaneously awarded 9% HTC and selected Readiness to Proceed points under 10 TAC §11.9(c)(8) (relating to Competitive HTC Selection Criteria), this period is 14 calendar days of the Board approval date. Applicants or Direct Loan awardees that commit any choice limiting activities as defined by HUD in 24 CFR Part 58 prior to obtaining environmental clearance will be subject to termination of the Direct Loan award.

(3) Contract Execution. After a Development receives environmental clearance (if applicable), the Department will draft a Contract to be emailed to the Direct Loan awardee. Direct Loan awardees must execute and return a Contract to the Department within 30 calendar days after receipt of the Contract.

(4) Loan Closing and Construction Commencement. Loan closing must occur and construction must begin on or before the date described in the Contract and ALLTS. If construction has not commenced within 12 months of the Contract Effective Date, the award may be terminated.

(5) Quarterly Construction Status Reports. The Development Owner is required to submit quarterly Construction Status Reports to the Asset Management Division as described and by the deadlines specified in 10 TAC §10.402(h) of this title (relating to Construction Status Report).

(6) Mid-Construction Development Inspection Letter. In addition to any other obligations required as the result of any other Department funding sources, the Development Owner must submit a Mid-Construction Development Inspection Request once the Development has met 25% construction completion as indicated on the G703 Continuation Sheet or HUD equivalent form. Department inspection staff will issue a Mid-Construction Development Inspection Letter that confirms work is being done in accordance with the applicable codes, the construction contract, and construction documents. Regardless of how Direct Loan funds are allocated among acquisition, Hard, and Soft Costs, up to 50% of the Direct Loan award may be released prior to issuance of the Mid-Construction Development Inspection Letter, with the remaining 50% available for distribution in accordance with the percentage of Construction Completion.

(7) Construction Completion. Construction must be completed, as reflected by the Development's certificate(s) of occupancy (if applicable), Certificate of Substantial Completion (AIA Form G704), and issuance of a Closed Final Development Inspection Letter by the Department within the construction term of any superior construction loan(s) or 24 months of the actual loan closing date if no superior construction loan(s) exist, with the repayment period beginning at the same time as the repayment on any superior permanent loan(s) or on the first day of the 25th month following the actual date of loan closing if no superior permanent loan(s) exist, unless extended in accordance with applicable provisions in §13.12 (relating to Pre-Closing Amendments to Direct Loan Terms) or §13.13 of this chapter (relating to Post-Closing Amendments to Direct Loan Terms). The Closed Final Development Inspection Letter issued by the Department will verify committed amenities have been provided and confirm compliance with all applicable accessibility requirements; this letter may include deficiencies that require resolution. The Final Development Inspection may be conducted concurrently with a Uniform Physical Condition Standards (UPCS) inspection. However, any letters associated with a UPCS inspection will not satisfy the Closed Final Development Inspection Letter required by this subsection.

(8) Initial Occupancy. Initial occupancy of all MFDL assisted Units by eligible households shall occur within six months of the final Direct Loan draw. Requests to extend the initial occupancy period must be accompanied by documentation of marketing efforts and a marketing plan. The marketing plan may be submitted to HUD for final approval, if required by the MFDL fund source.

(9) Per Unit Repayment. Repayment will be required on a per Unit basis for Units that have not been rented to eligible households within 18 months of the final Direct Loan draw.

(10) Termination and Repayment for Failure to Complete. Termination of the Direct Loan award and repayment of all disbursed funds will be required for any Development that is not completed within four years of the effective date of a Direct Loan Contract.

(11) Loan Closing. In preparation for closing any Direct Loan, the Development Owner must submit the items described in subparagraphs (A) - (F) of this paragraph. Providing incomplete documents, or not responding timely to subsequent Department requests for materials needed to facilitate closing, may significantly inhibit the Department's ability to meet closing timelines.

(A) Documentation of the prior closing or concurrent closing with all sources of funds necessary for the long-term financial feasibility of the Development.

(B) Due diligence items determined by the Department to be prudent and necessary to meet the Department's rules and to secure the interests of the Department, as requested by Staff.

(C) When Department funds have a first lien position during the construction period, assurance of completion of the Development in the form of payment and performance bonds in the full amount of the construction contract or equivalent guarantee in the sole determination of the Department is required. Development Owners utilizing the USDA §515 program are exempt from this requirement but must meet the alternative requirements set forth by USDA.

(D) Documentation required for preparation of closing loan documents includes, but is not limited to:

(i) Substantially final information necessary for REA staff to reevaluate the transaction prior to loan closing, including but not limited to a final development cost schedule, sources and uses, operating pro forma, annual operating expenses, rent schedule, updated written financial commitments or term sheets, and any additional financing exhibits that have changed since the time of Application.

(ii) Draft Owner/General Contractor agreement and draft Owner/Architect agreement prior to closing with final executed copies required by the day of closing;

(iii) Survey of the Property that includes a certification to the Department, Development Owner, Title Company, and other lenders;

(iv) Plans and specifications for review by the Department's inspection staff. Inspection staff will issue a plan review letter that is intended to assist in identifying early concerns associated with the Department's final construction requirements; and

(v) If layered with Housing Tax Credits, a fully executed limited partnership agreement between the General Partner and
the tax credit investor entity (may be provided concurrent with closing).

(E) If required by the fund source, prior to Contract Execution unless an earlier period is described in Title 10, Chapter 10 (relating to Uniform Multifamily Rules), Chapter 11 (relating to Qualified Allocation Plan), or Chapter 12 (relating to Multifamily Housing Revenue Bond Rules), the Development Owner must provide verification of:

(i) Environmental clearance from the Department or HUD, as applicable;

(ii) Site and Neighborhood clearance from the Department;

(iii) Documentation necessary to show compliance with the Uniform Relocation Assistance and Property Act and any other relocation requirements that may apply; and

(iv) Any other documentation that is necessary or prudent to meet program requirements or state or federal law in the sole determination of the Department.

(F) The Direct Loan Contract as executed, which will be drafted by the Department's counsel or its designee for the Department. No changes proposed by the Developer or Developer's counsel will be accepted unless approved by the Department's Legal Division or its designee.

(12) Loan Documents. The Development Owner is required to execute all loan closing documents required by and in the form and substance acceptable to the Department's Legal Division.

(A) Loan closing documents include but are not limited to a promissory note, deed of trust, construction loan agreement (if the proceeds of the loan are to be used for construction), LURA, Architect and/or licensed engineer certification of understanding to complete environmental mitigation if such mitigation is identified in HUD's environmental clearance or the Real Estate Analysis Division (REA) Underwriting Report and assignment and security instruments whereby the Developer, the Development Owner, and/or any Affiliates (if applicable) grants the Department their respective right, title, and interest in and to other collateral, including without limitation the Owner/Architect agreement and the Owner/General Contractor agreement, to secure the payment and performance of the Development Owner's obligations under the loan documents.

(B) Loan terms and conditions may vary based on the type of Development, Real Estate Analysis Underwriting Report, and the Set-Aside under which the award was made.

(13) Disbursement of Funds. The Borrower must comply with the requirements in subparagraphs (A) - (K) of this paragraph in order to receive a disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Borrower's compliance with these requirements is required with a request for disbursement:

(A) All requests for disbursement must be submitted through the Department's Housing Contract System, using the MFDL draw workbook or such other format as the Department may require;

(B) Documentation of the total construction costs incurred and costs incurred since the last disbursement of funds must be submitted. Such documentation must be signed by the General Contractor and certified by the Development architect and is generally in the form of an AIA Form G702/ G703 or HUD equivalent form;

(C) Disbursement requests must include a down-date endorsement to the Direct Loan (mortgagee) title policy or Nothing Further Certificate that includes a title search through the date of the Architect's signature on AIA form G702 or HUD equivalent form. For release of retainage the down-date endorsement to the Direct Loan title policy or Nothing Further Certificate must be dated at least 30 calendar days after the date of the completion as certified on the Certificate of Substantial Completion (AIA Form G704) with $0 as the work remaining to be completed. If AIA Form G704 or HUD equivalent form indicates an amount of work remaining to be completed, the Architect must provide confirmation that all work has been completed. Disbursement requests for acquisition and closing costs are exempt from this requirement;

(D) At least 50% of Direct Loan funds will be withheld from the initial disbursement of loan funds to allow for periodic disbursements;

(E) The initial draw request for the Development must be entered into the Department's Housing Contract System no later than 15 calendar days prior to the one year anniversary of the effective date of the Direct Loan Contract;

(F) Up to 75% of Direct Loan funds may be drawn before providing evidence of Match. Thereafter, the Borrower must provide evidence of Match being credited to the Development prior to release of the final 25% of funds;

(G) Developer Fee disbursement shall be limited by subparagraph (H) of this paragraph and is further conditioned upon clauses (i) - (iii), as applicable:

(i) For Developments in which the loan is secured by a first lien deed of trust against the Property, 75% shall be disbursed in accordance with percent of construction completed. 75% of the total allowable fee will be multiplied by the percent completion, as documented by the construction contract and as may be verified by an inspection by the Department. The remaining 25% shall be disbursed at the time of release of retainage; or

(ii) For Developments in which the loan is not secured by a first lien deed of trust or the Development is also utilizing Housing Tax Credits, Developer Fees will not be reimbursed by the Department, except as follows. If all other lenders and syndicator in a Housing Tax Credit Development (if applicable) provide written confirmation that they do not have an existing or planned agreement to govern the disbursement of Developer Fees and expect that Department funds shall be used to fund Developer Fees, they shall be reimbursed in the same manner as described in subparagraph (A) of this paragraph; and

(iii) The Department may reasonably withhold any disbursement in accordance with the Loan Documents and if it is determined that the Development is not progressing as reasonably necessary to meet the benchmarks for the timely completion of construction of the Development as set forth in the loan documents, or that cost overruns have put the Development Owner's ability to repay its Direct Loan or complete the construction at risk in accordance with the terms of the loan documents and within budget. If disbursement has been withheld under this subsection, the Development Owner must provide evidence to the satisfaction of the Department that the Development will be timely completed and occupied in order to continue receiving funds. If disbursement is withheld for any reason, disbursement of any remaining Developer Fee will be made only after construction of the Development has been completed, and all requirements for expenditure and occupancy have been met; and

(H) Expenditures must be allowable and reasonable in accordance with federal and state rules and regulations. The Department shall review each expenditure requested for reasonableness. The Department may request the Development Owner make modifications
to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of Department funds to Development Owner as may be necessary or advisable for compliance with all program requirements;

(I) Table Funding may be permitted at the time of closing, for disbursement of funds related to eligible acquisition costs and eligible softs costs incurred, and in an amount not to exceed 50% of the total funds. Table Funding must be requested in writing and will not be considered unless the Direct Loan Contract has been executed, and all necessary documentation has been submitted to and accepted by the Department at least 10 calendar days prior to the anticipated closing date;

(J) Following 50% construction completion, any funds will be released in accordance with the percentage of construction completion as documented on AIA Form G702/703 or HUD equivalent form. 10% of requested Hard Costs will be retained and will not be released until the final draw request. If the Development is receiving funds from more than one MFRL source, the retainage requirement will apply to each fund source individually. All of the items described in clauses (i) - (xii) of this subparagraph are required in order to approve the final draw request:

(i) Fully executed Certificate of Substantial Completion (AIA Form G704) with $0 as the cost estimate of work that is incomplete. If AIA Form G704 indicates an amount of work remaining to be completed, the Architect must provide confirmation that all work has been completed;

(ii) A down date endorsement to the Direct Loan title or Nothing Further Certificate dated at least 30 calendar days after the date of completion as certified on the Certificate of Substantial Completion (AIA Form G704);

(iii) For Developments not layered with Housing Tax Credits, a Closed Final Development Inspection Letter from the Department;

(iv) For Developments subject to the Davis-Bacon Act, evidence from the Department's Senior Labor Standards Specialist that the final wage compliance report was received and approved or confirmation that HUD maintains Davis-Bacon oversight as a result of a HUD-insured first lien loan;

(v) Certificate(s) of Occupancy (if New Construction);

(vi) Development completion reports, which includes, but is not limited to, documentation of full compliance with the Uniform Relocation Act/104(d), Match Documentation requirements, and Section 3 of the Housing and Urban Development Act of 1968, as applicable to the Development, and any other applicable requirement; and

(vii) If applicable to the Development, certification from Architect or a licensed engineer that all HUD environmental mitigation conditions have been met; and

(K) The final draw request must be submitted within 24 months from loan closing unless Development Period has been extended in accordance with 10 TAC §13.12 (relating to Pre-Closing Amendments to Direct Loan Terms) or 10 TAC §13.13 of this chapter (relating to Post-Closing Amendments to Direct Loan Terms), as applicable;


(A) Annual Audits under 24 CFR §93.406(b). Unless otherwise directed by the Department, the Development Owner shall arrange for the performance of an annual financial and compliance audit of funds received and performances rendered under the Direct Loan Contract, subject to the conditions and limitations set forth in the executed Direct Loan Contract. All approved audit reports will be available for public inspection within 30 days after completion of the audit.

(B) Cost Certifications under 24 CFR §93.406(b).

(i) Non-HTC-Layered Developments. Within 180 calendar days of the later of all title transfer requirements and construction work having been performed, as reflected by the Development's Certificate(s) of Occupancy (if New Construction) or Certificate of Substantial Completion (AIA Form G704 or HUD equivalent form), or when all modifications required as a result of the Department's Final Construction Inspection are cleared as evidenced by receipt of the Closed Final Development Inspection Letter, the Development Owner will submit to the Department a cost certification done by an independent licensed certified public accountant of all Development costs (including project NHTF eligible costs), subject to the conditions and limitations set forth in the executed Direct Loan Contract.

(ii) HTC-Layered Developments. With the Cost Certification required by the Low Income Housing Tax Credit Program, the Development Owner must submit to the Department a cost certification completed by an independent licensed certified public accountant of all Development costs (including NHTF project eligible costs), subject to the conditions and limitations set forth in the executed Direct Loan Contract.

§13.12. Pre-Closing Amendments to Direct Loan Terms.

(a) Executive Approval Required Pre-Closing. The Executive Director or authorized designee may approve amendments to loan terms prior to closing as described in paragraphs (1) - (6) of this subsection.

(1) Extensions of up to six months to the loan closing date required in 10 TAC §13.11(e) of this chapter (relating to Post-Award Requirements) may be approved prior to closing. An Applicant must submit sufficient evidence documenting good cause, including but not limited to, documented delays caused by circumstances outside the control of the applicant or constraints in arranging a multiple fund source closing. An extension will not be available if an Applicant has:

(A) Failed to timely begin or complete a process required to close; including, but not limited to:

(i) The process of finalizing all equity and debt financing;

(ii) The environmental clearance process;

(iii) The due diligence processing requirements; or

(B) Made changes to the Development that require significant additional underwriting by the Department without at least 45 days to complete the review.

(2) Changes to the loan maturity date to accommodate the requirements of other lenders or to maintain parity of term may be approved prior to closing.

(3) Extensions of up to 12 months to the Construction Completion date or date of receipt of a Closed Final Development Inspection Letter required in 10 TAC §13.11(g) of this chapter (relating to Post-Award Requirements) may be requested but generally are not approved prior to initial loan closing. Extensions under this paragraph
are determined based on documentation that the extension is necessary to complete construction and that there is good cause for the extension.

(4) Changes to the loan amortization or interest rate that cause the annual repayment amount to decrease less than 20%, or any changes to the amortization or interest rate that increase the annual repayment amount up to 20%, may be approved prior to closing.

(5) Decreases in the Direct Loan amount, provided the decrease does not jeopardize the financial viability of the Development may be approved prior to closing, though the Development Owner may be subject to penalties as further described in 10 TAC §13.11 of this chapter (relating to Post-Award Requirements). Increases will not be approved unless the Applicant competes for the additional funding under an open NOFA.

(6) Changes to other loan terms or requirements that would not require a Waiver, as necessary to facilitate the loan closing without exposing the Department to undue financial risk.

(b) Board Approval Required Pre-Closing. Board approval is necessary for any other changes prior to closing.

§13.13. Post-Closing Amendments to Direct Loan Terms.

(a) Good Cause Extensions. The Executive Director or authorized designee may approve extensions of up to 12 months under 10 TAC §13.11(g) or (m)(11) of this chapter (relating to Post-Award Requirements) based on documentation that there is good cause for the extension.

(b) Amendments to MFDL Awards. Except in cases of Force Majeure, changes to terms of awards subject to mandatory HUD reporting requirements will only be processed after the Construction Completion is reported to the federal oversight entity as completed, and the last of the MFDL funds have been drawn.

(c) Executive Amendments. The Executive Director or authorized designee may approve amendments to loan terms post-closing as described in paragraphs (1) - (3) of this subsection. Board approval is necessary for any other changes post-closing.

(1) Changes in Terms. Changes to the amortization or maturity date to accommodate the requirements of other lenders or maintain parity of term may be approved post-closing, provided the changes result in the Direct Loan continuing to meet the requirements of §13.8(c)(1) and (3) of this chapter (relating to Loan Structure and Underwriting Requirements), and NOFA requirements.

(2) Post-Closing Subordinations or Re-subordinations of MFDL Liens. Re-subordination of the Direct Loan in conjunction with refinancing may be approved post-closing, provided the conditions in subparagraphs (A) - (E) of this paragraph are met:

(A) The Borrower is current with loan payments to the Department, and no notice has been given of any Event of Default on any MFDL loan. Histories of late or non-payment on any other MFDL loan may result in denial of the request;

(B) The refinancing does not propose payment to any of the Development Owner or Developer parties (including the Limited Partners);

(C) A proposal for partial repayment of the MFDL lien is made with the request; and

(D) The new superior lien is in an amount that is equal to or less than the original senior lien and does not negatively affect the financial feasibility of the Development.

(i) For purposes of this section, a negative effect on the financial feasibility of the Development shall mean a reduction in

(ii) Changes to accommodate refinancing with a new superior lien that is in an amount that exceeds the original senior lien and which will be directly applied to property improvements, as evidenced by the loan or security agreements (exclusive of fees associated with the refinance and any required reserves), will be considered on a case by case basis.

(E) The subordination or re-subordination request does not include a request to subordinate or re-subordinate any MFDL LURA, with the exception of partial subordination or re-subordination of receivership rights (subject to the prosed receiver entity or Affiliate not having been Debarred by the Department or on the Federal Suspended or Debarred Listing).

(3) Workout Arrangements. Changes required to the Department's loan terms or amounts that are part of an approved Asset Management Division work out arrangement may be approved after Construction Completion.

(d) Contract Assignments and Assumptions of MFDL Liens. The Executive Director or authorized designee may approve the Contract Assignment and Assumption of MFDL Liens following approval of an Ownership Transfer request if the conditions in paragraphs (1) - (3) of this subsection are met:

(1) The assignment or assumption is not prohibited by the Contract, Loan Documents, or regulations;

(2) The assignment or assumption request is based on either subparagraph (A) or (B) of this paragraph:

(A) There are insufficient funds available in the transaction to fully repay the Direct Loan at the time of acquisition, for which Deferred Developer Fee, Development Owner or Affiliate Contributions, or other similar liabilities will not be considered in determining whether the Direct Loan could be repaid at the time of acquisition; or

(B) The new superior lien will be directly applied to property improvements as evidenced by the loan or security agreements, exclusive of fees association with the new financing and any required reserves; and

(3) The corresponding Ownership Transfer has been approved in accordance with all requirements in §10.406 of this title (relating to Ownership Transfers), and no prospective Owner (including entity, person, Board Member, as those terms are defined in 2 CFR Part 180, including Limited Partners) have been subject to state Debarment or are on the Federal Suspended or Debarred Listing.

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 14, 2019.

TRD-201903716
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 475-1676

PROPOSED RULES  October 25, 2019  44 TexReg 6125
CHAPTER 90. MIGRANT LABOR HOUSING FACILITIES

10 TAC §§90.1 - 90.8

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 90, Migrant Labor Housing Facilities, §§90.1 - 90.8. The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

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

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV’T CODE §2001.0221.

Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed rule does not create or eliminate a government program, but relates to the repeal, and simultaneous proposed new rule making changes to an existing activity governing licensing of Migrant Labor Housing Facilities.

2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor does the repeal reduce work load such that any existing employee positions could be eliminated.

3. The proposed repeal does not require additional future legislative appropriations.

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

5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The proposed action will repeal an existing regulation but is associated with the simultaneous proposed new rule making changes to an existing activity, the licensing of Migrant Labor Housing Facilities.

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

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

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV’T CODE §2006.002.

The Department has evaluated this rule and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities, as the repealed rule will be replaced with a similar rule.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV’T CODE §2007.043. The proposed rule does not contemplate nor authorize a taking by the Department; therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV’T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect on local employment, as the repealed rule will be replaced with a similar rule; therefore no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the repeal of this rule is in effect, the public benefit anticipated as a result of the repealed section will be unaffected as the repealed rule will be replaced with a similar rule. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments, as the repealed rule will be replaced with a similar rule.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019, to November 25, 2019, to receive input on the repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Tom Gouris, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email tom.gouris@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, NOVEMBER 25, 2019.

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§90.1. Definitions.
§90.2. Facilities.
§90.3. Licensing.
§90.4. Records.
§90.5. Complaints.
§90.6. Administrative Penalties and Sanctions.
§90.7. Dispute Resolution, Appeals, and Hearings.
§90.8. Forms.

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 11, 2019.

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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-1470

10 TAC §§90.1 - 90.8

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 90, Migrant Labor
Housing Facilities, §§90.1 - 90.9. In accordance with Tex. Gov’t Code Chapter 2306, Subchapter LL, a person may not establish, maintain, or operate a Migrant Labor Housing Facility without obtaining a License from the Department, and Subchapter LL further outlines requirements relating to the application, inspection, fees, and suspension of Licenses. The purpose of the proposed new chapter is to provide compliance with Tex. Gov’t Code Chapter 2306, Subchapter LL and update the rule to add the purpose of the rule, remove definitions redundant with statute, add a definition for the term “Provider” and previously undefined term "License,” add a section addressing Applicable Standards, significantly reduce and streamline the section that had provided Facility standards, revise the fee structure for a reduced application fee in certain circumstances to prevent Providers being discouraged from pursuing a License because of possible cost, revise the inspection timeline to ensure timeliness and reduce the likelihood of a timing conflict, update the process for handling complaints, update the applicable forms, and improve readability and clarity.

Tex. Gov’t Code §2001.0045(b) does not apply to the proposal for action because it is exempt under both §2001.0045(c)(6) which exempts rule changes necessary to protect the health, safety, and welfare of the residents of this state, and §2001.0045(c)(9), which exempts rule changes necessary to implement legislation. Compliance with the proposed rules are intended to ensure adherence to reasonable standards to benefit the health, safety, and welfare of those migrant laborers housed in the Facilities required to be licensed. Tex. Gov’t Code Chapter 2306, Subchapter LL, provides for the implementation of this activity.

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

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV’T CODE §2001.0221.

Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed rulemaking would be in effect:

1. The proposed rules do not create or eliminate a government program, but relates to the readoption of this rule, which makes changes to an existing activity, the licensing and oversight of certain Migrant Labor Housing Facilities.

2. The proposed rules do not require a change in work that would require the creation of new employee positions. While some additional work by the Department will be required associated with the acceptance of additional license applications and fees, added inspections, and follow-up of compliance with possible inspections findings, the Department anticipates handling this additional work with existing staff resources. The rule changes do not reduce work load such that any existing employee positions could be eliminated.

3. The proposed rules do not require additional future legislative appropriations.

4. In accordance with Tex. Gov’t Code §2306.929, the Department is authorized to set the license fee in an amount not to exceed $250. Since 2006, this rule has already had the fee set at $250, and the Department is not suggesting changing this basic fee though it is proposing a lower fee for certain recently inspected Facilities. The Department does anticipate an increase in the possible fees received, as there is a more targeted initiative to encourage those Providers that are currently not licensed to apply for licensure, which would increase fee receipts. As an offset to this potential increase and to the extent that the Department can utilize the inspections conducted by other state agencies and thereby limit the cost by eliminating the duplication of work, the Department is proposing to reduce the fee for new Licensees where they already have a satisfactory inspection by another state agency.

5. The proposed rules are not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The proposed rules will not limit or repeal an existing regulation, but can be considered to “expand” the existing regulations on this activity because the proposed rule clarifies the scope of facilities, standards, and individuals subject to the rule. Many Providers of such housing may have been unaware of the need to obtain a License from the Department, and were unaware of the possibility that housing that met the standards of the Department of Labor might not also meet the Texas licensing standards. This addition to the rule is necessary to clarify the statutory scope of Providers that must be licensed and ensure compliance with Tex. Gov’t Code, Chapter 2306, Subchapter LL.

7. The proposed rules do increase the number of individuals subject to the rule’s applicability as described in item 6 above.

8. The proposed rules may be considered to have a negative effect on the state’s economy because of the potential expense for employers to bring their Migrant Labor Housing Facility into compliance with the requirements of the rule and statutorily-required licensure. Alternatively, the rule could also impact an employer’s ability to procure the labor needed, which may affect the overall productivity of their industry and contribution to the state economy. This is an unavoidable consequence of the statute. The Department is not able to quantify or determine at this time the extent of Providers that are not currently licensed and the extent to which their Facilities are not up to licensure standard.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV’T CODE §2006.002. The Department has evaluated this rule and determined that:

1. TDHCA has, in drafting this proposal attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov’t Code, ch. 2306, subchapter LL.

2. None of the adverse effect strategies outlined in this subsection are applicable.

3. Based on raw data regarding H2-A visas that required housing inspections, there could be between 200 and 400 small or micro-businesses initially subject to the proposed rules, not already licensed and compliant. The latest United States Department of Agriculture Census of Agriculture reports Texas as having 1,610 farms with migrant workers and the same Census shows that approximately 29% of all Texas farms with hired workers have three or more workers, which results in a potential impact on 467 small businesses in total. The Department has determined that there may be adverse economic effects on small or micro-businesses for those Providers of migrant labor housing that are not currently providing housing to their laborers that will meet the proposed standard, but these economic effects are an unavoidable consequence of the statute. A minimal fee of $250 is in the existing rule and this is not being increased so does not present
a new cost, other than for those not previously licensed. The proposed rules do include a $175 reduction in the cost of a License for applicants who have recently been inspected by and provide a copy of a satisfactory housing inspection by another State or Federal agency. The economic impact of the rule beyond the fee can vary significantly per Provider depending on the extent to which their Facilities are not up to standard. Because the amount of work and materials needed to bring a Facility up to standard can vary dramatically from a Facility only needing to make a few minor repairs, to a possibly significant renovation of Facilities, an estimate is not able to be calculated. Moreover, though employers of workers on H2-A visas are required to provide housing to their workers, the Department cannot estimate the economic impact of the proposed rules if agricultural employers who currently provide housing to migrant laborers decide to cease providing housing rather than comply with the licensure standards.

The rule is not directly applicable to rural communities, other than through the business entities that primarily reside in those communities. However, for the reasons stated above, the economic consequences of the proposed changes are limited and unpredictable, thus no economic impact of the rule is projected for rural communities.

(3-a) The proposed rules identify the applicable federal standard for housing of farm workers, where applicable, and an additional 11 requirements, which have already been part of the rule, but exceed one or both of the federal standards. Further, though federal requirements exempt places of public accommodation (such as hotels) from inspection, the proposed rules account for the statutory requirements regarding licensure of Facilities, by placing the onus on an agricultural employer (who contracts for Facilities used by migrant workers) to obtain a License and facilitate an inspection of such a Facility - which would include rental accommodations such as a hotel.

The purpose of Tex. Gov’t Code, Ch. 2306, subchapter LL, is clearly grounded in protection of the health, safety, and welfare of migrant farm workers. Tex. Gov’t Code §2306.925 provides the Department with regulatory flexibility to define "the reasonable minimum standards of construction, sanitation, equipment, and operation" in order for a Migrant Labor Housing Facility to receive a License. These minimum federal standards are set out in 29 CFR §§500.130 and 500.132-500.135, (the Employment and Training Administration (ETA) and Occupational Safety and Health Administrations (OSHA) housing standards also referred to as the "ETA and OSHA Housing Standards"), and the proposed rules eliminate the exception for inspecting public accommodations provided in 29 CFR §500.131, and adds 11 additional standards - all grounded in enhanced health and safety. Whether, in accordance with the requirements of this analysis, the proposed rules use "regulatory methods that will accomplish the objectives of the applicable rules while minimizing adverse impacts on small business" is a matter of perspective. Any additional regulations that increase health and safety standards accomplish the objectives of the statute; but each comes at a cost above the "minimum" required by federal regulation.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV’T CODE §2007.043. The proposed rules do not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV’T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rules may have a negative effect on a local economy and its employment if the local Providers in that community conclude that to bring their Facilities into compliance would be cost prohibitive, impact their hiring decisions, and/or impact their ability to procure the labor needed. These issues could possibly effect the overall productivity of their business and impact on local employment. Depending on the extent of how many Providers are in a given local economy and the extent to which that Providers’ Facilities would not meet standards, this might be a concern; however, the Department is not able to quantify or determine that at this time for any given community.

Tex. Gov’t Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic area affected by the rule . . . ." Considering that the licensing standards in the new rule have largely been in effect for several years, there are no "probable" effects of the new rules on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be increased assurance of the health, safety, and welfare of migrant labor workers provided housing by their employers. The possible economic costs to any individuals required to comply with the new section will be the $75 to $250 fee for those Providers not already licensed, the up to $200 per day fee for non-compliance and the cost of improvements needed to bring a Facility into compliance.

f. FISCAL NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new sections are in effect, enforcing or administering the new section does have some foreseeable implications related to costs or revenues of the state or local government: The minimal revenue to the state of $75 to $250 per application and up to $200 per day for non-compliance will be used to offset additional expenses associated with inspection travel for each application. The other costs to administer the increased activity are being absorbed within current resources by the Department. There are no foreseeable implications related to cost or revenues of local governments from enforcing or administering the proposed rules.

REQUEST FOR PUBLIC COMMENT. The public comment period will begin October 25, 2019, to November 25, 2019, to receive input on the new Chapter. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Tom Gouris, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0220, or email tom.gouris@dhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, NOVEMBER 25, 2019.

STATUTORY AUTHORITY. The proposal is pursuant to Tex. Gov’t Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§90.1. Purpose.
The purpose of Chapter 90 is to establish rules governing Migrant Labor Housing Facilities that are subject to being licensed under Tex. Gov’t Code Chapter 2306, Subchapter LL (§§2306.921-2306.933). It
is recognized that alignment of state requirements with the federal standards for migrant farmworker housing that must be inspected in order to participate in other state and federal programs, such as with the U.
S. Department of Labor's H2-A visa program, and allows for cooperative efforts between the Department and other state and federal entities to share information. This will reduce redundancies and improve the effectiveness of the required licensing.

§90.2 Definitions.
The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Additionally, any words and terms not defined in this section but defined or given specific meaning in Tex. Gov't Code Chapter §§2306.921-2306.933, are capitalized. Other terms in 29 CFR §§500.130-500.135, 20 CFR §§654.404 et seq., and 29 CFR §1910.142 or used in those sections and defined elsewhere in state or federal law or regulation, when used in this chapter, shall have the meanings defined therein, unless the context herein clearly indicates otherwise.

(1) Act--the state law that governs the operation and licensure of Migrant Labor Housing Facilities in the state of Texas, found at Tex. Gov't Code, §§2306.921 - 2306.933.
(2) Board--The governing board of the Texas Department of Housing and Community Affairs.
(3) Business Day--any day that is not a Saturday, Sunday, or a holiday observed by the State of Texas.
(4) Business hours--8 a.m. to 5 p.m., local time.
(5) Department--The Texas Department of Housing and Community Affairs.
(6) Director--The Executive Director of the Department.
(7) Family--a group of people, whether legally related or not, that act as and hold themselves out to be a Family; provided, however, that nothing herein shall be construed as creating or sanctioning any unlawful relationship or arrangement such as the custody of an unemancipated minor by a person other than their legal guardian.
(8) License--the document issued to a Licensee in accordance with the Act.
(9) Licensee--any Person that holds a valid License issued in accordance with the Act.
(10) Occupant--any person, including a Worker, who uses a Migrant Labor Housing Facility for housing purposes.
(11) Provider--any Person who provides for the use of a Migrant Labor Housing Facility by Migrant Agricultural Workers, whether the Facility is owned by the Provider, or is contractually obtained for (or otherwise arranged by) the Provider. The Provider is the operator under Tex. Gov't Code §2306.928.
(12) Worker--A Migrant Agricultural Worker, being an individual who is:
(A) Working or available for work seasonally or temporarily in primarily an agricultural or agriculturally related industry, and
(B) Moves one or more times from one place to another to perform seasonal or temporary employment or to be available for seasonal or temporary employment.

§90.3 Applicability.
(a) All Migrant Labor Housing Facilities in the state of Texas, which may include hotels and other public accommodations if owned by or contracted for by employers in the agricultural or agriculturally related industry to house Workers, must be inspected and comply with the requirements in this chapter and 29 CFR §§500.130, 500.132 - 500.135, without the exception provided in 29 CFR §500.131.
(b) Where agricultural employers own, lease, rent, or otherwise contract for Facilities "used" by individuals or Families that meet the criteria described in the Act, the employer as Provider of said housing, "establishes" and becomes the "operator" of a Migrant Labor Housing Facility, and is the responsible entity for obtaining and "maintaining" the License on such Facility, as those terms are used in Tex. Gov't Code §2306.921 - .922.
(c) An applicant for a License must facilitate an inspection by the Department with the owner of the property(s) at which the Migrant Labor Housing Facility is located.
(d) Owners or operators of homeless shelters, public campgrounds, youth hostels, hotels and other public or private accommodations that do not contract for services with agricultural employers or other Providers to house Workers are not required to be licensed. Further, because a "Facility" under Tex. Gov't Code §2306.921(1) requires both elements of one or more structures, trailers, or vehicles, as well as the land appurtenant, no License would be required by a Worker or his/her Family using his/her own structure, trailer, or vehicle, but temporarily residing on the land of another.
(e) A Facility may include multiple buildings on scattered or noncontiguous sites, as long as the scattered sites are in a reasonable distance from each other, and the work location and the buildings are operated as one Facility by the Provider.

§90.4 Standards and Inspections.
(a) Facilities must follow the appropriate housing standard as defined in 29 CFR §500.132, (the Employment and Training Administration (ETA) and Occupational Safety and Health Administrations (OSHA) housing standards also referred to as the "ETA and OSHA Housing Standards"). The inspection checklists setting forth those standards are available on the Department's website at https://www.tdhca.state.tx.us/migrant-housing/index.htm.
(b) Inspections of the Facilities of applicants for a License and Licensees may be conducted by the Department under the authority of Tex. Gov't Code §2306.928 upon reasonable notice and using the appropriate inspection forms noted in subsection (a) of this section. Inspections may be conducted by other State or Federal agencies, on behalf of the Department, on forms promulgated by those agencies.
(c) In addition to the standards noted in subsection (a) of this section, all Facilities must comply with the following additional state standards:
(1) Facilities shall be constructed in a manner to insure the protection of Occupants against the elements. Facilities shall be maintained in good repair and in a sanitary condition. All doors to the exterior shall have working locks and all windows shall have working interior latches. Each unit shall have a working smoke detector. Fire extinguishing equipment shall be provided in an accessible place located within 100 feet from each Facility. Such equipment shall provide protection equal to a 2 1/2 gallon stored pressure of five gallon pump type water extinguisher.
(2) Combined cooking, eating, and sleeping arrangements must have at least 100 SF per person (aged 18 months and older); the portion of the Facility for sleeping areas must include at least 50 SF per person.
(3) Facilities for Families with children must have a separate room or partitioned area for adult Family members.
(4) In dormitory-type facilities, separate sleeping accommodations shall be provided for each sex. In Family housing units, separate sleeping accommodations shall be provided for each Family unit.

(5) Facilities previously used to mix, load, or store pesticides and toxic chemicals may not be used for cooking, dishwashing, eating, sleeping, housing purposes, or other similar purposes.

(6) In a central mess or multifamily feeding operation, the kitchen and mess hall shall be constructed in accordance with any applicable local or state rules on food services sanitation.

(7) Beds, bunks, or cots shall have a clear space of at least 12 inches from the floor. Triple-deck bunks shall be prohibited. Single beds shall be spaced not closer than 36 inches laterally or end to end. Bunk beds shall be spaced not less than 48 inches laterally or 36 inches end to end. There shall be a clear ceiling height above a mattress of not less than 36 inches. The clear space above the lower mattress of the bunk beds and the bottom of the upper bunk shall not be less than 27 inches.

(8) Communal bathrooms shall have a minimum of one showerhead per 10 persons and one lavatory sink per six persons. Showerheads shall be spaced at least three feet apart to insure a minimum of nine square feet of showering space per showerhead.

(9) In all communal bathrooms separate shower stalls shall be provided.

(10) Mechanical clothes washers shall be provided in a ratio of one per 50 persons. In addition to mechanical clothes washers, one laundry tray per 100 persons shall be provided. In lieu of mechanical clothes washers, one laundry tray or tub per 25 persons may be provided.

(11) All Facility sites shall be provided with electricity. The electrical systems shall conform to all applicable codes and shall be sufficient to provide the electricity with sufficient amperage to operate all required and available features, including but not limited to lighting, stoves, hot water heaters, heating systems, portable heaters, refrigeration, and such other devices as may be connected to wall type convenience outlets.

§90.5. Licensing.

(a) Tex. Gov’t Code, §2306.922 requires the licensing of Migrant Labor Housing Facilities.

(b) Any Person who wants to apply for a License to operate a Facility may obtain the application form from the Department. The required form is available on the Department’s website at https://www.tdhca.state.tx.us/migrant-housing/index.htm.

(c) An application must be submitted to the Department prior to the intended operation of the Facility, but no more than 60 days prior to said operation.

(d) The fee for a License is $250 per year, except in such cases where the Facility was previously inspected and approved to be utilized for housing under a State or Federal migrant labor housing program, and that such inspection conducted by a State or Federal agency is provided to the Department. Where a copy of such inspection conducted by a State or Federal agency is less than 90 days old, has no material deficiencies or exceptions, and is provided to the Department prior to the Department’s scheduled inspection, the application fee shall be reduced to $75. However, if an inspection or re-inspection by the Department is required at the sole determination by the Department, the full application fee will apply. The License is valid for one year from the date of issuance unless sooner revoked or suspended.

(e) Fees shall be tendered by check, money order, or via an online payment system (if provided by the Department), payable to the Texas Department of Housing and Community Affairs. If any check or other instrument given in payment of a licensing fee is returned for any reason, any License that has been issued in reliance upon such payment being made is null and void.

(f) A fee, when received in connection with an application is earned and is not subject to refund.

(g) Upon receipt of a complete application and fee, the Department shall review the existing inspection conducted by a State or Federal agency, if applicable and/or schedule an inspection of the Facility by an authorized representative of the Department. Inspections shall be conducted during Business Hours on weekdays that the Department is open, and shall cover all units that are subject to being occupied. Inspections by other State or Federal agencies in accordance with the requirements in 29 CFR §§500.130 - 500.135 may be accepted by the Department for purposes of this License, only if notice is given to the Department prior to the inspection in order for the Department to consider the inspection as being conducted by an authorized representative of the Department in accordance with §2306.928. In addition, a certification of the additional state standards described in 10 TAC §90.4(c) must be provided by the applicant, along with any supplemental documentation requested by the Department, such as photographts.

(h) The Person performing the inspection on behalf of the Department shall prepare a written report of findings of that inspection.

(1) If the Person performing the inspection finds that the Migrant Labor Housing Facility, based on the inspection, is in compliance with 10 TAC §90.4, and the Director finds that there is no other impediment to licensure, the License will be issued.

(2) If the Person performing the inspection finds that although one or more deficiencies were noted that will require timely corrective action which may be confirmed by the Provider without need for re-inspection, and the Director finds that there is no other impediment to licensure, the License will be issued subject to such conditions as the Director may specify. The applicant may, by signed letter, agree to these conditions, request a re-inspection within 60 days from the date of the Director’s letter advising them of the conditions, and submit documentation to support the completion of the corrective action as may be required by the Department, or treat the Director’s imposing of conditions as a denial of the application.

(3) If the Person performing the inspection finds that although one or more deficiencies were noted that will require timely corrective action, the deficiencies are of such a nature that a re-inspection is required, the applicant shall address these findings and advise the inspector or Department, within 60 days from the date of written notice of the findings, of a time when the Facility may be re-inspected. If a re-inspection is required, the License will not be eligible for the reduced fee described in subsection (d) of this section and the balance of the $250 fee must be remitted to the Department prior to the re-inspection. If Occupants are allowed to use the Facility prior to the re-inspection the applicant must acknowledge the operation of the Facility in violation of these rules, and pay a fee to the Department of up to $200 per day of operation through the date the Facility is approved by the inspector, and eligible for licensing. If the results of the re-inspection are satisfactory and the Director finds that there is no other impediment to licensure, the License will be issued. If the Director finds that the applicant made all reasonable efforts to complete any repairs and have the property re-inspected in a timely manner, the penalty for operating a Facility without a License may be reduced to an amount determined by the Director, but not less than $200.
(4) If the person performing the inspection finds that the Migrant Labor Housing Facility is in material noncompliance with §90.4 of this chapter (relating to Migrant Labor Housing Facilities), or that one or more imminent threats to health or safety are present, the Director may deny the application. In addition, the Department may also take action in accordance with §90.8 of this chapter.

(i) If the Director determines that an application for a License ought to be granted subject to one or more conditions, the Director shall issue an order accompanying the License, and such order shall:

1. Be clearly incorporated by reference on the face of the License;

2. Specify the conditions and the basis in law or rule for each of them; and

3. Such conditions may include limitations whereby parts of a Migrant Labor Housing Facility may be operated without restriction and other parts may not be operated until remedial action is completed and documented in accordance with the requirements set forth in the order.

(j) Correspondence regarding an application should be addressed to: Texas Department of Housing and Community Affairs Attention: Migrant Labor Housing Facilities P.O. Box 12489 AUSTIN TX 78711-2489

(k) The Department shall issue a letter informing the applicant of what is needed to complete the application and/or if a deviation found during the inspection requires a correction in order to qualify for issuance of a License.

(l) An applicant or Licensee that wishes to appeal any order of the Director, including the appeal of a denial of an application for a License or an election to appeal the imposing of conditions upon a License, may appeal such order by sending a signed letter to the Director within thirty (30) days from the date specified on such order, indicating the matter that they wish to appeal.

§90.7. Complaints.

(a) If the Department receives any complaint, it shall investigate it by appropriate means, including the conducting of a complaint inspection. Any complaint inspection will be conducted after giving the Provider notice of the inspection and an opportunity to be present. The complaint will be contacted by the Department as soon as possible but no later than 10 days of making a complaint and such a call may be relayed to local authority(s) if a possible life threatening safety or health issue is involved.

(b) A Licensee, through its Provider, shall be provided a copy of any complaint (or, if the complaint was made verbally, a summary of the matter) and given a reasonable opportunity to respond. Generally, this shall be 10 business days.

1. Complaints may be made in writing or by telephone to 1-833-522-7028.

2. Complaints may be made in English, Spanish, or other language.

3. To the fullest extent permitted by applicable law, the identity of any complainant shall be maintained as confidential (unless the complainant specifically consents to the disclosure of their identity or requests that the Department disclose their identity).

4. Licensees and Providers shall not engage in any retaliatory action against an Occupant for making a complaint in good faith.

(c) If any complaint involves matters that could pose an imminent threat to health or safety, all time frames shall be accelerated, and such complaint shall be addressed as expeditiously as possible.

(d) The Department may conduct interviews, including interviews of Providers and Occupants, and review such records as it deems necessary to investigate a complaint.

(e) The Department shall review the findings of any inspection and its review and, if it finds a violation of the Act or these rules to have occurred, issue a notice of violation.

(f) A notice of violation and order will be sent to the Licensee to the attention of the Provider.

(g) The notice of violation will set forth:

1. The complaint or other matter made the subject of the notice;

2. The findings of fact;
(3) The specific provisions of the Act and or these rules found to have been violated;

(4) The required corrective action;

(5) Any administrative penalty or other sanction to be assessed; and

(6) The timeframe for the Licensee either to agree to the recommended corrective action, and accept the administrative penalties and/or sanctions or appeal or to appeal the matter.

(h) The order will set forth:

(1) The complaint or other matter made the subject of the order;

(2) The findings of fact;

(3) The specific provisions of the Act and or these rules found to have been violated;

(4) The required corrective action;

(5) Any administrative penalty or other sanction assessed; and

(6) The date on which the order becomes effective if not appealed or otherwise resolved.

(i) Complaints regarding Migrant Labor Housing Facilities will be addressed under this section, and §1.2 of this title, concerning Department Complaint System to the Department, is not applicable.

§90.8. Administrative Penalties and Sanctions.

(a) When the Director finds that the requirements of the Act or these rules are not being met, he or she may assess administrative penalties or impose other sanctions as set forth in subsections (b) - (d) of this section. Nothing herein limits the right, as set forth in the Act, to seek injunctive relief.

(b) For each violation of the Act or rules a penalty of up to $200 per day per violation may be assessed.

(c) For violations that present an imminent threat to health or safety, if not promptly addressed, the Director may suspend or revoke the affected License.

(d) Administrative penalties assessed regarding Migrant Labor Housing Facilities will be addressed exclusively under this section, and Chapter 2 of this title (relating to Enforcement), is not applicable.

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 11, 2019.

TRD-201903710
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 475-1470

CHAPTER 20. AWARDS

13 TAC §20.2

The Texas Historical Commission (THC) proposes amendments to §20.2, relating to the Texas Treasure Business Award (the "Award" or "TTBA").

The Award is the agency's responsibility under Section 442.020, Texas Government Code. The purpose of the TTBA Program is to recognize the accomplishments of Texas businesses that have provided employment opportunities and support to the state's economy for at least 50 years. Title 13, Part II, §20.2 provides consistent implementation of the TTBA.

Subsection (c) establishes the eligibility for the Award. The proposed amendment to subsection (c) removes "independent" as a term describing entities eligible to receive the Award, thereby broadening the eligibility of the Award and simplifying the Commission's administration of the program. With adoption, it will no longer be necessary for the nominee or the Commission to identify or determine the exact business model or structure.

Subsection (h) clarifies when Award recipients may continue to be considered a Texas Treasure Historic Business despite changes and evolution of the business subsequent to the Award. The proposed amendment to subsection (h) deletes the citation that a recipient can continue to utilize the Award if it ceases to be independent. With the removal of independence as a criterion for nominees, this clause is no longer necessary. The subsequent requirement that an affiliated business that has not specifically received the Award, may not utilize the award remains relevant to all recipients and is retained.

FISCAL NOTE. Mark Wolfe, Executive Director, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering these amendments as proposed. The Award program is voluntary. There is no relationship between enforcing and administering this amendment and local government obligations or compliance.

PUBLIC BENEFIT/COST NOTE. Mr. Wolfe has determined for each year of the first five-year period the amendments are in effect the public benefit anticipated as a result of the amendments will be an increased clarity of the administration of the Texas Treasure Business Award. The proposed amendments do not impose a cost on regulated persons or entities; therefore, they are not subject to Texas Government Code, §2001.0045.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. Mr. Wolfe has determined that there will be no effect on rural communities, small business, or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required. The proposed amendments will apply to businesses that voluntarily participate in the Award and the amendments allow more businesses to qualify. There are no identifiable economic costs for persons or businesses to comply with the amended rule. Adoption of the amendment will have no economic or regulatory impact on small or microbusinesses nor on rural communities.

GOVERNMENT GROWTH IMPACT STATEMENT. During the first five years that the amendments would be in effect, the proposed amendments: will not create or eliminate a government program; will not result in the addition or reduction of employees; will not require an increase or decrease in future legislative
appropriations; will not lead to an increase or decrease in fees paid to a state agency; will not create a new regulation; will not repeal an existing regulation; and will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

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

REQUEST FOR PUBLIC COMMENT. Comments on the proposed amendments may be submitted to Mark Wolfe, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711-2276. Comments will be accepted for 30 days after publication in the Texas Register.

STATUTORY AUTHORITY. Amendments to §20.2 of Chapter 20 (Title 13, Part II of the Texas Administrative Code) relating to the Program are proposed under Section 442.005(q) of the Texas Government Code, which provides the THC with the authority to promulgate rules for the effective administration of its programs under the chapter; and under Section 442.020 of the Texas Government Code which provides THC with the authority to honor businesses that have existed in the state providing employment and supporting the Texas economy for 50 years or more.

CROSS REFERENCE TO STATUTE. The proposed amendments implement Section 442.020 of the Texas Government Code. No other statutes, articles, or codes are affected by these amendments.

§20.2. Texas Treasure Business Award.

(a) Purpose. The commission is authorized to honor businesses that have existed in this state providing employment and supporting the Texas economy for 50 years or more with the Texas Treasure Business Award.

(b) Definitions. The following words and terms shall have the following meanings unless the context clearly indicates otherwise.

(1) Award--Texas Treasure Business Award. A recipient of the award as determined by the commission is a Texas Treasure Historic Business.

(2) Continuous operation--A business that has continued in operation without substantial interruption.

(3) Commission--The Texas Historical Commission and its staff.

(4) Independent business--A business that is not a unit of an affiliated business entity, chain, or franchise. An independent business may be local, statewide, national, or multinational in scale.

(5) Texas business--A business that has its corporate offices in Texas or is majority-owned by residents of Texas and operated in Texas.

(6) Very similar type of business--Businesses with closely related products or services, including those that evolved with technology or the passage of time.

(7) Continuously owned by the same family--Business ownership that has passed through family members related by blood, marriage, or adoption.

(c) Eligibility. Independent] Texas businesses that have been in continuous, for-profit operation in the State of Texas for at least 50 years may be nominated for the award. The operations, products, or services offered at the time of the award nomination must be similar and related to those provided during the 50 or more years prior to the award. Nominated businesses must be considered by the Texas Comptroller of Public Accounts to be in good standing with its franchise tax reports and payments at the time of nomination to be considered for the award. Additional recognition may be given to an eligible business with continuous ownership by the same family; for a business operating in a historic building with architectural integrity; or for a business operated continuously for 75 years, 100 years, or 125 years.

(d) Nominations for the award may be made by any elected state official or by any authorized representative of the business being nominated.

(1) Nominations shall be made on a form established by the commission.

(2) The commission may require supporting materials that show evidence that the business has been continuously operating in Texas for 50 or more years.

(3) Nominations for businesses wishing to be recognized for additional criteria such as operating for 75 years, 100 years, 125 years or that wish to be recognized for having been continuously owned by the same family for at least 50 years or operated in a historic building with architectural integrity may be required to submit additional documentation.

(4) Nominations shall be accepted by the commission at any time during the year, however the commission may establish periodic deadlines for evaluating nominations and announcing awards.

(5) The Commission may establish a processing fee to offset the costs of the evaluation and awards.

(e) Evaluation. The Executive Director or his designee will evaluate the completed nomination materials. The Executive Director shall determine if the nominated business meets the criteria for the award. The commission shall notify the nominated business of its determination within 60 days of receiving complete nomination materials or at other periodic intervals established by the commission.

(f) Award. Businesses selected for the award will receive an award certificate or plaque and one or more window decals. The commission may establish a fee for additional certificates, plaques, or window decals.

(1) The commission shall notify the state senator and state representative in whose districts a recipient's principal place of business in this state is located.

(2) The commission, the recipient, and state senator and state representative shall cooperate in determining the location of the award presentation, if any.

(g) Use of logo. Texas Treasure Historic Businesses are encouraged to display window decals provided by or acquired from the commission on the recipient's place of business. Decals may be displayed on multiple locations of the awarded business provided these are locations of the same business operation named in the award.

(1) Texas Treasure Historic Businesses may use the award logo in advertising, displays, signs, or on vehicles that are part of the awarded businesses' named operation.

(2) Window decals or other display or use of the award logo shall be utilized only by Texas Treasure Historic Businesses.
(3) The logo and term "Texas Treasure Historic Business" shall be used in their complete format without alteration, unless otherwise approved by the commission.

(4) The commission may establish additional requirements for acceptable use of the logo.

(h) Changes to businesses after receipt of the award.

(1) A Texas Treasure Historic Business that receives the award may continue to display the award, plaques or decals for the same business after changes in ownership, operation or location provided the business continues to operate with the same or a very similar type of business and name.

(2) [A Texas Treasure Historic Business that ceases to operate as an independent business but that retains its name and the same or a very similar type of business may continue to utilize the award and logo.] An affiliated business entity, if any, is not entitled to utilize the award or logo for itself or other businesses it may operate that have not specifically received the award. 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 11, 2019.

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Mark Wolfe
Executive Director
Texas Historical Commission

Earliest possible date of adoption: November 24, 2019

For further information, please call: (512) 463-6100

Title 16. Economic Regulation

Part 1. Railroad Commission of Texas

Chapter 9. LP-Gas Safety Rules

The Railroad Commission of Texas (Commission) proposes amendments to the following rules in Subchapter A, General Requirements: §§9.1-9.18, relating to Application of Rules, Severability, and Retroactivity; Definitions; LP-Gas Forms; Records; Effect of Safety Violations; License Categories, Container Manufacturer Registration, and Fees; Applications for Licenses, Manufacturer Registrations, and Renewals; Requirements and Application for a New Certificate; Requirements for Certificate Holder Renewal; Rules Examination; Transfer of Employees; Trainees; General Installers and Repairman Exemption; Military Fee Exemption; Penalty Guidelines for LP-Gas Safety Violations; Hearings for Denial, Suspension, or Revocation of Licenses, Manufacturer Registrations, or Certificates; Designation and Responsibilities of Company Representatives and Operations Supervisors; and Reciprocal Examination Agreements with Other States; §9.21 and §9.22, relating to Franchise Tax Certification and Assumed Name Certificates; and Changes in Ownership, Form of Dealership, or Name of Dealership; §§9.26-9.28, relating to Insurance and Self-Insurance Requirements; Application for an Exception to a Safety Rule; and Reasonable Safety Provisions; §§9.35-9.38, relating to Written Procedure for LP-Gas Leaks; Report of LP-Gas Incident/Accident; Termination of LP-Gas Service; and Reporting Unsafe LP-Gas Activities; §9.41, relating to Testing of LP-Gas Systems in School Facilities; §§9.51 and §9.52, relating to General Requirements for LP-Gas Training and Continuing Education; and Training and Continuing Education; and §9.54, relating to Commission-Approved Outside Instructors.

In Subchapter B, LP-Gas Installations, Containers, Appurtenances, and Equipment Requirements, the Commission proposes amendments to §§9.101-9.103, relating to Filings Required for Stationary LP-Gas Installations; Notice of Stationary LP-Gas Installations; and Objections to Proposed Stationary LP-Gas Installations; amendments to §§9.107-9.110, relating to Hearings on Stationary LP-Gas Installations; Interim Approval Order for Stationary LP-Gas Installations; Physical Inspection of Stationary LP-Gas Installations; and Emergency Use of Proposed Stationary LP-Gas Installations; amendments to §§9.113-9.116, relating to Installation and Maintenance; Odorizing and Reports; Examination and Testing of Containers; and Container Corrosion Protection System; §9.126, relating to Appurtenances and Equipment; §§9.129-9.132, relating to Manufacturer's Nameplate and Markings on ASME Containers; Commission Identification Nameplates; 200 PSIG Working Pressure Stationary Vessels; and Sales to Unlicensed Individuals; §§9.134-9.137, relating to Connecting Container to Piping; Unsafe or Unapproved Containers, Cylinders, or Piping; Filling of DOT Containers; and Inspection of Cylinders at Each Filling; §§9.140-9.143, relating to System Protection Requirements; Uniform Safety Requirements; LP-Gas Container Storage and Installation Requirements; and Piping and Valve Protection for Stationary LP-Gas Installations with Individual or Aggregate Water Capacities of 4,001 Gallons or More.

In Subchapter C, Vehicles, the Commission proposes amendments to §§9.201-9.204, relating to Applicability; Registration and Transfer of LP-Gas Transports or Container Delivery Units; School Bus, Public Transportation, Mass Transit, and Special Transit Vehicle Installations and Inspections; and Maintenance of Vehicles; §9.206, relating to Vehicle Identification Labels; §9.208 relating to Testing Requirements; and §9.211 and §9.212, relating to Markings; and Manifests.

In Subchapter D, Adoption by Reference of NFPA 54 (National Fuel Gas Code), the Commission proposes amendments to §§9.301-9.303, relating to Adoption by Reference of NFPA 54; Clarification of Certain Terms Used in NFPA 54; and Exclusion of NFPA 54, §10.28; new §9.304, relating to Unvented Appliances; amendments to §§9.306-9.308, relating to Room Heaters in Public Buildings; Identification of Converted Appliances; and Installation of Piping; §9.311, relating to Special Exceptions for Agricultural and Industrial Structures Regarding Appliance Connectors and Piping Support; and §9.313, relating to Sections in NFPA 54 Adopted with Additional Requirements or Not Adopted. The Commission also proposes the repeal of §9.312, relating to Certification Requirements for Joining Methods.

In Subchapter E, Adoption by Reference of NFPA 58 (LP-Gas Code), the Commission proposes amendments to §9.401 and §9.403, relating to Adoption by Reference of NFPA 58; and Sections in NFPA 58 Not Adopted by Reference, and Adopted with Changes or Additional Requirements.

The Commission proposes the amendments, new rule and repeal to update and clarify the Commission's liquefied petroleum gas (LP-gas) rules. Amendments are also proposed to implement changes from the 86th Legislative Session. House Bill 2714 removed the requirement that manufacturers of LP-gas
containers obtain a license from the Commission and instead requires registration with the Commission. Proposed amendments to reflect this statutory change are found in §§9.2, 9.4-9.7, 9.15, 9.16, 9.21, 9.22, and 9.26. Operators will not be required to comply with changes directly related to manufacturer registrations until approximately March 1, 2020 to allow Commission programming efforts to be completed. Upon adoption, the Commission will specify the effective date relating to requirements for manufacturer registration.


The remaining amendments are non-substantive and are proposed to clarify existing language, correct outdated language such as incorrect division and department names, update references to other Commission rules, and ensure language throughout Chapter 9 is consistent. Clarifying changes include amendments to improve readability such as removing repetitive language, adding internal cross references, and including language from a referenced section (e.g., a fee amount) to give the reader better access to applicable requirements.


Proposed amendments to §9.2 remove definitions of terms that no longer appear in Chapter 9 or are only used within one section and, therefore, do not need to be defined. The proposed amendments add definitions of "registered manufacturer" and "service station," as those terms are now used throughout the chapter. The proposed amendments also clarify several existing definitions.

Proposed amendments in §9.3 remove the list of official forms from the rule language to ensure consistency with other chapters. All Commission forms are now located on the Commission’s website. The proposed amendments also specify the form amendment and adoption process, which is consistent with forms referenced in other Commission chapters.

Proposed amendments in §9.5 include changes to implement the registration requirement from House Bill 2714. "Manufacturer registration" is included alongside references to applications for license and exemptions. However, the amendments also condense the list of potential applicants and use "applicant" when possible to encompass all types of people seeking Commission authorization to conduct LP-gas related activities. In addition, the proposed amendments clarify when certain violations of a person who holds a position of ownership or control in the applicant will be attributed to an applicant. The intent of this provision is the same; the proposed amendments merely remove unnecessary language and reorganize the provision to make it more straightforward.

Amendments proposed in §9.6 update license categories to include licenses currently offered by the Commission, including Categories A1 and A2. The proposed amendments also clarify the Category D and Category I licenses. For example, the proposed amendments remove language related to the service and repair of an LP-gas appliance not required to be vented to the atmosphere. This language was moved to proposed new §9.304, relating to Unvented Appliances, to reduce confusion. Finally, amendments proposed to §9.6 implement House Bill 2714. These provisions remove language related to manufacture and fabrication from existing license categories and add new subsection (d) which states that a container manufacturer registration authorizes the manufacturer, assembly, repair, testing and sale of LP-gas containers. The original registration fee is $1,000; the renewal fee is $600.

Proposed amendments to §9.7 generally clarify license requirements and reorganize the section to group related requirements together and remove repetitive language that is contained within other rules. An amendment to subsection (a) is proposed to reflect NFPA updates. Proposed new subsection (h) contains the requirements for obtaining a registration authorizing the manufacture of containers. Proposed subsection (i) details the steps the Alternative Fuels Safety Department (AFS) follows to review and approve license and registration applications. Finally, amendments proposed in §9.7 add "registered manufacturer" in several subsections to implement House Bill 2714.

Proposed amendments in §9.8 move language from §9.7 regarding requirements for individuals who perform work, directly supervise LP-gas activities, or are employed in any capacity requiring contact with LP-gas. The proposed amendments also ensure "certificate" and "certificate holder" are used throughout §9.8 instead of using "certification," "certification holder," "certified," and "certification" inconsistently. Corresponding changes are also made in other sections for consistency.

Proposed amendments in §9.9 clarify requirements for certificate renewal and steps to renew a lapsed certificate.

Proposed amendments in §9.10 add language from §9.7 and §9.8 that an individual who passes the applicable examination with a score of at least 75% will become a certificate holder. The proposed amendments also clarify where and when examinations are available and what an examinee must bring to the exam site. Further, the proposed amendments incorporate the management-level examinations and their descriptions into §9.10(d)(2) instead of including those descriptions in a table. Finally, the proposed amendments clarify the process for obtaining a management-level certificate.

Amendments proposed in §9.11 change the title to "Transfer of Employees" to more accurately describe the rule's contents. The proposed amendments also update the process for licensees who hire certificate holders, including allowing notification to the Commission to include only the last four digits of the employee's Social Security Number.

Amendments proposed in §9.13 simplify the name of an exempt individual's proof of exemption such that "registration/examination exemption certificate" is changed to "exemption card." Proposed amendments also update department names and other references and remove repetitive language from other sections.

Proposed amendments in §9.17(a) clarify filing requirements for outlets. The proposed amendments change "termination" to "conclusion of employment" to better communicate AFS's intent for when a licensee must notify AFS of a company representative's or operations supervisor's departure. The amendments in subsection (d) update manual requirements to contemplate the use of electronic manuals in addition to printed manuals. The amendments also reorganize the section so that related requirements are found in the same subsection or paragraph.
Amendments proposed in §9.26 incorporate insurance requirements for registered manufacturers.

Amendments proposed in §9.51 move applicable language into §9.51 from other sections or tables. The proposed amendments update subsection (j) to reflect the Commission's online registration process and allow an individual to register for a course using only the last four digits of his or her Social Security Number. Finally, proposed amendments in §9.51 update department names and incorporate changes to reflect proposed amendments in other sections.

Proposed amendments in §9.52 move language from a table into the rule. Further, the proposed amendments clarify the process for individuals who fail to complete required training; remove dates that have already passed and thus are no longer applicable; and clarify how much credit a certificate holder can receive for an approved CETP course.

Proposed amendments to §9.54 include general updates and clarifications. The proposed amendments in subsection (h) specify the process for renewal of an outside instructor approval and what happens upon failure to renew. Proposed amendments in subsection (i) detail the process for outside instructors when AFS revises its course materials. The proposed amendments in subsection (l) remove language requiring AFS to send information related to complaints through certified mail.

Proposed amendments to §9.101 remove language related to local requirements due to Texas Natural Resources Code §113.054, which was added by the legislature in 2011. Proposed amendments also make minor updates and reorganize parts of the section for clarity.

Proposed amendments in §9.109 incorporate new terminology used by AFS such that a "safety rule violation" is now called a "non-compliance item."

Amendments proposed in §9.126 incorporate specific requirements for ASME containers with an individual water capacity of over 4,000 gallons. These requirements were moved from Table §9.403 to simplify the table.

Proposed amendments in §9.132 incorporate clarifying language from Texas Natural Resources Code §113.081(a).

Proposed amendments in §9.202, in addition to general updates and clarifications, clarify existing filing requirements for registering an LP-gas transport or container delivery unit. The amendments align Commission rules with U.S. Department of Transportation requirements.

Finally, proposed new §9.304 contains language moved from §9.6 related to the Category D license. The section exempts certain individuals who service, install, and repair LP-gas appliances not required to be vented to the atmosphere from the requirement to obtain a Category D license.

April Richardson, Director, Alternative Fuels Safety Department, has determined that there will be a one-time cost to the Commission of approximately $119,450 in programming costs based on 1250 hours of programming to implement changes required by HB 2714. This cost will be covered using the Commission’s existing budget. Further, AFS will have a one-time cost to replace outdated copies NFPA 54 and 58. The new copies of NFPA standards will be provided to all inspectors, to each district office, to managers at the AFS Austin office, and to examinees and instructors across the state. The total estimated cost to replace these books is $19,639. This cost will also be covered using AFS's existing budget. There are no anticipated fiscal implications for local governments as a result of enforcing the amendments and new rule.

Ms. Richardson has determined that there will be minimal costs for those required to comply with the proposed amendments. Any cost stems from the need to purchase the new version of NFPA 54 and/or NFPA 58 if a person required to comply does not already own a copy. The softbound copies of NFPA 54 and NFPA 58 total $141. Manufacturers who are no longer required to obtain a license will save $35 per company representative per year, as the certificate renewal requirements will not apply to these employees.

Ms. Richardson has also determined that the public benefit anticipated as a result of enforcing or administering the amendments will be compliance with recent changes to the Texas Natural Resources Code and increased public safety due to new NFPA standards.

In accordance with Texas Government Code, §2006.002, the Commission has determined there will be no adverse economic effect on rural communities, small businesses or micro-businesses resulting from the proposed amendments and new rule; therefore, the Commission has not prepared the economic impact statement or the regulatory flexibility analysis required under §2006.002.

The Commission has determined that the proposed rulemaking will not affect a local economy; therefore, pursuant to Texas Government Code, §2001.022, the Commission is not required to prepare a local employment impact statement for the proposed rules.

The Commission has determined that the proposed amendments and new rule do not meet the statutory definition of a major environmental rule as set forth in Texas Government Code, §2001.0225; therefore, a regulatory analysis conducted pursuant to that section is not required.

During the first five years that the rules would be in effect, the proposed amendments would not: create or eliminate a government program; create or eliminate any employee positions; require an increase or decrease in future legislative appropriations; increase or decrease fees paid to the agency; create a new regulation; increase or decrease the number of individuals subject to the rule's applicability; expand, limit, or repeal an existing regulation; or affect the state's economy. The amendments are proposed to align Commission rules with governing state statutes and national standards.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.texas.gov/general-counsel/rules/comment-form-for-proposed-rulemakings; or by electronic mail to rulescoordinator@rrc.texas.gov. The Commission will accept comments until 12:00 noon on Monday, November 18, 2019. The Commission finds that this comment period is reasonable because the proposal and an online comment form will be available on the Commission's website more than two weeks prior to Texas Register publication of the proposal, giving interested persons additional time to review, analyze, draft, and submit comments. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Richardson at (512) 463-6935. The status of Commission rulemakings in progress is available at www.rrc.texas.gov/general-counsel/rules/proposed-rules.
SUBCHAPTER A. GENERAL REQUIREMENTS

The Commission proposes the amendments under Texas Natural Resources Code, §113.051, which authorizes the Commission to promulgate and adopt rules and standards relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public; Texas Natural Resources Code §113.0815, which requires a person engaging in the manufacture or fabrication of containers to register with the commission in accordance with rules adopted by the commission; and Texas Natural Resources Code §113.082, which authorizes the Commission to adopt rules establishing license categories for LP-gas activities.

Statutory authority: Texas Natural Resources Code, §§113.051, 113.0815, and 113.082.

Cross reference to statute: Texas Natural Resources Code Chapter 113.


(a) The LP-Gas Safety Rules in this chapter apply to the design, installation, [location] and operation of liquefied petroleum gas systems, equipment, and appliances. These standards also apply to truck and railcar loading racks, but do not apply to marine terminals, natural gasoline plants, refineries, tank farms, gas manufacturing plants, plants engaged in processing liquefied petroleum gases, or to railroad loading racks used in connection with these excluded establishments.

(1) - (2) (No change.)

(3) Subchapter C, Vehicles [and Vehicle Dispensers], applies to transports and bobtails that deliver LP-gas, and school buses and other vehicles that are powered by LP-gas.

(4) - (5) (No change.)

(b) - (c) (No change.)

(d) Unless otherwise stated, the LP-Gas Safety Rules in this chapter [LP-Gas Safety Rules] are not retroactive. Any installation of an LP-gas system, containers, and appliances shall meet the requirements of this chapter at the time of installation.

(e) As stated in Texas Natural Resources Code, Chapter 113, any LP-gas container with a water capacity of one gallon or less, or any LP-gas piping system, or appliance attached or connected to such a container is exempt from the LP-Gas Safety Rules in this chapter [LP-Gas Safety Rules], including any adopted NFPA pamphlets. For the purpose of consistency, the figure of 4.20 lb is the equivalent [used to determine the weight] of one gallon of LP-gas. [The omission of a specific NFPA 58 pamphlet or any other NFPA rule containing any such applicable language from Table 4 of §9.403 of this title (relating to Sections in NFPA 58 Not Adopted by Reference, and Adopted With Changes, Additional Requirements, or Corrections) is inadvertent and shall not be read or understood as requiring or allowing any such size of LP-gas container to comply with the adopted LP-gas safety rule requirements.]

(f) This chapter shall not apply to vehicles and fuel supply containers that:

(1) are manufactured or installed by original equipment manufacturers; and

(2) comply with Title 49, Code of Federal Regulations, the Federal Motor Vehicle Safety Standards.; and

(3) comply with the National Fire Protection Association (NFPA) Code 58, Liquefied Petroleum Gas Code.]

(g) Vehicles and fuel supply containers excluded from the requirements of this chapter pursuant to subsection (f) of this section shall comply with the requirements of §9.203 of this title (relating [relating to School Bus, Public Transportation, Mass Transit, and Special Transit Vehicle Installations and Inspections], and the Commission's exception to NFPA 58, Chapter 11, §11.4.1.5) in Table 1 in §9.403 of this title [§9.403(a),] relating to Sections in NFPA 58 Not Adopted by Reference, and Adopted with Changes or Additional Requirements.

§9.2. Definitions.

In addition to the definitions in any adopted NFPA pamphlets, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) AFS--The Commission's Alternative Fuels Department within the Commission's Oversight and Safety Division.

(2) [(1)] Advanced field training (AFT)--The final portion of the training or continuing education requirements in which an individual shall successfully perform the specified LP-gas activities in order to demonstrate proficiency in those activities.

(2) AED--The Commission's Alternative Energy Division.]

(3) AFRED--The organizational unit of the AED that administers the Commission's alternative fuels research and education program, including LP-gas certification, exempt registration, training, and continuing education programs.

(3) [(4)] AFT materials--The portion of a Commission training module consisting of the four sections of the Railroad Commission's LP-Gas Qualifying Field Activities, including General Instructions, the Task Information, the Operator Qualification Checklist, and the Railroad Commission/Employer Record.

(4) [(5)] Aggregate water capacity (AWC)--The sum of all individual container capacities measured by weight or volume of water which are placed at a single installation location.

(6) Applicant--An individual:

[(A) who is applying for a new certificate; or

(B) whose certification has lapsed for a period of less than two years and who is applying to restore certification by paying any applicable fees and by completing any applicable training or continuing education requirements.]

(5) [(7)] Bobtail driver--An individual who operates an LP-gas cargo tank motor vehicle of 5,000 gallons water capacity or less in metered delivery service.

(6) [(8)] Breakaway--The accidental separation of a hose from a cylinder, container, transfer equipment, or dispensing equipment, which could occur on a cylinder, container, transfer equipment, or dispensing equipment whether or not they are protected by a breakaway device.

(9) Categories of LPG activities--The LP-gas license categories as specified in §9.6 of this title (relating to Licenses and Fees).

(7) [(10)] Certificate holder--An individual:

[(A) who has passed the required management-level qualification examination, pursuant to §9.10 of this title (relating to Rules Examination) satisfactorily completed any applicable training
or continuing education requirements as specified in §9.52 of this title (relating to Training and Continuing Education Courses), and paid the applicable fee;

(B) who has passed the required employee-level qualification examination pursuant to §9.10 of this title, paid the applicable fee, and complied with the training or continuing education requirements in §9.52 of this title;

(C) who has passed the required employee-level qualification examination has paid the applicable fee, and is required to comply with a training requirement as specified in §9.52 of this title;

(D) who holds a current examination exemption certificate pursuant to §9.13 of this title (relating to General Installers and Repairman Exemption).

(8) Certified--Authorized to perform LP-gas work as set forth in the Texas Natural Resources Code. Employee certification alone does not allow an individual to perform those activities which require licensing.

(9) CETP--The Certified Employee Training Program offered by the Propane Education and Research Council (PERC), the National Propane Gas Association (NPGA), or their authorized agents or successors.

(10) Commercial installation--An LP-gas installation located on premises other than a single family dwelling used as a residence, including but not limited to a retail business establishment, school, bulk storage facility, convalescent home, hospital, [retail LP-gas] cylinder exchange [filling/exchange] operation, service station, forklift refueling facility, private motor/mobile fuel cylinder filling operation, a microwave tower, or a public or private agricultural installation.

(11) Commission--The Railroad Commission of Texas.

(12) Company representative--The individual designated to the Commission by a license applicant or a licensee as the principal individual in authority and, in the case of a licensee other than a Category P licensee, actively supervising the conduct of the licensee's LP-gas activities.

(13) Container delivery unit--A vehicle used by an operator principally for transporting LP-gas in cylinders.

(14) Continuing education--Courses required to be successfully completed at least every four years by [certain] certificate holders to maintain certification.

(15) Director--The director of AFS [the AED] or the director's delegate.

(16) DOT--The United States Department of Transportation.

(17) Employee--An individual who renders or performs any services or labor for compensation, including individuals hired on a part-time or temporary basis, on a full-time or permanent basis, and owner-employees [or, for purposes of this chapter, an owner-employee].

(18) Interim approval order--The authority issued by the Railroad Commission of Texas following a public hearing allowing construction of an LP-gas installation.

(19) Leak grades--An LP-gas leak that is:

(A) a Grade 1 leak that represents an existing or probable hazard to persons or property, and requires immediate repair or continuous action until the conditions are no longer hazardous; or

(B) a Grade 2 leak that is recognized as being nonhazardous at the time of detection, but requires a scheduled repair based on a probable future hazard.

(20) Licensed--Authorized by the Commission to perform LP-gas activities through the issuance of a valid license.

(21) Licensee--A person who has applied for and been granted an LP-gas license by the Commission, or who holds a master or journeyman plumber license from the Texas State Board of Plumbing Examiners or a Class A or B Air Conditioning and Refrigeration Contractors License from the Texas Department of Licensing and Regulation and has properly registered with the Commission.

(22) LP-Gas Operations--The organizational unit of the AED that administers the LP-gas safety program, including licensing, truck registration, installation approvals, complaint and accident investigations, inspections of stationary installations and vehicles, and code enforcement.

(23) LP-gas system--All piping, fittings, valves, and equipment, excluding containers and appliances, that connect one or more containers to one or more appliances that use or consume LP-gas.

(24) Mass transit vehicle--Any vehicle which is owned or operated by a political subdivision of a state, city, or county, used primarily in the conveyance of the general public.

(25) Mobile fuel container--An LP-gas container mounted on a vehicle to store LP-gas as the fuel supply to an auxiliary engine other than the engine to propel the vehicle or for other uses on the vehicle.

(26) Mobile fuel system--An LP-gas system, excluding the container, to supply LP-gas as a fuel to an auxiliary engine other than the engine to propel the vehicle or for other uses on the vehicle.

(27) Motor fuel container--An LP-gas container mounted on a vehicle to store LP-gas as the fuel supply to an engine used to propel the vehicle.

(28) Motor fuel system--An LP-gas system, excluding the container, which supplies LP-gas to an engine used to propel the vehicle.

(29) MPS gas (Methylacetylene-propadiene, stabilized)--A mixture of gases in the liquid phase and as defined in Texas Natural Resources Code, Chapter 113, §113.002(41).

(30) Noncorrosive--Corrosiveness of gas which does not exceed the limitation for Classification 1 of ASTM International (ASTM) Copper Strip Classifications when tested in accordance with ASTM D 1834-64, "Copper Strip Corrosion of Liquefied Petroleum (LP) Gases."

(31) Nonspecification unit--An LP-gas transport not constructed to DOT MC-330 or MC-331 specifications but which complies with the exemption in 49 Code of Federal Regulations §173.315(k). (See also "Specification unit" in this section.)
(31) Operations supervisor--The individual who is certified by the Commission to actively supervise a licensee's LP-gas activities and is authorized by the licensee to implement operational changes.

(32) Outlet--A site operated by an LP-gas licensee from which any regulated LP-gas activity is performed.

(33) Outside instructor--An individual, other than a Commission employee, approved by AFRED to teach certain LP-gas training or continuing education courses.

(34) Person--An individual, partnership, firm, corporation, joint venture, association, or any other business entity, a state agency or institution, county, municipality, school district, or other governmental subdivision, or licensee, including the definition of "person" as defined in the applicable sections of 49 CFR relating to cargo tank hazardous material regulations.

(35) Portable cylinder--A receptacle constructed to DOT specifications, designed to be moved readily, and used for the storage of LP-gas for connection to an appliance or an LP-gas system. The term does not include a cylinder designed for use on a forklift or similar equipment.

(36) Property line--The boundary which designates the point at which one real property interest ends and another begins.

(37) Public transportation vehicle--A vehicle for hire to transport persons, including but not limited to taxis, buses (excluding school buses and mass transit or special transit vehicles), or airport courtesy vehicles.

(38) Recreational vehicle--A vehicular-type unit primarily designed as temporary living quarters for recreational, camping, travel, or seasonal use that either has its own motive power or is mounted on, or towed by, another vehicle.

(39) Registered manufacturer--A person who has applied for and been granted a registration to manufacture LP-gas containers by the Commission.

(40) Rules examination--The Commission's written examination that measures an examinee's working knowledge of Chapter 113 of the Texas Natural Resources Code and/or the current rules in this chapter.

(41) School--A public or private institution which has been accredited through the Texas Education Agency or the Texas Private School Accreditation Commission.

(42) School bus--A vehicle that is sold or used for purposes that include carrying students to and from school or related events.

(43) Self-service dispenser--A listed device or approved equipment in a structured cabinet for dispensing and metering LP-gas between containers that must be accessed by means of a locking device such as a key, card, code, or electronic lock, and which is operated by a certified employee of an LP-gas licensee or an ultimate consumer trained by an LP-gas licensee.

(44) Service station--An LP-gas installation that, for retail purposes, operates a dispensing station and/or conducts cylinder filling activities.

(45) Special transit vehicle--A vehicle designed with limited passenger capacity which is used by a mass transit authority for special transit purposes, such as transport of mobility-impaired persons.

(46) Specification unit--An LP-gas transport constructed to DOT MC-330 or MC-331 specifications. (See also "Non-specification unit" in this section.)

(47) Subframing--The attachment of supporting structural members to the pads of a container, excluding welding directly to or on the container.

(48) Trainee--An individual who has not yet taken and passed an employee-level rules examination.

(49) Training--Courses required to be successfully completed as part of an individual's requirements to obtain or maintain certain certificates.

(50) Transfer--The procedure to inform LP-Gas Operations of a change in operator of an LP-gas transport or container delivery unit already registered with LP-Gas Operations.

(51) Transport--Any bobtail or semitrailer equipped with one or more containers.

(52) Transport driver--An individual who operates an LP-gas trailer or semi-trailer equipped with a container of more than 5,000 gallons water capacity.

(53) Transport system--Any and all piping, fittings, valves, and equipment on a transport, excluding the container.

(54) Ultimate consumer--A person who buys a product to use rather than for resale. [The person controlling LP-gas immediately prior to its ignition.]

§9.3. LP-Gas [Repeat] Forms.

Forms required to be filed with AFRED shall be those prescribed by the Commission. A complete set of all required forms shall be posted on the Commission's web site. Notice of any new or amended forms shall be issued by the Commission. A person may file the prescribed form online or use any electronic filing process. The Commission may accept an earlier version of a prescribed form, provided that it contains all required information. [Under the provision of the Texas Natural Resources Code, Chapter 113, the Railroad Commission of Texas has adopted the following forms.]

[Figure: 46 TAC §9.3]

§9.4. Records [and Enforcement].

(a) Records. Each LP-gas licensee, registered manufacturer, or other [as] registrant shall retain:

(1) records of pressure tests and leakage tests for at least five years;

(2) a copy of all documentation submitted for an exception to an LP-gas rule pursuant to §9.27 of this title (relating to Application for an Exception to a Safety Rule), including the AFRED director's memorandum granting the exception, for as long as the exception is in use; and

(3) a copy of all customer records for at least five years.
(b) Periodic inspection. AFS [LP-Gas Operations] shall formulate a plan or program for periodic evaluation or inspection of records and facilities owned, operated, or serviced by LP-gas licenses, registered manufacturers, or other [œ] registrants for the purpose of verifying compliance with this chapter.

(c) (No change.)

(d) Licensee, registered manufacturer, and other registrant obligations.

(1) A registrant, officer, employee, or representative of an LP-gas licensee shall cooperate with the Commission and its authorized representatives in the administration and enforcement of the provisions in this chapter, in the determination of compliance with the provisions of this chapter, and in the investigation of violations, complaints alleging violations, and accidents or incidents involving LP-gas.

(2) A registrant, officer, employee, or representative of an LP-gas licensee shall make readily available all files, records, reports, documents and information, and shall make readily accessible all company equipment, property, and facilities as the Commission or its authorized representative may reasonably require in the administration and enforcement of this chapter, and in the investigation of violations, complaints alleging violations, and accidents or incidents involving LP-gas.

(3) Upon request by an authorized representative of the Commission, an LP-gas licensee's officer, employee, or representative, or a registrant shall provide copies of records, files, reports, documents and information for administration and enforcement of this chapter.

§9.5. Effect of Safety Violations.

(a) This section implements the provisions of Texas Natural Resources Code, §111.162, and applies to a violation that occurs on or after September 1, 2005.

(b) Except as provided by subsections (c) and (d) [œ] and [œ] of this section, the Commission may not approve an application for [œ] or renewal [œ] license, an exemption, or a manufacturer registration, or their associated renewals, [œ] registration [œ] under this chapter if:

(c) [œ] the applicant [œ] has violated a statute or Commission rule, order, license, permit, or certificate that relates to safety. [œ] ⁶

(d) a person who holds a position of ownership or control in the applicant [œ] has held a position of ownership or control in another person during the years preceding the date on which the application [œ] is filed and during that period of ownership or control the other person violated a statute or Commission rule, order, license, registration, permit, or certificate that relates to safety, then that violation will be attributed to the applicant. Regardless of whether the person's name appears or is required to appear on an application, a person holds a position of ownership or control in an applicant if the person is:

(1) an officer, director, general partner, sole owner, or trustee of, or the owner of at least 25 percent of the beneficial interest in the applicant; or

(2) the applicant and has been determined by a final judgment or final administrative order finding the violation has been entered against the applicant, registrant for an exemption, or other person and all appeals have been exhausted; or

(2) the Commission and the applicant, registrant for an exemption, or other person have entered into an agreed order relating to the alleged violation.

(4) Regardless of whether the person's name appears or is required to appear on an application or registration for an exemption, a person holds a position of ownership or control in an applicant, registrant for an exemption, or other person if the person is:

(1) an officer, director, general partner, sole owner, or trustee of, or the owner of at least 25 percent of the beneficial interest in the applicant, registrant for an exemption, or other person; or

(2) the applicant, registrant, or other person and has been determined by a final judgment or final administrative order to have exerted actual control over the applicant, registrant, or other person.

(c) [œ] Notwithstanding subsection (a) of this section, the [œ] Commission shall approve an application for a license, an exemption, or a manufacturer registration [œ] registration for an exemption] under this chapter[œ] if all of the following conditions, if applicable, are met:

(1) the conditions that constituted the violation have been corrected or are being corrected in accordance with a schedule to which the Commission and the applicant, registrant for an exemption, or other person have agreed;

(2) all administrative, civil, and criminal penalties have been paid or are being paid in accordance with a payment schedule to which the Commission and the applicant, registrant for an exemption, or other person have agreed; and

(3) the application [œ] registration for an exemption] complies with all other requirements of law and Commission rules.

(d) [œ] The Commission may issue a license, exemption, or manufacturer registration to an applicant described by subsection (a) [œ] of this section [œ] registration for an exemption] described by subsection (b) of this section] for a term specified by the Commission if the license, exemption, or manufacturer [œ] registration [œ] is necessary to remedy a violation of law or Commission rules.

(e) [œ] If the Commission is prohibited by subsection (a) [œ] of this section from approving an application for a license, an exemption, or a manufacturer registration [œ] registration for an exemption] is prohibited from doing so by that subsection if the applicant, license, or registrant for an exemption submitted an application or registration for an exemption], then the Commission, after notice and opportunity for a hearing, by order may refuse to renew or may revoke a license, an exemption, or a manufacturer registration [œ] registration for an exemption] issued to the applicant, license, or registrant for an exemption] under this chapter.

(1) In determining whether to refuse to renew or to revoke a person's license, exemption, or manufacturer registration [œ] registration for an exemption] under this subsection, the Commission shall consider the person's history of previous violations, the seriousness of previous violations, any hazard to the health or safety of the public, and the demonstrated good faith of the person.

(2) If the Commission issues a refusal or revocation [œ] an application or registration for an exemption is denied] under this subsection, the Commission shall provide the applicant [œ] registration for an
exemption] with a written statement explaining the reason for the denial.

(3) An order issued under this subsection must provide the applicant, licensee, or registrant for an exemption] a reasonable period to comply with the judgment or order finding the violation before the order takes effect.

(4) The Commission's refusal to renew or revocation of a person's license, exemption, or manufacturer registration [or registration for an exemption] under this subsection does not relieve the person of any existing or future duty under law, rules, or license, or registration conditions.

(5) On refusal to renew or revocation of a person's license, exemption, or manufacturer registration [or registration for an exemption] under this subsection, the person may not perform any activities under the jurisdiction of the Commission under this chapter, except as necessary to remedy a violation of law or Commission rules and as authorized by the Commission under a license, an exemption, or a manufacturer registration [or registration for an exemption] issued under subsection (d) [(6)] of this section.

(6) A fee tendered in connection with an application [or registration for an exemption] that is denied under this section is non-refundable.

(7) The Commission may not revoke or refuse to renew a license, an exemption, or a manufacturer registration [or registration for an exemption] under this subsection if the Commission finds that the applicant, licensee, registered manufacturer, or other registrant [for an exemption] has fulfilled the conditions set out in subsection (e) [(6)] of this section.

§9.6. License Categories, Container Manufacturer Registration, [Licenses] and Fees.

(a) A prospective licensee may apply to AFSD [LP-Gas Operations] for one or more licenses specified in subsection (b) [(6)] [(6)] [(16)] of this section. A prospective container manufacturer may apply to AFSD for a container manufacturer registration specified in subsection (d) of this section. Fees required to be paid shall be those established by the Commission and in effect at the time of application [licensing] or renewal and shall be paid at the time of application or renewal.

(b) [(6)] (6) The license categories and fees are as follows.

(1) A Category A license for container assembly and repair [manufacturers and/or fabricators] authorizes the [manufacture, fabrication,] assembly, repair, installation, subframing, testing, and sale of ASME or DOT LP-gas containers, including LP-gas motor or mobile fuel containers and systems, and the repair and installation of transport and transfer systems. A Category A license includes all activities covered by a Category A1 and Category A2 license. The original license fee is $1,000; the renewal fee is $600.

(2) A Category A1 license for ASME container assembly and repair authorizes the assembly, repair, installation, testing, and sale of ASME containers, including LP-gas motor or mobile fuel containers and systems, and the repair and installation of transport and transfer systems. The original license fee is $1,000; the renewal fee is $600.

(3) A Category A2 license for U.S. Department of Transportation (DOT) container assembly and repair authorizes the assembly, repair, installation, subframing, testing, and sale of LP-gas DOT containers, including LP-gas motor or mobile fuel containers and systems, and the repair and installation of transport and transfer systems. The original license fee is $1,000; the renewal fee is $600.

(4) [(3)] A Category B license for transport outfitters authorizes the subframing, testing, and sale of LP-gas transport containers, the testing of LP-gas storage containers, the installation, testing, and sale of LP-gas motor or mobile fuel containers and systems, and the installation and repair of transport systems and motor or mobile fuel systems. The original license fee is $400; the renewal fee is $200.

(5) [(3)] A Category C license for carriers authorizes the transportation of LP-gas by transport, including the loading and unloading of LP-gas, and the installation and repair of transport systems. The original license fee is $1,000; the renewal fee is $300.

(6) [(3)] A Category D license for general installers and repairmen authorizes the sale, service, and installation of containers, [excluding motor fuel containers,] and the service, installation, and repair of piping and, [certain,] appliances. A Category D license does not authorize the installation of motor fuel containers, motor fuel systems, [as defined by rule, excluding] recreational vehicle containers, or [appliances and LP-gas systems, and motor fuel and] recreational vehicle systems. The service and repair of an LP-gas appliance not required by the manufacturer to be vented to the atmosphere is exempt from Category D licensing. The installation of those unvented appliances to LP-gas systems by means of LP-gas appliance connectors is also exempt from Category D licensing. The original license fee is $100; the renewal fee is $70. Persons with certain licenses issued [Additionally, master or journeyman plumbers who are licensed] by the Texas State Board of Plumbing Examiners or [persons who are licensed with a Class A or B Air Conditioning and Refrigeration Contractors License issued by the Texas Department of Licensing and Regulation may register with AFSD [AFRED] as described in §9.13 of this title (relating to General Installers and Repairman Exemption). The initial registration fee is $50; the renewal registration fee is $20.

(7) [(5)] A Category E license for retail and wholesale dealers authorizes the storage, sale, transportation, and distribution of LP-gas at retail and wholesale dealers, and all other activities included in this section, except the manufacture, fabrication, assembly, repair, subframing, and testing of LP-gas containers, and except the sale and installation of LP-gas motor or mobile fuel systems that service an engine with a rating of more than 25 horsepower. The original license fee is $750; the renewal fee is $300.

(8) [(6)] A Category F license for cylinder filling authorizes the operation of a cylinder filling facility, including cylinder filling, the sale of LP-gas in cylinders, and the replacement of cylinder valves. The original license fee is $100; the renewal fee is $50.

(9) [(2)] A Category G license for dispensing stations authorizes the operation of LP-gas dispensing stations filling ASME containers designed for motor or mobile fuel. The original license fee is $100; the renewal fee is $50.

(10) [(9)] A Category H license for cylinder dealers authorizes the transportation and sale of LP-gas in cylinders. The original license fee is $1,000; the renewal fee is $300.

(11) [(9)] A Category I license for service stations and cylinder filling authorizes any [service station and] cylinder activity set out in Category F and dispensing station operations set out in paragraph (9) [(9)] [(6)] [(3)] [(3)] of this subsection. A Category I license does not authorize the transportation of LP-gas. [(section)] The original license fee is $150; the renewal fee is $70.

(12) [(4)] A Category J license for service stations and cylinder facilities authorizes the operation of a cylinder filling facility,
including cylinder filling and the sale, transportation, installation, and connection of LP-gas in cylinders, the replacement of cylinder valves, and the operation of an LP-gas service station as set out in Category G. The original license fee is $1,000; the renewal is $300.

13. A Category K license for distribution systems authorizes the sale and distribution of LP-gas through mains or pipes, and the installation and repair of LP-gas systems. The original license fee is $1,000; the renewal is $300.

14. A Category L license for engine and mobile fuel authorizes the sale and installation of LP-gas motor or mobile fuel containers, and the sale and installation of LP-gas motor or mobile fuel systems. The original license fee is $100; the renewal is $50.

15. A Category M license for recreational vehicle installers and repairmen authorizes the sale, service, and installation of recreational vehicle containers, and the installation, repair, and service of recreational vehicle appliances, piping, and LP-gas systems, including recreational vehicle motor or mobile fuel systems and containers. The original license fee is $100; the renewal is $70.

16. A Category N license for manufactured housing installers and repairmen authorizes the service and installation of containers that supply fuel to manufactured housing, and the installation, repair, and service of appliances and piping systems for manufactured housing. The original license fee is $100; the renewal is $70.

17. A Category O license for testing laboratories authorizes the testing of LP-gas containers, LP-gas motor fuel systems or mobile fuel systems, transfer systems, and transport systems for the purpose of determining the safety of the containers or systems for LP-gas service, including the necessary installation, disconnection, reconnection, testing, and repair of LP-gas motor fuel systems or mobile fuel systems, transfer systems, and transport systems involved in the testing of containers. The original license fee is $400; the renewal is $100.

18. A Category P license for portable cylinder exchange authorizes the operation of a portable cylinder exchange service, where the sale of LP-gas is within a portable cylinder with an LP-gas capacity not to exceed 21 pounds, where the portable cylinders are not filled on site, and where no other LP-gas activity requiring a license is conducted. The original license fee is $100; the renewal fee is $50.

19. A military service member, military veteran, or military spouse shall be exempt from the original license fee pursuant to the requirements in §9.14 of this title (relating to Military Fee Exemption). An individual who receives a military fee exemption is not exempt from renewal or transport registration fees specified in §9.7 and §9.202 of this title (relating to Applications for Licenses, Manufacturer Registrations, and Renewals [Application for License and License Renewal Requirements]; and Registration and Transfer of LP-Gas Transports or Container Delivery Units, respectively).

20. A container manufacturer registration authorizes the manufacture, assembly, repair, testing and sale of LP-gas containers. The original registration fee is $1,000; the renewal fee is $600.

§9.7. Applications for Licenses, Manufacturer Registrations, and Renewals [Application for License and License Renewal Requirements].

(a) In addition to complying with NFPA 54 §4.1, no person may engage in any LP-gas activity until that person has obtained a license from the Commission authorizing the LP-gas activities, except as follows:

1. A person is exempt from licensing under Texas Natural Resources Code §113.081(b) but is required to obtain a license before engaging in any LP-gas activities in commerce or in business.

2. A state agency or institution, county, municipality, school district, or other governmental subdivision is exempt from licensing requirements as provided in §113.081(g) if the entity is performing LP-gas activities on its own behalf but is required to obtain a license if performing LP-gas activities for or on behalf of a second party.

3. An original manufacturer of a new motor vehicle powered by LP-gas, or a subcontractor of a manufacturer who produces a new LP-gas powered motor vehicle for the manufacturer is not subject to licensing requirements but shall comply with all other rules in this chapter.

4. An ultimate consumer is not subject to licensing requirements if performing LP-gas activities dealing only with the ultimate consumer; however, a license is required to register a transport, bobtail, or cylinder delivery unit. An ultimate consumer's license does not require a fee or a company representative.

(b) An applicant for license shall not engage in any LP-gas activities until it has employed a company representative who meets the requirements of §9.17 of this title (relating to Designation and Responsibilities of Company Representatives and Operations Supervisors), or for Category D applicants only, who meets the requirements of §9.17 of this title or has obtained a General Installers and Repairman Exemption as specified in §9.13 of this title (relating to General Installers and Repairman Exemption).

[c] [a] No person shall perform work, directly supervise LP-gas activities, or be employed in any capacity requiring contact with LP-gas unless:

[E] [f] that individual has taken and passed any applicable rules examination specified in §9.10 of this title (relating to Rules Examination) and in §9.17 of this title (relating to Designation and Responsibilities of Company Representatives and Operations Supervisors);

2. the individual is in compliance with the training and continuing education requirements beginning in §9.51 of this title (relating to General Requirements for Training and Continuing Education), except for a trainee described in §9.12 of this title (relating to Trainees);

3. prior to performing authorized LP-gas activities in Texas, the individual is employed by a licensee or by a license-exempt entity, such as a political subdivision or a state agency; or

4. the individual holds a current examination exemption certificate pursuant to §9.13 of this title (relating to General Installers and Repairman Exemption) and is therefore exempt from the requirements of this subsection.

(b) A person exempt from licensing as authorized by Texas Natural Resources Code, §113.081(b), shall not engage in any LP-gas activities in commerce or in business without first obtaining a license.

(c) A state agency or institution, county, municipality, school district, or other governmental subdivision is exempt from licensing requirements as provided in §113.081(g) if the entity is performing work for itself on its own behalf, but is required to be licensed to perform work for or on behalf of a second party.

(d) Licensees, registered manufacturers, company representatives, and operations supervisors at each outlet shall have copies of all current licenses and/or manufacturer registrations and certificates.
[certification cards] for employees at that location available for inspection during regular business hours. In addition, licensees and registered manufacturers shall maintain a current version of the rules in this chapter [LP-Gas Safety Rules] and shall provide access to these rules for [at least one copy to] each company representative and operations supervisor. The rules [copies] shall also be available to employees during business hours.

(d) [§9.202] Licenses and manufacturer registrations issued under this chapter expire one year after issuance at midnight on the last day of the month prior to the month in which they are issued.

(e) If a license or registration expires, the person shall immediately cease LP-gas activities.

(f) An applicant for a new license shall submit to AFS [file with LP-Gas Operations]:

(1) a properly completed LPG Form 1 listing all names under which LP-gas related activities requiring licensing are to be conducted and the applicant’s properly qualified company representative [and, for licensees engaging in LP-gas product activities as defined in Texas Natural Resources Code, §113.081(a)(4), including a 24-hour emergency response telephone number. Any company performing LP-gas activities under an assumed name (“DBA” or “doing business as” name) shall file copies of the assumed name certificates which are required to be filed with the respective county clerk's office and/or the Secretary of State's office with LP-Gas Operations] and the following forms or documents as applicable:

(2) [LPG Form 16 or 16B and any of the following applicable forms:]

(A) LPG Form 1A if the applicant will operate [establish] any outlets pursuant to subsection (g) of this section;

(B) LPG Form 7 and any information requested under §9.202 of this title (relating to Registration and Transfer of LP-Gas Transports or Container Delivery Units) if the applicant intends to register any LP-gas transports or container delivery units;

(C) LPG Form 19 if the applicant will be transferring the operation of an existing bulk plant, service station, cylinder filling, or portable cylinder exchange rack installation from another licensee; [owner or name; and/or]

(D) any form required to comply with §9.26 of this title (relating to Insurance and Self-Insurance Requirements);

(E) a copy of the current certificate of account status if required by §9.21 of this title (relating to Franchise Tax Certification and Assumed Name Certificates); and/or

(F) copies of the assumed name certificates if required by §9.21 of this title; and

(2) payment for all applicable fees. If the applicant submits the payment by mail, the payment shall be in the form of a check or money order. If the applicant pays the applicable fee online, the applicant shall submit a copy of the online receipt via mail, email, or fax.

(3) [pay the following fees:]

(A) the applicable license fee specified in §9.6 of this title (relating to Licenses and Fees);

(B) transport registration fees specified in §9.202 of this title (relating to Registration and Transfer of LP-Gas Transports or Container Delivery Units), if the applicant for license intends to operate a transport or container delivery unit; and]

[(C) the nonrefundable management-level rules examination fee specified in §9.10 of this title (relating to Rules Examination); and]

[(D) the nonrefundable fee for any required training course as specified in §9.51 of this title (relating to General Requirements for Training and Continuing Education).]

(g) A licensee shall submit LPG Form 1A listing all outlets operated by the licensee.

(1) The licensee shall employ at each outlet an operations supervisor who meets the requirements of §9.17 of this title.

(2) Each outlet shall be listed on the licensee's renewal as specified in subsection (i) of this section.

[(g) An applicant for license shall not engage in LP-gas activities governed by the Texas Natural Resources Code, Chapter 113, and the LP-Gas Safety Rules, until he has employed a company representative and/or operations supervisor who has passed the management-level rules examination specified in §9.10 of this title (relating to Rules Examination) with a score of at least 75% and who has completed any required training in §9.51 and §9.52 of this title (relating to General Requirements for Training and Continuing Education; and Training and Continuing Education Courses), or who has obtained a General Installers and Repairman Exemption as specified in §9.13 of this title (relating to General Installers and Repairman Exemption). Company representatives and operations supervisors shall also comply with §9.17 of this title (relating to Designation and Responsibilities of Company Representatives and Operations Supervisors).

(h) A prospective container manufacturer may apply to AFS to manufacture LP-gas containers in the state of Texas. A person shall not engage in the manufacture of LP-gas containers in this state unless that person has obtained a container manufacturer’s registration as specified in this subsection.

(1) Applicants for container manufacturer registration shall file with AFS LPG Form 1M, and any of the following applicable forms or documents:

(A) any form required by §9.26 of this title;

(B) a copy of current certificate of account status if required by §9.21 of this title;

(C) copies of the assumed name certificates if required by §9.21 of this title;

(D) a copy of current DOT authorization. A registered manufacturer shall not continue to operate after the expiration date of the DOT authorization; and/or

(E) a copy of current ASME Code, Section VIII certificate of authorization or "R" certificate. If ASME is unable to issue a renewed certificate of authorization prior to the expiration date, the manufacturer may request in writing an extension of time not to exceed 60 calendar days past the expiration date. The request for extension shall be received by AFS prior to the expiration date of the ASME certificate of authorization referred to in this section, and shall include a letter or statement from ASME that the agency is unable to issue the renewal certificate of authorization prior to expiration and that a temporary extension will be granted for its purposes. A registered manufacturer shall not continue to operate after the expiration date of an ASME certificate of authorization until the manufacturer files a current ASME certificate of authorization with AFS or AFS grants a temporary exception.

(2) By filing LPG Form 1M, the applicant certifies that it has read the requirements of this chapter and shall comply with all applicable rules, regulations and adopted standards.
(3) The required fee shall accompany LPG Form 1M. An original registration fee is $1,000; the renewal fee is $600.

(A) If submitted by mail, payment shall be by check, money order, or printed copy of an online receipt.

(B) If submitted by email or fax, payment shall be a copy of an online receipt.

(4) If a manufacturer registration expires or lapses, the person shall immediately cease the manufacture, assembly, repair, testing and sale of LP-gas containers in Texas.

(i) AFS will review an application for license or registration to verify all requirements have been met.

(1) If errors are found or information is missing on the application or other documents, AFS will notify the applicant of the deficiencies in writing.

(2) The applicant must respond with the required information and/or documentation within 30 days of the written notice. Failure to respond by the deadline will result in withdrawal of the application.

(3) If all requirements have been met, AFS will issue the license or manufacturer registration and send the license or registration to the licensee or manufacturer, as applicable.

(1) [4a] For license and manufacturer registration renewals,[j]

(A) AFS [LP-Gas Operations] shall notify the licensee or registered manufacturer in writing at the address on file with AFS [LP-Gas Operations] of the impending license or manufacturer registration expiration at least 30 calendar days before the date the [a person's] license or registration is scheduled to expire.

(2) The renewal notice shall include copies of applicable LPG Forms 1, 1A, and 7, or LPG Form 1M [whichever are applicable] showing the information currently on file.

(3) The licensee or registered manufacturer shall review and return all renewal documentation [Renewals shall be submitted] to AFS [LP-Gas Operations] with any necessary changes clearly marked on the forms. The licensee or registered manufacturer shall submit any applicable fees with the renewal documentation. [Licences engaging in LP-gas product activities as defined in Texas Natural Resources Code, §113.081(a)(4), shall include on LPG Form 1 a 24-hour emergency response telephone number, if not previously submitted, along with the license renewal fee specified in §9.6 of this title (relating to Licenses and Fees) and any applicable transport registration fee specified in §9.202 of this title (relating to Registration and Transfer of LP-Gas Transports or Container Delivery Units) on or before the last day of the month in which the license expires in order for the licensee to continue LP-gas activities.]

(4) Failure to meet the renewal deadline set forth in this section shall result in expiration of the license or manufacturer registration.

(5) If a person's license or manufacturer registration expires, that person shall immediately cease performance of any LP-gas activities authorized by the license or registration.

(6) If a person's license or manufacturer registration has been expired for 90 calendar days or fewer, the person shall submit a renewal fee that is equal to 1 1/2 times the renewal fee in §9.6 of this title (relating to License Categories, Container Manufacturer Registration, and Fees).

(7) If a person's license or manufacturer registration has been expired for more than 90 calendar days but less than one year, the person shall submit a renewal fee that is equal to two times the renewal fee.

(8) If a person's license or manufacturer registration has been expired for one year or more, that person shall not renew but shall comply with the requirements for issuance of an original license or manufacturer registration under subsection (f) or (h) of this section.

(9) After verification that[i] the licensee or registered manufacturer has met all [other] requirements for licensing or manufacturer registration, AFS [LP-Gas Operations] shall renew the license or registration and send the applicable authorization to the licensee or manufacturer,[i] and the person may resume LP-gas activities.

(1) If a person's license has been expired for 90 calendar days or fewer, the person shall submit a renewal fee that is equal to 1 1/2 times the renewal fee required by §9.6 of this title. Upon receipt of the renewal fee, LP-Gas Operations shall verify that the person's license has not been suspended, revoked, or expired for more than one year. After verification, if the licensee has met all other requirements for licensing, LP-Gas Operations shall renew the license, and the person may resume LP-gas activities.

(2) If a person's license has been expired for more than 90 calendar days but less than one year, the person shall submit a renewal fee that is equal to two times the renewal fee required by §9.6 of this title. Upon receipt of the renewal fee, LP-Gas Operations shall verify that the person's license has not been suspended, revoked, or expired for more than one year. After verification, if the licensee has met all other requirements for licensing, LP-Gas Operations shall renew the license, and the person may resume LP-gas activities.

(3) If a person's license has been expired for one year or more, that person shall not renew, but shall comply with the requirements for issuance of an original license.

(k) [44] A person who was licensed in this state, moved to another state, and is currently licensed and has been in practice in the other state for the two years preceding the date of application may obtain a new license without reexamination. The person shall pay to AFS [LP-Gas Operations] a fee that is equal to two times the license renewal fee required by §9.6 of this title.

(1) [4a] As a prerequisite to licensing pursuant to this provision, the person shall submit, in addition to an application for licensing, proof of having been in practice and licensed in good standing in another state continuously for the two years immediately preceding the filing of the application;

(2) [4a] A person licensed under this provision shall be required to comply with all requirements of licensing other than the examination requirement, including but not limited to the insurance requirements as specified in §9.26 of this title [relating to Insurance Requirements] and the continuing education and training requirements as specified in §9.51 of this title (relating to General Requirements for LP-Gas Training and Continuing Education), and §9.52 of this title [relating to Training and Continuing Education].

(l) [4a] Applicants for license or license renewal in the following categories shall comply with these additional requirements:

(1) [4a] An applicant for a Category A license or renewal shall file with LP-Gas Operations for each of its outlets legible copies of:

[A] its current Department of Transportation (DOT) authorization. A licensee shall not continue to operate after the expiration date of the DOT authorization, and/or

[B] its current American Society of Mechanical Engineers (ASME) Code, Section VIII certificate of authorization;]

(a) In addition to complying with NFPA 58, §§4.4 and 11.2, no person shall perform work, directly supervise LP-gas activities, or be employed in any capacity requiring contact with LP-gas unless:

(1) that individual is a certificate holder who is:

(A) in compliance with all applicable training and continuing education requirements in §9.51 and §9.52 of this title (relating to General Requirements for LP-Gas Training and Continuing Education, and Training and Continuing Education, respectively); and

(B) in compliance with renewal requirements in §9.9 of this title (relating to Requirements for Certificate Holder Renewal); and

(C) employed by a licensee or a license-exempt entity in accordance with §9.7 of this title (relating to Applications for Licenses, Manufacturer Registrations, and Renewals) or holds a current examination exemption pursuant to §9.13 of this title (relating to General Installers and Repairman Exemption); or

(2) that individual is a trainee who complies with §9.12 of this title (relating to Trainees).

(b) Any individual, including an ultimate consumer, using an LP-gas transport on a public roadway must obtain a certificate.

(c) [(a)] An applicant for a new certificate shall:

(1) file with AFS [AFRED] a properly completed LPG Form 16 and the applicable nonrefundable rules examination fee specified in §9.10 of this title (relating to Rules Examination);

(2) pass the applicable rules examination with a score of at least 75%; and

(3) complete any required training and/or AFT in §9.51 and §9.52 of this title [(relating to General Requirements for Training and Continuing Education; and Training and Continuing Education Courses)]

(d) [(b)] An individual who holds an employee-level certificate who wishes to obtain a management-level certificate shall comply with the requirements of this section, including training and fees.


(a) [Active status.] In order to maintain active status, certificate holders shall renew their certificate annually as specified in [comply with the applicable continuing education requirements in] this section.

(b) AFS [Certificate renewal date. AFRED] shall notify licensees of any of their employees’ pending renewal deadlines [renewals] and shall notify the individual if not employed by a licensee, in writing, at the address on file with AFS [AFRED] no later than March 15 of a year for the May 31 renewal date of that year.

(c) Certificate holders shall remit the nonrefundable $35 annual certificate renewal fee to AFS [AFRED] on or before May 31 of each year. Individuals who hold more than one certificate shall pay only one annual renewal fee.

(1) Failure to pay the nonrefundable annual renewal fee by the deadline shall result in a lapsed certificate [certification].

(A) To renew a lapsed certificate [certification], the individual shall pay the nonrefundable $35 annual renewal fee plus a nonrefundable $20 late-filing fee. Failure to do so shall result in the expiration of the certificate.

(B) If an individual’s certificate lapses or [a person's certification] expires, that individual [person] shall immediately cease performance of any LP-gas activities authorized by the certificate [certification].

(C) If an individual’s certificate has been expired for more than two years from May 31 of the year in which the certificate [certification] lapsed, that individual shall comply with the requirements in §9.8 of this title (relating to Requirements and Application for New Certificate) or §9.13 of this title [for a new certificate].

(2) Upon receipt of the annual renewal fee and any late-filing fee, AFS [penalty, AFRED] shall verify that all applicable requirements have been met [the individual's certification has not been suspended, revoked, or expired for more than two years]. After verification, AFS [AFRED] shall renew the certificate and send a copy of the certificate, or exemption card, if applicable, [certification] and the individual may continue or resume LP-gas activities authorized by that certificate [certification].

(d) [Continuing education.] Certificate holders shall successfully complete the continuing education requirements as specified in §9.51 and §9.52 of this title (relating to General Requirements for LP-Gas Training and Continuing Education, and Training and Continuing Education Courses) to maintain active status [Courses]).

(1) Failure to comply with the continuing education requirements by the assigned deadline shall result in a lapsed certificate [certification].

(2) If a certificate [certification] lapses as specified in paragraph (1) of this subsection, the individual shall pay the $20 late fee.

(3) If an individual’s certificate lapses or expires, that individual shall immediately cease performance of any LP-gas activities authorized by the certificate.

(4) If an individual’s certificate has been expired for more than two years, that individual shall comply with the requirements in §9.8 or §9.13 of this title.

(e) Individuals renewing a certificate under §9.13 of this title must maintain a valid master or journeyman plumbers license or Class A or B Air Conditioning and Refrigeration Contractors license to renew their Commission certificate.

(f) Individuals renewing a certificate issued through reciprocal agreement under §9.18 of this title (relating to Reciprocal Examination Agreement with Other States) must maintain a valid certification in the state of original certification to renew their Commission certificate.

§9.10. Rules Examination.

(a) An individual who passes the applicable rules examination with a score of at least 75% will become a certificate holder. AFS will send a certificate to the licensee listed on LPG Form 16. If a licensee is not listed on the form, AFS will send the certificate to the individual's personal address.
(1) Successful completion of any examination shall be credited to and accrue to the individual.

(2) An individual who has been issued a certificate shall make the certificate readily available and shall present it to any Commission employee or agent who requests proof of certification.

(b) An applicant for examination shall bring to the exam site:

(1) a completed LPG Form 16; and

(2) payment of the applicable fee specified in subsection (c) of this section.

(c) An [in addition to complying with NFPA §§4.4 and 11-2, an] individual who files LPG Form 16 and pays the applicable nonrefundable examination fee may take the rules examination [at the Commission's AFRED Training Center, 6506 Bolm Road, Austin, Texas, between the hours of 8:00 a.m. and 12:00 noon, Monday through Friday, except for state holidays, and at other designated times and locations around the state. Tuesdays and Thursdays are the preferred days for examinations at the AFRED Training Center].

(1) Dates and locations of available Commission LP-gas examinations may be obtained in the Austin offices of AFS [AFRED] and on the Commission's web site, and shall be updated at least monthly. Examinations may [shall] be conducted at the Commission's AFS Training Center in Austin, between the hours of 8:00 a.m. and 12:00 noon, Monday through Friday, except for state holidays, and at other designated times and [in Austin and in other] locations around the state. Individuals or companies may request in writing that examinations be given in their area. AFS [AFRED] shall schedule its examinations and locations at its discretion.

(2) Except in a case where a conditional qualification has been requested in writing and approved under §9.17(g) of this title (relating to Designation and Responsibilities of Company Representatives and Operations Supervisors), the Category E, F, G, I, and J management-level rules examination shall be administered only in conjunction with the Category E, F, G, I, and J management-level courses of instruction. Management-level rules examinations other than Category E, F, G, I, and J may be administered on any scheduled examination day.

(3) The Commission may not issue a certification card to an applicant for a management-level certificate that requires completion of a course of instruction until the applicant completes both the required course of instruction and passes the required management-level rules examination.

(4) An applicant for a management-level certificate shall pass the management-level rules examination within two years after completing a required course of instruction. An applicant who fails to pass such an examination within two years of completing such a course shall reapply as a new applicant.

(5) Exam fees.

(A) The nonrefundable management-level rules examination fee [(for company representatives and operations supervisors)] is $70.

(B) The nonrefundable employee-level rules examination fee [(for employees other than company representatives or operations supervisors)] is $40.

(C) The nonrefundable examination fee shall be paid each time an individual takes an [wishes to take the] examination.

(D) Individuals who register and pay for a Category E, F, G, I, or J training course as specified in §9.51(j)(2)(A) [§9.51(f)(2)(A)] of this title (relating to General Requirements for LP-Gas Training and Continuing Education) shall pay the charge specified for the applicable examination.

(E) A military service member, military veteran, or military spouse shall be exempt from the examination fee pursuant to the requirements in §9.14 of this title (relating to Military Fee Exemption). An individual who receives a military fee exemption is not exempt from renewal, training, or continuing education fees specified in §9.9 of this title (relating to Requirements for Certificate Holder Renewal, §9.51 of this title, and §9.52 of this title (relating to Training and Continuing Education §§9.9, 9.51, and 9.52 of this title (relating to Requirements for Certificate Renewal; General Requirements for LP-Gas Training and Continuing Education; and Training and Continuing Education Courses, respectively)].

(4) Time limits.

(A) An [Effective June 1, 2008, an] applicant shall complete the examination within the time limit specified in this paragraph.

(i) The Category E management-level (closed book), Bobtail employee-level (open book), and Service and Installation employee-level (open book) examinations shall be limited to three hours.

(ii) All other [categories of] management-level [examinations] and [all other] employee-level examinations shall be limited to two hours.

(B) The examination proctor shall be the official timekeeper.

(C) An examinee shall submit the examination and the answer sheet to the examination proctor before or at the end of the established time limit for an examination.

(D) The examination proctor shall mark any answer sheet that was not completed within the time limit.


(d) This [Table 1 of this] subsection specifies the examinations offered by the Commission.

(1) Employee-level examinations.

(A) The Bobtail Driver examination qualifies an individual to operate a bobtail or container delivery unit, to perform all of the LP-gas activities authorized by the Transport Driver, DOT Cylinder Filler [Filling], and Motor/Mobile Fuel Filler examinations, and to perform leak checks and pressure tests, light appliances, and adjust regulators and thermocouples. The Bobtail Driver examination does not authorize an individual to connect or disconnect containers, except when performing a pressure test or removing a container from service.

(B) The Transport Driver examination qualifies an individual to operate an LP-gas transport equipped with a container of more than 5,000 gallons water capacity, to load and unload LP-gas, and connect and disconnect transfer hoses. The Transport Driver examination does not authorize an individual to operate a bobtail or to install or repair transport systems.

(C) The On-Road Motor Fuel Technician examination qualifies an individual to install LP-gas motor fuel containers, cylinders, and LP-gas motor fuel systems, and replace container valves on motorized vehicles licensed to operate on public roadways. The On-Road Motor Fuel Technician examination does not authorize an individual to fill LP-gas motor or mobile fuel containers.
(D) The Non-Road Motor Fuel Technician examination qualifies an individual to install LP-gas motor fuel containers, cylinders, and LP-gas motor fuel systems, and replace container valves on vehicles such as industrial forklift trucks and lawnmowers. The Non-Road Motor Fuel Technician examination does not authorize an individual to fill LP-gas motor fuel containers or cylinders.

(E) The Mobile Fuel Technician examination qualifies an individual to install LP-gas mobile fuel containers, cylinders, and LP-gas mobile fuel systems, and replace container valves on mobile fuel equipment such as trailers, catering trucks, mobile kitchens, tar kettles, hot oil units, auxiliary engines and similar equipment. The Mobile Fuel Technician examination does not authorize an individual to fill LP-gas mobile fuel containers or cylinders.

(F) The DOT Cylinder Filler [Filling] examination qualifies an individual to inspect, requalify, fill, disconnect and connect cylinders, including industrial truck cylinders, and to exchange cylinder valves. The DOT Cylinder Filler [Filling] examination does not authorize an individual to fill ASME motor or mobile fuel containers.

(G) The Recreational Vehicle Technician examination qualifies an individual to install LP-gas motor or mobile fuel containers, including cylinders, and to install and repair LP-gas systems on recreational vehicles. The Recreational Vehicle Technician examination does not authorize an individual to fill LP-gas containers.

(H) The Service and Installation Technician examination qualifies an individual to perform all LP-gas activities related to stationary LP-gas systems, including LP-gas containers, appliances, and stationary engines. The Service and Installation Technician examination does not authorize an individual to fill containers or operate an LP-gas transport.

(I) The Appliance Service and Installation Technician examination qualifies an individual to perform all LP-gas activities related to appliances, including installing, repairing and converting appliances, installing and repairing connectors from the appliance gas stop through the venting system, and to perform leak checks on the new or repaired portion of an LP-gas system. The Appliance Service and Installation Technician examination does not authorize an individual to install a container, install or repair piping upstream of and including the appliance gas stop, or to install, repair or adjust regulators.

(J) The Motor/Mobile Fuel Filler [Dispensing] examination qualifies an individual to inspect and fill motor or mobile fuel containers on vehicles, including recreational vehicles, cars, trucks, and buses. The Motor/Mobile Fuel Filler [Dispensing] examination does not authorize an individual to fill LP-gas cylinders or ASME stationary containers.

(2) Management-level examinations.

(A) The Category A examination qualifies an individual to assemble, repair, install, subframe, test, and sell both ASME and DOT containers and cylinders, including motor or mobile fuel containers and systems, and to repair and install transport and transfer systems.

(B) The Category A-1 examination qualifies an individual to assemble, repair, install, test, and sell ASME containers, including motor or mobile fuel containers and systems, and to repair and install transport and transfer systems.

(C) The Category A-2 examination qualifies an individual to assemble, repair, install, subframe, test, and sell DOT cylinders.

(D) The Category B examination qualifies an individual to subframe, test, and sell transport containers; test LP-gas storage containers; install, test, and sell LP-gas motor or mobile fuel containers and systems; and install and repair transport systems and motor or mobile fuel systems.

(E) The Category C examination qualifies an individual to transport LP-gas in a transport equipped with one or more containers, load and unload LP-gas, and install and repair transport systems.

(F) The Category D examination qualifies an individual to sell, service, and install containers, and to service, install, and repair piping and appliances, excluding motor fuel containers, motor fuel systems, recreational vehicle containers, or recreational vehicle systems.

(G) The Category E examination qualifies an individual to store, sell, transport and distribute LP-gas and perform all other categories of licensed activities except the manufacture, fabrication, assembly, repair, subframing, and testing of LP-gas containers and the sale and installation of LP-gas motor or mobile fuel systems rated at more than 25 horsepower.

(H) The Category F examination qualifies an individual to operate a cylinder-filling facility, including cylinder filling, the sale of LP-gas in cylinders, and the replacement of cylinder valves.

(I) The Category G examination qualifies an individual to operate an LP-gas dispensing station to fill ASME motor or mobile fuel containers.

(J) The Category H examination qualifies an individual to transport and sell LP-gas in cylinders.

(K) The Category I examination qualifies an individual to operate a service station as set out in Category F and G.

(L) The Category J examination qualifies an individual to operate a service station as set out in Category I, transport cylinders as set out in Category H and install and connect DOT cylinders.

(M) The Category K examination qualifies an individual to sell and distribute LP-gas through mains or pipes, and to install and repair LP-gas systems.

(N) The Category L examination qualifies an individual to sell and install both LP-gas motor or mobile fuel containers and fuel systems on engines.

(O) The Category M examination qualifies an individual to sell, service, and install recreational vehicle containers, and to install, repair, and service recreational vehicle appliances, piping, and LP-gas systems, including recreational vehicle motor or mobile fuel systems and containers.

(P) The Category N examination qualifies an individual to service and install containers that supply fuel to manufactured housing, and to install, repair, and service appliances and piping systems for manufactured housing.

(Q) The Category O examination qualifies an individual to test LP-gas containers, motor or mobile fuel systems, transfer systems, and transport systems to determine the safety of the containers or systems for LP-gas service, including the necessary installation, disconnection, reconnection, testing, and repair of LP-gas motor fuel systems or mobile fuel systems, transfer systems, and transport systems involved in the testing of containers.

(R) The Category P examination qualifies an individual to operate a portable cylinder exchange service where LP-gas is sold in portable cylinders whose LP-gas capacity does not exceed 21 pounds, where the portable cylinders are not filled on site, and where no other LP-gas activity requiring a license is conducted.
(c) Within 15 calendar days of the date an individual takes an examination, AFS [AFRED] shall notify the individual of the results of the examination.

(d) If the examination is graded or reviewed by a testing service, AFS [AFRED] shall notify the individual of the examination results within 14 days of the date AFS [AFRED] receives the results from the testing service. If the notice of the examination results will be delayed for longer than 90 days after the examination date, AFS [AFRED] shall notify the individual of the reason for the delay before the 90th day. AFS [AFRED] may require a testing service to notify an individual of the individual's examination results.

(2) Successful completion of any required examination shall be credited to and accrue to the individual.

(3) An individual who has been issued a certification card shall make the card readily available and shall present the card to any Commission employee or agent who requests proof of certification.

(f) [4f] Failure of any examination shall immediately disqualify the individual from performing any LP-gas related activities covered by the examination which is failed, except for activities covered by a separate examination which the individual has passed. If requested by an individual who failed the examination, AFS [AFRED] shall furnish the individual with an analysis of the individual's performance on the examination.

(1) Any individual who fails an examination administered by the Commission [only] at the Austin location may retake the same examination [only] one additional time during a business day.

(2) Any subsequent examination shall be taken on another business day, unless approved by the AFS [AFRED] director.

(3) An individual who fails an examination may request an analysis of the individual's performance on the examination.

(g) The Commission shall not issue a certificate to an applicant for a management-level certificate that requires completion of a course of instruction until the applicant completes both the required course of instruction and passes the required management-level rules examination.

(h) An applicant for a management-level certificate shall pass the management-level rules examination within two years after completing a required course of instruction. An applicant who fails to pass such an examination within two years of completing such a course shall reapply as a new applicant.

§9.11. Transfer of Employees [Previously Certified Individuals].

(a) A licensee or an ultimate consumer, or a state agency, county, municipality, school district, or other governmental subdivision shall notify AFS [AFRED] when a certificate holder or individual with an examination exemption [certified individual] is hired by filing LPG Form 16A and a nonrefundable $10 fee with AFS [AFRED] within 10 calendar days, or in lieu of LPG Form 16A, submits [that form, the $10 fee and a written notice including:

(1) the employee's name as recorded with the Commission; and
(2) the last four digits of the employee's social security number; names of the newly-hired certified employee's previous and new employers, and types of LP-gas work to be performed by the newly-hired certified employee. A state agency, county, municipality, school district, or other governmental subdivision is exempt from this subsection if such entity chooses not to certify its employees who perform LP-gas activities.

(b) Upon approval of the documents submitted under subsection (a) of this section and verification of the individual's active status, AFS will send a copy of the certificate or exemption card to the new employer.


(i) A licensee or ultimate consumer may employ an individual as a trainee for a period not to exceed 45 calendar days without that individual having successfully completed the rules examination as specified in §9.10 of this title (regarding Rules Examination) or registered as specified in §9.13 of this title (regarding to General Installers and Repairman Exemption) subject to the following conditions.

(1) The trainee shall be directly and individually supervised at all times by an individual who has successfully completed the Commission's rules examination for the areas of work being performed by the trainee.

(2) A trainee who successfully completes the rules examination shall comply with the training requirements for a new certificate in §9.51 and §9.52 of this title (regarding to General Requirements for LP-Gas Training and Continuing Education; and Training and Continuing Education [Courses]).

(3) A trainee who fails the rules examination shall immediately cease to perform any LP-gas related activities covered by the examination failed.

(4) A trainee who has been in training for a total period of 45 calendar days, in any combination and with any number of employers, shall cease to perform any LP-gas activities for which he or she is not currently certified.


(a) Any individual who is currently licensed as a master or journeyman plumber by the Texas State Board of Plumbing Examiners or who is currently licensed with a Class A or B Air Conditioning and Refrigeration Contractors License issued by the Texas Department of Licensing and Regulation may register with AFS [AFRED] and be granted an exemption to the Category D licensing and examination requirements (including insurance, and training and continuing education) provided the applicant:

(1) (No change.)

(2) submits a legible copy [photocopy] of a current Air Conditioning and Refrigeration Contractor or Master or Journeyman Plumbers certificate;

(3) submits a legible copy [photocopy] of a picture state-issued identification card or driver's license;

(4) (No change.)

(b) This exemption does not become effective until the exemption card [registration/examination exemption certificate] is issued by AFS [AFRED].

(c) The [registration/examination] exemption accrues to the individual and is nontransferable.

(d) (No change.)

(e) In order to maintain an exemption, each individual issued an exemption card must maintain a valid master or journeyman plumbers license or Class A or B Air Conditioning and Refrigeration Contractors license. Each individual [a registration/examination exemption certificate] shall also pay a $20 annual renewal fee to AFS [AFRED] on or before May 31 of each year. Failure to pay the annual renewal fee by May 31 shall result in a lapsed exemption.
If an individual's exemption lapses, that individual shall cease all LP-gas activities until the exemption has been renewed. To renew a lapse exemption, the applicant shall pay the $20 annual renewal fee plus a $20 late-filing fee. Failure to do so shall result in the expiration of the [registration/examination] exemption. If an individual's [registration/examination] exemption has been expired for more than two years, that individual shall complete all requirements necessary to apply for a new exemption.

(f) Any individual who is issued an exemption under this section agrees to comply with the current edition of the rules in this chapter [LP-Gas Safety Rules]. In the event the exempt individual surrenders, fails to renew, or has the license [licensed] revoked either by the Texas State Board of Plumbing Examiners or the Texas Department of Licensing and Regulation, that individual shall immediately cease performing any LP-gas activities granted by this section. [The exemption certificate shall be returned immediately to AFRED and all rights and privileges surrendered.]

(g) A military service member, military veteran, or military spouse shall be exempt from the original registration fee pursuant to the requirements in §9.14 of this title (relating to Military Fee Exemption). An individual who receives a military fee exemption is not exempt from renewal fees specified in §9.9 of this title [(relating to Requirements for Certificate Renewal)].


(a) - (d) (No change.)

(e) A military service member, military veteran, or military spouse who receives a military fee exemption is not exempt from, and may not use this section to circumvent, the requirements in this chapter to obtain a license or become certified by examination, including training requirements; license or certification renewal requirements, including training or continuing education courses [classes] or fees; or any transport registration requirements or fees.


(a) Policy. Improved safety and environmental protection are the desired outcomes of any enforcement action. Encouraging licensees, certificate holders, registered manufacturers, and other registrants to take appropriate voluntary corrective and future protective actions once a violation has occurred is an effective component of the enforcement process. Deterrence of violations through penalty assessments is also a necessary and effective component of the enforcement process. A rule-based enforcement penalty guideline to evaluate and rank LP-gas-related violations is consistent with the central goal of the Commission's enforcement efforts to promote compliance. Penalty guidelines set forth in this section will provide a framework for more uniform and equitable assessment of penalties throughout the state, while also enhancing the integrity of the Commission's enforcement program.

(b) Guidelines [Only guidelines]. This section complies with the requirements of Texas Natural Resources Code, §81.0531. The penalty amounts contained in the tables in this section are provided solely as guidelines to be considered by the Commission in determining the amount of administrative penalties for violations of Texas Natural Resources Code, Chapter 113, relating to LP-gas safety; of rules, orders, licenses, registrations, permits, or certificates relating to LP-gas safety adopted or issued under those provisions; and of regulations, codes, or standards that the Commission has adopted by reference.

(c) Commission authority. The establishment of these penalty guidelines shall in no way limit the Commission's authority and discretion to assess administrative penalties. The typical minimum penalties listed in this section are for the most common violations cited; however, this is neither an exclusive nor an exhaustive list of violations that the Commission may cite. The Commission retains full authority and discretion to cite violations of Texas Natural Resources Code, Chapter 113, relating to LP-gas safety; of rules, orders, licenses, registrations, permits, or certificates relating to LP-gas safety adopted or issued under those provisions; and of regulations, codes, or standards that the Commission has adopted by reference, and to assess administrative penalties in any amount up to the statutory maximum when warranted by the facts in any case, regardless of inclusion or omission from this section.

(d) (No change.)

(e) Typical penalties. Regardless of the method by which the typical penalty amount is calculated, the total penalty amount will be within the statutory limit. Typical penalties for violations of Texas Natural Resources Code, Chapter 113, relating to LP-gas safety; of rules, orders, licenses, registrations, permits, or certificates relating to LP-gas safety adopted under those provisions; and of regulations, codes, or standards that the Commission has adopted by reference, are set forth in Table 1.

Figure: 16 TAC §9.15(e)
[Figure: 16 TAC §9.15(e)]

(f) - (j) (No change.)

(k) Penalty calculation worksheet. The penalty calculation worksheet shown in Table 5 lists the typical penalty amounts for certain violations, the circumstances justifying enhancements of a penalty and the amount of the enhancement, and the circumstances justifying a reduction in a penalty and the amount of the reduction.

Figure: 16 TAC §9.15(k)
[Figure: 16 TAC §9.15(k)]

§9.16. Hearings for Denial, Suspension, or Revocation of Licenses, Manufacturer Registrations, or Certificates.

(a) The Commission may deny, suspend, or revoke a license, registration, or certificate for any person [individual] who fails to comply with the rules in this chapter [LP-Gas Safety Rules].

(1) If AFS [LP-Gas Operations] determines that an applicant for license, manufacturer registration, certificate, or renewal has not met the requirements of the rules in this chapter, AFS [LP-Gas Safety Rules, LP-Gas Operations] shall notify the applicant in writing of the reasons for the proposed denial. In the case of an applicant for license, manufacturer registration, or certificate, the notice shall advise the person that the application may be resubmitted within 30 calendar days of receipt of the denial with all cited deficiencies corrected, or, if the person disagrees with AFS' [LP-Gas Operations'] determination, that person may request in writing a hearing on the matter within 30 calendar days of receipt of the notice of denial.

(2) If a person resubmits the application [for license or license renewal] within 30 calendar days of receipt of the denial with all deficiencies corrected, AFS [LP-Gas Operations] shall issue the license, manufacturer registration, certificate, or [license] renewal as applicable.

(b) Hearing regarding denial of license, manufacturer registration, certificate or associated renewals [license renewal].

(1) An applicant receiving a notice of denial [of a license or license renewal] may request a hearing to determine whether the applicant did comply in all respects with the requirements for the category [or categories of] license, registration, or certificate sought. The request for hearing shall be in writing, shall refer to the specific requirements the applicant claims were met, and shall be submitted to AFS [LP-Gas Operations] within 30 calendar days of the applicant's receipt of the notification of denial.

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(2) Upon receipt of a request complying with paragraph (1) of this subsection, AFS [LP-Gas Operations] shall forward the request for a hearing to the Hearings Division [Office of General Counsel] for the purpose of scheduling a hearing within 30 calendar days following the receipt of the request for hearing to determine the applicant's compliance or noncompliance with applicable requirements [the licensing requirements for the category or categories of license sought].

(3) If, after hearing, the Commission finds the applicant's claim has been supported, the Commission may issue an order approving the license, manufacturer registration, or certificate and AFS shall issue the license, manufacturer registration, certificate, or associated renewal if applicable [it shall enter an order in its records to that effect, noting the category or categories of license for which the applicant is entitled to be licensed; and the license or renewal shall be issued].

(4) If, after hearing, the Commission finds that the applicant does not comply with the requirements of this chapter, the Commission may issue an order denying the application or renewal [is not qualified for the license or license renewal in the category or categories of license sought, it shall likewise enter an order in its records to that effect, and no license or renewal shall be issued to the applicant].

(c) Suspension or revocation of licenses, manufacturer registrations, or certificates [certifications].

(1) If AFS [LP-Gas Operations] finds by means including but not limited to inspection, review of required documents submitted, or complaint by a member of the general public or any other person, a probable or actual violation of or noncompliance with the Texas Natural Resources Code, Chapter 113, or the rules in this chapter, AFS [LP-Gas Safety Rules, LP-Gas Operations] shall notify the licensee, registered manufacturer, or certificate holder [certified person] of the alleged violation or noncompliance in writing.

(2) The notice shall specify the acts, omissions, or conduct constituting the alleged violation or noncompliance and shall designate a date not less than 30 calendar days or more than 45 calendar days after the licensee, registered manufacturer, or certificate holder [certified person] receives the notice by which the violation or noncompliance shall be corrected or discontinued. If AFS [LP-Gas Operations] determines the violation or noncompliance may pose imminent peril to the health, safety, or welfare of the general public, AFS [LP-Gas Operations] may notify the licensee, registered manufacturer, or certificate holder [certified person] orally with instruction to immediately cease the violation or noncompliance. When oral notice is given, AFS [LP-Gas Operations] shall follow it with written notification no later than five business days after the oral notification.

(3) The licensee, registered manufacturer, or certificate holder [certified person] shall either report the correction or discontinuance of the violation or noncompliance within the time frame specified in the notice or shall request an extension of time in which to comply. The request for extension of the time to comply shall be received by LP-Gas Operations within the same time frame specified in the notice for correction or discontinuance.

(d) Hearing regarding suspension or revocation of licenses, manufacturer registrations, and certificates [certifications].

[44] If a licensee, registered manufacturer, or certificate holder [certified person] disagrees with the determination of AFS [LP-Gas Operations] under this section, that person may request a public hearing on the matter to be conducted as specified in Chapter 1 of this title (relating to Practice and Procedure) in compliance with the Texas Government Code, Chapter 2001, et seq., Chapter 4 of this title (relating to Practice and Procedure), and this chapter). The request shall be in writing, shall refer to the specific rules or statutes to which the licensee or certified person claims to have complied with, and shall be received by AFS [LP-Gas Operations] within 30 calendar days of the [licensee's or certified] person's receipt of the notice of violation or noncompliance. AFS [LP-Gas Operations] shall forward the request for hearing to the Hearings Division [Office of General Counsel].

(22) If LP-Gas Operations determines that the licensee or certified person may not comply within the specified time, LP-Gas Operations may call a public hearing to be conducted in compliance with the Texas Government Code, Chapter 2001, et seq., Chapter 1 of this title, and any other applicable rules.) §9.17. Designation and Responsibilities of Company Representatives and Operations Supervisors.

(a) Each licensee shall have at least one company representative for the license and, in the case of a licensee other than a Category P licensee, at least one operations supervisor for each outlet.

(1) A licensee maintaining one or more outlets shall file LPG Form 1 with AFS listing the physical location of the first outlet and [LP-Gas Operations] designating the company representative for the license and [and/or] LPG Form 1A designating the physical location and operations supervisor for each additional outlet.

(2) (No change.)

(3) An individual may be operations supervisor at more than one outlet provided that:

(A) (No change.)

(B) the certified employee's and/or operations supervisor's telephone number is posted at the outlet on a sign with lettering at least 3/4-inch high, visible and legible during normal business hours [at all times]; and

(C) (No change.)

(4) The company representative may also serve as operations supervisor for one or more of the licensee's outlets provided that the individual meets both the company representative and the operations supervisor requirements in this section.

(5) A licensee shall immediately notify AFS [LP-Gas Operations] in writing upon conclusion of employment [termination], for whatever reason, of its company representative or any operations supervisor and shall at the same time designate a replacement [by submitting a new LPG Form 1 for a new company representative or a new LPG Form 1A for a new operations supervisor].

(6) [(A)] A licensee shall cease all LP-gas activities if it no longer employs [a, at the termination of its company representative, there is no other] qualified company representative [of the licensee] who complies [has complied] with the Commission's requirements. A licensee shall not resume LP-gas activities until such time as it has a properly qualified company representative or it has been granted a conditional qualification [an extension of time in which to comply] as specified in subsection (e) [(g)] of this section.

(7) [(B)] A licensee shall cease LP-gas activities at an outlet if it no longer employs [a, at the termination of its operations supervisor for that outlet, there is no other] qualified operations supervisor at that outlet who complies [has complied] with the Commission's requirements. A licensee shall not resume LP-gas activities at that outlet until such time as it has a properly qualified operations supervisor or it has been granted a condition qualification [an extension of time in which to comply] as specified in subsection (e) [(g)] of this section.

(b) Company representative. A company representative shall [comply with the following requirements]:

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(1) be an owner or employee of the licensed entity, in the case of a licensee other than a Category P licensee;

(2) be the licensee's principal individual in authority and, in the case of a licensee other than a Category P licensee, be responsible for actively supervising all LP-gas activities conducted by the licensee, including all appliance, container, portable cylinder, product, and system activities;

(3) have a working knowledge of the licensee's LP-gas activities to ensure [measure] compliance with the rules in this chapter and the Commission's administrative requirements [LP-Gas Safety Rules];

(4) pass the appropriate management-level rules examination [and complete any required training specified in §9.52 of this title (relating to Training and Continuing Education Courses)], or, in the case of an applicant for a Category D license, obtain an exemption [a General Installers and Repairman Exemption] as specified in §9.13 of this title (relating to General Installers and Repairman Exemption);

(5) complete any required training and/or continuing education required in §9.51 and §9.52 of this title (relating to General Requirements for LP-Gas Training and Continuing Education, and Training and Continuing Education, respectively);

6. [(c)] comply with the work experience or training requirements in subsection (c) [(g)] of this section, if applicable;

7. [(d)] be directly responsible for all employees performing their assigned LP-gas activities, unless an operations supervisor is fulfilling this requirement; and

8. [(e)] submit any additional information as deemed necessary by AFS [LP-Gas Operations].

(c) Operations supervisors. An operations supervisor, in the case of a licensee other than a Category P licensee, shall [comply with the following requirements]:

1. be an owner or employee of the licensee;

2. pass the applicable management-level rules examination [and complete any required training specified in §9.52 of this title (relating to Training and Continuing Education Courses)] or, in the case of a Category D license only, obtain an exemption [a General Installers and Repairman Exemption] as specified in §9.13 of this title (relating to General Installers and Repairman Exemption), before commencing or continuing the licensee's LP-gas activities at the outlet; and

3. complete any required training and/or continuing education required in §9.51 and §9.52 of this title; and

4. [(f)] be directly responsible for actively supervising the LP-gas activities of the licensee at the designated outlet.

(d) Category P licensees.

1. The company representative requirement for a Category P licensee may be satisfied by employing a Category E or J company representative if the Category E or J company representative is authorized by the Category P licensee to remove any employee who does not comply with the rules in this chapter or who performs unsafe LP-gas activities.

2. In lieu of an operations supervisor requirement for a Category P license, the Category E or J, or other licensee providing the Category P licensee with portable cylinders for exchange shall be required to:

   A. [(g)] prepare a manual containing, at a minimum, the following:

   i. [(h)] a description of the basic characteristics and properties of LP-gas;

   ii. [(i)] an explanation of the various parts of an LP-gas cylinder, including what the purpose of each part is and how to operate the cylinder valve;

   iii. [(j)] complete instructions on how to properly transport cylinders in vehicles;

   iv. [(k)] a prohibition against moving or installing cylinder cages at any store location;

   v. [(l)] a prohibition against taking or storing inside a building any cylinders that have or have had LP-gas in them;

   vi. [(m)] a requirement that all cylinders containing LP-gas be stored in a manner so that the relief valve is in the vapor space of the cylinder;

   vii. [(n)] a requirement that the employees who handle the cylinders know the location within the store of the manual and know the contents of the manual;

   viii. [(o)] instructions related to any potential hazards that may be specific to a location, including but not limited to the proper distancing of cylinders from combustible materials and sources of ignition;

   ix. [(p)] detailed emergency procedures regarding a leaking cylinder, including all applicable emergency contact numbers;

   x. [(q)] a requirement that any accidents be reported to the Category E or J, or other] licensee who prepares the manual, and detailed procedures for reporting any accidents;

   xi. [(r)] all Commission rules applicable to the Category P licensee, including the requirement that the Category P licensee is responsible for complying with all such rules;

   xii. [(s)] all provisions of Subchapter H ("Enforcement") of Chapter 113 of the Texas Natural Resources Code;

   xiii. [(t)] a detailed description of the training provided to each employee of the Category P licensee who may be engaged in any activities covered by the Category P license; and

   xiv. [(u)] a page for the signatures, printed names and dates of training for each individual trained at each outlet on this manual.

B. [(v)] provide a [copy of the] manual in print or electronic format [for display] at each outlet or location of the Category P licensee; and

C. [(w)] provide training as to the contents of the manual to each employee who may be engaged in any activities covered by the Category P license at all outlets or locations of the Category P licensee and maintain records regarding the employees of the Category P licensee who have been trained.

4. [complete all three requirements of this subsection, for existing Category P licensees, prior to October 25, 2001, and within 45 days of any Category P license obtained on or after September 7, 2001.]

3. [(x)] The Category P licensee shall [be responsible for the following]:

   A. [(y)] ensure [insure] that each employee who is involved with the activities covered by the Category P license is knowledgeable about the contents of the manual and has signed and dated the signature page of the manual; and
(B) [\(\text{\#2}\)] ensure [insuring] that each such employee is aware of the location of the manual and can show the manual to employees of the Commission upon [their] request.

(f) Category P licensees. The company representative requirement for a Category P licensee may be satisfied by employing a Category E, F, G, I, or J company representative or operations supervisor if the applicable management-level rules examination provided that the individual attends and successfully completes the next available Category E, F, G, I, or J management-level training course, or a subsequent Category E, F, G, I, or J management-level training course agreed on by the AFS [AFRED] director and the applicant.

(A) The written request shall include a description of the individual's LP-gas experience and other related information in order that the AFS [AFRED] director may properly evaluate the request.

[If the individual fails to complete the training requirements within the time granted by the AFRED director, the conditional qualification shall immediately be voided and the conditionally qualified company representative or operations supervisor shall immediately cease all LP-gas activities.]

(B) Applicants for company representative or operations supervisor who have less than three years' experience or which is not applicable to the category for which the individual is applying shall not be granted a conditional qualification and shall comply with the training requirements in §9.52 of this title [relating to Training and Continuing Education Courses] prior to AFS [AFRED] issuing a certificate.

(2) If the individual fails to complete the training requirements within the time granted by the AFS director, the conditional qualification shall immediately be voided and the individual shall immediately cease all LP-gas activities granted by the conditional qualification.

\section*{§9.18. Reciprocal Examination Agreements with Other States.}

(a) AFS [AFRED] may accept the examination requirements for LP-gas transport drivers from other states provided that the qualifying state has entered into a reciprocal agreement with Texas as specified in this section.

(b) A state that is interested in a reciprocal agreement with Texas shall provide a copy of its examination used to qualify transport drivers to AFS. AFS [AFRED] shall provide a copy of the Texas examination to the other state's LP-gas authority. The states shall review the materials to ensure that they contain substantially equivalent requirements. If each state accepts the requirements of the other state, both states shall sign the reciprocal agreement.

(1) The reciprocal agreement shall be in the form of a letter on the official letterhead of the state requesting the reciprocal agreement. The letter shall be signed and dated by an official representative of the LP-gas authority in both states. For Texas, the official representative shall be the AFS [AFRED] director.

(2) - (3) (No change.)

(4) AFS [AFRED] shall maintain a current list of all states participating in reciprocal agreements, a list of participating states' applicable fees, and a list of all individuals who have received a reciprocal examination exemption.

(5) (No change.)

(c) Individuals who apply for a reciprocal examination exemption shall pay the applicable fees required by each state in exchange for exemption from examination requirements.

(1) Individuals from other participating states shall remit to AFS [AFRED]

(A) the nonrefundable employee-level rules examination fee; and

(B) the annual certificate renewal fee specified in §9.10 and §9.9 of this title (relating to Rules Examination, and Requirements for Certificate Holder Renewal, respectively).

(2) (No change.)

(d) Applicants for a reciprocal examination exemption shall provide the following information to AFS [AFRED] to verify that they are properly and currently certified in their state:

(1) a state-issued certification card, license, letter, or similar document which shall clearly show a valid date and an indication that the individual passed the examination. Maintaining valid certification in the other state is required for continuing reciprocity in Texas; [and]

(2) a completed LPG Form 16R. Applicants from other states shall provide their Social Security numbers to AFS [AFRED] for purposes of record-keeping and to comply with the requirements in Texas Family Code Annotated §231.302(c) (Vernon 1996), which mandates disclosure of Social Security numbers by applicants to assist in the administration of laws relating to child support. Social Security numbers are subject to or excepted from disclosure to the public in accordance with Texas Government Code, Chapter 552; and []

(3) a copy of the applicant's valid driver's license.

(2) Texas applicants shall provide copies of their Commission-issued wallet certification cards showing their annual certification as their written proof when applying to other states for reciprocal examination exemptions.]

(e) Individuals from other states who apply for a reciprocal examination exemption from Texas shall be employed by a company that is properly and currently licensed in Texas or shall themselves fulfill all other licensing requirements in the rules in this chapter [LP-Gas Safety Rules].

(f) Individuals who obtain reciprocal examination exemptions are liable under the laws and rules of the state in which they perform the LP-gas activities.

(1) - (2) (No change.)

(3) A state may suspend, revoke, or deny a reciprocity renewal or an individual's reciprocal examination exemption, as specified in §9.16 of this title (relating to Hearings for Denial, Suspension, or Revocation of Licenses, Manufacturer Registrations, or Certificates) and shall notify the other state and all individuals holding the reciprocal examination examination within 14 calendar days of such suspension, revocation, or denial.

(g) AFS [Upon the effective date of this section, AFRED] may issue reciprocal examination exemptions only for LP-gas transport driver examinations. For purposes of reciprocal agreements, a "transport" is defined as a cargo tank motor vehicle of more than 5,000 gallons water capacity.
§9.21. Franchise Tax Certification and Assumed Name Certificates.

(a) An applicant for an original or renewal license or registered manufacturer that is a corporation, limited partnership, or limited liability company shall be approved to transact business in Texas by [in good standing with] the Texas Comptroller of Public Accounts [of the State of Texas]. The licensee or registered manufacturer shall provide a copy of the current Certificate of Account Status [Franchise Tax Statement] from the Texas Comptroller of Public Accounts [showing "In Good Standing"].

(b) All applicants for license or manufacturer registration, or their corresponding renewals, shall list on LPG Form 1 or LPG Form 1M all names under which LP-gas related activities requiring licensing or registration as a container manufacturer are to be conducted. Any company performing LP-gas activities under an assumed name ("DBA" or "doing business as" [name]) shall file with AFS copies of the assumed name certificates which are required to be filed with the respective county clerk's office and/or the Secretary of State's Office [secretary of state's office with LP-Gas Operations].

§9.22. Changes in Ownership, Form of Dealership, or Name of Dealership.

(a) Changes in ownership which require a new license or manufacturer registration.

(1) Transfer of dealership or outlet by sale, lease, or gift. The purchaser, lessee, or donee of any dealership or outlet shall have a current and valid license or manufacturer registration authorizing the LP-gas activities to be performed at the dealership or outlet or shall apply for and be issued an LP-gas license or manufacturer registration prior to engaging in any LP-gas activities which require a license or manufacturer registration. The purchaser, lessee, or donee shall notify AFS [LP-Gas Operations] by filing a properly completed LPG Form 1 or LPG Form 1M prior to engaging in any LP-gas activities at that dealership or outlet which require an LP-gas license or manufacturer registration, respectively.

(2) Other changes in ownership. A change in members of a partnership occurs upon the death, withdrawal, expulsion, or addition of a partner. Upon the death of a sole proprietor or partner, [or] the dissolution of a corporation or partnership, [or] any change in the members of a partnership, or other change in ownership that specifically provided for in this section, an authorized representative of the previously existing dealership or of the successor in interest shall notify AFS [LP-Gas Operations] in writing and shall immediately cease all LP-gas activities of the previously existing dealership which require an LP-gas license or manufacturer registration and shall not resume until LP-Gas Operations issues an LP-gas license or manufacturer registration to the successor in interest.

(b) Change in dealership business entity. When a dealership converts from one business entity into a different kind of business entity, the resulting entity shall have a current and valid license or manufacturer registration authorizing the LP-gas activities to be performed or shall apply for and be issued a license or manufacturer registration before engaging in any LP-gas activities which require an LP-gas license or manufacturer registration and shall immediately notify AFS [LP-Gas Operations] in writing of the change in business entity.

(c) Dealership name change. A licensee or registered manufacturer which changes its name shall not be required to obtain a new license or manufacturer registration but shall immediately notify AFS [LP-Gas Operations] as follows prior to engaging in any LP-gas activities under the new name. The licensee or registered manufacturer shall file:

(1) an amended LPG Form 1 or LPG Form 1M; [and, if applicable,]

(2) an amended Form 1A if outlet names will change;

(3) [(2)] a copy of the licensee's or registered manufacturer's business documents reflecting the name change, such as amendments to the articles of incorporation or assumed name filings;

(4) [(3)] certificates of insurance or affidavits in lieu of insurance if [where permitted by §9.26 of this title (relating to Insurance and Self-Insurance Requirements)] or both; and

(5) any other forms required by AFS.

[(4) an amended LPG Form 7 to transfer any LP-gas transportation or container delivery unit, including any fees specified in §9.202 of this title (relating to Registration and Transfer of LP-Gas Transports or Container Delivery Units); and]

[(5) an amended LPG Form 19, if applicable, to specify storage container inventory.]

(d) (No change.)

(e) In the event of a death of a sole proprietor or partner, the AFS [AFRED] director may grant a temporary exception not to exceed 30 calendar days to the examination requirement for company representatives and operations supervisors. An applicant for a temporary exception shall [agree to] comply with [all] applicable safety requirements.


(a) A licensee or registered manufacturer shall not perform any activity authorized by its license or registration under §9.6 of this title (relating to License Categories, Container Manufacturer Registration, and Fees) unless insurance coverage required by this section is in effect. LP-gas licensees, registered manufacturers, or applicants for license or manufacturer registration shall comply with the minimum amounts of insurance specified in Table 1 of this section or with the self-insurance requirements in subsection (i) of this section, if applicable. Registered manufacturers are not eligible for self-insurance. Before AFS grants or renews a manufacturer registration, an applicant for a manufacturer registration shall submit the documents required by paragraph (1) of this subsection. Before AFS [LP-Gas Operations] grants or renews a license, an applicant for a license shall submit either:

Figure: 16 TAC §9.26(a)
[Figure: 16 TAC §9.26(a)]

(1) (No change.)

(2) properly completed documents demonstrating the applicant's compliance with the self-insurance requirements set forth in subsection (j) [ii] of this section.

(b) Each licensee or registered manufacturer shall file LPG Form 999 or other written notice with AFS [LP-Gas Operations] at least 30 calendar days before the cancellation of any insurance coverage. The 30-day period commences on the date the notice is actually received by AFS [LP-Gas Operations].

(c) A licensee or applicant for a license that does not employ or contemplate employing any employee to be engaged in LP-gas related activities in Texas may file LPG Form 996B in lieu of filing a workers' compensation insurance form, including employer's liability insurance, or alternative accident and health insurance coverage. The licensee or applicant for a license shall file the required insurance form with AFS [LP-Gas Operations] before hiring any person as an employee engaged in LP-gas related work.

(d) A licensee, applicant for a license, or an ultimate consumer that does not operate or contemplate operating a motor vehicle equipped with an LP-gas cargo container or does not transport or contemplate transporting LP-gas by vehicle in any manner may file
LPG Form 997B in lieu of a motor vehicle bodily injury and property damage insurance form, if this certificate is not otherwise required. The licensee or applicant for a license shall file the required insurance form with AFS [LP-Gas Operations] before operating a motor vehicle equipped with an L-P-gas cargo container or transporting LP-gas by vehicle in any manner.

(e) A licensee, registered manufacturer, or applicant for a license or manufacturer registration that does not engage in or contemplate engaging in any LP-gas activities [operations] that would be covered by completed operations or products liability insurance, or both, may file LPG Form 998B in lieu of a completed operations and/or products liability insurance form. The licensee, registered manufacturer, or applicant for a license or manufacturer registration shall file the required insurance form with AFS [LP-Gas Operations] before engaging in any operations that require completed operations and/or products liability insurance.

(f) A licensee, registered manufacturer, or applicant for a license or manufacturer registration that does not engage in or contemplate engaging in any operations that would be covered by general liability insurance may file LPG Form 998B in lieu of filing a general liability insurance form. The licensee, registered manufacturer, or applicant for a license or manufacturer registration shall file the required insurance form with AFS [LP-Gas Operations] before engaging in any operations that require general liability insurance.

(g) (No change.)

(h) A state agency or institution, county, municipality, school district, or other governmental subdivision shall meet the requirements of this section for workers' compensation, general liability, and/or motor vehicle liability insurance. The requirements may be met by filing LPG Form 995 with AFS [LP-Gas Operations] as evidence of self-insurance, if permitted by the Texas Labor Code, Title 5, Subtitle C, and Texas Natural Resources Code, §113.097.

(i) Self-insurance requirements.

(1) (No change.)

(2) A licensee or license applicant desiring to self-insure shall file with AFS [LP-Gas Operations] a properly completed LPG Form 28, Notice of Election to Self-Insure [created 11.09] and a properly completed LPG Form 28-A, Bank Declarations Regarding Irrevocable Letter of Credit [created 11.02]. The licensee or license applicant shall attach to the LPG Form 28-A any documentation necessary to show that the bank issuing the irrevocable letter of credit meets the requirements in paragraph (5)(E) of this subsection.

(3) - (5) (No change.)

(6) In addition to the requirements of §9.36 of this title (relating to Report of LP-Gas Incident/Accident), within [Within] 30 days of the occurrence of any incident or accident involving the business activities of a self-insured LP-gas licensee that results in property damage or loss and/or personal injuries, the licensee shall notify AFS [LP-Gas Operations] in writing of the incident. The licensee shall include in the notification a list of the names and addresses of any individuals known to the licensee who may have suffered losses in the incident. The licensee shall also provide written notice to all such individuals of the licensee's status as being self-insured and of the expiration date of the licensee's letter of credit.

(j) Each licensee or registered manufacturer shall promptly notify AFS [LP-Gas Operations] of any change in insurance coverage or insurance carrier by filing a properly completed [revised] Acord™ form; other form approved by the Texas Department of Insurance that has been prepared and signed by the insurance carrier containing all required information; or documents demonstrating the applicant's compliance with the self-insurance requirements set forth in subsection (i) of this section. Failure to promptly notify AFS [LP-Gas Operations] of a change in the status of insurance coverage or insurance carrier may result in an enforcement action and an administrative penalty.

§9.27. Application for an Exception to a Safety Rule.

(a) A person may apply for an exception to the provisions of this chapter by filing LPG Form 25 along with supporting documentation, and a $50 filing fee with AFS [LP-Gas Operations].

(b) The application shall contain the following:

(1) the section number of any [applicable] rules for which an exception is being requested;

(2) the type of relief desired, including the exception requested and any information which may assist AFS [LP-Gas Operations] in comprehending the requested exception;

(3) (No change.)

(4) for all stationary installations, regardless of size, a description of the acreage and/or address upon which the subject of the exception will be located. The description shall be in writing and shall include:

(A) - (B) (No change.)

(C) a plat from the applicable appraisal district indicating the ownership of the land; [and]

(D) the legal authority under which the applicant, if not the owner, is permitted occupancy;[1]

(5) the name, business address, and telephone number of the applicant and of the authorized agent, if any; and

(6) [16] an original signature in ink by the party filing the application or by the authorized representative;

(7) [4] a list of the names and addresses of all interested entities as defined in subsection (c) of this section.

(c) Notice of the application for an exception to a safety rule.

(1) The applicant shall send a copy of LPG Form 25 by certified mail, return receipt requested, or otherwise delivered to all affected entities as specified in paragraphs (2), (3), and (4) of this subsection on the same date on which the form or application is filed with or sent to AFS [LP-Gas Operations]. The applicant shall include a notice to the affected entities that any objection shall be filed with AFS [LP-Gas Operations] within 18 calendar days of postmark or other delivery of the application. The applicant shall file all return receipts with AFS [LP-Gas Operations] as proof of notice.

(2) - (3) (No change.)

(4) AFS [LP-Gas Operations] may require an applicant to give notice to persons in addition to those listed in paragraphs (2) and (3) of this subsection if doing so will not prejudice the rights of any entity.

(d) Objections to the requested exception shall be in writing, filed at AFS [LP-Gas Operations] within 18 calendar days of the postmark of the application, and shall be based on facts that tend to demonstrate that, as proposed, the exception would have an adverse effect on [af] public health, safety, or welfare. AFS [LP-Gas Operations] may decline to consider objections based solely on claims of diminished property or esthetic values in the area.

(e) AFS [LP-Gas Operations] shall review the application within 21 business days of receipt of the application.

If an LP-gas installation, equipment, or appurtenances not specifically covered by the rules in this chapter [LP-Gas Safety Rules] has been or will be installed, AFS may [LP-Gas Operations shall apply and] require a licensee to comply with additional or alternative [any] reasonable safety provisions to ensure the LP-gas installation is safe for LP-gas service. If the affected licensee [entity] disagrees with AFS' requirements [LP-Gas Operations' determination], the licensee [entity] may request a hearing. The installation shall not be placed into LP-gas service [operation] until the Commission has determined that the installation is safe for LP-gas service.

§9.35. Written Procedure for LP-Gas Leaks.

(a) Each [In addition to NFPA 58 §14.4.10.1, each] licensee shall maintain a written procedure to be followed when any employee receives notification of a possible leak. The licensee shall ensure that all employees are familiar with the procedure and shall authorize employees to implement the procedure without management oversight.

The written procedure shall be available to emergency response agencies as specified in NFPA 58, §6.29.2 [§6.25.2 and as stated in Table 1 of §9.403 of this title, (relating to Sections in NFPA 58 Not Adopted by Reference, and Adopted with Changes or Additional Requirements).

(b) - (c) (No change.)


(a) At the earliest practical moment or within two hours following discovery, a licensee owning, operating, or servicing [the equipment or [of] an installation shall notify AFS [LP-Gas Operations] by telephone of any event involving LP-gas which:

1. caused a death or any personal injury requiring hospitalization; [or]

2. required taking an operating facility out of service; [or]

3. resulted in unintentional gas ignition requiring an emergency response; [or]

4. involved the LP-gas installation on any vehicle propelled by or transporting LP-gas; [or]

5. caused an estimated damage to the property of the operator, others, or both totaling $5,000 or more, including gas loss; [or]

6. could reasonably be judged as significant because of rerouting of traffic, evacuation of buildings, or media interest even though it does not meet paragraphs (1) - (5) of this subsection; or

7. (No change.)

(b) The telephonic notice required by this section shall be made to the Railroad Commission's 24-hour emergency line at (512) 463-6788 or 844-773-0305 and shall include the following:

1. name of reporting operator;

2. location of leak or incident;

3. date and time of incident;

4. fatalities and/or personal injuries;

5. phone number of operator;

6. status of incident regarding immediate hazard; and

7. other significant facts relevant to the incident.

(c) Following the initial telephone report, the LP-gas licensee who made the telephone report shall submit a properly completed LPG Form 20 to AFS [LP-Gas Operations]. The report shall be postmarked within 14 calendar days of the date of initial notification to AFS [LP-Gas Operations], or within five business days of receipt of the fire department's report, whichever occurs first, unless AFS [LP-Gas Operations] grants authorization for a longer period of time when additional investigation or information is necessary.

(d) Within five business days of receipt, AFS [LP-Gas Operations] shall review LPG Form 20 and notify in writing the person submitting the LPG Form 20 if the report is incomplete and specify in detail what information is lacking or needed. Incomplete reports may delay the resumption of LP-gas activities at the involved location.

(e) In the case of an accident or incident at a Category P licensee's location, the Category P licensee shall immediately notify the Category E or [if] J or other [licensee who supplies cylinders to the Category P licensee and the Category E or] J or other [licensee shall be responsible for making the accident or incident report to AFS [LP-Gas Operations] as specified in this section.

(a) If AFS [LP-Gas Operations] determines that any LP-gas container or installation constitutes an immediate danger to the public health, safety, and welfare, AFS [LP-Gas Operations] shall require the immediate removal of liquid and vapor LP-gas and/or the immediate disconnection by a properly licensed company to the extent necessary to eliminate the danger. This may include appliances, equipment, or any part of the system including the servicing container. A warning tag shall be installed by AFS [LP-Gas Operations] until the unsafe condition is remedied. Once the unsafe condition is corrected, the tag may be removed if authorized by AFS [LP-Gas Operations].

(b) If AFS [LP-Gas Operations] determines that any LP-gas container or installation does not comply with the Texas Natural Resources Code, Chapter 113, or the rules in this chapter [LP-Gas Safety Rules], but does not constitute an immediate danger to the public health, safety, and welfare, AFS [LP-Gas Operations] shall take action to ensure that the container or installation comes into compliance as soon as practicable. AFS [LP-Gas Operations] action may include the placement of a warning tag. Once the container or installation complies with Texas Natural Resources Code, Chapter 113, and the rules in this chapter, AFS [LP-Gas Safety Rules, LP-Gas Operations] may remove or delegate the removal of the warning tag.

(c) If the affected entity disagrees with the removal from service and/or placement of a warning tag, the entity may request a review of AFS' [LP-Gas Operations] decision within 10 calendar days. AFS [LP-Gas Operations] shall notify such entity of its finding, in writing, stating the deficiencies, within 10 business days. If the entity disagrees, the entity may request or AFS [LP-Gas Operations] on its own motion may call a hearing. Such installation shall be brought into compliance or removed from service until such time as the final decision is rendered by the Commission.


(a) A person may report any unsafe or noncompliant LP-gas activities to AFS [LP-Gas Operations] by mail, telephone, email [electronic mail], or fax [facsimile transmission (fax)]. When possible, the person shall make the report using LPG Form 22. [If a person makes a report of unsafe or noncompliant LP-gas activities to LP-Gas Operations without using LPG Form 22, LP-Gas Operations shall complete the LPG Form 22.] Within five business days of receipt of such report, AFS [LP-Gas Operations] shall notify the alleged non-compliant party [licensee and any other applicable person(s)] in writing regarding the report and specify the reported non-compliant installation and/or activities [violations, if any].

(b) The [if the submitting person does not specifically request anonymity, the] Commission may release the person's name in accordance with [any] applicable open records procedures.

(c) (No change.)


(a) (No change.)

(b) School district requirements. A school district shall ensure that a leakage test is performed on each school LP-gas system as specified in this section.

(1) The leakage test shall be performed by an LP-gas licensee, an individual registered with the Commission pursuant to §9.13 of this title (relating to General Installers and Repairman Exemption), or an employee of the school district who is a certificate holder [has been certified by the Commission to perform such a test].

(2) [If a leak is found in a school LP-gas system, the school district shall immediately remove the affected school district facility from LP-gas service until repairs are made and it passes a subsequent school LP-gas system leakage test. If an employee of a school district performs the initial test, then the subsequent test may not be performed by a school district employee.

(3) [22 Each school district shall provide the district's supplier with a copy of the most current LP-Gas Form 30 as proof the school LP-gas system has been tested in accordance with this section.

(4) [22] A school district shall retain LP Form 30 specifying the date and result of the leakage test performed on each school LP-gas system for a minimum of five years from the date each test was performed. A school district shall make LP Form 30 readily available for review by the Commission or its authorized representative upon request.

(e) Leakage test requirements.

(1) The results of the [each] leakage test for each building or structure shall be immediately documented on LPG Form 30.

(2) (No change.)

(f) Methods for conducting a leakage test.

(1) Upstream of first stage regulator. Insert a pressure gauge between the manual shutoff valve on the container(s) and the first stage regulator. Admit full container pressure to the system, and then close the manual shutoff valve on the container(s). Release gas from the system to lower the pressure gauge reading by 10 psig. If there is no decrease or increase in gauge pressure after the minimum test duration of 30 minutes, the system has no leakage and may remain in service.

(2) Between first stage and second stage regulators. Insert a pressure gauge with a 30-psig scale downstream of the first stage regulator, pressurize the system to normal operating pressure, and then close the manual shutoff valve on the container(s). Release LP-gas from the system to lower the pressure gauge reading by at least one-half the inlet pressure to the second stage regulator. If there is no decrease or increase in gauge pressure after the minimum test duration of 30 minutes, the system has no leakage and may remain in service.

(3) Downstream of final stage regulator(s). For systems serving appliances that receive gas at pressures of 1/2 psig or less, insert a water manometer or pressure gauge into the system downstream of the final system regulator. Pressurize the system to normal operating pressure and close the manual shutoff valve on the container(s). To ensure that all regulators in the system are unlocked and a leak anywhere in the system is communicated to the gauging instrument, release enough gas from the system, through a range burner or other suitable means, to drop the pressure to 9 (plus or minus 1/2) inches of water column. If there is no decrease or increase in gauge pressure after the minimum test duration of 30 minutes, the system has no leakage and may remain in service.

(g) Supplier requirements. A supplier shall terminate LP-gas service to a school district facility if:

(1) the supplier receives official notification from the school district [the LP-gas licensee] or the person conducting the leakage test that there is leakage in a school LP-gas system;

(2) (No change.)

(f) Commission requirements.

(1) (No change.)

(2) AFS [LP-Gas Operations] shall initiate any enforcement proceedings necessary under Texas Natural Resources Code, Chapter 113.

(g) Compliance deadlines.
(1) Each school district shall ensure a leakage test is performed as required by this section at least once every two years [beginning with the 2010-2011 school year].

(2) School districts shall complete the [initial] leakage tests before the beginning of the [2010-2011] school year. In the case of a year-round school, a school district shall ensure that a leakage test in each school district facility is conducted and reported not later than July 1 of the year in which the test is performed, with the first test due by July 1, 2010.

(3) (No change.)

§9.51. General Requirements for LP-Gas Training and Continuing Education.

(a) In addition to complying with NFPA 58, §§4.4 and 11.2, [effective March 1, 2001,] individuals shall comply with the training and continuing education requirements in this chapter.

(b) Applicants for [new licenses or] new certificates, as set forth in [§9.7 and] §9.8 of this title (relating to Requirements and Application for License and License Renewal Requirements, and) Application for a New Certificate[, respectively]) and persons holding existing [licenses or] certificates shall comply with the training or continuing education requirements in this chapter. Any individual who fails to comply with the training or continuing education requirements by the assigned deadline may regain certification by paying the nonrefundable course fee and satisfactorily completing an authorized training or continuing education course within two years of the deadline. In addition to paying the course fee, the person shall pay any fee or late penalties to AFS [AFRED].

(c) The training requirements apply [only] to:

(1) applicants for Category D, E, F, G, I, J, K, or M management-level certificates;

(2) applicants for the following [certain] employee-level certifications: [certificates]

(A) bobtail driver;

(B) DOT cylinder filler;

(C) recreational vehicle technician;

(D) service and installation technician;

(E) appliance service and installation technician;

(F) motor/mobile fuel filler; and

(G) dispenser operator.

(d) The continuing education requirements apply to the following individuals:

(1) Category D, E, F, G, I, J, K, and M management-level certificate holders;

(2) any ultimate consumer who has purchased, leased, or obtained other rights in any LP-gas bobtail, including any employee of such ultimate consumer if that employee drives or in any way operates the equipment on an LP-gas bobtail; and

(3) individuals holding the following employee-level certifications:

(A) bobtail driver;

(B) DOT cylinder filler;

(C) recreational vehicle technician;

(D) service and installation technician;

(E) appliance service and installation technician;

(F) motor/mobile fuel filler; and

(G) dispenser operator.

[(A)] all management-level certificate holders and employee-level certificate holders as specified in the tables in §9.52 of this title (relating to Training and Continuing Education Courses, and)

[(B)] any ultimate consumer who has purchased, leased, or obtained other rights in any LP-gas bobtail, including any employee of such ultimate consumer if that employee drives or in any way operates the equipment on an LP-gas bobtail.

[(c)] The training and continuing education requirements do not apply to an individual who:

(1) [A] drives or fuels [an ultimate consumer driving or fueling] a motor vehicle powered by LP-gas as an ultimate consumer;

(2) [B] [an individual who] fuels motor vehicles as an employee of an ultimate consumer;

(3) [C] is employed by [an employee of] a state agency, county, municipality, school district, or other governmental subdivision, unless such an individual is or becomes certified;

(4) [D] holds [an individual with] a general installers and repairman exemption; or

(5) holds a management or employee-level certification not specified in subsection (c) or (d) of this section.

[(E)] anyone certified only as a transport driver, or who holds only on-road motor fuel, non-road motor fuel, or mobile fuel certification.

[(f)] Except as provided in §9.41(b) of this title (relating to Testing of LP-Gas Systems in School Facilities), each [individual who performs LP-gas activities as an employee of an ultimate consumer or a state agency, county, municipality, school district, or other governmental subdivision shall be properly supervised by his or her employer. Any such individual who is not certified by the Commission to perform such LP-gas activities shall be properly trained by a competent person in the safe performance of such LP-gas activities.

[(g)] Individual credit. Successful completion of any required training or continuing education course [classes] shall be credited to and accrue to the individual.

[(h)] No partial credit. Individuals attending courses [classes] shall receive credit only if they attend the entire course [class] and pay any training or continuing education course fees in full. The Commission shall not award partial credit for partial attendance.

[(i)] Schedules. Dates and locations of available AFS [AFRED] LP-gas training and continuing education courses [classes] can be obtained in the Austin offices of AFS [AFRED], and on the Commission's web site and shall be updated at least monthly. AFS courses [AFRED classes] shall be conducted in Austin and in other locations around the state. Individuals or companies may request in writing that AFS courses [AFRED classes] be taught in their area. AFS [AFRED] shall schedule its courses [classes] and locations at its discretion.

[(j)] Course registration and scheduling [Registering for a class].

(1) Registering for a course. To register for a scheduled training or continuing education course [class], an individual shall complete the online registration process at least seven days [form provided by AFRED and file the form with AFRED training section]
prior to the course. AFS [class. AFRED] shall also accept course [class] registrations via regular mail, electronic mail (e-mail), or facsimile transmission (fax). Such [class] requests shall include the applicant's full name, address, phone number, level (either manager or employee) and category of certification (such as cylinder filling or service and installation), e-mail address, and the name or number, location, and date of the requested course [class].

(2) Costs for courses [classes].

(A) Each registration for a training course [class] shall require the payment of the applicable nonrefundable course [class] fee as follows:

(i) $75 for an [initial] eight-hour course [class];

(ii) $150 for the [initial] 16-hour Category F, G, I, and J course [class]; and

(iii) $750 for the [initial] 80-hour Category E course [class].

(B) The course [Category E, F, G, I, and J class] fees do not include the license or [management-level] rules examination fees [or license fee] described in §9.6 and §9.10 of this title (relating to License Categories, Container Manufacturer Registration, [Licenses] and Fees, and Rules Examination, respectively).

(C) Current certificate holders who have paid the annual renewal fee and who want to add a new certification other than Category E, F, G, I or J shall not be required to pay the $75 course [class] fee.

(D) Continuing education courses [classes] shall be offered at no charge to certificate holders who have timely paid the annual certificate renewal fee specified in §9.9 of this title [(relating to Requirements for Certificate Holder Renewal)].

(E) Requests for courses [classes] where no training or continuing education course [class] credit is given shall be submitted in writing to the AFS [AFRED] training section. The AFS [AFRED] training section may conduct the requested courses [classes] at its discretion. The nonrefundable fee for a non-credit course [class] is $250 if no overnight expenses are incurred by the AFS [AFRED] training section, or $500 if overnight expenses are incurred. AFS [AFRED] may waive the fee for a non-credit course [class] in cases where the Commission recovers the cost of the course [class] from another source, such as a grant.

(F) AFS [AFRED] may charge reasonable fees for materials for courses [classes] using third-party materials.

(3) Course scheduling. AFS [AFRED] shall schedule individuals to attend courses [classes] on a first-come, first-served basis, based on when the course fee is paid except as follows:

(A) Priority for attending the 16-hour Category F, G, I, and J course [class], and the 80-hour Category E course [class] is based on when the course [class] fee is paid.

(B) Priority for attending courses [classes] other than the 16-hour Category F, G, I, and J course [class], and the 80-hour Category E course [class] shall be given to applicants or certificate holders who must comply with training or continuing education requirements by the next May 31 deadline.

(C) If any course [class] has fewer than eight individuals registered within seven calendar days prior to the course, AFS [class, AFRED] may cancel the course [class] and may reschedule the registered individuals in another course [class] agreed upon by the individuals and the AFS [AFRED] training section reserves the right to determine the number of course registrants [class sizes for all classes].

(4) If a previously registered individual is unable to attend the course [class] at the time and place for which the individual is registered due to illness or other unforeseen circumstances, another individual from the same company may attend that same course [class] in his or her place.

(5) Applicants who take courses [classes] offered by an entity other than AFS [AFRED] shall comply with the registration, fee, and other requirements specified by that entity.

(k) An individual registered to take a course shall bring the following items to the course site:

(1) a registration confirmation email or fax;

(2) proof of payment unless exempt from the course fee; and

(3) documents required in §9.10(b) of this title if one or more examinations will be taken.

(l) [gs] [Retention of records.] Individual applicants or certificate holders shall be responsible for promptly notifying the AFS [AFRED] training section in writing of any discrepancies or errors in the training or continuing education records, and shall notify AFS [AFRED] of any discrepancies or errors in examination records or certificates [certification cards]. In the event of a discrepancy, AFS' [AFRED's] records, including due dates, shall be deemed correct unless the individual has copies of applicable documents which clarify the discrepancy.

§9.52. Training and Continuing Education [Courses].

(a) Training. Individuals identified in §9.51(c) of this title (relating to General Requirements for LP-Gas Training and Continuing Education) shall complete training. [In addition to complying with NFPA §§4.4 and 11.2, applicants for a new certification and applicants who have passed a certification examination but have not completed an applicable training course shall complete training as specified in the tables in subsection (h) of this section prior to their first certificate renewal deadline.]

(1) Available training courses.

(A) The 2.1 Dispenser Operations course covers proper filling and handling of ASME motor/mobile fuel containers, appurtenances, DOT cylinders, and dispenser operations.

(B) The 2.3 Bobtail Operations course covers federal and state regulations that apply to hazardous material transportation, the operation of propane delivery vehicles, and the rules in this chapter, including NFPA 54 and NFPA 58, which apply to LP-gas installations.

(C) The 3.2 Residential System Installation course covers the requirements for proper installation and startup of a residential propane system, including correct appliance operation.

(D) The 3.3 Appliance Conversion, Installation and Venting course covers the requirements for converting, installing, and venting of propane gas appliances.


(F) The 16-hour Category F, G, I, and J course covers ASME motor/mobile fuel containers, appurtenances, DOT cylinders, the operations of a dispenser to fill tanks and cylinders, and applicable LP-gas requirements for obtaining a Category F, G, I or J management-level certificate.
(G) The 80-hour Category E course covers all the material in courses 2.1, 2.3, 3.2, 3.3 and 3.8, and the Commission's rules in this chapter, including NFPA 54 and NFPA 58.

(2) Training requirements.

(A) Category E management-level applicants shall attend the 80-hour Category E course [class];

(B) Category F, G, I, and J management-level applicants shall attend the 16-hour Category F, G, I and J course [class]; and

(C) Category D, K and M management-level applicants and all applicants for employee-level certifications that are subject to training requirements shall complete [attend] an eight-hour course [class]. A certificate holder's training deadline shall not be extended if that individual retakes and passes an examination for the current category and level of certification. A training deadline shall be extended only after a certificate holder successfully completes an applicable training course [class].

(i) Category D management-level applicants shall complete the 3.2 course.

(ii) Category K management-level applicants shall complete the 3.2 course.

(iii) Category M management-level applicants shall complete the 3.8 course.

(iv) DOT Cylinder Filler applicants shall complete the 2.1 course.

(v) Motor and Mobile Fuel Filler applicants shall complete the 2.1 course.

(vi) Bobtail Driver applicants shall complete the 2.3 course.

(vii) Service and Installation applicants shall complete the 3.2 course.

(viii) Appliance Service and Installation applicants may complete either the 3.2 or 3.3 course.

(ix) Recreational Vehicle Technician applicants shall complete the 3.8 course.

(3) [(1)] Individuals who pass an employee-level rules examination between March 1 and May 31 of any year shall have until May 31 of the next year to complete any required training. Individuals who pass an employee-level rules examination at other times shall have until the next May 31 to complete any required training. Completion of AFT shall be in accordance with subsection (g) of this section.

(4) [(2)] Applicants for company representative or operations supervisor shall comply with the training requirements in this section prior to the Commission issuing a certificate.

(b) Continuing education. A certificate holder shall complete at least eight hours of continuing education every four years as specified in this subsection. Continuing education courses are specified in subsection (g) of this section. [the tables in subsection (h) of this section.]

(1) Upon fulfillment of the continuing education requirement, the certificate holder's next continuing education deadline shall be four years after the May 31 following the date of the most recent course [class] the certificate holder has completed, unless the course [class] was completed on May 31, in which case the deadline shall be four years from that date.

(2) A certificate holder's continuing education deadline shall not be extended if an examination for a current category and level of certification is retaken and passed; a continuing education deadline shall be updated [extended] only after a certificate holder successfully completes an applicable continuing education course [class]. An individual who completes a continuing education course [class] after the assigned deadline shall have four years from the original deadline to complete the next course [class].

[(1] Continuing education requirements for certain categories.]

[(A] Certificate holders who hold only a Category D, F, G, J, or K certificate as of the effective date of this section shall have completed their initial continuing education requirement by May 31, 2005. Beginning September 1, 2005, Category M and recreational vehicle technician certificate holders shall have completed their initial continuing education requirement by May 31, 2006. Certificate holders who hold a Category D, F, G, J, or K certificate or a recreational vehicle technician certificate and who have more than one certification as of February 1, 2001, shall complete their continuing education requirement by the continuing education deadline assigned for the initial certificate. Public employees who were certified as of June 1, 2006, shall have completed their continuing education requirement by May 31, 2007.]

[(B)] Certificate holders who are certified as recreational vehicle technicians or appliance service and installation technicians and are also certified to perform LPG-gas activities covered by one or more other [different] certifications shall complete the initial continuing education requirements for any one of the certifications held in order to maintain active status. For each subsequent continuing education requirement, such individuals shall be responsible for attending a different continuing education course [class] relevant to one of the other certifications held.

(4) [(2)] Certificate holders who attend a course [class] offered by an outside instructor shall not be entitled to a refund of the annual renewal fee or any other fees or penalties required by the Commission.

(5) [(3)] Certificate holders [Individuals] who have not paid the annual certificate renewal fee, including general installers and repairman exemption holders or members of the general public, shall not attend training or continuing education classes free of charge, but may request [from the AFRED training section to] attend courses [classes] at the charge specified in §9.51 of this title. A request to attend a course [relating to General Requirements for Training and Continuing Education]. Such requests shall be in writing, submitted to the AFS training section, and granted [handled] at AFS' [AFRED's] discretion on an individual basis and if space is available [in the requested class].

(6) [(4)] Any certificate holder who has timely paid the annual certificate renewal fee but is not otherwise required to attend a Commission continuing education course [class] may voluntarily attend a course [class], if space is available, by registering with the AFS [AFRED] training section as specified in §9.51 of this title [relating to General Requirements for Training and Continuing Education].

(c) Adding a new certification. A current certificate holder who successfully completes an examination for an additional certification that requires completion of a training course shall be assigned a training deadline pursuant to subsection (a)(2) and (3) [(a)(1)] of this section. Upon completion of the required training, the certificate holder shall be assigned a continuing education date pursuant to subsection (b) of this section.
(d) Train-the-Trainer courses [classes]. The Train-the-Trainer courses [classes] shall not count as credit towards the training or continuing education requirements.

(e) Course [Class] materials. Individuals who attend AFS [AFRED]-taught training courses [classes] shall receive a copy of the course [class] materials at no charge. Additional copies may be purchased from AFS [AFRED] at the established price.

(f) Certificates of completion. The AFS [AFRED] training section shall issue a certificate of completion to each individual who completes a management-level course [an AFRED-taught class. Individuals shall retain the certificates as proof of completion of the class].

(g) Advanced field training (AFT). Some courses [classes] may include AFT in addition to the classroom hours, during which course [class] attendees shall perform LP-gas activities. AFT shall be properly completed within 30 calendar days of attending the course [class]. All qualification tasks included in the AFT shall be completed. The AFT materials, including the qualification checklist and the certification page, shall be readily available at the licensee's Texas business location for review by an authorized Commission representative during normal business hours.

(1) The responsibility of certifying AFT activities shall not be delegated to an unauthorized individual. AFT qualification tasks shall be witnessed by an authorized individual, verified as being successfully completed, and the AFT form signed as follows:

(A) For licensees with only one company representative, that company representative shall self-certify the AFT.

(B) For licensees with more than one company representative, one company representative may certify the AFT of another company representative, but shall not self-certify.

(C) Company representatives shall certify operations supervisors' AFT.

(D) The company representative or an operations supervisor authorized by the licensee and in current good standing with the Commission shall certify the employees' AFT.

(E) If authorized, a Commission-approved outside instructor may certify any AFT.

(2) Other AFT situations shall be handled as follows:

(A) For a certified individual employed by a licensee, the licensee shall retain the most recently completed AFT material for each applicable category of the individual's certification in the individual's employment records.

(B) For an individual who ceases employment with a licensee, the licensee shall retain the latest required AFT material for at least two years from the date the individual is no longer employed by the licensee. The two-year period shall be based on the renewal period for the examination renewal fee penalty. The licensee shall provide a copy of the AFT material to the individual.

(C) For an individual who begins employment with a different licensee, the new licensee shall obtain a copy of the individual's AFT material from the individual and shall place the copy in the individual's employment records.

(D) An individual who is never employed by a licensee shall retain the most recently completed AFT material for each applicable category of the individual's certification in a safe location for at least two years from the date the course [class] that required the AFT was attended.

(E) For an individual who is employed by a licensee when a course [class] requiring AFT is attended, but who prior to the AFT's being certified becomes employed by a new licensee, the new licensee shall certify the individual's AFT.

(F) For an individual who is employed by a licensee when a class requiring AFT is attended, but who prior to the AFT's being certified ceases employment with the licensee and wishes to continue performing LP-gas activities, the individual shall contact a company representative or operations supervisor of another applicable licensee or an Commission [AFRED]-approved outside instructor to complete the AFT and maintain the LP-gas certification.

(3) Individuals who attend the 80-hour Category E management-level course [class] or the 16-hour Category F, G, I, and J management-level course [class] shall perform any required AFT activities during the course [class].

(4) If AFT is required for a course [class], the AFT checklist outlining the specific activities to be performed shall be included in the course [class] materials.

(5) A certified individual is exempt from the AFT requirement of a continuing education course if the individual has previously completed that same course, including the AFT.

(h) Available training and [courses]. Training and continuing education courses [and other information] are shown in Tables 1 through 4 of this subsection. Items on the tables marked with an "x" indicate courses that meet training or continuing education requirements for management-level or employee-level certificate holders in that category.

Figure: 16 TAC §9.52(h) (No change.)

(i) Credit for [attendance at CETP courses. A certificate holder who has successfully completed a CETP course [class], including any applicable knowledge and skills assessments, may receive credit toward the continuing education requirements specified in this section as follows:

(1) The CETP course [class] shall be approved for the category of certificate held as indicated on Tables 3 and 4 in subsection (h) of this section.

(2) The successful completion of a CETP course [class] is determined by a CETP course [National Propane Gas Association class] certificate, which is issued only after an individual has completed the prescribed course of study, including any related knowledge and skills assessments, for the applicable CETP job classification.

(3) To receive credit toward the Commission's continuing education requirements, the certificate holder shall submit the following information, clearly readable, to AFS: [by regular to AFRED, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967 by electronic mail to the following address: training-exams@rrc.texas.gov]

(A) the individual's full name, address, and telephone number; Social Security number;

(B) a copy of the certificate holder's certificate [the LP-gas certification(s) currently held]; and

(C) [the CETP class date and] a legible [readable] copy of the official CETP course [class] certificate [for an approved CETP class as specified in Tables 3 and 4 of subsection (h) of this section. The CETP class attendance date shall be within one year of the certificate holder's continuing education deadline].

(a) General.

(1) AFS [AFRED] may approve and award training or continuing education credit for the management-level and employee-level applicants and certificate holders specified in this section offered by an outside instructor provided the outside instructor complies with the requirements of this section.

(A) Authorized Category D outside instructors may offer only the applicable training and continuing education courses [classes] to Category D or K management-level applicants or certificate holders and to service and installation technician and appliance service and installation technician employee-level applicants or certificate holders.

(B) Authorized Category E outside instructors may offer only the applicable training and continuing education courses [classes] to Category D or K management-level applicants and to DOT [portable] cylinder filler [filling], motor/mobile fuel filler [dispenser], bobtail driver, service and installation technician, and appliance service and installation technician applicants and employee-level certificate holders.

(C) Authorized Category I outside instructors may offer only the applicable training and continuing education courses [classes] to Category F, G, I and J management-level certificate holders and DOT cylinder filler [filling] and motor/mobile fuel filler [dispenser] applicants and employee-level certificate holders.

(D) Authorized Category M outside instructors may offer only the applicable training and continuing education courses [classes] to Category M management-level applicants and recreational vehicle technician employee-level applicants or certificate holders.

(2) (No change.)

(3) All curriculum and course materials submitted for AFS [AFRED] review by an outside instructor applicant shall be printed or typewritten, organized, and easily readable, and shall remain confidential within the limits of Tex. Gov't Code, Chapter 552 (Public Information Act).

(4) Copies of the AFS [AFRED] curricula and materials are available from AFS [AFRED] at a reasonable cost.

(b) Application process. Outside instructor applicants shall submit the following to AFS [AFRED]:

(1) a non-refundable $300 registration fee for each outside instructor;

(2) a copy of the applicant's Category D, E, I, or M current certificate [certification card] or, in the case of Category D only, a copy of the master or journeyman plumber/class A or B [registration/examination] exemption card [certificate] issued under §9.13 of this title (relating to General Installers and Repairman Exemption) [by AFS [AFRED]];

(3) for each course the outside instructor applicant intends to teach:

(A) the curriculum for and a description of the course;

(B) the course materials and related supporting information or a statement that the instructor will use the AFS [AFRED] course materials;

(C) a statement specifying whether the outside instructor seeks approval to certify any AFT described in §9.52 of this title (relating to training and continuing education [courses]);

(4) - (5) (No change.)

(c) Curriculum standards. The curriculum for each course that an outside instructor applicant intends to teach shall include, where applicable, information that is at least the equivalent of AFS [AFRED's] course or courses on the same topic or topics, and shall include all applicable current LP-gas regulations for Texas. Courses not offered by AFS [AFRED] may be approved if the courses are equal or greater in overall quality to other approved courses.

(d) AFS [AFRED] review. AFS [AFRED] shall review the application for approval as an outside instructor and, within 14 business days of the filing of the application, shall notify the applicant in writing that the application is approved, denied, or incomplete. If an application is incomplete, AFS [AFRED's] notice of deficiency shall identify the necessary additional information, including any deficiencies in course materials. The outside instructor applicant shall file the necessary additional information within 30 calendar days of the date of AFS [AFRED's] notice of deficiency. The outside instructor applicant's failure to file the necessary additional information within the prescribed time period may result in the dismissal of the outside instructor's application and the necessity of the outside instructor applicant again paying the non-refundable $300 registration fee for each subsequent filing of an application.

(e) Additional requirements for approval. Outside instructor applicants whose applications are approved in writing by AFS [AFRED] shall attend AFS [AFRED's] Train-the-Trainer Course, the fee for which is included in the $300 registration fee. The Train-the-Trainer Course shall include classroom instruction and the subject-matter examinations for each course for which the applicant seeks approval to conduct. An outside instructor applicant shall pass the subject-matter examination for each course with a score of at least 85 percent and shall attend the subject-matter courses for which the applicant seeks approval to conduct.

(f) Notification of approval. Within 10 business days of the outside instructor applicant's completion of the requirements of this section, AFS [AFRED] shall notify the applicant in writing that the applicant is approved as an outside instructor and the outside instructor may then begin offering the approved courses.

(g) Term of approval. AFS [AFRED] approval of an outside instructor remains valid for three years unless the Commission revokes the approval pursuant to subsection (l) of this section.

(h) Renewal of approval. To continue offering AFS-approved [AFRED-approved] LP-gas courses [classes], an outside instructor shall renew his or her AFS outside instructor [AFRED] approval every three years by paying a nonrefundable $150 renewal fee to AFS [AFRED] and attending a Train-the-Trainer refresher course [class] prior to the outside instructor's next renewal deadline.

(i) Revision of course materials.
(1) An outside instructor who revises any course materials previously approved by AFS [AERED] shall submit the revisions in writing, along with a nonrefundable $100 review fee to AFS [AERED].

(2) If AFS revises its course materials, it shall provide a copy to all outside instructors authorized to conduct the course covered by the revised materials. Outside instructors using their own materials shall update their materials to align with the updated AFS material. Copies of the updated materials shall be submitted for review. The revised materials review fee will be waived in this instance.

(3) An outside instructor[shall] shall not use [the] materials in a course until the outside instructor has received written AFS [AERED] approval.

(4) AFS [AERED] shall review the revised course materials and, within 14 business days, shall notify the outside instructor in writing that the revised course materials are approved or not approved.

(5) If the revised course materials are not approved, AFS [AERED] notice shall identify the portion or portions that are not approved and/or shall describe any deficiencies in the revised course materials. The outside instructor shall file any necessary additional information within 30 calendar days of the date of AFS [AERED] notice of disapproval. The outside instructor's failure to file the necessary additional information within the prescribed time period may result in the dismissal of the outside instructor's request for approval of revised course materials and the necessity of again paying the $100 review fee for each subsequent filing of revised course materials.

(j) Continuing requirements. Outside instructors shall:

(1) maintain their Category D, E, I, or M certificate or Category D exemption [registration/examination exemption certificate] in continuous good standing. The Train-the-Trainer course [class] shall count as credit towards any training or continuing education requirements. Any interruption of the required Category D, E, I, or M certificate [certification] or Category D exemption [registration/examination exemption certificate] may result in the Commission revoking or suspending the outside instructor's approval;

(2) adhere to professional standards of conduct in course [class] presentations; and

(3) report to AFS [AERED] within three business days of the conclusion of a course [class] the names, social security numbers or RRC identification numbers, and any other information required by AFS [AERED], of the persons completing the course [class]. The report shall be made electronically by [electronic mail (e-mail) or in an electronic format provided by AFS]. The outside instructor shall ensure that AFS [AERED] receives the report by securing written acknowledgment of its receipt by AFS [AERED]. This acknowledgment may be by return [electronic mail (e-mail) or by facsimile transmission (fax)].

(k) Disclaimer. Outside instructors are responsible for every aspect of the courses [classes] they teach, including the location, schedule, date, time, duration, price, content, material, demeanor and conduct of the outside instructor, and reporting of attendance information. AFS may [AERED shall not] monitor or supervise the actual course [class] presentations by outside instructors. AFS [AERED] is not obligated to gather, maintain, or distribute information about outside instructors' course offerings, other than the names, telephone numbers, and addresses of approved outside instructors and the date on which an outside instructor's approval would expire, absent renewal. AFS [AERED] may refuse to issue or renew a certificate for an individual who presents for credit an unapproved course [class] a course [class] taught by an unapproved outside instructor; or a course [class] taught using unapproved, incomplete, or incorrect materials.

(i) Complaints.

(1) Complaints regarding outside instructors shall be made to AFS [AERED] in writing by email, fax [electronic mail (e-mail), facsimile transmission (fax)], or U.S. Postal Service; shall include the printed name, address, telephone number, and, if filed by fax or U.S. Postal Service, the signature of the person complaining; shall state the outside instructor's name, the date, location, and title of the course; and shall describe the facts that show [set forth the facts that the complainant alleges demonstrate that] the outside instructor:

(A) failed to meet or maintain AFS [AERED] requirements for outside instructor approval;

(B) - (C) (No change.)

(2) Upon receipt of a complaint and at its discretion, AFS [AERED] may gather any additional information necessary or appropriate to making a full and complete analysis of the complaint. AFS [AERED] shall send [deliver] a written copy of the analysis and any findings [by certified mail] to the outside instructor who is the subject of the complaint. The outside instructor may file a written response within 20 calendar days from the date the findings are postmarked.

(3) If AFS [AERED] determines that an outside instructor has engaged in conduct prohibited by this section, AFS [AERED] may prepare a report that states the facts on which the determination is based and the recommendation as to the action AFS [AERED] intends to take. AFS [AERED] may issue a written warning to the outside instructor; decline to approve or renew the outside instructor's approval; or revoke the outside instructor's approval.

(4) AFS [AERED] shall send [mail] a written copy of the report and recommendation to the outside instructor [by certified mail] and shall include a statement that the outside instructor has a right to a hearing on the determination contained in the report.

(5) (No change.)

(6) If the outside instructor accepts the determination, he or she shall notify AFS [AERED] in writing of the acceptance, and AFS [AERED] shall take the action indicated in the report.

(7) If an outside instructor requests a hearing or fails to respond timely to the notice given under paragraph (5) of this subsection, the AFS [AERED] director shall refer the matter to the Hearings Division [the Office of General Counsel for the setting of a hearing. The Office of General Counsel shall assign an examiner to conduct a hearing, which shall be conducted under the Commission's General Rules of Practice and Procedure, Chapter 1 of this title (relating to Practice and Procedure)].

(8) - (9) (No change.)

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 B. LP-GAS INSTALLATIONS, CONTAINERS, APPURTEINANCES, AND EQUIPMENT REQUIREMENTS


The Commission proposes the amendments under Texas Natural Resources Code, §113.051, which authorizes the Commission to promulgate and adopt rules and standards relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public; Texas Natural Resources Code §113.0815, which requires a person engaging in the manufacture or fabrication of containers to register with the commission in accordance with rules adopted by the commission; and Texas Natural Resources Code §113.082, which authorizes the Commission to adopt rules establishing license categories for LP-gas activities.

Statutory authority: Texas Natural Resources Code, §§113.051, 113.0815, and 113.082.

Cross reference to statute: Texas Natural Resources Code Chapter 113.


(a) General requirements. No LP-gas container shall be placed into LP-gas service or an installation operated or used in LP-gas service until the requirements of this section, as applicable, are met and the facility is in compliance with all applicable rules in this chapter [LP-Gas Safety Rules] and statutes[; in addition to any applicable requirements of the municipality or the county where an installation is or will be located]. LP-gas systems under the jurisdiction of DOT Safety regulations in 49 CFR Parts 192 and 199, and Part 40 shall comply with Chapter 8 of this title (relating to Pipeline Safety Regulations) prior to implementation of service.

(b) Commercial installations with an aggregate water capacity of less than 10,000 gallons.

(1) Within 30 calendar days following the completion of a container installation, the licensee shall submit LPG Form 501 to AFS [LP-Gas Operations] stating:

(A) the installation fully complies [is in total compliance] with the statutes and the rules in this chapter [LP-Gas Safety Rules];

(B) all necessary Commission [LP-gas] licenses, [and] certificates, and permits have been issued; and

(C) the date the installation has been placed into LP-gas service.

(2) The licensee shall pay [pay] a nonrefundable fee of $10 for each LP-gas container, including cylinders, each retail LP-gas cylinder exchange storage rack, and each forklift cylinder exchange rack or a forklift cylinder exchange installation where a storage rack is not installed that is listed on the form. A nonrefundable $35 fee shall be required for any resubmission.

(3) AFS [LP-Gas Operations] shall review the submitted information within 21 business days of receipt of all required information and shall notify the applicant in writing of any deficiencies. LP-gas activities [operations] may commence prior to the submission of LPG Form 501 if the facility is in compliance with the rules in this chapter [LP-Gas Safety Rules].

(c) Aggregate water capacity of 10,000 gallons or more.

(1) For installations with an aggregate water capacity of 10,000 gallons or more, the licensee shall submit the following information to AFS [LP-Gas Operations] at least 30 days prior to construction if the applicant is required to give notice as described in §9.102 of this title (relating to Notice of Stationary LP-Gas Installations):

(A) - (C) (No change.)

(D) a site plan of sufficient scale that identifies:

(i) the location, types, and sizes of all LP-gas containers already on site or proposed to be on site;

(ii) the distances from the containers [and the transfer system] to adjoining [the] property lines, buildings, and railroad, pipeline, or roadway rights-of-way;

(iii) - (vii) (No change.)

(viii) distance and location to nearest highway; and[.]

(E) if [H] the facility is accessed from a public highway under the jurisdiction of the Texas Department of Transportation, a statement or permit from the Texas Department of Transportation showing that the driveway is of proper design and construction to allow safe entry and egress of the LP-gas transports; and[.]

(F) [pay] a nonrefundable fee of $50 for the initial application, or a[. A] nonrefundable $30 fee [shall be required] for any resubmission.

(2) Prior [In addition to NFPA 58, §6.5.4 prior to the installation of any individual LP-gas container, AFS [LP-Gas Operations] shall determine whether the proposed installation constitutes a danger to the public health, safety, and welfare.

(A) AFS [LP-Gas Operations] may impose restrictions or conditions on the proposed LP-gas installation based on one or more of the following factors:

(i) - (iv) (No change.)

(v) type of activities [operations] on the installation's premises;

(vi) - (viii) (No change.)

(B) (No change.)

(3) [If an LP-gas stationary installation, equipment, or appurtenances not specifically covered by the LP-Gas Safety Rules has been or will be installed, LP-Gas Operations shall apply and require any reasonable safety provisions to ensure the LP-gas installation is safe for LP-gas service. If the affected entity disagrees with LP-Gas Operations' determination, the entity may request a hearing. The installation shall not be placed into LP-gas operation until LP-Gas Operations has determined that the installation is safe for LP-gas service.]

(4) [AFS [LP-Gas Operations] shall notify the applicant in writing of [outlining] its findings.

(4) If the application is administratively denied; [.]

(A) AFS shall specify the deficiencies in the written notice required in paragraph (3) of this subsection.

(B) The [the] applicant may modify the submission and resubmit it for approval or request a hearing on the matter in accordance with Chapter 1 of this title (relating to Practice and Procedure).

(5) The licensee shall not commence construction until notice of approval is received from AFS. If the subject installation is not completed within one year from the date AFS has granted construction
approval, the application will expire and the applicant shall submit a new application before the installation can be completed. [LP-Gas Operations.]

(6) The applicant shall submit to AFS written notice of completed construction and the Commission shall complete the [Upon completion of a] field inspection [as] specified in §9.109 of this title (relating to Physical Inspection of Stationary LP-Gas Installations) [or the operator, pending the inspection findings, may commence LP-gas operations of the facility].

[(6) If the subject installation is not completed within one year from the date of LP-Gas Operations’ completed review, the requirements of this subsection shall be resubmitted for LP-Gas Operations’ review.]

(7) The container may be placed into service after AFS has completed the inspection and determines the installation meets all safety requirements.

(8) [(d)] An applicant or operator shall not be required to submit LPG Form 500, LPG Form 500/A, or a site plan prior to the installation of bulkheads, swivel-type piping, breakaway devices, pneumatically-operated internal valves, or emergency shutoff valves, or when maintenance and improvements are being made to the piping system at an existing LP-gas installation with an aggregate water [a] capacity of 10,000 gallons or more.

[(e) If a licensee is replacing a container with a container of the same or less overall [length and] diameter and length or height, and is installing the replacement container, installed in the identical location of the existing container, the licensee shall file LPG Form 500.]

(d) [(f)] AFS (In addition, LP-Gas Operations) may request LPG Form 8, a Manufacturer’s Data Report, or any other documentation or information pertinent to the installation in order to determine compliance with the rules in this chapter [LP-Gas Safety Rules].

(e) For an installation that is a licensee outlet, the operating licensee shall comply with §9.7(g) of this title (relating to Applications for Licenses, Manufacturer Registrations, and Renewals).


(a) For a proposed installation with an aggregate water capacity of 10,000 gallons or more, an applicant shall send a copy of the filings required under §9.101(c) of this title (relating to Filings Required for Stationary LP-Gas Installations) by certified mail, return receipt requested or otherwise delivered, to all owners of real property situated within 500 feet of any proposed container location at the same time the originals are filed with AFS [LP-Gas Operations].

(1) AFS [LP-Gas Operations] shall consider the notice to be sufficient when the applicant has provided evidence that copies of a complete application have been mailed or otherwise delivered to all real property owners.

(2) The applicant may obtain names and addresses of owners from current county tax rolls.

(b) An applicant shall notify owners of real property situated within 500 feet of any proposed container location if:

(1) the current aggregate water capacity of the installation is more than doubled in a 12-month period;

(2) the resulting aggregate water capacity of the installation will be more than 120,000 gallons; or

(3) AFS [LP-Gas Operations] considers notice to be in the public interest.

(c) (No change.)

§9.103. Objections to Proposed Stationary LP-Gas Installations.

(a) Each owner of real property [situated within 500 feet of the proposed location of any LP-gas containers of 10,000 gallon aggregate water capacity or more] receiving notice of a proposed installation pursuant to §9.102(a) of this title (relating to Notice of Stationary LP-Gas Installations) shall have 12 months from the date the notice is postmarked to file a written objection with AFS using the LPG Form 1005 sent to the applicant [as described in §9.102 of this title (relating to Notice of Stationary LP-Gas Installations) with LP-Gas Operations]. An objection is considered timely filed when it is actually received by the Commission.

(b) AFS [LP-Gas Operations] shall review all objections within 10 business days of receipt. An objection shall be in writing and shall include a statement of facts showing that the proposed installation:

(1) does not comply with the rules in this chapter [LP-Gas Safety Rules], specifying which rules are violated;

(2) - (3) (No change.)

(c) Upon review of the objection, AFS [LP-Gas Operations] shall [either]:

(1) request [schedule] a public hearing as specified in §9.107 of this title (relating to Hearings on Stationary LP-Gas Installations); or

(2) notify the objecting party in writing within 10 business days of receipt requesting further information for clarification and stating why the objection is not valid [being returned]. The objection entity shall have 10 calendar days from the postmark of AFS’ [LP-Gas Operations] letter to file its corrected objection. Clarification of incomplete or nonsubstantive objections shall be limited to two opportunities. If new objections are raised in the objecting party’s clarification, the new objections shall be limited to one notice of correction.


(a) Reason for hearing. AFS [LP-Gas Operations] shall request [call] a public hearing if:

(1) the notice given to each real property owner situated within 500 feet of the proposed installation does not meet the requirements set forth in §9.102(a) of this title (relating to Notice of Stationary LP-Gas Installations);

(2) AFS [LP-Gas Operations] receives an objection that complies with §9.103 of this title (relating to Objections to Proposed Stationary LP-Gas Installations); or

(3) AFS [LP-Gas Operations] determines that a hearing is necessary to investigate the impact of the installation.

(b) Notice of public hearing. The Hearings Division [LP-Gas Operations] shall give notice of the public hearing at least 21 calendar days prior to the date of the hearing to the applicant and to all real property owners who were required to receive notice of the proposed installation under §9.102 of this title [relating to Notice of Stationary LP-Gas Installations].

(c) Procedure at hearing. The public hearing shall be conducted pursuant to Chapter 1 of this title (relating to Practice and Procedure) in accordance with the Texas Government Code, Chapter 2001 et seq., the general rules of practice and procedure of the Railroad Commission of Texas, and the LP-Gas Safety Rules.

If the Commission finds after a public hearing that the proposed installation complies with the rules in this chapter [LP-Gas Safety Rules] and the statutes of the State of Texas, and does not constitute a danger to the public health, safety, and welfare, the Commission shall issue an interim approval order. The construction of the installation and the setting of the container shall not proceed until the applicant has received written notification of the interim approval order. Any interim approval order shall include a provision that such approval may be suspended or revoked if:

1. The applicant has introduced LP-gas into the system prior to final approval; or

2. A physical inspection of the installation indicates that it is not installed in compliance with the submitted plan [plat] drawing for the installation, the rules in this chapter [LP-Gas Safety Rules] or the statutes of the State of Texas; or

3. The installation constitutes a danger to the public health, safety, and welfare.


(a) Aggregate water capacity of 10,000 gallons or more. The applicant shall notify AFS [LP-Gas Operations] in writing when the installation is ready for inspection. If LP-Gas Operations does not physically inspect the facility within 30 calendar days of receipt of notice that the facility is ready for inspection, the facility may operate conditionally until the initial complete inspection is made.

1. If any non-compliance items are cited [safety rule violations exist] at the time of AFS's [LP-Gas Operations'] initial inspection, the installation shall not be placed in LP-gas service [may be required to cease LP-gas operations] until the non-compliance items [violations] are corrected, as determined at the time of inspection depending on the nature of the non-compliance items cited.

2. If AFS does not physically inspect the facility within 30 calendar days of receipt of notice that the facility is ready for inspection, the facility may operate conditionally until the initial inspection is completed.

(b) Aggregate water capacity of less than 10,000 gallons. After receipt of LPG Form 501, AFS [LP-Gas Operations] shall conduct an inspection as soon as possible to verify that the installation described is in compliance with the rules in this chapter [LP-Gas Safety Rules]. The facility may be operated prior to inspection if it is in compliance with the rules in this chapter [LP-Gas Safety Rules]. If the initial [any LP-gas statute or safety rule violation exists at the time of the first inspection at a commercial installation results in the citation of non-compliance items, AFS may require that the subject container, including any piping, appliances, appurtenances, or equipment connected to it, may] be immediately removed from LP-gas service until the non-compliance items [violations] are corrected.

(c) Material variances. If AFS [LP-Gas Operations] determines the completed installation varies materially from the application originally accepted, correction of the variance and notification to AFS [LP-Gas Operations] or resubmission of the application is required. The review of such resubmitted application shall comply with §9.101 of this title (relating to Filings Required for Stationary LP-Gas Installations).

(d) In the event an applicant has requested an inspection and AFS [LP-Gas Operations] inspection identifies non-compliance items [violations] requiring modifications by the applicant, AFS [LP-Gas Operations] shall consider the assessment of an inspection fee to cover the costs associated with any additional inspection, including mileage and per diem rates set by the legislature.


When there is an immediate need for LP-gas supply under emergency circumstances, AFS [LP-Gas Operations] may waive the requirement for the initial [complete] inspection for a limited time period in order to meet the emergency need. LP-gas shall not be introduced into the container and it shall not be placed into LP-gas service until AFS [LP-Gas Operations] grants permission to do so.

§9.111. Installation and Maintenance.

In addition to NFPA 58 §6.21.1, all [All] LP-gas storage containers, valves, dispensers, accessories, piping, transfer equipment, gas utilization equipment, and appliances shall be installed and maintained in safe working order and in accordance with the manufacturer's instructions and the rules in this chapter [LP-Gas Safety Rules]. If any one of the LP-gas storage containers, valves, dispensers, accessories, piping, transfer equipment, gas utilization equipment, and appliances is not in safe working order, AFS [LP-Gas Operations] may require that the installation be immediately removed from LP-gas service and not be operated until the necessary repairs have been made.

§9.114. Odorizing and Reports.

(a) Odorization shall comply with NFPA 58, §4.2.

(b) If AFS [LP-Gas Operations] determines that there may [shall] be insufficient odorization, AFS [LP-Gas Operations] may require testing [as deemed necessary to determine its sufficiency]. If testing is deemed necessary, AFS [LP-Gas Operations] shall notify the necessary parties in writing as soon as possible. The written notification will advise which entity is responsible for having the tests performed and paying for the tests to be conducted. The testing shall be performed by a recognized testing laboratory equipped for and experienced in testing of odorization and, if requested, a copy of the test results shall be provided to AFS [LP-Gas Operations].

(c) The person or facility odorizing the gas or the operator of an automatic loading rack shall be responsible for the odorization.


(a) In order to determine the safety of a container, AFS [LP-Gas Operations] may require that the licensee or operator of the container submit [supply] a copy of the manufacturer's data report on that container. AFS [to LP-Gas Operations, LP-Gas Operations] may also require that the container and equipment be examined by a Category A, B, or O licensee, with a comprehensive report on the findings submitted to AFS [LP-Gas Operations] for its consideration. This subsection may be applied even though an acceptable LPG Form 23 has been received.

(b) Any stationary ASME LP-gas container previously in LP-gas service which has not been subject to continuous LP-gas vapor pressure shall be retested by an authorized Category A, B, or O licensed entity utilizing recognized ASME test methods to determine if the container is safe for LP-gas use in Texas, and the test results shall be submitted to AFS [LP-Gas Operations] on LPG Form 8.

(c) Any stationary ASME LP-gas container which has been subject to continuous LP-gas vapor pressure is not required to be tested prior to installation, provided the licensee or operator of the container files a [properly] completed LPG Form 23 with AFS [LP-Gas Operations] at the time LPG Form 500 is submitted for any facility requiring submission of a site plan in accordance with §9.101 of this title (relating to Filings Required for Stationary LP-Gas Installations).

(d) Any stationary ASME LP-gas container brought into Texas from out-of-state and intended for stationary LP-gas installation...
in Texas at any facility requiring submission of a site plan shall be tested in accordance with subsection (b) of this section prior to review approval being granted by AFS [LP-Gas Operations], unless that container is owned by a valid licensee. In this case, AFS [LP-Gas Operations] may determine that such tests are not necessary upon the receipt of an acceptable LPG Form 23 from the licensee.


(a) In addition to NFPA 58, §§5.2.1.11, 6.8.6.1(I), 6.8.6.2(A), 6.8.6.3(F), 6.11.3.14 and 6.19.2 [§§6.6.6.1(H), 6.6.6.2(1), and 6.6.6.3(4)], steel containers and piping systems installed underground, partially underground, or as mounted installations on or after March 1, 2014, shall include a corrosion protection system.

[(b) A corrosion protection system shall include the following:

[(1) a container coated with a material recommended for the service that is applied in accordance with the manufacturer's instructions;

[(2) a cathodic protection system that consists of one or more sacrificial anodes or an impressed current anode; and

[(3) a means to test the performance of the cathodic protection system.]

(b) [(c)] Cathodic protection systems installed on or after March 1, 2014 [in accordance with this section] shall be monitored by every licensee servicing the container in accordance with NFPA 58, §6.19.3.1 through 6.19.3.3. Such licensees shall document the test results. [A successful test shall be confirmed by one of the following results:

[(1) producing a voltage of -0.85 volts or more negative, with reference to a saturated copper-copper sulfate half cell;]

[(2) producing a voltage of -0.78 volts or more negative, with reference to a saturated potassium chloride calomel half cell;]

[(3) producing a voltage of -0.80 volts or more negative, with reference to a silver-silver chloride half cell; or]

[(4) results obtained through any other method described in Appendix D of Title 49 of the Code of Federal Regulations, Part 192.]

[(d) Sacrificial anodes installed in accordance with subsection (b) of this section shall be tested in accordance with the following schedule:

[(1) upon installation of the cathodic protection system, unless prohibited by climatic conditions, in which case testing shall be completed within 180 days after the installation of the system;

[(2) for continued verification of the effectiveness of the system, 12 to 18 months after the initial test;

[(3) upon successful verification of test results for the tests required in paragraphs (1) and (2) of this subsection, periodic follow-up testing shall be performed at intervals not to exceed 36 months;]

[(4) Systems which fail a test prescribed in paragraphs (1) and (2) of this subsection shall be repaired as soon as practical unless climatic conditions prevent such repair, in which case the repair shall be made not more than 180 days thereafter. Systems which fail a test and for which repairs have been made shall comply with the initial and follow-up testing requirements in paragraphs (1) and (2) of this subsection, and the results shall comply with subsection (c) of this section.]

[(e) Where an impressed current cathodic protection system is installed in accordance with subsection (b) of this section, the licensee shall inspect and test the system in accordance with the following schedule:]

[(1) all sources of impressed current at intervals not exceeding two months; and

[(2) all impressed current cathodic protection installations annually.]

[(c) [(d)] The license shall retain documentation of test results in accordance with §9.4 of this title (relating to Records and Enforcement).]

[(g) The licensee shall visually examine a container prior to its burial for damage to the coating. Damaged areas shall be repaired with a coating recommended for underground service and compatible with the existing coating.]

[(h) Partially underground, unmounded containers shall be installed so the aboveground portion of the container complies with NFPA 58 §6.6.1.4.]

[(i) Steel containers and piping systems installed underground, partially underground, or as mounted installations on or after March 1, 2014, shall not be filled unless a cathodic protection system is installed in accordance with this section.

[(j) Metallic piping and tubing that convey LP-gas from an underground, partially buried, or mounded storage container shall be installed with dielectric fittings to electrically isolate the container from the aboveground portion of the fixed piping system that enters a building.]


(a) All appurtenances and equipment placed into LP-gas service shall be listed by a nationally recognized testing laboratory such as Underwriters Laboratory (UL), Factory Mutual (FM), or American Gas Association (AGA) unless:

[(1) it is specifically prohibited for use by another section of the rules in this chapter [LP-Gas Safety Rules];

[(2) - (3) (No change.)

(b) Appurtenances and equipment that cannot be listed but are not prohibited for use by the rules in this chapter [LP-Gas Safety Rules] or the manufacturer's instructions shall be acceptable for LP-gas service, provided the appurtenances and equipment are installed in compliance with the applicable rules in this chapter [LP-Gas Safety Rules].

[(c) The licensee or operator of the appurtenances or the equipment shall maintain documentation sufficient to substantiate any claims regarding the safety of any valves, fittings, and equipment and shall, upon request, furnish copies to AFS [LP-Gas Operations].

[(d) ASME containers with an individual water capacity over 4,000 gallons shall comply with paragraph (1) or (2) of this subsection:

[(1) For container openings 1 1/4-inch or greater in size:

[(A) the container shall be equipped with:

[(i) a pneumatically operated internal valve equipped for remote closure and automatic shutoff using thermal (fire) actuation where the thermal element is located within five feet (1.5 meters) of the internal valve;

[(ii) a double back flow check filler valve; or

[(iii) a positive shutoff valve in combination with a back flow check valve;

[(B) Any vapor or liquid withdrawal opening 1 1/4-inch or larger with piping attached that exclusively provides service to sta-
tionary appliances or equipment and which is not part of a transfer system may be equipped with an excess flow valve and a shutoff valve installed as close as practical to the container in lieu of an internal valve or emergency shutoff valve;

(C) For reducing the size of a container opening, only one bushing with a minimum pressure rating in accordance with NFPA 58 Table 5.11.4.2 shall be installed;

(D) Container openings that are not compatible with internal valves shall be permitted to utilize both an excess-flow valve installed in the container and an emergency shutoff valve or a valve complying with API 607, Fire Test Soft-Seated for Quarter Turn Ball Valves Equipped with Non-Metallic Seats, which shall be pneumatically actuated and shall fail in the closed position.

(2) For container openings less than 1 1/4-inch in size, the container shall be equipped with:

(A) a positive shutoff valve that is located as close to the container as practical in combination with either an excess-flow valve or a back flow check valve installed in the container;

(B) a pneumatically operated internal valve with an integral excess-flow valve or excess-flow protection; or

(C) a double back flow check filler valve.

§9.129. Manufacturer's Nameplate and Markings on ASME Containers.

(a) - (c) (No change.)

(d) Nameplates on stationary ASME containers built prior to September 1, 1984, shall include at least the following legible information:

(1) the name of container manufacturer;
(2) the manufacturer's serial number;
(3) the container's working pressure; [and]
(4) the container's water capacity; and
(5) the ASME Code symbol.

(e) Nameplates on stationary ASME containers built on or after September 1, 1984, shall be stainless steel and permanently attached to the container by continuous fusion welding around the perimeter of the nameplate, and shall be stamped or etched with the following information required by NFPA 58, §5.2.8.3(C) and §11.3.4(B) in characters at least 5/32 inch high[c]

{[1] service for which the container is designed (underground, aboveground, or both);}
{[2] name and address of container supplier or trade name of container;}
{[3] water capacity of container in pounds or U.S. gallons;}
{[4] design pressure in pounds per square inch;}
{[5] the wording "This container shall not contain a product that has a vapor pressure in excess of _______ psi at 100 degrees F."}
{[6] outside surface area in square feet;}
{[7] year of manufacture;}
{[8] shell thickness and head thickness;}
{[9] overall length of the container, the outside diameter of the container, and dish radius of the header;}
{[10] manufacturer's serial number;}

{[11] ASME Code symbol;}
{[12] minimum design metal temperature _______ F degrees at MAWP _______ psi;}
{[13] type of construction "W", and}
{[14] degree of radiography "RT _______."}

(f) Any replacement nameplate issued by an original container manufacturer for containers constructed prior to September 1, 1984, shall be stainless steel and shall be affixed in accordance with ASME Code. The owner or operator of the container shall ensure that a copy of LPG Form 8 is filed with AFS [LP-Gas Operations] when a replacement nameplate is affixed.

(g) - (h) (No change.)

(i) AFS [LP-Gas Operations] may remove a container from LP-gas service or require ASME acceptance of a container at any time if AFS [LP-Gas Operations] determines that the nameplate, in any form defined in subsection (a)(1) - (4) of this section, is loose, unreadable, or detached, or if it appears to be tampered with or damaged in any way and does not contain at a minimum the items defined in subsection (d) of this section.


(a) Prior to an original ASME nameplate or any manufacturer-issued nameplate becoming unreadable or detached from a stationary container with a water capacity of 4,001 gallons or more, the owner or operator of the container may request an identification nameplate from AFS [LP-Gas Operations]. Commission identification nameplates shall be issued only for containers which can be documented as being in continuous LP-gas service in Texas from a date prior to September 1, 1984. The container's serial number and manufacturer on the original or manufacturer-issued nameplate shall be clearly readable at the time the Commission identification nameplate is attached.

(1) (No change.)

(2) AFS [LP-Gas Operations] shall review LPG Form 502 and the supporting documentation. AFS [LP-Gas Operations] shall have the manufacturer's data report on file for the container or the licensee shall provide a copy to LP-Gas Operations. The Commission identification nameplate shall not be issued unless the manufacturer's data report is reviewed. Upon review of submitted documents and confirmation of the manufacturer's data report, LP-Gas Operations shall mail a letter to the owner or operator of the container stating the estimated costs, which will be based on the following:

(A) - (B) (No change.)

(3) The owner or operator of the container shall pay the total estimated costs to AFS [LP-Gas Operations] before AFS [LP-Gas Operations] will proceed. Within 15 business days of receipt of all required documents and fees, AFS [LP-Gas Operations] shall:

(A) (No change.)

(B) inspect the container to ensure that the container is not dented, pitted, or otherwise damaged, and complies with other applicable rules in this chapter [LP-Gas Safety Rules], unless additional time is necessary as determined by the AFS [LP-Gas Operations] director; and

(C) advise the owner or operator that the container shall be tested if it appears to be pitted or otherwise damaged.

(i) (No change.)
(ii) If the container passes the test, AFS [LP-Gas Operations] shall proceed with the attachment of the nameplate.

(D) Within the 15-day period, AFS [LP-Gas Operations] shall notify the applicant in writing, in clear and specific language, of the outcome of AFS [LP-Gas Operations] review.

(4) Following AFS [LP-Gas Operations] review of any required tests and payment of all other due in addition to the previously paid estimated costs, and if AFS determines that all requirements have been met, AFS [LP-Gas Operations] shall issue an identification nameplate for the container.

(5) - (6) (No change.)

(b) (No change.)

(c) Commission identification nameplates shall not be valid until AFS [LP-Gas Operations] has received the final paperwork from the Commission employee who attached the nameplate. AFS [LP-Gas Operations] shall notify the owner or operator of the container in writing stating the date on which the nameplate is valid.

(d) If at any time during the Commission identification nameplate request or approval process, the original ASME nameplate becomes completely unreadable or detached, the owner or operator of the container shall immediately remove the container from service and notify AFS [LP-Gas Operations] in writing stating the date on which the nameplate is valid.

In addition, AFS [LP-Gas Operations] may remove such a container from service as stated in §9.129(i) of this title (relating to Manufacturer’s Nameplate and Markings on ASME Containers).

(e) (No change.)

(f) Fees charged for the Commission identification nameplate are nonrefundable except as described in this subsection. The cost of the nameplate is refundable only if the Commission employee finds upon actual inspection of the container that the original nameplate has become totally detached or unreadable, or that the container is pitted, dented, or otherwise damaged, therefore prohibiting attachment of the nameplate. The fees charged relating to AFS [LP-Gas Operations] travel and research costs will be refunded only if AFS [LP-Gas Operations] research shows that the nameplate cannot be issued. Otherwise, these fees will be nonrefundable if these activities have taken place before the Commission employee inspects a container and finds that a nameplate cannot be issued.


In addition to NFPA 58, §§5.2.4.2 and 5.9.2.5(A), 5.7.2.4 200 psig working pressure stationary vessels in LP-gas service in Texas prior to September 1, 1981, may be continued in service for commercial propane provided that they are fitted with pressure relief valves set for 250 psig normal start to discharge and comply with previous provisions of this chapter. For the purpose of this section, “commercial propane” is defined as having a vapor pressure not in excess of 210 psig at 100 degrees Fahrenheit. This section does not apply to LP-gas motor fuel and mobile fuel containers.

§9.132. Sales to Unlicensed Individuals.

A licensee shall not sell LP-gas, an ASME [or on LP-gas] container, or a DOT cylinder greater than 96 pounds to an unlicensed individual for resale. A licensee shall not sell an LP-gas container to an unlicensed individual for installation without determining that such container will be installed by a licensee authorized to perform such installation.


LP-gas piping shall be installed only by a licensee authorized to perform such installation, a registrant authorized by §9.13 of this title (relating to General Installers and Repairman Exemption), or an individual exempted from licensing as authorized by Texas Natural Resources Code, §113.081. A licensee shall not connect an LP-gas container or cylinder to a piping installation made by a person who is not licensed to make such installation, except that connection may be made to piping installed by an individual on that individual’s single family residential home. A licensee may connect to piping installed by an unlicensed person provided the licensee has performed a pressure test, verified that the piping is free of leaks and has been installed according to the rules in this chapter [LP-Gas Safety Rules], and filed with AFS a completed LPG Form 22 [with LP-Gas Operations], identifying the unlicensed person who installed the LP-gas piping.

§9.135. Unsafe or Unapproved Containers, Cylinders, or Piping.

In addition to NFPA 58, §§5.2.1.1[2.2.2.11] and 5.2.2, a licensee or the licensee’s employees shall not introduce LP-gas into any container or cylinder if the licensee or employee has knowledge or reason to believe that such container, cylinder, piping, or the system or the appliance to which it is attached is unsafe or is not installed in accordance with the statutes or the rules in this chapter [LP-Gas Safety Rules].


(a) In addition to NFPA 58 §7.4.2.1, single-opening DOT containers of less than 101 pounds LP-gas capacity, other than container designed to be used on forklift or industrial trucks, shall be filled by weight only. The weight of such containers shall be determined by scales that meet the specifications of the National Institute of Standards and Technology’s Handbook 44. Scales at licensees’ facilities shall be currently registered with the Texas Department of Agriculture. The scales shall have a rated weighing capacity which exceeds the total weight of the cylinders being filled. The scales shall be accurate during the filling of the cylinder. The formula for filling LP-gas containers by weight under this section is as follows:

1. The propane capacity in pounds is determined by multiplying the total water capacity in pounds by .42.

2. The proper scale setting is the total of [Add] the weight of the cylinder, the propane capacity in pounds, and [to the liquid weight of the product plus] the weight of the hose and nozzle. [The total weight of these three is the proper scale setting.]

(b) Containers designed to be used on forklifts or industrial trucks shall be filled as specified in NFPA 58, §§11.13 [§11.12].


In addition to NFPA 58, §§5.2.1.1. 2.2.2.16 [2.2.2.14], and 5.2.2, before filling a container or cylinder, the individual filling the container or cylinder shall conduct a visual inspection of the exposed, readily accessible areas of the container or cylinder for any obvious defects. Where the container or cylinder is dented, bulged, gouged, or corroded such that the integrity of the container or cylinder is substantially reduced, such container or cylinder shall not be filled.


(a) Stationary LP-gas installations, including LP-gas transfer systems, dispensing systems, and storage containers, shall be protected from tampering and damage as specified in this section. In addition to NFPA 58 §6.6.3.14, LP-gas transfer systems and storage containers shall be protected from tampering and/or vehicular traffic as specified in this section. New LP-gas systems which have never been installed or had LP-gas introduced into them, or other installations fitted to paragraphs (1) - (4) of this subsection, are not required to comply with the fencing and guard railing requirements in subsections (b) and (d) of this section. The fencing and guard railing requirements also do not apply to the following:

1. LP-gas systems and containers located at private residences.
![OCR Output]
(f) [(g)] In addition to NFPA 58 §5.2.8.1, LP-gas installations shall comply with the sign and lettering requirements specified in Table 1 of this subsection [section]. An asterisk indicates that the requirement applies to the equipment or location listed in that column.

Figure: 16 TAC §9.140(f)

(1) Unless colors are specified, lettering shall be in a color that sharply contrasts to the background color of the sign, and shall be readily visible to the public.

(2) Items 1, 2, and 3 in Table 1 may be combined on one sign.

(3) Items 1, 2, and 3 in the column entitled "Licensee or Non-Licensee ASME 4001+ Gal. A.W.C." in Table 1 apply to installations with 4,001 gallons or more aggregate water capacity protected only by guardrail as required in subsection (d) of this section, and bulkheads as required by §9.143 of this title (relating to Piping and Valve [Bulkhead, Internal Valve, API 607 Ball Valve, and ESV] Protection for Stationary LP-Gas Installations with Individual or Aggregate Water Capacities of 4,001 Gallons or More) for commercial, bulk storage, cylinder filling, or forklift installations.

(4) Item 11 in the column entitled "Requirements" in Table 1 applies to facilities which have two or more containers.

(5) Item 13 in the column entitled "Requirements" in Table 1 applies to outlets where an LP-gas certified employee is responsible for the LP-gas activities at that outlet, when a licensee's employee is the operations supervisor at more than one outlet as required by §9.17(a) of this title (relating to Designation and Responsibilities of Company Representative and Operations Supervisor).

(6) Any information in Table 1 of this subsection required for an underground container shall be mounted on a sign posted within 15 feet horizontally of the manway or the container shroud.

(7) Licensees and non-licensees shall comply with operational and/or procedural actions specified by the signage requirements of this section.

(8) Any 24-hour emergency telephone numbers shall be:

(A) monitored at all times; and

(B) be answered by a person who is knowledgeable of the hazards of LP-gas and who has comprehensive LP-gas emergency response and incident information, or has immediate access to a person who possesses such knowledge and information. A telephone number that requires a call back (such as an answering service, answering machine, or beeper device) does not meet the requirements of this section.

(g) [(ih)] In addition to NFPA 58, §8.4.2.2, storage [Storage] racks used to store nominal 20-pound DOT portable or any size forklift containers shall be protected against vehicular damage by:

(1) meeting the guardrail requirements of subsection (d) of this section; or

(2) installing guard posts, provided:[]

[(A) [effective February 1, 2008, for new installations,] the guard posts are installed a minimum of 18 inches from each storage rack, and;

(A) consist of at least three-inch schedule 40 steel pipe, capped on top or otherwise protected to prevent the entrance of water or debris into the guard post, no more than four feet apart, and anchored in concrete at least 30 inches below ground and rising at least 30 inches above the ground; or

(B) are [effective February 1, 2008, for new installations, the guard posts are installed a minimum of 18 inches from each storage rack and are] constructed of at least four-inch schedule 40 steel pipe capped on top or otherwise protected to prevent the entrance of water or debris into the guard post, and attached by welding to a minimum 8-inch by 8-inch steel plate at least 1/2 inch thick. The guard posts and 8 steel plate shall be permanently installed and securely anchored to a concrete driveway or concrete parking area.

(3) Guardrail or guard posts are not required to be installed if:

(A) the cylinder storage rack is located a minimum of 48 inches behind a concrete curb or concrete wheel stop that is a minimum of five inches in height above the grade of the driveway or parking area; or

(B) if the requirements of subparagraph (A) of this paragraph cannot be met, the cylinder storage rack must be installed a minimum of 48 inches behind a concrete curb or concrete wheel stop that is a minimum of four inches in height above the grade of the driveway or parking area, and a concrete wheel stop at least four inches in height must be installed at least 12 inches from the curb or first wheel stop;

(4) All parking wheel stops and cylinder storage racks in paragraph (3) of this subsection must be secured against displacement.

(h) [(ii)] Self-service dispensers shall be protected against vehicular damage by:

(1) vehicular barrier protection [guardrails] that complies [comply] with subsection (d) [(d)(2) - (6)] of this section; or

(2) vertical supports [guard posts] that comply with subsection (d) [(d)(2)] of this section; or

(3) where routine traffic patterns expose only the approach end of the dispenser to vehicular damage, support columns, concrete barriers, bollards, inverted U-shaped guard posts anchored in concrete, or other protection acceptable to AFS [LP-Gas Operations], provided:

(A) - (B) (No change.)

(i) [(4)] Self-service dispensers utilizing protection specified in paragraphs (2) - (3) of [this] subsection (h) of this section shall be connected to supply piping by a device designed to prevent the loss of LP-gas in the event the dispenser is displaced. The device must retain liquid on both sides of the breakaway point and be installed in a manner to protect the supply piping against damage.


(a) In addition to NFPA 58, §6.8.1.4 [§6.6.1.4], containers shall be painted as follows:

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44 TexReg 6170   October 25, 2019   Texas Register
(1) (No change.)

(2) If AFS [LP-Gas Operations] disapproves of a certain color, the licensee or ultimate consumer shall provide to AFS [LP-Gas Operations] information from the container or paint manufacturer stating specific reasons why the color is heat-reflective and should be approved. The AFS [LP-Gas Operations] director shall make the final determination and shall notify the licensee or ultimate consumer.

(b) In addition to NFPA 58, §6.27.4.2 [§6.24.1.2], each LP-gas private or public motor/mobile or forklift refueling installation which includes a liquid dispensing system shall incorporate into that dispensing system a breakaway device.

(1) Any vapor return hose installed at such installations shall also be equipped with a breakaway device.

(2) LP-gas installations at which forklift cylinders are completely removed from the forklift before being filled are not required to have a breakaway device.

(c) [Locking handles on ball-type shutoff valves]. Any ball-type shutoff valve less than two inches in size shall have a locking handle. If a ball-type shutoff valve of any size has a locking handle installed at the terminal end of the hose, the main liquid and/or vapor valves or main shutoff valves on the stationary container at an attended installation may remain open as long as the locking handle on the transfer hose remains locked until the transfer hose is properly connected. If a ball-type shutoff valve two inches or larger in size does not have a locking handle, the main liquid and/or vapor valves or main shutoff valves on the stationary container shall remain closed at all times and shall not be opened until the transfer hose is properly connected or disconnected.

(d) [Pump]. A retail operated [DOT portable container filling installation and/or] service station installation shall be equipped with a pump.

(e) In addition to NFPA 58, §5.2.8.1, all containers shall be numbered in accordance with the requirements set forth in Table 1 of §9.140 of this title (relating to System [Uniform] Protection Requirements [Standards]).

(f) In addition to NFPA 58, §6.5.4.1 [§6.4.7], no canopies or coverings are allowed over any stationary ASME [LP-gas] container of 125 gallons or more or over loading and unloading areas where LP-gas transport transfer operations are performed. Non-combustible wind breaks and other weather protection may be installed in accordance with NFPA 58, §6.7.1.1 and §6.25.3.3 to provide employees and customers protection against the elements of weather, but shall not be installed over any portion of an LP-gas container.

(g) Any container that may have contained product other than LP-gas shall be thoroughly cleaned and purged prior to introducing LP-gas into such container. Only grades of LP-gas determined to be noncorrosive may be introduced into any container. LP-gas may not contain anhydrous ammonia, hydrogen sulfide, or any other contaminant.

(1) If it is known or suspected that the LP-gas has been or may be contaminated, the person responsible for the contamination shall have one or more of the tests contained in "Liquefied Petroleum Gas Specifications for Test Methods, Gas Processors Association (GPA) 2140" performed by a testing laboratory or individual qualified to perform the tests. AFS [LP-Gas Operations] may request information necessary to determine the qualification of any testing laboratory or individual.

(2) (No change.)

(3) Based on the results of the tests, AFS [LP-Gas Operations] may require that the LP-gas be removed immediately from the container or that the container be removed immediately from LP-gas service.

(h) (No change.)

§9.142. LP-Gas Container Storage and Installation Requirements.

Except as noted in this section and in addition to NFPA 58 §6.4.1.1 [§6.2.1], LP-gas containers shall be stored or installed in accordance with the distance requirements in NFPA 58, §8.2.2.6.4.4 [§4.4.5], and 8.4.1 and any other applicable requirements in NFPA 58 or the rules in this chapter [LP-Gas Safety Rules].

(1) An LP-gas liquid dispensing installation other than a retail operated [DOT portable container filling] service station installation is not required to have a pump, provided that the storage containers are located one and one half times the required distances specified in NFPA 58, §6.4.1.1 [§6.2.2], or a minimum distance of 15 feet if the storage container is less than 125 gallons water capacity.

(2) (No change.)


(a) Instead of NFPA 58, §6.14, all §6.16.12, effective February 1, 2004[,] new stationary LP-gas installations with individual or aggregate water capacities of 4,001 gallons or more, including licenses and nonlicense locations shall:

(1) install a vertical bulkhead complying with subsection (d) of this section:[s] and

(2) install one of the following in [for] all container openings 1 1/4 inches or greater: [pneumatically-operated emergency shutoff valves (ESV), pneumatically-operated internal valves, or pneumatically-operated API 607 ball valves] as required in this section and §9.126 of this title (relating to Appurtenances and Equipment):

(A) pneumatically-operated emergency shutoff valves (ESV);

(B) pneumatically-operated internal valves;

(C) pneumatically-operated API 607 ball valves; or

(D) in lieu of the ESV or internal valve specified in subparagraphs (A) and (B) of this paragraph, a backflow check valve may be installed where the flow is in one direction into the container. The backflow check valve shall have a metal-to-metal seat or a primary resilient seat with metal backup, not hinged with combustible material, and shall be designed for the specific application. [In the table in §9.403 of this title (relating to Sections in NFPA 58 Not Adopted by Reference, and Adopted With Changes or Additional Requirements) for NFPA 58, §6.11.4, in lieu of a pneumatically-operated internal valve or a pneumatically-operated ESV, a backflow check valve may be installed where the flow is in one direction into the container. The backflow check valve shall have a metal-to-metal seat or a primary resilient seat with metal backup, not hinged with combustible material, and shall be designed for this specific application.]

(b) Valve protection requirements.

(1) The pneumatic ESV and/or backflow check valves shall be installed in the fixed piping of the transfer system upstream of the bulkhead and within four feet of the bulkhead with a stainless steel flexible wire-braided hose not more than 36 inches long installed between the ESV and the bulkhead.
(2) The ESV shall be installed in the piping so that any break resulting from a pull away will occur on the hose or swivel-type piping side of the connection while retaining intact the valves and piping on the storage side of the connection and will activate the ESV at the bulkhead and the internal valves, ESV, and API 607 ball valves at the container or containers. Provisions for anchorage and breakaway shall be provided on the cargo tank side for transfer from a railroad tank car directly into a cargo tank. Such anchorage shall not be required from the tank car side.

(3) Pneumatically-operated ESV, internal valves, and API 607 ball valves shall be equipped for automatic shutoff using thermal (fire) actuation where the thermal element is located within five feet (1.5 meters) of the ESV, internal valves, and/or API 607 ball valves. Temperature sensitive elements shall not be painted nor shall they have any ornamental finishes applied after manufacture.

(4) Internal valves, ESVs, and backflow check valves shall be tested annually for working order. The results of the tests shall be documented in writing and kept in a readily accessible location for one year following the performed tests.

(5) Pneumatically-operated internal valves, ESV, and API 607 ball valves shall be interconnected and incorporated into at least one remote operating system.

(c) [4b] In addition to NFPA 58 §5.9.4.1, [§5.9.6, within two years of February 1, 2001, or by February 1, 2003, at the latest], stationary LP-gas installations [in existence as of February 1, 2001, with individual or aggregate water capacities of 4,000 gallons or more, including licensees and nonlicensee locations], or railroad tank car transfer systems to fill trucks with no stationary storage involved, which do not have a bulkhead, ESV, and/or backflow check valves where the flow is in one direction into the container, shall have [install] vertical bulkheads, pneumatic ESV and/or backflow check valves installed where the flow is in one direction into the container. ESVs, internal valves, and API 607 valves shall have emergency remote controls conspicuously marked according to the requirements of Table 1 of §9.140 of this title (relating to System Protection Requirements) as follows:

1. For all new and existing facilities, where a bulkhead, internal valves, and ESVs are installed, at least one clearly identified and easily accessible manually operated remote emergency shutoff device shall be located between 20 and 100 feet from the ESV in the path of egress from the ESV.

2. In addition to NFPA 58 §7.2.3.8 beginning September 1, 2005, for new installations, at least one clearly identified and easily accessible manually operated remote emergency shutoff device shall be located between 25 and 100 feet from the ESV at the bulkhead and in the path of egress from the ESV. API 607 valves installed after February 1, 2008, shall also meet the requirements of this section.

(d) [4e] Existing installations which have horizontal bulkheads and cable-actuated ESV shall comply with the following:

1. If the horizontal bulkhead requires replacement, it shall be replaced with a vertical bulkhead;

2. If a cable-actuated ESV requires replacement, it shall be replaced with a pneumatically-operated ESV;

3. If the horizontal bulkhead or a backflow check valve or a cable-actuated ESV are moved from their original location to another location, no matter what the distance from the original location, then the installation shall comply with the requirements for a vertical bulkhead and pneumatically-operated ESV;

4. All cable-actuated ESV shall be replaced with pneumatically-operated ESV by January 1, 2011.

(e) [4d] Bulkheads, whether horizontal or vertical, shall comply with the following requirements:

1. Bulkheads shall be installed for both liquid and vapor return piping;

2. No more than two transfer hoses shall be attached to a pipe riser. If two hoses are simultaneously connected to one or two transports, the use of the two hoses shall not prevent the activation of the ESV in the event of a pull away;

3. Both liquid and vapor transfer hoses shall be plugged or capped when not in use;

4. Bulkheads shall be located at least 10 feet from any aboveground container or containers and a minimum of 10 feet horizontally from any portion of a container or valve exposed aboveground on any underground or mounded container. If the 10-foot distance cannot be obtained, the licensee or nonlicensee shall inform AFS [the Safety Division (the Division)] in writing and include all necessary information. AFS [The Division] may grant administrative distance variances to a minimum distance of five feet. If the licensee or nonlicensee requests that the bulkhead be closer than five feet to the container or containers, the licensee or nonlicensee shall apply for an exception to a safety rule as specified in §9.27 of this title (relating to Application for an Exception to a Safety Rule);

5. Horizontal bulkheads shall not be converted to vertical bulkheads;

6. Bulkheads shall be anchored in reinforced concrete to prevent displacement of the bulkhead, piping, and fittings in the event of a pullaway;

7. Bulkheads shall be constructed by welding using the following materials or materials with equal or greater strength, as shown in the diagram.

Figure: 16 TAC §9.143(e)(7)

(A) Six-inch steel channel iron shall be used;

(B) Legs shall be four-inch schedule 80 piping;

(C) The top crossmember of a vertical bulkhead shall be six-inch standard weight steel channel iron. The channel iron shall be installed so that the channel portion is pointing downward to prevent accumulation of water or other debris. The height of the top crossmember above ground shall not result in torsional stress on the vertical supports of the bulkhead in the event of a pullaway;

(D) The kick plate shall be at least 1/4 inch steel plate installed at least 10 inches from the top of the bulkhead crossmember. A kick plate is not required if the crossmember is constructed to prevent torsional stress from being placed on the piping to the pipe risers;

(E) Either a schedule 40 pipe sleeve or a 3,000-pound coupling shall be welded between the top crossmember and the kick plate;

(i) Pipe sleeves shall have a clearance of 1/4 inch or less for the piping to the pipe riser, and the piping shall terminate through the bulkhead with a schedule 80 pipe collar, a minimum 12-inch schedule 80 threaded (not welded) pipe riser (nipple), and an elbow or other fitting between the bulkhead and hose coupling;

(ii) If a 3,000-pound coupling is used, no collar is required; however, the minimum 12-inch length of schedule 80 threaded pipe riser and an elbow or other fitting between the bulkhead and hose coupling are required;
Elbows or other fittings shall comply with NFPA 58, §5.11.4 [§2.4.4] and shall direct the transfer hose from vertical to prevent binding or kinking of the hose.

In lieu of a minimum 12-inch nipple on [es] a vertical bulkhead, swivel-type piping (breakaway loading arm) may be installed. The swivel-type piping shall meet all applicable provisions of the rules in this chapter [LP-Gas Safety Rules]. The swivel-type piping may also be used for loading, unloading, or product transfer, but shall not be used in lieu of ESVs. The swivel-type piping shall be installed and maintained according to the manufacturer's instructions.

AFS [LP-Gas Operations] may require additional bulkhead protection if the installation is subject to exceptional circumstances or located in an unusual area where additional protection is necessary to protect the health, safety, and welfare of the general public.

In addition to NFPA 58, §§5.7.4.2 as amended in the table in §9.403 of this title (relating to Sections in NFPA 58 Not Adopted by Reference, and Adopted with Changes or Additional Requirements), ESVs, internal valves, and API 607 ball valves shall have emergency remote controls conspicuously marked according to the requirements of Table 4 of §9.140 of this title (relating to Uniform Protection Standards) as follows:

Effective February 1, 2001, for all new facilities, where a bulkhead, internal valves, and ESVs are installed, at least one clearly identified and easily accessible manually operated remote emergency shutoff device shall be located between 25 and 100 feet from the ESV in the path of egress from the ESV. Existing installations shall have complied by August 1, 2001.

Beginning September 1, 2005, for new installations, at least one clearly identified and easily accessible manually operated remote emergency shutoff device shall be located between 25 and 100 feet from the ESV at the bulkhead and in the path of egress from the ESV. API 607 ball valves installed after February 1, 2008, shall also meet the requirements of this section.

The use of swivel-type piping as specified in subsection (d)(8) of this section shall not eliminate the requirement for an ESV. Swivel-type piping may be installed between the bulkhead and the minimum 12-inch nipple, but shall not eliminate the requirement for an ESV. The swivel-type piping shall be installed and maintained according to the manufacturer's instructions.

The bulkheads, internal valves, backflow check valves, and ESVs shall be kept in working order at all times in accordance with the manufacturer's instructions and the rules in this chapter [LP-Gas Safety Rules]. If the bulkheads, internal valves, backflow check valves and ESVs are not in working order in accordance with the manufacturer's instructions and the rules in this chapter [LP-Gas Safety Rules], the licensee or operator of the installation shall immediately remove them from LP-gas service and shall not operate the installation until all necessary repairs have been made.

In addition to NFPA 58 §§5.11.6 and 6.11.6.1 [§§5.9.6 and 6.9.6.1], by February 1, 2003, rubber flexible connectors which are 3/4-inch or larger in size installed in liquid or vapor piping at an existing liquid transfer operation shall have been replaced with a stainless steel flexible connector. Stainless steel flexible connectors shall be 60 inches in length or less, and shall comply with all applicable rules in this chapter [LP-Gas Safety Rules]. Flexible connectors installed at a new installation after February 1, 2001, shall be stainless steel.

If necessary to increase LP-gas safety, AFS [LP-Gas Operations] may require a pneumatically-operated internal valve equipped for remote closure and automatic shutoff through thermal (fire) actuation to be installed for certain liquid and/or vapor connections with an opening of 3/4 inch or one inch in size.

Stationary LP-gas installations with individual or aggregate water capacities of 4.001 gallons or more are exempt from subsections (a) through (c) and (h) of this section provided:

1. each container is filled solely through a 3/4-inch double back check filler valve installed directly into the container; [and]
2. at least one clearly identified and easily accessible manually operated remote emergency shutoff device shall be located between 25 and 100 feet from the point of transfer in the path of egress to close the primary discharge valves in the containers; and
3. the LP-gas installation is not used to fill an LP-gas transport.

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 C. VEHICLES [AND VEHICLE DISPENSERS]


The Commission proposes the amendments under Texas Natural Resources Code, §113.051, which authorizes the Commission to promulgate rules and standards relating to any and all aspects of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the public; Texas Natural Resources Code §113.0815, which requires a person engaging in the manufacture or fabrication of containers to register with the commission in accordance with rules adopted by the commission; and Texas Natural Resources Code §113.082, which authorizes the Commission to adopt rules establishing license categories for LP-gas activities.

Statutory authority: Texas Natural Resources Code, §§113.051, 113.0815, and 113.082.

Cross reference to statute: Texas Natural Resources Code Chapter 113.

§9.201. Applicability.
(a) This subchapter applies to transport containers and moveable fuel storage tenders such as farm carts constructed to MC-330 or MC-331 Department of Transportation (DOT) specifications, nonspecification units, container delivery units, school buses, mass transit vehicles, special transit vehicles, and public transportation vehicles.

1. Transfer of LP-gas from one transport to another shall be permitted only through a hose with a nominal inside diameter of 1 1/4 inch or less and protected by an off-truck remote control shutdown as required in Title 49 Code of Federal Regulations (CFR) §173.315(n)(3) [CFR].
(2) An LP-gas transport shall not be joined to manifold piping or to a stationary container for use as an auxiliary storage container at any stationary installation except with prior approval from AFS [LP-Gas Operations].

(b) All transports and moveable fuel storage tenders shall comply with MC-330 or MC-331, or the exemption in 49 CFR [Title 49, Code of Federal Regulations (CFR)] §173.315(k).

(c) Licensees and ultimate consumers shall comply with other DOT or motor vehicle requirements, if applicable. In addition, transports and container delivery units shall also comply with the applicable sections of [Title 49 CFRL the Federal Motor Vehicle Safety Standards, and any other applicable regulations. Examples of such additional requirements are as follows:

(1) 49 CFR §177.834(j) states: "Except for a cargo tank conforming to §173.29(b)(2) of this subchapter, a person may not drive a cargo tank motor vehicle containing a hazardous material regardless of quantity unless: (1) All manhole closures are closed and secured; and (2) All valves and other closures in liquid discharge systems are closed and free of leaks, except external emergency self-closing valves on MC 338 cargo tanks containing the residue of cryogenic liquids may remain either open or closed during transit."

(2) 49 CFR §177.840(g) states: "Each liquid discharge valve on a cargo tank motor vehicle, other than an engine fuel line valve, must be closed during transportation except during loading and unloading."

(3) (No change.)

§9.202 Registration and Transfer of LP-Gas Transports or Container Delivery Units.

(a) A person who operates a transport equipped with LP-gas cargo tanks or any container delivery unit, regardless of who owns the transport or unit, shall register such transport or unit with AFS [LP-Gas Operations] in the name or names under which the operator conducts business in Texas prior to the unit being used in LP-gas service.

(1) To register a unit previously unregistered in Texas, the operator of the unit shall:

(A) pay to AFS [LP-Gas Operations] the $270 registration fee for each bobtail truck, semitrailer, container delivery unit, or other motor vehicle equipped with LP-gas cargo tanks; [and]

(B) file a properly completed LPG Form 7;[.]

(C) file a copy of the Manufacturer's Data Report;

(D) file a copy of the DOT Certificate of Compliance; and

(E) file a copy of the hydrostatic or pneumatic test required by §9.208 of this title (relating to Testing Requirements), unless the unit was manufactured within the previous five years or 10 years for units which meet the exemption in 49 CFR 180.407(c).

(2) To register an MC-330/MC-331 specification unit which was previously registered in Texas but for which the registration has expired, the operator of the unit shall:

(A) pay to AFS [LP-Gas Operations] the $270 registration fee;

(B) file a properly completed LPG Form 7; and

(C) file a copy of the latest test results if an expired unit has not been used in the transportation of LP-gas for over one year or if a current hydrostatic test has not been filed with AFS.

(3) To re-register a currently registered unit, the licensee operating the unit shall pay a $270 annual registration fee.

(4) [(3)] To transfer a currently registered unit, the new operator of the unit shall:

(A) pay the $100 transfer fee for each unit; and

(B) file a properly completed LPG Form 7.

(b) AFS [LP-Gas Operations] may also request that an operator registering or transferring any unit:

[1] file a copy of the Manufacturer's Data Report; or

[2] have the unit tested by a test other than those required by §9.208 of this title (relating to Testing Requirements).

(c) When all registration or transfer requirements have been met, AFS [LP-Gas Operations] shall issue LPG Form 4 which shall be properly affixed in accordance with the placement instructions on the form. LPG Form 4 shall authorize the licensee or ultimate consumer to whom it has been issued and no other person to operate such unit in the transportation of LP-gas and to fill the transport containers.

(1) A person shall not operate an LP-gas transport unit or container delivery unit in Texas unless the LPG Form 4 has been properly affixed or unless its operation has been specifically approved by AFS [LP-Gas Operations].

(2) A person shall not introduce LP-gas into a transport container unless that unit bears an LPG Form 4 or unless specifically approved by AFS [LP-Gas Operations].

(3) (No change.)

(4) This subsection shall not apply to:

(A) a container manufacturer/fabricator who introduces a reasonable amount of LP-gas into a newly constructed container in order to properly test the vessel, piping system, and appurtenances prior to the initial sale of the container. The liquid LP-gas shall be removed from [form] the transport container prior to the unit leaving the container manufacturer/fabricator's premises; or

(B) a person who introduces a maximum of 150 gallons of LP-gas into a newly constructed transport container when such container will provide the motor fuel to the chassis engine for the purpose of allowing the unit to reach its destination.

(5) AFS [LP-Gas Operations] shall not issue an LPG Form 4 if:

(A) AFS [LP-Gas Operations] or a Category A, B, or O licensee determines that the transport is unsafe for LP-gas service;

(B) AFS [LP-Gas Operations] does not have an inspection record of the transport or cylinder delivery unit by a Commission representative within four years of its initial registration [on or after January 1, 2006; or

(C) AFS [LP-Gas Operations] has not inspected the transport or cylinder delivery unit at least once every four years after the initial registration [within a four-year cycle thereafter].

(6) If an LPG Form 4 decal on a unit currently registered with AFS [LP-Gas Operations] is destroyed, lost, or damaged, the operator of that vehicle shall obtain a replacement decal by filing LPG Form 18B and a $50 replacement fee with AFS [LP-Gas Operations].


(a) After the manufacture of or the conversion to an LP-gas system on any vehicle to be used in Texas as a school bus, mass tran-
sit, public transportation, or special transit vehicle, the manufacturer, licensee, or ultimate consumer making the installation or conversion shall notify AFS [LP-Gas Operations], in writing on LPG Form 503 that the applicable LP-gas powered vehicles are ready for a complete inspection to determine compliance with the rules in this chapter [LP-Gas Safety Rules].

(b) AFS shall conduct the inspection within a reasonable time to ensure the vehicles are operating in compliance with the rules in this chapter.

(1) If AFS [LP-Gas Operations] initial complete inspection finds the vehicle in compliance with the rules in this chapter [LP-Gas Safety Rules] and the statutes, the vehicle may be placed into LP-gas service. For fleet installations of identical design, an initial inspection shall be conducted prior to the operation of the first vehicle, and subsequent vehicles of the same design may be placed into service without prior inspections. [Inspections shall be conducted within a reasonable time frame to ensure the vehicles are operating in compliance with the LP-Gas Safety Rules.]

(2) If violations exist at the time of the initial complete inspection, the vehicle shall not be placed into LP-gas service and the manufacturer, licensee, or ultimate consumer making the installation or conversion shall correct the violations. The manufacturer, licensee, or ultimate consumer shall file with AFS documentation demonstrating compliance with the rules in this chapter, or AFS shall conduct another complete inspection before the vehicle may be placed into LP-gas service.

(3) For public transportation vehicles only, [either manufactured to use or converted to LP-gas.] if AFS [LP-Gas Operations] does not conduct the initial inspection of such vehicle within 30 business days of receipt of LPG Form 503, the vehicle may be operated in LP-gas service if it complies with the rules in this chapter. [LP-Gas Safety Rules. The manufacturer, licensee, or ultimate consumer shall file with LP-Gas Operations documentation demonstrating compliance with the LP-Gas Safety Rules, or LP-Gas Operations shall conduct another complete inspection before the vehicle may be placed into LP-gas service.]

(c) The manufacturer, licensee, or ultimate consumer making the installation or conversion shall be responsible for compliance with the rules in this chapter [LP-Gas Safety Rules], statutes, and any other local, state, or federal requirements.

(d) If the requested AFS [LP-Gas Operations] inspection identifies violations requiring modifications by the manufacturer, licensee, or ultimate consumer, AFS [LP-Gas Operations] shall consider the assessment of an inspection fee to cover the costs associated with any additional inspection, including mileage and per diem rates set by the legislature.

§9.204. Maintenance of Vehicles.

(a) All LP-gas vehicles and vehicle containers, valves, dispensers, accessories, piping, transfer equipment, gas container, gas utilization equipment, and appliances shall be maintained in safe working order and in accordance with the manufacturer's instructions and the rules in this chapter [LP-Gas Safety Rules].

(b) If any of the LP-gas vehicles and vehicle containers, valves, dispensers, accessories, piping, transfer equipment, gas containers, gas utilization equipment, or appliances is not in safe working order, AFS [LP-Gas Operations] may require that the vehicle be immediately removed from LP-gas service and not be operated until the necessary repairs have been made.


LP-gas shall not be introduced into any vehicle powered by LP-gas and designed for regular use on public roadways unless the vehicle is properly identified by a weather-resistant diamond-shaped label described in NFPA 58, §12.3.4.2 [§11-4.1], as that section is amended in Table 1 of §9.403 of this title (relating to Sections in NFPA 58 Not Adopted by Reference, and Adopted With Changes or Additional Requirements).


Each transport container unit required to be registered with AFS [LP-Gas Operations] shall be tested in accordance with 49 CFR 180.407, relating to requirements for test and inspection of specification cargo tanks. The tests shall be conducted by any individual authorized by the United States Department of Transportation through a DOT "CT" number to conduct such tests. This section shall not apply to the initial transfer of unregistered units that are tested and transferred from another state. If the test results show any unsafe condition, or if the transport unit does not comply with 49 CFR Parts 100 - 185, the transport container unit shall be immediately removed from LP-gas service and shall not be returned to LP-gas service until all necessary repairs have been made and AFS [LP-Gas Operations] authorizes its return to service.

§9.211. Markings.

In addition to NFPA 58 §9.4.6.2, each LP-gas transport and container delivery unit in LP-gas service shall be marked on each side and the rear with the name of the licensee or the ultimate consumer operating the unit. Such lettering shall be legible and at least two inches in height and in sharp color contrast to the background. AFS [LP-Gas Operations] shall determine whether the name marked on the unit is sufficient to properly identify the licensee or ultimate consumer operating the unit.


(a) All manifests or bills of lading shall indicate the amount and type of odorant per gross gallons, the vapor pressure of the product at 100 degrees [degree] Fahrenheit, the net gallons, the loading temperature, the specific gravity at 60 degrees Fahrenheit, the type of product, and the United Nations number with verification by the loading entity and loader. A copy of the manifest or bill of lading shall be given to the entity receiving the shipment.

     (b) - (c) (No change.)

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. ADOPTION BY REFERENCE OF NFPA 54 (NATIONAL FUEL GAS CODE)


The Commission proposes the amendments and new rule under Texas Natural Resources Code, §113.051, which authorizes the Commission to promulgate and adopt rules and standards relating to any and all aspects or phases of the LP-gas industry that
will protect or tend to protect the health, welfare, and safety of the general public; Texas Natural Resources Code §113.0815, which requires a person engaging in the manufacture or fabrication of containers to register with the commission in accordance with rules adopted by the commission; and Texas Natural Resources Code §113.082, which authorizes the Commission to adopt rules establishing license categories for LP-gas activities.

Statutory authority: Texas Natural Resources Code, §§113.051, 113.0815, and 113.082.

Cross reference to statute: Texas Natural Resources Code Chapter 113.

§9.301. Adoption by Reference of NFPA 54.

(a) Except as modified in the remaining sections of this subchapter, the Commission adopts by specific reference the provisions established by the National Fire Protection Association in its 2018 [2006] edition of the National Fuel Gas Code, commonly referred to as NFPA 54 or Pamphlet 54. Nothing in this section or subchapter shall prevent the Commission, after notice, from adopting additional requirements, whether more or less stringent, for individual situations to protect the health, safety, and welfare of the general public. Any documents or parts of documents incorporated by reference into these rules shall be a part of these rules as if set out in full.

(b) The Commission also adopts by reference all other NFPA publications or portions of those publications referenced in NFPA 54 which apply to LP-gas activities only. The adopted pamphlets referenced in NFPA 54 are:

(14) NFPA 780, Standard for the Installation of Lightning Protection Systems, 2017 edition;

§9.301. Clarification of Certain Terms Used in NFPA 54.

(a) (No change.)

(b) Qualified agency. The term "qualified agency" as defined in NFPA 54, §3.3.81 [§3.3.83], shall include a person (as "person" is defined in §9.2 of this title (relating to Definitions)) who holds a current license issued by the Commission, or a person performing certain LP-gas activities on his own premises, as allowed in §9.134 of this title (relating to Connecting Container to Piping).

(c) (No change.)

§9.303. Exclusion of NFPA 54, §10.28 [§10.29].

The Commission does not adopt NFPA 54, §10.28 [§10.29], which refers to NFPA 52, Vehicular Fuel Systems Code. Persons engaging in CNG activities shall comply with the Commission's adopted rules in [at] Chapter 13 of this title (relating to Regulations for Compressed Natural Gas (CNG)).


An individual who services and repairs an LP-gas appliance not required by the manufacturer to be vented to the atmosphere is exempt from the requirement to obtain a Category D license as specified in §9.6 of this title (relating to License Categories, Container Manufacturer Registration, and Fees). An individual who installs these unvented appliances to LP-gas systems by means of LP-gas appliance connectors shall also exempt from Category D licensing.


In addition to applicable requirements in NFPA 54, §10.22.3 [Chapter 44], Installation of Specific Appliances [Equipment], room heaters in schools, day care centers, foster homes, hotels or other similar buildings or rooms used for temporary lodging shall be vented and equipped with a safety shutoff device, except that room heaters with 40,000 Btu or less input and infrared heaters are not required to be vented, but shall have a safety shutoff device and an oxygen depletion system (ODS).


(a) In addition to the requirements of NFPA 54, §9.1.3, and NFPA 58, §5.23 [§5.20], upon completion of the conversion and testing of LP-gas appliances, the licensee, registrant, or appliance manufacturer making the conversion shall attach to each such appliance a decal or tag of metal or other permanent material indicating that the appliance is converted for use with LP-gas.

(b) (No change.)

§9.308. Installation [Identification] of Piping [Installation].

(a) In addition to the requirements of NFPA 54, Chapter 7, Gas Piping Installation, LP-gas piping shall be installed, altered, repaired, pressure tested, and leakage tested only by persons properly [licensed or] certified by the Commission pursuant to §9.10 and §9.13 of this title (relating to Rules Examination, and General Installers and Repairman Exemption, respectively).

(b) Licensees and registrants shall document and retain such documentation of all pressure and leakage tests pursuant to §9.4 of this title (relating to Records) [and Enforcement].
§9.311. Special Exceptions for Agricultural and Industrial Structures Regarding Appliance Connectors and Piping Support.

(a) In addition to the requirements of NFPA 54, §9.6.2 and NFPA 58 §5.11.6.5 [§§5.11.6.5] regarding gas hose connectors, agricultural structures, such as greenhouses or broiler houses, or industrial structures not inhabited by humans may use a gas hose connector [have appliance connectors] more than six feet in length as an appliance connector provided that:

1. the hose used shall be marked as acceptable for LP-gas service;
2. the hose shall comply with NFPA 58, §§5.11.6.1 through 5.11.6.4 [§§5.11.6.1 through 5.11.6.4];
3. - (4) (No change.)
(b) (No change.)
(c) Items listed in NFPA 54, §1.1.1.1(2)(c) must comply with the requirements of NFPA 58 as adopted in Subchapter E of this chapter (relating to Adoption by Reference of NFPA 58 (LP-Gas Code)).

[(c) In addition to the requirements in NFPA 54, §7.2.6, the support spacing requirement for 3/4 to one inch pipe shall not apply to agricultural structures not inhabited by humans, such as greenhouses and broiler houses, provided that:

1. such piping is supported by ceiling trusses no more than ten feet apart; and
2. pipe joints and fittings are supported by the trusses.]

§9.313. Sections in NFPA 54 Adopted with Additional Requirements or Not Adopted.

Table 1 of this section lists certain NFPA 54 sections which the Commission adopts with additional requirements, changes, or does not adopt in order to address the Commission’s rules in this chapter.

Figure: 16 TAC §9.313

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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Haley Cochran
Rules Attorney, Office of the General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 475-1295

SUBCHAPTER E. ADOPTION BY REFERENCE OF NFPA 58 (LP-GAS CODE)

16 TAC §9.401, §9.403

The Commission proposes the amendments under Texas Natural Resources Code, §113.051, which authorizes the Commission to promulgate and adopt rules and standards relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public; Texas Natural Resources Code §113.0815, which requires a person engaging in the manufacture or fabrication of containers to register with the commission in accordance with rules adopted by the commission; and Texas Natural Resources Code §113.082, which authorizes the Commission to adopt rules establishing license categories for LP-gas activities.

Statutory authority: Texas Natural Resources Code, §§§113.051, 113.0815, and 113.082.

Cross reference to statute: Texas Natural Resources Code Chapter 113.


(a) Except as modified in this subchapter, the Commission adopts by specific reference the provisions established by the National Fire Protection Association (NFPA) in its 2017 [2008] edition of the Liquefied Petroleum Gas Code (formerly titled Standard for the Storage and Handling of Liquefied Petroleum Gases), commonly referred to as NFPA 58 or Pamphlet 58, [effective February 1, 2008].

Nothing in this section or subchapter shall prevent the Commission, after notice, from adopting additional requirements, whether more or less stringent, for individual situations to protect the health, safety and welfare of the general public. Any documents or parts of documents incorporated by reference into these rules shall be a part of these rules as if set out in full.

(b) The Commission also adopts by reference all other NFPA publications or portions of those publications referenced in NFPA 58,
§2.1, which apply to LP-gas activities only. The adopted pamphlets referenced in NFPA 58 are:


§9.403. Sections in NFPA 58 Not Adopted by Reference, and Adopted with Changes or Additional Requirements.

a. Table 1 of this section lists certain NFPA 58 sections which the Commission does not adopt because the Commission's corresponding rules are more pertinent to LP-gas activities in Texas, or which the Commission adopts with changed language or additional requirements in order to address the Commission's existing rules.

Figure: 16 TAC §9.403

(b) (No change.)

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

Filed with the Office of the Secretary of State on October 1, 2019.

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 60. PROCEDURAL RULES OF THE COMMISSION AND THE DEPARTMENT

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 60, Subchapter B, §60.23; Subchapter D, §60.40, and Subchapter I, §60.306; new rule Subchapter D, §60.36; and the repeal of Subchapter I, §60.302, regarding the Procedural Rules of the Commission and the Department. These proposed changes are referred to as the "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 60 implement Texas Occupations Code, Chapter 51, Texas Department of Licensing and Regulation, and Chapter 53, Consequences of Criminal Conviction.

The proposed rules implement House Bill (HB) 1342, 86th Legislature, Regular Session (2019). HB 1342 amends Texas Occupations Code, Chapter 51, to provide the Texas Commission of Licensing and Regulation (Commission) and the Executive Director of the agency the authority to issue restricted licenses to persons within the Department's Air Conditioning and Refrigeration and Electricians programs. Further, HB 1342 amends Chapter 51 to state that a person whose license has been revoked for failure to pay an administrative penalty is eligible to reapply once the penalty has been paid in full, or the person is paying the administrative penalty under a payment plan with the Department and is in good standing with respect to that plan.

The proposed rules also implement HB 1899, 86th Legislature, Regular Session (2019). HB 1899 amends Texas Occupations Code, Chapter 108, to require mandatory denial or revocation of licensure for certain health care professionals.

The proposed rules also make several non-substantive organizational and clean-up changes.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §60.23 to include the addition of subsection (b)(4), which implements Texas Occupations Code §51.357, as enacted by HB 1342, §2. This addition makes it clear that the Commission and the Executive Director have the authority to issue restricted licenses in accordance with Texas Occupations Code, Chapter 51, Subchapter G.

The proposed rules amend §60.23(b)(5) to better align the rule text with the requirements of Texas Occupations Code, Chapter 53, relating to the consequences of criminal conviction. The proposed changes include a reference to deferred adjudication missing from the existing rule and replace the reference to offenses carrying the possibility of confinement in a state or federal
facility with "an offense identified in Texas Occupations Code, §53.021."

The remaining proposed amendments to §60.23 are non-substantive and represent organizational or clean-up changes.

The proposed rules add new §60.36 (a) - (c) to implement HB 1342, §1, by stating that a person whose license has been revoked for failure to pay an administrative penalty may reapply once the person has either paid the penalty in full, or is paying the administrative penalty under a payment plan with the Department and is in good standing with respect to that plan. The proposed new subsection (c) provides a definition for "good standing" for purposes of the section.

The proposed rules add new §60.36(d) which is not a new provision but has been moved to the new rule from its former place at §60.40(c)(1). This change was made for organizational purposes and is not substantive.

The proposed rules add new §60.36(e) to implement Texas Occupations Code §108.054 and §108.055, as enacted by HB 1899, §8. New §60.36(e) simply states that a health care professional subject to mandatory denial or revocation by Texas Occupations Code §108.052 or §108.053, respectively, may reapply or seek reinstatement pursuant to Texas Occupations Code, Chapter 108, Subchapter B.

The proposed rules amend §60.40 to include the repeal of subsection (c). As mentioned above, the proposed rules move subsection (c)(1) of this rule to new proposed §60.36. Subsection (c)(2) has been removed, as it is no longer necessary in light of proposed new §60.36.

The repeal of §60.302 is proposed because the rule is redundant in light of the proposed changes to §60.306, summarized below.

The proposed changes to §60.306(a) and (b) implement Texas Occupations Code §§51.358(c) and (d), as enacted by HB 1342, §2. Sections 51.358(c) and (d) create a new type of contested case under the Administrative Procedure Act. Section 51.358(c) states that upon the expiration of a restricted license, there is a rebuttable presumption that the applicant is entitled to an unrestricted license. In order to retain restrictions on a license upon renewal, the Department must determine, pursuant to §51.358(d), either that: the applicant failed to comply with any condition imposed on the license, the applicant is not in good standing with the Department, or issuing an unrestricted license to the applicant would result in an increased risk of harm to any person or property. The proposed changes to §60.306(a) and (b) include a reference to this new type of contested case.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rules.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there may be a slight revenue gain, as there could be individuals who will obtain a restricted license who would not have obtained a license previously. However, the number of individuals who will obtain a restricted license cannot be estimated, and therefore any revenue gain also cannot be estimated.

Mr. Couvillon has also determined that for each year of the first five years the proposed rules are in effect, enforcing or adminis-tering the proposed rules does not have foreseeable implications relating to costs or revenues of local governments.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

PUBLIC BENEFITS

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be a possible increase in the number of licensed electricians, as well as the number of licensed air conditioning and refrigeration contractors and technicians. The proposed rules may allow persons with past criminal convictions to become employed within these industries, subject to reasonable restrictions and under supervision by a licensee. Additionally, the proposed rules will allow earlier reinstatement of licensure for those persons whose licenses have been revoked for failure to pay an administrative penalty, so they will spend less time not being able to work because of the lack of a license.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there may be additional costs to persons who are required to comply with the proposed rules. Because existing licensees will be required by the proposed rules (and by HB 1342) to ensure that persons under their supervision comply with the terms of a restricted license, there may be negligible costs involved for the supervising licensees. Any cost the supervising licensee may incur cannot be estimated, however. Additionally, no licensee will be required to take on supervision of a restricted licensee, so this cost is optional.

Restricted licensees will be required to comply with the conditions imposed by the Commission or Executive Director, but these conditions should not impose a cost.

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

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

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

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:
1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do not require an increase or decrease in fees paid to the agency.
5. The proposed rules do create a new regulation. Proposed §60.36 is a new rule, but it is required by HB 1342.
6. The proposed rules do expand, limit, or repeal an existing regulation. The proposed rules make several necessary amendments to existing rules in light of HB 1342 and HB 1899, along with non-substantive organizational and clean-up changes.
7. The proposed rules do not increase or decrease the number of individuals subject to the rule's applicability.
8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

Comments on the proposed rules may be submitted to Dalma Sotero, Legal Assistant, Texas Department of Licensing and Regulation, PO Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: erule.comments@tdlr.texas.gov. The deadline for comments is 30 days after publication in the Texas Register.

SUBCHAPTER B. POWERS AND RESPONSIBILITIES

16 TAC §60.23

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51, 202, 401, 402, 1302, and 1305. No other statutes, articles, or codes are affected by the proposed rules.

§60.23. Commission and Executive Director--Imposing Sanctions and Penalties.

(a) The commission [Commission] or executive director [Executive Director] may sanction a license holder, applicant, or other person [deny a license application or license renewal; or suspend or revoke any license], if the person:

1. obtains or attempts to obtain a license [the license was obtained or attempted to be obtained] by fraud or false representation;
2. falsifies any document [required documents] submitted to the department or commission [as part of the initial or renewal application packet are falsified];
3. refuses [the person refused] to permit inspection or interferes [interfered] with an inspection or investigation by an authorized representative of the commission [Commission] or department [Executive Director];
4. permits [the person permitted] the use or display of a [his] license by a person not authorized by law to use that license;
5. [the person] has been convicted of, or placed on deferred adjudication for, [a crime or] an offense identified in Texas Occupations Code, §53.021(a) [that carries the possibility of confinement in a state or federal facility]; or
6. [the person] violates a law establishing a regulatory program administered by the department [Department], or a rule or order of the commission [Commission] or department [the Department].

(b) The commission [Commission] or executive director [Executive Director] shall consider the factors set forth in Texas Occupations Code, §51.302(b) and may:

1. issue a written reprimand [to the person that specifies the violation];
2. revoke, suspend, or deny the person's license;
3. place on probation a person whose license has been suspended or revoked;
4. issue a restricted license to the person in accordance with Texas Occupations Code, Chapter 51, Subchapter G;
5. [(4)] refuse to renew the person's license; or
6. [(5)] impose administrative penalties against [on] the person after considering the factors set forth in Texas Occupations Code, §51.302(b).

(c) If the suspension or revocation of a license is probated, the commission [Commission] or executive director [Executive Director] may require the person to:

1. report regularly to the department [Executive Director] on matters that are the basis of the probation;
2. limit practice to the areas prescribed by the commission [Commission] or executive director [Executive Director];
3. complete professional education until the person attains a degree of skill satisfactory to the commission [Commission] or executive director [Executive Director] in those areas that are the basis for the probation; or
4. complete any other remedial actions agreed to by the parties.

(d) If a person has outstanding [or unpaid] administrative penalties, which were imposed by the Commission or the Executive Director, the department [Department] may place a hold on the person's license and the person may [will] not [be able to] renew the license until the administrative penalties are paid.

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 proposed rules are adopted under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51, 202, 401, 402, 1302, and 1305. No other statutes, articles, or codes are affected by the proposed rules.

16 TAC §60.36. License Eligibility After Denial or Revocation.

(a) Except as stated below or by other law, a person whose license is revoked by order of the commission or the executive director must wait one year from the date of revocation before applying for a new license.

(b) A person whose license has been revoked solely because of a failure to pay an administrative penalty may reapply at any time if the person either:

(1) has paid the administrative penalty in full; or

(2) is paying the administrative penalty under a payment plan with the department and is in good standing with respect to that plan.

(c) For purposes of this section, a person is in good standing with respect to a payment plan if, at the time of application, the person is current on the payment plan and has made timely payments on the plan for the preceding two months.

(d) A person whose license is revoked by operation of law pursuant to Texas Occupations Code, §53.021(b) must wait until release from imprisonment before applying for a new license.

(e) A person whose application for licensure as a health care professional has been denied, or whose license as a health care professional has been revoked, pursuant to Texas Occupations Code, Chapter 108, Subchapter B, may reapply or seek reinstatement as provided by that subchapter.

§60.40. License Eligibility for Persons with Criminal Convictions.

(a) Texas Occupations Code, Chapter 53 provides that the commission or executive director may suspend or revoke an existing license, disqualify a person from receiving a license, or deny a person the opportunity to be examined for a license if the person has been convicted of an offense listed under §53.021(a) or has a deferred adjudication that qualifies as a conviction under §53.021(d). Any such action shall be made after consideration of the factors listed in Texas Occupations Code, §53.022 and §53.023 and the guidelines issued by the department under §53.025.

(b) A person who is incarcerated because of a felony conviction is not eligible to obtain a license or renew a previously issued license under this chapter or any statute governing a program regulated by the department.

(c) Revocation Waiting Periods.

(1) A person whose license is revoked by operation of law under Texas Occupations Code §53.021(b) must wait until release from imprisonment before applying for a new license.

(2) A person whose license is revoked by order of the commission or the executive director must wait one year from the date of revocation before applying for a new license.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.
to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51, 202, 401, 402, 1302, and 1305. No other statutes, articles, or codes are affected by the proposed rules.

§60.306. Request for Hearing and Defaults.

(a) If, within twenty days after receiving a Notice of Alleged Violation or notice of continuation of restrictions on a license, the respondent fails to accept the department's determination and recommended administrative penalty, sanction, or both, or fails to make a written request for a hearing on the determination, the department may propose entry of a default order against the respondent unless otherwise provided by applicable law. There is a rebuttable presumption that notice is received three days after the notice was mailed.

(b) If [Where] a respondent fails to answer to the Notice of Alleged Violation or notice of continuation of restrictions on a license, the department may present to the commission or the executive director a motion for default order along with a proposed default order containing findings of fact and conclusions of law. Respondents will be notified as to the time and place for a motion for default order will be considered. If a respondent attends at the time and place prescribed in the notice, an administrative hearing may be set.

(c) - (d) (No change.)

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 14, 2019.

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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation

Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 463-8179

PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 402. CHARITABLE BINGO OPERATIONS DIVISION

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §§402.200 (General Restrictions on the Conduct of Bingo), §402.203 (Unit Accounting), §402.300 (Pull-Tab Bingo), §402.402 (Registry of Bingo Workers), §402.500 (General Records Requirements), §402.503 (Bingo Gift Certificates), §402.511 (Required Inventory Records), §402.702 (Disqualifying Convictions), and §402.706 (Schedule of Sanctions). The purpose of the proposed amendments is to implement statutory changes required by newly-enacted House Bill 914 (HB 914) and House Bill 1342 (HB 1342) from the Regular Session of the 86th Texas Legislature.

The proposed amendments implementing HB 914 extend the length of time a resident provisional bingo worker may continue working for a licensed organization pending approval of his/her application from 14 to 30 days. The proposed amendments allow for the sale of bingo cards, pull-tabs, and card-minders up to one hour before a bingo occasion, and for a single accounting of pull-tab sales that occur over consecutive occasions conducted by an organization within one day. The proposed amendments also extend the deadline for organizations to deposit proceeds into their bingo account from 2 days to 3 days. This extension, however, does not apply to units, which are still statutorily required to deposit proceeds within 2 days. Additionally, the proposed amendments eliminate the prize fee for merchandise prizes and define a “cash bingo prize” to include prepaid cards and other negotiable instruments. The proposed amendments require organizations that conduct bingo in more than one location to document the city and county where each occasion occurs along with prizes awarded and prize fees allotted.

Lastly, HB 1342 amended Texas Occupations Code Chapter 53, which applies to applicants for occupational licenses with criminal backgrounds. The bill eliminates the consideration of all convictions that are not directly-related to the occupation and it creates a new set of mitigating factors for agencies to consider when an applicant has a directly-related conviction. The proposed amendments will bring the Commission's rules into compliance with the new law.

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be no fiscal impact for state or local governments as a result of the proposed amendments that is attributable to the newly-enacted legislation. There will be no adverse effect on small businesses or rural communities, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an adverse economic effect on small businesses or rural communities as defined in Texas Government Code §2006.001(1-a) and (2).

Michael P. Farrell, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the anticipated public benefit will be to provide more flexibility for bingo conductors, to provide more convenience to bingo players, to make more people eligible for occupational licensure, and to align the Commission's rules with the newly-enacted statutory language.

Pursuant to Texas Government Code §2001.0221, the Commission provides the following Government Growth Impact Statement for the proposed rule. For each year of the first five years the proposed amendments will be in effect, Kathy Pyka, Controller, has determined the following:

(1) The proposed amendments do not create or eliminate a government program.

(2) Implementation of the proposed amendments does not require the creation of new employee positions or the elimination of existing employee positions.

(3) Implementation of the proposed amendments does not require an increase or decrease in future legislative appropriations to the Commission.

(4) The proposed amendments allow for a decrease in prize fees paid, but do not require an increase or decrease in prize fees paid to the Commission.

(5) The proposed amendments do not create a new regulation.
The proposed amendments do not expand or limit an existing regulation.

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule’s applicability.

(8) The proposed amendments do not positively or adversely affect this state’s economy.

The Commission requests comments on the proposed amendments from any interested person. Comments may be submitted to Tyler Vance, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at Legal.Input@lottery.state.tx.us. Comments must be received within thirty (30) days after publication of this proposal in the Texas Register in order to be considered. The Commission also will hold a public hearing to receive comments on this proposal at 10:00 a.m. on November 6, 2019, at 611 E. 6th Street, Austin, Texas 78701.

SUBCHAPTER B. CONDUCT OF BINGO

16 TAC §402.200, §402.203

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission’s jurisdiction.

This proposal is intended to implement Texas Occupations Code, Chapter 2001.


(a) - (e) (No change.)

(f) Merchandise prizes. Any merchandise or other non-cash prize, including bingo equipment, awarded as a bingo prize shall be valued at its current retail price. However, a non-cash prize awarded as a bingo prize may be valued at the price actually paid for the prize provided that the licensed organization maintains a record of the actual price paid. [Prize fees must be collected on merchandise and non-cash prizes.]”

(g) "Cash bingo prize" includes cash, coins, checks, money orders, or any other financial instrument that is convertible to cash. It includes any card, ticket, certificate or similar item with a pre-funded monetary value that may be used to purchase goods and services and is reduced in value when used. It does not include a card, ticket, certificate, or similar item that has no monetary value and is only redeemable one time for a specific good or service.

(h) [Reserved]

(i) [Reserved]

(j) The licensed organization is responsible for ensuring the following minimum requirements are met to conduct a bingo occasion in a manner that is fair:

(1) The licensed organization must make the following information available to players prior to the selling of a pull-tab bingo event ticket game:

(A) how the game will be played;

(B) the prize to be awarded if not United States currency; and

(C) how the winner(s) will be determined.

(2) Each licensed organization shall conspicuously display during all bingo occasions a sign indicating the name(s) of the operator(s) authorized by the licensed organization to be in charge of the occasion.

(A) The letters on the sign shall be no less than one inch tall.

(B) The sign shall inform the players that they should direct any questions or complaints regarding the conduct of the bingo occasion to an operator listed on the sign.

(C) The sign should further state that if the player is not satisfied with the response given by the operator that the player has the right to contact the Commission and file a formal complaint.

(3) Prior to the start of a bingo occasion, the licensed organization shall make a written game schedule available to all patrons. The game schedule must contain the following information:

(A) all regularly scheduled games to be played;

(B) the order in which the games will be played;

(C) the patterns needed to win;

(D) the prize(s) to be paid for each game, including the value of any non-cash bingo prizes as set in subsections (f) and (g) of this section;

(E) whether the prize payout is based on sales or attendance;

(F) the entrance fee and the number of cards associated with the entrance fee, if any; and

(G) the price of each type of bingo card offered for sale.

(4) The licensed organization may amend the game schedule during the bingo occasion to correctly reflect any changes to the game schedule provided that the amendments are announced to the patrons and documented, in writing, on the game schedule. If not otherwise prohibited by law, the licensed organization may conduct a bingo game that was not originally listed on the game schedule if the game and the prize(s) to be awarded for that game are announced to the patrons prior to the start of the game and documented, in writing, on the game schedule. Upon completion of the bingo occasion, the final game schedule must properly account for all games played during that occasion and the prizes awarded for those games. The final game schedule shall be maintained pursuant to §402.500(a) of this title (relating to General Records Requirements).

(j) [Reserved] Reservation of bingo cards. No licensed organization may reserve, or allow to be reserved, any bingo card or cards for use by a bingo player.

(k) [Reserved] Bingo worker requirements

(1) Bingo staff and employees may not play bingo during an occasion in which the bingo staff or employees are conducting or assisting in the conduct of the bingo occasion.

(2) A bingo worker shall not:

(A) communicate verbally, or in any other manner, to the caller the number(s) or symbol(s) needed by any player to win a bingo game;

(B) require anything of value from players, other than payment, for bingo cards, electronic card minding devices, pull-tab bingo tickets, and supplies; or
(l) [44] Caller requirements. The caller shall:
   (1) be located so that one or more players can:
       (A) observe the drawing of the ball from the bingo receptacle; and
       (B) gain the attention of the caller when the players bingo;
   (2) be the only person to handle the bingo balls during each bingo game;
   (3) call all numbers and make all announcements in a manner clear and audible to all of the playing areas of the bingo premises;
   (4) announce:
       (A) prior to the start of the regular bingo game, the pattern needed to win and the prize. If the prize amount is based on sales or attendance, the prize amount must be announced prior to the end of the game;
       (B) that the game, or a specific part of a multiple-part game, is closed after asking at least two (2) times whether there are any other bingos and pausing to permit additional winners to identify themselves;
       (C) whether the bingo is valid and if not, that there is no valid bingo and the game shall resume. The caller shall repeat the last number called before asking any more numbers; and
       (D) the number of winners for the game.
   (5) return the bingo balls to the bingo receptacle only upon the conclusion of the game; and
   (6) not use cell phones, personal digital assistants (PDAs), computers, or other personal electronic devices to communicate any information that could affect the outcome of the bingo game with anyone during the bingo occasion.

(m) [44] Verification.
   (1) Winning cards. The numbers appearing on the winning card must be verified at the time the winner is determined and prior to prize(s) being awarded in order to insure that the numbers on the card in fact have been drawn from the receptacle.

       (A) This verification shall be done either in the immediate presence of one or more players at a table or location other than the winner’s, or displayed on a TV monitor visible by all of the players or by an electronic verifier system visible by all the players.

       (B) After the caller closes the game, a winning disposable paper card or an electronic representation of the card for each game shall also be posted on the licensed premises where it may be viewed in detail by the players until at least 30 minutes after the completion of the last bingo game of that organization’s occasion.

   (2) Numbers drawn. Any player may request a verification of the numbers drawn at the time a winner is determined and a verification of the balls remaining in the receptacle and not drawn.

       (A) Verification shall take place in the immediate presence of the operator, one or more players other than the winner, and player requesting the verification.

       (B) Availability of this additional verification, done as a request from players, shall be made known either verbally prior to the bingo occasion, printed on the playing schedule, or included with the bingo house rules.

   (n) [44] Each licensed authorized organization must establish and adhere to written procedures that address disputes. Those procedures shall be made available to the players upon request.

   (o) [44] The total aggregate amount of prizes awarded for regular bingo games during a single bingo occasion may not exceed $2500. This subsection does not apply to:

       (1) a pull-tab bingo game, or
       (2) a prize of $50 or less that is actually awarded in an individual game of regular bingo.

   (p) [44] For purposes of §2001.419 of the Occupations Code, a bingo occasion will be considered to have occurred on the date on which the occasion began.

§402.203. Unit Accounting.
   (a) - (h) [No change.]
   (i) Unit Bingo Account.

   (1) The unit must establish and maintain one checking account designated as the "bingo account." The unit must maintain the "bingo account" in compliance with the same provisions of the Bingo Enabling Act and Charitable Bingo Administrative Rules applicable to a licensed authorized organization.

   (2) The face of the checks must list the name of the unit, the words "Bingo Account", and the unit's identification number.

   (3) Only the following may be deposited into the unit's bingo account:

       (A) proceeds from the conduct of bingo;
       (B) rent payments received by a unit member that is also a licensed commercial lessor; and
       (C) funds transferred by new members or funds transferred in accordance with §402.202 of this subchapter (relating to Transfer of Funds).

   (4) A separate deposit must be made for each bingo occasion conducted. Additionally, all sales and prizes must be recorded in accordance with the rules. [on the records for the occasion on which they occurred.]

   (5) All prize fees must be paid from the unit bingo account.

   (j) - (k) [No change.]

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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44 TexReg 6184 October 25, 2019 Texas Register
SUBCHAPTER C. BINGO GAMES AND EQUIPMENT

16 TAC §402.300

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Occupations Code, Chapter 2001.

§402.300. Pull-Tab Bingo.

(a) Definitions. The following words and terms, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Bingo Ball Draw--A pulling of a bingo ball(s) to determine the winner of an event ticket by either the number or color on the ball(s).

(2) Deal--A separate and specific game of pull-tab bingo tickets of the same serial number and form number.

(3) Face--The side of a pull-tab bingo ticket, which displays the artwork of a specific game.

(4) Flare--A poster or placard that must display:

(A) a form number of a specific pull-tab bingo game;
(B) the name of the pull-tab bingo game;
(C) the total card count of the pull-tab bingo game;
(D) the cost per pull-tab bingo ticket;
(E) the number of prizes to be awarded and the corresponding prize amounts of the pull-tab bingo game; and
(F) the name of the manufacturer or trademark.

(5) Form Number--The unique identification number assigned by the manufacturer to a specific pull-tab bingo game. A form number may be numeric, alpha, or a combination of numeric and alpha characters.

(6) High Tier--The two highest paying prize amounts as designated on the pull-tab bingo ticket and on the game's flare.

(7) Last Sale--The purchaser of the last pull-tab bingo ticket(s) sold in a deal with this feature is awarded a prize or a registration for the opportunity to win a prize.

(8) Merchandise--Any non-cash item(s), including bingo equipment, provided to a licensed authorized organization that is used as a prize.

(9) Pay-Out--The total sum of all possible prize amounts in a pull-tab bingo game.

(10) Payout Schedule--A printed schedule prepared by the manufacturer that displays:

(A) the name of the pull-tab bingo game;
(B) the form number of the pull-tab bingo game;
(C) the total card count of the pull-tab bingo game;
(D) the cost per pull-tab bingo ticket;
(E) the number of prizes to be awarded and the corresponding prize amount or jackpot for each category of the pull-tab bingo game;
(F) the number of winners for each category of prize;
(G) the profit of the pull-tab bingo game;
(H) the percentage of payout or the percentage of profit of the pull-tab bingo game; and
(I) the payout(s) of the pull-tab bingo game.

(11) Payout Structure--The printed information that appears on a pull-tab bingo ticket that shows the winnable prize amounts, the winning patterns required to win a prize, and the number of winners for each category of prize.

(12) Prize--An award of collectible items, merchandise, cash, bonus pull-tabs, and additional pull-tab bingo tickets, individually or in any combination.

(13) Prize Amount--The value of cash and/or merchandise which is awarded as a prize, as valued under §402.200(f) of this chapter. A collectible item is considered merchandise for determining allowable prize amounts.

(14) Serial Number--The unique identification number assigned by the manufacturer identifying a specific deal of pull-tab bingo tickets. A serial number may be numeric, alpha, or a combination of numeric and alpha characters.

(15) Subset--A part of a deal that is played as a game to itself or combined with more subsets and played as a game. Each subset may be designed to have:

(A) a designated payout; or
(B) a series of designated payouts. Subsets must be of the same form and serial number to have a combined designated payout or a series of designated payouts.

(16) Symbol--A graphic representation of an object other than a numeric or alpha character.

(17) Video Confirmation--A graphic and dynamic representation of the outcome of a bingo event ticket that will have no effect on the result of the winning or losing event ticket.

(18) Wheels--Devices that determine event ticket winner(s) by a spin of a wheel.

(19) "Consecutive bingo occasions within one day"--more than one bingo occasion conducted by an organization within a 24-hour period without any intervening occasions conducted by another organization, commencing at the start of the first occasion.

(b) - (d) (No change.)

(e) Sales and redemption.

(1) Instant pull-tab bingo tickets from a single deal may be sold by a licensed authorized organization over multiple occasions. A licensed authorized organization may bundle pull-tab bingo tickets of different form numbers and may sell those bundled pull-tab tickets during their licensed times. Pull-tab tickets may be sold up to one hour before an occasion, but they may only be redeemed during an occasion. [A winning instant pull-tab bingo ticket must be presented for payment during the licensed authorized organization's bingo occasion(s) at which the instant pull-tab bingo ticket is available for sale.]

(2) Except as provided by paragraph (3) or (4) of this subsection, the event used to determine the winner(s) of an event pull-tab bingo ticket deal must occur during the same bingo occasion at which the first event pull-tab bingo ticket from that deal was sold. A winning event pull-tab ticket must be presented for payment during the same bingo occasion at which the event occurred.
(3) For a licensed authorized organization that conducts bingo through a unit created and operated under Texas Occupations Code, Subchapter I-1, any organization in the unit may sell or redeem event pull-tab tickets from a deal on the premises specified in their bingo licenses and during such licensed time on consecutive occasions within one 24-hour period.

(4) For a licensed authorized organization that conducts bingo on consecutive occasions within one day [24-hour period], the organization may sell or redeem event pull-tab tickets from a deal during either occasion and may account for and report all of the pull-tab bingo ticket sales and prizes for the occasions as sales and prizes for the final occasion.

(5) Licensed authorized organizations may not display or sell any pull-tab bingo ticket which has in any manner been marked, defaced, tampered with, or which otherwise may deceive the public or affect a person's chances of winning.

(6) A licensed authorized organization may not withdraw a deal of instant pull-tab bingo tickets from play until the entire deal is completely sold out or all winning instant pull-tab bingo tickets of $25.00 prize winnings or more have been redeemed, or the bingo occasion ends.

(7) A licensed authorized organization may not commingle different serial numbers of the same form number of pull-tab bingo tickets.

(8) A winning instant pull-tab bingo ticket must be presented for payment during the licensed authorized organization's bingo occasion(s) at which the instant pull-tab bingo ticket is available for sale. [A licensed authorized organization may bundle pull-tab bingo tickets of different form numbers and may sell these bundled pull-tab bingo tickets during their licensed times.]

(9) The licensed authorized organization's gross receipts from the sale of pull-tab bingo tickets must be included in the reported total gross receipts for the organization, except that an organization that conducts consecutive bingo occasions during one day may account for and report all of the pull-tab bingo ticket sales for the occasions as sales for the final occasion. An organization that chooses to account for pull-tab bingo ticket sales for consecutive bingo occasions during one day as sales for the final occasion must also account for pull-tab bingo ticket prizes awarded over those occasions as prizes awarded for the final occasion. Each deal of pull-tab bingo tickets must be accounted for in sales, prizes or unsold cards.

(10) A licensed authorized organization may use video confirmation to display the results of an event ticket pull-tab bingo game(s). Video confirmation will have no effect on the play or results of any ticket or game.

(11) A licensed authorized organization must sell the pull-tab ticket for the price printed on the pull-tab ticket.

(12) Immediately upon payment of a winning pull-tab ticket of $25.00 or more, the licensed authorized organization must punch a hole with a standard hole punch through or otherwise mark or deface that winning pull-tab bingo ticket.

(f) (No change.)

(g) Records.

(1) Any licensed authorized organization selling pull-tab bingo tickets must maintain a purchase log showing the date of the purchase, the form number and corresponding serial number of the purchased pull-tab bingo tickets.

(2) Licensed authorized organizations must show the sale of pull-tab bingo tickets, prizes that were paid and the form number and serial number of the pull-tab bingo tickets on the occasion cash report, except that an organization that conducts consecutive bingo occasions during one day may account for and report all of the pull-tab bingo ticket sales for the occasions as sales for the final occasion. An organization that chooses to account for pull-tab bingo ticket sales for consecutive bingo occasions during one day as sales for the final occasion must also account for pull-tab bingo ticket prizes awarded over those occasions as prizes awarded for the final occasion. The aggregate total sales for the licensed authorized organization must be recorded on the cash register or point of sale station.

(3) Licensed authorized organizations must maintain a perpetual inventory of all pull-tab bingo games. They must account for all sold and unsold pull-tab bingo tickets and pull-tab bingo tickets designated for destruction. The licensed authorized organization will be responsible for the gross receipts[.] and prizes associated with the unaccounted for pull-tab bingo tickets.

(4) As long as a specific pull-tab bingo game serial number is in play, all records, reports, receipts and redeemed winning pull-tab bingo tickets of $25.00 or more relating to this specific pull-tab bingo game serial number must be retained on the licensed premises for examination by the Commission.

(5) If a deal is removed from play and marked for destruction then all redeemed and unsold pull-tab bingo tickets of the deal must be retained by the licensed authorized organization for a period of four years from the date the deal is taken out of play or until the destruction of the deal is witnessed by the Commission, its authorized representative or designee.

(6) Manufacturers and distributors must provide the following information on each invoice and other document used in connection with a sale, return, or any type of transfer of pull-tab bingo tickets:

(A) date of sale;

(B) quantity sold;

(C) cost per each deal of pull-tab bingo game sold;

(D) form number and serial number of each pull-tab bingo game's deal;

(E) name and address of the purchaser; and

(F) Texas taxpayer number of the purchaser.

(7) All licensed organizations must retain these records for a period of four years.

(h) (No change.)

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. LICENSING REQUIREMENTS

16 TAC §402.402

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Occupations Code, Chapter 2001.

§402.402. Registry of Bingo Workers.

(a) - (q) (No change.)

(r) A provisional employee must:

(1) immediately stop working:

(A) after 30 [44] days if the individual is not listed on the registry and is a resident of this state;

(B) after 75 days if the individual is not listed on the registry, not a resident of this state, and submitted a fingerprint card for a background investigation. If the fingerprint cards are returned by the law enforcement agency as unclassifiable, the Commission will notify the individual, and the individual may continue to be provisionally employed by submitting a written request and new fingerprint cards within 14 days of the notification;

(C) if found to be ineligible on the basis of the background investigation; and

(2) wear an identification card while on duty with the registry applicant's name, "Provisional Employment" as the unique registration number, and the submission date of the registry application as the expiration date.

(s) (No change.)

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SUBCHAPTER E. BOOKS AND RECORDS

16 TAC §§402.500, 402.503, 402.511

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Occupations Code, Chapter 2001.

§402.500. General Records Requirements.

(a) - (c) (No change.)

(d) An organization that conducts bingo in more than one location must record each occasion separately and include for each occasion the municipality and county where the occasion was held, the total amount of prizes awarded, and the prize fees to be distributed to the state and the local governments where the occasion was held, if applicable.

§402.503. Bingo Gift Certificates.

(a) - (b) (No change.)

(c) A bingo gift certificate may not be awarded as a prize for bingo unless the value of the certificate is paid for by the licensed authorized organization and recorded as a bingo prize on the daily schedule of prizes for the bingo occasion. [ and five percent of the value of the prize is withheld as a prize fee.]

(d) - (f) (No change.)

(g) Reporting Requirements:

(1) Funds from the sale of the gift certificate shall be maintained separately from the bingo funds. Such funds are not considered bingo funds until the gift certificate is redeemed for a bingo card, pull-tab bingo, or a card-minding device.

(2) Funds remaining from an expired or unredeemed gift certificate shall be disbursed equally among the participating licensed authorized organizations and deposited into each of their respective general fund accounts.

(3) When a gift certificate is redeemed, the sale of bingo paper, card-minding device, or pull-tab bingo shall be reported for that occasion. The gift certificate, when redeemed, shall be exchanged for cash from the gift certificate funds and deposited into the bingo account by the end of the third [second] business day after the bingo occasion for organizations as required by Occupations Code[§] §2001.451, and by the end of the second business day after the bingo occasion for units as required by Occupations Code §2001.435.

(4) At the end of each month, the licensed authorized organizations collectively shall reconcile the gift certificates purchased, sold, expired, redeemed, or remaining during the month to the cash on hand.

(h) - (i) (No change.)

§402.511. Required Inventory Records.

(a) - (b) (No change.)

(c) The licensed authorized organization may be held responsible for the gross receipts[and] and prizes [and prize fees] associated with missing or unaccounted for disposable bingo cards and pull-tab bingo tickets.

(d) - (e) (No change.)

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SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

16 TAC §402.702, §402.706

The amendments are proposed under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission’s jurisdiction.

This proposal is intended to implement Texas Occupations Code, Chapter 2001.

§402.702. Disqualifying Convictions.

(a) - (b) (No change.)

(c) For criminal convictions that do not fall under the categories addressed in subsection (b) of this section, the Commission may determine an applicant to be ineligible for a new or renewal license or a registry listing based on a criminal conviction for:

(1) An offense that directly relates to the duties and responsibilities of the licensed or registered activity;

(2) [An offense committed less than five years before the date of application];

(3) [An offense under §3g, Article 42.12 of the Code of Criminal Procedure; or

(4) A sexually violent offense, as defined by Article 62.001 of the Code of Criminal Procedure.

(d) - (g) (No change.)

(h) If the Commission determines that an applicant has a criminal conviction directly related to the duties and responsibilities of the licensed occupation, the Commission shall consider the following in determining whether to take an action against the applicant:

(1) the extent and nature of the person’s past criminal activity;

(2) the age of the person when the crime was committed;

(3) the amount of time that has elapsed since the person’s last criminal activity;

(4) the conduct and work activity of the person before and after the criminal activity;

(5) evidence of the person’s rehabilitation or rehabilitative effort while incarcerated or after release;

(6) evidence of the person’s compliance with any conditions of community supervision, parole, or mandatory supervision; and

(7) other evidence of the person’s fitness, including letters of recommendation.

(i) Pursuant to Chapter 53, Occupations Code, the Commission may consider mitigating factors in addition to criminal convictions to determine whether an applicant is eligible for a new or renewal license or registry listing. Such mitigating factors include:

1. Veteran’s status, including discharge status;

2. Remoteness in time; e.g., if more than 10 years have elapsed since the last conviction;

3. Absence of violation history as a current bingo licensee or bingo worker registrant over an extended period of time;

(4) Recommendations from law enforcement or community leaders; and

(5) Whether an arrest resulted in a deferred adjudication rather than a conviction.

(i) - (l) (No change.)

§402.706. Schedule of Sanctions.

(a) - (b) (No change.)

(c) Unless otherwise provided by this subchapter, the terms and conditions of a settlement agreement between the Commission and a person charged with violating the Bingo Enabling Act and/or the Charitable Bingo Administrative Rules will be based on the Schedule of Sanctions incorporated into this section.

Figure: 16 TAC §402.706(c)

(d) - (l) (No change.)

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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General Counsel

Texas Lottery Commission

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION

SUBCHAPTER BB. TEXAS APPLICATION FOR STATE FINANCIAL AID ADVISORY COMMITTEE

19 TAC §§1.9100 - 1.9106

The Texas Higher Education Coordinating Board proposes new sections in Chapter 1, Subchapter BB, §§1.9100 - 1.9106 concerning the establishment of an advisory committee to assist the board in adopting the procedures to allow a person to complete and submit the application for state financial aid by electronic submission through the website of the state common application as mandated by Texas Education Code Section 61.07762.

R. Jerel Booker, J.D., Assistant Commissioner for College Readiness and Success, has determined that for each year of the first five years the sections are in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Mr. Booker has also determined that for each of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be impact on students who apply for state financial aid, school districts who advise stu-
Government Growth Impact Statement

1. The rules will not create or eliminate a government program;
2. Implementation of the rules will not require the creation or elimination of employee positions;
3. Implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
4. The rules will not require an increase or decrease in fees paid to the agency;
5. The rules will create a new rule;
6. The rules will not limit or repeal an existing rule; and
7. The rules will not change the number of individuals subject to the rule.

The rules will minimally affect the state’s economy.

Comments on the proposal may be submitted by mail to R. Jerel Booker, J.D., Assistant Commissioner for College Readiness and Success, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or via email at CRI@THECB.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the Texas Register.

The new sections are proposed under Texas Education Code, Section 61.07762.

The new sections support Texas Education Code, Section 61.07762 and affect Section 51.762.

§1.9100. Authority and Specific Purpose of the Texas Application for State Financial Aid (TASFA) Advisory Committee.

(a) Authority. Statutory authority for this subchapter is provided in the Texas Government Code, Chapter 2110, §2110.0012 and §2110.0015 and Texas Education Code (TEC) §61.07762.

(b) Purpose. The Texas Application for State Financial Aid (TASFA) Advisory Committee is created to assist the board in adopting the procedures to allow a person to complete and submit the TASFA or similar application for state student financial assistance by electronic submission through the internet website which the board provides the common admission application form required by TEC §51.762.

§1.9101. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings:

1. Board--The Texas Higher Education Coordinating Board;
2. Apply Texas System--The state’s primary method for applying for admission to Texas public institutions of higher education. The Apply Texas System includes, but is not limited to, common admission applications; a portal for completing and submitting application forms to participating institutions of higher education; help desks to provide users assistance; and a portal through which Texas high school counselors gain access to status data regarding their students’ progress in applying for admission and financial aid.
3. Interested persons--Persons who attend committee meetings as representatives of stakeholder entities and any other persons who have made their interest in the work of the committee known to its presiding officer. Such interested persons may participate in committee discussions, as invited by the presiding officer to do so, but do not have the authority to cast votes.

§1.9102. Committee Membership and Officers.

(a) Membership shall consist of financial aid personnel, public school counselors, and other stakeholders who represent the needs of interested students with responsibility of advising students regarding financial aid.

(b) Membership on the committee shall include:

1. at least two financial aid personnel representatives from the following sectors of higher education: four-year public universities; two-year colleges, and participating private or independent institutions of higher education, all as defined by TEC §1.9103;
2. at least two representatives from public school districts;
3. at least one student representative from a public school district who will serve as a non-voting member;
4. at least one institution of higher education technical representative with knowledge of the transfer of financial aid data;
5. representatives of nonprofit organizations who represent the needs of interested students with responsibility of advising students regarding financial aid.

(c) Interested persons, such as the Texas Association of Student Financial Aid Administrators, Council of Public University Presidents and Chancellors, Texas Association of Community Colleges, Independent Colleges and Universities of Texas, and legislative and governmental relations staff shall be regularly advised of committee meetings.

(d) The number of committee members shall not exceed 24.

(e) Members of the committee shall select a chair, who will be responsible for conducting meetings and conveying committee recommendations to the board. A co-chair shall also be elected by the committee to serve in the chair’s stead as needed. The chair and co-chair shall each serve a two-year term.

(f) Members shall each serve a three-year term and may serve multiple terms.

§1.9103. Duration.

The committee shall be abolished no later than January 1, 2023 in accordance with Texas Government Code, Chapter 2110.008 and TEC §61.07762. It may be reestablished by the Board.

§1.9104. Meetings.

The committee shall meet at least three times a year. Additional meetings may be called as deemed appropriate by the chair of the committee. Meetings shall be open to the public and broadcast via the web, unless prevented by technical difficulties. Minutes shall be available to the public after they have been prepared by the Board staff and reviewed by members of the committee.

§1.9105. Tasks Assigned the Committee.

(a) Tasks assigned the committee may include:

(b) making recommendations to the Board on the procedures, development, and any associated cost of the online TASFA;

(c) identifying technical and functional revisions of the ApplyTX System regarding the development of the online TASFA;

(d) soliciting input from stakeholders across the state; and
§1.9106. Report to the Board.

The committee shall report any recommendations to the Board by December 1, 2020. The Board shall report the advisory committee's recommendations to the standing committee of each house of the legislature with jurisdiction over higher education by January 1, 2021.

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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William Franz
General Counsel
Texas Higher Education Coordinating Board
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CHAPTER 6. HEALTH EDUCATION, TRAINING, AND RESEARCH FUNDS

SUBCHAPTER C. TOBACCO LAWSUIT SETTLEMENT FUNDS

19 TAC §6.73

The Texas Higher Education Coordinating Board proposes amendments to Chapter 6, Subchapter C, §6.73 of Board rules concerning the nursing, allied health, and other health-related education grant programs.

Specifically this amendments will update the Board rules to align with the amendments to Texas Education Code, Chapter 63, Subchapter C, Sections 63.202 (f) and (g), enacted by House Bill 1401, 86th Texas Legislature, Regular Session, that extend exclusive priority of funding under the permanent fund for higher education nursing, allied health, and other health-related programs to institutions proposing to address the shortage of registered nurses.

Dr. Stacey Silverman, Interim Assistant Commissioner for Academic Quality and Workforce, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rule.

Dr. Silverman has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the continuation of awarding grants to eligible institutions that submit competitive grant proposals to address the education, recruitment, and retention of nursing students and faculty. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on small businesses, micro businesses, and rural communities.

Government Growth Impact Statement

(1) the rule will not create or eliminate a government program;
(2) implementation of the rule will not require the creation or elimination of employee positions;
(3) implementation of the rule will not require an increase or decrease in future legislative appropriations to the agency;
(4) the rule will not require an increase or decrease in fees paid to the agency;
(5) the rule will not create a new rule;
(6) the rule will not limit an existing rule;
(7) the rule will not change the number of individuals subject to the rule; and
(8) the rule will have no effect on the state's economy.

Comments on the proposed amendments may be submitted by mail to Stacey Silverman, Interim Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711, or via email at RuleComments@THECB.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the Texas Register.

The amendments are proposed under the Texas Education Code, Chapter 63, Subchapter C, Section 63.202, which provides the Coordinating Board with the authority to adopt rules to administer the section.

The amendments affect the implementation of Texas Education Code, Sections 63.202 (f) and (g).

§6.73. Nursing, Allied Health and Other Health-Related Education Grant Program

(a) - (c) (No Change.)
(d) Funding Decisions.
(1) Applications for grant funding shall be evaluated only upon the information provided in the written application.
(2) The Board shall approve grants upon the recommendation of the panel of reviewers and Board staff. The Commissioner shall report approved grants to the Board for each biennial grant period.
(3) Funding recommendations to the Board shall consist of the most highly ranked and recommended applications up to the limit of available funds. If available funds are insufficient to fund a proposal after the higher-ranking and recommended applications have been funded, staff shall negotiate with the applicant to determine if a lesser amount would be acceptable. If the applicant does not agree to the lesser amount, the staff shall negotiate with the next applicant on the ranked list. The process shall be continued until all grant funds are awarded to the most highly ranked and recommended applications.
(e) Contract. Following approval of grant awards by the Board, the successful applicants must sign a contract issued by Board staff and based on the information contained in the application.
(f) Cancellation or Suspension of Grants. The Board has the right to reject all applications and cancel a grant solicitation at any point before a contract is signed.
(g) Request for Proposal. The full text of the administrative regulations and budget guidelines for this program are contained in the official Request for Proposal (RFP) available upon request from the Board.
(h) This subsection pertains to the 2020-2021 and 2022-2023 [2016-2017 and 2018-2019] biennia only (rules are effective only through August 31, 2023 [August 31, 2019]).
that new degree program applications must evaluate the need for the proposed program of study; deleting a closed school previously allowed to have an AOS degree under §7.5(c); correcting cross-referenced subsections under §7.6-7.8; and clarifying that individuals who become new owners are subject to the independent audited financial records requirement.

Dr. Stacey Silverman, Interim Assistant Commissioner for Academic Quality and Workforce, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Dr. Silverman has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be public safety and safety of funds expended in seeking a post-secondary degree from Certificate of Authority and Certificate of Authorization institutions each school term. The revisions combine current surety instrument requirements into one rule and clarifies provisions previous language. Therefore, there is no additional effect on small businesses that grant postsecondary degrees. There are no anticipated economic costs to persons who are required to comply with the new section as proposed. There is no impact on other small businesses, micro businesses, or rural communities.

Dr. Stacey Silverman, Interim Assistant Commissioner for Academic Quality and Workforce, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas, 78711 or via email at AQWComments@THECB.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the Texas Register.

Government Growth Impact Statement

(1) the rules will not create or eliminate a government program;
(2) implementation of the rules will not require the creation or elimination of employee positions;
(3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
(4) the rules will not require an increase or decrease in fees paid to the agency;
(5) the rules will not create a new rule;
(6) the rules will not limit or repeal an existing rule; and
(7) the rules will not change the number of individuals subject to the rule.

(8) the rules will not affect the state's economy.

The amendment and new section are proposed under the Texas Education Code Sections 61.303 and 61.3075, which provide the Coordinating Board with the authority of granting Certificate of Authorization and Certificate of Authority.

The amendment supports Texas Education Code, Chapter 61. §7.3. Definitions.

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

(1) - (32) (No change.)

(33) Reciprocal State Exemption Agreement--An agreement entered into by the Board with an out-of-state state higher education agency or higher education system for the purpose of
creating a reciprocal arrangement whereby that entity's institutions are exempted from the Board oversight for the purposes of distance education. In exchange, participating Texas public and private or independent institutions of higher education as defined in Texas Education Code, §61.003 and private postsecondary educational institutions as defined in Texas Education Code, §61.302(2) would be exempted from that state's oversight for the purposes of distance education.

(34) - (39) (No change.)

§7.4 Standards for Operation of Institutions.

All non-exempt postsecondary educational institutions that operate within the state of Texas are required to meet the following standards. These standards will be enforced through the Certificate of Authority process for institutions without Board-recognized accreditation. Standards addressing the same principles will be enforced by Board-recognized accrediting agencies under the Certificate of Authorization process. Particular attention will be paid to the institution's commitment to education, responsiveness to recommendations and suggestions for improvement, and, in the case of a renewal of a Certificate of Authority, record of improvement and progress. These standards represent generally accepted administrative and academic practices and principles of accredited postsecondary institutions in Texas. Such practices and principles are generally set forth by institutional and specialized accrediting bodies and the academic and professional organizations.

(1) - (7) (No change.)

(8) Program Evaluation.

(A) The institution shall establish adequate procedures for planning and evaluation, define in measurable terms its expected educational results, and describe how those results will be achieved.

(B) For all associate degree programs, the evaluation criteria shall include the following: mission, labor market need, curriculum, enrollment, graduates, student placement, follow-up results, ability to finance each program of study, facilities and equipment, instructional practices, student services, public and private linkages, qualifications of faculty and administrative personnel, and success of its students.

(C) For applied associate degree programs relating to occupations where state or national licensure is required, graduates must pass the licensing examination at a rate acceptable to the related licensing agency.

(D) Prior to establishing a new degree program, the institution shall evaluate the need for the proposed program of study through survey, research, or other means of measure. The capacity and ability of similar programs at public, private or independent institutions of higher education and private postsecondary educational institutions within Texas to meet market needs shall be considered.

(9) - (24) (No change.)

§7.5 Administrative Injunctions, Limitations, and Penalties.

(a) - (b) (No change.)

(c) Associate of Occupational Studies (AOS) Degree- Texas has two [three] career schools or colleges awarding the AOS degree: Universal Technical Institute and [a] Western Technical College, and Golf Academy of America. The AOS degree shall be awarded in only the following fields: automotive mechanics, diesel mechanics, refrigeration, electronics, and business and golf complex operations and management. Each of the two [three] Institutions may continue to award the AOS degree for those fields listed in this subsection and shall be restricted to those fields. The Board shall not consider new AOS degree programs from any other career schools or colleges. A career school or college authorized to grant the AOS degree shall not represent such degree by using the terms "associate" or "associate's" without including the words "occupational studies." An institution authorized to grant the AOS degree shall not represent such degree as being the equivalent of the AAS or AAA degrees.

(d) - (r) (No change.)

§7.6 Recognition of Accrediting Agencies.

(a) Eligibility Criteria--The Board may recognize accrediting agencies with a commitment to academic quality and student achievement that demonstrate, through an application process, compliance with the following criteria:

(1) Eligibility. The accrediting agency's application for recognition must demonstrate that the entity:

(A) Is recognized by the Secretary of Education of the United States Department of Education as an accrediting agency authorized to accredit educational institutions that offer the associate degree or higher. Demonstration of authorization shall include clear description of the scope of recognized accreditation.

(B) Is applying for the same scope of recognition as that for which it is recognized by the Secretary of Education of the United States Department of Education:

(i) Using the U.S. Department of Education classification of instructional programs (CIP) code at the two-digit level, the applicant shall identify all fields of study in which institutions it accredits may offer degree programs.

(ii) Accrediting agencies shall, for each field of study in which an accredited institution may offer degree programs, specify the levels of degrees that may be awarded. Levels must be differentiated at least to the following, as defined in §7.3 of this chapter (relating to Definitions): applied associate degree, academic associate degree, baccalaureate degree, master's degree, first professional degree and doctoral degree. Associate of occupational studies (AOS) degrees are only allowed under §7.5(c) [§7.5(e)] of this chapter.

(iii) Only institutions that qualify as eligible for United States Department of Education Title IV programs as a result of accreditation by the applicant agency will be considered exempt under §7.7 of this chapter (relating to Institutions Accredited by Board-Recognized Accreditors).

(C) - (F) (No change.)

(2) (No change.)

(b) (No change.)

§7.7 Institutions Accredited by Board-Recognized Accreditors.

An institution which does not meet the definition of an institution of higher education contained in Texas Education Code §61.003, is accredited by a Board-recognized accreditor, and is interested in offering degrees or courses leading to degrees in the State of Texas must follow the requirements in paragraphs (1) - (4) of this section.

(1) Authorization to Offer Degrees or Courses Leading to Degrees in Texas.

(A) Each institution and/or campus location must submit an application for a Certificate of Authorization to offer degree(s) or courses leading to degrees in Texas. The application form for the Certificate of Authorization may be found on the Board's website. The application must contain the following information:

(i) Name of the institution;
(ii) Physical location of campus, or in the case of only providing clinicals or internships in Texas, the physical location of all clinical or internship sites, number of students in clinicals or internships and start and end date of clinicals or internships;

(iii) Name and contact information of the Chief Administrative Officer of the campus and name and contact information of the designated Single Point of Contact as defined in §7.3 of this chapter (relating to Definitions). In the case of an application based on clinicals or internships, name and contact information of clinical or internship site supervisors;

(iv) Name of Board-recognized accreditor;

(v) Level of degree, degree program name, and CIP code as authorized by the Board-recognized accreditor;

(vi) Documentation of notification to students and potential students of any program which does not make the graduate eligible to take required professional examinations in that field or to practice regulated professions in that field in Texas;

(vii) Dates of accreditation granted by the Board-recognized accreditor.

(I) If the institution or a location in Texas is currently subject to a negative or adverse action by its Board-recognized accreditor which has not resulted in a sanction, the institution must provide documentation explaining the reasons for the action and actions taken to reverse the negative or adverse action.

(II) If the institution or a location in Texas is currently subject to a sanction by its Board-recognized accreditor, the institution must provide documentation explaining the reasons for the action and actions taken to comply with the accrediting agency's standards or criteria, including a timeline for returning to compliance, in order to maintain accreditation.

(III) If the institution applies based on accreditation of its main campus while seeking final approval for the new Texas-based campus from its Board-recognized accreditor and the Texas Workforce Commission, the institution must provide documentation from its accreditor acknowledging that a decision on campus accreditation can be made within fifteen (15) months of the issuance of a provisional Certificate of Authorization.

(viii) Acknowledgement of student complaint procedure, compliance with the institutional accrediting agency's standards for operation of institutions, annual review reporting requirements, substantive change notification, and student data reporting requirements contained in this section, §§1.110 - 1.120 of this title (relating to Student Complaint Procedure), §7.4 of this chapter (relating to Standards for Operation of Institutions), §7.11 of this chapter (relating to Changes of Ownership and Other Substantive Changes), and §7.13 of this chapter (relating to Student Data Reporting), respectively;

(ix) Texas Workforce Commission Certificate of Approval or a Texas Workforce Commission exemption or exclusion from Texas Education Code, Chapter 132;

(x) Disclosure of most recent United States Department of Education financial responsibility composite score, including applicable academic year for score. If the institution has a score under 1.5, the institution must provide documentation of all actions taken since date of calculation to raise the score.

(xi) Documentation of reserves, lines of credit, or surety instruments that, when combined with tuition and fee receipts, are sufficient to allow the institution to fulfill its educational obligations for the current term to its enrolled students if the institution is unable to continue to provide instruction to its enrolled students for any reason. Such documentation must meet requirements as defined in §7.16 of this subchapter.

{(I) A surety instrument includes, but is not limited to, a surety bond, an assignment of a savings or escrow account, certificate of deposit, irrevocable letter of credit, or a properly executed participation contract with a private associations, partnership, corporation, or other entity whose membership is comprised of postsecondary institutions. }

{(II) The documented reserves, lines of credit, or surety instruments must be:

[(a)] In a form and amount acceptable to the Board;

[(b)] In an amount equal to or greater than the cost of providing a refund, including administrative costs associated with processing claims, for the maximum prepaid, unearned tuition and fees of the institution for a period or term during the applicable academic year for which programs of instruction are offered, including, but not limited to, on a semester, quarter, monthly, or class basis; except that the period or term of greatest duration and expense shall be utilized for this computation where an institution's year consists of one or more such periods or terms;

[(c)] Conditioned to provide indemnification to any student or enrollee of the school or his/her parent or guardian determined by the Board to have suffered loss of prepaid tuition or any fees as a result of violation of any minimum standard or as a result of the institution ceasing operation, provide evidence satisfactory to the Board of its financial ability to provide such indemnification, and list the amount of surety liability the guaranteeing entity will assume; and

[(d)] Held in Travis County, Texas, and conditioned to allow only the Board to withdraw funds for the benefit of persons identified in clause (ii) of this subparagraph.}

(III) The institution shall include a letter signed by an authorized representative of the institution showing in detail the calculations made pursuant to this section and explaining the method used for computing the amount of the reserves, lines of credit or surety instrument.

(B) Board staff will verify information and accreditation status. Upon determination that an institution is in good standing with its Board recognized accreditor, has sufficient financial resources, and, if applicable, has provided sufficient documentation of correcting accreditation or financial issues, Board staff will provide a Certificate of Authorization to offer in Texas those degrees or courses leading to degrees for which it is accredited. If an institution is only providing clinicals or internships in the state of Texas, a Certificate of Authorization will be issued for the institution to offer in the state of Texas identified clinicals or internships in connection with those degrees or courses leading to degrees for which the institution is accredited. The Certificate of Authorization will be issued to the institution by name, city and state.

(C) Certificates of Authorization are subject to annual review for continued compliance with the Board-recognized accreditor's standards of operation, student complaint processes, financial viability, and accurate and fair representation in publications, advertising, and promotion.

(i) Institutions must submit the following documentation on an annual basis for Board staff review and recommendation to the Board for continuation or revocation of the Certificate of Authorization:

[(I) Annual audited financial statements, issued less than one year from time of submission, prepared in accordance
with Generally Accepted Accounting Principles by an independent certified public accountant;

(II) Documentation of reserves, lines of credit, or surety instruments that, when combined with tuition and fee receipts, are sufficient to allow the institution to fulfill its educational obligations for the current term to its enrolled students if the institution is unable to continue to provide instruction to its enrolled students for any reason. Institutions under a Certificate of Authorization as of September 1, 2017 are required to provide documentation of reserves, lines of credit, or surety instruments going forward with the 2019 annual compliance review.

(III) Certification that the institution is providing accurate and fair representation in publications, advertising, and promotion, including disclosure to students and potential students of any program which does not make the graduate eligible to take required professional examinations in that field or to practice regulated professions in that field in Texas. The institution shall further certify that it is maintaining any advertising used in Texas for a minimum of five years and shall make any such advertisements available to the Board for inspection upon request.

(IV) An annotated copy of the student catalog or student handbook showing compliance with the principles addressed in §7.4 of this chapter with cross-reference to the operational standards of its institutional accrediting agency;

(V) A copy of the institution's student complaint policy, links to online student complaint procedures and forms, and summary of all complaints made by Texas residents or students enrolled at a Texas-based institution concerning the institution in accordance with §§1.110 - 1.120 of this title. The complaint summary shall include complaints which have been filed, with the institution, its accrediting agency, or the Board within the 12 months prior to the annual review reporting date and shall indicate whether pending or resolved;

(VI) Official statement of current accreditation status and any pending or final actions that change the institution's accreditation status from the institution's Board-recognized accreditor, including changes in degree levels or programs offered approvals, changes in ownership or management, changes in name, and changes in physical location within the 12 months prior to the annual review reporting date;

(VII) Information regarding heightened cash monitoring or other changes that affect students' federal financial aid eligibility through the US Department of Education;

(VIII) Attestation that all documentation submitted is true and correct and continued acknowledgement of student complaint procedure, annual review reporting requirements, substantive change notification, and student data reporting requirements contained herein this section, §§1.110 - 1.120 of this title, §§7.4, 7.11, 7.13, and 7.15 of this chapter, respectively.

(ii) Annual reviews are conducted based on an institution's name and initial date of authorization.

(I) Institutions with names starting with "A" through "O" must submit annual review documentation by January 15 of each year. The Board will review staff recommendations at the annual July Board meeting.

(II) Institutions with names starting with "P" through "Z" must submit annual review documentation by July 15 of each year. The Board will review staff recommendations at the annual January Board meeting.

(III) Institutions that have received their first Certificate of Authorization less than six months from the due date for submission of annual review documentation may wait to submit documentation until the following annual review submission date.

(iii) Prior to making a recommendation to the Board, staff has discretion to conduct a site visit at the institution if warranted by facts disclosed in the annual review documentation. The Board-recognized accreditor will be notified and invited to participate.

(D) Certificates of Authorization for institutions offering degrees or courses leading to degrees at a physical location in Texas, upon Board staff recommendation after annual review, expire at the end of the grant of accreditation by the Board-recognized accreditor.

(i) If a new grant of accreditation is awarded by the Board-recognized accreditor, the Certificate of Authorization may be renewed upon submission of documentation of the new grant of accreditation.

(ii) If an institution changes recognized accreditors, the institution must submit a new application for a Certificate of Authorization.

(E) Certificates of Authorizations based solely on providing clinicals or internships in Texas expire one year from date of issuance.

(i) If clinicals or internships are ongoing in Texas, the Certificate of Authorization based solely on providing clinicals or internships in Texas must be renewed on an annual basis. At least thirty (30) days, but no more than ninety (90) days, prior to the expiration of the current Certification of Authorization, an institution, if it desires renewal, is required to provide updated information regarding the physical location of all clinical or internship sites, number of students in clinicals or internships, and the start and end date of the clinicals or internships.

(ii) The Board shall renew the Certificate of Authorization based solely on providing clinicals or internships in Texas if it finds that the institution has maintained all requisite standards.

(F) Certificates of Authorization for Texas-based campuses which are provisionally-granted based on their main campus' accreditation expire at the end of fifteen (15) months.

(i) If accreditation has not been achieved by the expiration date, the provisionally-granted Certificate of Authorization will be withdrawn, the institution's authorization to offer degrees will be terminated, and the institution will be required to comply with the provisions of §7.8 of this chapter (relating to Institutions Not Accredited by a Board-Recognized Accreditor).

(ii) Subsequent provisionally-granted Certificates of Authorization will not be issued.

(iii) At least ninety (90) days prior to expiration of the certificate, institutions operating under a provisionally-granted Certificate of Authorization must submit either an application for a Certificate of Authority under this section or an application for a Certificate of Authority under §7.8 of this chapter.

(G) Institutions under an existing Certificate of Authorization must immediately notify the Board if the institution or its main campus becomes subject to a sanction by its Board-recognized accreditor. The institution must provide documentation explaining its current status and actions taken to comply with the accrediting agency's standards or criteria, including a timeline for returning to compliance, in order to maintain accreditation.
Upon accreditation's limitations, the Board determines if an institution's Certificate of Authorization is in violation of any applicable provisions.

(A) The Board will notify the institution of the violation and provide an opportunity to amend its petition within ten (10) days of notice receipt.

(B) The Board will revoke the institution's Certificate of Authorization if it fails to correct the violation after the opportunity to amend.

(C) The Board will issue an order of revocation within ten (10) days of the institution's failure to correct the violation.

(D) The Board will place a notice in a local newspaper, if required.

(E) The Board will submit a report to the Texas Workforce Commission, if required.

(F) The Board will provide the institutional community with notice of the revocation.

(G) The Board will maintain a record of the revocation.

(H) The Board will continue to monitor the institution's operation.

(I) The Board will ensure compliance with any new regulations.

(J) The Board will enforce any new fines or penalties.

(2) Restrictions Placed on Institution under Sanctions by Its Accrider:

(A) If an institution is under sanctions by its accreditor, limitations appropriate for the sanction shall be placed upon the institution's Certificate of Authorization. Limitations may include, but are not limited to:

(i) Restrictions on adding degree programs to its authorization;

(ii) An increase in the amount of financial reserves, lines of credit or surety instrument required to maintain a Certificate of Authorization; and

(iii) Review every six months, including unannounced site visits.

(B) The Board will notify the institution via letter of all restrictions placed upon its Certificate of Authorization due to its accreditors' sanctions.

(C) The Board will place a notice of all sanctions placed upon an institution via the Board's website.

(D) Restrictions and public notification will be removed upon written documentation from the institution's accreditor that all sanctions have ended.

(3) Grounds for Revocation of any Certificate of Authorization:

(A) An institution no longer holds a Certificate of Approval or Letter of Exemption issued by the Texas Workforce Commission.

(B) The institution loses accreditation from Board-recognized accreditor.

(C) The institution's Accrider is removed from the U.S. Department of Education or the Board's list of approved accreditors.

(i) If the institution's Certificate of Authorization is revoked due to its accrediting agency's removal from the U.S. Department of Education and/or the Board's list of approved accreditors, the Board, or Board staff as delegated, shall set a provisional time period within which institutions may continue to operate, not to exceed any provisional time period set by the United States Department of Education.

(ii) If the institution's Certificate of Authorization is revoked due to its accrediting agency's removal from the U.S. Department of Education or the Board's list of approved accreditors, a request to extend its Certificate of Authorization for the provisional time period set under paragraph (3)(C)(i) [2(C)] of this section, must be submitted to the Commissioner within ten (10) days of publication, by either the U.S. Department of Education or the Board, of such revocation.

(D) The institution fails to comply with data reporting, substantive change notification requirements, or annual review reporting requirements.

(E) Board staff recommends revocation based on deficiencies in compliance with the principles addressed in §7.4 of this chapter as evidenced by lack of compliance with the Board-recognized accreditor standards, which are found in annual review documentation and not corrected by the institution upon request by Board staff.

(F) The institution offers degrees for which it does not have accreditor approval.

(4) Process for Removal of Authorization:

(A) Commissioner notifies institution of ground for revocation as outlined in paragraph (3) [2] of this section unless paragraph (3)(C)[2(C)] above applies and the Board sets a provisional time period for compliance.

(B) Upon receipt of the notice of revocation, the institution shall not enroll new students and may only grant or award degrees or offer courses leading to degrees in Texas to students enrolled on the date of notice of revocation until it has either been granted a Certificate of Authority to grant degrees, or has received a determination that it did not lose its qualification for a Certificate of Authorization.

(C) Within ten (10) days of its receipt of the Commissioner's notice, the institution must provide, as directed by Board staff, one or more of the following:

(i) proof of its continued qualification for the exemption; or

(ii) submit data as required by §7.13 of this chapter; or

(iii) a plan to correct any non-compliance or deficiencies which lead to revocation; or

(iv) a plan to seek new Board-recognized accreditation; or

(v) written intention to apply for a Certificate of Authority within 60 days of the notice of revocation; or

(vi) a written teach-out plan, which must be approved by Board staff before implementation.

(D) After reviewing the evidence, the Commissioner will issue a notice of determination, which in the case of an adverse determination, shall contain information regarding the reasons for the denial, and the institution's right to a hearing.

(E) If a determination under this section is adverse to an institution, it shall become final and binding unless, within forty-five (45) days of its receipt of the adverse determination, the institution invokes the administrative remedies contained in Chapter 1, Subchapter B of this title (relating to Dispute Resolution).

(F) If a determination allows the institution to continue operating, a new Certificate of Authorization will be provisionally-granted. Provisions for continued operation under the new Certificate of Authorization may include, but are not limited to:

(i) requirements to provide updates to Board staff on a monthly basis;

(ii) continued progress toward full compliance with all Board rules and requirements;

(iii) continued progress toward new Board-recognized accreditation, if applicable, or toward approval for a Certificate of Authority; and

(iv) other requirements imposed by the Board.

(G) Certificates of Authorization which are provisionally-granted after a notice of revocation continue only as long as the institution complies with all such provisions.

(5) Closure of an Institution:

(A) The governing board, owner, or chief executive officer of an institution that plans to cease operation shall provide the Board with written notification of intent to close at least ninety (90) days prior to the planned closing date.
(B) If an institution closes unexpectedly, the governing board, owner, or chief executive officer of the school shall provide the Board with written notification immediately.

(C) If an institution closes or intends to close before all currently enrolled students have completed all requirements for graduation, the institution shall assure the continuity of students’ education by entering into a teach-out agreement with another institution authorized by the Board to hold a Certificate of Authority, with an institution operating under a Certificate of Authorization, or with a public or private institution of higher education as defined in Texas Education Code §61.003. The agreement shall be in writing, shall be subject to Board approval, shall contain provisions for student transfer, and shall specify the conditions for completion of degree requirements at the teach-out institution. The agreement shall also contain provisions for awarding degrees.

(D) The Certificate of Authorization for an institution is automatically withdrawn when the institution closes. The Commissioner may grant to an institution that has a degree-granting authority a temporary approval to award a degree(s) in a program for which the institution does not have approval in order to facilitate a formal agreement as outlined under this section.

(E) The curriculum and delivery shall be appropriate to accommodate the remaining students.

(F) No new students shall be allowed to enter the transferred degree program unless the new entity seeks and receives permanent approval for the program(s) from the Board.

(G) The institution shall transfer all academic records pursuant to §7.15 of this chapter (relating to Academic Records Maintenance, Protection, and Repository of Last Resort).

§7.8. Institutions Not Accredited by a Board-Recognized Accreditor: An institution which is not accredited by a Board-recognized accreditor and which does not meet the definition of institution of higher education contained in Texas Education Code, §61.003, must follow the Certificate of Authority process in paragraphs (1) - (9) of this section in order to offer degrees or courses leading to degrees in the state of Texas. Institutions are encouraged to contact the Board staff before filing a formal application.

(1) Certificate of Authority Eligibility.
(A) The Board will accept applications for a Certificate of Authority only from those applicants:
(i) proposing to offer a degree or credit courses leading to a degree; and
(ii) which meet one of the following conditions:
(I) has been legally operating, enrolling students, and conducting classes in Texas and has complied with state law as either a non-degree-granting institution or an exempt institution only offering degrees in religious disciplines for a minimum of two (2) years;
(II) has been legally operating, enrolling students, and conducting classes in Texas and has complied with state law as a degree-granting institution and seeks to open a new campus;
(III) has been legally operating as a degree-granting institution in another state for a minimum of four (4) years and can verify compliance with all applicable laws and rules in that state; or
(IV) does not meet one of the three previous operational history conditions, but meets additional application and review requirements for its initial application, and agrees to meet additional conditions, restrictions, or reporting requirements during its first two years of operation under a Certificate of Authority. The Certificate of Authority will be issued with written, specific conditions, restrictions, or reporting requirements placed upon the institution.

(V) The Board may not issue a Certificate of Authority for a private postsecondary institution to grant a professional degree, as defined in §7.3 of this title (relating to Definitions) or to represent that credits earned in this state are applicable toward a degree if the institution is chartered in a foreign country or has its principal office or primary educational program in a foreign country.

(B) To be considered by the Board as operating, means to have assembled a governing board, developed policies, materials, and resources sufficient to satisfy the requirements for a Certificate of Authority, and either have enrolled students and conducted classes or accumulated sufficient financing to do so for at least one year upon certification based on reasonable estimates of projected enrollment and costs. Sufficient financing may be demonstrated by proof of an adequate surety instrument meeting requirements as defined in §7.16 of this subchapter, including but not limited to, a surety bond, an assignment of a savings or escrow account, certificate of deposit, irrevocable letter of credit, or a properly executed participation contract with a private association, partnership, corporation, or other entity whose membership is comprised of postsecondary institutions. [, which is:]

(i) In a form and amount acceptable to the Board;

[(I) The amount of the surety instrument submitted to the Board with an application shall be equal to or greater than the cost of providing a refund, including administrative costs associated with processing claims, for the maximum prepaid, unearned tuition and fees of the school for a period or term during the applicable school year for which programs of instruction are offered, including, but not limited to, on a semester, quarter, monthly, or class basis; except that the period or term of greatest duration and expense shall be utilized for this computation where a school’s year consists of one or more such periods or terms:]

[(II) The applicant shall include a letter signed by an authorized representative of the institution showing in detail the calculations made pursuant to this section and explaining the method used for computing the amount of the surety instrument;]

[(III) Conditioned to provide indemnification to any student or enrollee of the school or his/her parent or guardian determined by the Board to have suffered loss of prepaid tuition or any fees as a result of violation of any minimum standard or as a result of a holder of a Certificate of Authority ceasing operation, and provides evidence satisfactory to the Board of its financial ability to provide such indemnification and lists the amount of surety liability the guaranteed entity will assume; and]

[(IV) Held in Travis County, Texas, and conditioned to allow only the Board to withdraw funds for the benefit of persons identified in clause (ii) of this paragraph.]

(2) Certificate of Authority Application Submission and Requirements.
(A) An applicant must submit an application to the Board to be considered for a Certificate of Authority to offer identified proposed degree(s), and courses which may be applicable toward a degree, in Texas.

(i) Applications must be submitted as an original and a copy in an electronic format as specified by Board staff, and accompanied by the application fee described in paragraph (3) of this section.
(ii) A single desk review of the application will be conducted to determine completeness and readiness for a site team visit.

(iii) The desk review will be done by a reviewer who will act as the site review team leader if the application is deemed complete and ready for a site team visit.

(iv) The desk reviewer, in consultation with Board staff, will make three possible recommendations. Board staff will make a final determination on acceptability of the application based on one of the three recommendations:

(I) The application is determined to be foundationally incomplete in one or more Standards for Operation of Institutions as described in §7.4 of this chapter and not ready for submission. A foundationally incomplete application is one where the Standards for Operation of Institutions have not been met to such a degree that the institution is unlikely to be sustainable or operational.

(II) The application may be resubmitted after incorporating revisions or additions suggested by the reviewer. The revisions or additions must allow the application to meet all Standards for Operation of Institutions.

(III) The application is acceptable and ready for a site review visit.

(v) If the application is foundationally incomplete and not ready for submission, a portion of the application fee; if not expended during the desk review, may be returned and another application may not be submitted for one year from the date of rejection of the foundationally incomplete application.

(B) The application form for the Certificate of Authority may be found on the Board’s website.

(C) The Certificate of Authority application must include:

(i) The name and address of the institution;

(ii) The purpose and mission of the institution;

(iii) Documentary evidence of compliance with paragraph (1)(A)(i)-(iii) of this section;

(iv) Documentary evidence of either a Letter of Exemption or Certificate of Approval from the Texas Workforce Commission pursuant to Texas Education Code, Chapter 132;

(v) Documentary evidence of articles of incorporation or other Texas-authorized organizational documents, regulations, rules, constitutions, bylaws, or other regulations established for the governance and operation of the institution;

(vi) Identification, by name and contact information,

(I) The sponsors or owners of the institution;

(II) The designated Single Point of Contact as defined in §7.3 of this chapter (relating to Definitions);

(III) The chief administrative officer, the principal administrators, and each member of the board of trustees or other governing board;

(IV) Identification of faculty who will, in fact, teach in each program of study, including identification of colleges attended and copies of transcripts for every degree held by each faculty member;

(vii) Information regarding each degree or course leading to a degree which the applicant proposes to offer, including a full description of the proposed degree or degrees to be awarded and the course or courses of study prerequisite thereto;

(viii) A description of the facilities and equipment utilized by the applicant, including, if applicable, all equipment, software, platforms and other resources used in the provision of education via online or other distance education;

(ix) Detailed information describing the manner in which the applicant complies with each of the Standards of Operations of Institutions contained in §7.4 of this chapter (relating to Standards for Operations of Institutions);

(x) If applicable, institutions accredited by entities which are not recognized by the Board must submit all accrediting agency reports and any findings and institutional responses to such reports and findings for ten years immediately preceding the application for a Certificate of Authority. Accreditation by entities which are not recognized by the Board does not allow an institution to offer a degree or courses leading to a degree without a Certificate of Authority to offer such degree or courses;

(xi) A written accreditation plan, identifying:

(I) The Board-recognized accrediting agency with which the applicant intends to apply for institutional accreditation;

(II) The planned timeline for application with and approval by the Board-recognized accrediting agency;

(III) Any contacts already made with the Board-recognized accrediting agency, including supporting documents.

(xii) Any additional information which the board may request.

(D) An applicant that does not meet the previous operational history conditions described by §7.8(1)(A)(ii)(I)-(III) of this chapter must be able to demonstrate it is able to meet all Standards for Operation of Institutions found in §7.4 of this chapter through documentation and/or possession of adequate resources. Such demonstration includes, but is not limited to:

(i) Executed agreements with all administration and faculty identified in the application;

(ii) Complete curriculum, assessment, and learning tools for each proposed degree;

(iii) Possession of all listed facilities and resources.

(E) An applicant that does not meet the previous operational history conditions described by §7.8(1)(A)(ii)(I)-(III) of this chapter may not apply for a graduate degree or for more than one area of study as part of its initial application for a Certificate of Authority.

(3) (No change.)

§7.11. Changes of Ownership and Other Substantive Changes.

(a) Change of Ownership or Control for Career Schools and Colleges. In the event of a change in ownership or control of a career school or college, the Certificate of Authority or Certificate of Authorization is automatically void unless the institution meets the requirements of this section.

(b) The Commissioner may authorize the institution to retain the Certificate of Authority or Certificate of Authorization during and after a change of ownership or control, provided that the institution notifies Board staff of the impending transfer in time for staff to receive, review, and approve the documents listed in paragraphs (1) - (4) of this subsection and provided that the following conditions are met:
§7.16 Financial Protections for Student Tuition and Fees.
The Board is required to ensure Certificate of Authorization and Certificate of Authority institutions maintain reserves, lines of credit, or surety instruments sufficient to allow the institution or person to fulfill its educational obligations of the current term to its enrolled students if the institution or person violates any minimum standard which results in loss of prepaid tuition or fees, or is unable to continue to provide instruction to its enrolled students.

(1) Sufficient Financial Resources Documentation.

(A) Sufficient financial resources may be demonstrated by proof of an adequate reserve, line of credit, or surety instrument. A surety instrument includes but is not limited to, a surety bond, an assignment of a savings or escrow account, certificate of deposit, irrevocable letter of credit, or a properly executed participation contract with a private association, partnership, corporation, or other entity whose membership is comprised of postsecondary institutions.

(B) The documented reserves, lines of credit, or surety instruments must be:

(i) In a form and amount acceptable to the Board;

(ii) In an amount equal to or greater than the cost of providing a refund, including administrative costs associated with processing claims, for the maximum unearned tuition and fees of the institution for a period or term during the applicable academic year for which programs of instruction are offered, including, but not limited to, on a semester, quarter, monthly, or class basis; except that the period or term of greatest duration and expense shall be utilized for this computation where an institution’s year consists of one or more such periods or terms. Unearned tuition and fees are tuition or fees billed to a student for the current term. No tuition or fee billed for the current term may be considered earned by the institution until the current term has been completed and students have received grades for courses taken during the term;

(iii) Conditioned to provide indemnification to any student or enrollee of the school or his/her parent or guardian determined by the Board to have suffered loss of unearned tuition or any fees as a result of violation of any minimum standard or as a result of the institution ceasing operation, provide evidence satisfactory to the Board of its financial ability to provide such indemnification, and list the amount of surety liability the guaranteeing entity will assume; and

(iv) Held in Travis County, Texas, and conditioned to allow only the Board to withdraw funds for the benefit of persons identified in clause (iii) of this subparagraph.

(C) The institution shall include a letter signed by an authorized representative of the institution showing in detail the calculations made pursuant to this section and explaining the method used for computing the amount of the reserves, lines of credit or surety instrument.

(D) Falsifying surety calculation or surety instrument will be reported to the Attorney General per §7.5(m) of this title relating to "Degree Granting Colleges and Universities Other Than Texas Public Institutions".

(2) Tuition and Fee Recovery.

(A) A Qualifying Event, when used in this subchapter, shall mean an event in which a student or enrollee of the school or his/her parent or guardian has been determined by the Board to have suffered loss of tuition or any fees as a result of violation of any minimum standard or as a result of the institution or location ceasing operation.

(B) The Board may withdraw the total amount of reserves, lines of credit, or surety instrument designated for tuition and fee recovery at the time the Board deems the institution or person has violated any minimum standard which results in loss of prepaid tuition or fees, or upon notice that an institution is unable to continue to provide instruction to its enrolled students.

(C) A student, enrollee, parent or guardian is required to apply for an unearned tuition and fee claim in order to be eligible for reimbursement:

(i) Board staff will make available an application claim form. Claim forms must include original signatures to be considered valid.

(ii) Board staff will determine supporting documentation required for each claim and notify the claimant. Supporting documentation may include an enrollment agreement, transcript, report card, loan agreement, cancelled checks, or other documentation which provides information on tuition and fee amounts paid during the current term and the institution's failure to meet minimum standards or continue operations.

(iii) Claims must be initiated by the claimant with a completed application claim form within 12 months of a Qualifying Event. The Board will publish the Qualifying Event date which will begin the 12 months claim period.

(iv) Board staff will review all student tuition and fee recovery claims within 30 days after the claim period ends. Refunds will be made in a timely manner either upon determination all possible valid claims have been filed before the end of the claim period or at the end of the 12 months claim period.

(I) Payments will be made based on verified tuition and fee amounts claimed.

(II) If the amount of institutional reserves, lines of credit, or surety instrument able to be withdrawn by the Board at the time of the Qualifying Event does not allow full payment of tuition and fees to all claimants, Board staff will apportion refunds according to verified tuition and fees claimed as a percentage of total amount claimed versus total amount withdrawn.
CHAPTER 21.  STUDENT SERVICES
SUBCHAPTER W.  TEXAS WORKING OFF-CAMPUS: REINFORCING KNOWLEDGE AND SKILLS (WORKS) INTERNSHIP PROGRAM

19 TAC §§21.700 - 21.707

The Texas Higher Education Coordinating Board proposes new Chapter 21, Subchapter W, Sections 21.700 - 21.707 concerning the Texas Working Off-Campus: Reinforcing Knowledge and Skills (WORKS) Internship Program. The proposed new rules will enforce the requirements, conditions, and limitations of the Texas WORKS Internship Program. The program provides full-time undergraduate students with paid off-campus internships to strengthen their marketable skills and support their transition to the workforce.

R. Jerel Booker, J.D., Assistant Commissioner for College Readiness and Success, has determined that for each year of the first five years the section is in effect, there will be a $1,000,000 cost to the state as a result of the rule. The agency is authorized to utilize a portion of the current work-study appropriation to administer the program. There will be minimal savings to public institutions of higher education, public and private high schools, and the agency.

Mr. Booker has also determined that for each of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be that employed students will have opportunities to add work experience as part of their academic program and earn funding critical to covering the costs of education. Administering this section will also support two of the four 60x30TX goals of the state plan for higher education: identified marketable skills and management of student debt. Due to the size of the state and the amount of funds allotted, there will be minimal impact on public institutions of higher education; and minimal impact on small businesses or rural communities as described in Texas Government Code, Chapter 2006; therefore, an Economic Impact Analysis is not required.

Comments on the proposed amendments may be submitted by mail to Jerel Booker, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas, 78711 or via email at CRI@THECB.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the Texas Register.

Government Growth Impact Statement

(1) The rules will not create or eliminate a government program;
(2) Implementation of the rules will not require the creation or elimination of employee positions;
(3) Implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
(4) The rules will not require an increase or decrease in fees paid to the agency;
(5) The rules will create a new rule;
(6) The rules will not limit or repeal an existing rule; and
(7) The rules will not change the number of individuals subject to the rule.

(8) The rules will minimally affect the state's economy

The new section is proposed under Texas Education Code, Chapter 56, Subchapter E-1, Sections 56.0854, which provides the Coordinating Board with the authority to adopt rules to enforce the requirements, conditions, and limitations concerning the WORKS Internship Program.

The new section affects the implementation of Texas Education Code, Chapter 56, Subchapter E-1, Sections 56.0851 - 56.0857 Texas Working Off-Campus: Reinforcing Knowledge and Skills (WORKS) Internship Program.

§21.700. Authority and Purpose of the Texas Working Off-Campus: Reinforcing Knowledge and Skills (WORKS) Internship Program.

(a) Authority. The Texas Working Off-Campus: Reinforcing Knowledge and Skills (WORKS) Internship Program is authorized by Texas Education Code, Chapter 56, Subchapter E-1, §§56.0851-56.0857.

(b) Purpose. The purpose of the program is to provide jobs funded in part by the State of Texas to enable students employed through the program to attend public or private institutions of higher education in Texas while exploring career options and strengthening marketable skills.


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

(1) Coordinating Board--The Texas Higher Education Coordinating Board.
(2) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.
(3) Program or Texas WORKS Internship Program--The Texas Working Off-Campus: Reinforcing Knowledge and Skills (WORKS) Internship Program.
(4) Eligible Employer--To be eligible to enter into agreement with the Coordinating Board to participate in the program, an employer must:

(A) be a private, nonprofit or for-profit entity or a governmental entity; and

(B) demonstrate the administrative and financial capacity to carry out the employer's responsibilities under the program, including the ability to pay full wages and benefits to a student employed through the program.

(5) Financial need--The cost of attendance at a particular public or private institution of higher education less the expected family contribution. The cost of attendance and family contribution are to be determined in accordance with Board guidelines.

(6) Half-time student--For undergraduates, enrollment or expected enrollment for the equivalent of six or more semester credit hours per regular semester.

(7) Eligible institution:

(A) an institution of higher education; or

(B) a private or independent institution of higher education, as defined by TEC §61.003(15), other than a private or independent institution of higher education offering only professional or graduate degrees.

(8) Eligible Wages--Gross wages paid to an individual student in the student's program employment.

(9) Resident of Texas--A resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B of this title (relating to Determination of Resident Status). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

(10) Administrative and Financial Capacity--An employer must have legal authority to operate within the state of Texas, be in good standing and have the financial responsibility and administrative capability to administer the Texas WORKS Internship program.

(A) The Coordinating Board determines an employer's financial responsibility based on its ability to meet all of its financial obligations, meet third-party financial audit requirements, and satisfactorily resolved any past internship performance violations.

(B) An employer must also demonstrate its ability to properly administer the Texas WORKS Internship program. Administrative capability focuses on the processes, procedures, and personnel used in administering the program and comply with reporting requirements. Eligible employers must have an adequate internal system of checks and balances, tracking and maintaining marketable skills, authorizing and disbursing funds, and reporting data accurately and in a timely manner.


(a) Must be a private nonprofit or for-profit entity or a governmental entity;

(b) Demonstrate the administrative and financial capacity to carry out the employer's responsibilities under the program, including the ability to pay full wages and benefits to a student employed through the program;

(c) Must enter into a contract with the coordinating board;

(d) Must provide employment to a student employed through the program in nonpartisan and nonsectarian activities that relate to the student's long-term career interests with identifiable marketable skills;

(e) Must use program positions only to supplement and not supplant positions normally filled by persons who are not eligible to participate in the program, as provided by coordinating board rule;

(f) Must provide the entirety of an employed student's wages and employee benefits; and

(g) submit eligible wages to the coordinating board for reimbursement;

(h) An employer is not eligible to participate in the program if the employer is:

1. a public or private institution of higher education in Texas; or

2. a career school or college, as defined by TEC §132.001.


A contract between the Coordinating Board and participating employers will establish the roles and responsibilities, base wages and minimum work hours for students employed, compliance with hiring and employment laws, and data reporting terms and conditions.


All employers will be required to login and have access to the Texas WORKS portal to upload invoices and receive payment for student wages.


(a) A qualified internship position must meet a specific set of criteria, including:

1. Internship must identify marketable skills to be strengthened or gained;

2. Internship must be paid;

3. Internship must be at least 8 weeks;

4. Intern must work 12 to 20 hours per week during the academic year or up to 40 hours per week during the summer;

5. Intern activities may not be political or sectarian in nature;

6. No more than 25% of intern's work can be administrative in nature;

7. No more than 50% of the eligible employer's workforce may be interns; and

8. Federal work study funds may not be received for the internship position.

(b) The Coordinating Board has the right to set a minimum number of internship opportunities per eligible employer.


(a) To be eligible for employment in the Program a person shall:

1. be a Texas resident as defined by THECB policies and procedures;

2. be enrolled for at least the number of hours required of a half-time student, and be seeking a degree or certification in an eligible institution;

3. establish financial need in accordance with Board procedures;

4. have a statement on file with the institution of higher education indicating the student is registered with the Selective Service

All employers participating in the Texas WORKS internship program shall:

(1) Maintain its records and accounts of all transactions related to intern placement, benefit and wages for not less than seven (7) years after contract expiration to ensure a full accounting of all funds received, disbursed, and expended by the employer. A participating employer shall make available, upon immediate request of the Coordinating Board, its representative(s), or an authorized auditing entity, all documents and other information related to the Texas WORKS Internship program.

(2) Make available upon immediate request, records and accounts for inspecting, monitoring, programmatic or financial auditing, or evaluation by the Coordinating Board, its representative(s) and an auditing entity authorized by law or regulation:

(A) for a period not less than seven (7) years after completion of all services under the Texas Works Internship program, or

(B) after the date of the receipt of the participating employer’s final claim for reimbursement or submission of the final expenditure report, or

(C) upon final resolution of all invoice questions related to the Texas Works Internship program. If an audit is announced, an employer shall retain its records until the audit has been completed or not less than seven (7) years after the expiration date of the contract for Texas WORKS Internship Program.

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 14, 2019.

TRD-201903749
William Franz
General Counsel
Texas Higher Education Coordinating Board

EARLIEST POSSIBLE DATE OF ADOPTION: November 24, 2019

For further information, please call: (512) 427-6247

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 62. COMMISSIONER’S RULES CONCERNING THE EQUALIZED WEALTH LEVEL

The Texas Education Agency (TEA) proposes amendments to §§62.1001, 62.1011, 62.1031, and 62.1051 and the repeal of §62.1041, concerning equalized wealth level. The proposed rule actions would implement the requirements of the Texas Education Code (TEC), §49.006, as transferred, redesignated, and amended by House Bill (HB) 3, 86th Texas Legislature, 2019. The proposed rule actions would implement House Bill (HB) 3, 86th Texas Legislature, 2019, by removing an outdated provision and updating references to statute.

BACKGROUND INFORMATION AND JUSTIFICATION: In 1993, the 73rd Texas Legislature created the current wealth equalization system in TEC, Chapter 36. Subsequently in 1995, the 74th Texas Legislature moved the wealth equalization provisions in the TEC from Chapter 36 to Chapter 41. At that same time, TEC, Chapter 16, pertaining to the Foundation School Program, was recodified as Chapter 42. In 2019, the 86th Texas Legislature moved the wealth equalization provisions in the TEC from Chapter 41 to Chapter 49, Options for Local Revenue Levels in Excess of Entitlement.

The proposed revisions would amend 19 TAC §62.1001, Authority of Trustees; Duration of Agreements; §62.1011, Election Duties of Board of Trustees; §62.1031, Date of Agreement for Purposes of Determining Election Date; and §62.1051, Definition of Parcel Detached and Annexed by Commissioner, to modify statutory references to correspond to current codification. The proposed revisions would also repeal 19 TAC §62.1041, Weighted Students in Average Daily Attendance for Purposes of Tax Rate Rollback, to remove an outdated provision. The tax rollback calculation in TEC, Chapter 49, does not use weighted average attendance.

Additionally, the subchapter title would be updated to Commissioner’s Rules Concerning Options for Local Revenue Levels in Excess of Entitlement.

FISCAL IMPACT: Leo Lopez, associate commissioner for school finance/chief school finance officer, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

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

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

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

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.
GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would repeal an existing regulation. The proposed repeal of 19 TAC §62.1041 would remove outdated provisions. The tax rollback calculation does not use weighted average daily attendance.

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

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Lopez has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposed amendments to 19 TAC §§62.1001, 62.1011, 62.1031, and 62.1051 would ensure references to statute reflect recent legislation. The proposed repeal of 19 TAC §62.1041 would remove outdated provisions. There is no anticipated economic cost to persons who are required to comply with the proposal.

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

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

PUBLIC COMMENTS: The public comment period on the proposal begins October 25, 2019, and ends November 25, 2019. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the Texas Register on October 25, 2019. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/. Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

19 TAC §§62.1001, 62.1011, 62.1031, 62.1051

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §49.006, as transferred, redesignated, and amended by House Bill 3, 86th Texas Legislature, 2019, which authorizes the commissioner of education to adopt rules necessary for the implementation of TEC, Chapter 49, Options for Local Revenue Levels in Excess of Entitlement.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §49.006, as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019. §62.1001. Authority of Trustees; Duration of Agreements.

(a) Trustees of independent school districts may not delegate their authority to enter into agreements necessary to achieve the purposes of the Texas Education Code, Chapter 49 [Chapter 41]. Nor may the trustees authorize any exclusive franchises on the right to negotiate on behalf of the district.

(b) Consolidations under the Texas Education Code, Chapter 49 [Chapter 41], Subchapter B; detachments and annexations under Subchapter C; and tax base consolidations under Subchapter F are permanent in duration and districts may not enter into agreements that purport to limit the duration of the agreement. Nor may the parties create by agreement any right to cancel the agreement.

§62.1011. Election Duties of Board of Trustees.

For the purposes of an election ordered under the Texas Education Code, Chapter 49 [Chapter 41], the board of trustees that orders the election shall perform any applicable duty assigned to the county judge or to the county commissioners court under the Texas Education Code, Chapter 13.

§62.1031. Date of Agreement for Purposes of Determining Election Date.

For the purposes of the Texas Education Code, §49.012 [§41.012], the date of an agreement entered by the board of trustees of a school district under the Texas Education Code, Chapter 49 [Chapter 41], Subchapter E or F, is the date that the agreement is certified by the commissioner of education.

§62.1051. Definition of Parcel Detached and Annexed by Commissioner.

For the purposes of implementing the Texas Education Code, Chapter 49 [Chapter 41], Subchapter G, a parcel shall be defined as one or more separately described items of real property, together with the improvements and personal property located on the property, that have the same taxable situs or that are:

1. contiguous to each other;
2. used as a unit or subject to the same predominant use; and
3. located within the boundaries of a single school district.

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 14, 2019.

TRD-201903738
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 475-1497

19 TAC §62.1041

STATUTORY AUTHORITY. The repeal is proposed under Texas Education Code (TEC), §49.006, as transferred, redesignated, and amended by House Bill 3, 86th Texas Legislature, 2019, which authorizes the commissioner of education to adopt rules necessary for the implementation of TEC, Chapter 49, Options for Local Revenue Levels in Excess of Entitlement.

CROSS REFERENCE TO STATUTE. The repeal implements Texas Education Code, §49.006, as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019.
§62.1041. Weighted Students in Average Daily Attendance for Purposes of Tax Rate Rollback.

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 14, 2019.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

CHAPTER 102. EDUCATIONAL PROGRAMS
SUBCHAPTER JJ. COMMISSIONER'S RULES CONCERNING INNOVATION DISTRICT

19 TAC §102.1309, §102.1315

The Texas Education Agency (TEA) proposes amendments to §102.1309 and §102.1315, concerning innovation districts. The proposed amendments would implement changes made by House Bill (HB) 3, 86th Texas Legislature, 2019, by reflecting the recodification of Texas Education Code (TEC), Chapters 41 and 42, and specifying additional reasons the commissioner may terminate a district's designation as a district of innovation.

BACKGROUND INFORMATION AND JUSTIFICATION: Chapter 102, Subchapter JJ, establishes provisions relating to the applicable processes and procedures for innovation districts.

The proposed amendment to §102.1309, Prohibited Exemptions, would update statutory references to align with HB 3, 86th Texas Legislature, 2019, which recodified sections of TEC, Chapter 41, into TEC, Chapter 49, and recodified sections of TEC, Chapter 42, into TEC, Chapter 48.

The proposed amendment to §102.1315, Termination, would also reflect changes in statute made by HB 3. TEC, §12A.008(b-1), was amended by HB 3 to extend the commissioner's authority to terminate a district's designation as a district of innovation for failure to comply with the duty to discharge or refuse to hire certain employees or applicants (1) for employment under TEC, §12.1059; (2) convicted of certain offenses under TEC, §22.085; or (3) not eligible for employment in public schools under TEC, §22.092, as added by HB 3. The proposed amendment to §102.1315(a)(3) would add these provisions to the rule.

FISCAL IMPACT: Jeff Cottrill, deputy commissioner for governance and accountability, has determined that for the first five years the proposal is in effect there would be no fiscal impact to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

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

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

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would expand an existing regulation. The proposed amendment to §102.1315 would implement HB 3, 86th Texas Legislature, 2019, by adding criteria that are used to determine if a district's innovation plan may be terminated. Specifically, the commissioner would be allowed to terminate a district's designation as a district of innovation if the district fails to comply with the duty to discharge or refuse to hire certain employees or applicants for employment under TEC, §§12.1059, 22.085, or 22.092.

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

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Cottrill has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcesing the proposal would be ensuring that rule language is based on current law. The amendment to §102.1309 would update the sections of statute that are prohibited from exemption based on recently passed legislation. In addition, the amendment to §102.1315 would provide school districts with clarification on commissioner authority to terminate a district's designation as a district of innovation. There is no anticipated economic cost to persons who are required to comply with the proposal.

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

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

PUBLIC COMMENTS: The public comment period on the proposal begins October 25, 2019, and ends November 25, 2019. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the Texas Register on October 25, 2019. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/. Comments on the proposal may also be submitted.
to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §12A.008(b-1), as added by House Bill 3, 86th Texas Legislature, 2019, which allows the commissioner of education to terminate a district's designation as a district of innovation if it fails to comply with the duty to discharge or refuse to hire certain employees or applicants for employment; and TEC, §12A.009, which authorizes the commissioner to adopt rules to implement districts of innovation.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §12A.008(b-1) and §12A.009.

§102.1309. Prohibited Exemptions. (a) An innovation district may not be exempted from the following sections of the Texas Education Code (TEC) and the rules adopted thereunder:

1. a state or federal requirement, imposed by statute or rule, applicable to an open-enrollment charter school operating under the TEC, Chapter 12, Subchapter D, including, but not limited to, the requirements listed in the TEC, §12.104(b), and:
   (A) TEC, Chapter 22, Subchapter B;
   (B) TEC, Chapter 25, Subchapter A, §§25.001, 25.002, 25.0021, 25.0031, and 25.004;
   (D) TEC, Chapter 29, Subchapter G;
   (E) TEC, Chapter 30, Subchapter A;
   (F) TEC, §30.104;
   (G) TEC, Chapter 34;
   (H) TEC, Chapter 37, §§37.006(l), 37.007(e), 37.011, 37.012, 37.013, and 37.020; and
   (I) TEC, Chapter 39;
2. TEC, Chapter 11, Subchapters A, C, D, and E, except that a district may be exempt from the TEC, §11.1511(b)(5) and (14) and §11.162;
3. TEC, Chapter 13;
4. TEC, Chapter 41;
5. TEC, Chapter 42;
6. TEC, Chapter 44, §§44.0011, 44.002, 44.003, 44.004, 44.0041, 44.005, 44.0051, 44.006, 44.007, 44.0071, 44.008, 44.009, 44.011, 44.0312, 44.032, 44.051, 44.052, 44.053, and 44.054;
7. TEC, Chapter 45, §§45.003, 45.005, 45.005, 45.106, 45.202, and 45.203; [null]
8. TEC, Chapter 46; [null]
9. TEC, Chapter 48; and
10. TEC, Chapter 49.
(b) In addition to the prohibited exemptions specified in subsection (a) of this section, an innovation district may not be exempted from:
   1. a requirement of a grant or other state program in which the district voluntarily participates;
   2. duties that the statute applies to the execution of that power if a district chooses to implement an authorized power that is optional under the terms of the statute; and
   3. requirements imposed by provisions outside the TEC, including requirements under the Texas Government Code, Chapter 822.

§102.1315. Termination. (a) The commissioner of education may:

1. terminate a district's designation as a district of innovation if, beginning with its ratings in the year of designation, the district is assigned for two consecutive school years:
   (A) a final unacceptable academic performance rating under the Texas Education Code (TEC), §39.054;
   (B) a final unacceptable financial accountability rating under the TEC, §39.082; or
   (C) a final unacceptable academic performance rating under the TEC, §39.054, for one of the school years and a final unacceptable financial accountability rating under the TEC, §39.082, for the other school year;
2. permit the district to amend the district's local innovation plan to address concerns specified by the commissioner in lieu of terminating the designation as described in paragraph (1) of this subsection; or
3. terminate a district's designation as a district of innovation if the district:
   (A) fails to comply with the duty to discharge or refuse to hire certain employees or applicants for employment under the TEC, §12.1059;
   (B) fails to comply with the duty to discharge or refuse to hire certain employees or applicants convicted of certain offenses under the TEC, §22.085; or
   (C) fails to comply with the duty to discharge or refuse to hire certain employees or applicants not eligible for employment in public schools under the TEC, §22.092.
(b) The commissioner shall terminate a district's designation as a district of innovation if, beginning with its ratings in the year of designation, the district is assigned for three consecutive school years:

1. a final unacceptable academic performance rating under the TEC, §39.054;
2. a final unacceptable financial accountability rating under the TEC, §39.082; or
3. any combination of one or more unacceptable ratings under paragraph (1) of this subsection and one or more unacceptable ratings under paragraph (2) of this subsection.
(c) Upon termination of an innovation plan, a district must return to compliance with all specified areas of the TEC by a date to be determined by the commissioner.
(d) A decision by the commissioner under this section is final and may not be appealed.

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 14, 2019.
PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 249. DISCIPLINARY PROCEEDINGS, SANCTIONS, AND CONTESTED CASES

SUBCHAPTER B. ENFORCEMENT ACTIONS AND GUIDELINES

19 TAC §§249.12, 249.14, 249.15

The State Board for Educator Certification (SBEC) proposes amendments to §§249.12, 249.14, and 249.15, concerning enforcement actions and guidelines. The proposed amendments to 19 Texas Administrative Code (TAC) Chapter 249, Subchapter B, would implement House Bill (HB) 3, Senate Bills (SBs) 1230, 1476, and 37, 86th Texas Legislature, 2019, by reflecting new reporting requirements for superintendents, principals, and directors of public schools and private school administrative officers; adding individuals listed on the registry of persons ineligible to work in public schools to the people that must be fired or refused employment by a certified educator; and removing the reference to student loan default as a ground for discipline by the SBEC. The proposed amendments would also allow the SBEC to deny the application for certification of any person who had abandoned a Texas Education Code (TEC), Chapter 21, contract within the preceding 12 months. The proposed amendments would also make technical changes to improve the readability of provisions and to align citations.

BACKGROUND INFORMATION AND JUSTIFICATION: Contract Abandonment

The proposed amendment to §249.12, Administrative Denial; Appeal, would add a new subsection (b)(7) to allow the SBEC to deny the certificate of a person who has abandoned a TEC, Chapter 21, contract within the past 12 months. The intern and probationary certificates that the SBEC issues to beginning teachers last only 12 months. When a person's certification expires, the SBEC loses jurisdiction over the person and cannot impose sanctions. Under 19 TAC §249.17(d)(3), the minimum sanction for contract abandonment is a one-year suspension. In most cases when an educator on an intern or probationary certificate abandons his or her contract, there is not enough time left before the certificate expires for the SBEC to impose a full one-year suspension. Under the current wording of §249.12, these educators can reapply for certification as soon as their intern or probationary certification expires, and the SBEC could not deny them certification unless the SBEC could prove that they were unworthy to instruct. While beginning educators who abandon contracts with school districts may not be permanently unworthy to instruct, they may need time to consider whether the education profession is right for them and time to get additional training before attempting to teach again—lest they abandon another contract the next year, disrupting the lives and learning of another classroom full of Texas students.

The proposed rule would allow SBEC to deny individuals who reapply within 12 months of abandoning a contract to ensure that those who abandon contracts have taken at least a 12-month break from teaching for self-reflection and additional training before they make another attempt. The proposed rule would only impact educators whose intern and probationary certificates have expired so that the person must reapply for a new certificate. The proposed rule would not impact educators on standard certificates who allow their certificates to go inactive. SBEC maintains jurisdiction over inactive certificates because they can be renewed without the educator having to fully reapply and, therefore, SBEC can sanction a standard certificate with the typical one-year suspension for contract abandonment required by 19 TAC §249.17(d)(3) without losing jurisdiction.

House Bill 3, 86th Texas Legislature, 2019

Throughout §249.14, Complaint, Required Reporting, and Investigation; Investigative Notice; Filing of Petition, and §249.15, Disciplinary Action by State Board for Educator Certification, the proposed amendments would modify "open-enrollment charter school" to read "charter school" to comport with the changes to TEC, Chapter 21, in HB 3, which now includes all forms of charter entities, whether open-enrollment or otherwise.

HB 3 also creates a registry of persons not eligible for employment in Texas public schools and requires superintendents or directors of school districts, districts of innovation, charter schools, regional education service centers, or shared services arrangements to notify the commissioner of education if an employee resigned or was terminated when there is evidence that the employee abused or otherwise committed an unlawful act with a student or minor or was involved in a romantic relationship with a student or minor. To reflect these new requirements, the proposed amendments would add reporting to the commissioner of education under TEC, §22.093, to the list of required reporting for which an educator can be disciplined if the educator fails to report under §249.15(b)(4). The proposed amendments would also reflect the registry of persons ineligible to work in public schools in §249.15(b)(12), which allows for SBEC to sanction an educator if the educator hires or fails to fire an employee on the register.

HB 3 also modifies the requirements of TEC, §22.085, which sets out the criminal history that requires a school district, charter school, or shared services arrangement to discharge or refuse to hire an employee or applicant, to parallel TEC, §21.058, by including individuals on deferred adjudication community supervision for which a defendant is required to register as a sex offender. To reflect these modifications, the proposed amendments would add language regarding community supervision to the reference to TEC, §22.085, in §249.15(b)(12).

Senate Bills 1230 and 1476, 86th Texas Legislature, 2019

To implement SB 1230, a proposed amendment to §249.14(d) would reflect the statute's language requiring a "chief administrative officer of a private school" to report to SBEC rather than to the "director of a private school." This semantic change does not change the meaning of the rule, which already required private school heads to report misconduct to the SBEC.

Similarly, to reflect the creation of misconduct reporting requirements for private school chief administrative officers in SB 1230, the proposed amendments would add TEC, §21.0062, to the list
of reporting obligations for which the SBEC can discipline a certified educator if the educator fails to comply.

To reflect the requirements of SB 1476 and SB 1230, a proposed amendment to §249.14(d) would allow superintendents and directors of public schools not to report evidence of misconduct if the superintendent or director has completed an investigation before the educator resigned and determined that the educator did not engage in misconduct.

**Senate Bill 37, 86th Texas Legislature, 2019**

To implement SB 37, the proposed amendments would remove a reference to student loan default as a ground for discipline by the SBEC in §249.15(f).

The proposed amendments also include technical edits to remove language regarding sanctions for failing to report from §249.14(d) and (e) because this language is redundant in §249.14(h) and makes §249.14(d) and (e) difficult to read. The proposed amendments would also make the list of "Priority 1" conduct match in §249.15(b)(9) and §249.14(k)(1).

**FISCAL IMPACT:** Ryan Franklin, associate commissioner for educator leadership and quality, has determined that for the first five-year period the proposal is in effect, there is no additional fiscal impact on state or local governments and there are no additional costs to entities required to comply with the proposal.

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

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

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

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

**GOVERNMENT GROWTH IMPACT:** The Texas Education Agency staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, the proposed rule would limit the requirement that a superintendent or director report educator misconduct to the SBEC by removing the requirement that a superintendent report when the investigation is complete and would exonerate the educator, in accordance with HB 3. The proposed rule would expand the reporting requirements for which the SBEC can sanction an educator if the educator fails to report in compliance with the statutory requirements. The proposed rule would also expand the reporting requirements for chief administrative officers in private schools, in accordance with SB 1230. The proposed rule would expand the enumerated reasons for which an educator’s application can be denied to include educators who have abandoned a contract within the preceding 12 months. The proposed rule would expand the reasons for which SBEC may sanction an educator to include hiring or failing to fire someone listed on the registry of persons who are not eligible to be employed under TEC, §22.092, in accordance with HB 3. The proposed rule would repeal the existing regulation that allowed the SBEC to consider sanctioning an educator for student loan default, in accordance with SB 37.

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

**PUBLIC BENEFIT AND COST TO PERSONS:** Mr. Franklin has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of the proposal would be ensuring consistency in the penalties and repercussions of contract abandonment for educators with intern and probationary certificates and improving student safety through enhanced enforceability of the new administrator reporting requirements imposed by the 86th Texas Legislature. The TEA staff has determined that there is no anticipated cost to persons required to comply with the proposal.

**DATA AND REPORTING IMPACT:** The proposal would have no new data and reporting impacts that were not directly created by HB 3 or SB 1246.

**PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS:** The TEA staff has determined that the proposal would not require any additional written reports or other paperwork to be completed by a principal or classroom teacher that were not directly required by the 86th Texas Legislature through HB 3.

**PUBLIC COMMENTS:** The public comment period on the proposal begins October 25, 2019, and ends November 25, 2019. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/. The SBEC will take registered oral and written comments on the proposal at the December 6, 2019 meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Attention: Mr. Ryan Franklin, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the Texas Register on October 25, 2019.

**STATUTORY AUTHORITY:** The amendments are proposed under Texas Education Code (TEC), §21.006(a), (b), (c), (c-1), and (c-2), as amended by House Bill (HB) 3 and Senate Bill (SB) 1476, 86th Texas Legislature, 2019, which requires the superintendent or director of a school district, district of innovation, open-enrollment charter school, other charter entity, regional education service center or shared services arrangement to report to the State Board for Educator Certification (SBEC) within seven business days of when the superintendent knew or received a report from a principal that an educator has resigned or is terminated when there is evidence that the educator has engaged in certain misconduct, unless the superintendent or director completes an investigation before the educator resigns or
is terminated and determines that the educator did not commit the alleged misconduct; TEC, §21.006(b-2), as amended by HB 3, 86th Texas Legislature, 2019, which requires a principal of a school district, district of innovation, or charter school to notify the superintendent within seven days when an educator is terminated or resigns, and there is evidence that the educator engaged in misconduct; TEC, §21.006(f) and (g), which give the SBEC rulemaking authority to implement TEC, §21.006; TEC, §21.006(g-1), as added by HB 3, 86th Texas Legislature, 2019, which requires the SBEC to develop and maintain an internet portal through which a superintendent or director can file a report confidentially and securely; TEC, §21.006(i), as amended by HB 3, 86th Texas Legislature, Regular Session, 2019, which gives the SBEC authority to impose administrative penalties on principals and superintendents who fail to fulfill their reporting obligations to the SBEC under TEC, §21.006; TEC, §21.0062, added by SB 1230, 86th Texas Legislature, 2019, which requires the chief administrative officer of a private school to notify the SBEC within seven days when a private school educator resigns before the completion of an investigation or is terminated when there is evidence that the educator has engaged in certain misconduct and gives the SBEC rulemaking authority to implement the provision; TEC, §21.007, which gives the SBEC authority to place a notice that an educator is under investigation for alleged misconduct on the educator’s public certification records; requires that the SBEC give the educator notice and an opportunity to show cause; requires that the SBEC limit the amount of time the notice can appear on the educator’s certification; and gives the SBEC rulemaking authority as necessary to implement the provision; TEC, §21.009(e), which states that the SBEC may revoke the certificate of an administrator if the board determines it is reasonable to believe that the administrator employed an applicant despite being aware that the applicant had been adjudicated for or convicted of having an inappropriate relationship with a student or minor; TEC, §21.031(a), which charges the SBEC with regulating and overseeing all aspects of the certification, continuing education, and standards of conduct for public school educators; TEC, §21.035, which states that Texas Education Agency (TEA) staff provides administrative functions and services for SBEC and gives SBEC the authority to delegate to either the commissioner of education or to TEA staff the authority to settle or otherwise informally dispose of contested cases involving educator certification; TEC, §21.041, which authorizes the SBEC to adopt rules as necessary for its own procedures, regulate educators, specify the requirements for issuance or renewal of educator certificates, administer statutory requirements, provide for educator disciplinary proceedings and for enforcement of the educator’s code of ethics; TEC, §21.058, which requires the SBEC to revoke the certification of an educator convicted or placed on deferred adjudication community supervision for certain offenses; TEC, §21.0581(a), as amended by SB 1230, 86th Texas Legislature, 2019, which gives the SBEC authority to sanction the educator certification of person who assists another person in obtaining employment at a school district, private school, or open-enrollment charter school when the certified educator knew the other person had previously engaged in sexual misconduct with a minor or student in violation of the law; TEC, §21.060, which sets out crimes that relate to the education profession and authorizes the SBEC to sanction or refuse to issue a certificate to any person who has been convicted of one of these offenses; TEC, §21.105(c), which allows the SBEC to impose sanctions against an educator who abandons a probationary contract; TEC, §21.160(c), which allows the SBEC to impose sanctions against an educator who abandons a continuing contract; TEC, §21.210(c), which allows the SBEC to impose sanctions against an educator who abandons a term contract; TEC, §22.082, which requires the SBEC to subscribe to the criminal history clearing house and allows the SBEC to obtain any criminal history from any closed case file; TEC, §22.0831, which requires the SBEC to review the criminal history of certified educators and applicants for certification; TEC, §22.085, as amended by HB 3, 86th Texas Legislature, 2019, which requires school districts, charter schools, and shared services arrangements to conduct fingerprint criminal background checks on employees and to refuse to hire those that have criminal history; TEC, §22.087, which requires superintendents and directors of school districts, charter schools, private schools, regional education service centers, and shared services arrangement to notify the SBEC if an applicant for a certification has criminal history that is not in the criminal history clearing house; TEC, §22.092, as added by HB 3, 86th Texas Legislature, 2019, which requires school districts, charter schools, districts of innovation, regional education service centers, and shared services arrangements to discharge or refuse to hire any person listed on the registry of persons not eligible for employment in Texas public schools; TEC, §22.093, as added by HB 3, 86th Texas Legislature, 2019, which requires superintendents or directors of school districts, districts of innovation, charter schools, regional education service centers, or shared services arrangements to notify the commissioner of education if an employee resigned or was terminated when there is evidence that the employee abused or otherwise committed an unlawful act with a student or minor, or was involved in a romantic relationship with a student or minor; Texas Government Code (TGC), §411.090, which allows the SBEC to get from the Texas Department of Public Safety all criminal history record information about any applicant for licensure as an educator; TGC, §2001.058(d-1) and (e), which set out the requirements for when the SBEC can make changes to a proposal for decision from an administrative law judge; Texas Family Code (TFC), §261.308(d) and (e), which requires the Texas Department of Family and Protective Services to release information regarding a person alleged to have committed abuse or neglect to the SBEC; TFC, §261.406(a) and (b), as amended by SB 1231, 86th Texas Legislature, 2019, which require the Texas Department of Family and Protective Services to send a copy of a completed investigation report involving allegations of abuse or neglect of a child in a public or private school to the TEA; Texas Occupations Code (TOC), §53.021(a), as amended by SB 1342, 86th Texas Legislature, 2019, which allows the SBEC to suspend or revoke an educator’s certificate, or refuse to issue a certificate, if a person is convicted of certain offenses; TOC, §53.022, as amended by SB 1342, 86th Texas Legislature, 2019, which sets out factors for the SBEC to determine whether a particular criminal offense relates to the occupation of education; TOC, §53.023, as amended by SB 1342, 86th Texas Legislature, 2019, which sets out additional factors for the SBEC to consider when deciding whether to allow a person convicted of a crime to serve as an educator; TOC, §53.024, which states that proceedings to deny or sanction an educator’s certification are covered by the Texas Administrative Procedure Act, TGC, Chapter 2001; TOC, §53.025, which gives the SBEC rulemaking authority to issue guidelines to define which crimes relate to the profession of education; TOC, §53.051, as amended by SB 1342, 86th Texas Legislature, 2019, which requires that the SBEC notify a license holder or applicant after denying, suspending or revoking the certification; TOC, §53.052, which allows a person who has been denied an educator certification or had their educator certification revoked or
suspended to file a petition for review in state district court after exhausting all administrative remedies; TOC, §56.003, as amended by SB 37, 86th Texas Legislature, 2019, which prohibits state agencies from taking disciplinary action against licensees for student loan non-payment or default; and Every Student Succeeds Act (ESSA), 20 United States Code (USC), §7926, which requires state educational agencies to make rules forbidding educators from aiding other school employees, contractors, or agents in getting jobs when the educator knows the job-seeker has committed sexual misconduct with a student or minor in violation of the law.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§21.006(a), (b), (b-1), (b-2), (c), (c-1), (c-2), as amended by HB 3 and SB 1476, 86th Texas Legislature, 2019, (f), (g), (g-1), as amended by SB 3, 86th Texas Legislature, 2019; and (i), as amended by HB 3, 86th Texas Legislature, 2019; 21.0062, as added by SB 1230, 86th Texas Legislature, 2019; 21.007; 21.009(e); 21.031(a); 21.035; 21.041; 21.058; 21.0581; 21.060; 21.105(c); 21.160(c); 21.210(c); 22.082; 22.0831; 22.085, as amended by HB 3, 86th Texas Legislature, 2019; 22.087; 22.092, as added by HB 3, 86th Texas Legislature, 2019; and 22.093, as added by HB 3, 86th Texas Legislature, 2019; Texas Government Code, §441.090 and §2001.058(e); Texas Family Code, §261.308(d) and (e) and §261.406(a) and (b), as amended by SB 1231, 86th Texas Legislature, 2019; Texas Occupations Code, §§53.021(a), as amended by SB 1342, 86th Texas Legislature, 2019; 53.022 and 53.023, as amended by SB 1342, 86th Texas Legislature, 2019, 53.024, 53.025, 53.051, as amended by SB 1342, 86th Texas Legislature, 2019, 53.052, and 56.003, as amended by SB 37, 86th Texas Legislature, 2019; and the ESSA, 20 USC, §7926.

§249.12. Administrative Denial; Appeal.

(a) This section applies to administrative denials, as that term is defined in §249.3 of this title (relating to Definitions). This section does not apply to the denial of an application for a certificate that has been permanently revoked, and it does not apply to the failure to issue a certificate because specific certification requirements have not been met.

(b) The Texas Education Agency (TEA) staff may administratively deny any of the matters set out in subsection (a) of this section based on satisfactory evidence that:

(1) the person filed a fraudulent application;

(2) the person assisted another person in obtaining employment at a school district or open-enrollment charter school, other than by the routine transmission of administrative or personnel files when the person knew that the other person had previously engaged in an inappropriate relationship with a minor or student in violation of the law;

(3) the person has committed an act that would make them subject to required revocation under the Texas Education Code (TEC), §21.058;

(4) the person has committed an act that would make them subject to mandatory permanent revocation or denial under §249.17(i) of this title (relating to Decision-Making Guidelines);

(5) the person has engaged in conduct or committed a crime or an offense that:

(A) demonstrates that the person lacks good moral character;

(B) demonstrates that the person is unworthy to instruct or to supervise the youth of this state;

(C) constitutes the elements of a crime or offense relating directly to the duties and responsibilities of the education profession; [ac]

(6) the person failed to comply with the terms or conditions of an order issued by or on behalf of the State Board for Educator Certification or the TEA staff; or [.]

(7) TEA staff has previously received a timely report from a school district that the person is subject to sanctions for having abandoned a TEC, Chapter 21, contract in violation of the TEC, §§21.105(c), 21.160(c), or 21.210(c) and less than 12 months has elapsed from the first day that, without district permission, the person failed to appear for work under the contract.

(c) The TEA staff shall provide written notice of the denial and the factual and legal reasons for it to the person whose application or request has been administratively denied. The notice shall be given by registered or certified mail to the address the person has provided in the application or request that is being denied. The person may attempt to show compliance with legal requirements by written submission or by requesting an informal conference, and/or may appeal and request a State Office of Administrative Hearings (SOAH) hearing as hereafter provided. The 30-day deadline to appeal and request a hearing is not tolled during any attempts to show cause.

(d) The appeal and request for a SOAH hearing of an administrative denial shall be in the form of a petition that complies in content and form with §249.26 of this title (relating to Petition) and 1 Texas Administrative Code, Part 7, §155.301 (relating to Required Form of Pleadings). In order to be referred to the SOAH for a contested case hearing, an appeal petition must be filed with the TEA staff within 30 calendar days after the person received or is deemed to have received written notice of the administrative denial. Unless otherwise proved by the person, the notice shall be deemed to have been received by the examinee no later than five calendar days after mailing to the most recent address provided by the person. The TEA staff may dismiss an appeal that is not timely filed without further action.

(e) The TEA staff shall send an answer to the petition to the person appealing an administrative denial and shall refer the petition and answer to the SOAH for a contested case hearing.


(a) The Texas Education Agency (TEA) staff may obtain and investigate information concerning alleged improper conduct by an educator, applicant, examinee, or other person subject to this chapter that would warrant the State Board for Educator Certification (SBEC) denying relief to or taking disciplinary action against the person or certificate.

(b) Complaints against an educator, applicant, or examinee must be filed in writing.

(c) The TEA staff may also obtain and act on other information providing grounds for investigation and possible action under this chapter.

(d) A person who serves as the superintendent of a school district or district of innovation, [or] the director of a [an open-enrollment] charter school, [private school], regional education service center, or shared services arrangement, or the chief administrative officer of a private school may notify the SBEC of any educator misconduct that the person believes in good faith may be subject to sanctions under this chapter and/or Chapter 247 of this title (relating to Educators’ Code of
Ethics). However, under any of the following circumstances, a person who serves in such a position shall promptly notify the SBEC in writing by filing a report with the TEA staff within seven business days of the date the person either receives a report from a principal under subsection (e) of this section or knew of any of the following [those] circumstances, except if the person is a superintendent or director of a public school and has completed an investigation in accordance with Texas Education Code (TEC), §21.006(c-2), resulting in a determination that the educator did not engage in misconduct [and may be subject to sanctions for failure to do so, pursuant to §249.15(b)(4) of this title (relating to Disciplinary Action by State Board for Educator Certification)]:

(1) that an applicant for or a holder of a certificate has a reported criminal history, which the superintendent or director obtained information by a means other than the criminal history clearinghouse established under Texas Government Code, §411.0845;

(2) that a certificate holder was terminated from employment and there is evidence that he or she committed any of the following acts:
   (A) sexually or physically abused a student or minor or engaged in any other illegal conduct with a student or minor;
   (B) possessed, transferred, sold, or distributed a controlled substance;
   (C) illegally transferred, appropriated, or expended school property or funds;
   (D) attempted by fraudulent or unauthorized means to obtain or to alter any certificate or permit that would entitle the individual to be employed in a position requiring such certificate or permit or to receive additional compensation associated with a position;
   (E) committed a crime, any part of such crime having occurred on school property or at a school-sponsored event; or
   (F) solicited or engaged in sexual conduct or a romantic relationship with a student or minor;

(3) that a certificate holder has submitted a notice of resignation and that there exists evidence that he or she committed one of the acts specified in paragraph (2) of this subsection.
   (A) Before accepting an employee's resignation that, under this paragraph, requires a person to notify the SBEC by filing a report with the TEA staff, the person shall inform the certificate holder in writing that such a report will be filed and that sanctions against his or her certificate may result as a consequence.
   (B) A person required to comply with this paragraph shall notify the governing body of the employing school district before filing the report with the TEA staff.
   (C) A superintendent or director of a school district shall complete an investigation of an educator if there is reasonable cause to believe the educator may have engaged in misconduct described in paragraph (2)(A) of this subsection despite the educator's resignation from district employment before completion of the investigation; or
   (4) any other circumstances requiring a report under the TEC [Texas Education Code (TEC)], §21.006.

(e) A person who serves as a principal in a school district, a district of innovation, or a [an open-enrollment] charter school must notify the superintendent or director of the school district, district of innovation, or charter school and may be subject to sanctions for failure to do so [pursuant to §249.15(b)(4) of this title (relating to Disciplinary Action by State Board for Educator Certification)] no later than seven business days after:

(1) an educator's termination or resignation following an alleged incident of misconduct involving one of the acts described in subsection (d)(2) of this section; or

(2) the principal knew about an educator's reported criminal history.

(f) Pursuant to the TEC, §21.006(b-2), (c), (h), and (i), a report filed under subsections (d) and (e) of this section must include:

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

(2) the factual circumstances requiring the report and the subject of the report by providing the following available information:
   (A) name and any aliases; certificate number, if any, or social security number;
   (B) last known mailing address and home and daytime phone numbers;
   (C) all available contact information for any alleged victim or victims;
   (D) name or names and any available contact information of any relevant witnesses to the circumstances requiring the report;
   (E) current employment status of the subject, including any information about proposed termination, notice of resignation, or pending employment actions; and
   (F) involvement by a law enforcement or other agency, including the name of the agency.

(g) Pursuant to the Family Educational Rights and Privacy Act (FERPA), 20 United States Code, §1232g(a)(4), and the federal regulations interpreting it at 34 Code of Federal Regulations, §99.3, education records that are protected by FERPA must be records that are directly related to a student, and the term "education records" does not include records that relate to a school employee in his or her capacity as a school employee.

(h) A person who is required to file a report under subsections (d) and (e) of this section but fails to do so timely is subject to sanctions under this chapter.

(i) If a school district board of trustees learns of a failure by the superintendent of the district or a district principal to provide a notice required under the Texas Code of Criminal Procedure (TCCP), §15.27(a), (a-1), or (b), the board of trustees shall report the failure to the SBEC. If the governing body of a private primary or secondary school learns of a failure by the principal of the school to provide a notice required under the TCCP, §15.27(e), and the principal holds a certificate issued under the TEC, Chapter 21, Subchapter B, the governing body shall report the failure to the SBEC.

(j) The TEA staff shall not pursue sanctions against an educator who is alleged to have abandoned his or her TEC, Chapter 21, contract in violation of the TEC, §21.105(c), 21.160(c), or 21.210(c), subject to the limitations imposed by the TEC, §21.4021(g), unless the board of trustees of the employing school district:

(1) submits a written complaint to the TEA staff within 30 calendar days after the effective date of the educator's separation from employment from the school district. For purposes of this section, unless the school district and the educator have a written agreement to the contrary, the effective date of separation from employment is the first
day that, without district permission, the educator fails to appear for work under the contract;

(2) renders a finding that good cause did not exist under the TEC, §§21.105(c)(2), 21.160(c)(2), or 21.210(c)(2). This finding constitutes prima facie evidence of the educator's lack of good cause, but is not a conclusive determination; and

(3) submits the following required attachments to the written complaint:

(A) the educator's resignation letter, if any;
(B) the agreement with the educator regarding the effective date of separation from employment, if any;
(C) the educator's contract; and
(D) school board meeting minutes indicating a finding of "no good cause" (if the board does not meet within 30 calendar days of the educator's separation from employment, the minutes may be submitted within 10 calendar days after the next board meeting).

(k) To efficiently administer and implement the SBEC's purpose under this chapter and the TEC, the TEA staff may set priorities for the investigation of complaints based on the severity and immediacy of the allegations and the likelihood of harm posed by the subject of the investigation. All cases accepted for investigation shall be assigned one of the following priorities.

(1) Priority 1: conduct that may result in the placement of an investigative notice pursuant to the TEC, §21.007, and subsection (l) of this section because it presents a risk to the health, safety, or welfare of a student or minor, parent of a student, fellow employee, or professional colleague, including, but not limited to, the following:

(A) any conduct constituting a felony criminal offense;
(B) indecent exposure;
(C) public lewdness;
(D) child abuse and/or neglect;
(E) possession of a weapon on school property;
(F) drug offenses occurring on school property;
(G) sale to or making alcohol or other drugs available to a student or minor;
(H) sale, distribution, or display of harmful material to a student or minor;
(I) certificate fraud;
(J) state assessment testing violations;
(K) deadly conduct; and
(L) conduct that involves inappropriate communication with a student as described in §247.2(3)(l) of this title (relating to Code of Ethics and Standard Practices for Texas Educators), inappropriate professional educator-student relationships and boundaries, or otherwise soliciting or engaging in sexual conduct or a romantic relationship with a student or minor.

(2) Priority 2: any sanctionable conduct that is not Priority 1 conduct under paragraph (1) of this subsection. An investigative notice will not be placed on an educator's certification records on the basis of an allegation of Priority 2 conduct. The TEA staff may change a case's priority at any time based on information received. Priority 2 conduct includes, but is not limited to, the following:

(A) any conduct constituting a misdemeanor criminal offense or testing violation that is not Priority 1 conduct;
(B) contract abandonment; and
(C) code of ethics violations that do not constitute Priority 1 conduct.

(l) After accepting a case for investigation, if the alleged conduct indicates a risk to the health, safety, or welfare of a student or minor, as described in subsection (k)(1) of this section, the TEA staff shall immediately place an investigative notice on the certificate holder's certification records stating that the certificate holder is currently under investigation. The placement of such an investigative notice must follow the procedures set forth in subsection (m)(1) of this section. After accepting a case for investigation, if the alleged conduct indicates a risk to the health, safety, or welfare of a parent of a student, fellow employee, or professional colleague, as described in subsection (k)(1) of this section, the TEA staff may place an investigative notice on the certificate holder's certification records stating that the certificate holder is currently under investigation. The placement of an investigative notice must follow the procedures set forth in subsection (m)(2) of this section.

(m) The following procedures must be followed for placing an investigative notice on the educator's certification records.

(1) At the time of placing an investigative notice on an educator's certification records for alleged conduct that indicates a risk to the health, safety, or welfare of a student or minor, the TEA staff shall serve the certificate holder with a letter informing the educator of the investigation and the basis of the complaint.

(A) Within ten calendar days of placing an investigative notice on the educator's certification records, the letter notifying the certificate holder of the investigation shall be mailed to the address provided to the TEA staff pursuant to the requirements set forth in §230.91 of this title (relating to Procedures in General).

(B) The letter notifying the certificate holder of the investigation shall include a statement of the alleged conduct, which forms the basis for the investigative notice, and shall provide the certificate holder the opportunity to show cause within ten calendar days why the notice should be removed from the educator's certification records.

(2) Prior to placing an investigative notice on an educator's certification records for alleged conduct that indicates a risk to the health, safety, or welfare of a parent of a student, fellow employee, or professional colleague, as described in subsection (k)(1) of this section, the TEA staff shall serve the certificate holder with a letter informing the educator of the investigation and the basis of the complaint.

(A) At least ten calendar days before placing an investigative notice on the educator's certification records, the letter notifying the certificate holder of the investigation shall be mailed to the address provided to the TEA staff pursuant to the requirements set forth in §230.91 of this title.

(B) The letter notifying the certificate holder of the investigation shall include a statement of the alleged conduct, which forms the basis for the investigative notice, and shall provide the certificate holder the opportunity to show cause within ten calendar days why the notice should not be placed on the educator's certification records.

(3) The TEA staff shall determine whether or not to remove or place an investigative notice on the educator's certification records, taking into account the educator's response, if any, to the letter notifying the certificate holder of the investigation.
(n) An investigative notice is subject to the following time limits.

1. An investigative notice may remain on the certification records of a certificate holder for a period not to exceed 240 calendar days.

2. The TEA staff may toll this time limit if information is received indicating that there is a pending criminal or administrative matter related to the alleged act of misconduct that gives rise to the investigative notice. For purposes of this subsection, a criminal or administrative matter includes an audit by a state or federal agency, an arrest, an investigation, related litigation or other enforcement action brought by a state or federal administrative agency, or a prosecution by a criminal law enforcement agency. Upon receiving notice that the criminal or administrative matter has been resolved the tolling period shall end. As part of its procedure, the TEA staff will attempt to make bimonthly (once every two months) contact with the agency where a related matter is pending to determine whether the related matter has been closed or otherwise resolved.

3. The TEA staff may toll this time limit if the matter is referred for a contested case hearing, upon agreement of the parties, or while the matter is pending action by the SBEC on a proposed agreed order.

(o) The TEA staff shall remove an investigative notice from an educator's certification records:

1. when a case's final disposition occurs within the time limits established in subsection (n) of this section; or

2. when the time limits for an investigative notice have been exceeded, if:
   
   A. the certificate holder has made a written demand to the TEA staff that the investigative notice be removed because the time limits have been exceeded; and
   
   B. the TEA staff has failed to refer the matter to the State Office of Administrative Hearings for a contested case hearing within 30 calendar days from the date of receipt of the written demand to remove the investigative notice.

(p) Only the TEA staff may file a petition seeking sanctions under §249.15 of this title. Prior to filing a petition, the TEA staff shall mail to the certificate holder affected by written notice of the facts or conduct alleged to warrant the intended action and shall provide the certificate holder an opportunity to show compliance with all requirements of law.

§249.15. Disciplinary Action by State Board for Educator Certification.

(a) Pursuant to this chapter, the State Board for Educator Certification (SBEC) may take any of the following actions:

1. place restrictions on the issuance, renewal, or holding of a certificate, either indefinitely or for a set term;

2. issue an inscribed or non-inscribed reprimand;

3. suspend a certificate for a set term or issue a probated suspension for a set term;

4. revoke or cancel, which includes accepting the surrender of, a certificate without opportunity for reapplication for a set term or permanently;

5. impose any additional conditions or restrictions upon a certificate that the SBEC deems necessary to facilitate the rehabilitation and professional development of the educator or to protect students, parents of students, school personnel, or school officials; or

6. impose an administrative penalty of $500-$10,000 on a superintendent or director who fails to file timely a report required under §249.14(d) of this title (relating to Complaint, Required Reporting, and Investigation; Investigative Notice; Filing of Petition) or on a principal who fails to timely notify a superintendent or director as required under §249.14(e) of this title under the circumstances and in the manner required by the Texas Education Code (TEC), §21.006.

(b) The SBEC may take any of the actions listed in subsection (a) of this section based on satisfactory evidence that:

1. the person has conducted school or education activities in violation of law;

2. the person is unworthy to instruct or to supervise the youth of this state;

3. the person has violated a provision of the Educators' Code of Ethics;

4. the person has failed to report or has hindered the reporting of child abuse pursuant to the Texas Family Code, §261.001, or has failed to notify the SBEC, the commissioner of education, or the school superintendent or director under the circumstances and in the manner required by the TEC, §21.006, §21.0062, §22.093, and §249.14(d)-(f) of this title;

5. the person has abandoned a contract in violation of the TEC, §§21.105(c), 21.160(c), or 21.210(c);

6. the person has failed to cooperate with the Texas Education Agency (TEA) in an investigation;

7. the person has failed to provide information required to be provided by §229.3 of this title (relating to Required Submissions of Information, Surveys, and Other Data);

8. the person has violated the security or integrity of any assessment required by the TEC, Chapter 39, Subchapter B, as described in subsection (g) of this section or has committed an act that is a departure from the test administration procedures established by the commissioner of education in Chapter 101 of this title (relating to Assessment);

9. the person has committed an act described in §249.14(k)(1) of this title, which constitutes sanctionable Priority 1 conduct, as follows:

   A. any conduct constituting a felony criminal offense;

   B. indecent exposure;

   C. public lewdness;

   D. child abuse and/or neglect;

   E. possession of a weapon on school property;

   F. drug offenses occurring on school property;

   G. sale to or making alcohol or other drugs available to a student or minor;

   H. sale, distribution, or display of harmful material to a student or minor;

   I. certificate fraud;

   J. state assessment testing violations;

   K. deadly conduct; or

   L. conduct that involves inappropriate communication with a student as described in §247.2(3)(I) of this title (relating to Code of Ethics and Standard Practices for Texas Educators), in appropriate
professional educator-student relationships and boundaries, or otherwise soliciting or engaging in sexual conduct or a romantic relationship with a student or minor;

(10) the person has committed an act that would constitute an offense (without regard to whether there has been a criminal conviction) that is considered to relate directly to the duties and responsibilities of the education profession, as described in §249.16(c) of this title (relating to Eligibility of Persons with Criminal History for a Certificate under Texas Occupations Code, Chapter 53, and Texas Education Code, Chapter 21). Such offenses indicate a threat to the health, safety, or welfare of a student or minor, parent of a student, fellow employee, or professional colleague; interfere with the orderly, efficient, or safe operation of a school district, campus, or activity; or indicate impaired ability or misrepresentation of qualifications to perform the functions of an educator and include, but are not limited to:

(A) offenses involving moral turpitude;
(B) offenses involving any form of sexual or physical abuse or neglect of a student or minor or other illegal conduct with a student or minor;
(C) offenses involving any felony possession or conspiracy to possess, or any misdemeanor or felony transfer, sale, distribution, or conspiracy to transfer, sell, or distribute any controlled substance defined in the Texas Health and Safety Code, Chapter 481;
(D) offenses involving school property or funds;
(E) offenses involving any attempt by fraudulent or unauthorized means to obtain or alter any certificate or permit that would entitle any person to hold or obtain a position as an educator;
(F) offenses occurring wholly or in part on school property or at a school-sponsored activity; or
(G) felony offenses involving driving while intoxicated (DWI);

(11) the person has intentionally failed to comply with the reporting, notification, and confidentiality requirements specified in the Texas Code of Criminal Procedure, §15.27(a), relating to student arrests, detentions, and juvenile referrals for certain offenses;

(12) the person has failed to discharge an employee or to refuse to hire an applicant when the employee or applicant was employed in a public school and on the registry of persons who are not eligible to be employed under TEC, §22.092, when the person knew that the employee or applicant had been adjudicated for or convicted of having an inappropriate relationship with a minor in accordance with the TEC, §21.009(e), or when the person knew or should have known through a criminal history record information review that the employee or applicant had been placed on community supervision or convicted of an offense in accordance with the TEC, §22.085;

(13) the person assisted another educator, school employee, contractor, or agent in obtaining a new job as an educator or in a school, apart from the routine transmission of administrative and personnel files, when the educator knew or had probable cause to believe that such person engaged in an inappropriate relationship with a minor or student;

(14) the person is a superintendent of a school district or the chief operating officer of an open-enrollment charter school who falsely or inaccurately certified to the commissioner of education that the district or charter school had complied with the TEC, §22.085; or

(15) the person has failed to comply with an order or decision of the SBEC.

(c) The TEA staff may commence a contested case to take any of the actions listed in subsection (a) of this section by serving a petition to the certificate holder in accordance with this chapter describing the SBEC's intent to issue a sanction and specifying the legal and factual reasons for the sanction. The certificate holder shall have 30 calendar days to file an answer as provided in §249.27 of this title (relating to Answer).

(d) Upon the failure of the certificate holder to file a written answer as required by this chapter, the TEA staff may file a request for the issuance of a default judgment from the SBEC imposing the proposed sanction in accordance with §249.35 of this title (relating to Disposition Prior to Hearing; Default).

(e) If the certificate holder files a timely answer as provided in this section, the case will be referred to the State Office of Administrative Hearings (SOAH) for hearing in accordance with the SOAH rules; the Texas Government Code, Chapter 2001; and this chapter.

(f) The provisions of this section are not exclusive and do not preclude consideration of other grounds or measures available by law to the SBEC or the TEA staff, including [student loan default or] child support arrears. The SBEC may request the Office of the Attorney General to pursue available civil, equitable, or other legal remedies to enforce an order or decision of the SBEC under this chapter.

(g) The statewide assessment program as defined by the TEC, Chapter 39, Subchapter B, is a secure testing program.

(1) Procedures for maintaining security shall be specified in the appropriate test administration materials.

(2) Secure test materials must be accounted for before, during, and after each test administration. Only authorized personnel may have access to secure test materials.

(3) The contents of each test booklet and answer document are confidential in accordance with the Texas Government Code, Chapter 551, and the Family Educational Rights and Privacy Act of 1974. Individual student performance results are confidential as specified under the TEC, §39.030(b).

(4) Violation of security or confidential integrity of any test required by the TEC, Chapter 39, Subchapter B, shall be prohibited. A person who engages in conduct prohibited by this section may be subject to sanction of credentials, including any of the sanctions provided by subsection (a) of this section.

(5) Charter school test administrators are not required to be certified; however, any irregularity in the administration of any test required by the TEC, Chapter 39, Subchapter B, would cause the charter itself to come under review by the commissioner of education for possible sanctions or revocation, as provided under the TEC, §12.115(a)(4).

(6) Conduct that violates the security and confidential integrity of a test is evidenced by any departure from the test administration procedures established by the commissioner of education. Conduct of this nature may include, but is not limited to, the following acts and omissions:

(A) viewing a test before, during, or after an assessment unless specifically authorized to do so;
(B) duplicating secure examination materials;
(C) disclosing the contents of any portion of a secure test;
(D) providing, suggesting, or indicating to an examinee a response or answer to a secure test item or prompt;
The Texas Department of Insurance proposes to amend 28 TAC §5.4307, concerning the Assumption Reinsurance Program for policies issued by the Texas Windstorm Insurance Association (TWIA). Section 5.4307 implements Insurance Code §2210.705.

EXPLANATION. Amending §5.4307 is necessary to implement changes to Insurance Code §2210.705 enacted by Senate Bill 615, 86th Legislature, (Regular Session) (2019). SB 615 requires amending §5.4307 because the current rule conflicts with the new provisions of Insurance Code §2210.705. SB 615 requires TDI to adopt or amend rules as needed by March 31, 2020, due to its changes to Insurance Code §2210.705.

Section 5.4307 provides rules for the TWIA Assumption Reinsurance Program. Amending §5.4307 is necessary to conform with the newly adopted provisions of Insurance Code §2210.705. SB 615 made two changes to this provision. First, it deleted the requirement that the reinsurance agreement include an offer commencement date of December 1. Second, it changed the deadline for the policyholder to opt out of the reinsurance agreement from on or before May 31 to not more than 60 days after the policyholder receives notice of the reinsurance agreement.

In addition, the proposed amendments include a nonsubstantive formatting change to conform the section to the agency's current style and to improve the rule's clarity.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Jamie Walker, deputy commissioner of the Financial Regulation Division, 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 the 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. Walker 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. Walker expects that enforcing the proposed amendments will have the public benefit of ensuring that TDI's rules conform to Insurance Code §2210.705.

Ms. Walker expects that the proposed amendments will not increase the cost of compliance with Insurance Code §2210.705 because it does not impose requirements beyond those the statute requires. Insurance Code §2210.705 requires TDI to adopt a rule by the procedure for the transfer of reinsured policies under the TWIA depopulation program. The proposed amendments will adopt provisions to conform to Insurance Code §2210.705 as amended by SB 615. As a result, the cost associated with the procedure for the transfer of reinsured policies under the TWIA depopulation program does not result from the enforcement or administration of the proposed amendments.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY 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. All of the proposed changes are necessary to make §5.4307 comply with the new requirements of Insurance Code §2210.705. 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 possible cost on regulated persons. No additional rule amendments are required under Government Code §2001.0045, because the proposed §5.4307 is necessary to

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each 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 not expand, limit, or repeal an existing regulation;
- will not increase or decrease the number of individuals subject to the rule's applicability; or
- will not 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. The department will consider any written comments on the proposal that are received by the department no later than 5:00 p.m., central time, on November 25, 2019. 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 public hearing must be separate from any comments and received by the department no later than 5:00 p.m., central time, on November 25, 2019. If the department holds a public hearing, the department will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. TDI proposes §5.4307 under Insurance Code §2210.705 and Insurance Code §36.001. Insurance Code §2210.705 requires TDI to adopt rules addressing the procedure for the transfer of reinsured policies under the TWIA depopulation program.

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. Section 5.4307 implements Insurance Code §2210.705, as amended by SB 615, 86th Legislature, (Regular Session) (2019).

§5.4307. Assumption Reinsurance Program.

(a) An insurer and the association must submit to the department the written assumption reinsurance program, including the assumption reinsurance agreement and all necessary documents, including notices and policy forms evidencing generally comparable coverage and premiums, to allow the department to determine that policyholders and the policyholders' agents have the necessary protections.

(b) The assumption reinsurance program and assumption reinsurance agreement must comply with Insurance Code Chapter 2210, Subchapter O. The assumption reinsurance agreement must include:

1. [an offer commencement date of December 14]

2. [the opportunity for the policyholder to opt out of the assumption reinsurance agreement not more than 60 days after the policyholder receives notice of the reinsurance agreement [on or before May 31];

3. [a transfer of the earned premium on a reinsured policy to a trust account to be held until the expiration of the policyholder opt-out period when the earned premium for the final reinsured policy will be transferred to the insurer;]

4. [the effective date of the assumption.

(c) The insurer and the association must not proceed with the assumption reinsurance program, and it is not effective unless the Commissioner approves the assumption reinsurance program in writing.

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 14, 2019.

TRD-201903741
James Person
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 676-6584

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 124. CARRIERS: REQUIRED NOTICES AND MODE OF PAYMENT

28 TAC §124.2, §124.3
The Texas Department of Insurance, Division of Workers' Compensation (DWC), proposes amendments to Texas Administrative Code (TAC), Title 28, §124.2 and §124.3, to implement Senate Bill (SB) 2551, 86th Legislature (2019). The proposed amendments to §124.2 define the process through which an insurance carrier may provide an injured employee, who may qualify for a presumption under Texas Government Code Chapter 607, Subchapter B with a 15-day notice that describes all steps taken by the insurance carrier to investigate the injury and the evidence that the insurance carrier reasonably believes is necessary to complete its investigation of the compensability
of the injury. The proposed amendments to §124.3 describe an insurance carrier's obligation to investigate each element of a presumption claim. Additional editorial corrections are made throughout these rules to align them with current style and usage. Concurrent with this rulemaking, DWC is proposing amendments to Chapter 180 that are also necessary to implement SB 2551.

BACKGROUND AND PURPOSE

Senate Bill 2551 amended both the Workers' Compensation Act, Labor Code Title 5, and Government Code Chapter 607, Subchapter B, relating to diseases and illnesses suffered by firefighters, peace officers, and emergency medical technicians (EMTs) (collectively "first responders"). A separate bill, SB 1582, added peace officers to the list of first responders covered by Subchapter B. As these proposed rules will apply uniformly to all first responders covered by Subchapter B, no additional rulemaking is required to implement SB 1582. The proposed amendments to Chapters 124 and 180 address both an insurance carrier's obligation to investigate and how a presumption claim is to be investigated. The proposed amendments also address the notification process for such claims.

Subchapter B applies to certain occupational diseases or illnesses suffered by first responders who meet the qualifications set forth under its provisions. Subchapter B applies to first responders who received a physical examination upon or during employment that did not reveal evidence of the illness or disease for which benefits or compensation is sought, who have been employed for five years or more as a first responder, and who seek benefits or compensation for a disease or illness covered by the subchapter that is discovered during employment as a first responder. Gov't Code §607.052(a). The diseases and illnesses covered by Subchapter B are reactions to vaccinations for smallpox or other diseases, tuberculosis or other respiratory illness, cancer (firefighters and EMTs only), and acute myocardial infarction or stroke. §§607.053-607.056. The presumptions under Subchapter B do not apply to a determination of a survivor's eligibility for benefits under Government Code Chapter 615 (relating to Financial Assistance to Survivors of Certain Law Enforcement Officers, Fire Fighters, and Others), in a case action brought in court except for judicial review of a grant or denial of employment-related benefits or compensation, to a determination regarding benefits or compensation under a life or disability insurance policy, or if the disease or illness for which benefits or compensation is sought is known to be caused by the use of tobacco and if either the first responder is or has been a user of tobacco or if their spouse has, during the marriage, smoked tobacco. §607.052(b). The presumptions under Subchapter B apply to a determination of whether a first responder's disability or death resulted from a disease or illness contracted in the course and scope of employment for purposes of benefits or compensation. §607.057.

Senate Bill 2551 amended Subchapter B to direct that four specified types of cancer and cancers originating in seven specified organs might trigger the presumption under Government Code §607.055. Senate Bill 2551 also amended the requirements for rebutting a presumption. A presumption can be rebutted through showing, by a preponderance of the evidence, that a risk factor, accident, hazard, or other cause not associated with an individual's service as a first responder was a substantial factor in bringing about the individual's disease or illness, without which the disease or illness would not have occurred. §607.056(a). A rebuttal must include a statement that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual's service as a first responder was a substantial factor in bringing about the individual's disease or illness, without which the disease or illness would not have occurred. §607.058(b).

Senate Bill 2551 also amended the Workers' Compensation Act (Act) to provide that an insurance carrier is not required to initiate compensation or deny a claim within 15 days after first receiving written notice of an injury if the claim results from an employee's disability or death for which a presumption is claimed under Subchapter B. In that circumstance, an insurance carrier must provide the claimant and DWC with a notice, referred to in these rules as a "Notice of Continuing Investigation," that describes all steps taken by the insurance carrier to investigate the injury before notice was given and the evidence the insurance carrier reasonably believes is necessary to complete its investigation of the compensability of the injury. The insurance carrier must issue a Notice of Continuing Investigation no later than 15 days after first receiving written notice of the injury. Labor Code §409.021.

The bill also amended Labor Code §415.021 to require that the DWC commissioner consider whether the employee cooperated with the insurance carrier's investigation of the claim and whether the employee timely authorized access to relevant medical records when determining whether to assess an administrative penalty involving a claim in which the insurance carrier provided a Notice of Continuing Investigation. The commissioner shall also consider whether the insurance carrier conducted an investigation of the claim, applied the statutory presumptions under Subchapter B, and expedited medical benefits under Labor Code §504.055 (relating to Expedited Provision of Medical Benefits for Certain Injuries Sustained by First Responder in Course and Scope of Employment by a political subdivision).

An insurance carrier's existing duty to investigate a claim is described under the Act. Labor Code 409.021 establishes the foundation for an insurance carrier's duty to investigate a claim prior to a refusal to pay benefits. Section 409.021(a-3) specifically provides that a Notice of Continuing Investigation must "describe all steps taken by the insurance carrier to investigate the injury before the notice was given and the evidence that the carrier reasonably believes is necessary to complete its investigation of the compensability of the injury." Section 409.021(c) provides that an insurance carrier has a right to continue to investigate the compensability of an injury during the 60-day period. Section 409.021(d) provides that an insurance carrier may reopen the issue of compensability if evidence is later found that could not be reasonably discovered earlier. This language plainly reflects a recognized obligation to reasonably investigate a claim in a timely manner. Upon receipt of written notice of injury, an insurance carrier shall conduct an investigation relating to the compensability of the injury, the insurance carrier's liability for the injury, and the accrual of benefits. A notice of refusal to pay benefits must specify the reasonable grounds for the refusal. Labor Code §409.022(a) and (c).

Furthermore, if an insurance carrier intends to rely on evidence discovered after the denial of a claim, the insurance carrier must show that the evidence could not have been reasonably discovered at an earlier date. Labor Code §409.022(b). When reviewing a health care provider's claim, an insurance carrier can request additional documentation necessary to clarify the provider's charges and, when disputing payment, an insurance
carrier must submit a report that sufficiently explains the reasons for the reduction or denial of payment. §408.027(b) and (e). An insurance carrier commits an administrative violation for any of 22 specified actions, including failing to process claims promptly and in a reasonable and prudent manner, misrepresenting the reason for not paying benefits or terminating or reducing payments of benefits, contradicting a claim if the evidence clearly indicates liability, and failing to comply with the Act. §415.002(a). Conversely, an insurance carrier is authorized to allow an employer to assist in the investigation and evaluation of a claim. §415.002(b)(2). The unambiguous command of these statutory provisions is that an insurance carrier is expected to conduct a reasonable investigation to establish grounds for refusing to pay benefits. Rule 124.3(a) sets forth the procedures for carrying out these statutory requirements for investigating claims.

Furthermore, as noted in 2012 by the Texas Supreme Court in Texas Mutual Insurance Company v. Ruttinger, an insurance "carrier has statutory and regulatory duties to promptly conduct adequate investigations and reasonably evaluate and expeditiously pay workers’ legitimate claims or face administrative penalties." 381 SW3d 430 (Tex. 2012). The Court further noted, "The Act's requirements include time limits for payment of benefits, giving notice of a compensability contest and the specific reason for the contest, and necessarily subsume the requirement of proper investigation and claims processing." Id. at 445 (citing Labor Code §409.021(a)). The court held that "[k]ey parts of the [workers’ compensation] system are the amount and types of benefits, the delivery systems for benefits, the dispute resolution processes for inevitable disputes that arise among participants, the penalties imposed for failing to comply with legislatively mandated rules, and the procedures for imposing such penalties." Id. at 449. The court recognized that DWC’s pervasive authority to regulate and penalize insurance carriers for inadequate investigations eliminated the need for private causes of action.

Insurance carriers have additional investigative responsibilities specific to designated claims advanced by first responders or their beneficiaries. As provided by SB 2551, an insurance carrier is relieved of the duty to either initiate payment or provide notice of its refusal to pay within 15 days of receiving written notice of a qualifying injury to a first responder, if it provides a Notice of Continuing Investigation "that describes all steps taken by the insurance carrier to investigate the injury before notice was given and the evidence that the carrier reasonably believes is necessary to complete its investigation of the compensability of the injury." Labor Code §409.021(a-3). An insurance carrier’s notice of refusal to pay benefits must explain why a presumption under Government Code, Chapter 607, Subchapter B, does not apply and must describe the evidence that the carrier reviewed in making that determination. §409.022(d). In determining whether to assess an administrative penalty for a claim involving a first responder, the commissioner must consider whether "the insurance company conducted an investigation of the claim [and] applied the statutory presumption under Subchapter B." §415.021(c-2).

For claims concerning first responders, Subchapter B provides elements necessary to qualify for a presumption under the subchapter, as well as a disqualification for tobacco use. Gov’t Code §607.052(a) and (b)(4). An insurance carrier may rebut any presumption established under Subchapter B "through a showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with the individual’s service as a firefighter, peace officer, or [EMT] was a substantial factor in bringing about the individual's disease or illness, without which the disease or illness would not have occurred." §607.058.

These provisions establish the evidentiary standard applicable to rebuttal of the presumption and require that an insurance carrier investigate a first responder’s qualification for a presumption under Subchapter B.

The Legislature has required that DWC adopt rules necessary to implement SB 2551 no later than January 1, 2020. The implementation will include the amended process for claim notification including an amendment in which the insurance carrier is not required to comply with the 15-day deadline to either give notice or refuse or start benefit payments on claims through issuance of a Notice of Continuing Investigation. Upon issuance of a Notice of Continuing Investigation, an insurance carrier will have more time to investigate a claim before taking action. The proposed amendments also describe an insurance carrier’s obligation to investigate when it receives notice of an injury for which a presumption may apply on a claim and the process the carrier must follow when investigating a presumption claim under Government Code, Chapter 607, Subchapter B.

The changes in law made by SB 2551 apply to a claim for benefits filed on or after June 10, 2019, the effective date of SB 2551. Section 8 of SB 2551 provides that the amendments to Government Code §§607.055 and §607.058 apply only to a claim for benefits filed on or after June 10, 2019. Section 10 of SB 2551 provides that Labor Code §504.053(4)(e)(1) applies only to a claim for benefits filed on or after June 10, 2019. These proposed amendments will not apply to a claim for benefits filed before June 10, 2019.

DWC posted an informal draft of these rules on its website for comment and hosted a stakeholder workshop on Wednesday, August 21, 2019. DWC revised the proposed amendments in response to the comments received during informal rulemaking. Labor Code §409.021(a-3), as amended by SB 2551, directs that an insurance carrier need not comply with the established 15-day pay or deny obligation if it issues a described notice. Proposed Rule 124.2 identifies this notice as a Notice of Continuing Investigation and requires that insurance carriers use a plain language format. DWC has posted a draft of the Notice of Continuing Investigation on its website at www.tdi.texas.gov/wc/rules/drafts.html.

The proposed amendments to Rule 124.2 add subsections (f)-(h) to establish the notice requirements provided for under Labor Code §409.021(a-3) (Notice of Continuing Investigation). Subsection (f) details the choice of actions that an insurance carrier may take during the first 15 days following receipt of a written notice of injury. Subsection (f)(3) provides that notice must be provided to both the claimant and DWC, as required under §409.021(a-3). This requirement is also consistent with DWC’s responsibility to monitor the workers’ compensation system, as set forth in Labor Code Chapter 414 (relating to Enforcement of Compliance and Practice Requirements).

The new subsection (g) clarifies that a "claim for benefits" means the first written notice of injury as provided in Rule 124.1 (concerning Notice of Injury). A written notice of injury can include DWC Form-001, Employer’s First Report of Injury or Illness, or if that form has not been filed, any other written communication, regardless of the source, which informs the carrier of the name of the injured employee, the identity of the employer, the approximate date of the injury, and information which asserts the injury is work related. The filing of a DWC Form-041, Employee’s Claim for Compensation for a Work-related Injury or Occupational Disease, or a DWC Form-042, Claim for Workers’ Com-
Pension Death Benefits, by an injured employee or their beneficiary would fulfill this requirement if it is the first written notice of injury.

Subsection (h) describes what must be included in a Notice of Continuing Investigation. The elements of a Notice of Continuing Investigation provide an outline for what constitutes a reasonable investigation and relevant and necessary information for that investigation. An insurance carrier may request that an injured employee provide specified information or documents within their custody or control and releases required to obtain evidence reasonably believed to be necessary to complete its investigation of the compensability of an injury. An insurance carrier must still pursue its own investigation, seeking to obtain information directly from health care providers, employers, and other sources. This is consistent with an insurance carrier’s existing duty under law to investigate a claim as discussed above. Senate Bill 2551 did not create any additional duty for an injured employee to respond to production requests from an insurance carrier.

Subsection (h)(3) provides a description of information or documents that may not be identified by the insurance carrier as reasonably necessary to complete its investigation through a Notice of Continuing Investigation, such as a request for additional diagnostic testing, mental health records, generic requests, or requests for records that are not directly related to either the disease or illness or eligibility for a statutory presumption under Government Code, Chapter 607, Subchapter B. The workers’ compensation system provides other opportunities for an insurance carrier to obtain additional diagnostic testing. Mental health records have no apparent relevance to an investigation involving any of the diseases or illnesses identified under Subchapter B. As described under Labor Code §409.021(a-3), the Notice of Continuing Investigation provides an insurance carrier with the opportunity to identify the claim-specific evidence that the insurance carrier reasonably believes is necessary to complete its investigation of the compensability of an injury.

The new subsection (j) describes additional requirements for an insurance carrier when issuing a denial notice on a claim where the insurance carrier issued a Notice of Continuing Investigation. These requirements are consistent with Labor Code §409.022. Subsection (j)(2) clarifies that the showing of evidence to rebut a presumption must be done as part of a denial notice. Gov’t Code §§607.057-607.058 and Labor Code §409.022(d). These requirements are consistent with Labor Code §415.021, as amended by SB 2551.

The proposed new subsection (s) establishes minimum standards for plain language notices including a minimum font size of 12-point be used in all plain language notices and that notices be printed on an insurance carrier’s letterhead. The requirement for a 12-point font is consistent with other guidelines and requirements for readability and plain language. For example, the Texas Department of Insurance requires that a notice of network requirements and employee information form must "be printed in not less than 12-point type." 28 TAC §10.63; see also Federal Plain Language Guidelines (May 2011), available at plainlanguage.gov. The requirements for 12-point font and letterhead will apply to all plain language notices, and DWC proposes that they go into effect on April 1, 2020, to provide insurance carriers with additional time to update their automated systems.

Throughout Rule 124.2, additional non-substantive editorial changes are proposed to correct errors of grammar and punctuation, clarify wording, and to conform to the agency’s style guidelines.

The amendments to Rule 124.3(a)(1-4) address the use of the Notice of Continuing Investigation as now allowed under Labor Code §409.021(a-3). As provided by SB 2551, by issuing a timely Notice of Continuing Investigation, an insurance carrier is allowed additional time to investigate a claim before deciding to pay or deny a claim on or before the 60th day from written notice of injury. §409.021(a-3). Under subsection (a)(4), if a Notice of Continuing Investigation is issued after the 15th day from receipt of written notice of injury, the insurance carrier is liable for accrued or payable income and medical benefits prior to a timely denial.

The proposed amendments to 124.3 delete penalty provisions in subsection (a)(4)(A-C) in order to conform with House Bill (HB) 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005. House Bill 7 amended Labor Code §415.021 to delete a limitation that an administrative penalty should not exceed $10,000. Section 415.021 permits DWC to assess administrative penalties of up to $25,000 per violation in addition to any other sanctions authorized by the Act. Section 415.021 also states that each day of noncompliance constitutes a separate violation and lists the factors that DWC must use when determining penalty amounts. Additionally, Labor Code §415.025 provides that a reference in the Labor Code or other law to a particular class of violation or administrative penalty must be construed as a reference to an administrative penalty, and except as otherwise provided in the Act, an administrative penalty may not exceed $25,000 per day per occurrence, and each day of noncompliance constitutes a separate violation in accordance with §415.021.

The proposed amendments to subsection (d) and proposed subsection (e) are required to provide for the use of a Notice of Continuing Investigation in claims involving death or burial benefits. Subsection (d) is amended to clarify, for purposes of death benefits, when an insurance carrier may issue a Notice of Continuing Investigation in accordance with the provisions of §124.2(f) and §124.3. Subsection (e) is proposed to provide that, notwithstanding the requirements of §132.13 (concerning Burial Benefits), when an insurance carrier issues a Notice of Continuing Investigation, the insurance carrier must either pay or deny a claim for burial benefits within seven days from the initiation of benefits or the issuance of a notice of denial.

The transition language in existing subsection (f) is now obsolete and proposed for deletion as all claims prior to September 1, 2003, have exceeded the 15 days provided in subsection (a).

A new subsection (g) is proposed to provide that if an insurance carrier receives written notice of injury for a disease or illness identified by Government Code Chapter 607, Subchapter B, it is required to investigate each element of the applicable statutory presumption in addition to investigating the compensability of the injury, liability for the injury, and the accrual of benefits. Subsection (g)(1) provides that a claimant is not required to expressly claim the applicability of a statutory presumption in order for the statutory presumption to apply.

As described in subsection (g)(2), a presumption under Subchapter B is claimed to be applicable upon a first responder's written notice of injury for a disease or illness identified by Subchapter B. As a written notice of injury constitutes a claim for any presumption under Subchapter B, an insurance carrier has the duty of investigating whether a presumption does or does not apply to an individual claim. This is consistent with the provisions of Government Code §§607.057 and §607.058 and Labor Code §409.021 and §415.021, as well as with an insurance
carrier's duty to investigate a claim as discussed above. Subsection (g)(2) is also consistent with the Legislature's intent that DWC "effectively educate and clearly inform each person who participates in the system as a claimant, employer, insurance carrier, health care provider, or other participant of the person's rights and responsibilities under the system and how to appropriately interact within the system." Labor Code §402.021 (relating to Goals; Legislative Intent; General Workers' Compensation Mission of Department).

As described in subsection (g)(3), whether a presumption does or does not apply has no direct bearing on issues relating to compensability, liability for the injury, and the accrual of benefits. For instance, if an employee is a smoker, the employee nonetheless may have suffered a compensable injury even if the presumption under Government Code §607.054 does not apply. Accordingly, as set forth in subsection (g)(3), an insurance carrier has a continuing obligation to conduct a reasonable investigation even when a presumption does not apply or is rebutted.

Throughout Rule 124.3, additional non-substantive editorial changes are proposed to correct errors of grammar and punctuation, clarify wording, renumber subsections, and to conform to the agency's style guidelines.

Debra Knight, Deputy Commissioner for Compliance and investigations, has determined that for each of the first five years these proposed rules will be in effect, there will be no additional estimated cost to the state and local governments, other than that imposed by the statute. There will not be any estimated reduction in costs to the state and local governments, nor will there be any estimated cost or increase in revenue to the state or local governments as a result of enforcing or administering these rules. DWC does not anticipate that these proposed amendments will require that insurance carriers make significant changes to their current practices and procedures.

While these rules do set forth more detailed procedures for investigating certain claims involving first responders, as required under SB 2551, insurance carriers had a preexisting obligation to investigate these claims. The clarification of an insurance carrier's investigative responsibilities should not result in any additional costs. As now provided by Labor Code §409.021(a), an insurance carrier is allowed additional time to make a decision on a claim. Thus, these proposed rules do not impose additional costs on an insurance carrier's investigation of a claim.

In addition, the Legislative Budget Board's (LBB's) fiscal note on SB 2551 found that there would be no significant fiscal implication to the state. Based on information provided to the Legislature by the Texas Department of Insurance, State Office of Risk Management, and Texas A&M University System Administration, the LBB assumed that the duties and responsibilities associated with implementing SB 2551 could be accomplished using existing resources. The LBB did note that the Texas Association of Counties (TAC) anticipated a potential fiscal impact on the TAC Risk Management Pool, which covers approximately 1,500 firefighters and EMTs. However, the extent of the impact could not be determined due to uncertainty in predicting the number or severity of future cancer claims. The LBB also noted that the Texas Municipal League Intergovernmental Risk Pool estimated a $6 million annual cost.

Senate Bill 1582 included peace officers among the persons covered under Government Code, Chapter 607, Subchapter B (other than for cancer claims under §607.055). Thus, these proposed amendments will apply to peace officers. However, an increase in costs as the result of the addition of peace officers under SB 1582, if any, cannot be defined with any precision given the inherent uncertainty of events and injuries and is beyond the scope of this rulemaking.

DWC's data on claims from first responders from January 1, 2012, to September 3, 2019, shows approximately 85 heart attack claims, 209 cancer claims (firefighters and EMTs only), and 7,208 claims for all other occupational diseases, including diseases and illnesses not identified under Government Code, Chapter 607, Subchapter B. As these claims will be dispersed among first responders working for political subdivisions across Texas, DWC does not anticipate that these proposed amendments will have more than a nominal effect on the Texas workers' compensation system as a whole.

It is not anticipated that the new requirements for plain language notices will result in increased costs. While it is possible that the larger font size could require additional pages for a plain language notice, that would be a claim-specific occurrence. Even with additional pages, this requirement is not likely to result in additional mailing costs. Any additional costs due to the requirement of providing a plain language notice on company letterhead, as DWC has long recommended, should be nominal.

PUBLIC BENEFITS AND COSTS

Ms. Knight has determined that for each of the first five years that these proposed rules will be in effect there will be a more efficient provision of benefits to injured employees under the Workers' Compensation Act, Labor Code, Title 5, and that the probable economic costs to insurance carriers required to comply with the rule will be minimal. The primary benefit of the adoption of these rules will be description and implementation of an insurance carrier's opportunity to suspend a decision while it conducts its investigation of a claim covered by Government Code Chapter 607, Subchapter B. Insurance carriers may now process presumption claims in accordance with the rule changes to §124.2 and §124.3 since SB 2551 became effective on June 10, 2019. The proposed rules also describe the responsibilities of an insurance carrier when investigating a claim with a presumption identified in Subchapter B.

These proposed rules are also designed to maintain the balance under the Act as described in the Texas Supreme Court's decision in Texas Mutual Insurance Company v. Ruttiger. In that case the court stated that an insurance "carrier has statutory and regulatory duties to promptly conduct adequate investigations and reasonably evaluate and expeditiously pay workers' legitimate claims or face administrative penalties." 381 SW3d 430 (Tex. 2012). The Court further noted, "The Act's requirements include time limits for payment of benefits, giving notice of a compensability contest and the specific reason for the contest, and necessarily subsume the requirement of proper investigation and claims processing." Id. at 445 (citing Labor Code §409.021(a)).

Participants in the workers' compensation system will also benefit from the clarifications to roles and responsibilities provided in these proposed rules. The new requirement that all plain language notices must be provided on the insurance carrier's letterhead and written in plain language and in 12-point font will benefit injured employees by improving the readability of such notices, and promoting a clearer understanding of what actions an insurance carrier is taking on their claims.

Firefighters and EMTs suffering from cancer will benefit from the clearer rights and responsibilities in the workers' compensation
system provided by SB 2551 and these proposed amendments. The list of specific cancers in Government Code §607.055(b) will provide injured first responders and insurance carriers with greater certainty as to which injured employees qualify for the presumption that the cancer developed during the course and scope of their employment. This will likely reduce the dispute and litigation of such claims.

GOVERNMENT GROWTH IMPACT STATEMENT
Ms. Knight has determined that during the first five years that these rules are in effect, the proposed rules do not create nor eliminate a government program. The implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions. The implementation of the proposed rules does not require an increase or decrease in future legislative appropriations. The proposed rules do not require an increase or decrease in fees paid to the agency. Beyond the requirements imposed by SB 2551, the proposed amendments do not create a new regulation. Proposed Rule 124.2(s) does expand upon existing requirements for plain language notices by requiring that all such notices be issued on an insurance carrier’s letterhead and set in not less than 12-point font. Previously, both proposed requirements have been recommendations for plain language notices as authorized by Labor Code §409.013 (relying on Plain Language Information: Notification of Injured Employee) and as required by DWC rules. The proposed rules do not increase or decrease the number of individuals subject to the rule's applicability. The proposed rules do not positively or adversely affect the state economy.

STATEMENT ON COSTS TO REGULATED PERSONS
DWC has determined that the proposed amendments do not impose a cost on regulated persons as they align the requirements of the rules with the authorizing statutes. As discussed above in the Fiscal Note, DWC does not anticipate that the requirements of proposed Rule 124.2(s) will impose costs on the Texas workers’ compensation system. Therefore, an examination of costs under Government Code §2001.0045 is not required.

LOCAL EMPLOYMENT IMPACT
For each of the first five years that these rules will be in effect, the rules will not have an impact on local employment beyond a benefit of providing injured employees covered by workers' compensation insurance greater certainty that an insurance carrier will have additional time to investigate their presumption claims under Government Code Chapter 607, Subchapter B.

ECONOMIC EFFECT ON SMALL BUSINESS AND RURAL COMMUNITIES
DWC does not anticipate that these rules will have an adverse economic effect on micro-businesses. These rules primarily impact insurance carriers, and as of 2016, DWC had identified 10 insurance carriers writing workers’ compensation and excess workers’ compensation business in Texas that met the definition of a small business under Government Code §2006.001(2). These entities had total national premiums of less than $6 million from all lines of business. Political subdivisions that self-insure their workers' compensation responsibilities, including rural political subdivisions, will be impacted by these rules. However, the proposed rules should not impose any new costs on self-insured political subdivisions. While there may be additional costs as a result of producing plain language notices on an insurance carrier’s letterhead in 12-point font, such costs would be nominal and cannot be determined with any accuracy as they would be influenced by the specific nature of individual claims.

REGULATORY FLEXIBILITY ANALYSIS
DWC does not find that it would be practicable to establish separate compliance or reporting requirements or to exempt either insurance carriers that qualify as small businesses or self-insured rural political subdivisions from these rules. The proposed amendments merely conform the rules to the requirements of the authorizing statutes. In addition, DWC found that the practical benefits of having uniform notice and investigation requirements significantly outweighed any potential impacts to insurance carriers that qualify as small businesses or to self-insured rural political subdivisions. Consequently, in accordance with Government Code §2006.002(c), DWC is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT
DWC has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit any 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 COMMENTS
Comments may be submitted by email to RuleComments@tdi.texas.gov or by mailing or delivering your comments to Cynthia Guillen, Office of General Counsel, MS-4D, Texas Department of Insurance, Division of Workers’ Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. To be considered, comments must be received by 5:00 p.m., Central Time, on November 25, 2019.

DWC will hold a public hearing to discuss these proposed rules on November 20, 2019 at 10 a.m. at the DWC central office located at 7551 Metro Center Drive, Suite 100, in Austin. DWC provides reasonable accommodations for persons attending meetings, hearings, or educational events as required by the Americans with Disability Act. If you need accommodations, please contact Cynthia Guillen at (512) 804-4275 or at RuleComments@tdi.texas.gov before noon, Central Time, on November 18, 2019.

STATUTORY AUTHORITY

Labor Code §402.00111 provides that the commissioner of workers’ compensation shall exercise all executive authority under Title 5 of the Labor Code. Section 402.00116 provides that the commissioner is the chief executive and administrative officer of the agency with all the powers and duties vested under the Workers’ Compensation Act (Act).

Section 402.00128 describes the general powers and duties of the DWC Commissioner, including assessing and enforcing penalties and prescribing the form, manner, and procedure for the transmission of information to DWC.

Section 402.021 provides that a basic goal of the Texas workers’ compensation system is that each employee shall be treated with dignity and respect when injured on the job and that it is the intent of the Legislature that the workers’ compensation system must
minimize the likelihood of disputes and resolve them promptly and fairly when identified and effectively educate and clearly inform each system participant of their rights and responsibilities under the system and how to appropriately interact within the system.

Section 402.061 provides that the commissioner shall adopt rules as necessary for the implementation and enforcement of the Act.

Section 409.013 authorizes DWC to develop plain language information to provide the public with information on the benefit process and compensation procedures.

Section 409.021(a) sets forth the general rule that not later than the 15th day after receipt of a written notice of injury, an insurance carrier must either begin payment of benefits or notify DWC and the injured employee in writing of its refusal to pay and their procedural rights. Section 409.021(a-3) provides that an insurance carrier is not required to comply with subsection (a) if the claim results from an injured employee's disability or death for which the presumption is claimed to be applicable under Subchapter B, Chapter 607, Government Code, and not later than the 15th day after the date on which the insurance carrier received written notice of the injury, the insurance company has provided the employee and DWC with a notice describing all steps taken by the insurance carrier to investigate the injury. Section 409.021(a-3) also requires the commissioner to adopt rules as necessary to implement that subsection. Section 409.021(d) provides that an insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

Section 409.022(c) provides that an insurance carrier commits an administrative violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commissioner. Section 409.022(d) provides that if an insurance carrier's notice of refusal to pay benefits under Section 409.021 is sent in response to a claim for compensation resulting from an EMT's, peace officer's, or a firefighter's disability or death for which a presumption is claimed to be applicable under Subchapter B, Chapter 607, Government Code, the notice must include a statement by the carrier that explains why the insurance carrier determined a presumption under that subchapter does not apply to the claim for compensation; and describes the evidence that the carrier reviewed in making the determination.

Section 414.002 provides that DWC shall monitor the system for compliance with the Act and rules as well as other laws relating to workers' compensation.

Section 415.021(c-2) provides that in determining whether to assess an administrative penalty involving a claim in which the insurance carrier provides notice under Section 409.021(a-3), the commissioner shall consider whether the injured employee cooperated with the insurance carrier's investigation and whether the injured employee authorized access to the applicable medical records.

Government Code Section 607.052(a) provides that notwithstanding any other law, this subchapter applies only to a firefighter, peace officer, or EMT who on becoming employed or during employment as a firefighter, peace officer, or EMT, received a physical examination that failed to reveal evidence of the illness or disease for which benefits or compensation are sought using a presumption established by this subchapter; is employed for five or more years as a firefighter, peace officer, or EMT; and seeks benefits or compensation for a disease or illness covered by this subchapter that is discovered during employment as a firefighter, peace officer, or EMT.

Section 607.052(b) provides that a presumption under this subchapter does not apply to a determination of a survivor's eligibility for benefits under Chapter 615; in a case of action brought in a state or federal court except for judicial review of a proceeding in which there has been a grant or denial of employment-related benefits or compensation; to a determination regarding benefits or compensation under a life or disability insurance policy purchased by or on behalf of the firefighter, peace officer, or EMT that provides coverage in addition to any benefits or compensation required by law; or if the disease or illness for which benefits or compensation is sought is known to be caused by the use of tobacco and the firefighter, peace officer, or EMT is or has been a user of tobacco, or their spouse has, during the marriage, been a user of tobacco that is consumed through smoking.

Section 607.058 provides that a presumption under §§607.053 - 607.056 may be rebutted through a showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with the individual's service as a firefighter, peace officer, or EMT was a substantial factor in bringing about the individual's disease or illness, without which the disease or illness would not have occurred. A rebuttal offered under Section 607.058 must include a statement by the person offering the rebuttal that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual's service as a firefighter, peace officer, or EMT was a substantial factor in bringing about the individual's disease or illness without which the disease or illness would not have occurred.

Finally, §9 of SB 2551 requires that the commissioner adopt rules as required by or necessary no later than January 1, 2020.

The proposed amendments support implementation of the Workers’ Compensation Act, Labor Code Title 5, Subtitle A. Chapter 124. Carriers: Required Notices and Mode of Payment

§124.2. Insurance Carrier Reporting and Notification Requirements.

(a) An insurance carrier shall notify the division [Commission] and the claimant of actions taken on[] or events occurring in a claim as required by this title.

(b) The division [Commission] shall prescribe the form, format, and manner of required electronic submissions through publications such as advisory(ies), instructions, specifications, the Texas Electronic Data Interchange Implementation Guide, and trading partner agreements. Trading partners will be responsible for obtaining a copy of the International Association of Industrial Accident Boards and Commissions (IAIABC) Electronic Data Interchange Implementation Guide.

(c) The insurance carrier shall electronically file, as that term is used in §102.5(e) of this title (concerning relating to) General Rules for Written Communications to and from the Commission), with the division [Commission]:

(1) the information from the original Employer's First Report of Injury; the insurance carrier's Federal Employer Identification Number (FEIN); and the policy number, policy effective date, and policy expiration date reported under §110.1 of this title (concerning relating to) Insurance Carrier Requirements for Notifying the Division [Commission of Insurance Coverage] for the employer associated with the claim, not later than the seventh day after the later of:

(A) receipt of a required report where there is lost time from work or an occupational disease; or
proposed rules
(1) If the insurance carrier asserts that a statutory presumption does not apply, a detailed statement explaining why and describing the claim-specific evidence or documentation that the insurance carrier reviewed.

(2) If the insurance carrier asserts that the statutory presumption has been rebutted, as provided under Government Code §607.058 (relating to Presumption Rebuttable), a detailed statement explaining why and describing the claim-specific evidence the insurance carrier reviewed in making the assertion that a risk factor, accident, hazard, or other cause not associated with the individual's service as a firefighter, peace officer, or emergency medical technician was a substantial factor in bringing about the individual's disease or illness without which the disease or illness would not have occurred.

(3) If the insurance carrier provided a timely Notice of Continuing Investigation as permitted by law, the denial notice must also include a statement describing whether the claimant provided a timely response to the notice.

(k) [§102.5(e)] Notification to the division [Commission] as required by subsections (c) - (h) [(e), (d) and (e)] of this section requires the insurance carrier to use electronic filing, as that term is used in §102.5(e) of this title (concerning General Rules for Written Communications to and from the Commission).

(1) In addition to the electronic filing requirements of this subsection, when an insurance [carrier] notifies the division [Commission] of a denial as required by [subsections (b) and (c) of this section, it must provide the division [Commission] a written copy of the notice provided to the claimant as described under subsections (i) - (j) [subsection (f)] of this section, as applicable.

(2) The notification requirements of this section are not considered completed until the copy of the notice provided to the claimant is received by the division [Commission].

(l) [§102.5(h)] Notification to the division [Commission] and the claimant of a dispute of disability, extent of injury, or eligibility of a claimant to receive death benefits shall be made as otherwise prescribed by this title and requires the insurance carrier to use plain language notices in the form and manner [with language and content] prescribed by the division [Commission]. These notices shall provide a full and complete statement describing the insurance carrier's action and its reason(s) for such action. The statement must contain sufficient claim-specific substantive information to enable the claimant [employee/legal beneficiary] to understand the insurance carrier's position or action taken on the claim. A generic statement that simply states the insurance carrier's position with phrases such as "no medical evidence to support disability," "not part of compensable injury," "liability is in question," "under investigation," "eligibility questioned," or other similar phrases with no further description of the factual basis for the action taken does not satisfy the requirements of this section.

(m) [§102.5(i)] The division [Commission] shall send an acknowledgment to the transmitting trading partner detailing whether an electronically submitted record was accepted, accepted with errors, or rejected. The acknowledgment shall be provided directly to the trading partner submitting the transmission, not through the Austin representative box identified in §102.5 of this title. If the record was accepted with errors in conditional elements, the insurance carrier must correct the errors in accordance with §102.5 of this title.

(n) [§102.5(j)] Except as otherwise provided by this title, insurance carriers shall not provide notices to the division [Commission] that explain that:

(1) - (3) [No change].

(4) the insurance carrier is disputing some or all medical treatment as not reasonable or necessary;

(5) compensability is not denied but the insurance carrier disputes the existence of disability (if there are no indications of lost time or disability and the employee is not claiming disability); or

(6) future medical benefits are disputed (notices of which shall not be provided to anyone in the system).

(q) [§102.5(l)] Written requests for a waiver of the electronic filing requirement for the Employer's First Report of Injury may be submitted to the commissioner [Commission's executive director] or their [his/her] designee for consideration. Waivers must be requested at least annually, and the requests must include[] a justification for the waiver, the volume of the insurance carrier's claims and total premium amounts, current automation capabilities, Electronic Data Interchange (EDI) programming status, and a specific target date to implement EDI. Waivers require written approval [from the executive director] and shall be granted at the discretion of and for the time frame noted by the commissioner [Executive Director] or their [his/her] designee.

(r) [§102.5(m)] If specifically directed by the division [Commission], such as through division [Commission] advisory or the Texas Electronic Data Interchange Guide, the insurance carrier may provide the information required in subsection (c) - (g) [(e), (d), or (e)] of this section to the division [Commission] in hardcopy or paper [hardcopy/paper] format.

(q) [§102.5(n)] Notifications to the claimant and the claimant's representative shall be filed by facsimile or electronic transmission unless the recipient does not have the means to receive such a transmission in which case the notifications shall be personally delivered or sent by mail.

(t) [§102.5(o)] Each [November 1, 2003, each] insurance carrier shall provide to the division [commission], through its Austin representative in the form and manner prescribed by the division [commission], the contact information for all workers' compensation claim service administration functions performed by the insurance carrier either directly or through third parties.

(1) The contact information for each function shall include mailing address, telephone number, facsimile number, and email [e-mail] address as appropriate. This contact information may be provided either in the form of a single [World Wide Web (Web) Uniform Resource Locator (URL) for a web [Web] page created and maintained by the insurance carrier that contains the required information or through an online submission to the division [Commission].

(A) Coverage verification (policy issuance and effective dates of policy);

(B) Claim adjustment;

(C) Medical billing;

(D) Pharmacy billing (if different from medical billing); and

(E) Preauthorization.

(2) If the web [Web] page option is used the page shall contain the date on which it was last updated and an email [e-mail] address or other contact information to which a user may report problems or inaccuracies.

(3) The insurance carrier shall update the contact information or [and/or] [Web] URL within 10 [ten] working days after any such change is made.
§124.3  Investigation of an Injury and Notice of Denial or Dispute  
[Denial/Dispute].

(a) Except as provided in subsection (b) of this section, upon receipt of written notice of injury as provided in §124.1 of this title (relating to Notice of Injury) the insurance carrier shall conduct an investigation relating to the compensability of the injury, the insurance carrier's liability for the injury, and the accrual of benefits. If the insurance carrier believes that it is not liable for the injury or that the injury was not compensable, the insurance carrier shall file the notice of denial of a claim (Notice of Denial) [(notice of denial)] in the form and manner required by Labor Code §409.022 (relating to Refusal to Pay Benefits; Notice; Administrative Violation) and §124.2 of this title (concerning Insurance [relating to] Carrier Reporting and Notification Requirements).

(1) If the insurance carrier does not file a Notice of Denial [(notice of denial)] by the 15th day after receipt of the written notice of injury or does not file a Notice of Continuing Investigation as described under Labor Code §409.021(a-3) (relating to Initiation of Benefits; Insurance Carrier's Refusal; Administrative Violation), the insurance carrier is liable for any benefits that accrue and shall initiate benefits in accordance with this section.

(2) If the insurance carrier files a Notice of Denial [(notice of denial)] after the 15th day but on or before the 60th day after receipt of written notice of the injury:

(A) The insurance carrier is liable for and shall pay all income benefits that had accrued and were payable prior to the date the insurance carrier filed the Notice of Denial [(notice of denial)] and only then is it permitted to suspend payment of benefits; and

(B) The insurance carrier is liable for and shall pay for all medical services, in accordance with the Act and rules, provided prior to the filing of the Notice of Denial [(notice of denial)].

(3) The insurance carrier shall not file notice with the division [commission] that benefits will be paid as and when they accrue with the division.

(4) An insurance [(A)] carrier's failure to file a Notice of Denial or a Notice of Continuing Investigation [(notice of denial of a claim)] by the 15th day after it receives written notice of an injury constitutes the insurance carrier's acceptance of the claim as a compensable injury, subject to the insurance carrier's ability to contest compensability on or before the 60th day after receipt of written notice of the injury. In the event of such a failure, the insurance carrier is liable for and shall pay all income and medical benefits that have accrued or become payable, subject to the insurance carrier's right to contest compensability on or before the 60th day.

(5) The insurance carrier commits an administrative [(a)] violation if, not later than the 15th day after it receives written notice of the injury, it does not begin to pay benefits as required, [or] file a Notice of Denial [(notice of denial)] of the compensability of a claim, or file a Notice of Continuing Investigation in the form and manner required by §124.2 of this title.

[(A) An administrative penalty under this subsection shall be assessed at:

(i) $500 if the carrier initiates compensation or files a notice of refusal within five working days of the date required by subsection (a);]

(iii) $1,500 if the carrier initiates compensation or files a notice of refusal more than five and less than 16 working days of the date required by subsection (a);

(iv) $2,500 if the carrier initiates compensation or files a notice of refusal more than 15 and less than 31 working days of the date required by subsection (a); or

(iv) $5,000 if the carrier initiates compensation or files a notice of refusal more than 30 working days after the date required by subsection (a).]

[(B) The administrative penalties provided for in this subsection are not cumulative and a violation occurs only with respect to the initial late payment of benefits.]

[(C) The division [commission] will send periodic notifications to all insurance carriers regarding the amount of penalties owed and the proper way to submit and document the payments.]

(b) Except as provided by subsection (c) of this section, the insurance carrier waives the right to contest compensability of or liability for the injury[,] if it does not contest compensability on or before the 60th day after the date on which the insurance carrier receives written notice of the injury.

(c) If the insurance carrier wants to deny compensability of or liability for the injury after the 60th day after it received written notice of the injury:

(1) the insurance carrier must establish that it is basing its denial on evidence that could not have reasonably been discovered earlier; and

(2) the insurance carrier is liable for and shall pay all benefits that were payable prior to and after filing the Notice of Denial [(notice of denial)] until the division [Commission] has made a finding that the evidence could not have been reasonably discovered earlier.

(d) If the claim involves the death of an injured employee, investigations, denials of compensability or liability, and disputes of the eligibility of a potential beneficiary to receive death benefits are governed by §132.17 of this title (concerning [relating to] Denial, Dispute, and Payment of Death Benefits). Notwithstanding §132.17(f)(1) and (2) of this title, the insurance carrier may issue a Notice of Continuing Investigation in accordance with the provisions of §124.2(f) and this section.

(e) Notwithstanding §132.13 of this title (concerning Burial Benefits), if an insurance carrier has issued a Notice of Continuing Investigation in accordance with the provisions of §124.2(f) and this section, the insurance carrier shall either pay or deny a claim for burial benefits within seven days from the date the insurance carrier either initiated benefits or filed a notice of denial in accordance with §124.2(f) of this title.

(f) [(e)] [Texas] Labor Code[(j)] §409.021 and subsection (a) of this section do not apply to disputes of extent of injury. If an insurance [(a)] carrier receives a medical bill that involves treatment(s) or service(s) that the insurance carrier believes is not related to the compensable injury, the insurance carrier shall file a notice of dispute of extent of injury (notice of dispute). The notice of dispute shall be filed in accordance with §124.2 of this title [(relating to Carrier Reporting and Notification Requirements)] and be filed not later than the earlier of:

(1) the date the insurance carrier denied the medical bill; or

(2) the due date for the insurance carrier to pay or deny the medical bill as provided in Chapter 133 of this title (concerning [relating to] General Medical Provisions).
The 15-day time frame provided for in subsection (a) and the administrative penalty provisions of subsection (a)(4) apply to a claim for benefits based on a compensable injury occurring on or after September 1, 2003. For claims based on a compensable injury occurring prior to September 1, 2003, the applicable time frame is seven days and the administrative penalty provisions of subsection (a)(4) are inapplicable.

If the insurance carrier receives a written notice of injury for a disease or illness identified by Texas Government Code, Chapter 607, Subchapter B (relating to Diseases or Illnesses Suffered by Firefighters, Peace Officers, and Emergency Medical Technicians), it shall investigate each element of the applicable statutory presumption as well as compensability of the injury, liability for the injury, and the accrual of benefits.

(1) A claimant is not required to expressly claim the applicability of a statutory presumption in order for the statutory presumption to apply.

(2) A presumption under Government Code, Chapter 607, Subchapter B, is claimed upon an insurance carrier's receipt of a written notice of injury which identifies:

(A) the injured or deceased employee's occupation as a firefighter, peace officer, or emergency medical technician, and

(B) the injured or deceased employee's disease or illness is a medical condition identified by Subchapter B.

(3) A determination that the statutory presumption does not apply does not relieve the insurance carrier of its continuing obligation to conduct a reasonable investigation relating to the compensability of the injury, liability for the injury, and accrual of benefits.

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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Nicholas Canaday III
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4703

CHAPTER 180. MONITORING AND ENFORCEMENT
INTRODUCTION
The Texas Department of Insurance, Division of Workers' Compensation (DWC), proposes amendments to Texas Administrative Code, Title 28, §180.8 and §180.26. The proposed amendments are necessary to implement Senate Bill (SB) 2551, 86th Legislature (2019). The proposed amendments to §180.8(b)(4) provide that the factors used for determining the appropriateness of a sanction include those under Texas Labor Code §415.021(c-2), if applicable. The proposed amendments to §180.26 add a new subsection (f) to provide that DWC will consider the factors listed in Labor Code §415.021(c-2) when a Notice of Continuing Investigation has been provided by the insurance carrier and amend subsections (i) and (j) to provide that DWC will consider the factors listed under §415.021(c-2) when assessing a sanction. The amendments to Chapter 180 are proposed concurrently with amendments to Chapter 124.

BACKGROUND AND PURPOSE
Senate Bill 2551 amended both the Workers' Compensation Act, Labor Code Title 5, and Government Code Chapter 607, Subchapter B, relating to diseases and illnesses suffered by firefighters, peace officers, and emergency medical technicians (EMTs) (collectively "first responders"). A separate bill, SB 1582, added peace officers to the list of first responders covered by Subchapter B. As these proposed rules will apply uniformly to all first responders covered by Subchapter B, no additional rulemaking is required to implement SB 1582. The proposed amendments to Chapters 124 and 180 address both an insurance carrier's obligation to investigate and how a presumption claim is to be investigated. The proposed amendments also address the notification process for such claims.

Subchapter B applies to certain occupational diseases or illnesses suffered by first responders who meet the qualifications set forth under its provisions. Subchapter B applies to first responders who received a physical examination upon or during employment that did not reveal evidence of the illness or disease for which benefits or compensation is sought, who have been employed for five years or more as a first responder, and who seek benefits or compensation for a disease or illness covered by the subchapter that is discovered during employment as a first responder. Gov't Code §607.052(a). The diseases and illnesses covered by Subchapter B are reactions to vaccinations for smallpox and other diseases, tuberculosis or other respiratory illness, cancer (firefighters and EMTs only), and acute myocardial infarction or stroke. §§607.053-607.056. The presumptions under Subchapter B do not apply to a determination of a survivor's eligibility for benefits under Government Code Chapter 615, (relating to Financial Assistance to Survivors of Certain Law Enforcement Officers, Fire Fighters, and Others), in a cause of action brought in court except for judicial review of a grant or denial of employment-related benefits or compensation, to a determination regarding benefits or compensation under a life or disability insurance policy, or if the disease or illness for which benefits or compensation is sought is known to be caused by the use of tobacco and if either the first responder is or has been a user of tobacco or if the their spouse has, during the marriage, smoked tobacco. §607.052(b). The presumptions under Subchapter B apply to a determination of whether a first responder's disability or death resulted from a disease or illness contracted in the course and scope of employment for purposes of benefits or compensation. §607.057.

Senate Bill 2551 amended Subchapter B to direct that four specified types of cancer and cancers originating in seven specified organs might trigger the presumption under Government Code §607.055. SB 2551 also amended the requirements for rebutting a presumption. A presumption can be rebutted through showing, by a preponderance of the evidence, that a risk factor, accident, hazard, or other cause not associated with an individual's service as a first responder was a substantial factor in bringing about the individual's disease or illness, without which the disease or illness would not have occurred. §607.058(a). A rebuttal must include a statement that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual's service as a first responder was a substantial factor in bringing about the individual's disease...
or illness, without which the disease or illness would not have occurred. §607.058(b).

Senate Bill 2551 also amended the Workers' Compensation Act (Act) to provide that an insurance carrier is not required to initiate compensation or deny a claim within 15 days after receiving written notice of an injury if the claim results from an employee's disability or death for which a presumption is claimed under Subchapter B. In that circumstance, an insurance carrier must provide the claimant and DWC with a notice, herein referred to as a "Notice of Continuing Investigation," that describes all steps taken by the insurance carrier to investigate the injury before notice was given and the evidence the insurance carrier reasonably believes is necessary to complete its investigation of the compensability of the injury. The insurance carrier must issue a Notice of Continuing Investigation no later than 15 days after first receiving written notice of the injury. Labor Code §409.021.

The bill also amended Labor Code §415.021, to require that the commissioner consider whether the employee cooperated with the insurance carrier's investigation of the claim and whether the employee timely authorized access to the relevant medical records when determining whether to assess an administrative penalty involving a claim in which the insurance carrier provided a Notice of Continuing Investigation, pursuant to Labor Code §409.021(a-3). The commissioner shall also consider whether the insurance carrier conducted an investigation of the claim, applied the statutory presumptions under Subchapter B, and expended medical benefits under Labor Code §504.055 (relating to Expedited Provision of Medical Benefits for Certain Injuries Sustained by First Responder in Course and Scope of Employment by a political subdivision).

The changes in law made by SB 2551 apply to a claim for benefits filed on or after June 10, 2019, the effective date of SB 2551. Section 8 of SB 2551 provides that the amendments to Government Code §607.055 and §607.058 apply only to a claim for benefits filed on or after June 10, 2019. Section 10 of SB 2551 provides that Labor Code §504.055(e)(1) applies only to administrative violations that occur on or after June 10, 2019. These proposed amendments will not apply to a claim for benefits filed before June 10, 2019.

DWC posted an informal draft of these rules on its website for comment and hosted a stakeholder workshop on Wednesday, August 21, 2019. No comments were received regarding the draft amendments to §180.8 and §180.26. These proposed amendments have not been changed since the informal draft.

Rule 180.8(b) describes the requirements for a notice of violation (NOV). The proposed amendments to subsection (b)(4)(A) and (B) incorporate by reference a new factor under Labor Code §415.021(c-2). Under the proposed amendments, if applicable, an NOV will demonstrate that DWC considered whether an employee timely authorized access to applicable medical records before determining whether to assess an administrative penalty involving a claim in which the insurance carrier provided notice under Labor Code §409.021(a-3) (Notice of Continuing Investigation).

Rule 180.26 concerns the criteria for imposing, recommending, and determining sanctions. The amendments include a new subsection (f) which provides that DWC shall consider the factors in Labor Code §415.021(c-2) when determining which sanction to impose in claims where the insurance carrier provided a Notice of Continuing Investigation.

FISCAL NOTE

Debra Knight, Deputy Commissioner for Compliance and Investigations, has determined that for each year of the first five years these proposed rules will be in effect, there will be no additional estimated cost to the state and local governments, other than what imposed by the statute. As these proposed amendments align Chapter 180 with the amendments made by SB 2551, there will not be any estimated reduction in costs to the state and local governments, nor will there be any estimated loss or increase in revenue to the state or local governments as a result of enforcing or administering these rules.

PUBLIC BENEFITS AND COSTS

Ms. Knight has determined that for each year of the first five years that these proposed new rules will be in effect there will be a more efficient provision of benefits to injured employees under the Workers’ Compensation Act, Labor Code, Title 5, and that the probable economic costs to insurance carriers required to comply with the rule will be minimal. The primary benefit of the adoption of these rules will be to give insurance carriers the opportunity to notify and conduct their investigation of a claim covered by Government Code Chapter 607, Subchapter B. Insurance carriers may now process cancer presumption claims in accordance with the rule changes to §124.2 and §124.3 since SB 2551 became effective on June 10, 2019.

GOVERNMENT GROWTH IMPACT STATEMENT

Ms. Knight has determined that during the first five years that these rules are in effect, the proposed rules neither create nor eliminate a government program. The implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions. The implementation of the proposed rules does not require an increase or decrease in future legislative appropriations. The proposed rules do not require an increase or decrease in fees paid to the agency. Other than those imposed by statute, the proposed rules do not create a new regulation. Other than that imposed by statute, the proposed rules do not expand, limit, or repeal an existing regulation. The proposed rules do not increase or decrease the number of individuals subject to the rule’s applicability. The proposed rules do not positively or adversely affect the state economy.

STATEMENT ON COSTS TO REGULATED PERSONS

As these rules are necessary to implement SB 2551, as provided under Government Code §607.058, a statement on costs to regulated persons under Government Code §2001.0045 is not required. As discussed above under the Fiscal Note, these proposed rules do not impose costs on the Texas workers' compensation system. These proposed amendments align the rule with the statutes as amended by SB 2551.

LOCAL EMPLOYMENT IMPACT

For each of the first five years that these rules will be in effect, the rules will not have an impact on local employment. These proposed amendments will merely align the rules with the statutes as amended by SB 2551.

ECONOMIC EFFECT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

DWC does not anticipate that these rules will have an adverse economic effect on small businesses, micro-businesses, or rural communities. These rules primarily impact insurance carriers, and as of 2016, DWC had identified 10 insurance carriers writing workers’ compensation and excess workers’ compensation

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business in Texas that met the definition of a small business under Government Code §2006.001(2). These entities had total national premiums of less than $6 million, from all lines of business. Political subdivisions that self-insure their workers’ compensation responsibilities, including rural political subdivisions, will be impacted by these rules; however, these rules would not impose any new costs on self-insured political subdivisions.

REGULATORY FLEXIBILITY ANALYSIS

DWC does not find that it would be practicable to establish separate compliance or reporting requirements or to exempt either insurance carriers that qualify as small businesses or self-insured rural political subdivisions from these rules. The proposed amendments merely conform the rules to the requirements of the authorizing statutes. As a result, this proposal does not require a regulatory flexibility analysis under Government Code §2006.002(c).

TAKINGS IMPACT ASSESSMENT

DWC 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 require a takings impact assessment under Government Code §2007.043.

REQUEST FOR COMMENTS

Comments may be submitted by email to RuleComments@tdti.texas.gov or by mailing or delivering your comments to Cynthia Guillen, Office of General Counsel, MS-4D, Texas Department of Insurance, Division of Workers’ Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. To be considered, comments must be received by 5:00 p.m., Central Time, on November 25, 2019.

DWC will hold a public hearing to discuss these proposed rules on November 20, 2019, at 10:00 a.m. at the DWC central office located at 7551 Metro Center Drive, Suite 100, in Austin. DWC provides reasonable accommodations for persons attending meetings, hearings, or educational events as required by the Americans with Disability Act. If you need accommodations, please contact Cynthia Guillen at (512) 804-4275 or at RuleComments@tdti.texas.gov before noon, Central time, on November 18, 2019.

SUBCHAPTER A. GENERAL RULES FOR ENFORCEMENT

28 TAC §180.8

STATUTORY AUTHORITY FOR §180.8


Labor Code §402.00111 provides that the commissioner of workers’ compensation shall exercise all executive authority under Title 5 of the Labor Code.

Section 402.00116 provides that the commissioner is the chief executive and administrative officer of the agency with all the powers and duties vested under the Act.

Section 402.00128 describes the general powers and duties of the commissioner, including assessing and enforcing penalties and prescribing the form, manner, and procedure for the transmission of information to DWC.

Section 402.021 provides that a basic goal of the Texas workers’ compensation system is that each employee shall be treated with dignity and respect when injured on the job and that it is the intent of the Legislature that the workers’ compensation system must minimize the likelihood of disputes and resolve them promptly and fairly when identified and effectively educate and clearly inform each system participant of their rights and responsibilities under the system and how to appropriately interact within the system.

Section 402.061 provides that the commissioner shall adopt rules as necessary for the implementation and enforcement of the Act.

Section 409.021(a) sets forth the general rule that, not later than the 15th day after receipt of written notice of injury, an insurance carrier must either begin payment of benefits or notify DWC and the injured employee in writing of its refusal to pay and their procedural rights. Section 409.021(a-3) provides that an insurance carrier is not required to comply with subsection (a) if the claim results from an employee’s disability or death for which the presumption is claimed to be applicable under Subchapter B, Chapter 607, Government Code and not later than the 15th day after the date on which the insurance carrier received written notice of the injury, the insurance carrier has provided the employee and DWC with a notice describing all steps taken by the insurance carrier to investigate the injury. Section 409.021(a-3) also requires the commissioner to adopt rules as necessary to implement that subsection. Section 409.021(d) provides that an insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier.

Section 409.022(c) provides that an insurance carrier commits an administrative violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commissioner. Section 409.022(d) provides that if an insurance carrier’s notice of refusal to pay benefits under Section 409.021 is sent in response to a claim for compensation resulting from an emergency medical technician’s, peace officer’s, or a firefighter’s disability or death for which a presumption is claimed to be applicable under Subchapter B, Chapter 607, Government Code, the notice must include a statement by the carrier that explains why the carrier determined a presumption under Subchapter B does not apply to the claim for compensation; and describes the evidence that the carrier reviewed in making the determination.

Section 414.002 provides that DWC shall monitor the system for compliance with the Act and rules as well as other laws relating to workers’ compensation.

Section 415.021(c-2) provides that in determining whether to assess an administrative penalty involving a claim in which the insurance carrier provides notice under Section 409.021(a-3), the commissioner shall consider whether the employee cooperated with the insurance carrier’s investigation and whether the employee authorized access to the applicable medical records.

Government Code §607.052(a) provides that notwithstanding any other law, this subchapter applies only to a firefighter, peace officer, or emergency medical technician who on becoming employed or during employment as a firefighter, peace officer, or emergency medical technician, received a physical examination that failed to reveal evidence of the illness or disease for
which benefits or compensation are sought using a presumption established by Subchapter B; is employed for five or more years as a firefighter, peace officer, or emergency medical technician; and seeks benefits or compensation for a disease or illness covered by Subchapter B that is discovered during employment as a firefighter, peace officer, or emergency medical technician.

Section 607.052(b) provides that a presumption under Subchapter B does not apply to a determination of a survivor's eligibility for benefits under Chapter 615; in a case of action brought in a state or federal court except for judicial review of a proceeding in which there has been a grant or denial of employment-related benefits or compensation; to a determination regarding benefits or compensation under a life or disability insurance policy purchased by or on behalf of the firefighter, peace officer, or emergency medical technician that provides coverage in addition to any benefits or compensation required by law; or if the disease or illness for which benefits or compensation is sought is known to be caused by the use of tobacco and the firefighter, peace officer, or emergency medical technician is or has been a user of tobacco or if their spouse has, during the marriage, been a user of tobacco that is consumed through smoking.

Section 607.058 provides that a presumption under §§607.053, 607.054, 607.055, or 607.056 may be rebutted through a showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with the individual's service as a firefighter, peace officer, or emergency medical technician was a substantial factor in bringing about the individual's illness, without which the illness would not have occurred. A rebuttal offered under Section 607.058 must include a statement by the person offering the rebuttal that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual's service as a firefighter, peace officer, or emergency medical technician was a substantial factor in bringing about the individual's illness without which the illness would not have occurred.

Finally, §9 of SB 2551 requires that the commissioner adopt rules no later than January 1, 2020. The proposed amendment supports the implementation of the Workers’ Compensation Act, Texas Labor Code Title 5, Subtitle A.

§180.8. Notices of Violation; Notices of Hearing; Default Judgments.
(a) (No change.)
(b) An NOV shall be in writing and include:
(1) the provision(s) of the Act, rule, order, or decision of the commissioner that the system participant violated;
(2) a summary of the facts that establish that the violation(s) occurred;
(3) a description of the proposed sanction that the division intends to impose;
(4) a statement of the basis for the proposed sanction including:
   (A) a description of the underlying facts considered by the division for each of the factors listed in Labor Code §415.021(c) and (c-2), if applicable, (relating to Assessment of Administrative Penalties) and §180.26 of this title (relating to Criteria for Proposing, Recommending and Determining Sanctions; Other Remedies) in determining the appropriateness of the division's proposed sanction;
   (B) a description of which factors under Labor Code §415.021(c) and (c-2), if applicable, and §180.26 of this title had a mitigating or aggravating effect on the division's proposed sanctions; and
(5) a description of the division's proposed sanction for each violation or violation type in the case of repeated administrative violations. This requirement does not prohibit the division from considering the aggregate impact of all administrative violations described in the NOV when proposing a sanction if justice requires such consideration;
(6) the right to consent to the charge and the proposed sanction(s);
(7) other information about the rights, obligations, and procedures for requesting a hearing.
(c) (i) (No change.)

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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Nicholas Canaday III
General Counsel
Texas Department of Insurance, Division of Workers’ Compensation
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For further information, please call: (512) 804-4703

SUBCHAPTER B. MEDICAL BENEFIT REGULATION
28 TAC §180.26
STATUTORY AUTHORITY FOR §180.26

Labor Code §402.00111 provides that the commissioner of workers’ compensation shall exercise all executive authority under Title 5 of the Labor Code.

Section 402.00116 provides that the commissioner is the chief executive and administrative officer of the agency with all the powers and duties vested under the Act.

Section 402.00128 describes the general powers and duties of the commissioner, including assessing and enforcing penalties and prescribing the form, manner, and procedure for the transmission of information to DWC.

Section 402.021 provides that a basic goal of the Texas workers' compensation system is that each employee shall be treated with dignity and respect when injured on the job, and that it is the intent of the Legislature that the workers' compensation system minimize the likelihood of disputes and resolve them promptly and fairly when identified, and effectively educate and clearly inform each system participant of their rights and responsibilities and how to appropriately interact within the system.
Section 402.061 provides that the commissioner shall adopt rules as necessary for the implementation and enforcement of the Act.

Section 409.021(a) sets forth the general rule that, not later than the 15th day after receipt of written notice of injury, an insurance carrier must either begin payment of benefits or notify DWC and the injured employee in writing of its refusal to pay and their procedural rights. Section 409.021(a-3) provides that an insurance carrier is not required to comply with subsection (a) if the claim results from an employee's disability or death for which the presumption is claimed to be applicable under Subchapter B, Chapter 607, Government Code, and not later than the 15th day after the date on which the insurance carrier received written notice of the injury, the insurance carrier has provided the employee and DWC with a notice describing all steps taken by the insurance carrier to investigate the injury. Section 409.021(a-3) also requires the commissioner to adopt rules as necessary to implement that subsection. Section 409.021(d) provides that an insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier. Section 409.022(c) provides that an insurance carrier commits an administrative violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commissioner. Section 409.022(d) provides that if an insurance carrier's notice of refusal to pay benefits under Section 409.021 is sent in response to a claim for compensation resulting from an emergency medical technician's, peace officer's, or a firefighter's disability or death for which a presumption is claimed to be applicable under Subchapter B, Chapter 607, Government Code, the notice must include a statement by the insurance carrier that explains why the insurance carrier determined a presumption under Subchapter B does not apply to the claim for compensation, and describes the evidence that the insurance carrier reviewed in making the determination.

Section 414.002 provides that DWC shall monitor the system for compliance with the Act and rules as well as other laws relating to workers' compensation.

Section 415.021(c-2) provides that in determining whether to assess an administrative penalty involving a claim in which the insurance carrier provides notice under Section 409.021(a-3), the commissioner shall consider whether the employee cooperated with the insurance carrier's investigation and whether the employee authorized access to the applicable medical records.

Government Code §607.052(a) provides that notwithstanding any other law, this subchapter applies only to a firefighter, peace officer, or emergency medical technician who on becoming employed or during employment as a firefighter, peace officer, or emergency medical technician, received a physical examination that failed to reveal evidence of the illness or disease for which benefits or compensation are sought using a presumption established by Subchapter B; is employed for five or more years as a firefighter, peace officer, or emergency medical technician; and seeks benefits or compensation for a disease or illness covered by Subchapter B that is discovered during employment as a firefighter, peace officer, or emergency medical technician.

Section 607.052(b) provides that a presumption under Subchapter B does not apply to a determination of a survivor's eligibility for benefits under Chapter 615; in a cause of action brought in a state or federal court except for judicial review of a proceeding in which there has been a grant or denial of employment-related benefits or compensation; to a determination regarding benefits or compensation under a life or disability insurance policy purchased by or on behalf of the firefighter, peace officer, or emergency medical technician that provides coverage in addition to any benefits or compensation required by law; or if the disease or illness for which benefits or compensation is sought is known to be caused by the use of tobacco and the firefighter, peace officer, or emergency medical technician is or has been a user of tobacco or if their spouse has, during the marriage, been a user of tobacco that is consumed through smoking.

Section 607.058 provides that a presumption under §§607.053, 607.054, 607.055, or 607.056 may be rebutted through a showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with the individual's service as a firefighter, peace officer, or emergency medical technician was a substantial factor in bringing about the individual's illness, without which the illness would not have occurred. A rebuttal offered under Section 607.058 must include a statement by the person offering the rebuttal that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual's service as a firefighter, peace officer, or emergency medical technician was a substantial factor in bringing about the individual's illness without which the illness would not have occurred.

Finally, §9 of SB 2551 requires that the commissioner adopt rules no later than January 1, 2020.

The proposed amendments support the implementation of the Workers' Compensation Act, Texas Labor Code Title 5, Subtitle A.


(a) - (e) (No change.)

(f) When determining which sanction to impose against a system participant and the severity of that sanction in claims where the insurance carrier provided notice under Section 409.021(a-3), (Notice of Continuing Investigation), the division shall consider the factors listed in Labor Code §415.021(c-2).

(g) [✓] In an investigation where both an administrative violation and a criminal prosecution are possible, the division may, at its discretion, postpone action on the administrative violation until the related criminal prosecution is completed.

(h) [✓] As an alternative to imposing a sanction such as an administrative penalty on a charged system participant, the division may, at its discretion, provide formal notice of the violation through a Warning Letter. A Warning Letter shall:

(1) - (3) (No change.)

(i) [✓] The division may enter into a consent order with the system participant if the division and the system participant have communicated regarding:

(1) - (2) (No change.)

(3) the appropriateness of the proposed sanction, including how the division considered the factors under Labor Code §415.021(c) and (c-2) and subsection (e) of this section in determining the proposed sanction.

(j) [✓] A consent order may be entered into before or after issuance of an NOV under §180.8 of this title (relating to Notices of Violation; Notices of Hearing; Default Judgments). Consent orders must include:
The commission proposes various non-substantive changes throughout the chapter to conform to Texas Register requirements and the executive director's current practices and guidelines. These proposed changes include: improving the rule structure; defining and using consistent terms; correcting grammatical, syntactic, and typographical errors; updating cross-references; and assigning titles to equations (such as Equation B.1). These non-substantive changes are not addressed in this Section-by-Section Discussion.

Additionally, certain terms were revised to prevent ambiguity by clarifying the term used, using consistent terms where the meaning is the same, and using defined terms. These changes are non-substantive and are not addressed in this Section-by-Section Discussion.

Throughout the proposed rulemaking, the commission proposes to differentiate between "sewage sludge" (which does not meet Class A, AB, or B pathogen and vector attraction reduction requirements) and "biosolids" (which is sewage sludge that has been treated to meet Class A, AB, or B pathogen and vector attraction reduction requirements). Due to these proposed changes, the commission also proposes to replace "annual whole sludge application rate" with "annual whole application rate," and "water treatment sludge" with "water treatment residuals." These proposed changes are consistent with accepted industry terminology. These changes are not addressed in this Section-by-Section Discussion.

§312.1, Purpose
The commission proposes to amend §312.1 to include "biosolids" and "water treatment residuals" due to their applicability to the purpose of the rules. The commission is proposing to remove the following sentence, "The standards applicable to the disposal of water treatment sludge are included" since water treatment residuals was combined with the list of other materials previously listed in the subsection.

§312.2, Applicability
The commission proposes to amend §312.2 by including biosolids and water treatment residuals to the applicability of the chapter.

§312.3, Exclusions
Throughout this section, the commission proposes to replace "does not establish requirements for" to "does not authorize" to provide clarification on activities that are not authorized under the rules.

The commission proposes to amend §312.3(f), to include water treatment residuals to be consistent with longstanding TCEQ practice.

The commission proposes to amend §312.3(h) by splitting the subsection into two subsections and re-letter the subsequent subsections in order to improve readability. This separates the exclusions related to storage and staging from the exclusions related to processing, use, or disposal. The commission is proposing to include "grit trap waste" in the list of wastes that are not authorized for processing, use, or disposal under the chapter.

The commission proposes to amend re-lettered §312.3(m) to "grease trap waste, grit trap waste" to distinguish grease trap waste and grit trap waste as two separate types of waste. The commission is also proposing to add a statement to clarify that the chapter does not authorize land application of the listed wastes, whether processed or unprocessed, that have been
commingled with biosolids, sewage sludge, domestic septage, or water treatment residuals.

The commission proposes to amend re-lettered §312.3(n), by adding "biosolids or domestic septage" to clarify that the chapter does not allow for the registration of processing operations, thus requiring a permit for such activity.

The commission proposes §312.3(o), to state that the chapter does not authorize sewage sludge, biosolids, or domestic septage processing operations unless the processing occurs at a treatment works. If adopted, and after the effective date of this rulemaking, any sewage sludge, biosolids, or domestic septage processing operations that are not located at a treatment works would be required to seek authorization under 30 TAC Chapter 330 (Municipal Solid Waste) or Chapter 332 (Composting), and a processing authorization under Chapter 330 or 332 may be authorized in accordance with this chapter for the final use and disposal. The commission also proposes a savings clause to allow any processing permit that was issued prior to the effective date of these amendments, to continue under the rule requirements as they existed prior to the effective date of these amendments.

§312.4, Required Authorizations or Notifications

The commission proposes to amend §312.4(a), to include "biosolids, or water treatment residuals in a monofil" to clarify the type of water treatment residuals disposal that requires a permit. This type of authorization has always been required for water treatment residual disposed of in a monofil. The commission phrase "in a monofil" only applies to water treatment residuals, not sewage sludge or biosolids.

The commission proposes to delete §312.4(a)(1), because all Class B land application registrations have expired or transitioned to a permit. Therefore, this requirement is no longer needed. Subsequent paragraphs have been renumbered.

The commission proposes to amend §312.4(b)(1), to clarify that Class A or Class AB biosolids should not meet metal limits, but instead not exceed the metal limits. The commission is also including the word "meets" when describing the pathogen reduction and vector attraction reduction requirements, as biosolids are required to meet these requirements.

The commission proposes to amend §312.4(b)(4), to change the date due from September 1st to September 30th for Class A and Class AB biosolids annual reports and to include the reporting period. The proposed due date is consistent with the Class B biosolids annual report due date and will allow Class A and Class AB biosolids notification holders time to submit their reports since the reporting period ends on August 31st.

The commission proposes to amend §312.4(c)(1), to remove the effective date of September 1, 2003 because all Class B registrations have expired or transitioned to a permit. Therefore, this date is no longer needed.

§312.6, Additional or More Stringent Requirements

The commission proposes to amend §312.6, to include biosolids, domestic septage, and water treatment residuals to be consistent with longstanding TCEQ practice. The commission proposes changing "public health" to "human health" to clarify that the requirements should be protective of all people. The commission proposes removing the word "pollutant" since there may be adverse effects from non-pollutants (e.g., odor, nuisance conditions, etc.) that could trigger the executive director to impose more stringent requirements than those in the chapter.

§312.7, Sampling and Analysis

The commission proposes to amend §312.7(a), by including water treatment residuals in the types of materials that are required to be sampled. Water treatment residuals shall be analyzed for pollutants when land applied or placed on a surface disposal site.

§312.8, General Definitions

The commission proposes to amend §312.8(2), "Active sludge unit" by changing the term to "Active disposal unit." In addition, the commission proposes to include domestic septage and water treatment residuals in the definition since both types of wastes can be placed on an active disposal unit.

The commission proposes to amend §312.8(6), "agronomic rate" by removing the word "sludge" from the definition. The proposed change is to clarify that an agronomic rate is not limited to sludge. The commission also proposes to amend §312.8(6)(B), by removing "in the sewage sludge" so that the amount of nitrogen is not just limited to sewage sludge, and by removing "grown on the land" to improve readability.

The commission proposes to amend §312.8(9), "Annual whole sludge application rate" by changing the term to "Annual whole application rate." The change is proposed to clarify that an annual whole application rate is not limited to sludge. The change also includes amending the definition by including "domestic septage, or water treatment residuals" among the types of wastes that are subject to an annual whole application rate.

The commission proposes to delete §312.8(11), "Apply sewage sludge or sewage sludge applied to the land" because the term has been replaced throughout the rule to land apply or land application. Subsequent definitions have been renumbered.

The commission proposes to amend renumbered §312.8(13), "Beneficial use" by replacing "placement" with "land application" because placement is used in the chapter in reference to surface disposal which is not beneficial use. The commission also proposes to add "domestic septage" and "water treatment residuals," because these materials can be land applied for beneficial use. Additionally, the definition includes food, fiber, feed, or turf as the crops are used for beneficial use and harvested. "Cover crop" has been removed since these crops are not harvested, thus making them non-beneficial.

The commission proposes §312.8(14), "Beneficial use site" to define the property boundaries surrounding one or more land application units. Subsequent definitions will be renumbered.

The commission proposes §312.8(15), "Biosolids" to differentiate this material from sewage sludge. Subsequent definitions will be renumbered.

The commission proposes §312.8(25), "Debris." The definition is similar to the previously defined term "Sewage sludge debris." Subsequent definitions will be renumbered.

The commission proposes to amend renumbered §312.8(28), "Disposal" by including "biosolids," "domestic septage," and "water treatment residuals" to clarify that the act of disposal would apply to these types of wastes.

The commission proposes §312.8(29) and (30), "Disposal unit" and "Disposal unit boundary." These definitions are similar to the previously defined term "sludge unit" and "sludge unit boundary." Subsequent definitions will be renumbered.
The commission proposes to amend renumbered §312.8(37), "Feed crops" by including "horses" to the list of domestic livestock examples that consume feed crops.

The commission proposes §312.8(43), "Grease trap waste" to differentiate grease trap waste from grit trap waste. Subsequent definitions will be renumbered.

The commission proposes to amend renumbered §312.8(47), "Harvesting" by clarifying that harvesting means the removal of crops from the land application unit. Also, to clarify that the act of cutting and leaving vegetative material on the land application unit is not considered removal.

The commission proposes §312.8(49), "Incinerator" to clarify that when this commonly understood term is used in the chapter, it is limited to incinerators that burn sewage sludge or biosolids only. Subsequent definitions will be renumbered.

The commission proposes §312.8(53), "Irrigation conveyance canal" to provide clarity and improve understanding when the term is used in the chapter. Subsequent definitions will be renumbered.

The commission proposes §312.8(54), "Lagoon." The definition is similar to the previously defined term "Sewage sludge lagoon." Subsequent definitions will be renumbered.

The commission proposes to amend renumbered §312.8(55), "Land application or land apply or land applied" by including "domestic septage" and "water treatment residuals" among the types of material that can be land applied. Sewage sludge is being removed from the types of material that can be land applied, because sewage sludge does not meet the criteria for land application.

The commission proposes §312.8(56), "Land application unit" to provide clarity and improve readability when the term is used in the chapter and to differentiate between land application unit and disposal unit. Subsequent definitions will be renumbered.

The commission proposes to amend renumbered §312.8(64), "Metal limit" by including "water treatment residuals" to clarify that metal limits apply to water treatment residuals.

The commission proposes to amend renumbered §312.8(65), "Monofill" by including "biosolids" and "water treatment residuals" among the types of materials that can be disposed of in a monofill.

The commission proposes to delete §312.8(75), "Sewage sludge debris" as this term has been revised to and defined as "debris." Subsequent definitions have been renumbered.

The commission proposes to delete §§312.8(76) - (78), "Sludge lagoon," "Sludge unit," and "Sludge unit boundary" as these terms have been revised to and defined as "Lagoon," "Disposal unit," and "Disposal unit boundary." Subsequent definitions have been renumbered.

The commission proposes to amend renumbered §312.8(77), "Precipitation" to clarify the climatic conditions that would prevent land application of biosolids or domestic septage.

The commission proposes §312.8(88), "Stabilization" to define it as a sewage sludge treatment process. Subsequent definitions will be renumbered.

The commission proposes to amend renumbered §312.8(89), "Staging" by including "biosolids, domestic septage, and water treatment residuals" among the types of materials that can be staged.

The commission proposes to amend renumbered §312.8(90), "Store or storage" by including "biosolids, domestic septage, and water treatment residuals" among the types of materials that can be stored. The commission also proposes the addition of the phrase "or in an enclosed vessel" to clarify that storage in an enclosed vessel must meet the storage requirements within the chapter.

The commission proposes §312.8(92), "Surface impoundment" to provide clarity when the term is used in the chapter. Subsequent definitions will be renumbered.

The commission proposes to amend renumbered §312.8(94), "Three hundred-sixty-five-day period" by replacing "cover" with "feed, food, fiber, or turf" to distinguish between what is grown for harvest for beneficial use.

The commission proposes to amend renumbered §312.8(97), "Treat or treatment" by including "biosolids, domestic septage, or water treatment residuals" as these types of material can be treated. Additionally, the commission is amending the definition to note that initial alkali addition for pathogen or vector control is considered processing but that subsequent alkali addition for pathogen or vector control is not considered processing.

The commission proposes to amend renumbered §312.8(98), "Treatment works" by clarifying that a treatment works is located at an authorized wastewater treatment plant. Sewage sludge or biosolids treatment at a beneficial use site or surface disposal site is not a treatment works.

The commission proposes §312.8(99), "Turf crop" to provide clarity when the term is used in the chapter. Turf crop is being added in the rule to allow the production of turf as a beneficial use. Subsequent definitions will be renumbered.

The commission proposes §312.8(104), "Waste pile" to provide clarity when the term is used in the chapter. Subsequent definitions will be renumbered.

The commission proposes to amend renumbered §312.8(105), "Water treatment sludge" by changing the term to "Water treatment residuals" for consistency with accepted industry terminology.

§312.9, Sludge Fee Program

The commission proposes to amend the title of §312.9, from "Sludge Fee Program" to "Fee Program" because the section applies to materials other than sewage sludge.

The commission proposes to amend §312.9(b) by including the reporting period of reporting period of September 1st of the previous year to August 31st of the current year to clarify the time period of the annual report information that is due on September 30th.

The commission proposes to delete §312.9(b)(3), since there are no sewage sludge or water treatment plant sludge disposal sites that were authorized by the commission or predecessor agency prior to October 1, 1995. Subsequent paragraphs are renumbered.

The commission proposes to amend renumbered §312.9(b)(4), to clarify that the $0.20 per dry ton fee also applies to water treatment residuals that are applied for beneficial use.
Throughout the section, the commission proposes to replace "meets" with "do not exceed" with regard to metal limits. Using the terminology of "meets" concentrations implies that the biosolids should contain a certain amount of metals to meet a minimum concentration. Changing the terminology to "do not exceed the metal concentrations" more clearly identifies the concentrations as a maximum limit which should not be exceeded. Replacing "meets" with "do not exceed" for metal concentrations then requires the changes to the remainder of the sentence to include "meets" for stating that the material must meet pathogen and vector attraction reduction requirements in the rule.

The commission proposes to amend §312.41(d), "public health" to "human" to clarify that the requirements should be protective of all people.

§312.42, General Requirements
The commission proposes to amend §312.42(b), by replacing "meets" with "do not exceed" with regard to metal limits. Using the terminology of "meets" concentrations implies that the biosolids should contain a certain amount of metals to meet a minimum concentration. Changing the terminology to "do not exceed the metal concentrations" more clearly identifies the concentrations as a maximum limit which should not be exceeded.

The commission proposes to amend §312.42(b) and (c) to replace "reached" with "exceeded" in reference to cumulative metal loading rates and annual application rates. The change prevents land application to sites that have exceeded the applicable rates, while allowing land application up to the exact rate.

The commission proposes to amend §312.42(i), to improve readability and clarity relating to toxicity.

§312.43, Metal Limits
The commission proposes to amend Figure: 30 TAC §312.43(b)(1), Figure: 30 TAC §312.43(b)(2), Figure: 30 TAC §312.43(b)(3), and Figure: 30 TAC §312.43(b)(4), to include "Land Application" in the titles and to make non-substantial changes to the formatting of the figures to improve readability.

The commission proposes to delete §312.43(c), pertaining to the calculation of the Annual Application Rate (AAR) for domestic septage. The AAR calculation for domestic septage is proposed to be moved to §312.49(b) (Procedure to Determine the Annual Whole Application Rate for Biosolids and Domestic Septage).

§312.44, Management Practices
Throughout §312.44, the commission proposes to replace "sewage sludge" with "biosolids and/or domestic septage" to provide clarification and to be consistent with longstanding TCEQ practice.

The commission proposes to amend §312.44(c), by clarifying that the buffer zones listed under paragraph (1)(A) and (B) and paragraph (2)(A) - (C), (E), and (F) are required to be established at permit or registration issuance and would be required to be maintained if a change were to occur in or surrounding the land application unit regardless of the buffer zone applicable at the time of permit or registration issuance. Additionally, the commission proposes to amend §312.44(c), by clarifying that the buffer zone listed under paragraph (2)(D), which is the requirement of a 750-foot buffer for an established school institution, business, or occupied residential structure, will be established initially at permit or registration issuance. This buffer must also be re-evaluated only when a permittee or registrant applies for a renewal or
major amendment and not during the term of the permit or registration. This clarification means that if, for example, a residential structure is constructed and is occupied after a permit is issued and lies within 750 feet of the boundaries of a land application unit, the buffer will be re-evaluated when the permit undergoes a renewal and not during the permit term.

The commission proposes to amend §312.44(h)(3), by replacing "rainstorms" with "any type of precipitation occurs" to clarify that biosolids or domestic septage may not be applied during other types of precipitation and not just rainstorms and to clarify that a person who land applies domestic septage is required to submit an Adverse and Alternative Weather Plan.

The commission proposes to amend §312.44(j)(3)(C), to clarify that best management practices for minimizing off-site tracking of material and sediment applies to domestic septage.

The commission proposes to amend §312.44(j)(4), to clarify that the executive director may require an odor control plan for a person who prepares or land applies domestic septage.

§312.47, Record Keeping

The commission proposes to amend the title of §312.47, by replacing "Record Keeping" with "Recordingkeeping."

The commission proposes to amend §312.47(a)(3) and (4), to clarify that the metal concentrations are not exceeded. Adding the language "are not exceeded" more clearly identifies the metal concentrations as a maximum limit which should not be exceeded rather than a concentration that must be in the biosolids.

The commission proposes to amend §312.47(a)(3)(B)(ii), (4)(B)(ii), and (5)(B)(ix) to provide clarity and improve readability.

The commission proposes §312.47(a)(7), to include that a person who land applies Class B biosolids develop information regarding the dates of harvesting and the amount harvested (excluding grazing) and retain the information for five years. The amount harvested (i.e., bushels, tons, bales) should reflect the nutrient removal for which the agronomic rate stated in the permit is based.

The commission proposes §312.47(a)(8), to include that, for a person who prepares biosolids, the recordkeeping requirements must be readily available for review by commission staff or be submitted to the executive director upon the request. This additional rule language is consistent with recordkeeping requirements for staging and storage, and record retention for transporters.

The commission proposes to amend §312.47(b), to include that records must be readily available for review by commission staff or be submitted to the executive director upon the request for a person who applies domestic septage. This additional rule language is consistent with recordkeeping requirements for staging and storage, and record retention for transporters.

The commission proposes §312.47(b)(9) and (10), to include that a person who land applies domestic septage develop information regarding the dates of harvesting and the amount harvested (excluding grazing) and retain the information for five years. The amount harvested (i.e., bushels, tons, bales) should reflect the nutrient removal for which the agronomic rate stated in the registration is based.

§312.48, Reporting

The commission proposes to amend §312.48(1), to include the annual reporting period being from September 1st of the previous year to August 31st of the current year.

The commission proposes to amend §312.48(1)(B)(i), by replacing "does not meet" metal concentrations in §312.43(b)(3) with "exceeds" these concentrations. Changing the language to "exceeds" more clearly identifies the metal concentrations as a maximum limit.

The commission proposes to amend §312.48(1)(C)(ii) to update the title of the report from "Annual Sludge Summary Report Form" to the "Annual Biosolids Land Application Summary Report Form."

The commission proposes to amend §312.48(2)(A), to update the title of the report from the "Quarterly Sludge Summary Report Form" to the "Quarterly Biosolids Land Application Summary Report Form."§312.49, Appendix A—Procedure To Determine the Annual Whole Sludge Application Rate for a Sewage Sludge

The commission proposes to amend the title of §312.49, by replacing "Appendix A—Procedure to Determine the Annual Whole Sludge Application Rate for a Sewage Sludge" with "Procedure to Determine the Annual Whole Application Rate for Biosolids and Domestic Septage" to more accurately reflect the purpose of the section.

The commission proposes to amend §312.49, by designating the first paragraph of this section as §312.49(a), which notes that the subsection applies to the annual whole application rate for biosolids.

The commission proposes to delete §312.49(1), (2), (3), and Figure: 30 TAC §312.49(1) (Equation (1)). Additionally, the commission proposes to delete Appendix A which is Figure: 30 TAC §312.49(3) and place the text of the figure into the rule as proposed §312.49(a)(1) - (3).

The commission proposes to rename and relocate Figure: 30 TAC §312.49(2) to Figure: 30 TAC §312.49(a)(3). This change is proposed because both Equation (1) and (2) were mathematically the same, but Equation (2) was written in a way to reach the desired result which is the annual whole application rate.

The commission proposes §312.49(b), which requires the annual whole application rate for domestic septage to be less than or equal to the rate calculated in Equation B.2. The commission proposes Figure: 30 TAC §312.49(b), also called Equation B.2., which is the mathematical equation for the annual whole application rate for domestic septage.

§312.50, Storage and Staging of Sludge at Beneficial Use Sites

The commission proposes to amend the title of §312.50, by replacing "Storage and Staging of Sludge at Beneficial Use Sites" with "Storage and Staging of Biosolids and Domestic Septage" to reflect the types of materials regulated by the section.

The commission proposes to add domestic septage throughout this section to clarify that the requirements for storage and staging of domestic septage are the same as for biosolids, which is consistent with longstanding TCEQ practice.

The commission proposes to amend §312.50(a)(3), to require biosolids and/or domestic septage be stored away from odor receptors. This change is consistent with existing staging requirements under this section and is intended to prevent off-site dust migration and nuisance odors.
The commission proposes to amend §312.50(a)(6), to replace the word "domestic animals" with "domestic livestock" to clarify that the requirement is intended to control access by domestic livestock, such as cattle, horses, goats, or domesticated swine, rather than domestic animals, such as cats or dogs.

The commission proposes to amend §312.50(c), to add language to clarify that moving the biosolids and/or domestic septicage to another staging area within a land application unit does not restart the timeframe allowed for staging.

The commission proposes §312.50(d), which would require recordkeeping for storage and staging of biosolids and/or domestic septicage at a land application unit. The recordkeeping would include both the date, volume, and type of material deposited at and removed from a storage facility or staging area. In the event that material is removed from the storage facility or staging area and taken to a different location rather than applied onsite, recordkeeping would include the information about the location where the material was taken. Records would be required to be retained for five years. The addition of these recordkeeping requirements would enable the executive director to verify compliance with the maximum timeframe allowed for storage and staging.

§312.64, Management Practices
The commission proposes to amend §312.64(k) and (l), by replacing "public health" with "human health" to clarify that the requirements should be protective of all people.

The commission proposes to amend §312.64(l), by replacing "animals" with "domestic livestock" to clarify the types of animals that must not be allowed to graze on an active disposal unit. This ensures that operators are not liable for wildlife that may graze on the land.

§312.65, Operational Standards—Pathogens and Vector Attraction
The commission proposes to amend §312.65(a) to maintain clarity after the term biosolids is being proposed in the rule.

§312.67, Record Keeping
The commission proposes to amend the title of §312.67, by replacing "Record Keeping" with "Recordkeeping."

The commission proposes to amend §312.67(b), by adding language to clarify the information that records shall contain when domestic septicage that is placed on an active disposal unit. The proposed language would allow the executive director to verify compliance with the vector attraction requirements in §312.83(b)(12).

§312.68, Reporting
The commission proposes to amend §312.68, by adding the reporting period.

§312.82, Pathogen Reduction
The commission proposes to amend §312.82(a)(2)(B)(i) - (vi), by changing "Class A" to "Class AB" to reflect the original intent of the Class AB pathogen requirements from the 2014 rulemaking (Rule Project Number 2014-010-312-OW).

The commission proposes to amend Figure: 30 TAC §312.82(a)(3)(A)(i) and Figure: 30 TAC §312.82(a)(3)(A)(iv), to replace the ">" with "=" for consistency with 40 Code of Federal Regulations (CFR) Part 503.

The commission proposes to amend §312.82(b)(3)(E), by changing "animals" to "domestic livestock" to clarify the types of animals that must not be allowed to graze on land for at least 30 days after application of biosolids. This ensures that operators are not liable for wildlife that may graze on the land.

§312.121, Purpose, Scope, and Standards
The commission proposes to amend the title of §312.121, to "Purpose and Applicability" to reflect that "Scope" is no longer included within the section.

The commission proposes to delete §312.121(b), (c), and (e). The adoption of 40 CFR Part 257 by reference is no longer needed because the requirements in 40 CFR are proposed to be directly incorporated within this subchapter. This proposed change will encapsulate all of the water treatment requirements within the rule rather than having to refer to separate regulations. The subsequent paragraphs will be re-lettered.

§312.122, Registrations and Permits
The commission is proposing to amend §312.122(a), to replace "landfill" with the term "monofill" to differentiate between disposal in a monofill versus a landfill. This clarification is necessary because the requirements for disposal of water treatment residuals in a landfill are established in Chapter 330. Chapter 312 does, however, establish the requirements for the disposal of water treatment residuals in a monofill.

The commission proposes to amend §312.122(b), to replace "40 Code of Federal Regulations Part 257" with the requirements of "this subsection." As previously noted, the proposed changes to this subchapter would encapsulate all of the water treatment requirements within the rule rather than having to refer to separate regulations.

§312.123, Annual Report
The commission proposes to repeal §312.123. The requirements to submit an annual report are being re-proposed as new §312.128 with changes. Moving this section improves the flow of the rule.

§312.123, General Requirements
The commission proposes a new §312.123, which outlines the general requirements that pertain to land application of water treatment residuals, such as, the requirement to comply with the rules in the subchapter and for the person who provides or land applies water treatment residuals to provide or obtain the information necessary to comply with the subchapter. The section is being proposed to be consistent with current commission policy and with the general requirements for biosolids in §312.42.

§312.124, Metal Limits
The commission proposes new §312.124, which establishes the maximum allowable metal concentration in water treatment residuals that can be land applied and requires the applicant to determine the soil cadmium concentration to demonstrate that the cumulative cadmium loading will not result in toxicity to the soil. The section is being proposed to be consistent with current commission policy.

§312.125, Management Practices
The commission proposes new §312.125. Subsection (a) establishes the requirements under which water treatment residuals can be land applied for the production of food crops and feed crops. These requirements are consistent with 40 CFR
§257.3-5. Subsections (b) - (h) establish the restrictions and management practices that must be met for land application or disposal of water treatment residuals. These requirements are consistent with current commission policy and the management practices for the land application of biosolids in §312.44.

§312.126, Frequency of Monitoring
The commission proposes new §312.126. This section establishes the monitoring frequency and the conditions under which the monitoring frequency can be increased or decreased for land application of water treatment residuals. These requirements are consistent with current commission policy and with the monitoring frequency established for the land application of biosolids.

§312.127, Recordkeeping
The commission proposes new §312.127. This section establishes the recordkeeping requirements and record retention periods for any person that prepares, derives material from, or land applies water treatment residuals. These requirements will allow the executive director to determine compliance with the requirements in this subchapter.

§312.128, Annual Report
The commission proposes new §312.128, which establishes the requirement to submit an annual report to TCEQ, the due date and reporting period for the report, and the minimum information that must be included in the report. This subsection also notes that the information submitted on the annual report will be used to assess an annual fee.

§312.129, Procedure to Determine the Annual Whole Application Rate for Water Treatment Residuals
The commission proposes new §312.129, which establishes the equations and procedures to determine the Annual Whole Application Rate so that it does not cause the annual loading rate for cadmium to be exceeded. This procedure is consistent with the requirements in 40 CFR §257.3-5.

§312.130, Storage of Water Treatment Residuals
The commission proposes new §312.130, which establishes the requirements for the storage of water treatment residuals prior to disposal or land application.

§312.141, Transporters--Applicability and Responsibility
The commission proposes to amend §312.141(d), to change "meets" to "does not exceed" the metal limits in Table 3 of §312.43(b)(3). This is to provide clarification that the rules under this section are not applicable to persons transporting biosolids that do not exceed the metal limits in Table 3.

§312.142, Transporter Registration
The commission proposes to amend §312.142(b)(1), by removing the requirement that a complete signed application form needs to be notarized since the notarized signature is not necessary.

The commission proposes to amend §312.142(c), to clarify that a current copy of a registration authorized by the executive director shall be maintained at their designated place of business.

The commission proposes to amend §312.142(e), to include that a new transporter registration application would be required to be submitted within 15 days when there is a change in ownership or existing operation methods. The commission also proposes to amend §312.142(e) by removing the statement that an old registration number will be voided and the old registration cancelled and the requirement to a new registration application if the registrant fails to submit an annual report. This statement is unnecessary for the purpose of this rule.

The commission proposes to amend §312.142(f), to include that transporters notify the executive director by letter, within 15 days after changes to license plate numbers of registered vehicles, addition of a new vehicle to the fleet, or removal of an existing vehicle from the fleet; if a transporter plans to haul waste to a location not included on the existing registration; or if a transporter plans to remove a location already included on the existing registration. These changes will assist the executive director with tracking transporter vehicles and the locations where wastes are hauled to.

§312.143, Transporters--Delivery Requirement and Full Pump-out Requirement
The commission proposes to amend §312.143, by implied (a) to §312.143(a) and by clarifying that the rule pertains to in-state disposal and by removing "(Texas)" since it is redundant.

The commission proposes §312.143(b), which would require transporters that deposit waste out-of-state to deposit wastes at a facility that has obtained written authorization to receive waste as required by the state where the recipient facility is located.

The commission proposes §312.143(c), which would require grit traps and grease traps to be fully evacuated unless the trap volume is greater than the tank capacity, in which case the transporter must arrange for the remaining wastes in the trap to be fully evacuated within 24 hours.

§312.144, Transporters--Vehicle and Equipment
The commission proposes to amend §312.144(e), by removing the requirement that if a vehicle, tank, or container that is used to transport domestic septage to a beneficial use site, the transporter would be required to keep records showing how pathogen and vector attraction reduction requirements were met. The purpose of the removal of this requirement is that there may be situations where septage transporters haul untreated domestic septage and deposit the waste at a permitted domestic septage processing facility. The domestic septage processing facility would only be required to keep records showing that the septage meets the requirements of pathogen reduction requirements listed in §312.82(c) and vector attraction reduction requirements in §312.83. In the event that the domestic septage meets the pathogen and vector attraction reduction requirements, the transporter must keep such records.

§312.145, Transporters--Recordkeeping
The commission proposes to amend §312.145(a)(2) and (7), to allow electronic signatures on trip tickets. This would allow companies that use electronic driver and dispatch logs to collect electronic signatures on trip tickets.

The commission proposes to amend §312.145(b)(4), to improve readability and remove redundancy.

§312.147, Temporary Storage
The commission proposes §312.147(c), which establishes recordkeeping requirements for temporary storage. The recordkeeping would include the date, volume, and type of waste deposited into and removed from a temporary storage facility, and information about the facility where waste removed was deposited. Records would be required to be retained for five
years. The addition of these recordkeeping requirements would enable the executive director to verify compliance with the maximum timeframe allowed for temporary storage.

§312.149, Interstate Transportation

The commission proposes to amend the title of §312.149, to "Out-Of-State Transportation."

The commission proposes to delete §312.149(b), since not all states regulate sludge transportation. The TCEQ does not have the ability to check the validity of the authorization nor means of enforcing out-of-state regulations. With the removal of subsection (b), subsection (a) will become a standalone paragraph within the section.

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 rulemaking is in effect, no fiscal implications are anticipated for the agency or other units of state or local government as a result of the administration or enforcement of the proposed rulemaking.

The rulemaking is proposed in order to clarify the intent of existing rule requirements, remove inconsistencies, and improve readability.

Public Benefits and Costs

Ms. Bearse also determined that for each year of the first five years the proposed rulemaking is in effect, the anticipated public benefit will be compliance with state law and clear rules for the administration and regulation of sludge use, disposal, and transportation. The rulemaking would benefit the public because it is likely that it will result in increased enforcement and compliance with environmental regulations. The proposed rulemaking is not expected to result in significant 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 rulemaking is 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 rulemaking is in effect. The rulemaking would apply statewide and have the same effect in rural communities as in urban communities.

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 rulemaking is 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 rulemaking is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement 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 not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rulemaking should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. Texas Government Code, §2001.0225, applies to "Major environmental rules" the result of which are to exceed standards set by federal law, express requirements of state law, requirements of a delegation agreements between state and the federal governments to implement a state and federal program, or rules adopted solely under the general powers of the agency instead of under a specific state law.

A "Major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely 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 or the state. The proposed rulemaking does not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rulemaking is to provide clarification for the intent of rule requirements. The rulemaking will clarify the intent of existing rule requirements, remove inconsistencies, and improve readability.

The proposed rulemaking modifies the state rules related to use and disposal of sewage sludge biosolids, domestic septage, and water treatment residuals. This will have an impact on the environment, human health, and/or public health and safety; however, the proposed rulemaking will not adversely affect the economy, a sector of the economy, productivity, competition, or jobs within the state or a sector of the state. Therefore, the commission concludes that the proposed rulemaking does not meet the definition of a "Major environmental rule."

Furthermore, even if the proposed rulemaking did meet the definition of a "Major environmental rule," it is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicability requirements specified in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), applies only to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless state law specifically requires the rule; 2) exceeds an express requirement of state law, unless federal law specifically requires the rule; 3) exceeds 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) is adopted solely under the general powers of the agency instead of under a specific state law.
In this case, the proposed rulemaking does not meet any of the four requirements in Texas Government Code, §2001.0225(a). First, this rulemaking does not exceed standards set by federal law. Second, the proposed rulemaking does not exceed an express requirement of state law, but rather changes the requirements under state law to ensure regulatory consistency, regulate more comprehensively the use and disposal of sewage sludge, biosolids, domestic septage, and water treatment residuals, and clarify the executive director's authority related to regulating to the use and disposal of sewage sludge, biosolids, domestic septage, and water treatment residuals. Third, the proposed rulemaking does not 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. Finally, the commission proposes the rulemaking under Texas Water Code, §§5.013, 5.102, 5.103, 5.120, 26.011, 26.027, and 26.041; and THSC, §361.121; therefore, the commission does not adopt the rule solely under the commission's general powers. The commission invites public comment on the Draft Regulatory Impact Analysis Determination.

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.

Taking Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, §2007.043. The following is a summary of that analysis. The specific purpose of the proposed rulemaking is to provide clarification for the intent of rule requirements. The rulemaking will clarify the intent of existing rule requirements, remove inconsistencies, and improve readability. The proposed rulemaking will substantially advance this stated purpose by adopting language intended to regulate more comprehensively the use and disposal of sewage sludge, biosolids, domestic septage, and water treatment residuals.

Promulgation and enforcement of these proposed rules would not be either a statutory nor a constitutional taking of private real property. Specifically, the proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found that the adoption is a rulemaking identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2), relating to rules subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., which therefore, requires that the goals and policies of the CMP be considered during the rulemaking process.

CMP goals applicable to the adopted rules include protection, preservation, restoration, and enhancement of the diversity, quality, quantity, functions, and values of coastal natural resource areas. Ensuring sound management of all coastal resources that balances the benefits of economic development with multiple human uses of the coastal zone, while enhancing planned public access to and enjoyment of the coastal zone in a manner that is compatible with private property rights and other uses of the coastal zone.

CMP policies applicable to the adopted rules include 31 TAC §501.13(a)(1) and (2) that mandate commission rules requiring applicants to provide necessary information so that the commission makes an informed decision on a proposed action listed in 30 TAC §505.11 (Actions and Rules Subject to the CMP), and identify the monitoring needed to ensure that activities authorized by actions listed 30 TAC §505.11 comply with all applicable requirements.

The proposed rulemaking clarifies the intent of existing rule requirements, remove inconsistencies, and improve readability. By adopting these rules, there will be greater protection in the areas of concern to the CMP.

The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22, and found the rulemaking is consistent with the applicable CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with those CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on November 19, 2019, at 10:00 a.m. in Building E, Room 1008, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Paige Bond, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: https://www6.tceq.texas.gov/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2017-035-312-OW. The comment period closes on November 26, 2019. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Brian Sierant, Land Application Team, Water Quality Division, (512) 239-1375.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§312.1 - 312.13

Statutory Authority

These amendments are proposed under the Texas Water Code (TWC). Specifically, TWC, §5.013, which establishes the general
jurisdiction of the commission and TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

These amendments are also proposed under TWC, §26.027, which authorizes the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state and Texas Health and Safety Code (THSC), §361.121, which gives the commission the authority to require a permit before a responsible person may apply Class B biosolids on a land application unit.

The proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, 26.027, and THSC, §361.121, which gives the commission the authority to regulate the land application and transportation of Class B biosolids.

§312.1. Purpose.

This chapter establishes standards, which consist of general requirements, pollutant limits, management practices, and operational standards, for the final use or disposal of sewage sludge or biosolids generated during the treatment of domestic sewage in a treatment works, and for the final use or disposal of domestic septage. Standards are included in this chapter for sewage sludge, biosolids, water treatment residuals, and domestic septage land applied [to the land] for beneficial use[,] or placed on a surface disposal site. Standards are also included in this chapter for sewage sludge or biosolids fired in an [a sewage sludge] incinerator. [The standards applicable to the disposal of water treatment sludge are included.] Also included in this chapter are pathogen and vector attraction reduction requirements for sewage sludge, biosolids, and domestic septage land applied [to the land] or placed on a surface disposal site. In addition, the standards in this chapter include the frequency of monitoring and record keeping requirements when sewage sludge, biosolids, [or] domestic septage, or water treatment residuals are land [is] applied [to the land] or placed on a surface disposal site. Also included are the frequency of monitoring and record keeping [record keeping] requirements when sewage sludge or biosolids are [is] fired in an [a sewage sludge] incinerator. Also included are requirements relating to the transportation of sewage sludge, biosolids, water treatment residuals [sludge], domestic septage, chemical toilet waste, grit trap waste, and grease trap waste.

§312.2. Applicability.

(a) This chapter applies to any person who prepares sewage sludge, biosolids, or domestic septage.

(b) This chapter applies to any person who fires sewage sludge or biosolids in an [a sewage sludge] incinerator.

(c) This chapter applies to any person who land applies sewage sludge, biosolids, water treatment residuals, or domestic septage [to the land] and to the owner/operator of a surface disposal site.

(d) This chapter applies to sewage sludge, biosolids, water treatment residuals, or domestic septage that is land applied [to the land] or placed on a surface disposal site.

(e) This chapter applies to sewage sludge or biosolids fired in an [a sewage sludge] incinerator.

(f) This chapter applies to land where sewage sludge, biosolids, water treatment residuals, or domestic septage is applied to a surface disposal site and to an [a sewage sludge] incinerator.

(g) This chapter applies to any person who transports sewage sludge, biosolids, water treatment residuals [sludge], domestic septage, chemical toilet waste, grit trap waste, or grease trap waste. This chapter does not apply to oily water mixtures in waste management units such as tanks, fractionation tanks, and sumps that meet the design requirements of the American Petroleum Institute for oil/water separators or have been designed for oil-water separation. Recycling of oil-water mixtures from the waste management units designed for oil-water separation must comply with the requirements found in Chapter 324 of this title (relating to Used Oil Standards). Waste in waste management units that do not meet the design criteria in this subsection and that are plumbed directly to a sanitary sewer are covered by this chapter.

(h) This chapter applies to the exit gas from an [a sewage sludge] incinerator stack.

(i) This chapter applies to any person who applies water treatment residuals [sludge] for disposal in a landfill, surface impoundment, or waste pile, as defined in 40 Code of Federal Regulations (CFR) §257.2.

(j) This chapter applies to any person who applies water treatment residuals [sludge] for disposal in a land application unit, as defined in §312.121 of this title (relating to Purpose, Scope, and Standards).

(k) This chapter applies to water treatment residuals [sludge] which are [is] disposed of in a landfill, surface impoundment, or waste pile, as defined in 40 CFR §257.2.

(l) This chapter applies to water treatment residuals [sludge] which are [is] disposed of in a land application unit, as defined in §312.121 of this title.

§312.3. Exclusions.

(a) This chapter does not authorize [establish requirements for] processes used to treat domestic sewage or for processes used to treat sewage sludge or domestic septage prior to final use or disposal, except as provided in §312.82 and §312.83 of this title (relating to Pathogen Reduction and Vector Attraction Reduction).

(b) This chapter does not require the selection of a method of use or disposal for sewage sludge, biosolids, or domestic septage. The determination of the way [manner in which] sewage sludge, biosolids, or domestic septage is used or disposed is a local determination.

(c) This chapter does not authorize [establish requirements for] sewage sludge or biosolids co-fired in an incinerator with other wastes or for the incinerator in which sewage sludge or biosolids and other wastes are co-fired. Other wastes do not include auxiliary fuel, as defined in 40 Code of Federal Regulations (CFR) §503.41(b), fired in an [a sewage sludge] incinerator.

(d) This chapter does not authorize [establish requirements for] the use and disposal of sewage sludge generated at an industrial facility, unless the sewage sludge is of a domestic origin and the sewage sludge is generated from the treatment of domestic sewage. If a process at an industrial facility that primarily treats industrial wastewater combines domestic sewage with any type of industrial
solid waste, any resulting sewage sludge, process waste, or wastewater generated at the industrial facility will be considered to be industrial solid waste and must be processed, stored, or disposed of in accordance with the applicable requirements of Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste). If a facility that primarily treats domestic wastewater combines domestic sewage with any type of industrial solid waste, any resulting sewage sludge, process waste, or wastewater generated at the facility will be considered to be domestic sewage sludge and must be processed, stored, or disposed of in accordance with the applicable requirements of this chapter.

(e) This chapter does not authorize \[\text{establish requirements for}\] the use or disposal of sewage sludge or other wastes determined to be a hazardous waste, as defined in §335.1 of this title (relating to Definitions) or as determined in accordance with 40 CFR, Part 261.

(f) This chapter does not authorize \[\text{establish requirements for}\] the use or disposal of sewage sludge, biosolids, or water treatment residuals with a concentration of polychlorinated biphenyls (PCBs) equal to or greater than 50 milligrams per kilogram of total solids (dry weight basis).

(g) This chapter does not authorize \[\text{establish requirements for}\] the use or disposal of ash generated during the firing of sewage sludge or biosolids in an \[\text{a sewage sludge}\] incinerator.

(h) This chapter does not authorize \[\text{establish requirements for}\] the storage of sewage sludge, biosolids, domestic sewage, grease trap waste, chemical toilet waste, or grit trap waste, except as provided for in §312.50 of this title (relating to Storage and Staging of Biosolids and Domestic Septage \[\text{Sludge at Beneficial Use Sites}\]) and §312.147 of this title (relating to Temporary Storage).

(i) This chapter does not authorize \[\text{establish requirements for}\] the processing, use, or disposal of grease trap waste, grit trap waste, chemical toilet waste, grit \[\text{e.g., sand, gravel, cinders, or other materials with a high specific gravity},\] screenings \[\text{e.g., relatively large materials such as rags},\] or other wastes generated during preliminary treatment of domestic sewage in a treatment works.

(j) This chapter does not authorize \[\text{establish requirements for}\] the use or disposal of industrial septage or a mixture of domestic septage and industrial septage.

(k) This chapter does not apply to \[\text{sludge, septage, or any} \] wastes resulting from activities associated with the exploration, development, and production of oil or gas or geothermal resources, as defined in §335.1 of this title, except for domestic septage or sewage sludge which may be collected at facilities where such activities occur, that is not mixed in any manner with other oil, gas, or geothermal wastes.

(l) Experimental use shall be excluded from the requirements of this chapter, provided the following conditions are met at the time the sewage sludge or biosolids are \[\text{placed on a land application unit} \text{beneficial use site} \text{or reclamation site}:

(1) the metal concentrations established in §312.43(b)(3) (Table 3) of this title (relating to Metal Limits) shall be met;

(2) one of the vector attraction reduction alternatives in §312.83(b)(1) - (11) of this title shall be met;

(3) the pathogen reduction compliance requirements established in §312.82(a) or (b) of this title \[\text{relating to Pathogen Reductions}\] shall be met;

(4) the applicant shall receive written approval from the executive director prior to commencement of operations for the experimental project; and

(5) the applicant shall submit to the executive director the aims and goals of the project and any other additional information the executive director believes necessary to establish the experimental nature of the project.

(m) This chapter does not authorize \[\text{establish requirements for}\] the land application of processed or unprocessed chemical toilet waste, grease trap waste, and grit trap waste, milk solids, or similar non-hazardous municipal or industrial solid wastes, or any of the wastes listed above combined with biosolids, sewage sludge, domestic septage, or water treatment residuals.

(n) This chapter does not allow for the registration of sewage sludge, biosolids, or domestic septage processing operations or facilities. Such facilities or operations are required to obtain a permit.

(o) This chapter does not authorize sewage sludge, biosolids, or domestic septage processing operations unless the processing occurs at a treatment works. Processing operations that are not located at a treatment works must be authorized under Chapter 330 of this title (relating to Municipal Solid Waste) or Chapter 332 of this title (relating to Composting). The final use and disposal of materials processed at an authorized processing facility may be authorized in accordance with this chapter. Processing permits that were issued on or prior to the effective date of the amendments to this chapter are to continue under the rule requirements as they existed immediately prior to the effective date of the amendments.

§312.4. Required Authorizations or Notifications.

(a) Permits. Except where in conflict with other chapters in this title, a permit shall be required before any storage, processing, incineration, [or] disposal of sewage sludge, biosolids, or water treatment residuals in a monofil, except for storage allowed under this section, §312.50 of this title (relating to the Storage and Staging of Biosolids and Domestic Septage \[\text{Sludge at Beneficial Use Sites}\]), §312.61(c) of this title (relating to Applicability), §312.147 of this title (relating to Temporary Storage), and §312.148 of this title (relating to Secondary Transportation of Waste). Any permit authorizing disposal of sewage sludge, biosolids, or water treatment residuals in a monofil shall be in accordance with any applicable standards of Subchapter C of this chapter (relating to Surface Disposal) or §312.101 of this title (relating to Incineration). No permit will be required under this chapter if issued in accordance with other requirements of the commission, as specified in §312.5 of this title (relating to Relationship to Other Requirements).

(1) Effective September 1, 2003, a permit is required for the beneficial land application of Class B sewage sludge. All registrations for the land application of Class B sewage sludge will expire on or before August 31, 2003. A person holding a registration to land apply sewage sludge who submitted an administratively complete permit application on or before September 1, 2002, may continue operations under the existing registration until final commission action on the permit application. For applications that also authorize the use of Class A, sewage sludge, domestic septage, or water treatment plant sludge, only the provisions for the use of Class B sewage sludge will expire on August 31, 2003; the other provisions will expire on the expiration date of the registration or when a permit authorizing the use of Class A sewage sludge, domestic septage, or water treatment plant sludge is issued for the site.

(1) (2) The effective date of a permit is the date that the executive director signs the permit.
(2) [¶3] Site permit information on file with the commission must be confirmed or updated, in writing, whenever the mailing address and/or telephone number of the owner or operator is changed, or whenever requested by the commission.

(3) [¶4] If a permit is required under this chapter, all activities at the site under this chapter, except transportation, shall be incorporated in the permit.

(4) [¶5] The commission may not issue a Class B biosolids [sewage sludge] permit for a land application unit that is located both in a county that borders the Gulf of Mexico and within 500 feet of any water well or surface water.

(b) Notification of certain Class A or Class AB biosolids [sewage sludge] land application activities.

(1) If biosolids do not exceed [sewage sludge meets] the metal concentration limits in Table 3 of §312.43(b)(3) of this title (relating to Metal Limits), meets the Class A or Class AB pathogen reduction requirements in §312.82(a) of this title (relating to Pathogen Reduction), and meets one of the requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction), it will not be subject to the requirements of §312.10 of this title (relating to Permit and Registration Applications Processing), §312.11 of this title (relating to Permits), §312.12 of this title (relating to Registrations), and §312.13 of this title (relating to Actions and Notice), except as provided in this subsection.

(2) Any generator in Texas or any person who first conveys sewage sludge or biosolids from out of state into the State of Texas and who proposes to store, land apply, or market and distribute biosolids [sewage sludge] meeting the standards of this subsection shall submit notification to the executive director, at least 30 days prior to engaging in such activities for the first time on a form approved by the executive director. A completed notification form shall be submitted to the Water Quality Division by certified mail, return receipt requested. The notification must contain information detailing:

(A) biosolids [sewage sludge] classification, all points of generation, and wastewater treatment facility identification;

(B) name, address, telephone number, and the longitude and latitude of the site for all persons who are being proposed to receive the biosolids [sewage sludge] directly from the generator;

(C) a description in a marketing and distribution plan that describes any of the following activities:

(i) to sell or give away biosolids [sewage sludge] directly to the public, including a general description of the types of end uses proposed by persons who will be receiving the biosolids [sewage sludge];

(ii) methods of distribution, marketing, handling, and transportation of the biosolids [sewage sludge];

(iii) a reasonable estimate of the expected quantity of biosolids [sewage sludge] to be generated or handled by the person making the notification; and

(iv) a description of any proposed storage and the methods that will be employed to prevent surface water runoff of the biosolids [sewage sludge] or contamination of groundwater; and

(D) prior to land application, a map showing the buffer zone areas required under §312.44(c)(2)(D) and (E) of this title (relating to Management Practices) for all persons who are being proposed to receive the biosolids [sewage sludge] directly from the generator that meets one of the Class AB pathogen reduction requirements in §312.82(a)(2) of this title.

(3) Thirty days after the notification has occurred, the activities regulated by this subsection may commence unless the executive director determines that the activities do not meet the requirements of this subsection or an applicant's permit. After receiving a notification, the executive director may review a generator's activities or the activities of the person conveying the biosolids [sewage sludge] into Texas to determine whether any or all [¶6] the requirements of this chapter are necessary. In making this determination, the executive director will consider specific circumstances related to handling procedures, site conditions, or the application rate of the biosolids [sewage sludge]. The executive director may review a proposal for storage of biosolids [sewage sludge], considering the amount of time and the amount of material described on the notification. Also, in accordance with §312.41 of this title (relating to Applicability), any reasonably anticipated adverse effect that may occur due to a metal pollutant in the biosolids [sewage sludge] may also be considered.

(4) Annually, on September 30th [¶7], each person subject to notification of certain Class A and Class AB biosolids [sewage sludge] activities required by this subsection shall provide a report to the executive director [commission], which shows in detail all activities described in paragraph (2) of this subsection that occurred during the current year ([in the] reporting period September 1st of previous year to August 31st of current year). The report must include an update of new information since the prior report or notification was submitted and all newly proposed activities. The report must also include a description of the annual amounts of biosolids [sewage sludge] provided to each initial receiver from the in-state generator and for persons who convey out-of-state biosolids [sewage sludge] into Texas, the amounts provided from this person directly to any initial receivers and an updated list of persons receiving the biosolids [sewage sludge]. This report can be combined with the annual report(s) required under §312.48 of this title (relating to Reporting), §312.68 of this title (relating to Reporting), or §312.128 [¶8] §312.123 of this title (relating to Annual Report).

(c) Registration of land application units [sites].

(1) Registrations [Effective September 1, 2003, registrations] may only be obtained for the land application of Class A or Class AB biosolids [sewage sludge] that do [does] not meet the requirements of subsection (b) of this section, water treatment residuals [plant sludge], and domestic septage.

(2) The effective date of the registration is the date that the executive director signs the registration [in accordance with §312.12(d) of this title]. Site registration information on file with the commission must be confirmed or updated, in writing, whenever the mailing address and/or telephone number of the owner or operator is changed or requested by the executive director.

(d) Authorization. No person may cause, suffer, allow, or permit any activity of land application [for beneficial use] of biosolids, water treatment residuals, or domestic septage [sewage sludge] unless such activity has received the prior written authorization of the commission.

§312.5. Relationship to Other Requirements.

Disposal of sewage sludge, biosolids, or water treatment residuals [sludge] in a municipal solid waste landfill unit, as defined in 40 Code of Federal Regulations (CFR) §258.2, that complies with the requirements in 40 CFR Part 257 [§257] and Part 258 [§258] constitutes compliance with federal Clean Water Act (CWA), §405(d) of the Clean Water Act (CWA). Any person who prepares sewage sludge, biosolids, or water treatment residuals [sludge] that are [is] disposed of in a municipal solid waste landfill unit shall ensure that the sewage sludge, biosolids, or water treatment residuals [sludge] meets the
requirements in 40 CFR Part 258 [§258] concerning the quality of materials disposed of in a municipal solid waste landfill unit. Storage, processing, or disposal of sewage sludge or biosolids authorized by a permit issued pursuant to Texas Water Code, §26.027, [of the Texas Water Code] will not require a separate permit authorization pursuant to this chapter, for the same activities. Sewage sludge, biosolids, or water treatment residuals [sludge] that are [is] disposed of in a municipal solid waste landfill unit, as defined in 40 CFR §258.2, are [is] not subject to the fee schedules of this chapter.

§312.6. Additional or More Stringent Requirements.
On a case-by-case basis, the commission or executive director may impose requirements for the use or disposal of sewage sludge, biosolids, domestic septage, or water treatment residuals in addition to or more stringent than the requirements in this chapter when necessary to protect human [public] health and the environment from any adverse effect from [of a pollutant in the] sewage sludge, biosolids, domestic septage or water treatment residuals.

§312.7. Sampling and Analysis.
(a) Representative samples of sewage sludge, biosolids, [or] domestic septage, or water treatment residuals that are land [is] applied [to the land] or placed on a surface disposal site shall be collected and analyzed.

(b) Representative samples of sewage sludge or biosolids fired in an [a sewage sludge] incinerator shall be collected and analyzed.

(c) The following methods, other methods as approved by the executive director, or the latest revision shall be used to analyze samples of sewage sludge, biosolids, water treatment residuals, or domestic septage.


§312.8. General Definitions.

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

(1) 25-year, 24-hour rainfall event--The maximum rainfall event with a probable recurrence interval of once in 25 years, with a duration of 24 hours as defined by the National Weather Service in Technical Paper Number 40, Rainfall Frequency Atlas of the United States, May 1961, and subsequent amendments, or equivalent regional or state rainfall information developed from it.

(2) Active disposal [sludge] unit--A disposal [sludge] unit that has not closed and/or is still receiving sewage sludge, biosolids, domestic septage, or water treatment residuals.

(3) Aerobic digestion--The biochemical decomposition of organic matter in sewage sludge into carbon dioxide, water, and other by-products by microorganisms in the presence of free oxygen.

(4) Agricultural land--Land on which a food crop, a feed crop, or a fiber crop is grown. This includes range land and land used as pasture.

(5) Agricultural management unit--A portion of a land application area contained within an identifiable boundary, such as a river, fence, or road, where the area has a known crop or land use history.

(6) Agronomic rate--The whole [sludge] application rate (dry weight basis) designed:

(A) to provide the amount of nitrogen needed by the crop or vegetation grown on the land; and

(B) to minimize the amount of nitrogen [in the sewage sludge] that passes below the root zone of the crop or vegetation [grown on the land] to the groundwater.

(7) Anaerobic digestion--The biochemical decomposition of organic matter in sewage sludge into methane gas, carbon dioxide, and other by-products by microorganisms in the absence of free oxygen.

(8) Annual metal loading rate--The maximum amount of a metal [pollutant] (dry weight basis) that can be applied to a land application unit [area of land] during a 365-day period.

(9) Annual whole [sludge] application rate--The maximum amount of biosolids, domestic septage, or water treatment residuals [sewage sludge] that can be applied to a land application unit [area of land] during a 365-day period.

(10) Applied uniformly--Land application conducted in [Sewage sludge placed on the land for beneficial use] such a way that the agronomic rate is not exceeded anywhere in the land application unit [application area].

[11] Apply sewage sludge or sewage sludge applied to the land--Land application or the spraying/spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil.

[12] Aquifer--A geologic formation, group of geologic formations, or a portion of a geologic formation capable of yielding groundwater to wells or springs.

[13] Base flood--A flood that has a 1% chance of occurring in any given year.

[14] Beneficial use--The land application of biosolids or domestic septage [Placement of sewage sludge onto land] in a manner that complies with the requirements of Subchapter B of this chapter (relating to Land Application [for Beneficial Use] and Storage of Biosolids and Domestic Septage), or the land application of...
water treatment residuals in a manner that complies with the requirements of Subchapter F (relating to Land Application, Storage, and Disposal of Water Treatment Residuals) [at Beneficial Use Sites].] and does not exceed the agronomic [need or rate] for a food, fiber, feed, or turf [cover] crop, or any metal or toxic constituent limitations that the food, fiber, feed, or turf [cover] crop may have. Land application of biosolids, water treatment residuals, or domestic septage [Placement of sewage sludge on the land] at a rate below the optimal agronomic rate will be considered a beneficial use.

(14) Beneficial use site—An area of land that contains one or more land application units.

(15) Biosolids--Sewage sludge that has been treated or processed to meet Class A, Class AB, or Class B pathogen standards under this chapter for beneficial use.

(16) [(15)] Bulk biosolids--Biosolids [sewage sludge--Sewage sludge] that are [is] not sold or given away in a bag or other container for land application [to the land].

(17) [(16)] Certified nutrient management specialist--An organization in Texas or an individual who is currently certified as a nutrient management specialist through a United States Department of Agriculture-Natural Resources Conservation Service recognized certification program.

(18) [(17)] Class A biosolids--Biosolids [sewage sludge--Sewage sludge] meeting the metal limits in §312.43(b)(1) and (3) of this title (relating to Metal Limits) and the pathogen reduction requirements in §312.82(a)(1)(B) of this title (relating to Pathogen Reduction).

(19) [(18)] Class AB biosolids--Biosolids [sewage sludge--Sewage sludge] meeting the metal limits in §312.43(b)(1) and (3) of this title (relating to Metal Limits) and the pathogen reduction requirements in §312.82(a)(1)(A) of this title (relating to Pathogen Reduction).

(20) [(19)] Class B biosolids--Biosolids [sewage sludge--Sewage sludge] meeting the metal limits in §312.43(b)(1) of this title (relating to Metal Limits) and one of the pathogen reduction requirements in §312.82(b) of this title (relating to Pathogen Reduction).

(21) [(20)] Contaminate an aquifer--To introduce a substance that causes the maximum contaminant level for nitrate in 40 Code of Federal Regulations (CFR) §141.11, as amended, to be exceeded in groundwater or that causes the existing concentration of nitrate in groundwater to increase when the existing concentration of nitrate in the groundwater already exceeds the maximum contaminant level for nitrate in 40 CFR §141.11, as amended.

(22) [(21)] Cover--Soil or other material used to cover sewage sludge, biosolids, domestic septage, or water treatment residuals placed on an active disposal [sludge] unit.

(23) [(22)] Cover crop--Grasses or small grain crop, such as oats, wheat, or barley, not grown for harvest.

(24) [(23)] Cumulative metal loading rate--The maximum amount of an inorganic pollutant (dry weight basis) that may be applied to a land application unit [area of land].

(25) Debris --Solid material such as rubber, plastic, glass, or other trash that may pass through a wastewater treatment process or sewage sludge or biosolids process. Also, material that may be collected with domestic septage. This solid material is visibly distinguishable from sewage sludge, biosolids, and domestic septage. This material does not include grit or screenings removed during the preliminary treatment of domestic sewage at a treatment works, nor does it include grit trap waste.

(26) [(24)] Density of microorganisms--The number of microorganisms per unit mass of total solids (dry weight basis) in the sewage sludge or biosolids.

(27) [(25)] Displacement--The relative movement of any two sides of a fault measured in any direction.

(28) [(26)] Disposal--The placement of sewage sludge, biosolids, domestic septage, or water treatment residuals on the land for any purpose other than beneficial use. Disposal does not include placement onto the land where the activity has been approved by the executive director or commission as storage or temporary storage and it occurs only for the period of time expressly approved.

(29) Disposal unit--Land that only sewage sludge or biosolids is placed for disposal. A sewage sludge or biosolids unit must be used for sewage sludge and biosolids. This does not include land that sewage sludge and biosolids is either stored or treated.

(30) Disposal unit boundary--The outermost perimeter of a surface disposal site.

(31) [(27)] Domestic septage--Either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receives only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works that receives either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap.

(32) [(28)] Domestic sewage--Waste and wastewater from humans or household operations that is discharged to a wastewater collection system or otherwise enters a treatment works.

(33) [(29)] Dry weight basis--Calculated based on the basis of having been dried at 105 degrees Celsius until reaching a constant mass (i.e., essentially 100% solids content).

(34) [(30)] Experimental use--Non-routine beneficial use land application or reclamation projects where sewage sludge or biosolids are [is] added to the soil for research purposes, in pilot projects, feasibility studies, or similar projects.

(35) [(31)] Facility--Includes all contiguous land, structures, other appurtenances, and improvements on the land used for the surface disposal, land application [for beneficial use], or incineration of sewage sludge.

(36) [(32)] Fault--A fracture or zone of fractures in any materials along which strata, rocks, or soils on one side are displaced with respect to strata, rocks, or soil on the other side.

(37) [(33)] Feed crops--Crops produced primarily for consumption by domestic livestock, such as swine, goats, cattle, horses, or poultry.

(38) [(34)] Fiber crops--Crops such as flax and cotton.

(39) [(35)] Final cover--The last layer of soil or other material placed on a sludge or biosolids unit at closure.

(40) [(36)] Floodway--A channel of a river or watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the surface elevation more than one foot.

(41) [(37)] Food crops--Crops consumed by humans. These include, but are not limited to, fruits, vegetables, and tobacco.

(42) [(38)] Forest--Land densely vegetated with trees and/or underbrush.
(43) Grease trap waste--Material collected in and from a grease interceptor in the sanitary sewer service line of a commercial, institutional, or industrial food service or processing establishment, including the solids resulting from dewatering processes.

(44) [39] Grit trap--A unit/chamber that allows for the sedimentation of solids from an influent liquid stream by reducing the flow velocity of the influent liquid stream. In a grit trap, the inlet and the outlet are both located at the same vertical level, at, or very near, the top of the unit/chamber; the outlet of the grit trap is connected to a sanitary sewer system. A grit trap is not designed to separate oil and water.

(45) [40] Grit trap waste--Waste collected in a grit trap. Grit trap waste includes waste from grit traps placed in the drains prior to entering the sewer system at maintenance and repair shops, automobile service stations, car washes, laundries, and other similar establishments. The term does not include material collected in an oil/water separator or in any other similar waste management unit designed to collect oil.

(46) [41] Groundwater--Water below the land surface in the saturated zone.

(47) [42] Harvesting--Removal of a food, fiber, feed or turf crop from a land application unit by the means [Any act] of cutting, picking, drying, baling, or gathering. The act of cutting and leaving vegetative material on the land application unit is not considered harvesting [. and/or removing vegetation from a field, or storing.]

(48) [43] Holocene time--The most recent epoch of the Quaternary period, extending from the end of the Pleistocene Epoch to the present. Holocene time began approximately 10,000 years ago.

(49) Incinerator--An apparatus for burning sewage sludge or biosolids at high temperatures until it is reduced to ash.

(50) [44] Incorporation--Mixing the applied material evenly through the top three inches of soil.

(51) [45] Industrial wastewater--Wastewater generated in a commercial or industrial process.

(52) [46] Institution--An established organization or corporation, especially of a public nature or where the public has access, such as child care facilities, public buildings, or health care facilities.

(53) Irrigation conveyance canal--A canal that is constructed to convey water from the source of supply to one or more farms.

(54) Lagoon--A surface impoundment located on site at a wastewater treatment plant for the storage of sewage sludge or biosolids. Any other type of impoundment must be considered an active disposal unit.

(55) [47] Land application or land apply or land applied--The spraying or spreading of biosolids, domestic septage, or water treatment residuals [sewage sludge] onto the land surface; the injection of biosolids, domestic septage, or water treatment residuals [sewage sludge] below the land surface; or the incorporation of biosolids, domestic septage, or water treatment residuals [sewage sludge] into the soil to [so that the sewage sludge can] either condition the soil or fertilize crops or vegetation grown in the soil.

(56) Land application unit--An area where materials are applied onto or incorporated into the soil surface for beneficial use or for treatment and disposal, where the disposal occurs within five feet of the surface of the land. The term does not include manure spreading operations.

(57) [48] Land with a high potential for public exposure--Land that the public uses frequently and/or is not provided with a means of restricting public access.

(58) [49] Land with a low potential for public exposure--Land that the public uses infrequently and/or is provided with a means of restricting public access.

(59) [50] Leachate collection system--A system or device installed immediately above a liner that is designed, constructed, maintained, and operated to collect and remove leachate from a disposal [sludge] unit.

(60) [51] Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(61) [52] Liner--Soil or synthetic material that has a hydraulic conductivity of 1 x 10^-2 centimeters per second or less. Soil liners must be of suitable material with more than 30% passing a number 200 sieve, have a liquid limit greater than 30%, a plasticity index greater than 15%, compaction of greater than 95% Standard Proctor at optimum moisture content, and will be at least two feet thick placed in six-inch lifts. Synthetic liners must be at least one mil thick with a minimum thickness of 20 mils and include an underdrain leak detection system.

(62) [53] Lower explosive limit for methane gas--The lowest percentage of methane in air, by volume, that propagates a flame at 25 degrees Celsius and atmospheric pressure.

(63) [54] Major sole-source impairment zone--A watershed that contains a reservoir that is used by a municipality as a sole source of drinking water supply for a population of more than 140,000, inside and outside of its municipal boundaries; and into which at least half of the water flowing is from a source that, on September 1, 2001, is on the list of impaired state waters adopted by the commission as required by 33 United States Code, §1313(d), as amended, at least in part because of concerns regarding pathogens and phosphorus, and for which the commission at some time prepared and submitted a total maximum daily load standard.

(64) [55] Metal limit--A numerical value that describes the amount of a metal allowed per unit amount of sewage sludge, biosolids, or water treatment residuals (e.g., milligrams per kilogram of total solids); the amount of a metal [pollutant] that can be applied to or disposed onto a land application unit [area of land] (e.g., kilograms per hectare); or the volume of a material that can be applied to a land application unit [area of land] (e.g., gallons per acre).

(65) [56] Monofil--A landfill or landfill trench in which sewage sludge, biosolids, or water treatment residuals are [is] the only type of solid waste placed.

(66) [57] Municipality--A city, town, county, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created by or under state law; an Indian tribe or an authorized Indian tribal organization having jurisdiction over sewage sludge or biosolids management; or a designated and approved management agency under federal Clean Water Act, §208, as amended. The definition includes a special district created under state law, such as a water district, sewer district, sanitary district, or an integrated waste management facility as defined in federal Clean Water Act, §201(e), as amended, that has as one of its principal responsibilities the treatment, transport, use, or disposal of sewage sludge or biosolids.

(67) [58] Off-site--Property that cannot be characterized as "on-site."
(68) [§809] On-site--The same or contiguous property owned, controlled, or supervised by the same person. If the property is divided by public or private right-of-way, the access must be by crossing the right-of-way or the right-of-way must be under the control of the person.

(69) [§810] Operator--The person responsible for the overall operation of a facility, land application unit, or surface disposal site [beneficial use site].

(70) [§811] Other container--Either an open or closed receptacle, including, but not limited to, a bucket, box, or a vehicle or trailer with a load capacity of one metric ton (2,200 pounds) or less.

(71) [§812] Owner--The person who owns a facility or part of a facility.

(72) [§813] Pasture--Land that animals feed directly on for feed crops such as legumes, grasses, grain stubble, forbs, or stover.

(73) [§814] Pathogenic organisms--Disease-causing organisms including, but not limited to, certain bacteria, protozoa, viruses, and viable helminth ova.

(74) [§815] Person who prepares sewage sludge or biosolids--Either the person who generates sewage sludge or biosolids during the treatment of domestic sewage in a treatment works or the person who derives a material from sewage sludge or biosolids.

(75) [§816] Place or placed sewage sludge or biosolids [or sewage sludge placed]--Disposal of sewage sludge or biosolids on a surface disposal site.

(76) [§817] Pollutant--An organic or inorganic substance, or a pathogenic organism that, after discharge and upon exposure, ingestion, inhalation, or assimilation into an organism either directly from the environment or indirectly by ingestion through the food chain, could, on the basis of information available to the executive director, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunction in reproduction), or physical deformations in either organisms or offspring of the organisms.

(77) Precipitation--Deposit on the land of rain, mist, hail, sleet, or snow that falls on the ground under the action of gravitational force.

(78) [§818] Process or processing--For the purposes of this chapter, these terms shall have the same meaning as "treat" or "treatment."

(79) [§819] Public contact site--Land with a high potential for contact by the public. This includes, but is not limited to, public parks, ball fields, cemeteries, plant nurseries, turf farms, and/or golf courses.

(80) [§820] Range land--Open land with indigenous vegetation.

(81) [§821] Reclamation site--Drastically disturbed land that is reclaimed using sewage sludge or biosolids. This includes, but is not limited to, strip mines and/or construction sites.

(82) [§822] Runoff--Rainwater, leachate, or other liquid that drains overland on any part of a land surface and runs off of the land surface.

(83) [§823] Seismic impact zone--An area that has a 10% or greater probability that the horizontal ground level acceleration of the rock in the area exceeds 0.10 gravity once in 250 years.

(84) [§824] Sewage sludge--Solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in treatment works. Sewage sludge includes, but is not limited to, domestic septage, scum, or solids removed in primary, secondary, or advanced wastewater treatment processes; and material derived from sewage sludge. Sewage sludge does not include ash or grit and screenings generated during preliminary treatment of domestic sewage in a treatment works.

(75) Sewage sludge debris--Solid material such as rubber, plastic, glass, or other trash that may pass through a wastewater treatment process or sludge process may be collected with sewage. This solid material is visibly distinguishable from sewage sludge. This material does not include grit or screenings removed during the preliminary treatment of domestic sewage at a treatment works; nor does it include grit trap waste.

(76) Sludge lagoon--An existing surface impoundment located on site at a wastewater treatment plant for the storage of sewage sludge. Any other type impoundment must be considered an active sludge unit, as defined in this section.

(77) Sludge unit--Land that only sewage sludge is placed for disposal. A sludge unit must be used for sewage sludge. This does not include land that sewage sludge is either stored or treated.

(78) Sludge unit boundary--The outermost perimeter of a surface disposal site.

(85) [§825] Sole-source surface drinking water supply--A body of surface water that is identified as a public water supply in §307.10 of this title (relating to Appendices A - G) and is the sole source of supply of a public water supply system, exclusive of emergency water connections.

(86) [§826] Source-separated organic material--As defined in §332.2 of this title (relating to Definitions).

(87) [§827] Specific oxygen uptake rate--The mass of oxygen consumed per unit time per unit mass of total solids (dry weight basis) [in the sewage sludge].

(88) Stabilization--A chemical or biological process that stops the natural fermentation process.

(89) [§828] Staging--Temporary holding of sewage sludge, biosolids, domestic septage, or water treatment residuals, at a land application unit [beneficial use site], for up to a maximum of seven calendar days per each staging location, prior to the land application of the sewage sludge.

(90) [§829] Store or storage--The placement of sewage sludge, biosolids, domestic septage, or water treatment residuals on land or in an enclosed vessel for longer than seven days.

(91) Surface disposal site--An area of land that contains one or more active disposal units.

(92) Surface impoundment--A facility or part of a facility that is a natural topographic depression, human-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), that is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and that is not an injection well. Examples of surface impoundments include: holding, storage, settling, and aeration pits, ponds, and lagoons.

(93) [§830] Temporary storage--Storage of waste regulated under this chapter by a transporter, which has been approved in writing by the executive director, in accordance with §312.147 of this title (relating to Temporary Storage).
(94) [853] Three hundred sixty-five day period--A running total that covers the period between land [sludge] application to a site and the nutrient uptake of the feed, food, fiber, or turf [cover] crop.

(95) [864] Total solids--The amount of solids in a material [materials in sewage sludge] that remain as residue when the material [of sewage sludge] is dried at 103 degrees Celsius to 105 degrees Celsius.

(96) [872] Transporter--Any person who collects, conveys, or transports sewage sludge, biosolids, water treatment residuals [plant sludges], grit trap waste, grease trap waste, chemical toilet waste, or domestic [and/or] septage by roadway, ship, rail, or other means.

(97) [889] Treat or treatment [of sewage sludge]--The preparation of sewage sludge, biosolids, domestic septage, or water treatment residuals for final use or disposal. This includes, but is not limited to, thickening, stabilization, initial alkali addition for pathogen or vector control, and dewatering [of sewage sludge]. This term does not include storage of sewage sludge, biosolids, domestic septage, or water treatment residuals, or subsequent alkali addition for pathogen or vector control.

(98) [890] Treatment works--Either a federally owned, publicly owned, or privately-owned [privately owned] device or system used to treat (including recycle and reclaim) either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature, located at an authorized wastewater treatment plant.

(99) Turf crop--Grass and the surface layer of earth held together by its roots that is grown and harvested as sod, sprigs, or plugs, primarily for the establishment of lawns.

(100) [901] Unstabilized solids--Organic materials in sewage sludge or biosolids that have not been treated in either an aerobic or anaerobic treatment process.

(101) [911] Unstable area--Land subject to natural or human induced forces that may damage the structural components of an active disposal unit or land application [sewage sludge] unit. This includes, but is not limited to, land that the soils are subject to mass movement.

(102) [921] Vector attraction--The characteristic of sewage sludge, biosolids, and domestic septage that attracts rodents, flies, mosquitoes, or other organisms capable of transporting infectious agents.

(103) [932] Volatile solids--The amount of the total solids in a material that is [sewage sludge] lost when the material [sewage sludge] is combusted at 550 degrees Celsius in the presence of excess oxygen.

(104) Waste pile--Any noncontainerized accumulation of solid, nonflowing waste that is used for treatment or storage.

(105) [941] Water treatment residuals--Material [sludge Sludge] generated during the treatment of either surface water or groundwater for potable use, which is not an industrial solid waste as defined in §335.1 of this title (relating to Definitions).

(106) [953] Wetlands--Those areas that are inundated or saturated by surface water or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

§312.9. [Sludge] Fee Program.

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

(1) Annual fee--A fee charged to each person holding a registration or permit under the commission's authority in Texas Health and Safety Code, Chapter 361, or a permit issued under the commission's authority in Texas Water Code, Chapter 26, except that a fee will not be assessed under this chapter as specified in §312.5 of this title (relating to Relationship to Other Requirements).

(2) Reported--Information compiled and submitted to the executive director [commission] that tracks the amount of waste being stored, treated, processed, transported, or disposed of in the state; tracks the amount of processing, transporting, and disposal capacity and reserve capacity; and enables equitable assessment and collection of fees.

(3) Payment--Receipt by the executive director [commission] of the full amount of the annual fee(s) due.

(b) Except as provided in subsection (f) of this section, the amount of the annual fee that is assessed is determined by weight of solids disposed of and reported to the executive director [commission] as of September 30th [30th] of each year (reporting period September 1st of previous year to August 31st of current year). Failure to report this information [the disposal of sewage sludge or water treatment sludge] does not exempt a registrant or permittee from this fee. The fees are as follows.

(1) The minimum fee assessed against each registration or permit is $100, regardless of whether the site is active or inactive.

(2) When water treatment residuals are [sludge is] mixed with a Class B biosolids [sewage sludge] or when Class B biosolids are land applied, [sewage sludge that is classified as Class B is applied to the land for beneficial use as described in Subchapter B of this chapter (relating to Land Application for Beneficial Use and Storage at Beneficial Use Sites)] the fee is $0.75 per dry ton.

(3) When sewage sludge or water treatment sludge is applied to a site for disposal and the disposal was authorized by the commission or predecessor agency prior to October 1, 1995, the fee is $1.25 per dry ton.

(4) When biosolids are [sewage sludge is] applied to a site for disposal or when water treatment residuals are [sludge is] applied to a site for disposal and the activity requires a permit as specified in Subchapter F of this chapter (relating to Land Application, Storage, and Disposal of Water Treatment Residuals), [Sludge], and the disposal is authorized by the commission or predecessor agency on October 1, 1995, or thereafter, the fee is $1.25 per ton.

(5) When water treatment residuals are [sludge is] applied to a site for beneficial use or disposal and the activity does not require a permit as specified in Subchapter F of this chapter, the fee is $0.20 per dry ton.

(6) When sewage sludge or biosolids are [is] fired in an [a sewage sludge] incinerator [as described in Subchapter E of this chapter (relating to Guidelines and Standards for Sludge Incinerations)], the fee is $0.25 per dry ton.

(7) An annual transporter fee is assessed against each person or entity holding a registration to transport sewage sludge, biosolids, water treatment residuals [sludge], domestic septage, chemical toilet waste, grease trap waste, or grit trap waste issued in accordance with Subchapter G of this chapter (relating to Transporters and Temporary Storage Provisions). The amount of the annual fee must be based upon the total annual volume of waste transported by the transporter under
each registration and reported to the executive director [commission] as of June 15th [15], each year. Failure to report the transportation of waste does not exempt a registrant from this fee. The fees are as follows.

(1) For a total annual volume transported of 10,000 gallons (50 cubic yards) or less, the fee is $100.

(2) For a total annual volume transported greater than 10,000 gallons (50 cubic yards) but equal to or less than 50,000 (250 cubic yards), the fee is $250.

(3) For a total annual volume transported greater than 50,000 gallons (250 cubic yards) but equal to or less than 200,000 gallons (1,000 cubic yards), the fee is $400.

(4) For a total annual volume transported of greater than 200,000 gallons (1,000 cubic yards), the fee is $500.

(d) Permit [Sludge permit] and registration holders shall submit [the] annual reports in accordance with §312.48(1) of this title (relating to Reporting) no later than September 30th [2] of each calendar year, for a reporting period covering September 1st [4] of the previous calendar year to August 31st [4] of the current calendar year. Fees assessed in subsection (b) of this section must be paid by the registrant or permittee on or before the due date specified in the invoice each year. Fees assessed in subsection (c) of this section must be paid by the registrant after billing by the executive director, prior to September 1st [4], of each year. Fees must be paid by check, certified check, or money order payable to the Texas Commission on Environmental Quality. The permittee or registrant of a facility failing to make payment of the fees imposed under this subchapter when due shall be assessed penalties and interest in accordance with Chapter 12 of this title (relating to Payment of Fees).

(e) Failure of the registrant or permittee to submit the required fee within 30 days of billing, shall be sufficient cause for the commission to revoke the registration or permit and authorization to process or dispose of waste. Any entity to whom a registration or permit is transferred shall be liable for payment of the annual fee on the same basis as the transferee.

(f) No fee will be assessed for sewage sludge, biosolids, or water treatment residuals [sludge] composted with source-separated organic material at a composting facility, including a composting facility located at a permitted landfill site. This subsection does not apply if the biosolids or residuals are [sludge is] not used as compost and are [is] deposited in a surface disposal site or landfill.

(g) Applicants [Sludge permit holders] shall submit permit application fees for Class B biosolids permit applications [sewage sludge].

(1) Any person who applies for a new permit, permit renewal, or permit amendment shall pay a permit application fee. The fees in this subsection relating to application for a permit, permit renewal, or major amendment supersede [supersede] the fees in §305.53 of this title (relating to Application Fee). An application for a minor amendment or permit transfer must be submitted in accordance with §305.53 of this title. The commission may not consider an application for final decision until such time as the permit application fee is paid. All permit application fees must be made payable to the commission and paid at the time the application for a permit is submitted.

(2) The executive director may not process an application until all delinquent annual fees and delinquent administrative penalties owed the commission by the applicant or for the site as delineated in the permit application are paid in full. Any permittee to whom a permit is transferred shall be liable for payment of the annual fees assessed for the permitted entity/site on the same basis as the transferee of the permit, as well as any outstanding fees and associated penalties owed the commission. If the applicant is not the permittee at the time fees become delinquent or against whom administrative penalties are assessed, the executive director may for good cause waive the applicant’s liability under this subsection for payment of delinquent annual fees or delinquent administrative penalties.

(3) An applicant may file a written request for a refund in the amount of 50% of the permit application fee paid if the permit is not issued. No fees will be refunded after a new permit, permit renewal, permit modification, permit amendment, or permit transfer has been issued by the commission. Transfer of a permit will not entitle the permittee to a refund, in whole or part, of any fee already paid by that permittee.

(4) The permit application fees will be between $1,000 and $5,000, based on the quantity of biosolids [sewage sludge] to be applied annually under the permit, as shown in the following schedule:

<table>
<thead>
<tr>
<th>Fee Level</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A)</td>
<td>$1,000, if the quantity is 2,000 dry tons or less;</td>
</tr>
<tr>
<td>(B)</td>
<td>$2,000, if the quantity is greater than 2,000 dry tons but less than or equal to 5,000 dry tons;</td>
</tr>
<tr>
<td>(C)</td>
<td>$3,000, if the quantity is greater than 5,000 dry tons but less than or equal to 10,000 dry tons;</td>
</tr>
<tr>
<td>(D)</td>
<td>$4,000, if the quantity is greater than 10,000 dry tons but less than or equal to 20,000 dry tons; or</td>
</tr>
<tr>
<td>(E)</td>
<td>$5,000, if the quantity is greater than 20,000 dry tons.</td>
</tr>
</tbody>
</table>

§312.10. Permit and Registration Applications Processing.

(a) Applications for permits, registrations, or other types of approvals required by this subchapter shall be reviewed by staff for administrative completeness within 14 calendar days of receipt of the application by the executive director.

(b) Permit and registration applications must include all information required by §312.11 of this title (relating to Permits), §312.12 of this title (relating to Registrations), or §312.14 of this title (relating to Transporter Registration).

(c) Upon receipt of an application for a permit or registration, excluding transportation registrations, the executive director shall assign the application a number for identification purposes, and prepare a Notice of Receipt of Application and Declaration of Administrative Completeness for domestic septage registrations or Notice of Receipt of Application and Intent to Obtain Permit for permits where applicable, which is suitable for publishing or mailing, and forward that notice to the Office of the Chief Clerk. The Office of the Chief Clerk shall notify every person entitled to notification of a particular application as described in §312.13 of this title (relating to Actions and Notice).

(d) The Notice of Receipt of Application and Declaration of Administrative Completeness for domestic septage registrations or Notice of Receipt of Application and Intent to Obtain Permit for permit where applicable, must contain the information required by Chapter 39 of this title (relating to Public Notice), Texas Water Code, §5.552(c), and the approximate anticipated date of the first land application of Class B biosolids [sludge] to the proposed land application unit.

(e) For land application, processing, disposal, storage, or incineration permits or sewage sludge, biosolids, or water treatment residuals permit applications and draft permits, nothing [Nothing] in this section shall be construed so as to waive the notice and processing requirements [concerning the application and the draft permit] in accordance with Chapter 39, Subchapters H and J of this title (relating
to Applicability and General Provisions and Public Notice of Water Quality Applications and Water Quality Management Plans), Chapter 50, Subchapters E - G of this title (relating to Purpose, Applicability, and Definitions; Action by the Commission; and Action by the Executive Director), Chapter 55, Subchapters D - F of this title (relating to Applicability and Definitions; Public Comment and Public Meetings; and Requests for Reconsideration or Contested Case Hearing), or Chapter 305, Subchapters C, D, and F of this title (relating to Application for Permit or Post-Closure Order; Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits; and Permit Characteristics and Conditions) [for applications for sewage sludge land application, processing, disposal, storage, or incineration permits].

(f) All permit applications for [sewage sludge] land application, processing, disposal, storage, or incineration of sewage sludge, biosolids, or water treatment residuals are subject to the application processing procedures and requirements in §§281.18 - 281.24 of this title (relating to Applications Returned; Technical Review; Extension; Draft Permit, Technical Summary, Fact Sheet, and Compliance History; Referral to Commission; Application Amendment; and Effect of Rules).

(g) All registration applications for Class A biosolids [sewage sludge], Class AB biosolids [sewage sludge], water treatment residuals [plant sludge], and domestic septage are subject to the application processing procedures and requirements in §§281.18 - 281.20 of this title.

(h) A registration or permit will be cancelled upon receipt of a written request for cancellation from either the site operator or landowner. The executive director will provide notice to the other party that cancellation has been requested and that cancellation will occur ten days from the issuance of notice. This notice is provided merely as a courtesy by the executive director [commission] and is not mandatory for cancellation.

(i) To transfer a registration or permit, both the site operator and the landowner must sign the transfer application. An application for transfer that is not signed by both the site operator and the landowner will be considered a request for cancellation.

(j) If a registration or permit for a site is cancelled, a complete application for registration or permit must be submitted in order to reauthorize the site. If the application is approved, the site will be authorized under the same site registration or permit number.

(k) For permits, a major amendment is defined in Chapter 305, Subchapter D of this title. For purposes of this chapter concerning registrations and except as provided in subsection (I) of this section, a major amendment for a registration is an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a registration or a substantive change in the information provided in an application for registration. Changes to registrations that are not considered major include, but are not limited to, typographical errors, changes that result in more stringent monitoring requirements, changes in site ownership, changes in site operator, or similar administrative information.

(I) Upon the effective date of this chapter, the executive director will process as a minor amendment a request by an existing permittee or registrant to change any substantive term, provision, requirement, or a limiting parameter in a permit or registration that implemented prior regulations of the commission, when it is no longer a requirement of this chapter. Notice requirements of §312.13 of this title are not applicable to a minor amendment for a registration.

(m) Term limits for registrations or permits may not exceed five years.

§312.11. Permits.
(a) The provisions of this section set the standards and requirements for permit applications [to land apply, process, store, dispose of, or incinerate sewage sludge]. Any information provided under this subsection must be submitted in quadruplicate form. A permit is required to:

1. [land apply Class B biosolids;]
2. [process (at a treatment works), store, dispose of, or incinerate sewage sludge;]
3. [process (at a treatment works), store, dispose of, or incinerate biosolids; or]
4. [disposal of water treatment residuals in a monofil.]

(b) Any person who is required to obtain or who requests a new permit or an amendment, modification, or renewal of a permit under this section is subject to the permit application procedures of §1.5(d) of this title (relating to Records of the Agency), §305.42(a) of this title (relating to Application Required), §305.43 of this title (relating to Who Applies), §305.44 of this title (relating to Signatories to Applications), §305.45 of this title (relating to Contents of Application for Permit), and §305.47 of this title (relating to Retention of Application Data). For a land application permit, the applicant must:

1. [the owner of the application site, if the biosolids were [sewage sludge was] generated outside this state; or]
2. [the site operator, if the biosolids were [sewage sludge was] generated in this state.

(c) A permit application must include all information in accordance with Chapter 281, Subchapter A of this title (relating to Applications Processing) and Chapter 305, Subchapter C of this title (relating to Application for Permit or Post-Closure Order), and must also include the following:

1. [the map required by §305.45(a)(6) of this title that provides the following information:
   A. the approximate boundaries of the site to be permitted, which must include all contiguous properties owned by or under the control of the applicant;]
   B. [the name and mailing address of the owner of each tract of land located:
   i. [within 1/4 mile of the land application unit [site to be permitted], as such information can be determined from the current county tax rolls or other reliable sources, at the time the application is filed, or other reliable sources,] for a Class B biosolids land application permit [sewage sludge beneficial land use permit applications submitted on or after September 1, 2003, or applications submitted before September 1, 2003, but not administratively complete by the commission by that date];
   ii. [within 1/2 mile of a disposal unit or incinerator [the site to be permitted], as such information can be determined from the current county tax rolls or other reliable sources, at the time the application is filed for an [for a sewage sludge] incineration or disposal permit [application]; and]
   iii. [adjacent to the site to be permitted, as such information can be determined from the current county tax rolls or other reliable sources, at the time the application is filed for a biosolids [domestic septage Class B sewage sludge beneficial use land application], sewage sludge processing or storage facility;]
   C. [the source(s) of the information for the surrounding property owners; and]
(D) the list of property owners. The list must be provided both as a hard copy, either on the map or as an attached list, and in electronic format or on four sets of self-adhesive mailing labels; and

(2) a notarized affidavit from the applicant(s) verifying land ownership of the permitted site or landowner agreement to the proposed activity.

(d) A permit application for land application of Class B biosolids [sewage sludge] must also include the following information:

(1) the information listed in §312.12(a)(1)(A) - (C) [§312.12(b)(1)(A) - (C)] of this title (relating to Registrations);

(2) analytical results establishing the background soil concentration of metals regulated by this chapter in each land application unit [the application area(s)], based on the following:

   (A) samples taken from the zero to six-inch zone of soil [to be affected by the addition of sewage sludge (including domestic septages)];
   
   (B) soil samples that accurately show soil conditions in the application area(s) and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;
   
   (C) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;
   
   (D) a separate composite sample taken from each United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) soil type (soils with the same characterization or texture), unless an alternate method is used; and
   
   (E) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

   (3) analytical results establishing the background soil concentration of nutrients, salinity, and pH in each land application unit [the application area(s)], based on the following:

   (A) separate samples taken from the zero to six-inch and from the six to 24-inch zones of soil [to be affected by the addition of sewage sludge (including domestic septages)];
   
   (B) soil samples that accurately show soil conditions in the land application unit [area(s)] and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;
   
   (C) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;
   
   (D) a separate composite sample taken from each USDA NRCS soil type (soils with the same characterization or texture), unless an alternate method is used;
   
   (E) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

   (4) information necessary to identify the hydrological characteristics of the surface water and groundwater within 1/4 mile of the land application unit [site to be permitted];

   (5) except for applications by political subdivisions, proof of a commercial liability insurance policy and an environmental impairment policy or a similar policy in accordance with Chapter 37, Subchapter V of this title (relating to Financial Assurance for Class B Sewage Sludge for Land Application Units); and

   (6) proof that the applicant has minimized the risk of water quality impairment caused by nitrogen applied to the land application unit through the application of Class B biosolids [sewage sludge] by having had a nutrient management plan prepared by a certified nutrient management specialist in accordance with the NRCS Practice Standard Code 590.

(e) A permittee of a Class B biosolids [sewage sludge] land application unit [site] shall comply with the requirements of Chapter 37, Subchapter V of this title.

(f) Any person who is issued a permit under this section [to land apply, or to process, store, dispose of, or incinerate sewage sludge] is subject to the permit characteristics and standards set forth in §305.122 of this title (relating to Characteristics of Permits), §305.123 of this title (relating to Reservation in Granting Permit), §305.124 of this title (relating to Acceptance of Permit, Effect), §305.125 of this title (relating to Standard Permit Conditions), §305.126 of this title (relating to Additional Standard Permit Conditions for Waste Discharge Permits), §305.127 of this title (relating to Conditions to be Determined for Individual Permits), §305.128 of this title (relating to Signatories to Reports), and §305.129 of this title (relating to Variance Procedures).

(g) If any provision of a permit is violated during its term, the permittee [permit holder] is required to report to the executive director the noncompliance in accordance with Texas Health and Safety Code, §305.122 of this title (relating to Characteristics of Permits), §305.123 of this title (relating to Reservation in Granting Permit), §305.124 of this title (relating to Acceptance of Permit, Effect), §305.125 of this title (relating to Standard Permit Conditions), §305.126 of this title (relating to Additional Standard Permit Conditions for Waste Discharge Permits), §305.127 of this title (relating to Conditions to be Determined for Individual Permits), §305.128 of this title (relating to Signatories to Reports), and §305.129 of this title (relating to Variance Procedures).

   (1) a description of the noncompliance and its cause;
   
   (2) the potential danger to human health, safety, or the environment;
   
   (3) the period of noncompliance, including exact dates and times;
   
   (4) if the noncompliance has not been corrected, the anticipated time it is expected to continue; and
   
   (5) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance, and to mitigate its adverse effects.

(h) Each biosolids [sewage sludge] land application permit must include a reference to the maximum quantity of biosolids [sewage sludge] that may be land applied under the permit.

   (i) Any permittee who requests a new permit or an amendment, modification, or renewal of a permit under this section [to land apply, process, store, dispose of, or incinerate sewage sludge] is subject to the standards and requirements for applications and actions concerning amendments, modifications, renewals, transfers, corrections, revocations, denials, and suspensions of permits, as set forth in §305.62 of this title (relating to Amendments), §305.63 of this title (relating to Re-
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visions.
§312.12. Registrations.

(j) The permittee shall immediately provide written notice to the executive director of any changes to a permit or to information on soil or subsurface conditions at the site, and provide any additional information concerning changes in land ownership, site control, operator, waste composition, source of biosolids [sewage sludge], or waste management methods.

(k) For land application units [sites] located in a major sole-source impairment zone, the permittee is subject to the following provisions:

(1) The operator shall have a nutrient management plan (nitrogen and phosphorus) prepared by a certified nutrient management specialist in accordance with the USDA NRCS Practice Standard Code 590;

(2) When results of the annual soil analysis for extractable phosphorus indicate a level greater than 200 parts per million of extractable phosphorus (reported as P) in the zero to six-inch sample for a particular land application unit [field] or if ordered by the commission in order to protect the quality of water in the state, then the operator may not apply any biosolids [sewage sludge] to the affected area unless the land application is implemented in accordance with a detailed nutrient utilization plan (NUP) that has been approved by the commission.

(3) A NUP is equivalent to the NRCS Nutrient Management Plan Practice Standard Code 590. The nutrient management plan, based on crop removal, must be developed and certified by one of the following individuals or entities:

(A) an employee of the NRCS;

(B) a nutrient management specialist certified by the NRCS;

(C) the Texas State Soil and Water Conservation Board;

(D) Texas Cooperative Extension;

(E) an agronomist or soil scientist on full-time staff at an accredited university located in the State of Texas;

(F) a professional agronomist certified by the American Society of Agronomy;

(G) a certified professional soil scientist certified by the Soil Science Society of America; or

(H) a licensed Texas geoscientist-soil scientist, after approval by the executive director based on a determination by the executive director that another person or entity identified in this paragraph cannot develop the plan in a timely manner.

(4) After a NUP is implemented, the operator shall land apply in accordance with the NUP until soil phosphorus is reduced below 200 parts per million in the zero to six-inch sample. Thereafter, the operator shall implement the requirements of the nutrient management plan.

(5) The buffer zones must be maintained according to the applicable requirements specified in §312.44(c) of this title (relating to Management Practices).

(a) After August 31, 2003, all registrations for the beneficial use of Class B sewage sludge will be void. Registrations for the beneficial use of Class A sewage sludge, water treatment plant sludge, and/or domestic septage will remain valid until they expire, are renewed, are cancelled, or are revoked.

(b) Except as provided in §312.44(b) of this title (relating to Required Authorizations or Notifications), an applicant for a registration to land apply Class A biosolids [sewage sludge], Class AB biosolids [sewage sludge], water treatment residuals, and [sludge, and/or] domestic septage shall:

(1) submit to the executive director an original, completed application form approved by the executive director, along with the appropriate number of copies of the registration application. Each applicant shall submit to the executive director such information as may reasonably be required to enable the executive director to determine whether such land application for beneficial use activities are compliant with the terms of this chapter. Such information may include, but is not limited to, the following:

(A) a description and composition of the material to be land applied;

(B) a description of all processes generating the material to be land applied at the site;

(C) information about the site and the planned management of the material to be land applied, including the name, address, and telephone number of any landowner or operator at the site and the following information:

(i) whether such material is managed on site and/or off site from its point of generation;

(ii) a description of each on-site land application unit [beneficial use unit or tract], including the name, address, and telephone number of all landowners, or the same information from a landowner acting as a spokesperson(s) for all the landowners, so long as the spokesperson submits to the executive director a sworn statement allowing the spokesperson to act for other persons;

(iii) a listing of the types of material to be land applied on each land application unit [managed in each unit or tract];

(iv) a detailed description of the beneficial use occurring at each land application unit [or tract of land] where application of Class A or Class AB biosolids [sewage sludge], water treatment residuals, and [sludge, and/or] domestic septage is proposed, including proposed waste management and crop production methods; and

(v) information regarding soil characteristics and subsurface conditions and surrounding landowners, including the following, as applicable:
(i) a map depicting the approximate boundaries of the tract of land owned or under the control of the applicant and each residential or business address and owner of all the tracts of land bordering the perimeter of any portion of the site;

(ii) a list on or attached to the map of the names and addresses of the owners of such tracts of land as can be determined from the current county tax rolls at the time the application is filed, and other reliable sources. The list of property owners must be provided in both hard copy and either in electronic format or on four sets of self-adhesive mailing labels; and

(iii) the source of the information;

(I) analytical results establishing the background soil concentration of metals regulated by this chapter in each land application unit [the application area(s)], as applicable, based on the following:

(i) samples taken from the zero to six-inch zone of soil [to be affected by the addition of sewage sludge (including domestic septage)];

(ii) soil samples that accurately show soil conditions in each land application unit [the application area(s)] and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(iii) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(iv) a separate composite sample taken from each United States Department of Agriculture (USDA) Natural Resource Conservation Service (NRCS) soil type (soils with the same characterization or texture), unless an alternate method is used;

(v) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan also included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

(III) analytical results establishing the background soil concentration of nutrients, salinity, and pH in each land application unit [the application area(s)], as applicable, based on the following:

(i) separate samples taken from the zero to six-inch and from the six to 24-inch zones of soil [to be affected by the addition of sewage sludge (including domestic septage)];

(ii) soil samples that accurately show soil conditions in each land application unit [the application area(s)] and that are taken at a spatial distribution of at least one composite sample per every 80 acres or less of soil type or area being sampled;

(iii) composite samples comprised of ten to 15 samples taken from points randomly distributed across the entire soil type or area(s) being sampled;

(iv) a separate composite sample taken from each USDA NRCS soil type (soils with the same characterization or texture), unless an alternate method is used;

(v) when using an alternate method for defining areas to be sampled such as sampling by agricultural management units or other defined areas, a sampling plan also included in the application, which sufficiently establishes background soil conditions through proportionate sampling of each USDA NRCS soil type in each area sampled;

(K) any information provided under this paragraph submitted to the executive director in quadruplicate form;

(2) immediately provide written notice to the executive director of any changes, requests for an amendment, modification, or renewal of a registration, or any additional information concerning changes in land ownership, changes in site control, or operator, changes in waste composition, changes in the source of biosolids or waste treatment residuals, [sewage sludge] or waste management methods, and information regarding soils and subsurface conditions where the operation is to be located. Any information provided under this paragraph must be submitted to the executive director in duplicate form.

(b) [46] The executive director shall determine, after review of any application, whether to approve or deny an application in whole or in part, deny with prejudice, suspend the authority to conduct an activity for a specified period of time, or amend or modify the proposed activity requested by the applicant. The determination of the executive director shall include review and action on any new applications or changes, renewals, and requests for major amendment of any existing application. In consideration of such an application, the executive director shall consider all relevant requirements of this chapter and consider all information pertaining to those requirements received by the executive director regarding the application. The written determination on any application, including any authorization granted, shall be mailed to the applicant upon the decision of the executive director.

(c) [46] At the same time that the executive director's decision is mailed to the applicant, notice of this decision must also be mailed to all parties who submitted written information on the application, as described in §312.13(c)(2) and (3) of this title (relating to Actions and Notice).

(d) [46] For registered land application units [sites] located in a major sole-source impairment zone, the registrant must comply with the provisions listed in §312.11(k) of this title (relating to Permits).

§312.13. Actions and Notice.

(a) Applicability. This section sets forth the way [manner] in which action will be taken on applications filed with the executive director for either a permit or a registration to land apply, store, process, dispose of, or incinerate sewage sludge, biosolids, water treatment residuals, or domestic septage.

(b) Permit actions.

(1) All permit applications are subject to the standards and requirements as set forth in Chapter 39, Subchapters H - J of this title (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; and Public Notice of Water Quality Applications and Water Quality Management Plans), Chapter 50, Subchapters E - G of this title (relating to Purpose, Applicability, and Definitions; Action by the Commission; and Action by the Executive Director), and Chapter 55, Subchapters D - F of this title (relating to Applicability and Definitions; Public Comment and Public Meetings; and Requests for Reconsideration or Contested Case Hearing).

(2) For disposal and incineration permit applications, notice must be provided to all owners of properties within 1/2 mile of the border of any portion of the tract of land where the permitted activities would occur. For beneficial use (excluding Class B biosolids [sewage sludge]), processing, and storage permit applications, notice must be provided to all owners of properties adjacent to any portion of the tract of land where the permitted activities will occur. The tract of land includes all contiguous properties under the ownership or control of the applicant.

(3) For Class B biosolids [sewage sludge] beneficial land use permit applications:
(A) notice must be provided under Chapter 39 of this title (relating to Public Notice) and under Texas Water Code, §5.552. The notice must also contain the anticipated date of the first land application of biosolids [sludge] to the proposed land application unit. An applicant for a new permit, permit amendment, or permit renewal under Texas Health and Safety Code, §361.121(c), shall notify by registered or certified mail each owner of land located within 1/4 mile of the proposed land application unit who lives on that land; and

(B) an owner of the land located within 1/4 mile of the proposed land application unit who lives on the land is considered an "affected person" for purposes of Texas Water Code, §5.115, and Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment). Individuals who do not own land within 1/4 mile of the proposed land application unit [site] are not excluded from being considered "affected persons" under §55.203 of this title (relating to Determination of Affected Person).

(c) Registration actions.

(1) The public notice requirements of this subsection apply to new applications for a registration, and to applications for major amendment of a registration. The requirements of this subsection do not apply to sites where only Class A or Class AB biosolids [sewage sludge] that has been authorized for marketing and distribution are [is] to be land applied for beneficial use or registrations for beneficial land use or disposal of water treatment residuals in a land application unit, surface impoundment, or waste pile [water treatment sludge].

(2) The Office of the Chief Clerk shall mail the Notice of Receipt of Application and Declaration of Administrative Completeness along with a copy of the registration application to the county judge in the county where the proposed site is to be located.

(3) The Office of the Chief Clerk shall mail the Notice of Receipt of Application and Declaration of Administrative Completeness to the landowners named on the application map or supplemental map, or the sheet attached to the application map or supplemental map.

(4) Each notice must specify both the name, affiliation, address, and telephone number of the applicant and of the executive director staff [commission employee] who may be reached to obtain more information about the application to register the site. The notice must specify that the registration application has been provided to the county judge and that it is available for review by interested parties.

(5) Any application for a registration is subject to the standards and requirements for actions concerning amendments, modifications, transfers, and renewals of registrations, as set forth in Chapter 50, Subchapter G of this title.

(d) Public comment on registrations. A person may provide the commission with written comments on any new or major amendment applications to register a site, where applicable. The executive director shall review any written comments when they are received within 30 days of mailing the notice. The written information received will be considered [utilized] by the executive director in determining what action to take on the application for registration in accordance with §312.12(b) [§312.12(c)] of this title (relating to Registrations).

(e) Motion to overturn. The applicant, public interest counsel, or other person may file with the chief clerk a motion to overturn under §50.139 of this title (relating to Motion to Overtur Executive Director's Decision) to overturn the executive director's final approval or denial of an application.

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

30 TAC §§312.41 - 312.50

Statutory Authority

These amendments are proposed under the Texas Water Code (TWC). Specifically, TWC, §6.013, which establishes the general jurisdiction of the commission and TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

These amendments are also proposed under TWC, §26.027, which authorizes the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state and Texas Health and Safety Code (THSC), §361.121, which gives the commission the authority to require a permit before a responsible person may apply Class B biosolids on a land application unit.

The proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, 26.027, and THSC, §361.121, which gives the commission the authority to regulate the land application and transportation of Class B biosolids.

§312.41. Applicability.

(a) Application to land. This subchapter applies to any person who prepares biosolids and/or domestic septage that are land applied [sewage sludge that is applied to the land], to any person who land applies biosolids and/or domestic septage [sewage sludge to the land], to biosolids and/or domestic septage that are land applied [sewage sludge applied to the land], and to the land on which biosolids and/or domestic septage are [sewage sludge is] applied.

(b) Bulk biosolids [sewage sludge].

(1) When bulk biosolids are land applied [sewage sludge is applied to the land] and do not exceed [meets] the metal concentrations in Table 3 of §312.43(b)(3) of this title (relating to Metal Limits),

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Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER B. LAND APPLICATION [FOR BENEFICIAL USE] AND STORAGE OF BIOSOLIDS AND DOMESTIC SEPTAGE [AT BENEFICIAL USE SITES]

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meets the Class A biosolids [sewage sludge] pathogen requirements in §312.82(a)(3) of this title (relating to Pathogen Reduction), and meets one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction), then the provisions of §312.42 of this title (relating to General Requirements) and §312.44 of this title (relating to Management Practices) do not apply with the exception of §312.44(a), (b), (h)(3), (j), and (m) of this title.

(A) When bulk biosolids are land applied [sewage sludge] that do not exceed [meets] the metal concentrations in Table 3 of §312.43(b)(3) of this title, meets the Class AB pathogen requirements in §312.82(a)(2) of this title, and meets one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title, is applied to the land, then §312.44(a), (b), (c)(2)(D) and (E), (d), (h)(1), (3), (5) and (6), (j), (l), and (m) of this title will apply to the land application of biosolids [sewage sludge].

(B) When bulk biosolids are land applied [sewage sludge] that do not exceed [meets] the metal concentrations in Table 3 of §312.43(b)(3) of this title, meets the Class AB pathogen requirements in §312.82(a)(2) of this title, and meets one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title, then the requirements in subparagraph (A) of this paragraph do not apply with the exception of §312.44(a), (b), (h)(3), (j), and (m) of this title.

(2) The executive director may apply any or all of §312.42 and §312.44 of this title to the bulk biosolids [sewage sludge] described in this subsection on a case-by-case basis after determining that the general requirements or management practices are needed to protect human [public] health or [and] the environment from any reasonably anticipated adverse effect that may occur from any metal in the bulk biosolids [sewage sludge].

(c) General Requirements for Bulk Derived Materials.

(1) When derived material from biosolids are land applied [sewage sludge is applied to the land] and do not exceed [meets] the metal concentrations in Table 3 of §312.43(b)(3) of this title, meets the Class A pathogen requirements in §312.82(a)(3) of this title, and meets one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title, then the provisions of §312.42 and §312.44 of this title do not apply with the exception of §312.44(a), (b), (h)(3), (j), and (m) of this title.

(A) When bulk biosolids are land applied [sewage sludge] that do not exceed [meets] the metal concentrations in Table 3 of §312.43(b)(3) of this title, meets the Class AB pathogen requirements in §312.82(a)(2) of this title, and meets one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title, is applied to the land, then §312.44(a), (b), (c)(2)(D) and (E), (d), (h)(1), (3), (5) and (6), (j), (l), and (m) of this title will apply to the land application of biosolids [sewage sludge].

(B) When bulk biosolids are land applied [sewage sludge] that do not exceed [meets] the metal concentrations in Table 3 of §312.43(b)(3) of this title, meets the Class AB pathogen requirements in §312.82(a)(2) of this title, and meets one of the vector attraction reduction requirements in §312.83(b)(1) - (8) in addition to (9) or (10) of this title, then the requirements in subparagraph (A) of this paragraph do not apply with the exception of §312.44(a), (b), (h)(3), (j), and (m) of this title.

(2) The executive director may apply any or all of §312.42 and §312.44 of this title to the bulk biosolids [sewage sludge] described in this subsection on a case-by-case basis after determining that the general requirements or management practices are needed to protect human [public] health or [and] the environment from any reasonably anticipated adverse effect that may occur from any metal in the bulk biosolids [sewage sludge].

§312.42 General Requirements.

(a) No person shall land apply biosolids and/or domestic septage [sewage sludge, including domestic septage, to the land] except in accordance with the requirements in this subchapter.

(b) No person shall land apply biosolids [sewage sludge] that exceeds [does not meet] the metal concentrations in Table 3 of §312.43(b)(3) of this title (relating to Metal Limits) to land where any of the cumulative metal loading rates in Table 2 of §312.43(b)(2) of this title have been exceeded [reached].

(c) No person shall land apply domestic septage to agricultural land, forest, or a reclamation site during a 365-day period where the annual application rate in §312.43(c) of this title has been exceeded [reached].

(d) The person who land applies biosolids and/or domestic septage [sewage sludge, including domestic septage, to the land] shall obtain information needed to comply with the requirements in this subchapter.
(e) If a treatment works provides bulk biosolids [sewage sludge] to a person who land applies the bulk biosolids [sewage sludge to the land], the treatment works shall provide the person who land applies the bulk biosolids [sewage sludge to the land] notice and necessary information to comply with the requirements in this subchapter.

(f) If a treatment works provides bulk biosolids [sewage sludge] to a person who prepares the bulk biosolids [sewage sludge] for land application [to the land], the treatment works shall provide the person who prepares the bulk biosolids [sewage sludge for application to the land] notice and necessary information to comply with the requirements in this subchapter.

(g) The person who land applies bulk biosolids [sewage sludge to the land] shall provide the owner or lease-holder of the land on which the bulk biosolids are [sewage sludge is] applied notice and necessary information to comply with the requirements in this subchapter.

(h) If a treatment works provides biosolids [sewage sludge] to a person who prepares the biosolids [sewage sludge] for sale or give away in a bag or other container for land application [to the land], the treatment works shall provide the person who prepares the biosolids [sewage sludge for sale or give away in a bag or other container for application to the land] notice and information to comply with the requirements in this subchapter.

(i) The applicant shall determine the concentration of regulated metals in accordance with §312.12(a)(1)(I) [§312.12(b)(1)(I)] of this title (relating to Registrations) and demonstrate to the satisfaction of the executive director [commission] that the proposed cumulative metal loading will not result in a toxic [non-toxic] condition or increase [reduce] the toxicity of the existing soil.

§312.43. Metal Limits.

(a) Biosolids [Sewage sludge].

(1) Bulk biosolids [sewage sludge] or biosolids [sewage sludge] sold or given away in a bag or other container shall not be land applied [to the land] if the concentration of any metal in the biosolids [sewage sludge] exceeds the ceiling concentration for the metal in Table 1 of subsection (b) of this section.

(2) If the bulk biosolids are [sewage sludge is] applied to agricultural land, forest, a public contact site, or a reclamation site, either:
   
   A) the cumulative loading rate for each metal shall not exceed the cumulative metal loading rate for the metal in Table 2 of subsection (b) of this section; or

   B) the concentration of each metal in the biosolids [sewage sludge] shall not exceed the concentration for the metal in Table 3 of subsection (b) of this section.

(3) If bulk biosolids are [sewage sludge is] applied to a lawn or a home garden, the concentration of each metal in the biosolids [sewage sludge] shall not exceed the concentration for the metal in Table 3 of subsection (b) of this section.

(4) If biosolids are [sewage sludge is] sold or given away in a bag or other container for land application [to the land], either:

   A) the concentration of each metal in the biosolids [sewage sludge] shall not exceed the concentration for the metal in Table 3 in subsection (b) of this section; or

   B) the product of the concentration of the each metal [pollutant] in the biosolids [sewage sludge] and the annual whole [sludge] application rate for the biosolids [sewage sludge] shall not cause the annual metal loading rate for the metal in Table 4 of subsection (b) of this section to be exceeded. The procedure used to determine the annual whole [sludge] application rate is presented in §312.49 [§312.49] of this title (relating to Appendix A) Procedure to Determine the Annual Whole [Sludge] Application Rate for Biosolids and Domestic Septage [a Sewage Sludge].

   b) Metal concentrations and loading rates--biosolids [sewage sludge].

      1) Ceiling concentrations.
      Figure: 30 TAC §312.43(b)(1)

      2) Cumulative metal loading rates.
      Figure: 30 TAC §312.43(b)(2)

      3) Metal concentrations.
      Figure: 30 TAC §312.43(b)(3)

      Figure: 30 TAC §312.43(b)(4)

   [cc] Domestic Septage. The annual application rate for domestic septage applied to agricultural land, forest, or a reclamation site shall be equal to or less than the annual application rate calculated using equation 1. AAR = N / 0.0026, where AAR = Annual application rate in gallons per acre per 365-day period; N = Amount of nitrogen in pounds per acre per 365-day period needed by the crop or vegetation grown on the land.

§312.44. Management Practices.

(a) Land application of bulk biosolids and/or domestic septage [sewage sludge] must not cause or contribute to the harm of a threatened or endangered species of plant, fish, or wildlife or result in the destruction or adverse modification of the critical habitat of a threatened or endangered species.

(b) Bulk biosolids and/or domestic septage [sewage sludge] must not be applied to agricultural land, forest, a public contact site, or a reclamation site that is flooded, frozen, or snow-covered so that the bulk biosolids and/or domestic septage [sewage sludge] enters a wetland or other water in the state, except as provided in a permit issued under Chapter 305 of this title (relating to Consolidated Permits) or federal Clean Water Act, §404.

(c) When bulk biosolids [sewage sludge] that do [does] not meet Class A pathogen requirements or domestic septage is land applied to agricultural land, forest, or a reclamation site, buffer zones listed under paragraph (1)(A) and (B) and paragraph (2)(A) - (C), (E) and (F) of this subsection must be established at the time of issuance of a permit or registration and maintained at all times for each land application unit [area] as noted in this section unless otherwise specified by the commission. In addition, the buffer zone listed under paragraph (2)(D) of this subsection must be established at the time of issuance of a permit or registration for each land application unit unless otherwise specified by the commission. The buffer zone listed under paragraph (2)(D) of this subsection shall be re-evaluated and maintained as needed, upon renewal or major amendment of a permit or registration.

   1) Surface water:

      A) 200-foot buffer zone, if the biosolids and/or domestic septage are sold is not incorporated; for land application units [sites] located in a major sole-source impairment zone this buffer zone must maintain a vegetative cover; or

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(B) 33-foot vegetative buffer zone, if the biosolids and/or domestic septage are [sludge is] incorporated.

(2) Other buffer zones:
   (A) 150 feet, private water supply well;
   (B) 500 feet, public water supply well, intake, spring or similar source, public water supply treatment plant, or public water supply elevated or ground storage tank;
   (C) 200 feet, solution channel, sinkhole, or other conduit to groundwater;
   (D) 750 feet, established school, institution, business, or occupied residential structure;
   (E) 50 feet, public right-of-way and property boundaries; and
   (F) 10 feet, irrigation conveyance canal.

(d) Any of the buffers established in subsection (c)(2)(D) and (E) of this section may be reduced or eliminated if an agreement to that effect is signed by the owners of the established school, institution, business, occupied residential structure, or adjacent property and this documentation is provided to the executive director prior to issuance of a permit or registration. Reductions or elimination of buffer zones in an existing permit or registration by agreement of the affected landowner will be considered a minor amendment of the permit or registration.

(e) Bulk biosolids and/or domestic septage [sewage sludge] must be applied to agricultural land, forest, or a public contact site at an annual [a] whole [sludge] application rate that is equal to or less than the agronomic rate for the agricultural land, forest, or public contact site on which the bulk biosolids and/or domestic septage are [sewage sludge is] applied.

(f) Bulk biosolids and/or domestic septage [sewage sludge] must be applied to a reclamation site at an annual [a] whole [sludge] application rate that is equal to or less than the agronomic rate for the reclamation site on which the bulk biosolids and/or domestic septage are [sewage sludge is] applied, unless otherwise specified by the executive director or commission. On a case-by-case basis, an annual [a] whole [sludge] application rate may exceed the agronomic rate for a specific time period.

(g) Groundwater protection measures.
   (1) A seasonal high groundwater table must be not less than three feet below the treatment zone for soils with moderate or slower permeability (less than two inches per hour).
   (2) A seasonal high groundwater table must be not less than four feet below the treatment zone for soils with moderately rapid or rapid permeability (greater than two inches per hour and less than 20 inches per hour).
   (3) Seasonal generally refers to a groundwater table that may be perched on a less permeable soil or geologic unit and fluctuates with seasonal climatic variation or that occurs in a soil or geologic unit as a variation in saturation due to seasonal climatic conditions and is identified as such in a published soil survey report or similar document.

   (4) Application of biosolids and/or domestic septage [sludge] to land having soils with greater permeability and with higher groundwater tables will be considered on a case-by-case basis, after consideration of soil pH, metal loadings onto the soil, soil buffering capacity, or other protective measures to prevent groundwater contamination.

   (h) Biosolids and/or domestic septage [Sludge] must be land applied by a method and under conditions that prevent runoff [of sewage sludge] beyond the land application unit [active application area] and protect the quality of the surface water and the soils in the unsaturated zone.

   (1) Biosolids and/or domestic septage [Sludge] must be land applied uniformly over the surface of the land.

   (2) Biosolids and/or domestic septage [sludge] may not be land applied to areas where permeable surface soils are less than two feet thick. The executive director will consider sites with thinner permeable surface soils, on a case-by-case basis.

   (3) Biosolids and/or domestic septage [Sewage sludge] may not be land applied during any time when precipitation occurs, [rainstorms or] during periods in which surface soils are water-saturated, or [and] when pooling of water is evident on the land application unit [site]. The operator of a Class B land application unit, a domestic septage land application unit, [TCEQ permitted] or a bulk biosolids land application unit that is [sewage sludge site] subject to the notification requirements in §312.4(b) of this title (relating to Required Authorizations or Notifications) [who land applies sewage sludge on agricultural land] shall submit an Adverse Weather and Alternative Plan. This plan shall detail procedures to address times when the biosolids and/or domestic septage [sewage sludge] cannot be applied to the land application unit [site] due to adverse weather or other conditions such as wind, precipitation, field preparation delays, and access road limitations.

   (4) Biosolids and/or domestic septage [Sludge] may not be applied to areas having topographical slopes in excess of 8.0%. On a case-by-case basis, the executive director will consider sites with steeper slopes when runoff controls are proposed and utilized, incorporation of biosolids and/or domestic septage [sewage sludge] into the soil occurs, or for certain reclamation projects.

   (5) Where runoff of biosolids and/or domestic septage [sludge] from the land application unit [active application area] is evident, the operator shall cease further land [sludge] application until the condition is corrected.

   (6) Biosolids and/or domestic septage [Sewage sludge] may not be land applied [under provisions of this section on land] within a designated floodway.

   (i) Either a label must be affixed to the bag or other container in which biosolids are [sewage sludge is] sold or given away for land application [to the land] or an information sheet must be provided to the person who receives biosolids [sewage sludge sold or given away in another container for land application [to the land]]. The label or information sheet must contain the following information:

      (1) the name and address of the person who prepared the biosolids [sewage sludge for sale or given away in a bag or other container for application to the land];

      (2) a statement that prohibits the land application of the biosolids [sewage sludge to the land] except in accordance with the instructions on the label or information sheet; and

      (3) the annual whole [sludge] application rate for the biosolids [sewage sludge] that do [does] not cause the annual metal loading rates in Table 4 of §312.43(b)(4) of this title (relating to Metal Limits) to be exceeded.

   (j) Nuisance controls.

      (1) A land application unit [site] location must be selected and the site operated in a manner to prevent public health nuisances.
Debris [Sewage sludge debris] must be prevented from blowing or running off site boundaries or into surface waters.

3. To prevent nuisance conditions from occurring, the operator shall:

A. minimize dust migration from the site and access roadways;

B. minimize offensive odors through incorporation of biosolids and/or domestic septage [Sewage sludge] into the soil or by taking some other type of corrective action; and

C. develop and implement best management practices (BMPs) to minimize off-site tracking of biosolids and/or domestic septage [Sewage sludge] and sediment during the transport of biosolids and/or domestic septage [Sewage sludge material] to and from the land application unit [site] or storage area; and to include at a minimum, removing tracked material, to the extent practicable, by the end of each day of operation at the site and either returning it to the site or otherwise disposing of it properly. The documented BMPs shall be retained by the operator and made readily available for review by a TCEQ representative.

4. Odor Control. Pursuant to the authority vested in the commission or executive director in §312.6 of this title (relating to Additional or More Stringent Requirements), a person who prepares biosolids and/or domestic septage [Sewage sludge] or land applies biosolids and/or domestic septage [Sewage sludge] on agricultural land may be subject to an Odor Control Plan on a case-by-case basis.

k. A permit or registration must specify the soil testing requirements for each land application unit [area].

1. The testing frequency must consider [take into account] common agricultural methods of determining [certain] crop nutrient needs, soil pH, phytotoxicity, and concentrations of metals regulated by this chapter.

2. No authorization may require soil testing of metals regulated by this chapter, at a frequency greater than once per five years or prior to submittal of a renewal application for a land application unit [beneficial use site]. Soil testing for metals regulated by this chapter may not be required for portions of the authorized site where biosolids and/or domestic septage have [Sewage sludge has] not been applied since the last soil metals testing was performed.

3. Paragraph (2) of this subsection does not apply if the executive director becomes aware of circumstances warranting increased monitoring of metals regulated by this chapter, [in order] to address sites where metal loading into the soil is a threat to human health or environmental quality.

   i. An operator of a Class AB or Class B land application unit [Sewage sludge site] shall post a sign that is visible from a publicly accessible road or sidewalk that is adjacent to the premises on which the land application unit is located stating that a biosolids [Sewage sludge beneficial] land application unit [site] is located on the premises. The sign shall be posted three days prior to and 14 days after the commencement of land application of biosolids [Sewage sludge] and shall include the operator name, telephone number, the classification of biosolids [Sewage sludge] and the TCEQ authorization number. In the event of reasonably unforeseen circumstances such as weather conditions or equipment failure that necessitate a change in a planned land application unit [site], the required sign may be posted on the day on which biosolids [Sewage sludge] land application commences. If signs are posted less than three days prior to land application, records shall be maintained documenting the unforeseeable circumstance that necessitated the change in a planned land application unit [site]. Such records shall be retained by the operator and be readily available for review by a TCEQ representative. [Records of any deviation of the posting requirements listed in this subsection and associated reasons shall be retained by the operator and be readily available for review by a TCEQ representative.]

m. All vehicles and equipment used for the transport of bulk biosolids and/or domestic septage [Class A, Class AB or Class B Sewage sludge] for land application or disposal shall be constructed, operated, and maintained to prevent the loss of liquid or solid materials during transport. An operator of a [Class A, Class AB or Class B] bulk biosolids land application unit [Sewage sludge site] may not accept bulk biosolids [Sewage sludge], unless the biosolids [Sewage sludge] is transported to the land application unit in a covered container with the covering firmly secured at the front and back.

§312.45. Operational Standards—Pathogens and Vector Attraction.

(a) Pathogens.

1. The Class A or Class AB biosolids [Sewage sludge] pathogen requirements in §312.82(a) of this title (relating to Pathogen Reduction) or Class B biosolids [Sewage sludge] pathogen requirements in §312.82(b) of this title shall be met if bulk biosolids are [Sewage sludge is] applied to agricultural land, forest, a public contact site, or a reclamation site.

2. The Class A or Class AB biosolids [Sewage sludge] pathogen requirements in §312.82(a) of this title shall be met if bulk biosolids are [Sewage sludge is] applied to a lawn or a home garden.

3. The Class A or Class AB biosolids [Sewage sludge] pathogen requirements in §312.82(a) of this title shall be met if biosolids are [Sewage sludge is] sold or given away in a bag or other container for land application [to the land].

4. The requirements in §312.82(c) of this title shall be met if domestic septage is applied to agricultural land, forest, or a reclamation site.

(b) Vector attraction reduction.

1. One of the vector attraction reduction requirements in §312.83(b)(1) - (10) of this title (relating to Vector Attraction Reduction) shall be met if bulk biosolids are [Sewage sludge is] applied to agricultural land, forest, a public contact site, or a reclamation site.

2. One of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title shall be met if bulk biosolids are [Sewage sludge is] applied to a lawn or a home garden.

3. One of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title shall be met if biosolids are [Sewage sludge is] sold or given away in a bag or other container for land application [to the land].

4. The vector attraction reduction requirements in §312.83(b)(12) of this title shall be met if domestic septage is applied to agricultural land, forest, or a public contact site.

§312.46. Frequency of Monitoring.

(a) Biosolids [Sewage sludge other than domestic septage].

1. The frequency of monitoring for the metals listed in §312.43(b)(1) - (4) of this title (relating to Metal Limits); the pathogen density requirements in either §312.82(a) or (b)(1)(C) and (b)(2) of this title (relating to Pathogen Reduction); and vector attraction reduction requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction) are defined in Table 5.

Figure: 30 TAC §312.46(a)(1) [Figure: 30 TAC §312.46(a)(1)]
(2) After the biosolids have \textit{sewage sludge has} been monitored for two years at the frequency shown in paragraph (1) of this subsection (Table 5), the executive director may reduce the frequency of monitoring for metal \textit{pollutant} concentrations and for the pathogen density requirements, but in no case shall the frequency of monitoring be less than once per year when biosolids are land applied \textit{sewage sludge is applied to the land}. A reduction in monitoring will be allowed after agency review of a significant data set of sample results and where the city or cities generating the biosolids \textit{sewage sludge} have in place a satisfactory and enforceable pretreatment program.

(3) After the biosolids have \textit{sewage sludge has} been monitored for two years at the frequency shown in paragraph (1) of this subsection (Table 5), the executive director may increase the frequency of monitoring for metal \textit{pollutant} concentrations and for the pathogen density requirements. An increase in monitoring will be required after agency review of a significant data set of sample results and where high metal \textit{pollutant} or pathogen values are present in biosolids that are \textit{sewage sludge} generated.

(b) Domestic sewage applied to agricultural land, forest, or a reclamation site shall be monitored for the pathogen reduction requirements in §312.82(c) of this title \textit{relating to Pathogen Reduction} and the vector attraction reduction requirements in §312.83(b)(12) of this title \textit{relating to Vector Attraction Reductions}.

§312.47. Recordkeeping [Record Keeping].

(a) Biosolids \textit{sewage sludge}.

(1) The person who prepares the biosolids \textit{sewage sludge} in §312.41(b)(1) or (e) of this title \textit{relating to Applicability} shall develop the following information and shall retain the information for five years:

(A) the concentration of each metal listed in Table 3 of §312.43(b)(3) of this title \textit{relating to Metal Limits} in the biosolids \textit{sewage sludge};

(B) the following certification statement: "I certify, under penalty of law, that the Class A (or insert Class AB) biosolids \textit{sewage sludge} pathogen requirements in 30 TAC §312.82(a) and the vector attraction reduction requirement in (insert one of the vector attraction reduction requirements in 30 TAC §312.83(b)(1) - (8)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.";

(C) a description of how the Class A or Class AB biosolids \textit{sewage sludge} pathogen requirements in §312.82(a) of this title \textit{relating to Pathogen Reduction} are met; and

(D) a description of how one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title \textit{relating to Vector Attraction Reduction} is met.

(2) The person who derives the material in §312.41(c)(1) or (f) of this title shall develop the following information and shall retain the information for five years:

(A) the concentration of each metal listed in Table 3 of §312.43(b)(3) of this title in the material;

(B) the following certification statement: "I certify, under penalty of law, that the Class A (or insert Class AB) biosolids \textit{sewage sludge} pathogen requirements in 30 TAC §312.82(a) and the vector attraction reduction requirement in (insert one of the vector attraction reduction requirements in 30 TAC §312.83(b)(1) - (8)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.";

(C) a description of how the Class A or Class AB biosolids \textit{sewage sludge} pathogen requirements in §312.82(a) of this title \textit{relating to Pathogen Reduction} are met; and

(D) a description of how one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title \textit{relating to Vector Attraction Reduction} is met.

(3) After the biosolids have \textit{sewage sludge has} been monitored for two years at the frequency shown in paragraph (1) of this subsection (Table 5), the executive director may increase the frequency of monitoring for metal \textit{pollutant} concentrations and for the pathogen density requirements. An increase in monitoring will be required after agency review of a significant data set of sample results and where high metal \textit{pollutant} or pathogen values are present in biosolids that are \textit{sewage sludge} generated.

(b) Domestic sewage applied to agricultural land, forest, or a reclamation site shall be monitored for the pathogen reduction requirements in §312.82(c) of this title \textit{relating to Pathogen Reduction} and the vector attraction reduction requirements in §312.83(b)(12) of this title \textit{relating to Vector Attraction Reductions}.

§312.47. Recordkeeping [Record Keeping].

(a) Biosolids \textit{sewage sludge}.

(1) The person who prepares the biosolids \textit{sewage sludge} in §312.41(b)(1) or (e) of this title \textit{relating to Applicability} shall develop the following information and shall retain the information for five years:

(A) the concentration of each metal listed in Table 3 of §312.43(b)(3) of this title \textit{relating to Metal Limits} in the biosolids \textit{sewage sludge};

(B) the following certification statement: "I certify, under penalty of law, that the Class A (or insert Class AB) biosolids \textit{sewage sludge} pathogen requirements in 30 TAC §312.82(a) and the vector attraction reduction requirement in (insert one of the vector attraction reduction requirements in 30 TAC §312.83(b)(1) - (8)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.";

(C) a description of how the Class A or Class AB biosolids \textit{sewage sludge} pathogen requirements in §312.82(a) of this title \textit{relating to Pathogen Reduction} are met; and

(D) a description of how one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title is met.

(3) If the metal concentrations in Table 3 of §312.43(b)(3) of this title are not exceeded, the Class A or Class AB biosolids \textit{sewage sludge} pathogen requirements in §312.82(a) of this title, and the vector attraction reduction requirements in either §312.83(b)(9) or (10) of this title are met when bulk biosolids are [sewage sludge is] applied to agricultural land, forest, a public contact site, or a reclamation site:

(A) The person who prepares the bulk biosolids \textit{sewage sludge} shall develop the following information and shall retain the information for five years:

(i) the concentration of each metal listed in Table 3 of §312.43(b)(3) of this title in the bulk biosolids \textit{sewage sludge};

(ii) the following certification statement: "I certify, under penalty of law, that the pathogen requirements in 30 TAC §312.82(a) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.";

(iii) a description of how the pathogen requirements in §312.82(a) of this title are met.

(B) The person who applies the bulk biosolids \textit{sewage sludge} shall develop the following information and shall retain the information for five years:

(i) the following certification statement: "I certify, under penalty of law, that the management practices in 30 TAC §312.44 and the vector attraction reduction requirement in (insert either 30 TAC §312.83(b)(9) or (10)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the management practices and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including fine and imprisonment.";

(ii) a description of how the management practices in §312.44 of this title (relating to Management Practices) are met for each site on which bulk biosolids are \textit{sewage sludge is} applied; and

(iii) a description of how the vector attraction reduction requirements in either §312.83(b)(9) or (10) of this title are met for each site on which bulk biosolids are \textit{sewage sludge is} applied.

(4) If the metal concentrations in Table 3 of §312.43(b)(3) of this title are not exceeded and the Class B pathogen requirements in §312.82(b) of this title are met when bulk biosolids are \textit{sewage sludge is} applied to agricultural land, forest, a public contact site, or a reclamation site:
(A) The person who prepares the bulk biosolids [sewage sludge] shall develop the following information and shall retain the information for five years:

(i) the concentration of each metal listed in Table 3 of §312.43(b)(3) of this title in the bulk biosolids [sewage sludge];

(ii) the following certification statement: "I certify under penalty of law, that the Class B biosolids [sewage sludge] pathogen requirements in 30 TAC §312.82(b) and the vector attraction reduction requirement in [insert one of the vector attraction reduction requirements in 30 TAC §312.83(b)(1) - (8) if one of those requirements is met] have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment;

(iii) a description of how the Class B biosolids [sewage sludge] pathogen requirements in §312.82(b) of this title are met; and

(iv) when one of the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title is met, a description of how the vector attraction reduction requirement is met.

(B) The person who applies the bulk biosolids [sewage sludge] shall develop the following information and shall retain the information for five years:

(i) the following certification statement: "I certify under penalty of law, that the management practices in 30 TAC §312.44, the site restrictions in 30 TAC §312.82(b)(3), and the vector attraction reduction requirements in [insert either 30 TAC §312.83(b)(9) or (10), if one of those requirements is met] have been met for each site on which bulk biosolids are [sewage sludge is applied. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the management practices and site restrictions (and the vector attraction reduction requirements if applicable) have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment;

(ii) a description of how the management practices in §312.44 of this title are met for each site on which bulk biosolids are [sewage sludge is applied;

(iii) a description of how the site restrictions in §312.82(b)(3) of this title are met for each site on which bulk biosolids are [sewage sludge is applied; and

(iv) when the vector attraction reduction requirement in either §312.83(b)(9) or (10) of this title is met, a description of how the vector attraction reduction requirement is met.

(5) If the requirements in §312.43(a)(2)(A) of this title are met when bulk biosolids are [sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site:

(A) The person who prepares the bulk biosolids [sewage sludge] shall develop the following information and shall retain the information for five years:

(i) the concentration of each metal listed in Table 1 of §312.43(b)(1) of this title in the bulk biosolids [sewage sludge];

(ii) the following certification statement: "I certify under penalty of law, that the pathogen requirements in [insert either 30 TAC §312.82(a) or (b)] and the vector attraction reduction requirement
supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the site restrictions have been met. I am aware that there are significant penalties for false certification including fine and imprisonment;"

(xii) a description of how the site restrictions in §312.82(b)(3) of this title are met for each site on which Class B bulk biosolids are land [sewage sludge is] applied;

(xiii) the following certification statement when the vector attraction reduction requirement in either 30 TAC §312.83(b)(9) or (10) [of this title] is met: "I certify, under penalty of law, that the vector attraction reduction requirement in (insert either 30 TAC §312.83(b)(9) or (10)) has been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the vector attraction reduction requirement has been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment;"

and

(6) If the requirements in §312.43(a)(4)(B) of this title are met when biosolids are [sewage sludge is] sold or given away in a bag or other container for land application [to the land], the person who prepares the biosolids [sewage sludge that is sold or given away in a bag or other container] shall develop the following information and shall retain the information for five years:

(A) the annual whole [sludge] application rate for the biosolids [sewage sludge that do [does] not cause the annual metal loading rates in Table 4 of §312.43(b)(4) of this title to be exceeded;

(B) the concentration of each metal listed in Table 4 of §312.43(b)(4) of this title in the biosolids [sewage sludge];

(C) the following certification statement: "I certify, under penalty of law, that the management practice in 30 TAC §312.44(e), the Class A (or insert Class AB) biosolids [sewage sludge] pathogen requirement in 30 TAC §312.82(a), and the vector attraction reduction requirement in (insert one of the vector attraction reduction requirements in 30 TAC §312.83(b)(1) - (8)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the management practice, pathogen requirements, and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment;"

(D) a description of how the Class A or Class AB biosolids [sewage sludge] pathogen requirements in §312.82(a) of this title are met;

(E) a description of how one of the vector attraction requirements in §312.83(b)(1) - (8) of this title is met.

(7) The person who land applies Class B biosolids shall develop the following information and shall retain the information for five years:

(A) the dates of harvesting; and

(B) the amount harvested, excluding grazing.

(8) The requirements of this subsection must be readily available for review by commission staff or be submitted to the executive director upon request.

(b) Domestic septage. When domestic septage is applied to agricultural land, forest, or a reclamation site, the person who applies the domestic septage shall develop the following information and shall retain the information for five years and must be readily available for review by commission staff or be submitted to the executive director upon request:

(1) the location, by either street address or latitude and longitude, of each site on which domestic septage is applied;

(2) the number of acres in each site on which domestic septage is applied;

(3) the date and time domestic septage is applied to each site;

(4) the nitrogen requirement for the crop or vegetation grown on each site during a 365-day period;

(5) the rate, in gallons per acre per 365-day period, at which domestic septage is applied to each site;

(6) The following certification statement: "I certify, under penalty of law, that the pathogen requirements in (insert either 30 TAC §312.82(c)(1) or (2)) and the vector attraction reduction requirements in (insert 30 TAC §312.83(b)(9), (10), or (12)) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the pathogen requirements and vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment;"

(7) a description of how the pathogen requirements in either §312.82(c)(1) or (2) of this title are met;

(8) a description of how the vector attraction reduction requirements in §312.83(b)(9), (10), or (12) of this title are met;

(9) the dates of harvesting; and

(10) the amount harvested, excluding grazing.

§312.48. Reporting.

Unless otherwise specified by the executive director, permittees and registrants [commission, sludge management facilities] shall submit the following information to the Enforcement Division, the Wastewater Permitting Section of the Water Quality Division, and the appropriate regional office:

(1) annually by September 30th [20] of each year (reporting period September 1st of the previous year to August 31st of the current year):

(A) the information in §312.47 of this title (relating to Recordkeeping [Record Keeping]) for the applicable requirements;

(B) the information in §312.47(a)(5)(A)(i) - (iv) of this title if:

(i) the biosolids exceed [sewage sludge does not meet] the metal concentrations in §312.43(b)(3) of this title (relating to Metal Limits);

(ii) 90% or more of any of the cumulative metal loading rates in §312.43(b)(2) of this title is reached at a site; or
(iii) biosolids are [sewage sludge is] applied to a site after 90% of any of the cumulative metal loading rates is reached at the site; and

(C) for the Class B biosolids [sewage sludge beneficial] land application permittee [permit holder]:

(i) evidence that the permittee [permit holder] is complying with the nutrient management plan developed by a certified nutrient management specialist in accordance with the United States Department of Agriculture Natural Resource Conservation Service Practice Standard Code 590;

(ii) a completed Annual Biosolids Land Application [Sludge] Summary Report form; and

(iii) proof of continuation of commercial liability insurance and environmental impairment insurance; and

(2) for the Class B biosolids permittee [sewage sludge beneficial land use permit holder], submit quarterly reports by the 15th day of the month following each quarter. Quarterly reports are due December 15th, March 15th, June 15th, and September 15th and must include:

(A) a Quarterly Biosolids Land Application [Sludge] Summary Report form; and

(B) a computer-generated quarterly report containing:

(i) the source, quality, and quantity of Class B biosolids land [sewage sludge] applied to the land application unit;

(ii) the location of the land application unit, either in terms of longitude and latitude or by physical address, including the county;

(iii) the dates of delivery of Class B biosolids [sewage sludge];

(iv) the dates of land application of Class B biosolids [sewage sludge];

(v) the cumulative amount of metals land applied to the land application unit [through the application of Class B sewage sludge];

(vi) crops grown at the land application unit [site]; and

(vii) the suggested agronomic application rate for the Class B biosolids [sewage sludge].

§312.49. [Appendix A—]Procedure to [To] Determine the Annual Whole [Sludge] Application Rate for Biosolids and Domestic Septage [a Sewage Sludge].

(a) [Section 312.43(a)(4)(B) of this title (relating to Metal Limits) requires that the product of the concentration for each metal listed in Table 4 of §312.43 of this title in sewage sludge sold or given away in a bag or other container for application to the land and the annual whole sludge application rate (AWSAR) for the sewage sludge not cause the annual metal loading rate for the metal in Table 4 of §312.43(b)(4) of this title to be exceeded.] This subsection [appendix] contains the procedure used to determine the annual whole application rate (AWAR) [(AWSAR)] for a biosolids [sewage sludge] that does not cause the annual metal loading rates in Table 4 of §312.43(b)(4) of this title (relating to Metal Limits) to be exceeded. Determine the AWAR using the following procedure.

(1) Analyze a sample of the biosolids to determine the concentration for each of the metals listed in Table 4 of §312.43 of this title.

(2) Using the metal concentrations from paragraph (1) of this paragraph and the AMLRs from Table 4 of §312.43 of this title, calculate an AWAR for each metal using Equation B.1.

(3) The AWAR for the biosolids is the lowest AWAR calculated in paragraph (2) of this paragraph.

Figure: 30 TAC §312.49(a)(3)

[(4) The relationship between the annual metal loading rate (AMLR) for a metal and the annual whole sludge application rate (AWSAR) for a sewage sludge is shown in equation (1).]

[Figure: 30 TAC §312.49(1)]

[(2) To determine the AWSAR, equation (1) is rearranged into equation (2)):

[(3) The procedure used to determine the AWSAR for a sewage sludge is presented in Appendix A.]

(b) Domestic Septage. The annual whole application rate for domestic septage applied to agricultural land, forest, or a reclamation site shall be equal to or less than the annual whole application rate calculated using Equation B.2.

Figure: 30 TAC §312.49(b)

§312.50. Storage and Staging of Biosolids and Domestic Septage [Sludge at Beneficial Use Sites].

(a) Except as provided in subsection (b) of this section, storage of biosolids and/or domestic septage [sludge] at a [beneficial] land application unit [site] must not exceed 90 days. Storage is allowed only when the following requirements are carried out.

(1) Written authorization must be obtained from the executive director prior to construction of the storage area.

(2) The storage area must be operated and maintained to prevent surface water runoff and to prevent a release to groundwater. Discharge of stormwater [storm water] or wastewater which has come into contact with biosolids and/or domestic septage [sewage sludge] is prohibited. The storage area shall be designed to collect such runoff. Any runoff collected during the storage of biosolids and/or domestic septage [sewage sludge] shall be disposed in a manner to prevent a release to groundwater.

(3) The storage area shall be designed, constructed, and operated in a manner which protects human [public] health and the environment. Biosolids and/or domestic septage shall be stored away from odor receptors in order to prevent off-site dust migration from the storage area and to prevent nuisance odors.

(4) The storage area must be lined to prevent a release to groundwater. Natural or artificial liners are required for leachate control. A natural liner or equivalent barrier of one foot of compacted clay with a permeability coefficient of 1 × 10⁻⁶ cm/sec or less must be provided. Various flexible synthetic membrane lining materials may be used in lieu of soil liners if prior written approval has been obtained from the executive director. The applicant [registrant] shall furnish certification by a licensed professional engineer or licensed professional geoscientist that the completed storage area lining meets the appropriate criteria described in this section prior to using the facilities. The certification shall be signed, sealed, and dated by a licensed professional engineer or licensed professional geoscientist.

(5) The request for the storage area [application] shall outline measures to be taken to minimize vectors and to avoid public health nuisances such as odors.

(6) The storage area shall be fenced, or other methods shall be used, if necessary to control access by humans or domestic livestock [animals].
Berms or dikes shall be constructed to contain the waste without leakage.

Liquid biosolids and/or domestic septage [sludge] must be stored in an enclosed vessel.

Processing of biosolids and/or domestic septage [sludge] is prohibited unless a permit is obtained from the commission.

In the event a person who prepares biosolids and/or domestic septage [sewage sludge] that is land applied to the land, or who land applies biosolids and/or domestic septage [sewage sludge to the land], is subject to an Odor Control Plan as described in §312.44(j)(4) of this title (relating to Management Practices), that person must comply with the terms of the applicable Odor Control Plan in order to store biosolids and/or domestic septage [sewage sludge] at a land application unit [beneficial use site].

(b) Up to an additional 90 days of storage will be allowed with the prior approval of the appropriate Texas Commission on Environmental Quality (TCEQ) regional office, for reasons associated with application area flooding, saturated soils, or frozen soils.

(c) Staging of biosolids and/or domestic septage [sewage sludge] on-site, prior to land application, is allowable without executive director approval. Staging of biosolids and/or domestic septage [sewage sludge] may only occur for a maximum of seven calendar days per each individual staging location within the beneficial land application unit [site]. Up to an additional 14 days of staging biosolids and/or domestic septage [sewage sludge] will be allowed with the prior approval of the appropriate TCEQ [Texas Commission on Environmental Quality] regional office, for reasons associated with application area flooding, saturated soils, frozen soils, or equipment failure. Biosolids and/or domestic septage cannot be moved to another staging area to restart the timeframe allowed for staging. Written records of the location of each staging area and timeframe in which biosolids and/or domestic septage were stored shall be retained by the operator and be readily available for review by a TCEQ representative. The operator shall stage the biosolids and/or domestic septage [sewage sludge] away from odor receptors in order to prevent off-site dust migration from the staging area and to prevent nuisance odors.

[(1) prevent off-site dust migration from the staging area; and]

[(2) prevent nuisance odors.]

(d) Recordkeeping. The person who stores or stages biosolids and/or domestic septage shall develop the following information and shall retain the information for five years:

(1) the date, volume, and type of material deposited at the storage facility or staging area;
(2) the date, volume, and type of material removed from the storage facility or staging area; and
(3) if the material was not land applied on-site, the permit or registration number, location, and operator of the facility where the material that was removed from the storage facility or staging area was deposited.

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 11, 2019.

SUBCHAPTER C. SURFACE DISPOSAL

30 TAC §§312.61 - 312.68

Statutory Authority

These amendments are proposed under the Texas Water Code (TWC). Specifically, TWC, §5.013, which establishes the general jurisdiction of the commission and TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

These amendments are also proposed under TWC, §26.027, which authorizes the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state and Texas Health and Safety Code (THSC), §361.121, which gives the commission the authority to require a permit before a responsible person may apply Class B biosolids on a land application unit.

The proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, 26.027, and THSC, §361.121, which gives the commission the authority to regulate the land application and transportation of Class B biosolids.

§312.61. Applicability.

(a) This subchapter applies to any person who prepares sewage sludge and/or biosolids that are placed on a surface disposal site, to the owner/operator of a surface disposal site, to sewage sludge or biosolids placed on a surface disposal site, and to a surface disposal site.

(b) This subchapter does not apply to sewage sludge and/or biosolids stored on the land or to the land on which sewage sludge and/or biosolids is stored when the storage period is two years or less and the sewage sludge and/or biosolids is stored at a treatment works authorized for such storage.

(c) This subchapter does not apply to sewage sludge and/or biosolids at a treatment works authorized for such storage that remains on the land for longer than two years but less than five years when the person who prepares the sewage sludge or biosolids demonstrates that the land on which the sewage sludge and/or biosolids remains is not an active disposal [sludge] unit or surface disposal site. The demonstration shall include the following information, which shall be reviewed and approved by the executive director and retained by the person who

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality

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For further information, please call: (512) 239-2678
prepares the sewage sludge and/or biosolids for the period that the sewage sludge and/or biosolids remains on the land:

1. the name and address of the person who prepared the sewage sludge and/or biosolids;
2. the name and address of the person who either owns the land or leases the land;
3. the location of the land, by latitude and longitude, street address if available, and boundary shown on a 7 1/2-minute quadrangle United States Geological Survey map;
4. an explanation of why sewage sludge and/or biosolids needs to remain on the land for longer than two years prior to final use or disposal; and
5. the date by which the sewage sludge and/or biosolids will be used or disposed of. This date must clearly maintain a storage period of less than five years.

§312.62. General Requirements.

(a) No person shall place sewage sludge and/or biosolids on an active disposal [sludge] unit unless the requirements in this subchapter are met.

(b) An active disposal [sludge] unit shall not be located within 60 meters of a fault that has displacement in Holocene time, located in an unstable area, or located in a wetland, except as provided in a permit issued pursuant to federal Clean Water Act, §402 or §404 [of the CWA, shall close within one year from the effective date of this regulation].

(c) The owner/operator of an active disposal [sludge] unit shall submit a written “closure and post closure plan” to the executive director, for approval, at least 180 days prior to the date that the active disposal [sludge] unit closes. The plan shall describe how the [sludge] unit will be closed and, at a minimum, shall include:

1. a discussion of how the leachate collection system will be operated and maintained for three years after the disposal [sludge] unit closes if the disposal [sludge] unit has a liner and leachate collection system;
2. a description of the system used to monitor for methane gas in the air in any structures within the surface disposal site and in the air at the property line of the surface disposal site, as required in §312.64(j) of this title (relating to Management Practices); and
3. a discussion of how public access to the surface disposal site will be restricted for a minimum of three years after the last [sludge] unit in the surface disposal site closes.

4. The final cover system for monofills [aerial fills (monofills)] shall be composed of no less than two feet of soil. The first 18 inches or more of cover shall be of clayey soil, classification SC or CL as defined in the "Unified Soils Classification System" developed by the United States Army Corps of Engineers, compacted in layers of no more than six inches to minimize the potential for water infiltration. A CH soil may be used; however, this soil may experience excessive cracking and shall therefore be covered by a minimum of 12 inches of topsoil to retain moisture. Other types of soil may be used with prior written approval from the executive director. The final six inches of cover shall be of suitable topsoil that can sustain [is capable of sustaining] native plant growth and shall be seeded or sodded immediately following the application of the final cover in order to minimize erosion. Side slopes of the final cover for monofills [all above ground disposal areas (mono-fills)] shall not exceed 25% grade (four feet horizontal to one foot vertical). Side slopes for the final cover in excess of 25% may be authorized by the executive director provided that controlled drainage such as flumes, diversion terraces, spillways, or other acceptable methods are incorporated into the final cover system design submitted to the executive director for review and approval. The final cover for the topmost portion of a disposal unit [or facility] shall have a gradient of not less than 2.0% and not greater than 6.0%[4] and shall possess a sufficient minimum grade to preclude ponding of surface water when total fill height and expected subsidence are taken into consideration.

(d) The owner/operator shall comply with the post-closure care maintenance requirements for final cover, as detailed in paragraphs (1) and (2) of this subsection for the duration of the post-closure period for these units or sites.

1. For a minimum of the first three years after the completion of final closure, the permittee shall retain the right of entry to and maintain all rights-of-way of a closed surface disposal site in order to conduct periodic inspections of the closed site. The owner/operator shall correct, as needed, erosion of cover material, lack of vegetative growth, leachate or methane migration, [and] subsidence, or ponding of water on the disposal unit or surface disposal site. If any of these problems occur after the end of the three-year post closure maintenance period or persist for longer than the first three years of post-closure care maintenance, the owner/operator shall be responsible for any corrections until the executive director determines that all problems have been adequately resolved. The executive director may reduce the post-closure maintenance period for surface disposal sites if all wastes and waste residues have been removed during closure.

2. Any monitoring programs (groundwater [ground-water] monitoring, resistivity surveys, methane monitoring, etc.) in effect during the life of the surface disposal site shall be continued during the post-closure care maintenance period.

(e) Following completion of the post-closure care maintenance period for each surface disposal site, the owner/operator shall submit to the executive director for review and approval a [documented] certification, signed by an independent licensed [registered] professional engineer, verifying that post-closure care maintenance has been completed in accordance with the approved post-closure plan. The submittal to the executive director shall include all applicable documentation necessary for the certification of completion of post-closure care maintenance. Once approved, this certification shall be retained by the owner/operator.

(f) Deed Recordation Notification.

1. No person shall place sewage sludge and/or biosolids on an active disposal [sludge] unit prior to recording, in the deed records of the county or counties in which the disposal takes place, the following information:

A. a metes and bounds description of the portion(s) of the tract of land on which disposal of sewage sludge and/or biosolids will take place;
B. a detailed description of the sewage sludge and/or biosolids which is to be disposed of;
C. all pertinent information related to the permit to dispose of sewage sludge and/or biosolids, including at least the permit number and issuing agency; and
D. the name and permanent address of the person or persons operating the facility who can provide [where] more specific information on the waste [can be secured].

2. Proof of recordation shall be provided to the executive director prior to issuance of [before the commission issues] a permit.
§312.63. Metal Limits (Other Than Domestic Septage).

(a) Except as provided in subsection (b) of this section, the concentration for each metal listed in Table 6 of this subsection in sewage sludge and/or biosolids placed on an active disposal [sludge] unit that does not have a liner and leachate collection system shall be equal to or less than the concentration for the metal in Table 6 of this subsection.

Figure: 30 TAC §312.63(a)

(b) The concentration of each metal listed in Table 6 of subsection (a) of this section in sewage sludge and/or biosolids placed on an active disposal [sludge] unit whose boundary is less than 150 meters from the property line of the surface disposal site shall not exceed the concentration determined using the following procedure.

1. The shortest actual distance from the active disposal [sludge] unit boundary to the property line of the surface disposal site shall be determined.

2. The concentration of each metal listed in Table 7 of this paragraph in the sewage sludge and/or biosolids shall not exceed the concentration in Table 7 of this paragraph that corresponds to the actual distance as described in paragraph (1) of this subsection.

Figure: 30 TAC §312.63(b)(2)

§312.64. Management Practices.

(a) Sewage sludge and/or biosolids shall not be placed on an active disposal [sludge] unit if it is likely to adversely affect a threatened or endangered species listed under the Endangered Species Act, §4, or its designated critical habitat.

(b) An active disposal [sludge] unit shall not restrict the flow of the 100-year flood nor be located within the 100-year floodway.

(c) When a surface disposal site is located in a seismic impact zone, each disposal [sludge] unit in that site shall be designed to withstand the maximum recorded horizontal ground-level acceleration.

(d) An active disposal [sludge] unit shall be located 60 meters or more from a fault that has displacement in Holocene time, unless otherwise approved by the executive director or commission.

(e) An active disposal [sludge] unit shall not be located in an unstable area.

(f) An active disposal [sludge] unit shall not be located in a wetland except as provided in a permit issued under the federal Clean Water Act, §402 or §404.

(g) Runoff from an active disposal [sludge] unit shall be collected and disposed in accordance with discharge permit requirements and any other applicable requirements. The runoff collection system for an active disposal [sludge] unit shall have the capacity to handle runoff from a 25-year, 24-hour rainfall event.

(h) The leachate collection system for an active disposal [sludge] unit that has a liner and leachate collection system shall be operated and maintained during the period the disposal [sludge] unit is active and for three years after the disposal [sludge] unit closes.

(i) Leachate from an active disposal [sludge] unit that has a liner and leachate collection system shall be collected and disposed in accordance with the applicable requirements during the period the disposal [sludge] unit is active and for three years after the disposal [sludge] unit closes.

(j) When a cover is placed on an active disposal [sewage sludge] unit, the concentration of methane gas in air in any structure within the surface disposal site shall not exceed 25% of the lower explosive limit for methane gas during the period that the disposal [sewage sludge] unit is active and the concentration of methane gas in air at the property line of the surface disposal site shall not exceed the lower explosive limit for methane gas during the period that the disposal [sludge] unit is active. When a final cover is placed on a disposal [sludge] unit at closure, the concentration of methane gas in air in any structure within the surface disposal site shall not exceed 25% of the lower explosive limit for methane gas for three years after the disposal [sludge] unit closes and the concentration of methane gas in air at the property line of the surface disposal site shall not exceed the lower explosive limit for methane gas for three years after the disposal [sludge] unit closes. On a case by case basis, the executive director may consider exclusion from these requirements.

(k) A food crop, a feed crop, or a fiber crop shall not be grown on an active disposal [sludge] unit, unless the owner/operator of the surface disposal site demonstrates to the executive director [commission] that through additional management practices, human [public] health and the environment are protected from any reasonably anticipated adverse effects of metals in sewage sludge and/or biosolids when crops are grown.

(l) Domestic livestock [Animals] shall not be grazed on an active disposal [sludge] unit, unless the owner/operator of the surface disposal site demonstrates to the executive director [commission] that through additional management practices, human [public] health and the environment are protected from any reasonably anticipated adverse effects of metals in sewage sludge and/or biosolids when domestic livestock [animals] are grazed.

(m) Public access to a surface disposal site shall be restricted during the period that the surface disposal site contains an active disposal [sludge] unit and for a period of three years after the last active disposal [sludge] unit in the surface disposal site closes. The means of restricting access to a surface disposal site shall be effective with consideration of the location of the site and adjacent land use(s).

1. The permit application shall include an explanation of the means for restricting access to a surface disposal site.

2. The executive director shall include, as a condition of the proposed permit, specific requirements for the means of restricting access to a surface disposal site.

(n) Sewage sludge and/or biosolids placed on an active disposal [sludge] unit must not contaminate an aquifer. Results of a groundwater monitoring program developed by a licensed professional geoscientist or licensed professional engineer or a certification by a licensed professional geoscientist or licensed professional engineer shall be used to demonstrate that sewage sludge and/or biosolids placed on an active disposal [sludge] unit does not contaminate an aquifer. The results or certification shall be signed, sealed, and dated by the licensed professional geoscientist or licensed professional engineer preparing the results or certification.

§312.65. Operational Standards—Pathogen and Vector Attraction.

(a) Pathogen reduction for biosolids and/or sewage sludge (other than domestic septage). The [Class A and Class AB sewage sludge] pathogen reduction requirements in §312.82(a) or
(b)(1)(A) and (2) of this title (relating to Pathogen Reduction) [or the Class B sewage sludge pathogen reduction requirements in §312.82(b)(1)(A) and (2) of this title] shall be met when sewage sludge and/or biosolids are [is] placed on an active disposal [sludge] unit, unless the vector attraction reduction requirements in §312.83(b)(11) of this title (relating to Vector Attraction Reduction) are [is] met.

(b) Pathogen reduction for domestic[. Domestic] septage. The pathogen reduction requirement in §312.82(c)(2) of this title shall be met when domestic septage is placed on an active disposal [sludge] unit.

(c) Vector attraction reduction for biosolids and/or sewage[. Sewage] sludge (other than domestic septage). One of the alternatives for vector attraction reduction in §312.83(b)(1) - (11) of this title shall be met when sewage sludge and/or biosolids are [is] placed on an active disposal [sludge] unit.

(d) Vector attraction reduction for domestic[. Domestic] septage. The vector attraction reduction requirement in §312.83(b)(12) of this title shall be met when domestic septage is placed on an active disposal [sludge] unit.

§312.66. Frequency of Monitoring.

(a) Biosolids and/or sewage [Sewage] sludge (other than domestic septage).

(1) When required by this subchapter, the frequency of monitoring for the metals in Table 6 and Table 7 of §312.63(a) and (b) of this title (relating to Metal Limits), the pathogen density requirements in §312.82(a) and (b) of this title (relating to Pathogen Reduction) [and in §312.82(a) of this title (relating to Vector Attraction Reduction)], the vector attraction reduction requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction), for sewage sludge and/or biosolids placed on an active disposal [sludge] unit shall be the frequency in Table 8 of this paragraph. Figure: 30 TAC §312.66(a)(1)

(2) The executive director or commission may increase or decrease the frequency of monitoring required in paragraph (1) of this subsection after the sewage sludge and/or biosolids are [is] monitored for two years at the frequency in Table 8 in paragraph (1) of this subsection. The increase in frequency of monitoring should only increase to the next highest frequency for each two-year period and then may be lowered in the same manner. In no case shall the frequency of monitoring be less than the frequency required in Table 8 in paragraph (1) of this subsection if sewage sludge and/or biosolids are [is] placed on an active disposal [sludge] unit.

(b) If the vector attraction reduction requirements in §312.83(b)(12) of this title are met when domestic septage is placed on an active disposal [sewage sludge] unit, each individual container of domestic septage shall be monitored for compliance with those requirements.

(c) Air in structures within a surface disposal site at and the property line of the surface disposal site shall be monitored continuously for methane gas during the period the surface disposal site contains an active disposal [sludge] unit on which the sewage sludge and/or biosolids are [is] covered and for three years after a disposal [sludge] unit closes if a final cover is placed on the sewage sludge and/or biosolids.

§312.67. Recordkeeping [Record Keeping].

(a) Biosolids and/or Sewage [When sewage] sludge (other than domestic septage) [is placed on an active sludge unit].

(1) The person who prepares the sewage sludge and/or biosolids shall develop the following information and shall retain the information for five years.

(A) The concentration of each metal listed in Table 6 of §312.63(a) of this title (relating to Metal Limits) in the sewage sludge and/or biosolids [when the metal concentrations in Table 6 are met].

(B) The following certification statement: "I certify, under penalty of law, that the management practices in 30 TAC §312.64; the pathogen requirements in (insert the citation to the specific pathogen reduction requirements that are met from 30 TAC §312.82 [of this title (relating to Pathogen Reduction)]) and the vector attraction reduction requirements in (insert the citation to the specific vector attraction reduction requirements that are met from 30 TAC §312.83(b) [of this title (relating to Vector Attraction Reduction)]) when one of those requirements is met] have been met. This determination has been made under my direction and supervision in accordance with the system designed to assure that qualified personnel properly gather and evaluate the information used to determine that the (specific requirements for pathogen and vector attraction reduction (when appropriate)) have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment."

(C) A description of how the pathogen reduction requirements in §312.82(a) of this title (relating to Pathogen Reduction) are met, when required [any of those requirements are met].

(D) A description of how one of the vector attraction reduction requirements in §312.83(b) of this title (relating to Vector Attraction Reduction) are met, when required.

(2) The owner/operator of the surface disposal site shall develop the following information and shall retain that information for five years.

(A) The concentration of each metal listed in Table 7 of §312.63(b) of this title in the sewage sludge and/or biosolids [when the metal concentrations in Table 7 are met].

(B) The following certification statement: "I certify, under penalty of law, that the management practices in 30 TAC §312.64 and the vector attraction reduction requirements in (insert the citation to the specific requirements that are met from 30 TAC §312.83(b) [of this title (relating to Vector Attraction Reduction)]) have been met. This determination has been made under my direction and supervision in accordance with the system designed to assure that qualified personnel properly gather and evaluate the information used to determine that the management practices (and specific requirements for vector attraction reduction (when appropriate)) have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment."

(C) A description of how the management practices in §312.64 of this title (relating to Management Practices) are met.

(D) A description of how one of the vector attraction reduction requirements in §312.83 of this title [relating to Vector Attraction Reduction] are met when required.

(b) Domestic septage. [When domestic septage is placed on an active sludge unit].

(1) The [When the vector attraction reduction requirements in §312.83(b)(12) of this title (relating to Vector Attraction Reduction) are met, the] person who places [the] domestic septage on a [the] surface disposal site shall develop the following information and shall retain the information for five years.[;]
(A) The following certification statement: "I certify, under penalty of law, that the vector attraction reduction requirements in 30 TAC §312.83(b)(12) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the vector attraction reduction requirements have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment."

(B) A description of how the vector attraction reduction requirements in §312.83(b)(12) of this title [relating to Vector Attraction Reductions] are met. The record shall include the date and time of alkali addition, the pH after alkali addition, the time after 30 minutes of the alkali addition, the pH after 30 minutes.

(2) The owner/operator of the surface disposal site shall develop the following information and shall retain that information for five years.

(A) The following certification statement: "I certify, under penalty of law, that the management practices in 30 TAC §312.64 and the vector attraction reduction requirements in (insert the citation to the specific vector attraction reduction requirements that are met from 30 TAC §312.83 [of this title]) have been met. This determination has been made under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate the information used to determine that the management practices (and vector attraction reduction requirements (when appropriate)) have been met. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment."

(B) A description of how the management practices in §312.64 of this title are met.

(C) A description of how one of the vector attraction reduction requirements in §312.83 of this title are met when required.

§312.68. Reporting.

All facilities regulated under this subchapter shall submit the information required in §312.67(a) of this title (relating to Recordkeeping [Record Keeping]) to the executive director [commission] by September 30th [L] each year (reporting period September 1st of the previous year to August 31st of the current year).

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

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Texas Commission on Environmental Quality

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For further information, please call: (512) 239-2678

SUBCHAPTER D. PATHOGEN AND VECTOR ATTRACTION REDUCTION

30 TAC §§312.81 - 312.83

Statutory Authority

These amendments are proposed under the Texas Water Code (TWC). Specifically, TWC, §5.013, which establishes the general jurisdiction of the commission and TWC, §§5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority provided by TWC, §5.103; TWC, §§5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

These amendments are also proposed under TWC, §26.027, which authorizes the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state and Texas Health and Safety Code (THSC), §361.121, which gives the commission the authority to require a permit before a responsible person may apply Class B biosolids on a land application unit.

The proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, 26.027, and THSC, §361.121, which gives the commission the authority to regulate the land application and transportation of Class B biosolids.

§312.81. Scope.

(a) This subchapter contains the pathogen reduction requirements that must be met for biosolids [a sewage sludge] to be classified either Class A, Class AB, or Class B [with respect to pathogen reduction].

(b) This subchapter contains the site restrictions for the land on which Class B biosolids, [a sewage sludge that is Class B] with respect to pathogens, are [in] either land applied for beneficial use or placed on an active disposal [sludge] unit.

(c) This subchapter contains the pathogen reduction requirements for domestic septage applied to agricultural land, forest, or a reclamation site for beneficial use and the pathogen reduction requirements for domestic septage placed on an active disposal [sludge] unit.

(d) This subchapter contains the site restrictions for the land on which domestic septage is applied for beneficial use or placed on an active disposal [sludge] unit.

(e) This subchapter contains the vector attraction reduction requirements for biosolids [sewage sludge] and domestic septage that are land applied for beneficial use or placed on an active disposal [sludge] unit.

§312.82. Pathogen Reduction.

(a) [Sewage sludge--]Class A and Class AB biosolids.

(1) Compliance requirements--Class A and Class AB.

(A) For biosolids [sewage sludge] to be classified as Class AB, with respect to pathogens, the requirements in subparagraphs (C) and (D) of this paragraph and the requirements of one of the alternatives listed in paragraph (2) of this subsection must be met.

(B) For biosolids [sewage sludge] to be classified as Class A, with respect to pathogens, the requirements in subparagraphs
(C) and (D) of this paragraph and the requirements of one of the alternatives listed in paragraph (3) of this subsection must be met. Biosolids [sewage sludge] that meet [meets] the requirements of subparagraph (A) of this paragraph may be classified as Class A biosolids [sewage sludge] if a variance request is submitted in writing that is supported by substantial documentation demonstrating equivalent methods for reducing odors and written approval is granted by the executive director. The executive director may deny the variance request or revoke an [that] approved variance if it is determined that the variance may potentially endanger human health or the environment or create nuisance odor conditions.

(C) The requirements of the chosen alternative for pathogen reduction from paragraphs (2) and (3) of this subsection must be met prior to or at the same time as the vector attraction reduction requirements, except the requirements in §312.83(b)(6) - (8) of this title (relating to Vector Attraction Reduction).

(D) Either the density of fecal coliform in the biosolids [sewage sludge] must be less than 1,000 Most Probable Number per gram of total solids (dry weight basis) or the density of Salmonella (sp. bacteria) in the biosolids [sewage sludge] must be less than three Most Probable Number per four grams of total solids (dry weight basis) at the time the biosolids are [sewage sludge is] used or disposed of, at the time the biosolids are [sewage sludge is] prepared for sale or given away in a bag or other container for land application [to the land], or at the time the biosolids [sewage sludge] or material derived from biosolids are [sewage sludge is] prepared to meet the requirements in §312.41(b), (c), (e), or (f) of this title (relating to Applicability).

(2) Compliance alternatives--Class AB.

(A) Alternative 2. The temperature and pH of the biosolids [sewage sludge that is used or disposed of] must be maintained at specific values for specific periods of time.

(i) The pH of the biosolids [sewage sludge] must be raised to above 12 and must remain above 12 for 72 hours.

(ii) The temperature of the biosolids [sewage sludge] must be above 52 degrees Celsius for 12 hours or longer during the period that the pH of the biosolids [sewage sludge] is above 12.

(iii) At the end of the 72-hour period during which the pH of the biosolids [sewage sludge] is above 12, the biosolids [sewage sludge] must be air dried to achieve a percent solids in the biosolids [sewage sludge] greater than 50%.

(B) Alternative 3. The biosolids [sewage sludge that is used or disposed of] must be analyzed prior to pathogen treatment to determine whether the biosolids contain [sewage sludge contains] enteric viruses and viable helminth ova.

(i) When the density of enteric viruses in the biosolids [sewage sludge] prior to pathogen treatment is less than one Plaque-forming Unit per four grams of total solids (dry weight basis), the biosolids are [sewage sludge is] Class AB [A] with respect to enteric viruses until the next monitoring episode for the biosolids [sewage sludge].

(ii) When the density of enteric viruses in the biosolids [sewage sludge] prior to pathogen treatment is equal to or greater than one Plaque-forming Unit per four grams of total solids (dry weight basis), the biosolids are [sewage sludge is] Class AB [A] with respect to enteric viruses when the density of enteric viruses in the biosolids [sewage sludge] after pathogen treatment is less than one Plaque-forming Unit per four grams of total solids (dry weight basis) and when the values or ranges of values for the operating parameters for the pathogen treatment process that produces the biosolids [sewage sludge] that meet [meets] the enteric virus density requirement are documented.

(iii) After the enteric virus reduction in clause (ii) of this subparagraph is demonstrated for the pathogen treatment process, the biosolids continue [sewage sludge continues] to be Class AB [A] with respect to enteric viruses when the values for the pathogen treatment process operating parameters are consistent with the values or ranges of values documented in clause (ii) of this subparagraph.

(iv) When the density of viable helminth ova in the biosolids [sewage sludge] prior to pathogen treatment is less than one per four grams of total solids (dry weight basis), the biosolids are [sewage sludge is] Class AB [A] with respect to viable helminth ova until the next monitoring episode for the biosolids [sewage sludge].

(v) When the density of viable helminth ova in the biosolids [sewage sludge] prior to pathogen treatment is equal to or greater than one per four grams of total solids (dry weight basis), the biosolids are [sewage sludge is] Class AB [A] with respect to viable helminth ova when the density of viable helminth ova in the biosolids [sewage sludge] after pathogen treatment is less than one per four grams of total solids (dry weight basis) and when the values or ranges of values for the operating parameters for the pathogen treatment process that produces the biosolids [sewage sludge] that meet [meets] the viable helminth ova density requirement are documented.

(vi) After the viable helminth ova reduction in clause (v) of this subparagraph is demonstrated for the pathogen treatment process, the biosolids continue [sewage sludge continues] to be Class AB [A] with respect to viable helminth ova when the values for the pathogen treatment process operating parameters are consistent with the values or ranges of values documented in clause (v) of this subparagraph.

(C) Alternative 4. The biosolids [sewage sludge that is used or disposed of] must be analyzed prior to pathogen treatment to determine whether the biosolids contain [sewage sludge contains] enteric viruses and viable helminth ova.

(i) The density of enteric viruses in the biosolids [sewage sludge] must be less than one Plaque-forming Unit per four grams of total solids (dry weight basis) at the time the biosolids are [sewage sludge is] used or disposed of, at the time the biosolids are [sewage sludge is] prepared for sale or given away in a bag or other container for land application [to the land], or at the time the biosolids [sewage sludge] or material derived from biosolids are [sewage sludge is] prepared to meet the requirements in §312.41(b), (c), (e), or (f) of this title.

(ii) The density of viable helminth ova in the biosolids [sewage sludge] must be less than one per four grams of total solids (dry weight basis) at the time the biosolids are [sewage sludge is] used or disposed of, at the time the biosolids are [sewage sludge is] prepared for sale or given away in a bag or other container for land application [to the land], or at the time the biosolids [sewage sludge] or material derived from biosolids are [sewage sludge is] prepared to meet the requirements in §312.41(b), (c), (e), or (f) of this title.

(3) Compliance alternatives--Class A.

(A) Alternative 1. The temperature of the biosolids [sewage sludge that is used or disposed of] must be maintained at a specific [specified] value for a specific period of time.

(i) When the percent solids of the biosolids are [sewage sludge is] 70.0% or higher, the temperature of the biosolids [sewage sludge] must be 50 degrees Celsius or higher; the period must be 20 minutes or longer; and the temperature and time period
must be determined using Equation D.1 of [the equation in] this clause, except when small particles of biosolids [sewage sludge] are heated by either warmed gases or an immiscible liquid.

Figure: 30 TAC §312.82(a)(3)(A)(i)
[Figure: 30 TAC §312.82(a)(3)(A)(ii)]

(ii) When the percent solids of the biosolids [sewage sludge is] 7.0% or higher and small particles of biosolids [sewage sludge] are heated by either warmed gases or an immiscible liquid, the temperature of the biosolids [sewage sludge] must be 50 degrees Celsius or higher, the time period must be 15 seconds or longer, and the temperature and time period must be determined using Equation D.1 [the equation in] clause (i) of this subparagraph.

(iii) When the percent solids of the biosolids [sewage sludge] is less than 7.0% and the time period is at least 15 seconds, but less than 30 minutes, the temperature and time period must be determined using the Equation D.1 [equation] in clause (i) of this subparagraph.

(iv) When the percent solids of the biosolids [sewage sludge] is less than 7.0%, the temperature of the biosolids [sewage sludge] is 50 degrees Celsius or higher, and the time period is 30 minutes or longer, the temperature and time period must be determined using Equation D.2 [the equation in] this clause.

Figure: 30 TAC §312.82(a)(3)(A)(iv)
[Figure: 30 TAC §312.82(a)(3)(A)(iv)]

(B) Alternative 5 (Processes to Further Reduce Pathogens (PFRP)). Biosolids [Sewage sludge that is used or disposed of] must be treated in one of the PFRP described in 40 Code of Federal Regulations (CFR) Part 503, Appendix B.

(C) Alternative 6 (PFRP Equivalent). Biosolids [Sewage sludge that is used or disposed of] must be treated in a process that has been approved by the United States Environmental Protection Agency (EPA) as being equivalent to those in subparagraph (B) of this paragraph.

(b) [Sewage sludge--] Class B Biosolids.

(1) Compliance requirements--Class B.

(A) For biosolids [a sewage sludge] to be classified as Class B with respect to pathogens, the requirements in subparagraphs (B) and (C) of this paragraph must be met. As an alternative for biosolids [a sewage sludge] to be classified as Class B, the requirements of subparagraph (B) of this paragraph and paragraph (2) of this subsection must be met.

(B) The site restrictions in paragraph (3) of this subsection must be met when Class B biosolids, [sewage sludge that is classified as Class B] with respect to pathogens, are land applied [is applied to the land for beneficial use].

(C) A minimum of seven representative samples of the biosolids [sewage sludge] must be collected within 48 hours of the time that the biosolids are [sewage sludge is] used or disposed of during each monitoring episode for the biosolids [sewage sludge]. The geometric mean of the density of fecal coliform for the samples collected must be less than either 2,000,000 Most Probable Number per gram of total solids (dry weight basis) or 2,000,000 Colony-forming Units per gram of total solids (dry weight basis).

(2) Processes to Significantly Reduce Pathogens (PSRP) compliance alternatives--Class B. Biosolids [Sewage sludge that is used or disposed of] must be treated in one of the PSRP described in 40 CFR Part 503, Appendix B, or must be treated by an equivalent process approved by the EPA, so long as all of the following requirements are met by the biosolids generator [of the sewage sludge].

(A) Prior to use or disposal, all the biosolids [sewage sludge] must have been generated from a single location, except as provided in subparagraph (F) of this paragraph.

(B) An independent Texas licensed [registered] professional engineer must make a certification to the biosolids generator [of a sewage sludge] that the wastewater treatment facility generating the biosolids [sewage sludge] is designed to achieve one of the PSRP at the permitted design loading of the facility. The certification need only be repeated if the design loading of the facility is increased. The certification must include a statement indicating that the design meets all the applicable standards specified in 40 CFR Part 503, Appendix B.

(C) Prior to any off-site transportation or on-site use or disposal of any biosolids [sewage sludge] generated at a wastewater treatment facility, the licensed [chief certified] operator of the wastewater treatment facility or other responsible official who manages the PSRP at the wastewater treatment facility for the permittee, shall certify that the biosolids [sewage sludge] underwent at least the minimum operational requirements necessary in order to meet one of the PSRP. The acceptable processes and the minimum operational and recordkeeping requirements must be in accordance with established EPA final guidance.

(D) All certification records and operational records describing how the requirements of this paragraph were met must be kept by the generator for a minimum of three years and be available for inspection by the executive director [commission] staff for review.

(E) In lieu of a generator obtaining a certification as specified in subparagraph (B) of this paragraph, the executive director will accept from the EPA a finding of equivalency to the defined PSRP.

(F) If the biosolids are [sewage sludge is] generated from a mixture of sources, resulting from a person who prepares biosolids [sewage sludge] from more than one wastewater treatment facility, the resulting derived product must meet one of the PSRP, and meet the certification, operation, and recordkeeping requirements of this paragraph.

(3) Site restrictions.

(A) Food crops with harvested parts totally above the land surface that touch the biosolids/soil mixture [sewage sludge/soil mixture] must not be harvested from the land for at least 14 months after land [the] application of biosolids [sewage sludge].

(B) Food crops with harvested parts below the land surface [of the land] must not be harvested for at least 20 months after land application of biosolids [sewage sludge] when the biosolids remain [sewage sludge remains] on the land surface for four months or longer prior to incorporation into the soil.

(C) Food crops with harvested parts below the land surface [of the land] must not be harvested for at least 38 months after land application of biosolids [sewage sludge] when the biosolids remain [sewage sludge remains] on the land surface for less than four months prior to the incorporation into the soil.

(D) Food crops, feed crops, and fiber crops must not be harvested for at least 30 days after land application of biosolids [sewage sludge].

(E) Domestic livestock [Animals] must not be allowed to graze on the land for at least 30 days after land application of biosolids [sewage sludge].

(F) Turf crops grown on land where biosolids are [sewage sludge is] applied may not be harvested for at least one year.
after land application of biosolids [sewage sludge] when the harvested turf is placed on either land with a high potential for public exposure or a lawn.

(G) Public access to land with a high potential for public exposure must be restricted for at least one year after land application of biosolids [sewage sludge].

(H) Public access to land with a low potential for public exposure must be restricted for at least 30 days after land application of the biosolids [sewage sludge].

(c) Domestic septage.

(1) The site restrictions in subsection (b)(3) of this section must be met if domestic septage is land applied to agricultural land, forest, or a reclamation site.

(2) The pH of domestic septage land applied to agricultural land, forest, or a reclamation site must be raised to 12 or higher by alkali addition and, without the addition of more alkali, must remain at 12 or higher for a period of 30 minutes.

§312.83. Vector Attraction Reduction.

(a) Compliance requirements.

(1) One of the vector attraction reduction requirements in subsection (b)(1) - (10) of this section shall be met when bulk biosolids are land [sewage sludge is] applied to agricultural land, forest, a public contact site, or a reclamation site.

(2) One of the vector attraction reduction requirements in subsection (b)(1) - (8) of this section shall be met when bulk biosolids are [sewage sludge is] applied to a lawn or, a home garden, or are sold or given away in a bag or other container.

(3) One of the vector attraction reduction requirements in subsection (b)(1) - (11) of this section shall be met when biosolids are [sewage sludge (other than domestic septage) is] placed on an active disposal [sewage sludge] unit.

(4) One of the vector attraction reduction requirements in subsection (b)(9), (10), or (12) of this section shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site.

(5) One of the vector attraction reduction requirements in subsection (b)(9) - (12) of this section shall be met when domestic septage is placed on an active disposal [sewage sludge] unit.

(b) Compliance alternatives.

(1) The mass of volatile solids in the biosolids [sewage sludge] shall be reduced by a minimum of 38%.

(2) If [an] anaerobically digested biosolids [sewage sludge] cannot meet the 38% volatile solids reduction requirement in paragraph (1) of this subsection, vector attraction reduction can be demonstrated by digesting a portion of the previously digested biosolids [sewage sludge] anaerobically in a laboratory in a bench-scale unit for 40 additional days at a temperature between 30 and 37 degrees Celsius. If, at the end of the 40 days, the volatile solids in the biosolids [sewage sludge] at the beginning of that period is reduced by less than 17%, vector attraction reduction is achieved.

(3) If [an] aerobically digested biosolids [sewage sludge] cannot meet the 38% volatile solids reduction requirement in paragraph (1) of this subsection, vector attraction reduction can be demonstrated by digesting a portion of the previously digested biosolids [sewage sludge] that has a percent solids of 2.0% or less aerobically in a laboratory in a bench-scale unit for 30 additional days at 20 degrees Celsius.

If, at the end of the 30 days, the volatile solids in the biosolids [sewage sludge] at the beginning of that period is reduced by less than 15%, vector attraction reduction is achieved.

(4) The specific oxygen uptake rate (SOUR) for biosolids [sewage sludge] treated in an aerobic process shall be equal to or less than 1.5 milligrams of oxygen per hour per gram of total solids (dry weight basis) at a temperature of 20 degrees Celsius.

(5) Biosolids [Sewage sludge] shall be treated in an aerobic process for 14 days or longer. During that time, the temperature of the biosolids [sewage sludge] shall be higher than 40 degrees Celsius and the average temperature of biosolids [sewage sludge] shall be higher than 45 degrees Celsius.

(6) The pH of biosolids [sewage sludge] shall be raised to 12 or higher by alkali addition and, without the addition of more alkali, shall remain at 12 or higher for two hours and then remain at a pH of 11.5 or higher for an additional 22 hours.

(7) The percent solids of biosolids [sewage sludge] that do [does] not contain unstabilized solids generated in a primary wastewater treatment process shall be equal to or greater than 75% based on the moisture content and total solids prior to mixing with other materials.

(8) The percent solids of biosolids [sewage sludge] that contains unstabilized solids generated in a primary wastewater treatment process shall be equal to or greater than 90% based on the moisture content and total solids prior to mixing with other materials.

(9) Biosolids [Sewage sludge] shall be injected below the land surface [of the land]. No significant amount of the biosolids [sewage sludge] shall be present on the land surface within one hour after the biosolids are [sewage sludge is] injected. If the biosolids [sewage sludge] that are [is] injected below the land surface are [of the land is] Class A or Class AB with respect to pathogens, as described in §312.82 of this title (relating to Pathogen Reduction), the biosolids [sewage sludge] shall be injected below the land surface within eight hours after the biosolids are [sewage sludge is] discharged from the pathogen treatment process.

(10) Biosolids [Sewage sludge] applied to the land surface or placed on a surface disposal site shall be incorporated into the soil within six hours after application or placement on the land. If the biosolids [sewage sludge] that are [is] incorporated into the soil are [is] Class A or Class AB with respect to pathogens, as described in §312.82 of this title, the biosolids [sewage sludge] shall be applied to or placed on the land within eight hours after the biosolids are [sewage sludge is] discharged from the pathogen treatment process.

(11) Biosolids [Sewage sludge] placed on an active disposal [sewage sludge] unit shall be covered with soil or other material at the end of each operating day.

(12) The pH of domestic septage shall be raised to 12 or higher by alkali addition and, without the addition of more alkali, shall remain at 12 or higher for 30 minutes.

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 F. LAND APPLICATION, STORAGE, AND DISPOSAL OF WATER TREATMENT RESIDUALS [SLUDGE]

30 TAC §§312.121 - 312.130

Statutory Authority

These amendments and new sections are proposed under the Texas Water Code (TWC). Specifically, TWC, §5.013, which establishes the general jurisdiction of the commission and TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

These amendments and new sections are also proposed under TWC, §26.027, which authorizes the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state and Texas Health and Safety Code (THSC), §361.121, which gives the commission the authority to require a permit before a responsible person may apply Class B biosolids on a land application unit.

The proposed amendments and new sections implement TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, 26.027, and THSC, §361.121, which gives the commission the authority to regulate the land application and transportation of Class B biosolids.

§312.121. Purpose and Applicability[Scope, and Standards]

(a) The purpose of this subchapter is to establish minimum requirements that define the acceptable management of water treatment residuals [sludge]. These requirements apply as specified in §312.2 of this title (relating to Applicability).

(b) Except as provided in subsection (e) of this section, the regulations contained in 40 CFR, Part 257 (including all appendices to Part 257), are adopted by reference as amended and adopted in the CFR through October 9, 1993. The definitions contained in 40 CFR, Part 257 supersede any definitions for the same terms found in §312.8 of this title (relating to General Definitions).

(c) The commission does not adopt the definition of land application unit as specified in 40 CFR, §257.2.

(d) The following term, when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise. Land application unit is an area where water treatment residuals are [sludge is] applied onto or incorporated into the soil surface for [treatment or] disposal, where the disposal occurs within five feet of the land surface [of the land].

(e) The criteria and applicable definitions found in 40 CFR, Part 257 apply to disposal of water treatment sludge in a landfill waste pile, land application unit, or surface impoundment.

(f) When water treatment residuals are [sludge is] mixed with sewage sludge, biosolids, or domestic septage or when water treatment residuals are [sludge is] placed on land for disposal along with sewage sludge, biosolids, or domestic septage, it is subject to all applicable requirements of sewage sludge, biosolids, or domestic septage, as specified in this chapter.

§312.122. Registrations and Permits.

(a) A permit shall be required before any disposal of water treatment residuals [sludge] in a monofill [landfill]. The requirements for applications, permits, permit conditions, and actions by the commission shall be in accordance with Chapter 305 of this title (relating to Consolidated Permits). Applications for permits will be processed in accordance with Chapter 281 of this title (relating to Applications Processing). Disposal of water treatment residuals in a landfill is regulated by Chapter 330 of this title (relating to Municipal Solid Waste).

(b) Any person who disposes of water treatment residuals [sludge] in a land application unit, surface impoundment, or waste pile [in accordance with §312.121 of this title (relating to Purpose, Scope, and Standards)] shall apply for registration on a form approved by the executive director. [Commission. A completed application must be submitted to the commission's Permitting Section of the Water Quality Division.] Before issuing a registration, the executive director will [may] review the application to determine whether the proposed activity meets the requirements of this subchapter [40 Code of Federal Regulations Part 257].

§312.123. General Requirements.

(a) No person shall land apply water treatment residuals except in accordance with the requirements in this subchapter.

(b) The person who land applies water treatment residuals shall obtain information needed to comply with the requirements in this subchapter.

(c) If a water treatment plant operator provides bulk water treatment residuals to a person who land applies the water treatment residuals, the water treatment plant operator shall provide the person who land applies the water treatment residuals notice and necessary information to comply with the requirements in this subchapter.

(d) If a water treatment plant operator provides water treatment residuals to a person who prepares the water treatment residuals for land application, the water treatment plant operator shall provide the person who prepares the water treatment residuals for land application notice and necessary information to comply with the requirements in this subchapter.

(e) The person who land applies water treatment residuals shall provide the owner or lease-holder of the land on which the water treatment residuals are land applied notice and necessary information to comply with the requirements in this subchapter.

§312.124. Metal Limits.

(a) Water treatment residuals shall not be land applied if the concentration of any metal in the water treatment residuals exceeds the ceiling concentration for the metals in Table 1 of §312.43(b)(1) of this title (relating to Metal Limits).

(b) The applicant shall determine the soil concentration of cadmium in accordance with §312.12(a)(1)(f) of this title (relating to Registrations) and demonstrate to the satisfaction of the executive director
that the proposed cumulative cadmium loading will not result in a toxic condition or increase the toxicity of the existing soil.


(a) When water treatment residuals are land applied to agricultural land, forest, a public contact site, or a reclamation site for the production of food or feed crops, the requirements in either paragraph (1) or (2) of this subsection must be met.

(1) Production of any food crops.

(A) The pH of the residuals and soil mixture must be 6.5 or greater at the time of land application, except for water treatment residuals containing cadmium concentrations of 2 mg/kg (dry weight) or less.

(B) The annual cadmium loading rate (ACLR), which is the annual application of cadmium from water treatment residuals, must not exceed 0.5 kilograms per hectare (kg/ha).

(C) The cumulative application of cadmium from water treatment residuals must not exceed the levels in Table 9 of this subsection.

Figure: 30 TAC §312.125(a)(1)(C)

(2) Production of feed crops:

(A) The pH of the water treatment residuals and soil mixture must be 6.5 or greater at the time of land application or at the time the crop is planted, whichever occurs later, and the pH must be maintained whenever feed crops are grown.

(B) There must be a facility operating plan which demonstrates how the feed crops will be distributed to preclude ingestion by humans. The operating plan must describe the measure to be taken to safeguard against possible health hazards from cadmium entering the food-chain, which may result from alternative land uses.

(C) Future property owners must be notified by a stipulation in the land record or property deed which states that the property has received water treatment residuals at high cadmium application rates and that food crops should not be grown, due to a possible health hazard.

(b) Land application or disposal of water treatment residuals must not cause or contribute to the harm of a threatened or endangered species of plant, fish, or wildlife or result in the destruction or adverse modification of the critical habitat of a threatened or endangered species.

(c) Water treatment residuals must not be land applied when the ground is flooded, frozen, or snow-covered to prevent the water treatment residuals from entering surface water in the state.

(d) Water treatment residuals must be land applied at an annual whole application rate that is equal to or less than the agronomic rate for the crop. For land application to a reclamation site, the executive director may, on a case-by-case basis, authorize an annual whole application rate that exceeds the agronomic rate for the crop, for a specific time-period.

(e) Water treatment residuals must be land applied or placed on an active disposal unit by a method and under conditions that prevent runoff of the residuals beyond the land application unit or surface disposal site and that protect the quality of the surface water and the soils in the unsaturated zone.

(1) Water treatment residuals must be land applied or placed uniformly over the land application unit or active disposal unit.

(2) Where runoff of water treatment residuals from the land application unit or surface disposal site is evident, the operator shall cease further application or disposal until the condition is corrected.

(3) A land application unit or active disposal unit located in floodplains shall not restrict the flow of the base flood, reduce the temporary water storage capacity of the floodplain, or result in a washout of water treatment residuals, so as to pose a hazard to human life, wildlife, or land or water resources.

(f) A land application unit or active disposal unit shall not contaminate an underground drinking water source.

(g) Nuisance controls.

(1) A land application unit or surface disposal site location must be selected, and the site operated in a manner to prevent public health nuisances.

(2) Debris must be prevented from blowing or running off-site boundaries or into surface waters.

(3) To prevent nuisance conditions from occurring, the operator shall:

(A) minimize dust migration from the site and access roadways;

(B) minimize offensive odors through incorporation of water treatment residuals into the soil or by taking some other type of preventative action; and

(C) develop and implement best management practices (BMPs) to minimize off-site tracking of water treatment residuals when transporting the material to and from the land application unit, surface disposal site, or storage area. BMPs must also address removing tracked material, to the extent practicable, by the end of each day of operation at the site and either returning it to the site or otherwise disposing of it properly. The documented BMPs shall be retained by the operator and made readily available for review by the executive director.

(h) A registration must specify the soil testing requirements for each land application unit.

(1) The testing frequency must consider common agricultural methods of determining the crop nutrient needs, soil pH, phytotoxicity, and concentrations of metals regulated by this chapter.

(2) The soil testing frequency for metals regulated by this chapter shall be once per five years or prior to submittal of a renewal application. Soil testing for metals regulated by this chapter is not required for portions of the authorized site where water treatment residuals have not been land applied since the last soil metals testing was performed. The executive director may require more frequent soil monitoring if metal loading into the soil is a threat to human health or the environment.

§312.126. Frequency of Monitoring.

(a) Water treatment residuals that are land applied shall be monitored for the metals listed in Table 1 of §312.43(b)(1) of this title (relating to Metal Limits) at the frequency specified in Table 10 of this subsection.

Figure: 30 TAC §312.126(a)

(b) After the water treatment residuals have been monitored for two years at the frequency shown in Table 10 of subsection (a) of this section, the executive director may reduce the monitoring frequency, but in no case shall the monitoring frequency be less than once per year when water treatment residuals are land applied. A request to
reduce monitoring frequency must be submitted to the executive director with the sample results from the previous two years.

(c) After the water treatment residuals have been monitored for two years at the frequency shown in Table 10 of subsection (a) of this section, the executive director may increase the monitoring frequency. An increase in monitoring frequency will be required where high metal concentrations are present in the water treatment residuals.

§312.127. Recordkeeping.

(a) A person who prepares the water treatment residuals for land application shall retain the sample results demonstrating compliance with Table 1 of §312.43(b)(1) of this title (relating to Metal Limits) for five years.

(b) A person who derives material from water treatment residuals for land application shall retain the sample results demonstrating compliance with Table 1 of §312.43(b)(1) of this title for five years.

(c) A person who land applies water treatment residuals meeting the requirements in §312.125(a)(1) of this title (relating to Management Practices) shall retain the following information indefinitely:

(1) the concentration of cadmium in the water treatment residuals;
(2) the amount of water treatment residuals land applied;
(3) the number of acres where water treatments residuals were land applied;
(4) the cumulative amount of cadmium in the water treatment residuals land applied to each site;
(5) the background soil pH at the time of when water treatment residuals were land applied; and
(6) the soil cation exchange capacity (CEC) in meq/100 grams.

(d) A person who land applies water treatment residuals meeting the requirements in §312.125(a)(2) of this title shall retain the information required by §312.125(a)(2) of this title indefinitely.

(e) A person who land applies water treatment residuals shall develop the following information and shall retain the information for five years:

(1) the dates of harvesting; and
(2) the amount harvested, excluding grazing.

§312.128. Annual Report.

A person who land applies or disposes of water treatment residuals shall submit a report to the executive director by September 30th of each year (reporting period September 1st of previous year to August 31st of the current year) which describes land application or disposal activities regulated under this subchapter. The report shall include, at a minimum, the registration or permit number of the land application unit or surface disposal site, the amount of water treatment residuals which have been land applied or disposed of during the reporting period, the information required by §312.127(a)(1) or (2)(B) of this title (relating to Recordkeeping), as applicable, and §312.127(c) of this title, as applicable. The information shall be submitted on forms furnished by the executive director. From the information provided, the executive director will assess an annual fee, in accordance with the requirements of §312.9 of this title (relating to Fee Program).

§312.129. Procedure to Determine the Annual Whole Application Rate for Water Treatment Residuals.

(a) This subsection contains the procedure used to determine the annual whole application rate (AWAR) for water treatment residuals that does not cause the annual cadmium loading rates (ACLR) in §312.125(a)(1) of this title (relating to Management Practices) to be exceeded.

(b) Determine the AWAR using Equation F.1 of this subsection. Figure: 30 TAC §312.129(b)

§312.130. Storage of Water Treatment Residuals.

(a) Written authorization from the executive director is required to store water treatment residuals prior to disposal or land application.

(b) The storage area must be operated and maintained to prevent surface water runoff and to prevent a release to groundwater.

(c) Except as authorized by subsection (d) of this section, storage of water treatment residuals must not exceed two years.

(d) Storage may be increased to a period of up to five years with prior approval from the executive director and when the person who stores the water treatment residuals demonstrates that the land on which the water treatment residuals remain is not an active disposal unit. The demonstration shall include the following information, which shall be reviewed and approved by the executive director and retained by the person who stores the water treatment residuals for the period that the water treatment residuals remain on the land:

(1) the name and address of the person who prepared the water treatment residuals;
(2) the name and address of the person who either owns the land or leases the land;
(3) the location of the land, by latitude and longitude, street address if available, and boundary shown on a 7 1/2-minute quadrangle United States Geological Survey map;
(4) an explanation of why water treatment residuals need to be stored for longer than two years; and
(5) the date by which the water treatment residuals will be used or disposed of. This date must correspond to a storage period of less than five years.

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

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SUBCHAPTER F. DISPOSAL OF WATER TREATMENT SLUDGE

30 TAC §312.123

Statutory Authority

The repeal is proposed under the Texas Water Code (TWC). Specifically, TWC, §5.013, which establishes the general jurisdiction of the commission and TWC, §5.102, which provides the
commission with the authority to carry out its duties and general powers under its jurisdictional authority provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

The proposed repealed rule implements TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, and 26.034.

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SUBCHAPTER G. TRANSPORTERS AND TEMPORARY STORAGE PROVISIONS

30 TAC §§312.141 - 312.147, 312.149, 312.150

Statutory Authority

These amendments are proposed under the Texas Water Code (TWC). Specifically, TWC, §5.013, which establishes the general jurisdiction of the commission and TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the code and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; TWC, §26.011, which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state; and TWC, §26.034, which gives the commission the authority to set standards to prevent the discharge of waste that is injurious to the public health.

These amendments are also proposed under TWC, §26.027, which authorizes the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state and Texas Health and Safety Code (THSC), §361.121, which gives the commission the authority to require a permit before a responsible person may apply Class B biosolids on a land application unit.

The proposed amendments implement TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 26.011, 26.027, and THSC, §361.121, which gives the commission the authority to regulate the land application and transportation of Class B biosolids.

§312.141. Transporters--Applicability and Responsibility.

(a) Rules contained in this subchapter establish standards applicable to persons, including municipalities, state and federal agencies, collecting, generating and/or transporting biosolids/sewage sludge, water treatment residuals [sludge], domestic sewage, chemical toilet waste, grit trap waste, or grease trap waste. This chapter also establishes standards applicable to persons and facilities who receive waste from transporters regulated under this subchapter. Methods of transportation shall include measures utilizing roadway, rail, and water.

(b) Transporters of waste subject to control under this subchapter shall only transport the waste types specified in subsection (a) of this section. Each transporter shall take reasonable precautions to ensure that waste handled in accordance with rules contained in this subchapter is not hazardous waste, as defined in Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste).

(c) The processing of wastes is not authorized under this subchapter, except for domestic septage under §312.144(e) of this title (relating to Transporters--Vehicle and Equipment).

(d) These rules are not applicable to persons transporting biosolids [sewage sludge] that do not exceed [meets] the metal concentration limits in §312.43(b)(3) (Table 3) of this title (relating to Metal Limits), meets the requirements in §312.82(a)(1) of this title (relating to Pathogen Reduction), [and] meets one of the requirements in §312.83(b)(1) - (8) of this title (relating to Vector Attraction Reduction), and has been approved for marketing and distribution as authorized in Subchapter B of this chapter (relating to Land Application and Storage of Biosolids and Domestic Septage [for the Beneficial Use]).

§312.142. Transporter Registration.

(a) Persons who plan to transport biosolids/sewage sludge, water treatment residuals [sludge], domestic sewage, chemical toilet waste, grit trap waste, or grease trap waste regulated under this subchapter shall apply for registration with the commission on forms furnished by the executive director and receive a registration from the executive director prior to commencing operations.

(b) Failure to submit a complete and accurate application or other information requested by the executive director will result in the return of the application to the applicant. Applications for transportation registrations shall include:

1. a complete, signed application form(s) [and notarized] and appropriate copies provided;

2. the verified legal status of the applicant(s);

3. the signature of the applicant(s), checked against agency requirements, in accordance with §305.44 of this title (relating to Signatories to Applications);

4. the attachment of technical reports and supporting data required by the application; and

5. any other information as the executive director or the commission may reasonably require.

(c) Persons who apply to the commission for registration and receive a registration shall maintain a current copy of the registration.
authorization, as annotated by the executive director with an assigned registration number, at their designated place of business and in each vehicle operated under that registration. This registration shall be produced and shown to the operator of the facility receiving the waste at the time of delivery.

(d) The expiration date of the registration shall be August 31st of the year in which it expires. Registrations are required to be renewed biennially prior to the expiration date. Application for renewal shall be submitted by June 15th of the year in which the registration expires. Any registrant shall notify the executive director in writing within 15 days of cessation of operation and request that the registration be cancelled, and request all forms and reports needed to report waste hauled during the period of registration.

(e) A new registration application is required to be submitted within 15 days after any of the following, whereupon the old registration number will be voided and the old registration cancelled:

1. change in ownership of the operating entity; or
2. determination by the executive director that operations or management methods are no longer adequately described by the existing registration.[ or]

[(3) failure of the registrant to submit an annual summary report.]

(f) Transporters shall notify the executive director, by letter, within 15 days after any of the following changes of their operations, including, but not limited to:

1. the office or place of business is moved or its address or telephone number changes;
2. the name of the operating entity is changed;
3. a transporter plans to handle a waste not included in the existing registration;
4. a change in license plate numbers of registered vehicles, a new vehicle, and/or an existing vehicle removed from the fleet;
5. a transporter plans to haul waste to a location not included on the existing registration; or
6. a transporter plans to remove a location already included on the existing registration.

(g) The commission may revoke or void a registration for cause as provided in §312.150 of this title (relating to Penalties). An opportunity for a formal hearing on the revocation may be requested by the registrant within 20 days after a Notice of Revocation has been sent from the executive director to the last known address of the registrant. If the registration is revoked or voided, a transporter shall not continue to transport the wastes regulated under this subchapter.

(h) An applicant owing delinquent fees or an applicant who has failed to submit required reports will not be eligible to renew their registration to transport waste until all fees and reports are submitted and accepted by the executive director.

(i) A registrant failing to submit the annual summary report by the date due is subject to payment of the maximum fees specified in §312.9(c) of this title (relating to Sludge Fee Program).

(j) The commission issues authorization stickers for all registered motor transport vehicles and the fee per motor transport vehicle is $10. [wall issue, beginning February 1, 1995, authorization stickers for all registered motor transport vehicles. The commission will charge a fee of $10 per motor transport vehicle.]

§312.143. Transporters--Delivery Requirement and Full Pump-out Requirement.

(a) For in-state disposal, transporters shall deposit wastes at a facility designated by or acceptable to the generator where the owner or operator of the facility agrees to receive the wastes and the [Texas] facility has written authorization by permit or registration issued by the executive director to receive wastes. In this regard, "authorization by the executive director" means the executive director or commission has given its approval by rule, permit, letter, or other document that identifies the individual facility or class of facilities to receive that specific waste or class of waste.

(b) Each grit trap and grease trap pumped shall be fully evacuated unless the trap volume is greater than the tank capacity on the vacuum truck in which case the transporter shall arrange for additional transportation capacity so that the trap is fully evacuated within a 24-hour period. If a transporter cannot fully evacuate a grit trap or grease trap because the trap volume is greater than the tank capacity on the truck, the transporter shall arrange for additional transportation capacity to ensure the trap is fully evacuated within the 24-hour period following the transporter's inability to fully evacuate the trap.

§312.144. Transporters--Vehicle and Equipment.

(a) Marking and identification. Owners or operators of specially equipped vacuum pump trucks, tanks, or containers used for the collection and/or over-the-road transportation of wastes regulated under this subchapter shall prominently mark such trucks, tanks, or containers to show the following:

1. company name;
2. telephone number;
3. authorization stickers (motor vehicles only); and
4. the commission assigned registration number on both sides of the vehicles or receptacle.

(A) The registration number shall be a minimum of two inches in height, in block numbers permanently affixed. The registration number must be clearly visible at a distance of 50 feet.

(B) The company name and phone number, authorization stickers, and the registration number shall be removed from the trucks, tanks, or containers, by the registrant, when it is no longer authorized by the commission or leaves the control of the person(s) holding the registration.

(b) Sanitation standards. All vehicles and equipment used for the collection and transportation of the wastes regulated under this subchapter shall be constructed, operated, and maintained to prevent loss of liquid or solid waste materials and to prevent health nuisance and safety hazards to operating personnel and the public. Collection vehicles and equipment shall be maintained in a sanitary condition to preclude nuisance conditions such as odors and insect breeding.

(c) Mixing of incompatible wastes. Mixing of incompatible wastes within the same container is prohibited. Transporters shall not use the same container or pumping equipment to collect or transport
incompatible waste without first emptying and cleaning the container and equipment of all previously handled wastes. For purposes of this subsection, incompatible waste are wastes which have different processing, storage, or disposal requirements. However, transporters may mix wastes with different characteristics provided the facility to which the waste is being transported is authorized to store, process, or dispose of such mixed wastes.

(d) Site gauges. All closed vehicles, tanks, or containers used to transport liquid wastes regulated by this subchapter shall have sight gauges maintained in a manner which can be used to determine whether [or not] a vehicle is loaded and its [the] approximate capacity. Gauges are not required to read in gallons or liters[,] but shall show what percentage of the tank capacity is filled. An alternate method to measure actual volumes may be utilized with prior written approval from the Executive Director.

(e) Septage transport. If [the vehicles, tanks, or containers are used to transport domestic septage to a beneficial use site, the registrant shall keep records showing how] the domestic septage transported meets [were] the pathogen and vector attraction reduction requirements listed in §312.82(c) of this title (relating to Pathogen Reduction) and §312.83 of this title (relating to Vector Attraction Reduction), the registrant shall keep records pertaining to the pathogen and vector attraction reduction requirements. Copies of records pertaining to the pathogen and vector attraction reduction requirements shall be maintained on the vehicles for a minimum of one month and at the land application unit [beneficial use site] and transporter office for a minimum of five years.

(f) Discharge valves. All closed vehicles, tanks, or containers used to transport liquid wastes regulated by this subchapter shall prominently mark all discharge valves and ports. All discharge ports shall be visible and readily accessible.

(g) Inspection. All transport vehicles shall include, but are not limited to, trucks, portable tanks, trailers, barges, or similar transport vehicles/receptacles and are subject to inspection by commission staff authorized by the executive director. If a transport vehicle fails the inspection, the authorization sticker and the commission assigned registration number are to be removed from the vehicle and that vehicle is not authorized to transport waste until the vehicle is re-inspected [reinspected] and passes.

§312.145. Transporters—Recordkeeping.

(a) Trip tickets. Persons who collect and transport waste subject to control under this subchapter shall maintain a record of each individual collection and deposit. Such records must be in the form of a trip ticket. Similar documentation may be used with written approval by the executive director. The trip ticket must include:

(1) name, address, telephone number, and commission registration number of transporter;

(2) name, signature (or electronic signature), address, and telephone number of the person who generated the waste and the date collected;

(3) type and amount(s) of waste collected or transported;

(4) name and signature(s) of responsible person(s) collecting, transporting, and depositing the waste;

(5) date and place where the waste was deposited;

(6) identification (permit or site registration number, location, and operator) of the facility where the waste was deposited;

(7) name and signature (or electronic signature) of facility on-site representative acknowledging receipt of the waste and the amount of waste received; and

(b) Maintenance of records and reporting.

(1) Trip tickets. Trip tickets must be divided into five parts and records of trip tickets must be maintained as follows.

(A) One part of the trip ticket must have the generator and transporter information completed and be given to the generator at the time of waste pickup.

(B) The remaining four parts of the trip ticket must have all required information completely filled out and signed by the appropriate party before distribution of the trip ticket.

(C) One part of the trip ticket must go to the receiving facility.

(D) One part of the trip ticket must go to the transporter, who shall retain a copy of all trip tickets showing the collection and disposition of waste.

(E) One copy of the trip ticket must be returned by the transporter to the person who generated the waste within 15 days after the waste is received at the disposal or processing facility.

(F) One part of the trip ticket must go to the local authority, if needed.

(2) Record retention. Copies of trip tickets must be retained for five years and be readily available for review by commission staff or be submitted to the executive director upon request.

(3) Rail or barge transport. Persons who transport waste via rail or barge may use an alternate recordkeeping system, if approved by the executive director.

(4) Reporting. By July 1st [4], transporters must submit to the executive director an annual summary of their activities for the previous period of June 1st [4] through May 31st [4], showing the amounts and types of waste collected and delivered to each facility, [following):

{[(A) amounts and types of waste collected;]

[(B) disposition of such wastes; and]

[(C) amounts and types of waste delivered to each facility.]}

(c) Discrepancies. A facility that receives waste must note any significant discrepancies on each copy of the trip ticket.

(1) Trip ticket discrepancies are differences between the quantity or type of waste designated on the trip ticket, and the quantity or type of waste a facility actually received. Significant discrepancies in type are obvious differences that can be discovered by inspection or waste analysis. Significant discrepancies in quantity are:

(A) for bulk weight, variations greater than 10% in weight; and

(B) for liquid waste, any variation greater than 15% in gallons.

(2) Upon discovering a significant discrepancy, the transporter must attempt to reconcile the discrepancy with the waste generator or owner or operator of the receiving facility (e.g., with telephone conversations). If the discrepancy is not resolved within 15 days after delivering the waste, the transporter must immediately submit to the executive director a letter describing the discrepancy and attempts to reconcile it, and a copy of the trip ticket.
(d) Notification. A facility that receives waste from a transporter that cannot produce a registration acknowledgment under §312.142(c) of this title (relating to Transporter Registration) must notify the appropriate regional office of the commission within three days of the waste receipt of the transporter's failure to produce a current registration authorization.

(e) Local ordinances. Where local ordinances require controls and records substantially equivalent to or more stringent than the requirements of subsection (a) of this section, transporters may use such controls and records to satisfy the commission's requirement under this section.

§312.146. Transporters--Discharge or Spills.
In the event of a discharge or spill of waste during collection or transportation, the collector or transporter must take appropriate action to protect human health and the environment (e.g., notify local law enforcement and health authorities; dike the discharge area; clean up any waste discharge that occurs during transportation; or take such action as may be required or approved by federal, state, or local officials having jurisdiction so that the waste discharge no longer presents a health or environmental problem). Transporters are responsible for reporting certain spills to the executive director in accordance with requirements of the State of Texas Oil and Hazardous Substance Spill Contingency Plan and the Texas Water Code, Chapter 26.039.

§312.147. Temporary Storage.
(a) Transporters who store waste in a mobile closed container (container on wheels) shall not store the waste for more than four days.

(b) Transporters who temporarily store waste at a fixed or permanent site shall obtain approval in writing from the executive director prior to engaging in such activities. The storage site shall comply with the following standards:

(1) The temporary storage of waste shall not exceed 30 days.

(2) The use of lagoons and/or in-ground storage tanks are not authorized under the provision of this section.

(3) If the waste is not stored in a closed vessel, the location of the storage site shall meet the buffer zone requirement in §312.44(d) of this title (relating to Management Practices).

(4) The storage of waste shall not cause or contribute to the harm of a threatened or endangered species of plant, fish, or wildlife or result in the destruction or adverse modification of the critical habitat of a threatened or endangered species.

(5) The waste shall be stored by a method and under conditions that prevent runoff and protect the quality of the surface water and groundwater.

(6) The storage site shall not be located on land within a designated base flood zone (100-year floodplain).

(7) A storage site location shall be selected, and the site operated in a manner to prevent public health nuisances. Where nuisance conditions exist, the operator shall take necessary action to abate such nuisances.

(c) Recordkeeping. Transporters who store waste shall develop the following information and shall retain the information for five years:

(1) the date, volume, and type of waste deposited into temporary storage facility;

(2) the date, volume, and type of waste removed from temporary storage facility; and

(3) the identification (permit or site registration number, location, and operator) of the facility where the waste removed from the temporary storage facility was deposited.

[44] Persons who engage in the transportation of wastes (subject to regulation under this subchapter) from Texas to other states or from other states to Texas, or persons who collect or transport such waste in Texas but have their place of business in another state, shall comply with all the requirements for transporters contained in §§312.141 - 312.150 of this title (relating to Transporters and Temporary Storage Provisions). If such persons also engage in any activity of managing such wastes in Texas by storage, processing, beneficial use, or disposal, they shall follow the applicable requirements of this chapter for such activities.

[4(b) Prior to approval of a transporter registration by the executive director, persons who engage in the transportation of wastes (subject to regulation under this subchapter) from Texas to other states or from other states to Texas, shall submit to the executive director copies of authorization(s) that allow transportation and/or disposal of waste in another state(s), including the state in which the office or place of business is located.]

§312.150. Penalties.
Failure of a transporter to properly and correctly maintain records, trip tickets, or other documents; or failure of a transporter to submit to the executive director correct information on the annual summary report or on an application for registration by the required due date; or unauthorized discharges of sewage sludge, biosolids, water treatment residuals [sludge], domestic septage, chemical toilet waste, grit trap waste, or grease trap waste shall be sufficient cause for the commission to void the transporter's registration and authorization to transport such wastes. The commission may also take any other action authorized by law to secure compliance, including the assessment of administrative penalties or seeking of civil penalties as prescribed by law and the rules of 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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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality

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For further information, please call: (512) 239-2678

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TITLE 31. NATURAL RESOURCES AND CONSERVATION
PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD
CHAPTER 529. FLOOD CONTROL
SUBCHAPTER B. STRUCTURAL REPAIR GRANT PROGRAM
31 TAC §§529.51, 529.52, 529.54 - 538.57
The Texas State Soil and Water Conservation Board (State Board) proposes amendments to the following sections of Title 31, Part 17, Chapter 529, Subchapter B, Flood Control, Structural Repair Grant Program:

§529.51 concerning Definitions;
§529.52 concerning Administration of Funds;
§529.54 concerning Request for Applications;
§529.55 concerning Submitting an Application;
§529.56 concerning Review and Selection of Applications; and
§529.57 concerning Contracts Between the State Board and Sponsors.

Background and Purpose

The proposed amendments are necessary to comply and successfully implement Senate Bill (S.B.) 500, regarding an appropriation of $150,000,000 from the economic stabilization fund (ESF) to the State Board for dam infrastructure projects beginning on June 6, 2019.

As requested by the 86th Legislature, the State Board developed a plan, known as the "Plan for $150 Million," to implement dam infrastructure projects with the appropriated funding. The plan calls for funding for the upgrade of approximately 24 dams to meet current Texas Commission on Environmental Quality (TCEQ) safety criteria. The proposed rule changes will decrease the non-state funded matching requirement for upgrade projects for sponsors from 5-percent, to 1.75-percent. This rule change is required for the successful implementation of the "Plan for $150 Million," as local sponsors often have small, limited operating budgets, and many will not have the means to participate in upgrading dams to meet current TCEQ safety criteria if 5-percent match is required. The primary purpose of these dams is to protect lives and property by reducing the velocity of floodwaters and thereby reducing flows to a safer rate.

Section-by-Section Summary

The proposed amendments to §529.51(14) would replace the word "restoring" with "upgrading" as it pertains to meeting TCEQ safety criteria. "Upgrading" more accurately reflects the work that is being done with this type of repair project. Also, the amendments clarify the difference between "dam repair" and "dam upgrade."

The proposed change to §529.52(b) will simply remove the words "general revenue" so that the rule pertains to any funds appropriated by the state, including funds from the ESF.

The proposed amendments to §529.52(e) will add additional language regarding the non-state matching requirement for upgrade projects. For upgrade projects to meet TCEQ safety criteria, the State Board will require 1.75-percent of the total contract cost to be provided by funds not originating from state appropriations.

The proposed amendment to §529.54 adds the word "structural" to clarify that the rule applies to all structural repair projects, including both dam repair and dam upgrades.

The proposed amendments to §529.55(c) will specify that the State Board may not pay more than 95-percent of the total repair project cost and no more than 98.25-percent for upgrade projects to meet current TCEQ safety criteria.

The proposed amendments to §529.56(b)(6) will remove "five-percent" and be replaced with the "required percentage," so that it will accurately reflect the differences in required percentages of non-state matching requirements between repair projects and upgrade projects.

The proposed amendments to §529.57(b) will specify that the State Board will not pay more than 95-percent of the total repair project cost and no more than 98.25-percent for upgrade projects to meet current TCEQ safety criteria. The remaining 5-percent for repair projects and 1.75-percent for upgrade projects must be documented as a monetary or in-kind contribution in the contract.

Fiscal Impact on State and Local Government

Kenny Zajicek, COO/CFO for the State Board, has determined that for the first five-year period the proposed amendments will be in effect, there will be no anticipated fiscal implications for state or local governments as a result of enforcing or administering the proposed amendments because they do not impose an increased cost to those watershed sponsors.

Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required under Texas Government Code §2001.022.

Public Benefit/Cost to Regulated Persons

Mr. Zajicek has determined for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing or administering the rule will be to decrease the financial burden on sponsors so that structural repair projects that will upgrade flood control dams to meet current TCEQ safety criteria can be completed, which will result in the ability for those dams to protect lives and property downstream. There will be no anticipated economic costs to persons required to comply with this rule.

There are no costs to regulated persons because the State Board does not regulate individuals.

One-for-one Rule Analysis

The State Board does not regulate individuals, therefore the proposed amendments do not impose a cost on a person. The amendments do not impose a cost on another state agency or a special district; therefore, it is not subject to Texas Government Code §2001.0045.

Government Growth Impact

During the first five years of the proposed rulemaking would be in effect, it would not: (1) create or eliminate a government program; (2) require the creation of new employee positions or eliminate existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; (4) require an increase or decrease in fees paid to the agency; (5) create a new regulation; (6) expand or repeal an existing regulation; and (7) negatively affect the state's economy. Because the State Board does not regulate individuals, it is not necessary to perform an analysis to determine the number of individuals subject to the proposed amendments' applicability.

The proposed rule amendments would reduce the non-state funded matching requirement for watershed sponsors which will be required to implement the "Plan for $150 Million" fully and successfully. Dam upgrade projects provide an average annual benefit to the state of Texas of $169,300 per dam upgrade, over a 100-year period.
Local Employment and Impact Statement

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

Fiscal Impact on Small and Micro-Businesses and Rural Communities

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

Takings Impact Assessment

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

Environmental Rule Analysis

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

Request for Public Comment

Comments on the proposed amendments may be submitted to Liza Parker, Policy Analyst/Legislative Liaison, Texas State Soil and Water Conservation Board; 1497 Country View Lane, Temple, Texas 76504, within 30 days of publication of these proposed amendments in the Texas Register. Comments may also be submitted via fax to (254) 773-3311 or via email to lparker@tss-wcb.texas.gov.

Statutory Authority

The amendments are proposed under Texas Agriculture Code, Title 7, Chapter 201, §201.020 which provides the Texas State Soil and Water Conservation Board with the authority to adopt rules as necessary for the performance of its functions under Chapter 201, Texas Agriculture Code, and are proposed under §201.022, which authorizes the State Board to assist Soil and Water Conservation Districts in carrying out programs and powers.

No other code, article or statutes are affected by this amendment.

§292.51. Definitions.
The following words and terms, when used in this subchapter, have the following meanings:

(1) Authorized representative—An individual representing all sponsors identified on an application for structural repair grant funds. The authorized representative shall be the single point of contact for all communications regarding an application.

(2) Eligible applicant—A partnership of all entities listed as a sponsor on a watershed agreement for a watershed project.

(3) Fiscal year—The 12-month period of time beginning September 1 of a year and ending on August 31 of the following year.

(4) Flood control dam—Floodwater retarding structures, also commonly referred to as flood control structures, watershed structures, flood prevention or "FP" sites, and certain grade stabilization structures included in the National Inventory of Dams built by the federal government under one of the four following federal authorizations:

(A) Public Law 78-534, Section 13 of the Flood Control Act of 1944;

(B) Public Law 156-67, the pilot watershed program authorized under the heading Flood Prevention of the Department of Agriculture Appropriation Act of 1954;

(C) Public Law 83-566, the Watershed Protection and Flood Prevention Act of 1954; and

(D) Subtitle H of Title XV of the Agriculture and Flood Act of 1981, commonly known as the Resource Conservation and Development Program.

(5) In-kind match—Non-monetary contributions of services, equipment, or other items of value included in a contract scope of work between the State Board and a sponsor for the purpose of satisfying all or a portion of a non-state funded matching requirement for structural repair activities. In-kind match is not eligible if the source is contributing the in-kind match because it was enabled to do so directly through state appropriations.

(6) National Inventory of Dams—The U.S. Army Corps of Engineers' list of dams first authorized by the National Dam Inspection Act (Public Law 92-367) of 1972.

(7) Natural Resources Conservation Service (NRCS)—An agency of the United States Department of Agriculture which was formerly known as the Soil Conservation Service.

(8) Operation and maintenance (O&M)—The activities associated with maintaining optimal physical conditions and functioning of a flood control dam specified in §292.2(9) of this chapter (relating to Definitions); O&M is not structural repair as defined in paragraph (14) of this section.

(9) O&M agreement—A written agreement pertaining to a specific flood control dam or dams within a watershed project, taking into consideration the powers and jurisdictional boundaries of sponsors, that specifies each sponsors' responsibilities for financing and performing O&M inspections and activities.

(10) Reimbursement request—A request for reimbursement of an activity included in a contract scope of work executed between the State Board and a sponsor.

(11) Soil and water conservation district (SWCD)—A governmental subdivision of this state and a public body corporate and politic, organized pursuant to Chapter 201 of the Agriculture Code.

(12) Sponsor—An entity or individual that is a signatory to a watershed project plan, watershed agreement, or O&M agreement.

(13) State Board—The Texas State Soil and Water Conservation Board organized pursuant to Chapter 201 of the Agriculture Code.

(14) Structural repair—The act of performing an activity or activities for the purpose of restoring a flood control dam to original design specifications (dam repair) or upgrading [restoring] a flood control dam to meet current TCEQ safety criteria (dam upgrade). Struc-
tural repair is not an activity defined as operation and maintenance in §529.2(9) of this chapter. Structural repair activities include:

(A) Lime treatment, removal and replacement, and/or slope flattening of dam embankment to repair slope slides;
(B) Repair of sinkholes in dam embankment;
(C) Repair of cracks in dam embankment;
(D) The installation of armored plating on dam embankments to repair and mitigate wave erosion;
(E) Performing earthwork and establishing vegetation on dam embankments to repair and mitigate wave erosion;
(F) Drain system installation or repair;
(G) Repair of excessive settlement on dam embankment;
(H) Replacement or stabilization of vertical inlet on principal spillway;
(I) Installation of a liner to repair or mitigate pipe separation or cracking on principal spillway;
(J) Replacement of a principal spillway pipe due to separation or cracking;
(K) Installation of impact basin or armored plating on plunge pool due to erosion;
(L) Repair of major auxiliary spillway erosion from storm damage;
(M) Any activity defined as O&M in §529.2(9) of this chapter if the performance of the activity is determined to be necessary by the State Board in conjunction with a structural repair activity defined in this subchapter; O&M activities determined to be necessary by the State Board will be included in a contract scope of work executed between the State Board and a sponsor;
(N) Any other activity related to flood control dam structural repair at the discretion of the State Board and included in a contract scope of work executed between the State Board and a sponsor.

(15) Texas Commission on Environmental Quality (TCEQ)—The state agency created under Title 2, Subtitle A, Chapter 5 of the Texas Water Code (formerly the Texas Natural Resource Conservation Commission).

(16) Watershed agreement—A legal document that records the responsibilities of the sponsors and NRCS for implementing a watershed project plan relating to contributions of funding, the acquisition of land rights, construction, O&M, project administration, management of affected lands, as well as responsibilities regarding permitting and water and mineral rights.

(17) Watershed project—A geographic area delineated by the boundaries of a watershed within which a series of flood control dams have been constructed or are planned to be constructed by NRCS to prevent and/or minimize floodwater damage to lives and property.

(18) Watershed project plan (or Work Plan)—A plan developed by local sponsors with the assistance of NRCS for a watershed project that includes descriptions of the watershed, problems to be addressed, works of improvement to be installed, costs of installed works, project benefits, cost-benefit analyses, financing information, and general requirements for O&M.

§529.52. Administration of Funds.

(a) General Fiscal Provisions. SWCD sponsors entering into a contract with the State Board for structural repair activities must comply with all applicable provisions within the Manual of Fiscal Operations for Soil and Water Conservation Districts unless the contract scope of work specifies otherwise. The Manual of Fiscal Operations for Soil and Water Conservation Districts is approved and periodically amended by the State Board and is available on the State Board’s website; hardcopies of this manual may be requested from the State Board.

(b) Sources of funding. The amount of funding made available for structural repair grants during a fiscal year will be determined by the State Board out of funds [general revenue] appropriated by the Texas Legislature. Other sources of funding may be used for structural repair grants by the State Board if applicable and when available. Funds will be obligated by contract between the State Board and sponsors for the period of time specified within a contract.

(c) Reimbursement only. Payment will be made on a reimbursement basis only.

(d) Activities eligible for reimbursement. Funds may be used to reimburse costs associated with the performance of structural repair activities as defined by this subchapter on flood control dams, as well as costs associated with the purchasing of easements, engineering design, performance inspections, and any other structural repair activities approved by the State Board at their discretion. Legal fees associated with purchasing easements and land rights determinations may be eligible for reimbursement if specified in a contract scope of work executed between the State Board and sponsors.

(e) Non-state funded matching requirement. Contracts for dam [structural] repair projects between the State Board and a sponsor will require that 5-percent of the total contract cost be provided by funds not originating from state appropriations. Contracts for dam upgrades to meet TCEQ safety criteria, between the State Board and a sponsor, will require that 1.75-percent of the total contract cost be provided by funds not originating from state appropriations. The State Board may enter into a contract with sponsors that provides 100-percent of the total project cost if the flood control dam on which the activities are to be performed is a part of a watershed project where the original watershed agreement did not include at least one sponsor empowered by the State of Texas to levy taxes.

(f) In-kind match contributions. All or a portion of the non-state funded matching requirement may be satisfied through "in-kind" contributions. In-kind contributions must be documented in contracts between the State Board and sponsors at rates approved by the State Board prior to obligation of funds.

(g) Administrative costs of sponsors. Contracts between the State Board and sponsors may include an amount for administration not to exceed 5-percent of the total contract amount.

(h) Utilizing structural repair grant funds for O&M. Contracts between the State Board and sponsors may include funds for performing O&M activities as defined by §529.2(9) of this chapter if those activities are included in the contract scope of work.

§529.54. Request for Applications.
The State Board may publish a request for applications for structural repair grants. The amount of funding made available through the request for applications will be determined by the State Board. Upon being made aware of flood control dam structural repair needs not identified on an application received as a result of the request for applications, the State Board may independently solicit for contractors to complete a structural repair project.

§529.55. Submitting an Application.
(a) Applications must be submitted on forms provided by the State Board.

(b) Copies of all applicable watershed agreements and O&M agreements for the flood control dams identified in an application must be submitted with the application.

(c) All applications must have certification signatures by authorized individuals from all sponsors identified in the applicable watershed agreement with O&M responsibility for the flood control dam(s) on which repairs are proposed acknowledging and approving the application prior to it being submitted to the State Board for consideration. Certification by signature means the sponsor agrees to cooperate on the project with the other sponsors, may consider entering into a contract with the State Board relating to the project’s completion, and is aware that the State Board may not pay more than 95-percent of the total dam repair project cost, and no more than 98.25-percent of a dam upgrade project cost. Where one or more of the sponsors listed on the watershed agreement is no longer formally in existence, the remaining sponsors should contact the State Board prior to submitting an application for additional guidance.

(d) Each application must identify one individual as the person that will represent all sponsors on the application. The authorized representative shall be the single point of contact for all communications regarding an application.

(e) Each application must include cost estimates for the entire project. Cost estimates must be categorized by construction, engineering design, and easement purchasing.

(f) Each application must specify the length of time in which the project is anticipated to be completed.

(g) Each application must include a characterization of the amount, type, and source of match funding the sponsors intend to acquire if the application is selected by the State Board for contracting.

(h) Submittal of an application does not constitute a contractual agreement or a promise of a contractual agreement between the State Board and any entity.

§529.56. Review and Selection of Applications.

(a) The State Board will perform an administrative and technical review of all applications to evaluate consistency with state law and program rules and guidance.

(b) Applications determined to be administratively and technically complete, as well as consistent with program rules, will be evaluated against criteria adopted by the State Board. Criteria used by the State Board for determining which applications may result in a contract for grant funds include, but are not limited to:

(1) Accuracy and completeness of the application;
(2) Risk of dam failure;
(3) Potential loss of life due to dam failure;
(4) Potential damage to critical infrastructure due to dam failure;
(5) The extent and type of structural repair needed; and
(6) The ability of sponsors to provide the required percentage [five percent] of the total cost of the project through funds not originating from state appropriations.

§529.57. Contracts Between the State Board and Sponsors.

(a) Structural repair grant funds may be obligated through contractual agreement to any entity listed as a sponsor on a watershed agreement, or to the NRCS. The State Board may execute contracts with multiple sponsors to complete the project as necessary.

(b) Contracts between the State Board and sponsors shall specify that the State Board is responsible for no more than 95-percent of the total contract amount for dam repair projects, and no more than 98.25-percent for dam upgrade projects to meet TCEQ safety criteria. The remaining 5-percent and 1.75-percents (respectively) must be documented as a monetary or in-kind contribution in the contract.

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, 2019.

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Liza Parker
Policy Analyst/Legislative Liaison
Texas State Soil and Water Conservation Board
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For further information, please call: (254) 773-2250

TITLE 34. PUBLIC FINANCE
PART 1. COMPTROLLER OF PUBLIC ACCOUNTS
CHAPTER 7. PREPAID HIGHER EDUCATION TUITION PROGRAM
SUBCHAPTER K. HIGHER EDUCATION SAVINGS PLAN
34 TAC §7.101
The Comptroller of Public Accounts proposes an amendment to 34 TAC §7.101, concerning definitions.

The amendment to §7.101 updates the definition of qualified higher education expenses in paragraph (7) to reference the federal definition of the term, which was recently amended in the Tax Cuts and Jobs Act of 2017 and House Bill 3655, 86th Legislature, 2019.

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

Mr. Currah also has determined that the proposed amendment would have no fiscal impact on the state government, units of local government, or individuals. The proposed amendment would benefit the public by updating the rule to reflect the most current state and federal statutory changes. There would be no significant economic cost to the public. The proposed amendment would have no significant fiscal impact on small businesses or rural communities.

Comments on the proposal may be submitted to Linda Fernandez, Director, Educational Opportunities and Investment Divi-
This amendment is proposed under Education Code, §54.702(a) and §54.710, which authorize the Prepaid Higher Education Tuition Board in the Comptroller of Public Accounts to adopt rules to implement the program.

This amendment implements Education Code, Chapter 54, Subchapter G.


The following words, terms, and phrases, when used in this subchapter, shall have the following meanings.

(1) Beneficiary--The designated individual whose qualified higher education expenses are expected to be paid from a savings trust account.

(2) Financial institution--A bank, trust company, savings and loan association, credit union, broker-dealer, mutual fund, insurance company, or other similar financial institution that is authorized to transact business in this state.

(3) Nonqualified withdrawal--A withdrawal from a savings trust account other than:

(A) a qualified withdrawal;

(B) a withdrawal that is made as the result of the death or disability of the beneficiary of the account; or

(C) a withdrawal that is made as a result of the receipt of a scholarship or an allowance or payment that is described in Internal Revenue Code of 1986, §135(d)(1)(B) or (C), as amended, and that the beneficiary has received, to the extent that the amount of the withdrawal does not exceed the amount of the scholarship, allowance, or payment, in accordance with federal law.

(4) Owner--The individual, trust, estate, Uniform Gift to Minors Act (UGMA) custodian or Uniform Transfer to Minors Act (UTMA) custodian, guardian, corporation, non-profit entity, or other legal entity, or any combination thereof, that results from transfers by operation of law, that owns a savings trust account under a savings trust agreement between the board and that individual, trust, estate, UGMA or UTMA custodian, guardian, corporation, non-profit entity, or other legal entity, or any combination thereof.

(5) Plan manager--A financial institution that is under contract with the board to serve as a plan administrator.

(6) Promotional material, or savings plan information--Any material published or used in any written, electronic, or other public media. For the purpose of §7.102(c)(2) and (3), of this title (relating to General Provisions) the term does not include:

(A) internet banner ads that link directly to a web page that contains a link to the savings plan description;

(B) time-limited broadcast advertisements;

(C) press releases distributed only to members of the media;

(D) materials and information that is not distributed to account owners, beneficiaries, or the public; or

(E) objects, advertisements or social media posts that include no more than the name and logo of the plan and a short slogan that does not constitute a call to invest.

SUBCHAPTER L. PREPAID TUITION UNIT UNDERGRADUATE EDUCATION PROGRAM: TEXAS TOMORROW FUND II

34 TAC §§7.122, 7.125, 7.136, 7.141, 7.142

The Comptroller of Public Accounts proposes amendments to 34 TAC §7.122 concerning definitions, §7.125 concerning redemption of tuition units, §7.136 concerning transfer to institutions on redemptions of tuition units, §7.141 concerning effect of program termination on contract and §7.142 concerning statement regarding status of prepaid tuition contract.

The amendments to §7.122 update the format of the definitions listed in all paragraphs so that they are presented in the same format as other definitions listed in Chapter 7; update the definitions of beneficiary in paragraph (2) and eligible educational in-
stition in paragraph (5) pursuant to new legislation, HB 3655, 86th Legislature, 2019; clarify the definition of enrollment period in paragraph (6) because there is a no longer an initial enrollment period and delete the obsolete language; delete the definition of market value in paragraph (10) because the term is not used in Subchapter L; add paragraph (11) defining medical and dental units, private or independent institution of higher education, public junior college, public state college, public technical institute, and recognized accrediting agency to reflect the definition in the Education Code; delete the definition in paragraph (17) because the terms are defined in paragraph (11); update the definition of program or plan in paragraph (17) to allow the board to select a different name for the plan for marketing purposes; update the definition of reduced refund value in paragraph (20) because the term market value is not being used; update the definition of refund value in paragraph (21) to comport with the method determined by the board; clarify the definition of prepaid tuition contract in paragraph (15) and the definition of tuition in paragraph (26) to reflect medical and dental units for purposes of implementing HB 3655; and renumbered the paragraphs so that they are arranged in numerical order.

The amendments to §7.125 update subsections (a) and (e) to add medical and dental units because the language is no longer complete since the adoption of HB 3655.

The amendment to §7.136 revises subsection (b) to add medical and dental units because the language is no longer complete since the adoption of HB 3655.

The amendment to §7.141 updates subsection (a)(1) to add medical and dental units because the language is no longer complete since the adoption of HB 3655.

The amendments to §7.142 change the deadline in subsection (a) from January 1st to 31st to allow adequate time to post all calendar year-end transactions and change "any" to "a" in subsection (a)(5) to limit the specific institutions.

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

Mr. Currah also has determined that the proposed amendments would have no fiscal impact on the state government, units of local government, or individuals. The proposed amendments would benefit the public by updating and clarifying the rule with the most current statutory changes and to allow more time to capture all transactions pertaining to the prior calendar year. There would be no significant economic cost to the public. The proposed amendments would have no significant fiscal impact on small businesses or rural communities.

Comments on the proposals may be submitted to Linda Fernandez, Director, Educational Opportunities and Investment Division, Comptroller of Public Accounts, at P.O. Box 13407, Austin, Texas 78711-3407 or at Linda.Fernandez@cpa.texas.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the Texas Register.

These amendments are proposed under Education Code, §54.752(b)(1), which authorizes the Prepaid Higher Education Tuition Board in the Comptroller of Public Accounts to adopt rules to implement the program.

These amendments implement Education Code, Chapter 54, Subchapter H.

§7.122. Definitions.
The following words, terms, and phrases, when used in this subchapter, shall have the following meanings:

(1) [2] Accredited out-of-state institution of higher education--[means a] public or private institution of higher education that:
   (A) is located outside this state; and
   (B) is accredited by a recognized accrediting agency.

(2) [2] Beneficiary--The [means the] person designated under a prepaid tuition contract as the person entitled to apply one or more tuition units purchased under the contract to the payment of the person's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, medical and dental unit, career school, or accredited out-of-state institution of higher education.

(3) [2] Board--The [means the] Prepaid Higher Education Tuition Board.

(4) [2] Career school--A [means a] career school or college as defined by Education Code, §52.001(9) that offers a two-year associate degree as approved by the Texas Higher Education Coordinating Board.

(5) [2] Eligible educational institution--A [means a] general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, medical and dental unit, career school, or accredited out-of-state institution of higher education, that qualify as eligible educational institutions under Internal Revenue Code, §529.

(6) [2] Enrollment period--The [means the] period established by the board during which a purchaser may enter into a contract with the board to purchase tuition units. The general [initial] enrollment period is September 1 through the end of February. For beneficiaries who are newborn infants under one year of age at the time of enrollment, the [initial] enrollment period is [will be] extended to cover the period of September 1 through July 31. [These enrollment periods will apply annually thereafter subject to change by the board. The executive director may establish a provisional enrollment process to allow potential applicants to begin the enrollment process outside of the enrollment period with pricing to be established in the next enrollment period.]

(7) [2] First payment due date--The [means the] date the first payment is due after enrolling in the program and establishing a new prepaid tuition contract. The first payment due date will be specified in the prepaid tuition contract, and shall initially be established as May 1st. The first payment due date serves as the anniversary date for establishing the three-year holding period. The first payment due date may be changed subsequently by the board for future enrollment periods.


(9) [2] General academic teaching institution--Has [means] the meaning assigned by Education Code, §61.003, except that the term does not include a public state college.

(10) "Market value" means an amount equal to the total purchase price of any unused tuition units, plus the portion of the total
not earnings on assets of the Fund attributable to that amount (including any negative returns.)

(10) [¶¶] Matriculation—Enrollment[\textsuperscript{\textregistered}] means enrollment as a member of the student body at an eligible educational institution.

(11) Medical and dental unit, private or independent institution of higher education, public junior college, public state college, public technical institute, and recognized accrediting agency—Have the meanings assigned by Education Code, §61.003.

(12) [\textsuperscript{\textregistered}] Paid in full—All[\textsuperscript{\textregistered}] means that all the required payments for the tuition units and any assessed fees under the prepaid tuition contract have been received and credited to the account.

(13) [\textsuperscript{\textregistered}] Pay-As-You-Go—Purchasing[\textsuperscript{\textregistered}] means purchasing tuition units at the price in effect for that type of tuition unit on the day payment is received for the tuition unit. Pay-As-You-Go includes paying for tuition units with a lump sum payment or multiple lump sum payments, without being obligated to pay for any additional tuition units.

(14) [\textsuperscript{\textregistered}] Plan manager—A[\textsuperscript{\textregistered}] professional investment manager that is under contract with the board to serve as a plan administrator and to invest the assets of the fund on behalf of the board.

(15) [\textsuperscript{\textregistered}] Prepaid tuition contract—A[\textsuperscript{\textregistered}] contract under which a person purchases from the board on behalf of a beneficiary one or more tuition units that the beneficiary is entitled to apply to the payment of the beneficiary’s undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, medical and dental unit, career school, or accredited out-of-state institution of higher education.

(16) [\textsuperscript{\textregistered}] Prepayment—Payment[\textsuperscript{\textregistered}] means payment of the balance due or a portion of the balance due under a prepaid tuition contract, ahead of the schedule provided in the contract.

[¶¶] Private or independent institution of higher education, public junior college, public state college, public technical institute, and recognized accrediting agency—Have the meanings assigned by Education Code, §61.003.

(17) [¶¶] Program[\textsuperscript{\textregistered}] or [¶¶] Plan—The[\textsuperscript{\textregistered}] means the prepaid tuition unit undergraduate education program. The board may select a different name for the program or plan for marketing purposes.

(18) [¶¶] Purchaser—A[\textsuperscript{\textregistered}] professional investment manager that is under contract with the board to serve as a plan administrator and to invest the assets of the fund on behalf of the board.

(19) [¶¶] Redemption—The[\textsuperscript{\textregistered}] exchange of one or more tuition units to pay costs of tuition and required fees at an eligible educational institution.

(20) [¶¶] Reduced Refund Value—The[\textsuperscript{\textregistered}] lesser of:

(A) the amount paid by the purchaser or other contributor to purchase any unused tuition units under the contract on behalf of the beneficiary; or

(B) the amount paid by the Purchaser or other contributor to purchase any unused tuition units to be refunded under the contract, plus or minus the portion of the total net earnings or losses on assets of the Plan attributable to that amount [the current market value of the invested payments or contributions for any unused tuition units, as determined by the plan manager. Reduced Refund Value does not include any state provided or procured matching contributions or any earnings on state provided or procured matching contributions.

(21) [¶¶] Refund Value—An[\textsuperscript{\textregistered}] amount equal to the total purchase price of the unused tuition units to be refunded from the account, plus annual net earnings on the contributions made to the account to purchase the tuition units that are being refunded (including any negative returns), with the earnings rate to be set by the board at a rate that is up to two percent less than the actual investment return for the fund for each of the years the contract is in effect, provided that in no event shall the annual net earnings on the contributions ever exceed five percent annually, and provided further that for any year in which the investment return does not support payment of any earnings, the board may elect not to credit and pay any earnings on the contributions, to preserve the actuarial soundness of the fund. Refund Value shall not be less than Reduced Refund Value that would have been paid if the Tuition Units had been held for less than three years. Refund Value does not include any state provided or procured matching contributions or any earnings on State provided or procured matching contributions.

(22) [¶¶] Required fee—A[\textsuperscript{\textregistered}] fee, other than a laboratory fee for a specific course, that is charged by a public or private institution of higher education to all students at the institution who are not exempt from the fee. For purposes of this subdvision, a fee is a required fee only to the extent that the fee is considered a qualified higher education expense under Internal Revenue Code, §529. Required fees are generally those fees imposed on all students as a condition of enrollment. Required fees do not include fees such as equipment usage fees required for particular courses, charges for room and board, book costs, or any optional fees.

(23) [¶¶] Sales period—The[\textsuperscript{\textregistered}] year long period from September 1 through August 31 during which a purchaser who has established a prepaid tuition contract may make purchases under the contract at the price(s) established under the contract, or at the price established for tuition units applicable to the sales period if additional tuition units are purchased during the sales period.

(24) [¶¶] Three-year holding period—The[\textsuperscript{\textregistered}] period of time that must transpire before a beneficiary or purchaser may redeem a tuition unit to pay for qualified higher education expenses, as provided under §7.125(g) of this title (relating to Redemption of Tuition Units).

(25) [¶¶] Transfer value—The[\textsuperscript{\textregistered}] value of the prepaid tuition contract at the time of transfer, that is the lesser of:

(A) an amount equal to the cost, at the time of the transfer, of the tuition and required fees that would be covered by redemption of the number and type of tuition units to be transferred from the account (but not including any units resulting from any State provided or procured matching funds) if the beneficiary were redeeming the units at a general academic teaching institution or two-year institution of higher education as follows:

(i) for a Type I unit, at the general academic teaching institution that had the highest tuition and required fee cost;

(ii) for a Type II unit, at a general academic teaching institution that had tuition and required fee cost at the weighted average; and

(iii) for a Type III unit, at a two-year institution of higher education that had tuition and required fee cost at the weighted average; or

(B) an amount equal to the current market value of the unused tuition units to be transferred from the account, which is an
amount equal to the total purchase price of the unused tuition units to be transferred from the account (but not including any state provided or procured matching contributions), plus the portion of the total net earnings on assets of the Fund attributable to that amount (including any negative returns), but not including any earnings on state provided or procured matching contributions, as determined by the plan manager.

(26) [(27) "Tuition--The[] means the] charges imposed by a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, medical and dental unit, career school, or accredited out-of-state institution of higher education, on undergraduates as a condition of enrollment, which are identified by such institution as tuition.

(27) [(28) "Tuition unit--A[] means a] portion of the cost of undergraduate resident tuition and required fees that may be prepaid, whose assigned value, when used to pay the cost of tuition and required fees at an eligible educational institution, is equal to:

(A) for a Type I tuition unit, one percent of the cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by the general academic teaching institution with the highest such tuition and fee costs for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(d);

(B) for a Type II tuition unit, one percent of the weighted average cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by general academic teaching institutions for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(e); or

(C) for a Type III tuition unit, one percent of the weighted average cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by two-year institutions of higher education for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(f).

(28) [(29) "Two-year institution of higher education--A[] means a] public junior college, a public state college, and a public technical institute, as those terms are defined in Education Code, §61.003.

(29) [(30) "Weighted average--Has the meaning[] with respect to tuition and required fees means]:

(A) for Type II tuition units, a weighted average cost for undergraduate resident tuition and required fees of general academic teaching institutions for the applicable academic year, computed by the method specified in Education Code, §54.753(e); and

(B) for Type III tuition units, a weighted average cost for undergraduate resident tuition and required fees of two-year institutions of higher education for the applicable academic year, computed by the method specified in Education Code, §54.753(f).

§7.125. Redemption of Tuition Units.

(a) In accordance with this subchapter, when a beneficiary under a prepaid tuition contract redeems tuition units to pay costs of tuition and required fees, the board shall apply money in the Fund, in the amount provided by Education Code, §54.765, to pay all or the applicable portion of the costs of the beneficiary’s tuition and required fees at the general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, medical and dental unit, career school, or accredited out-of-state institution of higher education in which the beneficiary enrolls.

(1) Subject to subsection (c)(2) of this section, and the other provisions of this section, a beneficiary may redeem any type of tuition unit or partial tuition unit for attendance at an institution described by this section.

(2) A general academic teaching institution or two-year institution of higher education shall accept the amount transferred to the institution under Education Code, §54.765(c), when the unit or units are redeemed as payment for all or the applicable portion of the beneficiary’s tuition and required fees.

(b) To pay for the entire cost of undergraduate resident tuition and required fees for an academic year consisting of 30 semester credit hours:

(1) redemption of 100 Type I tuition units (or an approximate equivalent amount of Type II or III units) is required at the general academic teaching institution with the highest tuition and fee cost as described by Education Code, §54.753(d);

(2) redemption of 100 Type II tuition units (or an approximate equivalent amount of Type I or III units) is required at a general academic teaching institution with the applicable tuition and fee cost at the Weighted Average as described by Education Code, §54.753(e); and

(3) redemption of 100 Type III units (or an approximate equivalent amount of Type I or II units) is required at a two-year institution of higher education with the applicable tuition and fee cost at the Weighted Average as described by Education Code, §54.753(f).

(c) The number of tuition units that must be redeemed to pay for the entire cost of tuition and required fees for an academic year at another general academic teaching institution or two-year institution of higher education may be higher or lower:

(1) in proportion to the amount that the cost of tuition and required fees at that institution is higher or lower than the amount determined for the institution with the highest cost or Weighted Average cost, as applicable; or

(2) if a more or less valuable type of tuition unit is redeemed.

(d) To assist purchasers in determining the number of tuition units a beneficiary must redeem to cover the costs of tuition and required fees at general academic teaching institutions and two-year institutions of higher education, each year the board shall prepare a tuition unit redemption chart and post the chart on the board’s Internet website. The chart will show for each general academic teaching institution and for each two-year institution of higher education the number of each type of units purchased that year that would be required to cover the cost of tuition and required fees, based on an academic year consisting of 30 semester credit hours.

(1) The exact amount of tuition units that will be required to attend a particular institution will depend upon the cost of tuition and required fees at the institution in the year of redemption.

(2) For Type I tuition units, the number of units required to attend a particular institution may be less than anticipated when purchased if that institution’s costs are less than the general academic teaching institution with the highest tuition and fee cost in the year of redemption.

(3) For Type II and III tuition units, the number of units required to attend a particular institution may be more or less than anticipated when purchased, and will depend on whether that institution’s costs are higher or lower than the Weighted Average cost in the year of redemption. To the extent the cost of a particular institution is higher
than the Weighted Average cost, the beneficiary will have to redeem additional tuition units to cover the higher cost, or pay the amount of the difference as provided in subsection (e) of this section.

(e) If a beneficiary redeems fewer tuition units of the type or combination of types necessary to pay the total cost of the beneficiary's tuition and required fees at the general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, medical and dental unit, career school, or accredited out-of-state institution of higher education at which the beneficiary enrolls, the beneficiary is responsible for paying the amount of the difference between the amount of tuition and required fees for which the beneficiary pays through the redemption of one or more tuition units and the total cost of the beneficiary's tuition and required fees at the institution.

(f) A beneficiary who redeems Type III tuition units (or an approximate equivalent amount of Type I or II units) to attend a public junior college and who does not reside within the taxing jurisdiction of the junior college is responsible for paying any portion of the tuition charged by the junior college to persons who do not reside within that taxing jurisdiction.

(g) A beneficiary or purchaser may not redeem a tuition unit earlier than the third anniversary of the date the unit was purchased.

1. For the purpose of calculating the three-year holding period for an initial Pay-As-You-Go purchase, the first payment due date after initially enrolling in the program is considered the date the initial units were purchased. These units may not be redeemed to pay for tuition and required fees until the third anniversary after the payment due date.

2. For installment plan payments, the three-year holding period is considered met if the purchaser enrolls in the program and the first payment due date is at least three years prior to any redemption of tuition units, and the installment plan is paid in full before redemption of any of the tuition units.

3. Additional Pay-As-You-Go purchases start a new three-year holding period as of the date payment is received for the additional tuition units.

4. Under the three-year holding period, the latest date that a purchaser could purchase tuition units to pay for a semester of undergraduate education using Pay-As-You-Go purchases is three years prior to the date of expected redemption of the tuition units, subject to the requirement that all tuition units under the contract must be used not later than the 10th anniversary of the date the beneficiary is projected to graduate from high school, not counting time spent by the beneficiary as an active duty member of the United States armed services.

5. If all of the tuition units in an account do not meet the three-year holding period, the purchaser may redeem those units or fractional units that meet the three-year holding period, and redeem the remaining tuition units in the account when the three-year holding period is met.

(h) A beneficiary may redeem more than 100 tuition units in one academic year of the type or combination of types as needed to pay the total cost of the beneficiary's tuition and required fees at an eligible educational institution.

(i) To accommodate part-time attendance or the enrollment in more or less semester hours than the contemplated 30 credit hours in an academic year, the board may calculate a per credit hour tuition unit cost for the eligible educational institution applicable to the year of redemption, whereby the number of tuition units required to be redeemed shall be in proportion to the amount that tuition and required fees to be charged to the beneficiary by the eligible educational institution are more or less costly than the cost for attending two semesters of 15 credit hours each or 30 total credit hours in an academic year.

(j) A beneficiary may redeem fractional tuition units as needed to pay the cost of the beneficiary's tuition and required fees at an eligible educational institution.

§7.136. Transfer to Institutions on Redemptions of Tuition Units.

(a) When a beneficiary enrolls at a general academic teaching institution or two-year institution of higher education and notifies the institution that payment will be made by redeemed tuition units, the comptroller will arrange for the transfer to the institution of the appropriate amount specified under Education Code, §54.765(c), (d) and (e).

(b) When a beneficiary enrolls at a private or independent institution of higher education, medical and dental unit, career school, or accredited out-of-state institution of higher education, upon request the comptroller will arrange for the transfer to the institution of the amount specified under Education Code, §54.765(f).

§7.141. Effect of Program Termination on Contract.

(a) A prepaid tuition contract remains in effect after the program is terminated, if, when the program is terminated, the beneficiary:

1. has been accepted by or is enrolled at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, medical and dental unit, career school, or accredited out-of-state institution of higher education; or

2. is projected to graduate from high school not later than the third anniversary of the date the program is terminated.

(b) A prepaid tuition contract terminates when the program is terminated if the contract does not remain in effect under subsection (a) of this section.

(c) For contracts that are terminated pursuant to subsection (b) of this section, the purchaser is entitled to a refund of the Refund Value, less any fees that are past due and payable to the program under the board's fee schedule.

§7.142. Statement Regarding Status of Prepaid Tuition Contract.

(a) Not later than January 31 [4] of each year, the plan manager shall make available online without charge to each purchaser a statement of:

1. the amount paid by the purchaser under the prepaid tuition contract;

2. the total number of each type of tuition unit covered by the contract at any one time;

3. the number of each type of tuition unit remaining under the contract;

4. the number of each type of tuition unit that has met the three-year holding period;

5. the value of the purchasers' tuition units if redeemed at a [any] general academic teaching institution or two-year institution of higher education designated for that year by the purchaser in the time and manner required by the board, not to exceed five institutions, with such information being provided in the tuition unit redemption chart developed pursuant to §7.125(d) of this title (relating to Redemption of Tuition Units); and

6. any other information the board determines is necessary or appropriate.
(b) As soon as feasible after the end of the calendar year, the plan manager shall provide a written statement without charge to each purchaser reflecting the information listed in subsection (a) of this section, covering activities in the account through the end of the calendar year.

c) The plan manager shall provide a separate accounting for each designated beneficiary.

d) The plan manager shall also provide a statement if tuition units are redeemed under the contract during the year, and if any other distributions are made under the contract that calendar year.

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

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Victoria North
Chief Counsel, Fiscal and Agency Affairs Legal Services Division
Controller of Public Accounts

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

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 73. BENEFITS

34 TAC §73.47

The Employees Retirement System of Texas (ERS) proposes new §73.47, concerning Assignment of Death Benefit for Funeral Services, in 34 Texas Administrative Code (TAC) Chapter 73, concerning Benefits.

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 TAC §§61.1, et seq., concerning Terms and Phrases.

Section 73.47, concerning Assignment of Death Benefit for Funeral Services, is proposed to be added to comply with the requirements of Chapter 1178 (H.B. 3522), Acts of the 86th Legislature, Regular Session, 2019. H.B. 3522 added Tex. Gov’t Code §814.404 and §814.504 to permit designated beneficiaries of ERS members and retirees to assign certain death benefits to licensed funeral directors or funeral establishments. Section 3 of H.B. 3522 requires ERS to adopt rules to implement §814.404 and §814.504.

GOVERNMENT GROWTH IMPACT STATEMENT

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

1. the proposed new rule will not create or eliminate a government program;
2. implementation of the proposed new rule will not require the creation of new employee positions or eliminate existing employee positions;
3. implementation of the proposed new rule will not require an increase or decrease in future legislative appropriations to the agency;
4. the proposed new rule will not require an increase or decrease in fees paid to the agency;
5. the proposed new rule will create a new rule or regulation;
6. the proposed new rule will not expand an existing rule or regulation;
7. the proposed new rule will not increase or decrease the number of individuals subject to the rule’s applicability; and
8. the proposed new rule will not positively or adversely affect the state’s economy.

Ms. Robin Hardaway, Director of Customer Benefits, has determined that for the first five-year period the rule is in effect, to her knowledge: there will be no fiscal implication for state or local government or local economies as a result of enforcing or administering the rule; small businesses, micro-businesses, and rural communities will not be affected; there are no known anticipated economic effects to persons who are required to comply with the rule as proposed; and the proposed rule does not impose a cost on regulated persons. The proposed new rule does not constitute a taking.

Ms. Hardaway also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of adopting and complying with the rule would be to provide a standard form to permit designated beneficiaries of ERS members and retirees to assign certain death benefits in accordance with applicable law.

Comments on the proposed new rule 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 comments is 30 days after publication in the Texas Register.

The new rule is proposed under Tex. Gov’t Code §814.404 and §814.504, which require ERS to adopt rules to implement those statutes.

No other statutes are affected by the proposed new rule.

§73.47 Assignment of Death Benefit for Funeral Services.

(a) Notwithstanding any other rule, a designated beneficiary of a System member or retiree may, under Sections 814.404 and 814.504, Texas Government Code, assign a death benefit otherwise payable to the beneficiary only to the extent permitted by those statutes.

(b) An assignment under this section must be made in accordance with and on a form promulgated by the System, and the System has sole discretion to determine if the assignment is valid and complies with applicable law.

(c) In the event that a System member or retiree has designated multiple beneficiaries, any assignment under this section applies only to the share of the benefit to which an individual beneficiary making the assignment is determined by the System to be eligible. The System may rely on the approved beneficiary designation form on file with the System in making such a determination.

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

44 TexReg 6284 October 25, 2019 Texas Register
PART 11. TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

CHAPTER 302. GENERAL PROVISIONS RELATING TO THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §§302.2 - 302.5, 302.7, 302.9

The State Board of Trustees (Board) of the Texas Emergency Services Retirement System (TESRS) proposes amendments to Chapter 302, General Provisions Relating to the Texas Emergency Services Retirement System, §§302.2 - 302.5, 302.7, and 302.9.

The proposed amendments clarify Board rules governing the administration of TESRS and, pursuant to the Board’s authority under §861.006(a), Texas Government Code, delay the implementation of the enrollment and participation of employees of participating departments until the Board can assure the participation of such employees satisfies the plan qualification requirements under the Internal Revenue Code of 1986, as amended.

The proposed amendments are necessary to clarify Board rules governing the administration of TESRS to comply with House Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which amended §§861 - 865, Texas Government Code.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT. Kevin Deiters, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there are no foreseeable implications related to the cost or revenues of state or local governments.

PUBLIC BENEFIT/COST NOTE: Mr. Deiters has also determined that for the first five-year period the amended rules are in effect, the public benefit will be a more clearly defined process for the administration of the pension system.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT: There are no anticipated economic costs to persons who are required to comply with the amendments to these rules, as proposed. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022 and 2001.024(a)(6).

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments; therefore, no regulatory flexibility analysis or economic impact statement, as specified in Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT. For each year of the first five years the proposed amendments will be in effect, TESRS has determined that these amendments (1) will not create or eliminate a government program; (2) will not result in the addition or reduction of employees; (3) will not require an increase or decrease in future legislative appropriations; (4) will not lead to an increase or decrease in fees paid to a state agency; (5) will not create a new regulation; (6) will not repeal an existing regulation; and (7) will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

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

PUBLIC COMMENTS: Comments on the amended rule may be submitted in writing to Kevin Deiters, Executive Director, Texas Emergency Services Retirement System, P.O. Box 12577, Austin, Texas 78711-2577, submitted electronically to outreach@tesrs.texas.gov, or faxed to (512) 936-3480. Comments must be received no later than thirty days from the date of publication of this proposal.

STATUTORY AUTHORITY: The amendments are proposed pursuant to Texas Government Code, §865.006(b), which authorizes the state board to adopt rules as necessary for the administration of the fund.

Sections 861.001, 861.006, 862.001, and 862.002 of the Texas Government Code are affected by this proposal.

§302.2. Benefit Distributions.

(a) In this section:


(2) “§401(a)(9) requirements” means the requirements under §401(a)(9) of the code and Treasury Regulations §1.401(a)-1 through §1.401(a)(9)-9.

(b) The annual benefit based on the service of a member may not exceed the amount permitted by the code and related regulations for the appropriate year, including, without limitation, §415(b) of the Code. If the aggregated benefit otherwise payable under the pension system and any other defined benefit plan maintained by a political subdivision that has contributed to the fund on behalf of the member would otherwise exceed the benefits allowable under federal law, the reduction in benefits must first be applied to the extent possible from the other plan, and only after those reductions, from the fund.

(c) A retirement annuity or benefits to a qualified beneficiary under the pension system may not begin after the deadlines provided under the code and related regulations, including, without limitation, the deadlines provided by subsection (d) of this section.

(d) All distributions under the fund must at all times comply with and conform to the §401(a)(9) requirements, and any distribution required under the incidental death benefits requirements of §401(a) of the code will be treated as a distribution under the §401(a)(9) requirements. This subsection overrides any distribution options inconsistent with the §401(a)(9) requirements. The pension system shall develop procedures to ensure that distributions comply with the §401(a)(9) re-
requirements, including the requirement that a member's entire interest under the pension system will be distributed, or begin to be distributed, to the member no later than April 1 of the year after the later of the year in which the member ceases performing qualified service for a participating department or the year in which the member attains age 70-1/2.

(c) If the annual compensation of a member is ever taken into account for any purpose of the fund, that annual compensation may not exceed the limit in effect under §401(a)(17) of the code, as periodically adjusted in accordance with guidelines provided by the United States Secretary of the Treasury.

§302.3. Trustee-to-Trustee Transfer.
The distributee of a rollover distribution may elect, in a manner provided by the pension system, to have the distribution paid directly to an eligible retirement plan specified by the distributee in the form of a direct trustee-to-trustee transfer. The pension system shall develop procedures to implement this section in accordance with the Internal Revenue Code of 1986, as amended, and related regulations.

§302.4. Reduction or Revocation of Benefits.
(a) A person entitled to benefits from the pension system may, in a manner determined by the pension system, reduce the amount of the benefits or revoke the right to the benefits. A decision under this section is irrevocable and binding on the person's spouse and dependents, if applicable. If the person reducing or revoking benefits is married, the person's spouse must consent to such reduction or revocation in writing in a manner determined by the pension system.

(b) A reduction or revocation under this section applies to all payments that become or would have become due after the date of the reduction or revocation. Amounts waived under this section are forfeited to the pension system.

(c) A subsequent cost-of-living adjustment granted under the pension system, [or] a benefit increase granted by a governing body of a participating department, or a benefit increase or adjustment for persons entitled to benefits under the Texas Local Fire Fighters Retirement Act that are being administered by the pension system will not be applied to persons who have reduced or revoked their benefits under this section.

§302.5. Corrections of Errors and Contributions Past Due.
(a) The participating department head [local board] shall correct an error in membership in membership or computation of qualified service as soon as administratively practicable after the participating department head discovers the error or the local board notifies the participating department head of an error [at a meeting of the local board]. Using a form provided by the pension system, the request for correction of error shall be certified by the local board chair and provided to the Executive Director in the manner prescribed by the pension system.

(b) The Executive Director shall review the request for correction of error and may require the participating department head [local board] to provide additional documentation with respect to the correction of error. The Executive Director may reject any proposed correction if such additional documentation does not support the proposed correction of error or if such additional documentation is not provided. The Executive Director shall notify the participating department head and the local board chair if the proposed correction of error is approved or is denied due to lack of documentation provided by the participating department head or for any other reason [local board does not support the correction of error].

(c) The Executive Director shall determine the applicable past due contributions required by the correction of error, if any, including applicable interest charges in accordance with §863.005 of the Texas Government Code.

(d) In accordance with §865.014(a), Texas Government Code, the governing body of the political subdivision associated with [of which] the participating department that is requesting the correction [a part] is liable for payment of past due contributions and interest charges, if any, and such payments shall be made in accordance with instructions provided by the pension system.

§302.7. Employees of Participating Departments [Auxiliary Employee].

(a) Effective September 1, 2019, the 86th Texas Legislature adopted H.B. 3247 which amended §862.002, Texas Government Code, to allow all employees of a participating department to participate in the pension system. [The rate of compensation requirement for the determination of whether a person is an auxiliary employee under §861.001(2), Government Code shall be measured on a calendar year basis, utilizing the total compensation received by the person for performing emergency services for the participating department in the office or position to which the person is appointed as an auxiliary employee and the total hours of emergency services performed by such person for the participating department in such office or position. The local board shall be responsible for the policy relating to the determination of the total hours of emergency services that a person performs in a given calendar year for purposes of the determination of the rate of compensation under this subsection.]

(b) Pursuant to the authority granted to the state board under §861.006(a), Texas Government Code, to adopt rules to modify the pension system as necessary to meet the plan qualification requirements under §401(a) of the code, the implementation of the enrollment and participation of employees of participating departments, whether full-time or part-time, as members of the pension system will be delayed to ensure the participation of such employees satisfies the plan qualification requirements under §401(a) of the code. [Compensation and hours performed for emergency services in a full-time position or office for a participating department will not be considered in determining whether or not a person is an auxiliary employee for purposes of the system as long as such full-time position or office has different roles and responsibilities that are clearly distinct from the roles and responsibilities of the office or position for which the person performs emergency services as an auxiliary employee.]

(c) The state board intends to adopt rules related to the participation of employees of participating departments in the pension system on or before September 1, 2020 to the extent such participation is consistent with plan qualification requirements under the code.

(d) [ee] Notwithstanding as otherwise provided [the determination in §302.7, [subsection (a) of this section, a person shall not qualify as an auxiliary employee of a [if the total compensation received by the person for performing emergency services for the participating department who [in the office or position to which the person] is enrolled [appointed] as a member of the pension system before September 1, 2019 shall continue to be a member of the pension system until otherwise provided [an auxiliary employee in a calendar year exceeds an amount equal to 4,000 multiplied by the sum of the federal minimum wage rate plus $2].

§302.9. Certification of Physical Fitness.
A member who experiences a break-in-service of more than six months from all participating departments must again satisfy the requirements of §862.003(a), Texas Government Code (Certification of Physical Fitness), to receive credit for qualified [credited] service under the pension system.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency’s legal authority to adopt.
CHAPTER 304. MEMBERSHIP IN THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §304.1

The State Board of Trustees (Board) of the Texas Emergency Services Retirement System (TESRS) proposes amendments to Chapter 304, Membership in the Texas Emergency Services Retirement System, §304.1 regarding participation in the pension system by departments.

The proposed amendments are necessary to clarify Board rules governing the administration of TESRS to comply with House Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which amended §§861 - 865, Texas Government Code.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT. Kevin Deiters, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there are no foreseeable implications related to the cost or revenues of state or local governments.

PUBLIC BENEFIT/COST NOTE: Mr. Deiters has also determined that for the first five-year period the amended rules are in effect, the public benefit will be a more clearly defined process for the administration of the pension system.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT: There are no anticipated economic costs to persons who are required to comply with the amendments to these rules, as proposed. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022 and §2001.024(a)(6).

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments; therefore, no regulatory flexibility analysis or economic impact statement, as specified in Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT. For each year of the first five years the proposed amendments will be in effect, TESRS has determined that these amendments (1) will not create or eliminate a government program; (2) will not result in the addition or reduction of employees; (3) will not require an increase or decrease in future legislative appropriations; (4) will not lead to an increase or decrease in fees paid to a state agency; (5) will not create a new regulation; (6) will not repeal an existing regulation; and (7) will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

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

PUBLIC COMMENTS: Comments on the amended rule may be submitted in writing to Kevin Deiters, Executive Director, Texas Emergency Services Retirement System, P.O. Box 12577, Austin, TX 78711-2577, submitted electronically to outreach@terss.texas.gov, or faxed to (512) 936-3480. Comments must be received no later than thirty days from the date of publication of this proposal.

STATUTORY AUTHORITY: The amendments are proposed pursuant to Texas Government Code, §862.001, which authorizes the state board to adopt rules as necessary for the administration of the fund.

Texas Government Code, §862.001, is affected by this proposal.

§304.1. Participation by Department

(a) The governing body of a department that performs emergency services may, in the manner provided for taking official action by the body, elect to participate in the pension system. The governing body of a department shall notify the Executive Director in writing as soon as practicable of an election made under this section. An election made under this section is irrevocable except as provided by §862.001, Texas Government Code, and any rules adopted by the board thereunder. Effective September 1, 2015, a department must have at least seven individuals [volunteers or auxiliary employees] who would be eligible to be a member in the pension system in order to make the election to participate provided under this section.

(b) The effective date of a department's participation in the pension system must be the first day of a month that follows the election of the [a] governing body of the department to participate in the pension system.

(c) The governing body of a department that makes an election under (a) above or the governing body of the political subdivision associated with such [a] department may purchase prior service credit under §306.1 of this title under the terms of that section for service performed before the effective date of participation in the pension system, but neither the pension system nor the governing body of the participating department or the political subdivision is liable for the payment of benefits because of any disability or death that occurred before that date.

(d) The governing body of a department that performs emergency services that makes the election for a department to participate as described in subsection (a) of this section shall not be a for-profit entity.]

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

Filed with the Office of the Secretary of State on October 10, 2019.

TRD-201903636
CHAPTER 306. CREDITABLE SERVICE FOR MEMBERS OF THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §§306.1 - 306.3

The State Board of Trustees (Board) of the Texas Emergency Services Retirement System (TESRS) proposes amendments to Chapter 306, Creditable Service for Members of the Texas Emergency Services Retirement System, §§306.1 - 306.3.

The proposed amendments are necessary to clarify Board rules governing the administration of TESRS to comply with House Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which amended §§861 - 865, Texas Government Code.

The proposed amendments also increase the maximum amount of prior service credit that the governing body of a department or the governing body of a political subdivision associated with the department may purchase for a member from ten years to fifteen years and extends the period that such governing body may purchase prior service from two years to five years after enrolling in the pension system.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT. Kevin Deiters, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there are no foreseeable implications related to the cost or revenues of state or local governments.

PUBLIC BENEFIT/COST NOTE: Mr. Deiters has also determined that for the first five-year period the amended rules are in effect, the public benefit will be a more clearly defined process for the administration of the pension system.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT: There are no anticipated economic costs to persons who are required to comply with the amendments to these rules, as proposed. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022 and §2001.024(a)(6).

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES: There will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments; therefore, no regulatory flexibility analysis or economic impact statement, as specified in Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT. For each year of the first five years the proposed amendments will be in effect, TESRS has determined that these amendments (1) will not create or eliminate a government program; (2) will not result in the addition or reduction of employees; (3) will not require an increase or decrease in future legislative appropriations; (4) will not lead to an increase or decrease in fees paid to a state agency; (5) will not create a new regulation; (6) will not repeal an existing regulation; and (7) will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

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

PUBLIC COMMENTS: Comments on the amended rules may be submitted in writing to Kevin Deiters, Executive Director, Texas Emergency Services Retirement System, P.O. Box 12577, Austin, Texas 78711-2577, submitted electronically to outreach@tesrs.texas.gov, or faxed to (512) 936-3480. Comments must be received no later than thirty days from the date of publication of this proposal.

STATUTORY AUTHORITY: The amendments are proposed pursuant to Texas Government Code, §865.006(b), which authorizes the state board to adopt rules as necessary for the administration of the fund.

Texas Government Code, §§863.001, 863.004 are affected by this proposal.

§306.1. Prior Service Credit for Members of Participating Departments.

(a) The governing body of a [A] department that elects to participate in the pension system and is not merging an existing pension plan into the pension system may, before the fifth (5th) [second] anniversary of the date the department begins participation, make a one-time election to purchase service credit for qualified service performed for the department before the effective date of departmental participation by the persons who became members of the pension system on the effective date of the departmental participation.

(b) The governing body of a [A] department that elects or has previously elected to participate in the pension system and is merging or has merged an existing pension plan into the pension system may at any time purchase service credit for qualified service performed for the department before the effective date of departmental participation by the persons who are members of the pension system on the date the department contracts for the purchase.

(c) The maximum amount of prior service credit a member may receive under this section is 15 [14] years. Prior [A department may choose to purchase prior] service credit may be purchased for a number of years not to exceed a maximum of 15 [14] years. The pension system shall grant prior service credit under this section if the governing body of the department or the governing body of the political subdivision associated with the department agrees in writing to finance the prior service credit by a lump-sum payment or within a period not to exceed 10 years from the effective date of the election to purchase the service credit.

(d) The cost to finance the purchase of prior service credit is based on the actuarially assumed rate of investment return on fund assets at the time payment for the service credit begins. The governing body of the department or the governing body of the political subdivision associated with the [A] department may purchase prior service credit under subsection (a) of this section based on any contribution rate at or above the minimum provided by statute or state board rule for the period purchased and under subsection (b) of this section based on any contribution rate at or above the current minimum provided by state board rule at the time payment for the service credit begins. The
overall costs associated with the purchase of prior service credit shall be determined by the pension system actuary according to generally accepted actuarial standards and must be determined to be actuarially sound for the cost-sharing pension system.

(e) To purchase prior service credit, the governing body of the department or the governing body of the political subdivision associated with the [department] must provide the Executive Director with a detailed, verified record of prior service showing the amount of qualified service performed for the department before the effective date of departmental participation by each person who became a member of the pension system on the effective date of the departmental participation [department]. The record for each member must include the member's date of birth and entry date in the department.

(f) The maximum amount of prior service credit provided by the rule applies only to prior service credit purchased, or under a written agreement to be financed that is instituted, on or after September 1, 2019 [September 1, 2007]. Prior service credit purchased, or under a written agreement to be financed, under a procedure administered by the pension system before September 1, 2019 [September 1, 2007], is subject to the maximum amount of credit and the terms and value in effect under the pension system’s [system] procedures at the time of purchase or written agreement to purchase.

(g) Prior service credit may not be purchased for any service performed prior to September 1, 2019 by a member who did not satisfy the requirements to be considered a "volunteer" or "auxiliary employee" under §611.001, Texas Government Code, prior to such date.

§306.2. Merger of Existing Pension Plan into Pension System.

(a) Subject to approval by the state board, the governing body of a department that elects to participate in the pension system shall merge into the pension system any existing defined-benefit pension plan it operates for emergency services personnel.

(b) The pension system actuary shall determine the prior service costs for active members as of the merger date according to generally accepted actuarial standards. In the event that the assets of the merging plan do not cover the prior service costs for active members, the governing body of the department or the governing body of the political subdivision associated with the [participating department] shall pay the determined prior service costs for active members not later than the 10th anniversary of the effective date of merger. Interest on the prior service costs accrues at the assumed rate of investment return at the time determination of the prior service costs is made, except that interest is waived if such governing body [the department] completes payment not later than the first anniversary of the effective date of merger.

(c) The state board shall determine the discount rate for determining the liability for the monthly benefits which retirees [annuitants] are being paid on the effective date of the merger and for deferred monthly benefits for inactive members who, on that date, have a vested right to a future monthly benefit upon attaining the required age. Using this discount rate, the pension system actuary shall then determine the liability for these retirees and inactive members according to generally accepted actuarial standards. In the event that the assets of the merging plan do not cover the costs associated with the liability of monthly benefits of these retirees and inactive members, the governing body of the department or the governing body of the political subdivision associated with the [participating department] shall pay the determined costs for such monthly benefits not later than the 10th anniversary of the effective date of merger. Interest on the costs for monthly benefits for retirees and inactive members accrues at the assumed rate of investment return at the time determination of such costs is made, except that interest is waived if such governing body [the department] completes payment not later than the first anniversary of the effective date of merger.

(d) Upon returning [return as a volunteer or auxiliary employee] to service with the participating department for which the member was performing services prior to active military duty, the member is eligible to be awarded qualified service credit for the period

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while on active military duty under this section, not to exceed five (5) years, and in accordance with USERRA if the member:

(1) is discharged or released from active military duty under honorable conditions or as otherwise provided by USERRA; and

(2) returns [as a volunteer or as an auxiliary employee] to service with the participating department for which the member was performing services prior to active military duty within ninety (90) days of discharge or release from active military duty or longer period of time as may be required by USERRA, provided that the participating department substantiates such return from active military duty by submitting a letter to the pension system verifying the member's return from military service, including the last date of active military service and date of return with the participating department, and by providing any relevant documentation that may be requested by the pension system. The pension system shall consider the provisions of USERRA or regulations adopted pursuant to USERRA in determining eligibility for qualified service credit of members who return to service [as a volunteer or as an auxiliary employee for] a participating department later than 90 days due to illness or injury incurred in, or aggravated during, uniformed service.

(e) In accordance with USERRA, if a member returns to service with [as a volunteer or as an auxiliary employee for] the participating department for which the member was performing services prior to active military duty within the period of time required by USERRA, the governing body of the political subdivision associated with the participating department shall make the contributions (including the Part One and Part Two contributions) that would have been made if the member had been performing emergency services or support services for [a volunteer or auxiliary employee with] the participating department during the period of active military duty. Such contributions are due no later than ninety (90) days after the member's date of return to service [as a volunteer or auxiliary employee with] the participating department.

(f) Notwithstanding subsection (e) of this section, if the governing body of the political subdivision associated with the [a] participating department has not previously made the required contributions for periods of active military duty that are reflected as military leave in the records of the pension system and occurred prior to the effective date of this section, the governing body of the political subdivision associated with the participating department will have ninety (90) days following the receipt of notice from the pension system to make the contributions required under subsection (e) [(4)] of this section. The notice from the pension system will include identification of the eligible members, the periods of service for which the member is eligible to receive qualified service credit, not to exceed five (5) years, and the amount that the governing body of the political subdivision associated with the participating department is required to contribute. The period of time to make the contributions under this subsection may be extended at the discretion of the Executive Director [executive director].

(g) For purposes of this section, the member's date of return to service [as a volunteer or auxiliary employee with] the participating department for which the member was performing services prior to active military duty is the date the member (1) attends at least one hour of annual training, (2) participates in one of the participating department's emergencies, or (3) [performs one hour as an auxiliary employee in accordance with §§61.001(2), Government Code, or (4)] provides support services for one of the participating department's emergencies if the governing body of the participating department includes all persons who provide support services for the department as members of the pension system in accordance with §§62.0025, Texas Government Code.

(h) Notwithstanding any provisions of this section to the contrary, contributions, benefits, and qualified service credit with respect to active military duty shall be provided in accordance with the Internal Revenue Code §414(u) and as required by USERRA.

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 10, 2019.
TRD-201903637
Kevin Deiters
Executive Director
Texas Emergency Services Retirement System
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 936-3474

CHAPTER 308. BENEFITS FROM THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §§308.1 - 308.4

The State Board of Trustees (Board) of the Texas Emergency Services Retirement System (TESRS) proposes amendments to Chapter 308, Benefits from the Texas Emergency Services Retirement System.

The proposed amendments are necessary to clarify Board rules governing the administration of TESRS to comply with House Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which amended §§861 - 865, Texas Government Code.

The amendments propose to increase line-of-duty death benefits from $60,000 to $100,000 and enable a member whose occupation is homemaker or caretaker to qualify for disability benefits.

The proposed amendment of §308.2 will remove the requirements for local boards to hold a hearing on a service retirement application.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT. Kevin Deiters, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there are no foreseeable implications related to the cost or revenues of state or local governments.

PUBLIC BENEFIT/COST NOTE: Mr. Deiters has also determined that for the first five-year period the amended rules are in effect, the public benefit will be a more clearly defined process for the administration of the pension system.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT: There are no anticipated economic costs to persons who are required to comply with the amendments to these rules, as proposed. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022 and 2001.024(a)(6).

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES. There will be no impact on rural communities, small businesses, or micro-businesses as
a result of implementing these amendments; therefore, no regulatory flexibility analysis or economic impact statement, as specified in Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT. For each year of the first five years the proposed amendments will be in effect, TESRS has determined that these amendments (1) will not create or eliminate a government program; (2) will not result in the addition or reduction of employees; (3) will not require an increase or decrease in future legislative appropriations; (4) will not lead to an increase or decrease in fees paid to a state agency; (5) will not create a new regulation; (6) will not repeal an existing regulation; and (7) will not result in an increase or decrease in the number of individuals subject to the rule. During the first five years that the amendments would be in effect, the proposed amendments will not positively or adversely affect the Texas economy.

PUBLIC COMMENTS: Comments on the amended rule may be submitted in writing to Kevin Deiters, Executive Director, Texas Emergency Services Retirement System, P.O. Box 12577, Austin, Texas 78711-2577, submitted electronically to outreach@texas.texas.gov, or faxed to (512) 936-3480. Comments must be received no later than thirty days from the date of publication of this proposal.

STATUTORY AUTHORITY: The amendments are proposed pursuant to Texas Government Code, §865.006(b), which authorizes the state board to adopt rules as necessary for the administration of the fund.

Sections 864.001, 864.004, 864.006, 864.016 of the Texas Government Code are affected by this proposal.

§308.1. Eligibility for Retirement Annuity.
(a) A member is eligible to retire and receive a full service retirement annuity with full benefits from the pension system when the member has at least 15 years of qualified service credited in the pension system and has attained the age of 55.

(b) A member is eligible to retire and receive a partial service retirement annuity from the pension system when the member has at least 10 years of qualified service credited in the pension system and has attained the age of 55. Such partial retirement benefit shall accrue and be calculated as a percentage of a full service retirement benefit determined in Rule §308.2(f) at the following rates:

1. 50 percent after the first 10 years of credited qualified service; and
2. An additional 10 percent a year for the next five years of credited qualified service.

(c) Vested retirement benefits, including accrued partial service retirement benefits, are nonforfeitable. A retirement benefit also becomes nonforfeitable when a member attains normal retirement age or, to the extent funded, on the termination or partial termination of the pension system or the complete discontinuance of contributions to the pension system. A person whose retirement benefit met a partial vesting requirement as it existed on December 31, 2006, is eligible to retain that eligibility and the base amount of that benefit as it existed on that date.

§308.2. Service Retirement Annuity.
(a) In this section, normal retirement age is the later of the month a member completes 15 years of credited qualified service or attains the age of 55.

(b) A member who has terminated service with all participating departments may apply for a service retirement annuity by filing an application for retirement with the Executive Director. The application may not be filed more than one calendar month before the date the member wishes to retire [and must designate a desired retirement date], which may not precede the date of filing or the date of first eligibility to retire. The effective date of a member's retirement is the first day of the calendar month after the later of the following:

1. the date on which a member turns 55 years of age;
2. the date of termination of service with the participating department; or
3. the date on which the pension system receives an application that meets the requirements of this subsection from a member.

(e) [(d)] A monthly service retirement annuity is payable for the period beginning on the effective date of retirement through the month in which the retiree dies but is not payable for any month for which the retiree was eligible to retire but did not. Amounts payable for periods following the effective date of retirement but prior to the commencement of benefit payments will be paid in a lump sum with the first benefit payment.

(d) [(e)] A service retirement annuity is payable in equal monthly installments.

(f) [(g)] Except as otherwise provided by this section, the full service retirement monthly annuity is equal to six times the [governing body's] average monthly Part One contribution as described in Rule §310.6 during the retiring member's term of qualified service with all participating departments.

(g) [(h)] For credited qualified service in excess of 15 years, a retiring member is entitled to receive an additional 6.2 percent of the full service retirement annuity compounded annually and adjusted for months of credited qualified service that constitute less than a year.

(h) Notwithstanding subsection (g) of this section, a person who had more than 15 years of qualified service as of December 31, 2006, is entitled to a service retirement annuity computed as the greater of the amount that existed on that date or the amount computed under the formula in effect on the date the person terminates service with all participating departments.

§308.3. Disability Retirement Benefits.
(a) Except as otherwise provided by §864.004, [and] §864.005, and §864.0051, Texas Government Code, and this section, a member whose disability results from performing emergency services or support services [service duties] is entitled to a temporary disability retirement benefit in the form of a monthly annuity during the period of the disability as determined under §864.004(c), Texas Government Code, in an amount equal to $400 plus $50 for every $12 increase in Part One contributions above $36 based on [by] the contribution rate applicable to the participating department [governing body] for which the member [person] was performing emergency services or support services [service duties] at the time of the disability.

(b) An increase in contributions [by a governing body] after the payment of a monthly disability annuity begins does not increase the amount of the annuity.

(c) Disability benefits are prorated for portions of months during which a person is disabled.
An application for disability retirement benefits must be filed with the local board. The [A] local board shall report to the Executive Director, in a manner provided by the pension system, a determination of a temporary disability not later than the 45th day after the date the application is received by the local board [disability begins].

The determination of a temporary disability is a determination that a member is disabled as described in §§864.004(a), Texas Government Code prior to the determination of permanent disability by the medical board under §§864.005(a) [§864.005(a)], Texas Government Code and is not a determination that a particular condition of a member is of a temporary nature. A member's right to receive a continuing disability retirement benefit shall be determined in accordance with §§864.005, Texas Government Code.

For purposes of a determination by the local board or the medical board of a member's disabled status under §§864.004, §§864.005, or §§864.005(a), a member's "regular occupation" may be determined within the sole discretion of the local board or medical board to mean any occupation the member held immediately prior to becoming disabled, whether or not the member received compensation in connection with such occupation, including, without limitation, an occupation as a homemaker or caretaker.

The state board may adopt procedures for the administration of disability retirement benefits under the pension system as it deems necessary.

§308.4. Death Benefits.

(a) The surviving spouse and dependents of a member who dies as a result of performing emergency services or support services [service duties] are entitled to the benefit provided under §§864.006, Texas Government Code. The beneficiary of an active member who dies as a result of performing emergency services or support services [service duties] is entitled to a lump-sum benefit of $100,000 [$60,000].

(b) Except as otherwise elected under subsection (c) or (d) of this section, the beneficiary of a deceased active member whose death did not result from the performance of emergency services or support services [service duties], including a member whose death resulted from the performance of active military duty, is entitled to: the sum of the amount that has been contributed on the decedent's behalf from whatever source at the time of the member's death and the amount that would have been contributed by a participating department after the member's death, based on the participating department's contribution rate at the time of the member's death, at the end of the period required for full service retirement benefits, but in no event less than the total amount that has actually been contributed on the member's behalf.

(c) In lieu of the benefit provided by subsection (b) of this section, if the surviving spouse is the sole designated beneficiary of a deceased member (i) who dies as an active member of a participating department, (ii) whose death did not result from the performance of emergency services or support services [service duties] and (iii) who had attained the minimum age and service requirements under Rule §308.1 for a full or partial service retirement as of the date of death, the surviving spouse may elect to receive a death benefit annuity, beginning on the later of the date on which the decedent would have attained the minimum age requirement or the date the surviving spouse applies for the annuity, equal to two-thirds of the monthly annuity for a full or partial retirement, as applicable, to which the decedent would have been entitled on the date that the member would have attained the minimum age requirement.

The election under Rule §308.4(b) or (c), as applicable, is not available to the deceased member's spouse if the deceased member designated more than one beneficiary to receive such death benefit, even if the spouse is one of the deceased member's designated beneficiaries.

All beneficiary designations of a member will become null and void upon such member's termination from service with all participating departments. No designated beneficiary is entitled to a death benefit under this section following a member's termination of service from all participating departments.

The surviving spouse of a deceased member who dies after terminating service, but before commencing a service retirement annuity from the pension system under Rule §308.2, is entitled to receive upon application to the pension system (i) the death benefit annuity described in subsection (c) of this section if the deceased member had attained the minimum age and service requirements under Rule §308.1 for a full or partial service retirement as of the date of death or (ii) the death benefit annuity described in subsection (d) of this section if the deceased member had attained the minimum service requirements, but had not attained the minimum age requirement under Rule §308.1 for a full or partial service retirement as of the date of death, beginning on the dates described in subsection (d) of this section. The surviving spouse of a deceased member is entitled to the benefit under this subsection even if the surviving spouse was not the designated beneficiary of the deceased member upon termination of active service from all participating departments.

The surviving spouse of a person who dies after commencing a service retirement annuity from the pension system under Rule §308.2 is entitled to the benefit provided by §§864.009, Texas Government Code.

For beneficiary designations made after September 1, 2015, a member who is married and designates a beneficiary other than his or her spouse must obtain written spousal consent for such beneficiary designation in a manner as determined by the pension system.

Any death benefit that is payable to a dependent will be paid to the legal guardian of such dependent for the benefit of such dependent.

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 10, 2019.

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Kevin Deliors
Executive Director
Texas Emergency Services Retirement System
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 936-3474
CHAPTER 310. ADMINISTRATION OF THE
TENNESS EMERGENCY SERVICES RETIREMENT
SYSTEM
34 TAC §§310.2, 310.4 - 310.6, 310.8 - 310.10, 310.12
The State Board of Trustees (Board) of the Texas Emergency
Services Retirement System (TESRS) proposes amendments to
Chapter 310, Administration of the Texas Emergency Services
Retirement System, §§310.2, 310.4 - 310.6, 310.8 - 310.10, and
310.12.

The proposed amendments are necessary to clarify Board rules
regarding the administration of TESRS to comply with House
Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which

The proposed amendments establish the requirement for the
participating department head and the local board to work to-
gether to enroll eligible members into the pension system. They
also enhance the oversight abilities of the local board by prohib-
iting the election of the participating department head as the chair
of the local board.

The proposed amendments also eliminate the need for unnec-
essary local board meetings by moving the annual election of local
board officers to the last day of February. Finally, the proposed
amendments clarify that the governing body of the political sub-
division associated with the participating department is respon-
sible for the payment of contributions to the pension system.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT.
Kevin Deiters, Executive Director, has determined that for each
year of the first five-year period the proposed amendments are
in effect, there are no foreseeable implications related to the
cost or revenues of state or local governments.

PUBLIC BENEFIT/COST NOTE: Mr. Deiters has also deter-
mined that for the first five-year period the amended rules are
in effect, the public benefit will be a more clearly defined process
for the administration of the pension system.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL
EMPLOYMENT: There are no anticipated economic costs to per-
sons who are required to comply with the amendments to these
rules, as proposed. There is no effect on local economy for the
first five years that the proposed amendments are in effect; there-
fore, no local employment impact statement is required un-

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEX-
IBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSI-
NESSES, AND RURAL COMMUNITIES. There will be no impact
on rural communities, small businesses, or micro-businesses as
a result of implementing these amendments; therefore, no regu-
latory flexibility analysis or economic impact statement, as spec-

GOVERNMENT GROWTH IMPACT STATEMENT. For each
year of the first five years the proposed amendments will be in

Texas the first five years that the amendments would be in effect, the
proposed amendments will not positively or adversely affect the
Texas economy.

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

PUBLIC COMMENTS: Comments on the amended rules may
be submitted in writing to Kevin Deiters, Executive Director,
Texas Emergency Services Retirement System, P.O. Box
12577, Austin, Texas 78711-2577, submitted electronically to
outreach@tesrs.texas.gov, or faxed to (512) 936-3480. Com-
ments must be received no later than thirty days from the date
of publication of this proposal.

STATUTORY AUTHORITY: The amendments are proposed pur-
suant to Texas Government Code, §§865.006(b), which autho-
rites the state board to adopt rules as necessary for the admin-
istration of the fund.

Texas Government Code, §§865.006, 865.010, 865.012,
865.014, 865.019 are affected by this proposal.

§310.2. Additional Duties of State Board.
(a) The state board shall formulate the basic and general poli-
cies of the pension system and the rules consistent with the purposes,
policies, and standards stated in statutes administered by the state
board.

(b) The state board shall adopt and revise written investment
objectives and policies after consultation with the pension system's in-
vestment counselor and shall periodically review such objectives and
policies.

§310.4. Standard of Conduct for Financial Advisors and Service
Providers.
(a) In accordance with §2263.004, Texas Government Code,
financial advisors and service providers that directly or indirectly
receive more than $10,000 in compensation from the pension system
during a state fiscal year and that provide financial services to the Ex-
ecutive Director, the state board, or individual members of the state
board regarding the investment or management of the fund's assets shall
comply with all applicable standards of conduct with which they are
required to comply in accordance with federal or state law, rules, or
regulations, relevant trade or professional associations, and the state
board's investment policy.

(b) A financial advisor or service provider must agree to com-
ply with these standards of conduct as a prerequisite to establishing and
continuing any business relationship regarding the fund.

(c) The state board is authorized to terminate any business or
contractual relationship with a financial advisor or service provider that
the state board has determined to have failed to comply with an appli-
cable standard of conduct.

§310.5. Local Board of Trustees.
(a) A local board annually shall elect a chair, vice chair and
secretary for a given calendar year no later than the last day of Febru-
ary (January 31st) of such calendar year. The participating department
head may not be elected to serve as the chair of the local board.

(b) A meeting of a local board is subject to the Texas Open
Meetings law (Chapter 551, Government Code).

§310.6. Local Contributions.
(a) Except as otherwise provided by this section, the governing body of the political subdivision associated with a [each] participating department shall make a contribution for each month for each individual who [in which a volunteer or auxiliary employee of the participating department] is a member of the pension system as determined under §862.002, Texas Government Code. The monthly contribution is composed of two parts, as outlined in subsections (b) and (c) of this section. Contributions are payable for each month of service regardless of whether the member receives a year of qualified service. Contributions are payable as provided by §865.014, Texas Government Code, and §310.8 of this title (relating to Billing). Contributions required under this section are not considered compensation to the members for whom they are made.

(b) The Part One contribution is the portion of the [participating departments'] contribution that is used for purposes of calculating the benefit of a member as provided in §308.2 of this title (relating to Service Retirement Annuity). The Part One contribution will be no less than the minimum contribution amount provided in subsection (d) of this section.

(c) The Part Two contribution is the portion of the [participating departments'] contribution that is applied to reduce the unfunded actuarial accrued liability of the pension system as contemplated under §861.001(1) and §864.002(a)(1), Texas Government Code. The Part Two contribution is not used for purposes of calculating the service retirement benefit of a member as provided in §308.2 of this title. The state board may establish or modify the Part Two contribution based on the pension system's most recent actuarial valuation approved by the state board, but in no case shall the Part Two contribution exceed 15 percent of the Part One contribution attributable to the participating department [department's Part One contribution]. Any Part Two contribution established or modified by the state board will be effective beginning on September 1 following the state board's approval of such Part Two contribution. The governing body of a political subdivision associated with the [A] participating department shall make the Part Two contribution for each month as provided in subsection (a) of this section.

(d) The minimum contribution rate for each participating department is $36 per member. After August 31, 2015, the minimum contribution rate for each participating department is $36 per member plus any Part Two contribution that might be charged by the pension system, as provided in subsection (c) of this section. The governing body of a political subdivision associated with the [A] participating department may elect to make Part One contributions with respect to a participating department at a rate greater than the minimum contribution amount by notifying the Executive Director in writing of the rate.

(e) Contributions are payable when leave is taken under the Family and Medical Leave Act of 1993 (29 U.S.C. §2601 et seq.). Contributions are not payable during a period of temporary disability.

(f) Contributions are not immediately payable during a period of military leave while on active military duty if (1) the military duty constitutes qualified military service in uniformed services, as provided under the Uniformed Services Employment and Re-Employment Rights Act, 38 United States Code §4301 et seq. (USERRA) and (2) the member is designated as on military leave by the pension system upon receiving documentation from the participating department that substantiates such active military duty under procedures developed by the pension system pursuant to [Rule] §306.3(c) of this title (relating to Qualified Service Credit for Eligible Active Military under the Uniformed Services Employment and Re-Employment Rights Act). Contributions for the period of active military duty shall be paid by the governing body of the political subdivision associated with the participating department upon the member's return to the participating department in accordance with [Rule] §306.3(e) and as required by USERRA.

(g) The pension system may accept Part One and Part Two contributions from the governing body of the participating department or the governing body of the political subdivision associated with the participating department, but in no event shall the pension system's acceptance of contributions directly from the governing body of the participating department waive or otherwise limit the ultimate responsibility of the governing body of the political subdivision associated with the participating department to make contributions and associated interest, if any, to the pension system.


(a) The Executive Director shall bill the governing body [bodies] of a political subdivision associated with a participating department [departments] semi-annually on the last business day of February and August.

(b) Each billing shall include, as appropriate, charges for:

1. monthly Part One contributions for participating members and any corresponding Part Two contributions, if applicable;

2. optional annuity increases or supplemental payments;

3. annuity payments funded by the governing body of the political subdivision associated with the participating department or the governing body of the participating [entity or by] department [contributions];

4. prior service contributions;

5. late-payment interest charges; and

6. unpaid administrative penalties.

(c) At least 30 days before the last business day of February and of August, the Executive Director shall send to the chair of the local board of each participating department a semi-annual pension roster report (Roster) that includes the name of each person who performs emergency services or support services, if applicable, for the participating department and is identified as a member of the pension system, and the name of each person who is receiving pension payments under a funding arrangement with the plan.

(d) The local board shall verify the accuracy of the Roster report[s] and shall work with the participating department head to enroll each person who is performing or has performed emergency services or support services, if applicable, for the participating department since the date of the last verified Roster and who is not listed on the Roster [performs service as a volunteer or auxiliary employee(s)] as a member of the pension system as required by §862.002, Texas Government Code [Section 862.002].

(e) Upon request by the local board chair or the participating department head, the Executive Director will provide [the local board chair with] an updated Roster [roster] for certification.

(f) The local board shall meet and certify, by signature of the chairman, the accuracy of the Roster report and return the signed Roster report to the Executive Director no later than the fifth day before the last day of the billing period.

(g) Based on the certified Roster [roster], on the last day of the month of the billing period, an invoice shall be generated by the pension system and provided to the governing body of the political subdivision associated with the participating department [entity]. Payments are due within 30 days of the invoice date. Late payments accrue interest at the current actuarially assumed rate of investment return on fund assets.

(h) In this section:
(1) The term "ACH" (Automated Clearing House) means the legal framework of rules and operational procedures adopted by financial institutions for the electronic transfer of funds.

(2) The term "ACH Credit" means an ACH transaction initiated by the governing body of a political subdivision or the governing body of a participating department for the electronic transfer of funds from the account of the governing body of the political subdivision or the governing body of the participating department to the account of the pension system.

(3) The term "ACH Debit" means an ACH transaction initiated by the pension system for the electronic transfer of funds from the account of the governing body of a political subdivision or the governing body of a participating department to the account of the pension system.

(4) The term "electronic funds transfer" means the transfer of funds, other than by check, draft or similar paper instrument, that is initiated electronically to order, instruct, or authorize a financial institution to debit or to credit an account.

(5) The term "pre-authorized direct debit" means the method available to the governing body of a political subdivision or the governing body of a participating department for electronically paying required contributions by granting a continuing authorization to the pension system to initiate an ACH Debit for the electronic transfer of funds from the designated bank account of the governing body of the political subdivision or the governing body of the participating department to the account of the pension system in an amount equal to the contributions required to be paid.

(6) The term "wire transfer" generally means a single transaction, initiated by the governing body of a political subdivision or the governing body of the participating department, in which funds are electronically transferred to the account of the pension system using the Federal Reserve Banking System rather than the ACH.

(i) Amounts required to be contributed to the pension system in accordance with Chapter 865 of the Texas Government Code may be made by preauthorized direct debits (ACH Debits), electronic funds transfer, or by wire transfer.

(j) The governing body of a political subdivision or the governing body of a participating department may elect to use the preauthorized direct debit method of payment by filing a signed authorization agreement with the pension system in which the governing body of the political subdivision or the governing body of the participating department has designated a single bank account from which all transfers will be made.

(k) The authorization agreement entered into for this purpose constitutes continuing authority for the pension system to initiate a direct debit of the governing body of the political subdivision's or the governing body of the participating department's [body's] designated bank account.

(l) An authorization agreement remains in effect until the pension system receives either a written revocation of the agreement, or a subsequent written agreement, which automatically revokes the existing authorization. A new authorization agreement must be filed if there is any change in the designated bank account. The pension system, in its sole discretion, may terminate the authorization agreement by mailing written notice to the governing body of the political subdivision or the governing body of the participating department, as applicable. Thereafter, the governing body of the political subdivision or the governing body of the participating department must remit all contributions by check, electronic funds transfer, wire transfer, or other monetary means approved by the Executive Director. The alternative method of payment may include a fee to recover the cost of administering this subsection.

(m) On the 30th day after the invoice date, the pension system will initiate an ACH Debit in the amount of the invoice. The actual transfer of funds from the ACH designated account will not occur before the due date of the invoice.

(n) An ACH Debit that is reversed by a governing body of a political subdivision or the governing body of the participating department or that fails because sufficient funds are not available for transfer constitutes nonpayment of the required contributions and, thereafter, the required contributions will not be considered to have been received until the day the funds are actually transferred to the account of the pension system. Such unpaid funds may be subject to interest charges.

§310.9. Periodic Reports; Administrative Penalties.

(a) The Executive Director shall require periodic reports of local boards and participating department heads. The Executive Director shall specify the content of such periodic reports to ensure the ability of the state board and the Executive Director to administer the pension system in a manner that uses fund assets in a manner required by statute.

(b) A report required in accordance with this section is late if it is not received by the Executive Director before the end of the second month following the last day [month] required to be covered in the report.

(c) An administrative penalty is imposed on each late periodic report required in accordance with this section. The penalty is $500 for each violation, except that a surcharge of $100 will be added to the penalty for each month the report remains late.

(d) The Executive Director may waive an administrative penalty under this section if the Executive Director determines, after a written request by a local board or a participating department head for a waiver, that the delay in reporting was beyond the control of the parties [entities] responsible for preparing and submitting the report and was not the result of neglect, indifference, or lack of diligence.

(e) A local board or participating department head may appeal the Executive Director's denial of a waiver to the state board to be determined at the state board's next scheduled meeting. On appeal to the state board, the state board is subject to the same standard for determination as the Executive Director but may in its discretion accept additional information from the local board or the participating department head.

§310.10. Voluntary Payments by Departments to Retirees and Beneficiaries.

(a) The governing body of a [A] participating department, as authorized by this section, may make one or more supplemental payments to retirees and other beneficiaries of the pension system, or may provide an increase in the amount of annuities paid to retirees and other beneficiaries of the pension system. The governing body of a participating [A] department may choose to apply a supplemental payment or increase in annuities to all retirees and beneficiaries as of the date of the payment or increase or to only those whose benefits are derived from a person who was eligible to retire under §308.1(a) of this title (relating to Eligibility for Retirement Annuity) or with a specified greater number of years of qualified service.

(b) An increase in benefits may consist of:

(1) an additional payment that does not exceed the greater of $50 or 100 percent of a retiree's [an annuitant's] monthly scheduled payment;
(2) an annuity increase based on the 12-month increase in the Consumer Price Index for All Urban Consumers as of December of the preceding year;

(3) an increase to allow each annuity to reach a minimum monthly amount;

(4) an increase that adds to each annuity a specified amount for each whole year of credited service for the participating department; or

(5) a percentage increase to each annuity.

(c) Before it may implement a supplemental payment or annuity increase under this section, the governing body of a participating department shall:

(1) obtain from the Executive Director a determination from the pension system's actuary that the participating department's payments to the pension system will be sufficient to finance the anticipated additional benefits; and

(2) contract with the Executive Director to make quarterly payments to the pension system that are necessary to finance the increase in benefits.

(d) A supplemental payment or increase in benefits must apply to all retirees [annuitants] in the same annuity classification but may be based on persons who qualified for an annuity under a previously lower contribution rate.

§310.12. Access to Information about Members, Retirees [Annuitants], and Beneficiaries.

(a) The Executive Director shall develop a pension system security policy to protect member information, including electronic data.

(b) The local board annually shall review the pension system security policy and implement processes with respect to accessing the participating department's information in the pension system's online database which protect member information, including electronic data.

(c) At a meeting of the local board, the local board shall designate at least two (2)[primary and secondary] users who are approved by the local board to have access to the participating department's information in the pension system's online database. Using forms provided by the pension system and certified by signature of the local board chair, the local board shall report to the Executive Director the required information for each of the local board's approved users. At a meeting of the local board no later than the last day of February [January 31st] of each calendar year, the local board shall designate and approve two [or more] [the primary and secondary] users and report the approved user information to the Executive Director in the manner prescribed by the Executive Director.

(d) The Executive Director shall authorize access to the pension system's online database only to users who complete a confidentiality agreement.

(e) Authorized users' confidentiality agreements under this section remain in effect until the last day of February [January 31st] of each calendar year or until the local board chair provides the Executive Director a written revocation of an authorized user's local board approval to maintain member records through access to the pension system's online database.

(f) If an authorized user's local board approval is revoked, the local board shall fill the vacancy for the remainder of the calendar year by the procedure in which the user was originally approved.

(g) All user access to the pension system's online database is subject to the Executive Director's approval and may be terminated at any time.

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 10, 2019.

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Kevin Deiters
Executive Director
Texas Emergency Services Retirement System
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For further information, please call: (512) 936-3474

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER U. CONTRACTING

37 TAC §1.264

The Texas Department of Public Safety (the department) proposes amendments to §1.264, concerning Procedures for Vendor Protests of Procurements. The amendments to this rule are necessary to change the title of assistant director to chief and administration division to Infrastructure Operation. These amendments will help reduce vendor confusion during the vendor protest process by updating the rule to reflect organizational changes.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is 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, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of rule will be clarity in procedures for vendor protests of procurements.

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

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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 the proposal may be submitted to Lisa Maldonado, Procurement and Contract Services Director, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0001. 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Government Code, §2161.003. Texas Government Code, §411.004(3) and §2161.003 are affected by this proposal.

§1.264. Procedures for Vendor Protests of Procurements.

(a) Definitions.

(1) Working days--Monday through Friday, except national and state holidays as defined by Texas Government Code, §662.003. When counting working days, do not count the day of the act or event after which the ten-day period of time begins to run. The last day of the ten-day period is included in the count, unless the last day is a Saturday, Sunday, national holiday or state holiday, in which event the ten-day period runs until the end of the next day which is not a Saturday, Sunday, national holiday or state holiday.

(2) Interested parties--All contractors who have submitted bids, offers, responses or proposals for the contract at issue.

(b) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract, may formally protest to the chief [assistant director] of the Infrastructure Operations [administration] division. Such protests must be in writing, addressed to the chief [assistant director] of the Infrastructure Operations [administration] division and filed within ten working days after such aggrieved person knows, or should have known, of the occurrence of the action which is protested. A protest is considered filed when received by the chief [assistant director] of the Infrastructure Operations [administration] division. Formal protests must conform to the requirements herein and shall be resolved in accordance with the procedure set forth herein. Copies of the protest must be mailed or delivered by the protesting party to all other identifiable interested parties.

(c) In the event of a timely protest under this section, the department shall not proceed further with the solicitation or award of the contract unless the director, after consultation with the end user, deputy director, and the chief [assistant director] of the Infrastructure Operations [administration] division makes a written determination that the award of contract without delay is necessary to protect the best interests of the state.

(d) A formal protest must be sworn and notarized and must contain:

(1) the name and address of the protestor;

(2) appropriate identification of the procurement;

(3) a specific identification of the statutory or regulatory provision(s) that the action complained of is alleged to have violated;

(4) a specific description of each act alleged to have violated the statutory or regulatory provision(s) identified in paragraph (3) of this subsection;

(5) a precise statement of the relevant facts regarding the alleged violation of the statutory or regulatory provision(s) identified in paragraph (3) of this subsection;

(6) an identification of the issue or issues to be resolved regarding the alleged violation of the statutory or regulatory provision(s) identified in paragraph (3) of this subsection;

(7) supporting exhibits, evidence or documents to substantiate the alleged violation of the statutory or regulatory provision(s) identified in paragraph (3) of this subsection, unless not available at the time of filing, in which case the expected availability date shall be indicated;

(8) arguments and authorities in support of the protest; and

(9) an affidavit which affirms that the contents of the protest are true and accurate and that copies of the protest have been mailed or delivered to other identifiable interested parties.

(e) The department will maintain all documentation regarding the purchase in accordance with the department's applicable records retention schedule.

(f) The chief [assistant director] of Infrastructure Operations [administration] shall have the authority, prior to appeal to the director, to settle and resolve a protest concerning the solicitation or award of a contract. The chief [assistant director] may solicit written responses to the protest from other interested parties.

(g) If the protest is not resolved by mutual agreement, the chief [assistant director] will issue a written determination on the protest after conferring with the deputy director.

(1) If the chief [assistant director] determines that no violation of rules or statutes has occurred, the chief [assistant director] shall so inform the protesting party and other interested parties by letter which sets forth the reasons for the determination.

(2) If the chief [assistant director] determines that a violation of the rules or statutes has occurred in a case where a contract has not been awarded, the chief [assistant director] shall so inform the protesting party and other interested parties by letter which sets forth the reasons for the determination and the appropriate remedial action.

(3) If the chief [assistant director] determines that a violation of the rules or statutes has occurred in a case where a contract has been awarded, the chief [assistant director] shall so inform the protesting party and other interested parties by letter which sets forth the reasons for the determination, which may include ordering the contract void.
CHAPTER 15. DRIVER LICENSE RULES
SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES
37 TAC §15.30

The Texas Department of Public Safety (the department) proposes amendments to §15.30, concerning Identification Certificates. The expiration date of a driver license and a commercial driver license is determined by statute. Senate Bill 616, passed during the 86th Legislative Session, extended the term of a driver license to eight years. Texas Transportation Code §521.101(f) indicates the department will specify the expiration date of an identification card issued to a citizen, national, lawful permanent resident, refugee, or asylee. The department previously set a six year term for an identification certificate in §15.30. In order to align the term for an identification certificate with the terms of driver licenses and commercial driver licenses, this amendment to §15.30 extends the term of issuance or renewal for an identification card from six years to eight years. This amendment also amends subsection (b) to include a reference to expiration dates for certain sex offenders.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is 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, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of rule will be reducing the frequency in which citizens, nationals, lawful permanent residents, refugees or asylees are required to renew an identification card.

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; nor will it require the creation of new employee positions nor eliminate current employee positions. Because the expiration date is changing from six to eight years and the fee remains at $15.00, there will be potential negative

(h) The chief's [assistant director's] determination on a protest may be appealed by the protesting party to the director. The appeal shall be limited to review of the chief's [assistant director's] determination. Copies of the appeal must be mailed or delivered by the appealing party to the other interested parties and must contain an affidavit that such copies have been provided. An appeal of the chief's [assistant director's] determination must be in writing and must be received in the director's office no later than ten working days after the protestor's receipt of the chief [assistant director]. Infrastructure Operation's [administration's] determination. The protestor is deemed to have received the chief's [assistant director's] determination upon the earliest of the following:

(1) when delivered in hand and a receipt granted;
(2) three days after it is deposited in the United States mail by regular mail; or
(3) at the time it is sent via electronic mail or facsimile.

(i) The director may confer with the general counsel in their [his] review of the matter appealed. The director may, in their [his] discretion, refer the matter to the commission for its consideration at a regularly scheduled open meeting or issue a written decision on the protest. A decision issued either by the commission in open meeting or in writing by the director shall be the final administrative action of the department.

(j) When a protest has been appealed to the director under subsection (h) of this section and has been referred to the commission by the director under subsection (i) of this section, the requirements detailed in this subsection shall apply:

(1) The director's office shall mail copies of the appeal and responses of interested parties, if any, to the commissioners.
(2) All interested parties who wish to make an oral presentation at the open meeting shall notify the director at least 48 hours in advance of the open meeting.
(3) The commission may consider oral presentations and written documents presented by staff and interested parties. The chairman of the commission shall set the order and amount of time allowed for presentations.
(4) The commission's determination of the appeal shall be by duly adopted resolution reflected in the minutes of the open meeting and shall be final.

(k) Unless good cause for delay is shown or the department determines that a protest or appeal raises issues significant to procurement practices or procedures, a protest or appeal that is not timely filed will not be considered.

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

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fiscal implications to state revenue in years 7 and 9, subsequent to the effective date of this rule. The expiration date change will occur in June 2020, and reduces the potential fiscal impact to only year eight if the fee is not increased during the 87th Legislative Session. The estimated fiscal impact is a loss of revenue in FY 26 of $3,773,960 and a loss of revenue in FY 27 of $3,656,850. 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 the proposal may be submitted by mail to Ron Coleman, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department’s work; Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code; and §521.101, which authorizes the department to issue identification card certificates.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 and §521.101 are affected by this proposal.

§15.30 Identification Certificates.

(a) Identification certificates issued to a citizen, national, lawful permanent resident, refugee, or asylee are dated to expire on the next birth date of the holder occurring eight [six] years after date of application.

(b) Identification certificates issued to applicants not described by subsection (a) of this section are dated to expire as provided by Transportation Code, §521.101(2)(A)(ii) or (B) and §521.103(b) and (c).

(c) All original applicants for an identification certificate must present proof of identity as required in §15.24 of this title (relating to Identification of Applicants).

(d) Any person whose identification certificate has expired over two years must apply as an original applicant.

(e) There are no age limits and testing is not required.

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

The Texas Department of Public Safety (the department) proposes amendments to §15.49, concerning Proof of Domicile. The amendments are necessary because the 86th Texas Legislature enacted HB123 which exempts certain homeless youth from the standard proof of domicile requirements. This amendment also updates the acceptable documentation for demonstrating proof of domicile during the driver license application process.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is 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, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of rule will be enhanced security of state-issued driver licenses and identification certificates and continuing focus on issues of potential fraud and misrepresentation in the driver license application process.

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 or 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 the proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. 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, §411.004(3), which authorizes the Public Safety Commission to
adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.49. Proof of Domicile.

(a) To establish domicile in Texas for a non-commercial driver license or identification certificate, an applicant must reside in Texas for at least thirty (30) days prior to application. Applicants who surrender a valid, unexpired out-of-state driver license or identification certificate are not required to reside in Texas for at least thirty (30) days prior to application.

(b) In order to prove domicile, all original applicants for a driver license or identification certificate must present two acceptable documents verifying the applicant's residential address in Texas.

(c) The department may require individuals renewing or obtaining a duplicate driver license or identification certificate to present proof of domicile prior to issuance.

(d) In order to satisfy the requirements of this section the individual must provide two documents, which contain the applicant's name and residential address, from the acceptable proof of domicile list in subsection (e) of this section. At least one of the documents presented must demonstrate that the applicant has resided in Texas for at least thirty (30) days prior to application. [unless the applicant is surrendering a valid, unexpired out-of-state driver license].

(e) Acceptable proof of domicile documents are:

1. A current deed, mortgage, monthly mortgage statement, mortgage payment booklet, or a residential rental/lease agreement.
2. A valid, unexpired Texas voter registration card.
3. A valid, unexpired Texas motor vehicle registration or title.
4. A valid, unexpired Texas boat registration or title.
5. A valid, unexpired Texas concealed handgun license or license to carry.
6. A utility or residential service bill [An electric, water, natural gas, satellite television, cable television, or non-cellular telephone statement] dated within ninety (90) days of the date of application. Examples of acceptable statement include, but are not limited to, electric, water, gas, internet, cable, streaming services, lawn service, cellular telephone, etc.
7. A Selective Service card.
8. A medical or health card.
9. A current homeowners or renters insurance policy or [homeowners or renters insurance] statement.
10. A current automobile insurance policy, card, or [an automobile insurance] statement.
11. A Texas high school, college, or university report card or transcript for the current school year.
12. A pre-printed W-2, 1099, or 1098 tax form from an employer, government, or financial entity for the most recent tax year.
13. Mail or printed electronic statements from financial institutions; including checking, savings, investment account, and credit card statements dated within ninety (90) days of the date of application.
14. Mail or printed electronic statements from a federal, state, county, or city government agency dated within ninety (90) days of the date of application.
15. A current automobile payment booklet or statement.
16. A pre-printed paycheck or payment stub dated within ninety (90) days of the date of application.
17. Current documents issued by the U.S. military indicating residence address.
18. A document from the Texas Department of Criminal Justice indicating the applicant's recent release or parole.
20. Both documents may [not] be from the same source if the source is a local governmental entity that provides multiple residential services. For example, an individual may [not] use [vehicle registration and vehicle title for the same or different vehicles from the same registration office or] a water and gas bill from the same municipal utility if they are on separate statements. Documents from the same source for different months will not be accepted.[ Mail addressed with a forwarding label or address label affixed to the envelope or contents are not acceptable.]
21. Mail addressed with a forwarding label or address label affixed to the envelope or contents is not acceptable.
22. [§3] If the individual cannot provide two documents from the acceptable proof of domicile list, the individual may submit a Texas residency affidavit executed [submitted] by:
   (1) An individual who resides at the same residence address as the applicant.
   (2) A representative of a governmental entity, not-for-profit organization, assisted care facility/home, adult assisted living facility/home, homeless shelter, transitional service provider, [or] group/half way house, or college/university certifying to the address where the applicant resides or receives services. The organization must provide a notarized letter verifying that they receive mail or
services for the individual or completed Texas Residency Affidavit (DL-5).

(i) An individual is not required to comply with this section if the applicant is subject to the address confidentiality program administered by the Office of the Attorney General, [judicial address confidentiality under Texas Transportation Code, §521.121] or currently incarcerated in a Texas Department of Criminal Justice facility.

(ii) Minors under the conservatorship of the Department of Family and Protective Services (DFPS) and individuals under the age of 21 in DFPS paid foster care are not required to comply with subsection (b) of this section and may present an approved DFPS residency form signed by a DFPS caseworker or caregiver as proof of the applicant's residential address in Texas.

(k) Homeless youth, defined by 42 U.S.C. §11434a, may present a letter certifying the child or youth does not have a residence from:

(1) the school district in which the child is enrolled;
(2) the director of an emergency shelter or transitional housing program;
(3) the director of a basic center for runaway and homeless youth; or
(4) a transitional living program.

(l) All documents submitted by an individual must be acceptable to the department. The department has the discretion to reject or require additional evidence to verify domicile address.

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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SUBCHAPTER D. DRIVER IMPROVEMENT
37 TAC §15.89

The Texas Department of Public Safety (the department) proposes amendments to §15.89, concerning Moving Violations. The amendments to §15.89 fulfill the requirement of House Bill 2048 enacted by the 86th Texas Legislature. This bill repeals the Driver Responsibility Program, eliminating the need for the points information previously included on the moving violations graphic and references to the program in the rule. Additionally, House Bill 2048 adds Texas Transportation Code, §542.304, which requires the department to designate by rule the offenses that constitute a moving violation of the traffic law. The graphic in this section has been updated to include these offenses.

Suzy Whitten, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

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

Ms. Whitten has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be elimination of points that could have generated surcharges assessed to Texas driver license holders due to moving violations and a greater understanding of recently enacted moving violations.

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 Margaret Buster, Drive License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code; and §542.304 which requires the department to designate by rule the offenses involving the operation of a motor vehicle that constitute a moving violation of traffic law.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 and §542.304, are affected by this proposal.

§15.89 Moving Violations.

(a) Moving violations are [defined as] an act committed in connection with the operation of a motor vehicle on a public street or high-
way, which constitutes a hazard to traffic and is prohibited by state law or city ordinance.

(b) A list of traffic offenses that constitute a moving violation is detailed in the graphic in this subsection [available in Table 1].

Figure: 37 TAC §2001.0225.

(c) Table 1 also indicates the moving violations that will be assessed points under the Driver Responsibility Program, Texas Transportation Code (TRC), Chapter 708, Subchapter B.

(1) Not all moving violations are assessed points under the Driver Responsibility Program, however, they may be considered for Habitual Violator action under TRC, §521.292(a)(3).

(2) Moving violation convictions that are assessed specific surcharges pursuant to Texas Transportation Code, §§708.102 (intoxicated driver offenses), 708.103 (driving while license invalid or without financial responsibility), and 708.104 (driving without valid license including no commercial driver license, driving without the proper commercial license endorsement and driving without the proper motorcycle endorsement), will not be assessed points under the Driver Responsibility Program.

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
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SUBCHAPTER J. DRIVER RESPONSIBILITY PROGRAM

37 TAC §§15.161 - 15.168

The Texas Department of Public Safety (the department) proposes the repeal of §§15.161 - 15.168, concerning Driver Responsibility Program. The repeal of these rules is necessary to inform the public of the elimination of the Driver Responsibility Program, which was repealed by the 86th Texas Legislature’s enactment of House Bill 2048.

Suzy Whitten, Chief Financial Officer, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

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

In addition, Ms. Whitten has also determined that for each year of the first five-year period the repeal is in effect, the public benefit will be elimination of the Driver Responsibility Program, which has generated inadequate funds for its intended purpose and resulted in hardships for many Texans.

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 eliminate a government program based on the 86th Texas Legislature’s enactment of House Bill 2048, which repeals Texas Transportation Code, Chapter 708; will not require an increase or decrease in future legislative appropriations to the agency; requires the elimination of current employee positions; and requires a decrease in fees paid to the agency. The proposed rulemaking does repeal an existing regulation. The proposed rulemaking also decreases 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 by mail to Marguerite Buster, Drive License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department’s work; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.161. General Information.

§15.162. Surcharge Payments.

§15.163. Military Deployment Deferral Program.

§15.164. Amnesty Program.

§15.165. Incentive Program.

§15.166. Indigency Program.


§15.168. Surcharge Reduction - Driving Without Valid Driver License.
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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For further information, please call: (512) 424-5848

CHAPTER 16. COMMERCIAL DRIVER LICENSE

SUBCHAPTER A. LICENSING REQUIREMENTS, QUALIFICATIONS, RESTRICTIONS, AND ENDORSEMENTS

37 TAC §16.1

The Texas Department of Public Safety (the department) proposes an amendment to §16.1, concerning General Requirements. The Driver License Division conducts a periodic review of the Federal Motor Carrier Safety Regulations, Title 49, Code of Federal Regulations (CFR), Part 383 relating to Commercial Driver License (CDL) Enforcement, for purposes of ensuring Texas Administrative Rules comply with current federal CDL regulations. Texas' most recent review and adoption of 49 C.F.R. Part 383 was May 1, 2018. This rule proposal will adopt 49 C.F.R. Part 383 as enacted through May 1, 2019. The amendment to this rule is necessary to comply with the Code of Federal Regulations governing the issuance of commercial driver licenses.

Adoption of the federal regulations through May 1, 2019 will allow Texas to implement a new federal waiver for military personnel seeking a CDL. This waiver permits certain active duty military and those recently discharged who regularly operated a commercial motor vehicle to apply for a Texas CDL without taking the knowledge and skills exam.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is 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, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of rule will be reduction in the number of commercial driver license knowledge and skills exams needing to be administered to active duty military and those who have been recently discharged from the military.

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 the proposal may be submitted by mail to Ron Coleman, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulescomments@dps.texas.gov. 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Transportation Code, §522.005, which authorizes the department to adopt rules necessary to administer Chapter 522 of the Texas Transportation Code; and §521.101, which authorizes the department to issue identification card certificates.

Texas Government Code, §411.004(3) and Texas Transportation Code, §522.005 are affected by this proposal.


(a) The Federal Motor Carrier Safety Administration (FMCSA) is the lead federal agency responsible for regulating states' commercial driver license (CDL) programs and providing safety oversight of commercial driver licensing and commercial motor vehicles (CMV). In accordance to the Federal Commercial Motor Vehicle Safety Act, Texas is mandated to follow all federal regulations governing commercial driver licensing. Failure to adhere to or deviating from these regulations can result in the decertification of Texas' CDL program, thereby prohibiting Texas from issuing commercial driver licenses to Texas residents and the withdrawal of federal highway funding in accordance to 49 CFR §§384.401, 384.403 and 384.405.

(b) All rules and regulations adopted in this chapter apply to every person, including employers of such persons, who holds a Texas CDL or operates a commercial motor vehicle (CMV) in this state, regardless if they are operating in interstate, foreign, or intrastate commerce.

(1) The department incorporates by reference and adopts:
(A) The Federal Motor Carrier Safety Regulations, Title 49, Code of Federal Regulations (CFR) Part 383 including all interpretations thereto, as amended through May 1, 2019 [May 1, 2018]. Where there is conflict between 49 CFR Part 383 and Texas Transportation Code, Chapter 522, Texas Transportation Code, Chapter 522 controls with the exception of the definition of CMV.

(B) 49 CFR §390.5--Definitions.

(2) The CFR permits states discretion to exempt or not exempt certain individuals from CDL standards, requirements, and penalties. The department, utilizing the discretion permitted by the CFR, does not adopt the CFR exemptions detailed in subparagraph (A) - (C) of this paragraph:

(A) 49 CFR §383.3(d)(3)--related to drivers employed by a local government for the purpose of removing snow and ice from roadways.

(B) 49 CFR §383.3(e)--related to certain restricted CDL issued in the State of Alaska.

(C) 49 CFR §383.3(g)--related to restricted CDL for certain drivers in the pyrotechnic industry.

(3) The Federal Commercial Motor Vehicle Safety Act and the CFR allows states to enact laws and regulations that are stricter than the federal requirements. The department does not adopt the CFR provisions detailed in subparagraph (A) and subparagraph (B) of this paragraph because Texas has enacted stricter requirements.

(A) 49 CFR §383.31(a)--related to the requirement that a person must notify the department upon conviction for a motor traffic control violation within 30 days after the date the person has been convicted. Texas Transportation Code, Chapter 522 requires the license holder to report the conviction within 7 days.

(B) 49 CFR §383.31(b)--related to the requirement that a person must notify his/her employer upon conviction for a motor traffic control violation within 30 days after the date the person has been convicted. Texas Transportation Code, Chapter 522 requires the license holder to report the conviction within 7 days.

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 11, 2019.

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D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 424-5848

37 TAC §16.7

The Texas Department of Public Safety (the department) proposes amendments to §16.7, concerning Proof of Domicile. The amendments to this rule are necessary to update and clarify the acceptable documentation for demonstrating proof of domicile during the driver license application process.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is 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, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of rule will be enhanced security of state-issued commercial driver licenses and continuing focus on issues of potential fraud and misrepresentation in the driver license application process.

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 the proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department’s work and Texas Transportation Code, §522.005, which authorizes the department to adopt rules necessary to administer Chapter 522 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §522.005 are affected by this proposal.

§16.7. Proof of Domicile.

(a) A person applying for a commercial driver license (CDL) which authorizes operation of a commercial motor vehicle (CMV) [in interstate commerce] must be domiciled in Texas. For purposes of this
requirement, the state of domicile means the state where a person has the person's true, fixed, and permanent home and principal residence and to which the person intends to return whenever absent. A person may have only one state of domicile.

(b) In order to prove domicile, all original applicants for a CDL must present two acceptable documents verifying the applicant’s domicile address in Texas.

(c) The department may require individuals renewing or obtaining a duplicate CDL to present proof of domicile prior to issuance.

(d) In order to satisfy the requirements of this section the individual must provide two documents, which contain the applicant’s name and domicile address, from the acceptable proof of domicile list in subsection (e) of this section.

(e) Acceptable proof of domicile documents are:

(1) A current deed, mortgage, monthly mortgage statement, [current] mortgage payment booklet, or a [current] residential rental/lease agreement.

(2) A valid, unexpired Texas voter registration card.

(3) A valid, unexpired Texas motor vehicle registration or title.

(4) A valid, unexpired Texas boat registration or title.

(5) A valid, unexpired Texas license to carry a handgun or license to carry.

(6) A utility or residential service bill [An electric, water, natural gas, satellite television, cable television, or non-cellular telephone statement] dated within ninety (90) [90] days of the date of application. Example of acceptable statements include, but are not limited to: electric, water, gas, internet, cable, streaming services, lawn service, cellular telephone, etc.

(7) A Selective Service card.

(8) A medical or health card.

(9) A current homeowners [homeowners] or renters [renters'] insurance policy or [homeowners’ or renters’ insurance] statement.

(10) A current automobile insurance policy, card, or [an automobile insurance] statement.

(11) A Texas high school, college, or university report card or transcript for the current school year.

(12) A pre-preprinted W-2, 1099, or 1098 form from an employer, government, or financial entity for the most recent tax year. [a W-2 or 1099 tax form from the current tax year.]

(13) Mail or printed electronic statements from financial institutions; including checking, savings, investment account, and credit card statements dated within 90 days of the date of application.

(14) Mail or printed electronic statements from a federal, state, county, or city government agency dated within 90 days of the date of application.

(15) A current automobile payment booklet or statement.

(16) A pre-printed paycheck or payment stub dated within ninety (90) [90] days of the date of application.

(17) Current documents issued by the U.S. military indicating residence address.

(18) A document from the Texas Department of Criminal Justice indicating the applicant's recent release or parole.

(f) Both documents may [not] be from the same source if the source is a local governmental entity that provides multiple residential services. For example, an individual may [not] use [vehicle registration and vehicle title for the same or different vehicles from the same registration office or] a water and gas bill from the same municipal utility if they are on separate statements. Documents from the same source for different months will not be accepted. [Mail addressed with a forwarding label or address label affixed to the envelope or contents are not acceptable.]

(g) Mail addressed with a forwarding label or address label affixed to the envelope or contents is not acceptable.

(h) If the individual cannot provide two documents from the acceptable proof of domicile list, the individual may submit a Texas residency affidavit executed [submitted] by:

(1) An individual who resides at the same residence address as the applicant.

(A) For related individuals, the applicant must present a document acceptable to the department indicating a family relationship to the person who completed the Texas residency affidavit and present two acceptable proof of domicile documents with the name of the person who completed the Texas residency affidavit. Acceptable documents demonstrating family relationship may include but are not limited to:

(i) marriage license;

(ii) military dependent identification card;

(iii) birth certificate; and

(iv) adoption records.

(B) For unrelated individuals, the individual must accompany the applicant, present [a] valid identification as defined under §15.24 of this title (relating to Identification of Applicants) [Texas driver license or identification card], and present two acceptable proof of domicile documents from the acceptable proof of domicile list in subsection (d) of this section.

(2) A representative of a governmental entity, not-for-profit organization, assisted care facility/home, adult assisted living facility/home, homeless shelter, transitional service provider, [or ] group/half way house, or college/university certifying to the address where the applicant resides or receives services. The organization must provide a notarized letter verifying that they receive mail or services for the individual or completed Texas Residency Affidavit (DL-5).

(i) [Not] An individual is not required to comply with this section if the applicant is subject to the address confidentiality program administered by the Office of the Attorney General, [not] under Texas Transportation Code, §§521.121, or currently incarcerated in a Texas Department of Criminal Justice facility.

(j) All documents submitted by an individual must be acceptable to the department. The department has the discretion to reject or require additional evidence to verify domicile address.

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 11, 2019.
SUBCHAPTER C. SANCTIONS AND DISQUALIFICATIONS

37 TAC §16.68

The Texas Department of Public Safety (the department) proposes new §16.68, concerning Eligibility For Reinstatement After Lifetime Disqualification. Texas Transportation Code, §522.082, allows the department to adopt a rule establishing a procedure for reinstatement of the person’s commercial driver license (CDL) whose license was disqualified for life under Texas Transportation Code, §522.081(d)(1). This new rule is intended to inform eligible persons of this procedure.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is 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, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of the rule will be the availability of additional CDL holders to assist with the industry-wide shortage of qualified commercial motor vehicle drivers.

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 the proposal may be submitted by mail to Kris Krueger, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Transportation Code, §522.005, which authorizes the department to adopt rules necessary to administer Chapter 522 of the Texas Transportation Code; Texas Transportation Code, §522.082, which allows the department to adopt rules for reinstatement of a CDL after lifetime disqualification.

Texas Government Code, §411.004(3) and Texas Transportation Code, §522.005 and §522.082 are affected by this proposal.

§16.68. Eligibility for Reinstatement After Lifetime Disqualification.

(a) A person disqualified from driving a commercial motor vehicle for life under Texas Transportation Code, §522.081(d) may apply to the department for reinstatement if:

(1) the person meets all requirements under state and federal law to hold a commercial driver license (CDL);

(2) the person completes the required state-approved education program identified on the application for reinstatement; and

(3) at least ten (10) years have passed from the effective date of the lifetime disqualification.

(b) A person seeking reinstatement under this section shall submit an application on a form specified by the department. The form is located on the department's website: http://www.dps.texas.gov/DriverLicense/.

(c) The department shall provide written notice by email or first class mail of the approval or denial of an application submitted under this section. The determination to reinstate or deny an application by the director, or their designee, is final.

(d) An applicant who has been approved for reinstatement is eligible to apply for a commercial learner's permit (CLP) to test for a CDL.

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 11, 2019.

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D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 424-5848

CHAPTER 35. PRIVATE SECURITY
SUBCHAPTER A. GENERAL PROVISIONS
The Texas Department of Public Safety (the department) proposes amendments to §§35.1 - 35.7, concerning General Provisions. These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Additional changes to §35.4 are intended to implement 86th Legislative Session's House Bill 1342 which amended Occupations Code, §§53.021, 53.022, and 53.023. Other rule changes simplify the rules or enhance the department's regulatory oversight of the Private Security Program.

Suzy Whittenton, Chief Financial Officer, 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, micro-businesses, or rural communities required to comply with the sections 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.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 create a regulation. A proposed amendment to §35.5 authorizes suspension of a security officer's commission when the officer fails to cooperate with a Medical Advisory Board (MAB) investigation. The suspension remains in effect until the officer cooperates with the investigation. MAB investigations assist the department in determining whether commissioned security officers are mentally and physically capable of safely handling a firearm (a statutory eligibility criterion). Without the authority to suspend the commission for failure to cooperate, the ability to enforce the statutory requirement and ensure the public's safety is compromised. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702; and Texas Occupations Code, §§53.021, 53.022, and 53.023 Texas Government Code, §411.004(3) and Texas Occupations Code, §§1702.061(a), 53.021, 53.022, and 53.023, are affected by this proposal.

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

(1) Act--Texas Occupations Code, Chapter 1702.
(2) Application--Includes an application for an original, renewal, duplicate or updated individual license, security officer [registration, endorsement,] commission, or company license issued under the Act.
(3) Company representative - An individual on the basis of whose qualifications a company license has been obtained.
(4) Board--The Texas Private Security Board.
(5) Department--The Texas Department of Public Safety.
(6) Mechanical security device--Any device designed to control the opening or closing of a room, building, safe, vault, lockbox, safety deposit box, or motor vehicle, and which is not an electric access control device or alarm system as defined by the Act.
(7) [§35.023] Regrant--An individual who holds a registration, endorsement, or commission under the Act.
(8) [§35.024] SOAH--The State Office of Administrative Hearings.
(9) [§35.025] Television camera or still camera system--Any device or system of devices that produces a visual image or series of images either recorded, transmitted through an intranet or internet protocol based device, or monitored by security personnel, for the purposes of private security or surveillance. The phrase does not refer to a television camera or still camera system used exclusively:

(A) To monitor traffic conditions on public roads;
(B) To detect motor vehicle violations on public roads;
(C) For telephone or video conferencing;
(D) To monitor a manufacturing process;
(E) For medical purposes by medical practitioners;
§35.2. Employment Requirements.

(a) Individuals licensed by [Those registered with] the department to perform a regulated service may only perform such services for companies licensed under the Act [for the employer with whom they are registered]. A person may not contract directly with a client to perform a regulated service unless licensed by the department as a company under [Subchapter E of] the Act.

(b) The employment relationship between a licensed company and its individually licensed [registered] or commissioned employees must be such that the licensee's commercial liability insurance policy provides the statutorily required coverage for claims arising from the regulated services provided on behalf of the licensee by its [registered or commissioned] employees. The failure to maintain and provide current documentation of such coverage is a violation of the Act.

§35.3. Individual License [Registration] Applicant Pre-Employment Check.

(a) Pursuant to §1702.230 of the Act, the pre-employment background check of the applicant described in subsection (c) of this section must be conducted when:

(1) An application meeting the requirements of §35.21 of this title (relating to Individual License [Registration] Applications) is [has been] submitted;

(2) The department's website does not indicate the application is complete within 48 hours after the submission of the applicant's fingerprints; and

(3) Regulated services are to be performed by the applicant prior to issuance of the license [registration].

(b) The ability to perform a noncommissioned [noncommissioned] regulated service prior to licensure is conditional on either:

(1) Department notification that a complete application has been received and:

(A) Performance of the pre-employment background check required under subsection (c) of this section;

(B) The determination that the applicant is not disqualified based on the background check; and

(C) The employer's retention of the search results in the employee's file, as required by subsection (e) of this section; or

(2) The absence of notification by the department that a complete application has been received, the passage of 48 hours since submission of the application materials required by §35.21 of this title, and:

(A) Performance of the pre-employment background check required under subsection (d) of this section;

(B) The determination that the applicant is not disqualified based on the background check; and

(C) The employer's retention of the search results in the employee's file, as required by subsection (e) of this section.

(c) For purposes of subsection (b)(1) of this section, the pre-employment background check must at a minimum include the review of either the department's publicly accessible criminal history website or a commercial criminal history website, review of the department's sex offender registry website, and confirmation the applicant is not disqualified for the license [registration or endorsement] based on either the applicant's criminal history or the requirement to register as a sex offender under Chapter 62, Code of Criminal Procedure. Nothing in this subsection precludes an employer from using a more stringent method of determining an applicant's eligibility.

(d) For purposes of subsection (b)(2) of this section, the pre-employment background check must at a minimum include the review of the department's publicly accessible criminal history and sex offender registry website(s), and confirmation the applicant is not disqualified for the license [registration or endorsement] based on either the applicant's criminal history or the requirement to register as a sex offender under Chapter 62, Code of Criminal Procedure. Nothing in this subsection precludes an employer from using a more stringent method of determining an applicant's eligibility.

(e) The employer must maintain written documentation of the pre-employment check for at least two (2) years, regardless of the subsequent employment status of the applicant. The absence of such documentation constitutes a rebuttable presumption that the background check was not conducted.

§35.4. Guidelines for Disqualifying Criminal Offenses.

(a) The private security profession [industry] is in a position of trust; it provides services to members of the public that involve access to confidential information, to private property, and to the more vulnerable and defenseless persons within our society. By virtue of their licenses, security professionals are provided with greater opportunities to engage in fraud, theft, or related property crimes. In addition, licensure provides those predisposed to commit assaultive or sexual crimes with greater opportunities to engage in such conduct and to escape detection or prosecution.

(b) Therefore, the commission [board has] determined that offenses detailed in subsection (c) of this section [of the following types] directly relate to the duties and responsibilities of those who are licensed under the Act. Such offenses include crimes under the laws of another state or the United States, if the offense contains elements that are substantially similar to the elements of an offense under the laws of this state. Such offenses also include those "aggravated" or otherwise enhanced versions of the listed offenses.

(c) The list of offenses in this subsection is intended to provide guidance only and is not exhaustive of either the offenses that may relate to a particular regulated occupation or of those that are independently disqualifying under Texas Occupations Code, §53.021(a)(2) - (4). With the exception of those offenses listed in paragraphs (6)(A) - (6)(F) of this subsection, the [The listed] offenses listed in paragraphs (1) - (5) and (7) - (14) of this subsection are general categories that include all specific offenses within the corresponding chapter of the Texas Penal Code. In addition, after due consideration of the circumstances of the criminal act and its relationship to the position of trust involved in the particular licensed occupation, the commission [board] may find that an offense not described below also renders a person unfit to hold a license. In particular, an offense that is committed in one's capacity as a licensee [registrant] under the Act, or an offense that is facilitated by one's license [registration, endorsement, or commission] under the Act, will be considered related to the licensed occupation and may render the person unfit to hold the license.

   (1) Arson, damage to property--Any offense under the Texas Penal Code, Chapter 28.

   (2) Assault--Any offense under the Texas Penal Code, Chapter 22.
(3) Bribery--Any offense under the Texas Penal Code, Chapter 36.

(4) Burglary and criminal trespass--Any offense under the Texas Penal Code, Chapter 30.

(5) Criminal homicide--Any offense under the Texas Penal Code, Chapter 19.

(6) Disorderly conduct--Any of the offenses detailed in paragraphs (6)(A) - (6)(F), but only if committed by an applicant for, or holder of, a license as a security officer, personal protection officer, or private investigator: [offense under the Texas Penal Code, Chapter 42.]

(A) 42.01(a)(7) and 42.01(a)(8) - only discharge of firearm in public place, and display of firearm or other deadly weapon in public place calculated to alarm.

(B) 42.06, False Alarm or Report.

(C) 42.062, Interference with Emergency Request for Assistance.

(D) 42.07, Harassment.

(E) 42.072, Stalking.

(F) 42.12, Discharge of Firearm in Certain Municipalities.

(7) Fraud--Any offense under the Texas Penal Code, Chapter 32.

(8) Kidnapping--Any offense under the Texas Penal Code, Chapter 20.

(9) Obstructing governmental operation--Any offense under the Texas Penal Code, Chapter 38.

(10) Perjury--Any offense under the Texas Penal Code, Chapter 37.

(11) Robbery--Any offense under the Texas Penal Code, Chapter 29.

(12) Sexual offenses--Any offense under the Texas Penal Code, Chapter 31.

(13) Theft--Any offense under the Texas Penal Code, Chapter 31.

(14) In addition:

(A) An attempt to commit a crime listed in this subsection;

(B) Aiding and abetting in the commission of a crime listed in this subsection; and

(C) Being an accessory (before or after the fact) to a crime listed in this subsection.

(d) A felony conviction for an offense listed in subsection (c) of this section is disqualifying for ten (10) years from the date of conviction [the completion of the sentence, unless subject to this subsection].

(e) A Class A misdemeanor conviction for an offense listed in subsection (c) of this section is disqualifying for five (5) years from the date of conviction [completion of the sentence].

(f) Conviction for a felony or Class A offense that does not relate to the occupation for which license is sought is disqualifying for five (5) years from the date of conviction, pursuant to Texas Occupations Code, §53.021(a)(2).

(g) [§(g)] Independently of whether the offense is otherwise described or listed in subsection (c) of this section, a conviction for an offense listed in Texas Code of Criminal Procedure, Article 42.12 §3g, or Article 42A.054, or that is a sexually violent offense as defined by Texas Code of Criminal Procedure, Article 62.001, or a conviction for burglary of a habitation, is permanently disqualifying subject to the requirements of Texas Occupations Code, Chapter 53.

(h) [§(h)] A Class B misdemeanor conviction for an offense listed in subsection (c) of this section is disqualifying for two (2) [five (5)] years from the date of conviction.

(i) [§(i)] Any unlisted offense that is substantially similar in elements to an offense listed in subsection (c) of this section is disqualifying in the same manner as the corresponding listed offense.

(j) [§(j)] A pending charge under an indictment or information [Class B misdemeanor charged] for an offense listed in subsection (c) of this section is grounds for summary suspension.

(k) Any pending Class A misdemeanor charged by information or pending felony charged by indictment is grounds for summary suspension.

(l) [§(l)] In determining the fitness to perform the duties and discharge the responsibilities of the licensed occupation of a person against whom disqualifying charges have been filed or who has been convicted of a disqualifying offense, the department will [board shall] consider:

(1) The extent and nature of the person's past criminal activity;

(2) The age of the person when the crime was committed;

(3) The amount of time that has elapsed since the person's last criminal activity;

(4) The conduct and work activity of the person before and after the criminal activity;

(5) Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;

(6) The date the person will be eligible; and

(7) Any other evidence of the person's fitness, including letters of recommendation. [from:]

[AL] Prosecutors or law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person, or

[BU] The sheriff or chief of police in the community where the person resides.

(m) [§(m)] In addition to the documentation listed in subsection (j) [§(l)] of this section, the applicant or licensee [or registrant] shall furnish proof in the form required by the department that the person has:

(1) Maintained a record of steady employment;

(2) Supported the applicant's dependents;

(3) Maintained a record of good conduct; and

(4) Paid all outstanding court costs, supervision fees, fines and restitution ordered in any criminal case in which the applicant has been charged or convicted.

(n) The failure to timely provide the information listed in subsection (j) [§(l)] and subsection (k) [§(m)] of this section may result in the proposed action being taken against the application or license.
The provisions of this section are authorized by the Act, §1702.004(b), and are intended to comply with the requirements of Texas Occupations Code, Chapter 53. All periods of disqualification provided in this section are subject to an analysis under subsection (j) of this section, and the requirements of Texas Occupations Code, Chapter 53.

§35.5. Standards of Conduct.

(a) The State Seal of Texas may not be displayed as part of a uniform or identification card, or markings on a motor vehicle, other than such items prepared or issued by the department.

(b) All licensees and company representatives [Licensees and registrants] shall cooperate fully with any investigation conducted by the department, including but not limited to the provision of employee records upon request by the department and compliance with any subpoena issued by the department. Commissioned security officers and personal protection officers shall cooperate fully with any request of the Medcal Advisory Board made pursuant to Health and Safety Code, §12.095 relating to its determination of the officer's ability to exercise sound judgment with respect to the proper use and storage of a handgun. Violation of this subsection may result in the suspension of the license or commission for the duration of the noncompliance.

(c) If arrested, charged, or indicted for a criminal offense above the level of Class C misdemeanor, a registrant shall within seventy-two (72) hours notify the employer, and the employer (whom notified by the employee or otherwise informed) shall notify the department in writing (including by email) within seventy-two (72) hours of notification. The notification shall include the name of the arresting agency, the offense, court, and cause number of the change or indictment. The registrant and employer must supplement their respective notifications as further information becomes available.

(d) An [Any] individual licensee [registrant who has been] issued a pocket card shall carry the pocket card on or about their [his] person while on duty and shall present same to [upon request from] a peace officer or to a representative of the department upon request.

§35.6. Contract and Notification Requirements.

(a) A company license holder [licensee] shall inform the client of the right to a written contract describing the fees to be charged and the services to be rendered.

(b) If requested, a written contract for regulated services shall be furnished to a client within seven (7) days.

(c) The written contract shall be dated and signed by the owner, manager, or other individual expressly authorized to execute contracts on behalf of the licensee.

(d) Within seven (7) days of contracting for regulated services with another licensee, the licensee shall:

1. Notify the recipient of those services of the name, address, and telephone number, and individual to contact at the company that purchased the contract;

2. Notify the recipient of services at the time the contract is negotiated that another licensed company may provide any, all or part of the services requested by subcontracting or outsourcing those services; and

3. Notify the recipient of services of the name, address, phone number, and license number of the company providing those services, if any of the services are subcontracted or outsourced to a licensed third party.

(e) The notice required under subsection (d) of this section shall:

1. Be provided [mailed] to the recipient in a written form that emphasizes the required information; and

2. If the services are those of an alarm system company, required notice shall include stickers or other materials to be affixed to the alarm system indicating the alarm system company's or alarm systems monitor's new telephone number.

(f) Subsection (e) of this section shall not apply to an alarm system company that subcontracts its monitoring services to another alarm system company if the conditions detailed in this subsection are met:

1. The contract for monitoring is with another alarm systems company licensed under the Act;

2. The contract between the original contracting licensee and the client remains in full force and effect, continues to govern all rights of the client with respect to the provision of alarm services, and remains in the control of the original contracting licensee;

3. Neither the contact information provided to the client, nor the address and telephone numbers for alarm service, have changed as a result of the subcontracting arrangement; and

4. The contact information provided to the client relating to the monitoring of the alarm system has not changed.

§35.7. Firearm Standards.

(a) Commissioned security officers and personal protection officers may only carry firearms of a category recognized in subsection (b) of this section, and only if [a firearm of the category with which they have been formally trained as required under the Act and this chapter, and for which documentation of the training is on file with the department.]

1. The officers have been formally trained as required under the Act and this chapter; and

2. The officers have submitted documentation of the training to the department.

(b) The recognized firearm categories are:

1. SA--Any handgun, whether semi-automatic or not;

2. NSA--Handguns that are not semi-automatic; and

3. STG--Shotgun.

(c) Commissioned security officers and personal protection officers must exercise care and sound judgment in the use and storage of their firearms.

(d) No security officer may carry an inoperative, unsafe, replica, or simulated firearm in the course and scope of employment or while in uniform.

(e) No commissioned security officer or personal protection officer may brandish, point, exhibit, or otherwise display a firearm at any time [anytime], except as authorized by law.

(f) The discharge of a firearm by a security officer while on duty or otherwise acting or purporting to act under the authority of a security officer commission shall be immediately reported to the officer's employer. The employer must notify the department of the discharge of a firearm in writing within twenty-four (24) hours of the incident. The notification to the department must include:

1. The name of the person discharging the firearm;
(2) The name of the employer;
(3) The location of the incident;
(4) A brief description of the incident;
(5) A statement reflecting whether death, personal injury, or property damage resulted; and
(6) The name of the investigating or arresting law enforcement agency, if applicable.

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 14, 2019.
TRD-201903711
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 424-5848

37 TAC §35.10, §35.11

The Texas Department of Public Safety (the department) proposes the repeal of §35.10 and §35.11, concerning General Provisions. These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Specifically, the bill repeals Chapter 1702's provisions regulating private security sales persons and guard dog trainers, thus necessitating the repeal of rules relating to these licenses.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeal is 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, micro-businesses, or rural communities required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal 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 the repeal is in effect, the public benefit will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 repeal existing regulations. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed repeal is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx Select "Private Security." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a), are affected by this proposal.

§35.10. Residential Solicitation.

§35.11. Guard Dog Welfare Requirements.

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 B. [REGISTRATION AND] LICENSING

37 TAC §§35.21, 35.22, 35.24 - 35.26, 35.28 - 35.31

The Texas Department of Public Safety (the department) proposes amendments to §§35.21, 35.22, 35.24 - 35.26, 35.28, and 35.29 and proposed new §§35.30 and §35.31, concerning Registration and Licensing. These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). The change to §35.25 is necessitated by House Bill 3609. Other rule changes
simplify the rules or enhance the department's regulatory oversight of the Private Security Program. Additionally, the subchapter title is changing from "Registration and Licensing" to "Licensing."

Suzy Whittenton, Chief Financial Officer, 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, micro-businesses, or rural communities required to comply with the sections 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.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a), are affected by this proposal.

(a) It is the responsibility of the licensed company to ensure an application that meets the requirements of this section is [has been] submitted to the department by or on behalf of any employee who is required to be licensed [registrant] under the Act. An application must include all items required under subsection (b) of this section in order to comply with the requirements of §1702.230(c) of the Act.

(b) The items detailed in this subsection must be submitted in the manner prescribed by the department:

1. The required fee;
2. A copy of the applicant's Level II certificate of completion when applicable;
3. Fingerprint in the form and manner approved by the department; and
4. The criminal history check fee as provided in this chapter.

(c) As part of the department's criminal history check, additional court documents or related materials may be requested of the applicant. Failure to comply with such a request may result in the rejection of the application as incomplete.

§35.22. Renewal Individual License Applications [for Registrations and Licenses].
(a) An application for renewal must be submitted in the manner prescribed by the department. The application must include:

1. The required fee;
2. If the fingerprints on file do not meet current Federal Bureau of Investigation or the department's quality standards, applicants will be required to submit a new set of electronic fingerprints to complete the renewal application process [Fingerprints in the form and manner approved by the department]; and
3. The criminal history check fee as provided in this chapter.

(b) A complete renewal application must be submitted prior to expiration for the current [registration, endorsement or] license to remain in effect pending the approval of the renewal application. If the completed application is not received by the department prior to the expiration date, no regulated services may be performed until a complete renewal application is submitted in compliance with this chapter.

§35.24. Photographs.
If the applicant does not have a digital photograph on file with the department or the department is unable to access the photograph on file, the laminated pocket card will be issued without a photograph. When presenting such a pocket card to a peace officer or to a representative of the department, the licensee [registrant] shall also present a valid government issued identification card or driver [driver] license.

§35.25. Assumed Names; Corporations.
(a) All individual applicants doing business under an assumed name shall submit an assumed name certificate from the county clerk of the county in which the applicant either:

1. Has or will maintain business or professional premises; or
2. Conducts business or renders a professional service, if the person does not or will not maintain business or professional premises in any county.
Corporations and other entities permitted and governed by the Texas Business Organizations Code using an assumed name shall submit an assumed name certificate from the Texas Secretary of State, and the county clerk of the county in which the entity either:

1. Has or will maintain business or professional premises, or

2. Conducts business or renders a professional service, if the entity does not or will not maintain business or professional premises in any county.

Corporate applicants shall submit a current certificate of existence or a certificate of authority from the Texas Secretary of State.

Licensees may not operate under any name not reflected in current department records as the name under which the licensee will be doing business.


(a) When a Class A or B license is reclassified as a Class C license, a fee in the amount of the difference in the cost of the licenses shall be paid. There shall be no refund when a Class C license is reclassified as a Class A or Class B license.

(b) The department may approve the assignment of a company license to the spouse or heir(s) of a deceased owner provided:

1. A copy of the owner's death certificate is filed with the department; and

2. A copy of the Will, Order Admitting Will to Probate, Letters of Testament, Affidavit of Heirship with two affiants' signatures, or Order of Heirship is filed with the department and

3. In the case of the death of a qualified manager, that a replacement manager is qualified within ninety (90) days.

(c) Other assignments will be permitted only under one of the conditions detailed in this subsection:

1. The ownership in the assignor and assignee will remain the same;

2. The [registered] owners holding at least 25% ownership in the original license, and collectively holding a majority ownership interest, consent to the assignment; or

3. If there is an insufficient number of [registered] owners holding at least 25% ownership in the original license to potentially hold a majority in ownership interest in the license, the license may be assigned by majority vote of the entity's board of directors or equivalent level decision making body of the licensee. The license holder must provide the department written documentation reflecting the vote and the intended date of assignment.

(d) The assignor must provide the department written documentation establishing the intended date of assignment and notarized statements establishing the consent of a majority of the owners of the current license, or if applicable, the qualified manager, from the appropriate individuals. The assignee must ensure any new owners required to register are in compliance with the requirement of the Act currently approved by the department. The assignee may not perform regulated services prior to the proposed date of assignment or the date of the department's approval of all required license applications or fingerprint submissions for new owners, whichever is later. The assignor must cease performance of all regulated services on the earlier of either the proposed date of assignment or the date of surrender or termination of any related owner licenses.

(e) An additional assignment fee will be assessed as provided by this chapter upon assignment of a license under subsection (b) or (c) of this section.

(f) A license may only be terminated by consent of the [registered] owners holding at least 25% in the licensed company and collectively holding a majority ownership interest, unless the ownership structure of the company has an insufficient number of such owners to potentially represent a majority, in which case the license may be terminated by majority vote of the entity's board of directors or equivalent level decision making body of the licensee. The license holder must provide the department written documentation reflecting the vote and the intended date of termination.

§35.28. Individual Licensee or Commissioned Security Officer [Registered] Name Change.

A change of name must be reported to the department within thirty (30) days of the effective date of change. The notice of the change shall be in writing, and shall include a certified copy of the legal document ordering the name change.

§35.29. Employee [Registered] Termination.

When a licensed or commissioned [registered] employee of a company license holder [licensee] is terminated for any conduct in violation of the Act or this chapter, the licensee shall notify the department of such conduct within fourteen (14) days of termination. The notification shall be submitted in the manner prescribed by the department and must include any and all available documentation or evidence concerning the alleged offense.

§35.30. Company License Application Requirements.

As provided in §1702.110(a)(6), as part of the company application an applicant for a company license that is an entity other than individual must submit fingerprints of each officer who is to oversee the security-related aspects of the business, or a partner or shareholder who owns at least a 25% interest in the applicant. All such individuals must satisfy the eligibility criteria provided in the Act and in §35.4 of this title (relating to Guidelines for Disqualifying Criminal Offenses). Should an individual fail to meet these requirements, the company application will be denied, or, if the license has been issued, the license will be subject to suspension or revocation, as applicable.

§35.31. License Expiration.

(a) All company licenses are valid for one (1) year from the date of issuance and expire on the first anniversary of the date of issuance.

(b) All individual licenses are valid for two (2) years from the date of issuance and expire on the second anniversary of the date of issuance.

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 Texas Department of Public Safety (the department) proposes the repeal of §35.41, concerning Manager Standards. These rule changes implement the 86th Legislative Session’s Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Specifically, the bill repeals Chapter 1702’s provisions regulating managers of private security companies, thus necessitating the repeal of rules relating to these licensees.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeal is 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, micro-businesses, or rural communities required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal 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 the repeal is in effect, the public benefit will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 or eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does repeal 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 repeal is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www dps.texas.gov/rsd/contact/default.aspx Select "Private Security." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a), are affected by this proposal.

§35.41. Manager Standards.

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 Texas Department of Public Safety (the department) proposes new §35.41 and amendments to §35.42 and §35.43, concerning Manager Standards. These rule changes implement the 86th Legislative Session’s Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Other rule changes simplify the rules or enhance the department’s regulatory oversight of the Private Security Program. Additionally, the subchapter title is changing from Manager Standards to Company Representative.

Suzy Whittenton, Chief Financial Officer, 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 an adverse economic effect on small businesses and micro-businesses required to comply with the sections as proposed. There will be no adverse impact on rural communities required to comply with the sections 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.
The estimated number of small businesses that will be subject to the new rule is 365. The analysis is based on the assumptions that (1) the businesses affected by this rule are the currently licensed sole proprietorships whose owner was not also the licensed manager (prior to September 1), and (2) the owner was not the manager because he or she did not have the requisite experience or was not able to pass the manager's examination. Of the 371 licensed sole proprietorships whose owner was not also the manager, 365 have 100 or fewer employees.

The estimated number of micro businesses that will be subject to the new rule is 311. The analysis is based on the assumptions that (1) the businesses affected by this rule are the currently licensed sole proprietorships whose owner was not also the licensed manager (prior to September 1), and (2) the owner was not the manager because he or she did not have the requisite experience or was not able to pass the manager's examination. Of the 371 sole proprietorships whose owner is not also the manager, 311 have 20 or fewer employees.

In order to comply with the rule's requirement to appoint a company representative (one who either has a 25% interest in the company or is an officer who oversees the security-related aspects of the business), these businesses will be required to either incorporate, form limited liability companies, or form partnerships. Depending on the type of entity formed, the impact may be minimal. For corporations and limited liability companies, a known cost would be the $300 fee for filing a Certificate of Formation with the Secretary of State. There is no filing requirement for the formation of a general partnership. Any other costs are dependent on the specific circumstances and needs of the business, but those actually required by the rule are assumed to be negligible.

In an attempt to reduce the impact on small businesses and micro business, the rule provides that until September 1, 2020, or the expiration of the license (whichever is later) for the licensee to comply with the new rule. Further, the statutory language on which the rule is based has been interpreted broadly to minimize the number of affected small and micro businesses impacted by the change.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 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 rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a), are affected by this proposal.

§35.41. Company Representative.

(a) The company representative is the individual to whom the department may direct all correspondence and on whom the department may rely to ensure the company's compliance with all requirements of this chapter and the Act. This individual must meet the applicable experience requirements for company licensure provided in the Act and this chapter, and must successfully complete the examination as provided in §1702.117 of the Act and §35.42 of this title (relating to Examination).

(b) An applicant for a company license who is an individual will be the company representative for all purposes relating to the administration of the Act.

(c) An applicant for a company license that is an entity other than individual must designate an individual to be the company representative. The individual must be an officer who is to oversee the security-related aspects of the business, or a partner or shareholder who owns at least a 25% interest in the applicant. Formal documentation reflecting the individual's status with the applicant must be submitted to the department in conjunction with the company license application. An applicant may appoint multiple company representatives if necessary to satisfy the experience requirements for multiple licenses, so long as each individual meets the requirements of §1702.110(a)(6) of the Act and of this section.

§35.42. [Manager] Examination.

(a) All company representatives (as defined in §35.1 of this title (relating to Definitions) and as described in §35.41 of this title (relating to Company Representative) [applicants for registration as qualified manager of a licensee]) must pass the written examination administered by the department. The [All applicants must pass the examination with a] minimum passing score is [at] 70%.

(b) Good order and discipline will be maintained during the examination. Conduct which is disruptive is grounds for immediate removal.
(c) An oral examination may be given upon receipt of proof of dyslexia as defined by Texas Education Code, §51.970. Proof must be submitted in writing in a manner prescribed by the department.

(d) Any examination other than the single examination authorized by payment of the original license fee shall be considered a reexamination for which the reexamination fee shall be required.

§35.43. Temporary Continuation of Business [Operation Without Manager].

(a) Pursuant to §1702.122 of the Act, if a company representative ceases to be connected with a company license holder, [when a qualified manager of a licensee has been terminated or is no longer employed as manager, and the department has been notified of the action in writing within fourteen (14) days,] the business may be temporarily operated by an owner, officer, partner, or shareholder for a period not to exceed ninety (90) [sixty (60)] days following the date the company representative ceases to be connected with the company license holder [of the manager's termination or cessation of managerial duties].

(b) Continued operation of the company in a regulated capacity beyond the ninety (90) day period provided in subsection (a) of this section, without a qualified company representative, is a violation of the Act. [In the event summary action has been taken against the manager, the manager must immediately cease all regulated functions as qualified manager. Any applicable period of temporary operation pursuant to subsection (a) of this section shall run from the effective date of the summary action].

(c) An individual whose registration as a qualified manager expires on September 1, 2019, under the provisions of the 86th Legislature, Senate Bill 616, may continue to function as the company representative until the later of either September 1, 2019, or until the company license expires. Upon renewal of the company license, the company representative must meet the requirements of §35.41(c) of this title (relating to Company Representative).

(d) An individual may not continue to function as the company representative, and is deemed to no longer be connected with the company for purposes of this section, should the individual fail to meet the eligibility criteria provided in the Act and 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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D. Phillip Adkins
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For further information, please call: (512) 424-5848

SUBCHAPTER D. DISCIPLINARY ACTIONS

37 TAC §35.52

The Texas Department of Public Safety (the department) proposes amendments to §35.52, concerning Administrative Penalties. These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Other changes simplify the rule or enhance the department's regulatory oversight of the Private Security Program.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the rule is 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, micro-businesses, or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a), are affected by this proposal.
§35.52. Administrative Penalties.

The administrative penalties in this section are guidelines to be used in enforcement proceedings under the Act. The fines are to be construed as maximum penalties only, and are subject to application of the factors provided in Texas Government Code, §411.524 (§1702.402 of the Act).

Figure: 37 TAC §35.52

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
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SUBCHAPTER E. ADMINISTRATIVE HEARINGS

37 TAC §§35.62 - 35.65

The Texas Department of Public Safety (the department) proposes the repeal of §§35.62 - 35.65, concerning Administrative Hearings. The repeal of these rules is necessary to reorganize the rules; the affected rules are being repealed and replaced, without substantive changes.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeal is 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, micro-businesses, or rural communities required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal 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 the repeal is in effect, the public benefit will be improved organization of the department's administrative rules.

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 repeal existing regulations. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed repeal is in effect, the proposed rule should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Private Security." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a), are affected by this proposal.

§35.62. Default Judgments.

§35.63. Hearing Costs.

§35.64. Preliminary Hearings.

§35.65. Contested Cases Based On Sex Offender Registration Requirement.

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
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37 TAC §35.62

The Texas Department of Public Safety (the department) proposes new §35.62, concerning Preliminary Hearing; Settlement Conference. These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is 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, micro-businesses,
or rural communities required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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; 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 Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; §411.506, which authorizes the commission to adopt rules establishing procedures for the informal resolution of complaints filed against private security licensees; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and §411.506, and Texas Occupations Code, §1702.061(a), are affected by this proposal.

§35.62. Preliminary Hearing; Settlement Conference.

(a) A person who receives notice of the department's intention to deny an application for a license, to reprimand, suspend or revoke a license, or to impose an administrative penalty under §35.52 of this title (relating to Administrative Penalties), may appeal the decision by submitting a request to appeal by mail, facsimile, or electronic mail, to the department in the manner provided on the department's Private Security Program website within thirty (30) calendar days after receipt of notice of the department's proposed action. If a written request to appeal is not submitted within thirty (30) calendar days of the date notice was received, the right to an informal hearing or settlement conference, as applicable, under this section or §35.66 of this title (relating to Hearings Before The State Office Of Administrative Hearings) is waived, and the action becomes final.

(b) If the action is based on the person's criminal history, a preliminary, telephonic hearing will be scheduled. Following the hearing, the department will either dismiss the proceedings and withdraw the proposed action, or issue a written statement of findings to the respondent either upholding or modifying the original proposed action.

(c) If the proposed action is based on an administrative violation, a settlement conference will be scheduled. The settlement conference may be conducted in person or by telephone, by agreement of the parties. Following the settlement conference, the parties will execute an agreed order, or, if no agreement is reached, the department will issue a written determination either upholding or modifying the originally proposed action.

(d) The department's findings following an preliminary hearing, or its determination following a settlement conference, may be appealed to the State Office of Administrative Hearings by submitting a request by mail, facsimile, or electronic mail, to the department in the manner provided on the department's Private Security Program website, within thirty (30) calendar days after receipt of the findings or determination. If a written request is not submitted within thirty (30) calendar days of the date notice was received, the findings or determination shall become final.

(e) Requests for continuance must be submitted in writing at least three (3) business days prior to the scheduled hearing or conference. Requests must be based on good cause. Multiple requests may be presumed to lack good cause and may be denied on that basis.

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. PERSONAL PROTECTION OFFICERS

37 TAC §§35.91 - 35.93

The Texas Department of Public Safety (the department) proposes amendments to §§35.91 - 35.93, concerning Personal Protection Officers. These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

Suzy Whittenton, Chief Financial Officer, 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, micro-businesses, or rural communities required to comply with the sections 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.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 or 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 rules are in effect, the proposed rules should not impact positively or negatively the state’s economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a) and §1702.204(b), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a) and §1702.204(b), are affected by this proposal.

§35.91. Requirements for Personal Protection License [Endorsement].

(a) An applicant for a personal protection license [endorsement] shall:

1. Submit a written application for a personal protection license [endorsement] on a form prescribed by the department;

2. Be at least twenty-one (21) years of age;

3. Either possess a valid security officer commission issued prior to applying for a personal protection license [endorsement], or submit an application for security officer commission in conjunction with the application for a personal protection license [endorsement];

4. Submit proof that the applicant has successfully completed the personal protection officer course taught by an approved personal protection officer instructor; and

5. Submit proof of completion of the Minnesota Multiphasic Personality Inventory test or equivalent (proof of completion of the Minnesota Multiphasic Personality Inventory test shall be on the prescribed form Declaration of Psychological and Emotional Health and shall be signed by a licensed psychologist).

(b) A personal protection officer may transfer their license [endorsement] to another employer if the personal protection officer:

1. Has transferred their [his] security officer commission to the new employer; and

2. Submits the appropriate form and transfer fee to the department within fourteen (14) days of the transfer of employment to the new employer.

§35.92. Employer Requirements.

Personal protection officer employers shall:

1. Issue the personal protection officer [endorsement] pocket card issued by the department to the personal protection officer;

2. Maintain on file for inspection all contracts for personal protection officer services; and

3. Maintain on file for inspection all current records on all persons issued a personal protection license [endorsement] including the personal protection officer's name, current residential address, and telephone number.

§35.93. Personal Protection Officer Standards.

(a) Personal protection officers must comply with all standards and requirements applicable to commissioned security officers, as provided in this chapter and the Act.

(b) In addition, a personal protection officer shall not:

1. Perform personal protection officer duties for any person(s) other than [the person(s)] the employer indicated in the department records;

2. Fail to timely surrender the personal protection officer pocket card upon written notice served by the department or their [his] employer;

3. While in the course and scope of employment as a personal protection officer, provide or engage in any other service regulated by the Act or this chapter other than providing personal protection from bodily harm to one (1) or more individuals;

4. Fail to conceal a firearm if providing the services as a commissioned personal protection officer in plain clothes;

5. Fail to carry on his or her person, the pocket card issued while performing the officer's duties as a personal protection officer; or
(6) Fail to present the pocket card for security officer commission and personal protection license [endorsement] upon request made by a peace officer or representative of the department.

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

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D. Phillip Adkins
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SUBCHAPTER H. SECURITY DEPARTMENT OF PRIVATE BUSINESSES AND POLITICAL SUBDIVISIONS

37 TAC §35.101, §35.102

The Texas Department of Public Safety (the department) proposes amendments to §35.101 and §35.102, concerning letters of authority. These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Additionally, the title of this subchapter is changing from Letter of Authority to Security Department of Private Businesses and Political Subdivisions.

Suzy Whitten, Chief Financial Officer, 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. Whitten has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the sections 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.

Ms. Whitten has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/bsd/contact/default.aspx. Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a), are affected by this proposal.

§35.101. Security Department of Private Business [Letter of Authority].

(a) To [The security department of a private business, as defined in the Act, must obtain a letter of authority to] employ a commissioned security officer, a personal protection officer, or a noncommissioned security officer, a security department of a private business, as defined in the Act, must notify and register with the department as provided in §1702.181 of the Act.

(b) To employ in a noncommissioned capacity an individual meeting the conditions of §1702.323(d) of the Act, a security department of a private business must obtain a letter of authority and register the individual with the department.

(c) A security department of a private business may [shall] not provide guard company services to a third party unless licensed as a guard company.

(d) The holder of a private business letter of authority must qualify a manager who meets the requirements of the Act as they pertain to the manager of a security services contractor and maintain on file with the department the name of the individual responsible to ensure the commissioned security officer's compliance and ensure records are maintained in accordance with applicable laws and rules.

(e) A private business letter of authority is valid for one year and may be renewed by submitting the department approved renewal application and the required renewal fee no earlier than ninety (90) days prior to expiration.

§35.102. Security Department of Political Subdivision [Governmental Letter of Authority].

To employ a political subdivision that employs a commissioned private security officer or personal protection officer, a security depart-
ment of a political subdivision must notify and register with the department as provided in §1702.181 of the Act [must obtain a governmental letter of authority].

[(b) The governmental letter of authority is valid for one (1) year and may be renewed by submitting the department approved renewal application and required renewal fee no earlier than ninety (90) days prior to expiration.]

[(c) The holder of the governmental letter of authority must designate and maintain on file with the department the name of the individual responsible for ensuring the commissioned security officer’s compliance with the Act and this chapter and for ensuring records are maintained in accordance with 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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SUBCHAPTER I. COMPANY RECORDS

37 TAC §35.111, §35.112

The Texas Department of Public Safety (the department) proposes amendments to §35.111 and §35.112, concerning Company Records. These rule changes implement the 86th Legislative Session’s Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

Suzy Whittenton, Chief Financial Officer, 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, micro-businesses, or rural communities required to comply with the sections 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.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 rules are in effect, the proposed rules should not impact positively or negatively the state’s economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select “Private Security.” 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department’s work; Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a), are affected by this proposal.

§35.111. Employee Records.

Licensees and security departments of private businesses or political subdivisions registered with the department shall keep records of all employees licensed [registered] or commissioned under the Act. The employee records, detailed in this section, shall be maintained for a period of two (2) years from the last date of employment:

(1) Full name, date of employment, position, and address;
(2) Social security number;
(3) Last date of employment;
(4) Date and place of birth;
(5) One [color] photograph;
(6) The results of any drug tests;
(7) Documentation of a [the] pre-employment check if required under §35.3 of this title [chapter] (relating to Individual License [Registration] Applicant Pre-employment Check); and
(8) All training certificates earned by the employee while employed by the private business or political subdivision [licensee].

§35.112. Business Records.

(a) Licensees shall maintain copies of the records detailed in this section, or otherwise required under this chapter, for two (2) years from the later of the date the related service was provided or the date the contract was completed:
(1) All contracts for regulated service and related documentation reflecting the actual provision of the regulated service; and

(2) Copies of any timesheets, invoices, or scheduling records reflecting the employment dates of any licensed or commissioned [registered] employees.

(b) If the company has no physical place of business within the State of Texas, the records shall be maintained:

(1) At the office of the registered agent within the State of Texas; or

(2) At any physical location within the State of Texas of an agent or employee of the company.

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 J. SPECIAL COMPANY LICENSE QUALIFICATIONS

37 TAC §§35.121 - 35.123

The Texas Department of Public Safety (the department) proposes amendments to §§35.121 - 35.123, concerning Special Company License Qualifications. These rule changes implement the 86th Legislative Session’s Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

Suzy Whittenton, Chief Financial Officer, 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, micro-businesses, or rural communities required to comply with the sections 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.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 rules are in effect, the proposed rules should not impact positively or negatively the state’s economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department’s work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a), are affected by this proposal.

§35.121. Investigations Company License.

(a) Pursuant to the Act, the department has determined [that] an applicant for licensure as a private investigations company or the prospective company representative [manager] of the applicant company must meet one of the qualifications detailed in this section:

(1) Three (3) consecutive years of investigation related experience;

(2) A bachelor's degree in criminal justice or related course of study;

(3) A bachelor's degree with twelve (12) months of investigation related experience;

(4) An associate degree in criminal justice or related course of study, with twenty-four (24) months of investigation related experience;

(5) A specialized course of study directly designed for and related to the private investigation profession, taught and presented through affiliation with a four (4) year college or university accredited and recognized by the State of Texas. This course of study must be endorsed by the four (4) year college or university's department of criminal justice program and include a departmental faculty member(s) on its instructional faculty. This course of study must consist of a minimum of two hundred (200) instructional hours including coverage of ethics, the Act, and this chapter; or

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Other combinations of education and investigation related experience may be substituted for the above at the discretion of the department or its designated representative.

(b) The degrees referenced in subsection (a) of this section must be affiliated with a college or university recognized by the Texas Higher Education Coordinating Board, Southern Association of Colleges and Schools, or other accreditation organization recognized by the State of Texas.

§35.122. Guard Company License.
Pursuant to the Act, the department has determined that an applicant for licensure as a guard company or the prospective company representative of the applicant company must meet the qualifications detailed in this section:

1. Must be at least twenty one (21) years of age at the time of application;
2. Must have at least three (3) years accumulated employment experience in the field in which the company is licensed; and
3. Must have at least one (1) year of experience in a managerial or supervisory position.

§35.123. Locksmith Company License.
Pursuant to the Act, the department has determined that an applicant for licensure as a locksmith company or the prospective company representative of the applicant company, must meet one of the qualifications detailed in this section:

1. Qualification option one. Two (2) consecutive years of full-time locksmith-related experience; or
2. Qualification option two.

(A) Successful completion of a department approved forty-eight (48) hour basic locksmith course and a six hundred (600) hour fundamentals of locksmith course, with the curriculum content detailed in this subparagraph:
(i) Introduction to locksmithing.
(ii) The Act and this chapter.
(iii) State of Texas and United States Government business requirements.
(iv) Key blank identification.
(v) Key machine and key duplication.
(vi) Codes and code cutting.
(vii) Basic lock types.
(viii) Basic picking.
(ix) Rim and mortise cylinders.
(x) Key in knob/key in lever locks.
(xi) Deadbolts and mortise locks.
(xii) Installations.
(xiii) Impressioning.
(xiv) Basic master-keying.
(xv) Basic safe servicing.
(xvi) Small format interchangeable core.
(xvii) High security and key control cylinders.
(xviii) Automotive opening.

(b) Successful completion of a basic locksmith proficiency exam that covers a minimum of twelve (12) locksmith subjects and is approved by the department; and

(C) One (1) year of full-time locksmith related experience.

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 K. FEES
37 TAC §35.131, §35.132
The Texas Department of Public Safety (the department) proposes amendments to §35.131 and §35.132, concerning Fees. These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Section 35.131 is amended to remove the specific fee for fingerprint background checks. These fees are determined by state law and federal regulations that may be subject to change as those state and federal provisions are amended.

Suzy Whittenton, Chief Financial Officer, 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, micro-businesses, or rural communities required to comply with the sections 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.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.
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 rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rpd/contact/default.aspx. Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a) and §1702.062(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a) and §1702.062(a), are affected by this proposal.

§35.131. Licensing and Examination Fees.

(a) Pursuant to the Act, the figure in this subsection details the fee schedule:

Figure: 37 TAC §35.131(a)

(b) An [Upon completion of development and production of the department's new laminated pocket card, an] additional fee of $5.00 will be charged for any new application or renewal requiring the issuance of a new pocket card.

(c) Fees collected are non-refundable and non-transferable.

(d) Payment of fees shall be made in a manner approved by the department.

(e) If payment is dishonored or reversed prior to issuance, the application will be abandoned as incomplete. If the [registration, endorsement] commission[,] or license is [has been] issued prior to being dishonored or reversed, revocation proceedings will be initiated pursuant to the Act, §1702.361. The department may dismiss a pending revocation proceeding upon receipt of payment of the full amount due, including any additional processing fees.

(f) Original fees shall not be prorated. The full fee shall accompany all original applications.

§35.132. Subscription Fees.

The subscription fees detailed in this section are authorized under Texas Government Code, §2054.252.

(1) Each individual licensee[, registrant, or commissioned security officer] shall pay the following subscription fee for occupational license renewal: $2 for a $30 to $50 renewal and $3 for a $100 renewal. This fee is in addition to the renewal fee.

(2) Each company licensee shall pay the following subscription fee for occupational license renewal: $7 for a $225 renewal; $11 for a $300 to $350 renewal; $12 for a $400 renewal; and $16 for a $540 renewal. This fee is in addition to the renewal fee.

(3) Each individual applicant for a license[, registration or security officer commission] shall pay the following subscription fee upon application: $2 for a $30 to $50 application; and $3 for a $100 application. This fee is in addition to the application fee.

(4) Each company license applicant shall pay the following subscription fee upon application: $11 for a $300 to $350 application; $12 for a $400 application; and $16 for a $540 application. This fee is in addition to the application fee.

(5) Each individual licensee [registrant or commissioned security officer] shall pay a $2 subscription fee for an employee information update. This fee is in addition to the employee information update fee.

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 L. TRAINING

37 TAC §§35.141 - 35.143, 35.145, 35.147

The Texas Department of Public Safety (the department) proposes amendments to §§35.141 - 35.143, 35.145, and 35.147, concerning Training. These rule changes implement the 86th Legislative Session’s Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act). Other rule changes simplify the rules or enhance the department’s regulatory oversight of the Private Security Program.

Suzy Whittenton, Chief Financial Officer, 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, micro-businesses, or rural communities required to comply with the sections 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.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/bsd/contact/default.aspx. Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a) and §1702.1675(f), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a) and §1702.1675(f), are affected by this proposal.

§35.141. Training Requirements.

(a) Security and Personal Protection Officer Training.

(1) The Level II training course shall be completed by all applicants for a security officer commission or for a license [registration] as a noncommissioned security officer. The course material shall be prepared or approved by the department. A certificate indicating completion of Level II training shall be submitted to the department with the required application. Level II training may be taught by the licensee's [manager, the manager's] designee, or a department [board] approved school and department [board] approved instructor using the most current version of the respective department [board] Level II training course manuals.

(2) The Level III training course shall be completed by all applicants for a security officer commission and a personal protection officer license [endorsement]. The course material shall be prepared by and obtained from the department. A certificate indicating completion of Level III training shall be submitted to the department along with the application to license [register] the individual. Level III training must be taught by a department approved school and department approved instructor.

(3) The Level IV training course shall be completed by all applicants for a personal protection officer license [endorsement]. The course material shall consist of a minimum of fifteen (15) classroom hours and shall be offered by department approved personal protection officer training schools and taught by department approved personal protection training instructors. All training shall be conducted with a department approved instructor present during all instruction. All students of a personal protection officer training course shall be tested with an examination prepared by and obtained from the department.

(b) Peace Officer Exemption.

(1) Applicants for either a security officer commission or a personal protection officer license [endorsement] who are full-time peace officers, certified by the Texas Commission on Law Enforcement (TCOLE), may be exempted from the Level III training requirements upon submission to the department of a sworn affidavit attesting to the applicant's review of and familiarity with the Act and the related administrative rules.

(2) Applicants for either a security officer commission or a personal protection officer license [endorsement] who have honorably retired as Texas peace officers within the preceding two (2) years may be exempted from the Level II and III training requirements upon submission to the department of proof of their honorably retired status (in the form of documentation from the employing agency or TCOLE), and of a sworn affidavit attesting to the applicant's review of and familiarity with the Act and this chapter. For purposes of the above exemption, "honorably retired" means that the applicant:

(A) Did not retire in lieu of a disciplinary action;

(B) Was eligible to retire from the law enforcement agency or was ineligible to retire only as a result of an injury received in the course of the applicant's employment with the agency; and

(C) Is entitled to receive a pension or annuity for service as a law enforcement officer or is not entitled to receive a pension or annuity only because the law enforcement agency that employed the applicant does not offer a pension or annuity to its employees.

(c) Alarm Systems Training.

(1) The Level I alarm systems training course shall be successfully completed, and the certification submitted to the department, by any licensee [registrant] employed as an alarm systems installer [or a security alarm salesperson] in order to renew an original license [registration].

(2) Alarm systems Level I training must be taught by a department approved alarm systems training school and a department approved alarm instructor.
§35.142. Training School Approval.

(a) An application for training school approval shall be submitted in the manner prescribed by the department.

(b) To be approved, the school must:

(1) Use the department's most current training manual;

(2) Obtain [Register and obtain] approval of all instructors as provided under §35.143 [(§35.133) of this title [chapter] (relating to Training Instructor Approval);]

(3) Ensure that all owners, officers, partners, or shareholders are in compliance with the fingerprint submission requirement and individual license requirements of the Act, §1702.110 and §1702.221, respectively.

(33) Register a qualified manager;

(34) Register all owners, officers, partners, or shareholders, as provided in the Act, §1702.110.

(c) The letter of approval [or license certificate] shall be valid for one (1) year and may be renewed by submitting an application for renewal thirty (30) days prior to the expiration date.

(d) An entity having a private business letter of authority or a governmental letter of authority may seek approval as a training school by meeting requirements of this chapter where applicable. A training school approved under this section may only train employees of the entity.

(e) The department may deny an application for approval for any reason relating to the failure to satisfy the requirements of this section, or for prior violations of the Act or this chapter on the part of the owners or instructors associated with the applicant.

(f) The department may withdraw or suspend approval of a training school upon evidence the school has operated in violation of the Act or this chapter, or upon notification that an owner, officer, partner or shareholder has been charged with or convicted of a disqualifying offense as provided in §35.4 of this title (relating to Guidelines For Disqualifying Criminal Offenses). Certificates of completion or proficiency submitted for courses taught subsequent to notification of withdrawal or suspension of the school's approval will be rejected.

§35.143. Training Instructor Approval.

(a) An application for approval as a training instructor shall contain evidence of qualification as required by the department. Instructors may be approved for classroom or firearm training, or both. An individual may apply for approval for one or both of these categories. To qualify for classroom or firearm instructor approval, the applicant must submit acceptable certificates of training for each category. The classroom instructor and firearm certificates shall represent a combined minimum of forty (40) hours of department approved instruction.

(b) The items detailed in this subsection may constitute proof of qualification as a classroom instructor for security officers:

(1) An instructor's certificate issued by Texas Commission on Law Enforcement (TCOLE);

(2) An instructor's certificate issued by federal, state, or political subdivision law enforcement agency approved by the department;

(3) An instructor's certificate issued by the Texas Education Agency (TEA);

(4) An instructor's certificate relating to law enforcement, private security, or industrial security issued by a junior college, college, or university; or

(5) A license to carry [concealed] handgun instructor certificate issued by the department.

(c) The items listed in this subsection may constitute proof of qualification as a firearm training instructor, if reflecting training completed within two (2) years of the date of the application:

(1) A handgun instructor's certificate issued by the National Rifle Association;

(2) A firearm instructor's certificate issued by TCOLE; or

(3) A firearm instructor's certificate issued by a federal, state, or political subdivision law enforcement agency approved by the department.

(d) Proof of qualification as an alarm systems training instructor shall include proof of completion of an approved training course on alarm installation.

(e) Proof of qualification as a personal protection officer instructor shall include, but not be limited to:

(1) A firearm instructor's certificate issued by TCOLE along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for three (3) or more years. Evidence may include:

(A) Affidavit from employer; or

(B) A copy of curriculum taught.

(2) An instructor's certificate issued by federal, state, or political subdivision law enforcement academy along with proof that the individual has instructed nonlethal self-defense or nonlethal defense of a third party for three (3) or more years. Evidence may include:

(A) Affidavit from employer; or

(B) A copy of curriculum taught.

(3) An instructor's certificate issued by TEA along with proof that the individual has instructed nonlethal self-defense [self defense] or nonlethal defense of a third party for three (3) or more years. Evidence may include:

(A) Affidavit from employer; or

(B) A copy of curriculum taught.

(4) An instructor's certificate relating to law enforcement, private security or industrial security issued by a junior college, college or university along with proof that the individual has instructed nonlethal self-defense [self defense] or nonlethal defense of a third party for three (3) or more years. Evidence may include:

(A) Affidavit from employer; or

(B) A copy of curriculum taught.

(5) Evidence of successful completion of a department approved training course for personal protection officer instructors.

(44) A letter of approval from the department shall be issued to each approved instructor and shall be valid for a period of one (1) year. The instructor's approval may be renewed for a period of one (1) year, upon application to the department and payment of the renewal fee.]
(g) [[22] In addition to summary actions under the Act, based on criminal history disqualifiers, the department may revoke or suspend an instructor's approval or deny the application or renewal thereof upon evidence that:

1. The instructor or applicant has violated any provisions of the Act or this chapter;
2. The qualifying instructor's certificate has been revoked or suspended by the issuing agency;
3. A material false statement was made in the application; or
4. The instructor does not meet the qualifications set forth in the provisions of the Act and this chapter.

§35.145. Handgun Course.
(a) In addition to the firearm qualification requirements as set forth in the Act, a department approved firearm training instructor may qualify a student by using:

1. The Texas Department of Public Safety Primary Issued Handgun Qualification Course; or
2. The Texas Department of Public Safety Approved License to Carry [Concealed] Handgun License Course.

(b) All individuals qualifying with a firearm to satisfy the requirements of the Act shall qualify with an actual demonstration by the individual of the ability to safely and proficiently use the category of firearm for which the individual seeks qualification.

(c) The categories of handguns are:

1. SA--Semi-automatic; and
2. NSA--Non semi-automatic.

(d) The SA qualification authorizes the carrying of either semi-automatic or non semi-automatic handguns.

§35.147. Certificates of Completion, Training Records, and Notifications.
(a) A department approved training school shall:

1. Issue an original certificate of completion to each qualifying student within seven (7) days after the student qualifies;
2. Maintain adequate records to show attendance, progress and grades of students and maintain on file a copy of each certificate issued to students at the department approved training school;
3. Make all required records available to investigators employed by the department for inspection during reasonable business hours; and
4. Retain all training records for twenty-four (24) months from the date of completion of training.

(b) Certificate of completion for firearms qualification (firearm proficiency) shall contain the:

1. Name and approval number of the school;
2. Name, signature, and approval number of firearms training instructor;
3. Full name of student, and the student's Texas Driver License number, Texas Identification Card number or the last four (4) digits of the student's social security number; and
4. Date of completion.

(c) Certificate of completion for Level II shall contain the:

1. Name and approval number of the school;
2. Name, signature, and approval number of training instructor; and
3. Full name of student, and the student's Texas Driver License number, Texas Identification Card number or the last four (4) digits of the student's social security number.

(d) Certificate of completion for Level III and IV shall contain the:

1. Name and approval number of the school;
2. Date of firearm training completion of Level III;
3. Name, signature, and approval number of classroom and/or firearm training instructor;
4. Full name of student, and the student's Texas Driver License number, Texas Identification Card number or the last four (4) digits of the student's social security number; and
5. The specific date of firearm qualification along with the name and approval number of the firearms instructor on those certificates designating completion of Level III.

(e) Certificate of completion for alarm systems installation training shall contain:

1. Name and approval number of the school;
2. Name, signature, and approval number of alarm systems installation training instructor;
3. Full name of student, and the student's Texas Driver License number, Texas Identification Card number or the last four (4) digits of the student's social security number; and
4. Date of completion; and
5. Note the category of firearm as defined in this chapter; and
6. Be on a certificate form designed or approved by the department.

(f) Notice shall be given in writing to the department within fourteen (14) days after a change in address of the approved instructor.

(g) A letter of approval from the department shall be issued to each approved instructor and shall be valid for a period of one (1) year. The instructor's approval may be renewed at any time up to one (1) year after expiration, upon application to the department and payment of the renewal fee.

(h) In addition to summary actions under the Act, based on criminal history disqualifiers, the department may revoke or suspend an instructor's approval or deny the application or renewal thereof upon evidence that:

1. The instructor or applicant has violated any provisions of the Act or this chapter;
2. The qualifying instructor's certificate has been revoked or suspended by the issuing agency;
3. A material false statement was made in the application; or
4. The instructor does not meet the qualifications set forth in the provisions of the Act and this chapter.
(A) Name [The name] and approval number of the school;

(B) Name [The name], signature and approval number of training instructor:

(C) Full [The full] name of student, and the student's Texas Driver License number, Texas Identification Card number or the last four (4) [six (6)] digits of the student's social security number [of student];

(D) Date [The date] of final completion of the entire course; and

(E) The words "Has successfully completed the alarm installation [installation or alarm systems salesperson alarm] training school approved by the Texas Department of Public Safety."

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 M. CONTINUING EDUCATION

37 TAC §35.161, §35.162

The Texas Department of Public Safety (the department) proposes amendments to §35.161 and §35.162, concerning Continuing Education. These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

Suzy Whittenton, Chief Financial Officer, 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, micro-businesses, or rural communities required to comply with the sections 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.

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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 rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www dps.texas.gov/rsc/contact/default.aspx. Select "Private Security." 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, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a) and §1702.309(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a) and §1702.309(a), are affected by this proposal.

§35.161. Continuing Education Requirements.

(a) An application to renew an individual [a] license[, registration, endorsement, or commission] may not be submitted until the required minimum hours of department approved continuing education credits have been earned in accordance with the Act and this chapter. Proof of the required continuing education must be maintained by the employer and contained in the employee's personnel file [of the registrant's employing company]. All individual licensees [registrants] shall indicate they have completed the required minimum hours of department approved continuing education credits on their application for renewal. [A renewal application shall also include the name of the school, school number, date of attendance, number of hours attended, and courses of instruction attended.]

(b) Owners [Participating owners, partners, and shareholders, who perform services regulated under the Act on behalf of the licensed company, shall comply with the continuing education requirements of this section applicable to the regulated service provided. Participating owners], partners, and shareholders who hold individual licenses as owners only, [do not otherwise perform services regulated under the Act] shall complete a total of eight (8) hours of continuing education, including seven (7) hours in the subject matter that relates to the type of regulated service provided by their company [the licensee], and one (1) hour of ethics. Noncommissioned [For purposes of this section, participating refers to involvement in decisions governing the operation of the regulated company. Nonparticipating owners, partners, or share-
holders; noncommissioned] security officers, and all individuals not required to obtain a [registration, endorsement] commission or license under the Act are specifically exempted from the continuing education requirements.

(c) All individual license holders [registrants] not otherwise [specifically] addressed in this section shall complete a total of eight (8) hours of continuing education, seven (7) hours of which must be in subject matter that relates to the type of individual license [registration] held, and one (1) hour of which must cover ethics. [Following the initial registration period, qualified managers of Class B licensed companies may take a one (1) hour course devoted to changes in laws and rules applicable to the security industry, as a substitute for the above one (1) hour ethics requirement.]

(d) Private investigators [and managers of Class A and Class C licenses] with more than fifteen (15) years of continued licensure [registration] as a private investigator [or manager of a Class A or Class C license] shall complete a total of twelve (12) hours of continuing education, eight (8) hours of which must relate to investigations [be in subject matter that relates to the type of registration held], two (2) hours of which must cover ethics, and two (2) hours of which must involve the review of the Act and the rules of this chapter.

(e) Private investigators [investigators and managers of Class A and Class C licenses] with less than fifteen (15) years of continued licensure [registration] as a private investigator [or manager of a Class A or Class C license] shall complete a total of eighteen (18) hours of continuing education, fourteen (14) of which must relate to investigations [be in subject matter that relates to the type of registration held], two (2) hours of which must cover ethics, and two (2) hours of which must involve the review of the Act and the rules of this chapter.

(f) Any individual licensed [person registered] as a private investigator who fails to complete the required continuing education during the twenty-four (24) months of [an] initial licensure [registration] is not eligible to make a new or renewal application until such time as the training requirement for the previous licensure [registration] period has been satisfied.

(g) Commissioned security officers and personal protection officers shall complete six (6) hours of continuing education. Continuing education for commissioned security officers and personal protection officers must be taught by department approved schools and instructors [approved by the department to instruct commissioned security officers as defined in the Act]. Commissioned security officers shall submit a firearms proficiency certificate along with the renewal application.

(h) During the first twelve (12) months of initial licensure, [registration, each person employed as an] alarm system installers [installer or alarm systems salesperson] must complete the Alarm Level 1 training. This training consists[consisting] of sixteen (16) hours of classroom instruction or equivalent online course as approved by the department, with two (2) hours covering the National Electrical Code (NEC) as it applies to low voltage. Alarm [any person employed as an alarm] systems installer or alarm systems salesperson must earn [earned] eight (8) hours of continuing education credits in an alarm related field, with one (1) hour covering the National Electrical Code (NEC) as it applies to low voltage, during each subsequent twenty-four (24) month period. This requirement must be satisfied prior to the expiration date of the license and before renewal [registration in order to renew the registration].

(i) For the protection of the installer and the general public, the work of an alarm system installer who has not completed the required sixteen (16) hours of instruction must be overseen by an installer who has completed the required sixteen (16) hours of instruction. The oversight required under this section need not involve direct physical supervision, but the overseeing installer is responsible for ensuring the installation complies with all applicable requirements and regulations.

(j) Any licensed [person registered as an] alarm systems installer [or salesperson] who fails to complete sixteen (16) hours of training during the twenty-four (24) months of initial licensure, or who fails to complete eight (8) hours of continuing education during any subsequent licensing period is not eligible to renew [make a new or renewal application] until [such time as] all training requirements for the previous license period have been satisfied.

(k) Alarm monitors shall complete four (4) hours of continuing education relating [in subject matter that relates] to the duties and responsibilities of an alarm monitor.

(l) All individuals [persons registered or] licensed as locksmiths must complete sixteen (16) hours of continuing education every two (2) years.

(m) Attendees of continuing education courses shall maintain certificates of completion furnished by the school director in their files for a period of two (2) years. Attendees shall furnish the department copies of all certificates of completion upon request.

§35.162. Continuing Education Schools.

(a) Except as otherwise provided by this subchapter, all continuing education credits must be earned through department approved continuing education schools.

(b) All department approved continuing education schools shall comply with subsection (b)(1) - subsection (b)(7):

(1) Each school must identify to the department a school director as its agent responsible for ensuring the school's compliance with this subchapter, including the maintenance of attendance records, the provision of such records to department personnel upon request, and the verification of curricula and instructors' qualifications. The failure of this individual to perform these duties or to otherwise comply with this subchapter may result in the cancellation of the school's certificate of approval and the rejection of claims for continuing education credit obtained from that school.

(2) School attendance records shall include:

(A) Subjects taught in each course of instruction;

(B) Total hours of each course of instruction and the hours instructed on each subject;

(C) Date of instruction;

(D) Name, license number, and date(s) of attendance for each individual that attended a course of instruction; and

(E) Name and qualifications of instructor.

(3) Schools shall issue certificates of attendance to [registrants or] licensees attending a course of instruction. The certificates of attendance shall contain the name and license number of the attendee, the date of attendance, the number of hours of attendance, and the course(s) of instruction attended. Each certificate shall be signed and dated by the school director.

(4) Schools shall maintain all records required by this section for a period of two (2) years.

(5) The school shall provide copies of all records required under this subchapter to the department upon request.

(6) The school director shall verify that the curriculum of each continuing education course offered is in compliance with this chapter.
(7) The school director shall verify the qualifications of each instructor.

(c) Attendees of courses of continuing education shall maintain certificates of completion furnished by the school director in their files for a period of two (2) years. Attendees shall furnish the department with copies of all certificates of completion upon request.

(d) Licensed companies with ten (10) or more licensed [registered] employees may make a written request for a letter of exemption allowing them to provide continuing education to those employees registered under the requesting company's license. Such requests shall be addressed to the department. A letter of exemption granted under this section shall be valid for two (2) years. To qualify for a letter of exemption, the company must appoint a training director, assure that all training is in compliance with all related administrative rules, maintain proof of all training, and provide each licensed employee with a certificate of training as required by this section. There is no annual fee associated with a letter of exemption issued under this subsection. The exemption provided in this subsection does not apply to commissioned security officers or personal protection officers.

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

Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 424-5848