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 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 14. FEDERALLY QUALIFIED HEALTH CENTER SERVICES

1 TAC §355.8261

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.8261, concerning Federally Qualified Health Center Services Reimbursement.

BACKGROUND AND PURPOSE

The purpose of the proposal is to comply with Senate Bill 670, 86th Legislature, Regular Session, 2019, which requires HHSC to ensure that a federally qualified health center (FQHC) be reimbursed for a covered telemedicine medical service or telehealth service delivered by a health care provider to a Medicaid recipient. The proposed amendment will also clarify how rates are set for newly enrolled FQHCs that are authorized to be included on a consolidated cost report of another FQHC.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §355.8261(b)(10)(A)(i) specifies that a new FQHC that is included on the cost report of another FQHC (i.e., part of a consolidated cost report) should be assigned the rate of the other FQHC.

The proposed amendment to §355.8261(b)(12) and §355.8261(b)(13) includes telemedicine and telehealth services in the definition of a "visit" and a "medical visit." This change increases transparency and provides additional detail on the existing reimbursement structure for FQHCs.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

(2) implementation of the proposed amendment will not affect the number of employee positions;

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

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

(5) the proposed amendment will not create a new rule;

(6) the proposed amendment will expand an existing rule; and

(7) the proposed amendment will not change the number of individuals subject to the rule.

(8) HHSC has insufficient information to determine the proposed amendment's effects on the state's economy.

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

Trey Wood has also determined that there is no adverse economic impact on small businesses, micro-businesses, and rural communities. There are no FQHCs in rural areas and no FQHCs are small businesses or micro-businesses.

LOCAL EMPLOYMENT IMPACT

The proposed rule amendment will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this amendment because the amendment is necessary to receive a source of federal funds. The amendment is also necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule amendment.

PUBLIC BENEFIT AND COSTS

Victoria Grady, Director of Provider Finance, has determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the amended section. The public benefit anticipated as a result of enforcing or administering the amendment will be an enhanced ability of FQHCs to provide healthcare to Medicaid recipients by ensuring that telehealth services are included in options for providing services.

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Kevin Niemeyer in HHSC Rate Analysis at (512) 730-7445.

Written comments on the proposal may be submitted to the HHSC Provider Finance Department, Mail Code H-400, 4900 North Lamar Blvd., Austin, TX 78714-9030; by fax to (512)-730-7475; or by email to RateAnalysis-Dept@hhsc.state.tx.us within 31 days of publication of this proposal in the *Texas Register.*

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register.* Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) faxed or emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When faxing or emailing comments, please indicate "Comments on Proposed Rule 21R008" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.0216(i), which requires HHSC to adopt rules to implement the subsection; Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32.

The amendment affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§355.8261. Federally Qualified Health Center Services Reimbursement.

(a) Prospective Payment System (PPS) Methodology. Federally Qualified Health Centers (FQHCs) selecting the PPS methodology, in accordance with section 1902(bb) of the Social Security Act, as amended by the Benefits Improvement and Protection Act (BIPA) of 2000 (42 U.S.C. §1396a(bb)), effective for the FQHC's fiscal year that includes dates of service occurring January 1, 2001, and after, will be reimbursed a PPS per visit encounter rate for Medicaid covered services. FQHCs are reimbursed a prospective per visit encounter rate for a visit that meets the requirements of subsections (b)(12) and (13) of this section. The final base rate for each FQHC existing in 2000 was calculated based on one hundred percent (100%) of the average of the FQHC's reasonable costs for providing Medicaid covered services as determined from audited cost reports for the FQHC's 1999 and 2000 fiscal years. The final base rate was calculated by adding the total audited reimbursable costs as determined from the 1999 and 2000 cost reports and dividing by the total audited visits for these same two periods. The reimbursement methodologies described in subsection (b) of this section apply to the PPS methodology, except for the following:

(1) The effective rate for APPS described in subsection (b)(4) of this section does not apply to PPS. Increases in the final base rate or the effective rate for a PPS-reimbursed FQHC shall be the rate of change in the Medicare Economic Index (MEI) for primary care. If the increase in an FQHC's costs is greater than the MEI for PPS, an FQHC may request an adjustment of its effective rate as described in subsection (b)(6) of this section.

(2) State initiated reviews, described in subsection (b)(10)(D) of this section, are not applicable for providers who select the PPS methodology.

(b) Alternative Prospective Payment System (APPS) Methodology. FQHCs selecting the APPS methodology, in accordance with section 1902(bb) of the Social Security Act, as amended by the Benefits Improvement and Protection Act (BIPA) of 2000 (42 U.S.C. §1396a(bb)), effective for the FQHC's fiscal year that includes dates of service occurring January 1, 2001, and after, are reimbursed an APPS per visit encounter rate for Medicaid covered services at one hundred percent (100%) of reasonable costs. FQHCs are reimbursed a prospective per visit encounter rate for a visit that meets the requirements of paragraphs (12) and (13) of this subsection. The final base rate for each FQHC existing in 2000 was calculated based on one hundred percent (100%) of the average of the FQHC's reasonable costs for providing Medicaid covered services as determined from audited cost reports for the FQHC's 1999 and 2000 fiscal years. The final base rate was calculated by adding the total audited reimbursable costs as determined from the 1999 and 2000 cost reports and dividing by the total audited visits for these same two periods.

(1) Prior to the Health and Human Services Commission (HHSC) setting a final base rate pursuant to this section for each FQHC existing in 2000, each FQHC was reimbursed on the basis of an interim base rate. The interim base rate for each FQHC was calculated from the latest finalized cost report settlement, adjusted as provided for in paragraph (4) of this subsection. When HHSC determined a final base rate, interim payments were reconciled back to the beginning of the interim period. For FQHCs that agreed to the APPS methodology prior to August 31, 2010, adjustments were made to the FQHC's interim payments only if the interim payments were less than what would have occurred under the final base rate. Paragraph (10) of this subsection contains the interim and final base rate methodology for new FQHCs. The final base rate, as adjusted, applies prospectively from the date of the final approval. Payments made under the APPS methodology will be at least equal to the amount that would be paid under PPS.

(2) Reasonable costs, as used in setting the interim or final base rate or any subsequent effective rate, is defined as those costs that are allowable under Medicare Cost Principles, as outlined in 42 C.F.R. part 413, with no productivity screens and no per visit payment limit. Administrative costs will be limited to thirty percent (30%) of total costs in determining reasonable costs. Reasonable costs do not include unallowable costs.

(3) Unallowable costs are expenses that are incurred by an FQHC and that are not directly or indirectly related to the provision of covered services, according to applicable laws, rules, and standards. An FQHC may expend funds on unallowable cost items, but those costs must not be included in the cost report/survey, and they are not used in calculating an interim or final base rate determination. Unallowable costs include, but are not necessarily limited to, the following:

(A) compensation in the form of salaries, benefits, or any form of compensation given to individuals who are not directly or indirectly related to the provision of covered services;

(B) personal expenses not directly related to the provision of covered services;

(C) management fees or indirect costs that are not derived from the actual cost of materials, supplies, or services necessary for the delivery of covered services, unless the operational need and cost effectiveness can be demonstrated;

(D) advertising expenses other than those for advertising in the telephone directory yellow pages, for employee or contract labor recruitment, and for meeting any statutory or regulatory requirement;

(E) business expenses not directly related to the provision of covered services. For example, expenses associated with the sale or purchase of a business or expenses associated with the sale or purchase of investments;

(F) political contributions;

(G) depreciation and amortization of unallowable costs, including amounts in excess of those resulting from the straight line depreciation method; capitalized lease expenses, less any maintenance expenses, in excess of the actual lease payment; and goodwill or any excess above the actual value of the physical assets at the time of purchase. Regarding the purchase of a business, the depreciable basis will be the lesser of the historical but not depreciated cost to the previous owner or the purchase price of the assets. Any depreciation in excess of this amount is unallowable;

(H) trade discounts and allowances of all types, including returns, allowances, and refunds, received on purchases of goods or services. These are reductions of costs to which they relate and thus, by reference, are unallowable;

(I) donated facilities, materials, supplies, and services including the values assigned to the services of unpaid workers and volunteers whether directly or indirectly related to covered services, except as permitted in 42 C.F.R. part 413;

(J) dues to all types of political and social organizations and to professional associations whose functions and purpose are not reasonably related to the development and operation of patient care facilities and programs or the rendering of patient care services;

(K) entertainment expenses, except those incurred for entertainment provided to the staff of the FQHC as an employee benefit. An example of entertainment expenses is lunch during the provision of continuing medical education on-site;

(L) board of director's fees, including travel costs and meals provided for directors;

(M) fines and penalties for violations of statutes, regulations, and ordinances of all types;

(N) fund raising and promotional expenses, except as noted in subparagraph (D) of this paragraph;

(O) interest expenses on loans pertaining to unallowable items, such as investments. Also the interest expense on that portion of interest paid that is reduced or offset by interest income;

(P) insurance premiums pertaining to items of unallowable costs;

(Q) any accrued expenses that are not a legal obligation of the provider or are not clearly enumerated as to dollar amount;

(R) mileage expense exceeding the current reimbursement rate set by the federal government for its employee travel;

(S) cost for goods or services that are purchased from a related party and that exceed the original cost to the related party;

(T) out-of-state travel expenses not related to the provision of covered services, except out-of-state travel expenses for training courses that increase the quality of medical care and/or the operating efficiency of the FQHC;

(U) over-funding contributions to self-insurance funds that do not represent payments based on current liabilities;

(V) overhead costs beyond the thirty percent (30%) limitation established by HHSC.

(4) The effective rate for APPS - The effective rate is the rate paid to the FQHC for the FQHC's fiscal year. The effective rate shall be updated by the rate of change in the MEI plus (0.5) percent for each of the FQHC's fiscal years since the setting of its final base rate. If the increase in an FQHC's costs is greater than the MEI plus (0.5) percent for APPS, an FQHC may request an adjustment of its effective rate as described in paragraph (6) of this subsection. The effective rate shall be calculated at the start of each FQHC's fiscal year and shall be applied prospectively for that fiscal year. The effective rate for PPS is described in subsection (a)(1) of this section.

(5) PPS and APPS reimbursement methodology selection is determined as follows:

(A) Each new in-state FQHC will receive a letter from HHSC upon enrollment as a new provider along with the Federally Qualified Health Centers (FQHC) Prospective Payment System Form. This form must be signed by an authorized representative and returned to HHSC within thirty (30) days of the enrollment letter date. The form must indicate the selection as either the PPS or APPS reimbursement methodology. If HHSC does not receive the form within the specified time requirement, HHSC will select the PPS reimbursement methodology for this provider. For a provider that fails to return the form selecting the APPS reimbursement methodology, the provider may submit a written request along with the Federally Qualified Health Centers (FQHC) Prospective Payment System Form selecting the APPS reimbursement methodology. Upon approval by HHSC, the new selection will be effective the first day of the provider's next fiscal year.

(B) Each out-of-state FQHCs will receive the PPS reimbursement methodology. Out-of-state FQHCs may not select the APPS reimbursement methodology. HHSC will compute an effective rate based on reasonable costs provided by the FQHC on its most recent Medicare cost report, pursuant to paragraph (8)(A) and (B) of this subsection. The effective rate will reflect the rate that would have been calculated for an in-state FQHC based on the approved scope of services that an in-state FQHC could provide in Texas.

(C) When HHSC makes a change to the PPS or APPS reimbursement methodology, HHSC may require FQHCs to reselect the PPS or APPS reimbursement methodology, in accordance with the requirements of subparagraph (A) of this paragraph.

(6) A change of the effective rate is determined as follows:

(A) An adjustment, as described in paragraph (10)(C) of this subsection, will be made to the effective rate if the FQHC can show that it is operating in an efficient manner as defined in paragraph (7)(B) of this subsection, or show that the adjustment is warranted due to a change in scope as defined in paragraph (7)(A) of this subsection.

(B) HHSC also may adjust the effective rate of an FQHC on its own initiative, in accordance with paragraph (10)(D) of this subsection, if it is determined that a change of scope has occurred and an adjustment to the effective rate as defined in paragraph (7) of this subsection is warranted based on the audit of the cost report described in paragraph (8)(C) of this subsection.

(7) Any request to adjust an effective rate must be accompanied by documentation showing that the FQHC is operating in an efficient manner or that it has had a change in scope. A change in scope provided by an FQHC includes the addition or deletion of a service or a change in the magnitude, intensity or character of services currently offered by an FQHC or one of the FQHC's sites.

(A) A change in scope includes:

(i) an increase in service intensity attributable to changes in the types of patients served, including but not limited to, patients with HIV/AIDS, the homeless, the elderly, migrants, those with other chronic diseases or special populations;

(ii) any changes in services or provider mix provided by an FQHC or one of its sites;

(iii) changes in operating costs that have occurred during the fiscal year and which are attributable to capital expenditures, including new service facilities or regulatory compliance;

(iv) changes in operating costs attributable to changes in technology or medical practices at the FQHC;

(v) indirect medical education adjustments and a direct graduate medical education payment that reflects the costs of providing teaching services to interns and residents; or

(vi) any changes in scope approved by the Health Resources and Service Administration (HRSA).

(B) Operating in an efficient manner includes:

(i) showing that the FQHC has implemented an outcome-based delivery system that includes prevention and chronic disease management. Prevention includes, but is not limited to, programs such as immunizations and medical screens. Disease Management must include, but not be limited to, programs such as those for diabetes, cardiovascular conditions, and asthma that can demonstrate an overall improvement in patient outcome;

(ii) paying employees' salaries that do not exceed the rates of payment for similar positions in the area, taking into account experience and training as determined by the Texas Workforce Commission;

(iii) providing fringe benefits to its employees that do not exceed fifteen percent (15%) of the FQHC's total costs;

(iv) implementing cost saving measures for its pharmacy and medical supplies expenditures by engaging in group purchasing; and

(v) employing the Medicare concept of a "prudent buyer" in purchasing its contracted medical services.

(8) Cost report forms and worksheets are required as follows:

(A) As-Filed Medicare Cost Report. The As-Filed Medicare Cost Report includes:

(i) CMS form 222-92 Independent Rural Health Clinic/Freestanding and Federally Qualified Health Center Worksheet, including the HCFA 339 Form.

(I) Worksheet S part 1 - Statistical Data;

(II) Worksheet S part 2 - Certification By Officer or Administrator;

(III) Worksheet S part 3 - Statistical Data for Clinics Filing Under Consolidated Cost Reporting;

(IV) Worksheet A page 1 - Reclassification and Adjustment of Trial Balance of Expenses;

(V) Worksheet A page 2 - Reclassification and Adjustment of Trial Balance of Expenses;

(VI) Worksheet A-1 - Reclassifications;

(VII) Worksheet A-2 - Adjustments to Expenses;

(VIII) Worksheet A-2-1, Parts I to III - Statement of Cost of Services from Related Organizations;

(IX) Worksheet B part I and II - Visits and Overhead Cost for RHC/FQHC Services; and

(X) Worksheet C part I and II - Determination of Medicare Reimbursement.

(ii) Texas Medicaid Supplemental Worksheets.

(I) Determination of FQHC Cost Based Rate;

(II) Exhibit 1 - Determination of FQHC Medicaid Reimbursable Cost - Rate Worksheet;

(III) Exhibit 2 - Visit Reconciliation - Employed Providers; and

(IV) Exhibit 3 - Visit Reconciliation - Contract Service Providers.

(iii) Trial Balance with account titles. If the provider's Trial Balance has only account numbers, a Chart of Accounts will need to accompany the Trial Balance.

(iv) A mapping of the Trial Balance that shows the tracing of each Trial Balance account to a line and column on Worksheet A pages 1 and 2.

(v) Documentation supporting the provider's reclassification and adjustment entries.

(vi) A Schedule of Depreciation of depreciable assets.

(vii) A listing of all satellites, if applicable.

(viii) Federal Grant Award notices or changes in scope approved by HRSA.

(ix) All items must be complete and accurate.

(B) Final Audited Medicare Cost Report. In-state providers must file the final audited cost report received from Medicare, as required in paragraph (9) of this subsection. The final audited Medicare cost report includes:

(i) A copy of the final audited CMS form 222-92 Independent Rural Health Clinic/Freestanding and Federally Qualified Health Center Worksheets, including the HCFA 339 Form filed with Medicare.

(ii) Texas Medicaid Supplemental Worksheets.

(I) Determination of FQHC Cost Based Rate;

(II) Exhibit 1 - Determination of FQHC Medicaid Reimbursable Cost - Rate Worksheet;

(III) Exhibit 2 - Visit Reconciliation - Employed Providers; and

(IV) Exhibit 3 - Visit Reconciliation - Contract Service Providers.

(iii) All items must be complete and accurate.

(C) Change of Effective Rate Cost Report. The change of effective rate cost report is used by in-state or out-of-state FQHCs that are requesting a change in their effective rate due to a change in scope or operating in an efficient manner. The cost report must contain at least six (6) months of financial information. The documents needed for in-state and out-of-state providers filing a change of effective rate cost report are the same as required for the as-filed cost report in paragraph (8)(A) of this subsection.

(D) Projected Cost Report. The projected cost report is used by in-state or out-of-state FQHCs that are requesting an initial interim rate. The cost report must contain at least twelve (12) months of projected financial information. The required documents are the same as required for the as-filed cost report in paragraph (8)(A) of this subsection, except that the information contained in clauses (iii), (iv) and (v) are not required.

(E) Low Medicare Utilization Cost Report. The low Medicare utilization cost report is used by in-state and out-of-state providers to meet the annual filing requirements for providers not required to file a full cost report with Medicare. A provider filing the Low Medicare Utilization cost report must complete and submit all required forms and supporting documentation described in paragraph (8)(A) of this subsection for all rate determination processes described in paragraph (10) of this subsection.

(F) If a provider fails to submit a required cost report, HHSC or its designee may delay or withhold vendor payment to the provider until a complete cost report has been received and accepted by HHSC or its designee.

(9) Cost Report Filing Requirement. Each FQHC must submit a copy of its Final Audited Medicare Cost Report, as described in paragraph (8)(B) of this subsection, to HHSC or its designee within thirty (30) days of receipt of the report from Medicare. An FQHC filing a Low Utilization Cost Report with Medicare may comply with this subsection by filing a copy of such cost report with HHSC annually, within thirty (30) days of filing the report with Medicare.

(10) FQHC rate determination process.

(A) New FQHC.

(i) If the owner of a new FQHC owns one or more FQHCs in Texas and will include the new facility on the Medicare cost report of another FQHC, then HHSC will apply the rate assigned to the other FQHC as the interim base rate of the new FQHC. If the owner of a new FQHC does not include the new facility on the Medicare cost report of another FQHC, the [A] new FQHC must file a projected cost report, pursuant to paragraph (8)(D) of this subsection, within 90 days of their designation as an FQHC to establish an initial interim base rate. The cost report must contain the FQHC's reasonable costs anticipated to be incurred during the FQHC's initial fiscal year. The initial interim base rate for this [a] new FQHC shall be set at the lesser of eighty percent (80%) of the anticipated reasonable costs determined from the projected cost report or eighty percent (80%) of the average rate paid to FQHCs on January 1 of the calendar year during which the FQHC first applies as a new FQHC [~~or for a change in scope, if applicable~~].

(ii) Each new FQHC must submit to HHSC or its designee an As-Filed Medicare Cost Report, pursuant to paragraph (8)(A) of this subsection, within five (5) calendar months after the end of the FQHC's first full fiscal year. HHSC will determine an updated interim base rate based on one hundred percent (100%) of the reasonable costs contained in the As-Filed Medicare Cost Report. An As-Filed Medicare Cost Report must reflect twelve (12) months of continuous service that meets the requirements of paragraph (7)(B) of this subsection. Interim rates will be adjusted prospectively until the Final Audited Medicare Cost Report reflecting twelve (12) months of continuous service is processed. HHSC will, within eleven (11) months of receipt of the As-Filed Medicare Cost Report reflecting twelve (12) months of continuous service determine the updated interim base rate.

(iii) Each new FQHC must submit to HHSC or its designee a Final Audited Medicare Cost Report, pursuant to paragraph (9) of this subsection. The Final Audited Medicare Cost Report settlement, reflecting twelve (12) months of continuous service, must be completed within eleven (11) months of receipt of a cost report. The rate established shall be the final base rate. HHSC will reconcile payments back to the beginning of the interim period applying the final base rate. If the final base rate is greater than the interim base rate, HHSC will compute and pay the FQHC a settlement payment that represents the difference in rates for the services provided during the interim period. If the final base rate is less than the interim base rate, HHSC will compute and recoup from the FQHC any overpayment resulting from the difference in rates for the services provided during the interim period. The final base rate is adjusted in accordance with paragraph (4) of this subsection to determine the effective rate.

(iv) If a new FQHC cost report described in clause (ii) or (iii) of this subparagraph does not meet the requirement of reflecting twelve (12) months of continuous service that meets the requirements of paragraph (7)(B) of this subsection, HHSC will prospectively establish the interim rate based on the lesser of the interim rate determined by the cost report or eighty percent (80%) of the average rate paid to FQHCs on January 1 of the calendar year during which the FQHC first applies as a new FQHC or for a change in scope, if applicable, adjusted by applicable increases.

(B) Change of Ownership. If an existing FQHC facility changes ownership, the new owner must notify HHSC of the ownership change within ten (10) calendar days of the change.

(i) If the new owner of an FQHC facility owns no other FQHC facility in Texas, HHSC will treat the FQHC facility as a new FQHC. HHSC will set an initial interim base rate equal to one hundred percent (100%) of the previous owner's effective rate, and will then follow the procedures under subparagraph (A)(ii) and (iii) of this paragraph.

(ii) If the new owner of an FQHC facility owns one or more FQHC facilities in Texas and will include the new facility on the Medicare cost report of another FQHC facility, then HHSC will apply the rate assigned to the other FQHC.

(iii) If the new owner of an FQHC facility owns one or more FQHC facilities in Texas, but will not include the new facility on the Medicare cost report of another FQHC facility, then HHSC will determine a rate for the facility in accordance with clause (i) of this subparagraph.

(iv) If the new owner is ultimately not allowed by Medicare to include its new FQHC facility on the Medicare cost report of the other FQHC facility that it owns, then HHSC will determine a rate for the facility in accordance with subparagraph (A) of this paragraph.

(C) Request for Change of Effective Rate.

(i) An FQHC that requests an adjustment of its effective rate due to a change in scope or operating in an efficient manner must file a Change of Effective Rate Cost Report described in paragraph (8)(C) of this subsection. The FQHC must include the necessary documentation to support a claim that the FQHC has undergone a change in scope or is operating in an efficient manner pursuant to paragraph (7) of this subsection. A cost report filed to request an adjustment in the effective rate may be filed at any time during an FQHC's

fiscal year, but no later than five (5) calendar months after the end of the FQHC's fiscal year. All requests for adjustment in the FQHC's effective rate must include at least six (6) months of financial data. Within sixty (60) days of receiving the Change of Effective Rate Cost Report described in paragraph (8)(C) of this subsection, HHSC or its designee will make a determination regarding a new interim base rate.

(ii) If HHSC determines through the review of the information provided in clause (i) of this subparagraph that an adjustment to the effective rate is warranted, HHSC will determine an interim base rate based on one hundred percent (100%) of the reasonable costs contained in the Change of Effective Rate Cost Report. Interim payments will be adjusted prospectively until the final audited cost report is processed.

(iii) The FQHC must submit to HHSC or its designee an As-Filed Medicare Cost Report, described in paragraph (8)(A) of this subsection, within five (5) calendar months after the end of the FQHC's fiscal year. HHSC and the FQHC will then follow the procedures under subparagraph (A)(ii) and (iii) of this paragraph.

(D) State Initiated Review.

(i) For an in-state FQHC that has chosen the APPS methodology, HHSC may prospectively reduce the FQHC's effective rate to reflect one hundred percent (100%) of its reasonable costs or the PPS effective rate, whichever is greater. After reviewing the Final Audited Medicare Cost Report described in paragraph (8)(B) of this subsection, HHSC will determine if an in-state FQHC is being reimbursed more than one hundred percent (100%) of its reasonable cost or the PPS effective rate, whichever is greater, through the following steps:

(I) Determine the reasonable cost per encounter from the Final Audited Medicare Cost Report;

(II) Determine the effective PPS rate per encounter as would have been applied to the FQHC if the FQHC had chosen PPS as described in subsection (a) of this section for the same time period corresponding to the FQHC's Final Audited Medicare Cost Report described in subclause (I) of this clause;

(III) Select the greater of subclause (I) or (II) of this clause;

(IV) If the result in subclause (III) of this clause is less than the APPS effective rate for this period, HHSC will set the result in subclause (III) of this clause as the new final base rate for this period;

(V) The prospective rate described in clause (iii) of this subparagraph will be determined by adjusting the new final base rate from subclause (IV) of this clause in accordance with paragraph (4) of this subsection to determine the effective rate.

(VI) The new final base rate from subclause (IV) of this clause and subsequent effective rates will not apply to claims for services provided prior to the implementation date described in clause (iii) of this subparagraph.

(ii) State initiated reviews will be based on a determined twelve (12) month time period and the most recent cost data received in accordance with paragraph (9) of this subsection. For any provider filing a Low Utilization Cost Report with Medicare in accordance with paragraph (9) of this subsection, upon request by HHSC, the provider must complete and submit the forms and worksheets described in paragraph (8)(A) of this subsection for the fiscal years ending within the determined twelve (12) month time period, even if the cost report was not required to be filed by Medicare.

(iii) HHSC will apply the state initiated rate reduction prospectively beginning on the first day of the month following forty-five (45) days after the date of the Final Base Rate Notification letter. The final base rate is adjusted in accordance with paragraph (4) of this subsection to determine the effective rate.

(iv) HHSC will not increase the effective rate for an FQHC based on the outcome of a state-initiated cost report audit. It is the responsibility of the FQHC to request HHSC to adjust the effective rate if the FQHC can show that it is operating in an efficient manner as defined in paragraph (7)(B) of this subsection, or can show a change in scope as defined in paragraph (7)(A) of this subsection.

(v) For PPS the state initiated reviews is not applicable, as described in subsection (a)(2) of this section.

(E) Final Base Rate Notification Letter. HHSC will provide to an FQHC written notification of any determined final base rate forty-five (45) days prior to implementation of the final base rate. The effective date of the final base rate is determined by the applicable FQHC Rate Determination Process described in subparagraph (A) - (D) of this paragraph.

(F) Request for Review of Final Base Rate. The FQHC may submit a written request for review of the final base rate within 30 days of the date of the Final Base Rate Notification Letter in the circumstances described in clauses (i) - (iii) of this subparagraph.

(i) The FQHC believes that HHSC made a mathematical error or data entry error in calculating the FQHC's reasonable cost. The request for review must include the supporting documentation of the perceived mathematical error or data entry error in calculating the final base rate. HHSC will evaluate the request for review and the merit of the supporting documentation. If HHSC determines the request for review merits a change in the final base rate, HHSC will adjust the final base rate to the effective date of the Final Base Rate Notification Letter.

(ii) The FQHC believes that the FQHC made an error in reporting its cost or data in the Texas Medicaid Supplemental Worksheets described in paragraph (8)(A) of this subsection that would result in a different calculation of the FQHC's reasonable cost. The request for review must include the corrected Texas Medicaid Supplemental Worksheets and supporting documentation of the correction of error in reporting of cost or data. If HHSC determines the request for review merits a change in the final base rate, HHSC may adjust the final base rate to the effective date of the Final Base Rate Notification Letter.

(iii) The FQHC believes that the FQHC made an error in reporting its cost or data in the Final Audited Medicare Cost Report described in paragraph (8)(B) of this subsection that would result in a different calculation of the FQHC's reasonable cost. The request for review must include the correspondence submitted to the Medicare fiscal intermediary to amend the Medicare cost report. HHSC will consider the request for review upon receipt of the provider amended Final Audited Medicare Cost Report and supporting documentation of the correction of error in reporting of cost or data. If HHSC determines the request for review merits a change in the final base rate, HHSC may adjust the final base rate to the effective date of the Final Base Rate Notification Letter.

(iv) HHSC will send the FQHC written notification of the results of its request for review.

(v) If the FQHC disagrees with the results of the review in clause (iv) of this subparagraph, the FQHC may formally appeal in accordance with §§357.481 - 357.490 of this title (relating to Hearings Under the Administrative Procedure Act).

(11) In the event that the amount paid to an FQHC by a managed care organization (MCO) or dental managed care organization (DMO) is less than the amount the FQHC would receive under PPS or APPS, whichever is applicable, the state will ensure the FQHC is reimbursed the difference on at least a quarterly basis. The state's supplemental payment obligation will be determined by subtracting the baseline payment under the contract for services being provided from the effective PPS or APPS rate without regard to the effects of financial incentives that are linked to utilization outcomes, reductions in patient costs, or bonuses.

(12) A visit is a face-to-face, telemedicine, or telehealth encounter between an FQHC patient and a physician, physician assistant, nurse practitioner, certified nurse-midwife, visiting nurse, a qualified clinical psychologist, clinical social worker, other health professional for mental health services, dentist, dental hygienist, or an optometrist. Encounters with more than one health professional and multiple encounters with the same health professional that take place on the same day and at a single location constitute a single visit, except where one of the following conditions exist:

(A) after the first encounter, the patient suffers illness or injury requiring additional diagnosis or treatment; or

(B) the FQHC patient has a medical visit and an "other" health visit, as defined in paragraph (13) of this subsection.

(13) A medical visit is a face-to-face, telemedicine, or telehealth encounter between an FQHC patient and a physician, physician assistant, nurse practitioner, certified nurse midwife, or visiting nurse. An "other" health visit includes, but is not limited to, a face-to-face, telemedicine, or telehealth encounter between an FQHC patient and a qualified clinical psychologist, clinical social worker, other health professional for mental health services, a dentist, a dental hygienist, an optometrist, or a Texas Health Steps Medical Screen.

(c) Payment dispute.

(1) An FQHC that believes an MCO or DMO has improperly denied a claim for payment or has provided insufficient reimbursement may appeal to the MCO or DMO. The MCO or DMO must address provider appeals as required by Texas Government Code §533.005(a)(15) and (19) and its contractual obligations with HHSC.

(2) If the MCO or DMO is not able to resolve the appeal, the FQHC may submit a complaint to HHSC for review. If HHSC finds the MCO or DMO has not correctly reimbursed the FQHC in accordance with contractual obligations, HHSC may require the MCO or DMO to reimburse the FQHC and assess remedies against the MCO or DMO in accordance with HHSC's contract with the MCO or DMO.

(3) The state will ensure the FQHC is paid the full PPS or APPS encounter rate for all valid claims.

(4) This subsection applies to claims for services provided by an FQHC on an in-network or out-of-network 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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TRD-202004568

Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: December 13, 2020
For further information, please call: (737) 203-7842

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 17. STATE ARCHITECTURAL PROGRAMS

13 TAC §17.2

The Texas Historical Commission (Commission) proposes amendments to §17.2, relating to Review of Work on County Courthouses, Title 13, Part 2, Chapter 17 of the Texas Administrative Code.

Section 17.2 outlines the definitions and the rules related to Texas Government Code §442.008, Review of Work on County Courthouses. The rules detail the process for reviewing work on county courthouses but does not currently include a definition of monument or outline a process for relocating or removing monuments from the protected courthouse square.

The proposed amendment will add a definition that clarifies what the Commission considers a monument and refers to a proposed rule §21.13 in Chapter 21 that details a process for relocating or removing monuments that the Commission has the authority to protect.

FISCAL NOTE. Mark Wolfe, Executive Director, has determined that for each of the first five-years the proposed amendments are in effect, there will not be a fiscal impact on state or local government as a result of enforcing or administering these amendments, as proposed. The proposed amendments allow the Commission to close inactive applications for tax credits under defined circumstances. Because the closure of an application does not ultimately affect whether the applicant may obtain the tax credit, there will be no impact on state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Wolfe 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 handling of applications.

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 new section is in effect; therefore, no local employment impact statement is required under Texas Government Code, §§2001.022 and 2001.024(a)(6).

COSTS TO REGULATED PERSONS. The proposed new section does not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSI-

NESSES, AND RURAL COMMUNITIES. Mr. Wolfe has also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments and therefore no regulatory flexibility analysis, as specified in Texas Government Code §2006.002, is required. Because the proposed amendments only allow for the administrative closure of pending applications, the amendments do not affect any applicant's ability to receive tax credits. Accordingly, there should be no impact to rural communities, small businesses, or micro-businesses.

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. THC 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. Comments will be accepted for 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY AND STATEMENT ON AUTHORITY. These amendments are proposed under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably effect the purposes of the Commission and the Texas Tax Code §171.909, which requires the Commission to adopt rules for the implementation of the rehabilitation tax credit program. The Commission interprets Texas Tax Code §171.909 as an authorization to administer the rehabilitation tax credit program, which includes the administrative closure of applications that are inactive due to applicant inaction.

Except as described herein, the proposed amended rule affects no other code, article, or statute.

§17.2. Review of Work on County Courthouses.

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

(A) Demolish--To remove, in whole or part. Demolition of historical or architectural integrity includes removal of historic architectural materials such as, but not limited to, materials in the following categories: site work, concrete, masonry, metals, carpentry, thermal and moisture protection, doors and windows, finishes, specialties, equipment, furnishings, special construction, conveying systems, mechanical and electrical.

(B) Sell--To give up (property) to another for money or other valuable consideration; this includes giving the property to avoid maintenance, repair, etc.

(C) Lease--To let a contract by which one conveys real estate, equipment, or facilities for a specified term and for a specified rent.

(D) Damage--To alter, in whole or part. Damage to historical or architectural integrity includes alterations of structural elements, decorative details, fixtures, and other material.

(E) Integrity--Refers to the physical condition and therefore the capacity of the resource to convey a sense of time and place or historic identity. Integrity is a quality that applies to location, design, setting, materials, and workmanship. It refers to the clarity of the historic identity possessed by a resource. In terms of architectural design, to have integrity means that a building still possesses much of its mass, scale, decoration, and so on, of either the period in which it was conceived and built, or the period in which it was adapted to a later style which has validity in its own rights as an expression of historical character or development. The question of whether or not a building possesses integrity is a question of the building's retention of sufficient fabric to be identifiable as a historic resource. For a building to possess integrity, its principal features must be sufficiently intact for its historic identity to be apparent. A building that is significant because of its historic association(s) must retain sufficient physical integrity to convey such association(s).

(F) Courthouse--The principal building(s) which houses county government offices and courts and its (their) surrounding site(s), including the courthouse square and its associated site features, such as hardscape, fences, lampposts and monuments[~~(typically the courthouse square)~~].

(G) Hardscape--Features built into a landscape made of hard materials such as wood, stone or concrete, such as but not limited to paved areas, roads, driveways, pools, fountains, concrete walkways, stairways, culverts or walls.

(H) Monuments--Includes markers and structures erected to commemorate or designate the importance of an event, person, or place, which may or may not be located at the sites they commemorate. Included in this category are certain markers erected by the commission and county historical commissions, and markers and statuary located on public grounds such as courthouse squares, parks, and the Capitol grounds.

(I) [~~(G)~~] Ordinary maintenance and repairs--Work performed to architectural or site materials which does not cause removal or alteration or concealment of that material.

(2) Procedure.

(A) Notice of alterations to county courthouse.

(i) A county may not demolish, sell, lease, or damage the historical or architectural integrity of any building that serves or has served as a county courthouse without notifying the commission of the intended action at least six months before the date on which it acts. Any alteration to the historical or architectural integrity of the exterior or interior requires notice to the commission.

(ii) If the commission determines that a courthouse has historical significance worthy of preservation, the commission shall notify the commissioners court of the county of that fact not later than the 30th day after the date on which the commission received notice from the county. A county may not demolish, sell, lease, or damage the historical or architectural integrity of a courthouse before the 180th day after the date on which it received notice from the commission. The commission shall cooperate with any interested person during the 180-day period to preserve the historical integrity of the courthouse.

(iii) A county proceeding with alterations to its courthouse in violation of Texas Government Code, §442.008 and this section may be subject to civil penalties under Texas Government Code, §442.011.

(iv) the relocation or removal of monuments from a courthouse square is governed by §21.13 of this title (relating to Removal of Markers and Monuments).

(B) Notice from the county to the commission. At least six months prior to the proposed work on a county courthouse, a letter from the county judge briefly describing the project should be submitted to the commission, along with construction documents, sketches or drawings which adequately describe the full scope of project work and photographs of the areas affected by the proposed changes.

(C) The commission will consider the opinions of interested parties with regard to the preservation of the courthouse per Texas Government Code, §442.008(b).

(D) Notice from the commission to the commissioner's court of the county. Written notice of the commission's determination regarding the historical significance of a courthouse for which work is proposed shall include comments pursuant to a review of the proposed work by the commission. Comments shall be made based on the Secretary of the Interior's Standards for the Treatment of Historic Properties 1992 or latest edition, which are summarized in clauses (i) - (iii) of this subparagraph:

(i) Definitions for historic preservation project treatment.

(I) Preservation is defined as the act or process of applying measures necessary to sustain the existing form, integrity, and materials of an historic property. Work, including preliminary measures to protect and stabilize the property, generally focuses upon the ongoing maintenance and repair of historic materials and features rather than extensive replacement and new construction. New exterior additions are not within the scope of this treatment; however, the limited and sensitive upgrading of mechanical, electrical, and plumbing systems and other code-required work to make properties functional is appropriate within a preservation project.

(II) Rehabilitation is defined as the act or process of making possible a compatible use for a property through repair, alterations, and additions while preserving those portions or features which convey its historical, cultural, or architectural values.

(III) Restoration is defined as the act or process of accurately depicting the form, features, and character of a property as it appeared at a particular period of time by means of the removal of features from other periods in its history and reconstruction of missing features from the restoration period. The limited and sensitive upgrading of mechanical, electrical, and plumbing systems and other code-required work to make properties functional is appropriate within a restoration project.

(IV) Reconstruction is defined as the act or process of depicting, by means of new construction, the form features, and detailing of a non-surviving site, landscape, building, structure, or object for the purpose of replicating its appearance at a specific period of time and in its historic location.

(ii) General standards for historic preservation projects.

(I) A property shall be used as it was historically, or be given a new use that maximizes the retention of distinctive materials, features, spaces, and spatial relationships. Where a treatment and use have not been identified, a property shall be protected and, if necessary, stabilized until additional work may be undertaken.

(II) The historic character of a property shall be retained and preserved. The replacement of intact or repairable historic materials or alteration of features, spaces, and spatial relationships that characterize a property shall be avoided.

(III) Each property shall be recognized as a physical record of its time, place and use. Work needed to stabilize, consolidate, and conserve existing historic materials and features shall be physically and visually compatible, identifiable upon close inspection, and properly documented for future research.

(IV) Changes to a property that have acquired historic significance in their own right shall be retained and preserved.

(V) Distinctive materials, features, finishes, and construction techniques or examples of craftsmanship that characterize a property shall be preserved.

(VI) The existing condition of historic features shall be evaluated to determine the appropriate level of intervention needed. Where the severity of deterioration requires repair or limited replacement of a distinctive feature, the new material shall match the old in composition, design, color, and texture.

(VII) Chemical or physical treatments, if appropriate, shall be undertaken using the gentlest means possible. Treatments that cause damage to historic materials shall not be used.

(VIII) Archeological resources shall be protected and preserved in place to the extent possible. If such resources must be disturbed, mitigation measures shall be undertaken.

(iii) Specific standards for historic preservation projects. In conjunction with the eight general standards listed in clause (ii)(I) - (VIII) of this subparagraph, specific standards are to be used for each treatment type.

(I) Standards for rehabilitation.

(-a-) A property shall be used as it was historically or be given a new use that requires minimal change to its distinctive materials, features, spaces, and spatial relationships.

(-b-) The historic character of a property shall be retained and preserved. The removal of distinctive materials or alteration of features, spaces, and spatial relationships that characterize a property shall be avoided.

(-c-) Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or elements from other historic properties, shall not be undertaken.

(-d-) Changes to a property that have acquired historic significance in their own right shall be retained and preserved.

(-e-) Distinctive materials, features, finishes, and construction techniques or examples of craftsmanship that characterize a property shall be preserved.

(-f-) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and where possible, materials, replacement of missing features shall be substantiated by documentary and physical evidence.

(-g-) Chemical or physical treatments, if appropriate, shall be undertaken using the gentlest means possible. Treatments that cause damage to historic materials shall not be used.

(-h-) Archeological resources shall be protected and preserved in place to the extent possible. If such resources must be disturbed, mitigation measures shall be undertaken.

(-i-) New additions, exterior alterations, or related new construction shall not destroy historic materials, features, and spatial relationships that characterize the property. The new work shall be differentiated from the old and shall be compatible with the historic materials, features, size, scale and proportion, and massing to protect the integrity of the property and its environment.

(-j-) New additions and adjacent or related new construction shall be undertaken in such a manner that, if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

(II) Standards for restoration.

(-a-) A property shall be used as it was historically or be given a new use which reflects the property's restoration period.

(-b-) Materials and features from the restoration period shall be retained and preserved. The removal of materials or alteration of features, spaces, and spatial relationships that characterize the period shall not be undertaken.

(-c-) Each property shall be recognized as a physical record of its time, place and use. Work needed to stabilize, consolidate and conserve materials and features, from the restoration shall be physically and visually compatible, identifiable upon close inspection, and properly documented for future research.

(-d-) Materials, features, spaces, and finishes that characterize other historical periods shall be documented prior to their alteration or removal.

(-e-) Distinctive materials, features, finishes, and construction techniques or examples of craftsmanship that characterize the restoration period shall be preserved.

(-f-) Deteriorated features from the restoration period shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and, where possible, materials.

(-g-) Replacement of missing features from the restoration period shall be substantiated by documentary and physical evidence. A false sense of history shall not be created by adding conjectural features, features from other properties, or by combining features that never existed together historically.

(-h-) Chemical or physical treatments, if appropriate, shall be undertaken using the gentlest means possible. Treatments that cause damage to historic materials shall not be used.

(-i-) Archeological resources affected by a project shall be protected and preserved in place to the extent possible. If such resources must be disturbed, mitigation measures shall be undertaken.

(-j-) Designs that were never executed historically shall not be constructed.

(III) Standards for reconstruction.

(-a-) Reconstruction shall be used to depict vanished or non-surviving portions of a property when documentary and physical evidence is available to permit accurate reconstruction with minimal conjecture, and such reconstruction is essential to the public understanding of the property.

(-b-) Reconstruction of a landscape, building, structure, or object in its historic location shall be preceded by a thorough archeological investigation to identify and evaluate those features and artifacts which are essential to an accurate reconstruction. If such resources must be disturbed, mitigation measures shall be undertaken.

(-c-) Reconstruction shall include measures to preserve any remaining historic materials, features, and spatial relationships.

(-d-) Reconstruction shall be based on the accurate duplication of historic features and elements substantiated by documentary or physical evidence rather than on conjectural designs or the availability of different features from other historic properties. A reconstructed property shall re-create the appearance of the non-surviving historic property in materials, design, color, and texture.

(-e-) A reconstruction shall be clearly identified as a contemporary re-creation.

(-f-) Designs that were never executed historically shall not be constructed.

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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Mark Wolfe
Executive Director
Texas Historical Commission
Earliest possible date of adoption: December 13, 2020
For further information, please call: (512) 463-6100

CHAPTER 21. HISTORY PROGRAMS
SUBCHAPTER B. OFFICIAL TEXAS HISTORICAL MARKER PROGRAM

13 TAC §21.13

The Texas Historical Commission (Commission) proposes new §21.13, concerning historical marker and monument removal.

The new §21.13 provides a process for individuals, groups, and County Historical Commissions to request removal of Official Texas Historical Markers and monuments.

FISCAL NOTE. Mark Wolfe, Executive Director, has determined that for each of the first five-years the proposed amendments are in effect, there will not be a fiscal impact on state or local government as a result of enforcing or administering this new rule, as proposed.

PUBLIC BENEFIT/COST NOTE. Mr. Wolfe has also determined that for the first five-year period the amended rules are in effect, the public benefit will be the provision of a procedure through which the public may voice concern and request removal of historical markers and monuments erected by the State of Texas.

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 new section is in effect; therefore, no local employment impact statement is required under Texas Government Code, §§2001.022 and 2001.024(a)(6).

COSTS TO REGULATED PERSONS. The proposed new section does not impose a cost on regulated persons, including another state agency, a special district, or a local government

and, therefore, is 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 also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments and therefore no regulatory flexibility analysis, as specified in Texas Government Code §2006.002, is required.

GOVERNMENT GROWTH IMPACT STATEMENT. THC staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking, as specific in Texas Government Code, §2006.0221. 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 lead to an increase in fees paid to a state agency; will 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. THC 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. Comments will be accepted for 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY. These amendments are proposed under the authority of Texas Government Code §442.006, which directs the Commission to coordinate the state historical marker program; Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission; Texas Government Code §442.006(h), which requires the Commission to adopt rules for the historical marker program; Texas Government Code §442.0045, which reserves the removal of Official Texas Historical Markers to the Commission; and §§191.097 of title 9 of the Natural Resources Code, which provides for removal of State Antiquities Landmark designation.

CROSS REFERENCE TO STATUTE. No other statutes, articles, or codes are affected by these amendments.

§21.13. Removal of Markers and Monuments.

(a) Any individual, group, or county historical commission (CHC) may request removal of an Official Texas Historical Marker ("marker"), as defined in §21.3 of this title (relating to Definitions), or a monument ("monument") within the Commission's jurisdiction, as defined in §26.3 of this title (relating to Definitions).

(b) With the exception of monuments that are State Antiquities Landmarks or included within the boundaries of State Antiquities Landmarks, which shall follow procedures as described in §191.097 and §191.098 of Title 9 of the Natural Resources Code as well as applicable rules adopted thereunder, requests for removal of a historical marker or monument shall include:

(1) The name and contact information for the requesting individual, group, or CHC;

(2) The name and location of the marker or monument for which removal is requested;

(3) Justification for removal of the marker or monument;

(4) Narrative history and photographs of the marker or monument;

(5) Written owner consent for removal from the landowner for sites located on private land;

(6) A plan explaining how the marker or monument will be removed in such a way as to protect its condition and be delivered to a location approved by THC.

(c) Marker and monument removal requests shall be submitted to the Commission at 1511 Colorado St., Austin, TX 78701; by mail to P.O. Box 12276, Austin, TX 78711; or by email to thc@thc.texas.gov. The Commission will send a copy of the request and supporting materials to

(d) The County Historical Commission (CHC) for the county in which the marker or monument is located, return receipt requested. In the absence of a formally-established CHC, a copy will be submitted to the county judge, return receipt requested.

(e) The Commission's History Programs Committee ("Committee") shall consider requests for removal of markers and monuments that are not State Antiquities Landmarks or located within the boundaries of a State Antiquities Landmarks, including those also governed by §17.2 of this title (relating to Review of Work on County Courthouses) and §442.008(a) of Title 4 of the Government Code. A request shall be considered at the Committee's next scheduled meeting, provided that such meeting happens at least 20 days after the removal request is received by the Commission. If fewer than 20 days separates the receipt of the request and the next Committee meeting then the request shall be considered at the subsequent scheduled meeting.

(f) The Committee may choose to take public testimony on the request. If public testimony is invited, such testimony may be limited by the Committee chair to a period of time allocated per speaker.

(g) Upon consideration of a removal request, the Committee shall make a recommendation to the Commission on whether to approve or deny the removal request. The recommendation of the Committee shall be placed on the agenda of the full Commission meeting immediately following the Committee meeting for approval or denial.

(h) If the request is approved by the Commission, the person who submitted the removal request must arrange for removal of the marker or monument in such a way as to protect its condition, and deliver it to a location approved by THC at the requestor's expense.

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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Mark Wolfe
Executive Director
Texas Historical Commission
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For further information, please call: (512) 463-6100

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CHAPTER 26. PRACTICE AND PROCEDURE

SUBCHAPTER D. HISTORIC BUILDINGS AND STRUCTURES

13 TAC §26.21

The Texas Historical Commission (Commission) proposes amendments to §26.21, relating to the Issuance and Restriction of Historic Buildings and Structures Permits, Title 13, Part 2, Chapter 26 Subchapter D of the Texas Administrative Code.

Section 26.21 describes the process for issuance and restrictions of Historic Buildings and Structures Permits.

The proposed amendment clarifies that Historic Building and Structure permit applications may be sent to both the Antiquities Advisory Board (AAB) and the Commission following review by staff, will clarify the process. In addition, the amendment lengthens the amount of time the board must receive the application prior to review, while striking a provision for failure to respond in 60 days now that permit issuance may be contingent on Commission approval at quarterly meetings.

FISCAL NOTE. Mark Wolfe, Executive Director, has determined that for each of the first five-years the proposed amendments are in effect, there will not be a fiscal impact on state or local government as a result of enforcing or administering these amendments, as proposed. The proposed amendment clarifies who may be required to review a permit and the number of days in which the applications needs to be submitted. Because the person reviewing and the required submission day does not ultimately affect whether the applicant may obtain the tax credit, there will be no impact on state of local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Wolfe 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 handling of applications.

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 new section is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022 and 2001.024(a)(6).

COSTS TO REGULATED PERSONS. The proposed new section does not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES. Mr. Wolfe has also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments and therefore no regulatory flexibility analysis, as specified in Texas Government Code §2006.002, is required. As the proposed amendments only change the number of days in which a permit is submitted and who reviews the permit application, the amendments do not affect any applicant's ability to receive a permit. Accordingly, there should be no impact to rural communities, small businesses, or micro-businesses.

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. THC 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. Comments will be accepted for 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY AND STATEMENT ON AUTHORITY. These amendments are proposed under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission, which grants the Commission the power to adopt rules to administer Chapter 26 of the Texas Government Code.

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

§26.21. Issuance and Restriction of Historic Buildings and Structures Permits.

(a) Issuance of permit. The commission shall review the permit application submitted pursuant to §26.20 of this title (relating to Application for Historic Buildings and Structures Permits) and may issue the permit, issue the permit with special conditions, request additional information for review, request a revised scope of work, or deny the permit application.

(1) Review by commission staff. Within 30 days of the receipt of a permit application, staff shall notify the applicant in writing that the permit application is complete and accepted for filing or that the permit application is incomplete and specify the additional information required for review, such as additional drawings, construction details, or product information. The commission will issue or deny the permit within 60 days of the receipt of a complete permit application, unless additional time is required for review by the Antiquities Advisory Board and/or the commission under paragraph (2) of this subsection. The commission will notify the permit applicant if more than 60 days is required to act on the application. Permits are issued by the commission and must be signed by the executive director, the director of the Division of Architecture, or a designated representative.

(2) Review by the Antiquities Advisory Board. The executive director may choose to submit the permit application to the

Antiquities Advisory Board for its consideration and potential recommendation to the commission for permitting. Permits that are denied by commission staff may be appealed by the applicant to the Antiquities Advisory Board. The board shall review such applications at its next scheduled meeting, provided it shall have a minimum of 30 [~~15~~] days to prepare for such review. Recommendations of the board shall be taken to the next scheduled meeting of the commission by the chair of the board or by one of the other commissioners who serve on the board for action thereon.

(3) The deadlines in this section may be extended for good cause. In the event a deadline is extended, the commission shall provide notice of the extension and the good cause to the applicant in writing. The applicant may complain directly to the executive director if the staff exceeds the established period for processing permits and may request a timely resolution of any dispute arising from the delay.

[~~(4) Failure to respond. If no response has been made by the commission within 60 days of receipt of any permit application, the permit shall be considered to be granted.~~]

(b) Terms and conditions. When a permit is issued, it will contain all standard and special terms and conditions governing the project work.

(c) Permit period. No permit will be issued for less than six months, nor more than ten years, but may be issued for any length of time within those limits as deemed necessary by the commission in consultation with the applicant and project architect.

(d) Transferal of permits. No permit issued by the commission will be assigned by the permittee in whole or in part to any other institution, museum, corporation, organization, or individual without the consent of the commission.

(e) Permit expiration. The expiration date is specified in each permit and is the date by which all project work must be complete, including submission of the required completion report and fulfillment of all terms and conditions of the permit. It is the responsibility of the permittee, project architect, and professional firm to meet any and all permit terms and conditions prior to the expiration date listed on the permit.

(1) Expiration notification. The permittee and project architect will be notified 60 days in advance of permit expiration.

(2) Expiration extension. The permittee or project architect must provide a written request to the commission if an extension of the final due date for completion of the permit is desired. The request must detail the reason(s) an extension is necessary and state when completion of the permit requirements is expected. The Division of Architecture (DoA) of the commission will review the extension request to determine whether an extension is warranted. Permit extensions will be issued by letter and may extend the permit completion due date once for no less six months and no more than ten years as deemed appropriate. Permit extensions requested for preparation of the completion report, following substantial completion of the permitted work, will be issued for no greater than nine months, unless authorized by the Antiquities Advisory Board. If an additional extension is subsequently requested, the DoA may issue the extension or request that the Antiquities Advisory Board review the request and make a recommendation to the commission regarding further extension. The commission may, by a majority vote of its members, approve or disapprove an additional extension of the final due date of an Antiquities Permit, provided that the following conditions are met:

(A) the permittee, project architect, and/or the professional firm listed on the permit must provide written documentation to the Antiquities Advisory Board and give an oral presentation justifying why an additional permit due-date extension is warranted; and

(B) justification for the additional extension must show that the extension is needed due to circumstances beyond the control of the permittee, project architect, or professional firm. Examples include, but are not limited to: funding problems or death of the project architect.

(f) Expiration responsibilities. Professional firms must ensure that a project architect is assigned to a permit at all times, until all obligations under the permit have been fulfilled, regardless of whether the permit is active or has expired. Expired permits are considered to be in default and will be reported to the Antiquities Advisory Board. Commission staff or the board may request that the permittee, project architect, and/or professional firm appear and give an oral presentation regarding the need for an extension pursuant to subsection (e)(2) of this section, or the board may pursue other remedies as allowed under §26.24 of this title (relating to Compliance with Rules for Historic Buildings and Structures Permits).

(g) Permit amendments. Proposed changes in the terms and conditions of the permit must be approved by the commission's executive director, the director of the DoA, or their designated representative. This includes changes in the permitted project plans and specifications that could affect the integrity of the structure, building, or site.

(h) Permit hold or cancellation. The commission may place on hold or cancel a Historic Buildings and Structures Permit pursuant to §26.24 of this title under the following circumstances:

(1) the death of the project architect;

(2) failure of the permit applicant to fully fund the permitted project work;

(3) project work undertaken does not comply with the terms, conditions and approved project documents under the permit; and/or

(4) violation of §26.24 of this title.

(i) Institutions of higher education. If an institution of higher education notifies the commission that it protests the terms of a permit granted to an institution of higher education under this section, the matter becomes a contested case under the provisions of the Administrative Procedure Act, Texas Government Code §2001.051, et seq. The institution of higher education must notify the commission of its protest within 30 days of its receipt of notice of the terms of the permit to initiate a contested case. The hearing officer and the commission will follow the procedures and take into account the criteria listed in Texas Natural Resources Code, §191.021(c). Weighing these criteria against the criteria specified in §26.20(b) of this title (relating to Standards for the Treatment of Historic Properties), the commission shall include a requirement in a permit only if the record before the committee establishes by clear and convincing evidence that such inclusion would be in the public interest.

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 November 2, 2020.

TRD-202004583

Mark Wolfe

Executive Director

Texas Historical Commission

Earliest possible date of adoption: December 13, 2020

For further information, please call: (512) 463-6100

SUBCHAPTER F. REMOVAL OF DESIGNATIONS

13 TAC §26.28

The Texas Historical Commission (Commission) proposes new Subchapter F and rule §26.28, related to removal of designations for privately or publicly owned landmarks, within Title 13, Part 2, Chapter 26 of the Texas Administrative Code.

Rule 26.28 creates a process for removal requests of State Antiquities Landmark designations by referral to the Antiquities Advisory Board and the Commission, with provisions for appropriate public notice and comment.

FISCAL NOTE. Mark Wolfe, Executive Director, has determined that for each of the first five years the proposed amendments are in effect, there will not be a fiscal impact on state or local government as a result of enforcing or administering the new rule as proposed. Because the proposed new rule only clarifies the administration of duties already authorized under sections of the State Antiquities Code, Texas Government Code, Health and Safety Code, and Transportation Code, there will be no impact on state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Wolfe 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 administrative procedures and exercise of authority.

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 new section is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022 and §2001.024(a)(6).

COSTS TO REGULATED PERSONS. The proposed new section does not impose a cost on regulated persons, including another state agency, a special district, or a local government and, therefore, is 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 also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing this new rule and therefore no regulatory flexibility analysis, as specified in Texas Government Code §2006.002, is required. The proposed new rule does not affect small businesses, micro-businesses, or rural communities because the new rule only clarifies the administrative procedures with which to carry out existing statutes.

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. Comments will be accepted for 30 days after publication in the *Texas Register*.

STATUTORY AUTHORITY AND STATEMENT ON AUTHORITY. This new rule is proposed under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of that chapter. This rule is also authorized under Texas Government Code §442.0045 (included in HB 1422 from the 86th Legislative Session to be effective September 1, 2019), which allows the Commission to delegate its authority to the executive director by rule or order.

Except as described herein, the proposed new rule affects no other code, article, or statute.

§26.28. Removal of Designations for Privately or Publicly Owned Landmarks.

(a) The public or private owner of property on which a landmark is designated pursuant to this Chapter may apply to the commission for removal of the landmark designation. The application must be submitted to the commission on a form approved by the commission, and the commission will determine whether the application is complete. The application shall indicate the basis for the property's original designation as an archeological site, shipwreck, cache or collection, historic building or structure, or any combination thereof, per the criteria for evaluation specified in §§26.10 - 26.12 of this title (relating to Archaeology) and §26.19 of this title (relating to Criteria for Evaluating Historic Buildings and Structures).

(1) If the owner of the property is a public entity, or if the property was, at the time of its designation, owned by a public entity, the applicant owner must also give notice of the application at their own expense in a newspaper of general circulation published in the city, town, or county in which the building, structure or site is located. If no newspaper of general circulation is published in the city, town, or county, the notice must be published in a newspaper of general circulation in an adjoining or neighboring county that is circulated in the county of the applicant's residence. The notice must:

(A) be printed in 12-point boldface type;

(B) include the exact location of the building or site; and

(C) include the name of the applicant/owner of the building or site.

(2) An original copy of the notice and an affidavit of publication signed by the newspaper's publisher must be submitted to the

commission with the application form. This notification must be received by the commission a minimum of 60 days prior to a regularly scheduled public meeting of the commission at which the application may be considered. All decisions regarding when an application will be considered by the commission will be made by the executive director of the commission.

(3) Applications must be accompanied by a deed or other legal description of the property at issue.

(b) Evaluation. The executive director of the commission will determine whether the application is complete and acceptable, whether the property is eligible for landmark designation removal, and when the application will be placed on the agenda of one of the commission's public meetings. In support of such determinations, the commission's staff will review the property according to the criteria for evaluation specified in §§26.10 - 26.12 and §26.19 of this title.

(c) Notification of nomination. If the commission's staff wishes to apply to remove a property's landmark status, it must give the owner a written notification that an application will be considered by the commission at one of its regularly scheduled public meetings. This notification must be received by the owner a minimum of 15 days prior to the regularly scheduled public meeting of the commission at which the application is scheduled to be presented. The commission must also send the owner site information on the proposed application.

(d) Presentation of applications. For landmarks eligible for designation removal, commission staff will evaluate the application and make a recommendation on whether removal is appropriate. Applications and staff recommendations will be presented to the Antiquities Advisory Board. Written notice of the time and location for presentation to the Board will be sent to the owner. The Antiquities Advisory Board will review each application, the staff recommendations related to each application, and any testimony given by the owner of the property and the public at large. The Antiquities Advisory Board will then determine by majority vote whether or not the landmark has any further historical, archeological, educational or scientific value, and whether or not it is of sufficient value to warrant its further classification as a landmark. The Board will then pass on its recommendations regarding each application to the commission. The chair of the Antiquities Advisory Board, or one of the other commission members who serve on the Antiquities Advisory Board, will present the application and recommendations to the commission at one of its public meetings.

(e) Comment period. No vote on removal of designation may be taken by the commission for a minimum period of 30 days after the Antiquities Advisory Board presents its recommendation to the commission, during which time all concerned parties may present information to the commission in support of or against the application. Comments may be submitted to the commission at any time prior to the vote described in subsection (f) of this section, including during public testimony at the commission meeting where the vote will occur. Comments should address the property's merits in light of the criteria specified in §§26.10 - 26.12 and §26.19 of this title. This 30 day comment period may be waived by the commission on application by the owner if the commission finds that good cause exists.

(f) Presentation of application and vote. Unless waived by the commission pursuant to subsection (e) of this section, after the minimum comment period of 30 days has elapsed, the commission may consider the application for removal of designation at one of its public meetings. The owners of the property will be informed of the agenda by written notice at least 15 calendar days in advance of the meeting date. Any person may present information on the application or testify at the meeting when the final decision is to be made. The commission will then determine by majority vote whether or not the landmark has any further historical, archeological, educational or scientific value, and whether or not it is of sufficient value to warrant its further classification as a landmark. The commission may vote to approve or to deny the request for removal of designation, to request further information, or to make any other decision.

(g) Notification of removal of designation. Written notification of the commission's decision regarding the removal of designation of a property as a landmark will be forwarded to the owner.

(h) Marker. If the commission approves an application to remove landmark designation, the owner must, within 30 days and at their own expense, remove any plaques or markers identifying the property as a State Antiquities Landmark, and deliver the same to the Texas Historical Commission at the address designated in the written notification provided by the commission.

(i) Recording. If the commission approves an application to remove landmark designation, it shall execute and record in the deed records of the county in which the site is located an instrument setting out the determination.

(j) Privileged or restricted information. The location of archeological sites is not public information. However, information on sites may be disclosed to qualified professionals as provided by Chapter 24 of this title (relating to Restricted Cultural Resource Information). In order to comply with Chapter 24, applications for removal of landmark status from designated archeological sites may vary from other applications submitted under this section.

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 November 2, 2020.

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Mark Wolfe
Executive Director
Texas Historical Commission
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For further information, please call: (512) 463-6100

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER EE. ACCREDITATION STATUS, STANDARDS, AND SANCTIONS

DIVISION 1. STATUS, STANDARDS, AND SANCTIONS

19 TAC §97.1055

The Texas Education Agency (TEA) proposes an amendment to §97.1055, concerning accreditation status. The proposed amendment would modify the rule to indicate that TEA will not issue accreditation statuses in the 2020-2021 academic year due to the lack of accountability ratings for the prior academic year and that, for purposes of issuing lowered accreditation

statuses based on consecutive years of performance, the 2019 and the 2021 academic accountability ratings are consecutive.

BACKGROUND INFORMATION AND JUSTIFICATION: Section 97.1055(a)(1) requires the commissioner to annually assign each school district an accreditation status. Subsections (a)(1)(A) and (b)-(e) set forth the requirements a school district must meet each school year to receive the status of Accredited and states how the accreditation statuses of Accredited-Warned, Accredited-Probation, and Not Accredited-Revoked are determined. In years in which the applicable academic rating cannot be issued to school districts due to extraordinary public health and safety circumstances, the commissioner does not have both applicable ratings necessary to issue an Accreditation status, as required. Due to extraordinary public health and safety circumstances related to COVID-19 and the closure of schools during the state's testing window, academic accountability ratings were not issued for the 2019-2020 school year. The 2020 rating label issued to all districts and campuses is Not Rated: Declared State of Disaster.

The proposed amendment to §97.1055 would amend subsection (a)(9) to clarify that the academic accountability ratings issued for the 2018-2019 and 2020-2021 school years are consecutive when determining multiple years of academically unacceptable or insufficient performance. In addition, subsection (a)(11) would be amended to clarify that accreditation statuses issued for the 2019-2020 and 2021-2022 school years are consecutive.

The proposed amendment would add new subsection (a)(12) to clarify how a rating of Not Rated-Data Integrity or similar rating is issued to a school district will affect accreditation. When such a rating is issued, the commissioner may withhold or withdraw a previously issued accreditation rating. In the following school year, the commissioner will issue an accreditation rating based on the applicable school years.

The proposed amendment would also add new subsection (a)(13) to clarify that when there is a rating in only the financial accountability rating system or the academic accountability rating system, the commissioner may elect whether to consider the available rating when assigning a future accreditation status. This will allow the commissioner flexibility to determine the proper accreditation status when the district has a chain of failures in both accountability systems and breaks the chain when only one rating is available.

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

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

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

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

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

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would limit and expand an existing regulation. The proposed amendment would limit the requirement that the agency issue accreditation statuses annually by enabling the agency not to assign statuses for the 2020-2021 school year due to the lack of academic accountability ratings for the 2019-2020 school year. The proposed amendment would expand the regulation by clarifying that academic accountability ratings for the 2018-2019 and 2020-2021 school years will be consecutive for the purposes of determining multiple years of unacceptable or insufficient academic performance and that the accreditation statuses issued for the 2019-2020 and 2021-2022 school years will be consecutive.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not 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 enforcing the proposal would be ensuring that school districts continue to receive an accreditation status on an annual basis and provide a clear process by which the agency will assign statuses in years in which the applicable ratings used to determine statuses are not issued. There is no anticipated economic cost to persons who are required to comply with the proposal.

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

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

PUBLIC COMMENTS: The public comment period on the proposal begins November 13, 2020, and ends December 14, 2020. 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 November 13, 2020. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §39.051, which requires the commissioner to determine accreditation statuses; and TEC, §39.052, which establishes the requirements for the commissioner to consider when determining accreditation statuses.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §39.051 and §39.052.

§97.1055. Accreditation Status.

(a) General provisions.

(1) Each year, the commissioner of education shall assign to each school district an accreditation status under Texas Education Code (TEC), §39.052(b) and (c). Each district shall be assigned a status defined as follows.

(A) Accredited. Accredited means the Texas Education Agency (TEA) recognizes the district as a public school of this state that:

(i) meets the standards determined by the commissioner under TEC, §39.052(b) and (c), and specified in §97.1059 of this title (relating to Standards for All Accreditation Sanction Determinations); and

(ii) is not currently assigned an accreditation status of Accredited-Warned or Accredited-Probation.

(B) Accredited-Warned. Accredited-Warned means the district exhibits deficiencies in performance, as specified in subsection (b) of this section, that, if not addressed, will lead to probation or revocation of its accreditation status.

(C) Accredited-Probation. Accredited-Probation means the district exhibits deficiencies in performance, as specified in subsection (c) of this section, that must be addressed to avoid revocation of its accreditation status.

(D) Not Accredited-Revoked. Not Accredited-Revoked means the TEA does not recognize the district as a Texas public school because the district's performance has failed to meet standards adopted by the commissioner under TEC, §39.052(b) and (c), and specified in subsection (d) of this section.

(2) The commissioner shall assign the accreditation status, as defined by this section, based on the performance of each school district. This section shall be construed and applied to achieve the purposes of TEC, §39.051 and §39.052, which are specified in §97.1053(a) of this title (relating to Purpose).

(3) The commissioner shall revoke the accreditation status of a district that fails to meet the standards specified in this section. In the event of revocation, the purposes of the TEC, §39.051 and §39.052, are to:

(A) inform the parents of students enrolled in the district, property owners in the district, general public, and policymakers that the TEA does not recognize the district as a Texas public school because the district's performance has failed to meet standards adopted by the commissioner under TEC, §39.052(b) and (c), and specified in subsection (d) of this section; and

(B) encourage other districts to improve their performance so as to retain their accreditation.

(4) Unless revised as a result of investigative activities by the commissioner as authorized under TEC, Chapter 39 or 39A, or other law, an accreditation status remains in effect until replaced by an accreditation status assigned for the next school year. An accreditation status shall be revised within the school year when circumstances require such revision in order to achieve the purposes specified in §97.1053(a) of this title.

(5) An accreditation status will be withheld pending completion of any appeal or review of an academic accountability rating, a financial accountability rating, or other determination by the commissioner, but only if such appeal or review is:

(A) specifically authorized by commissioner rule;

(B) timely requested under and in compliance with such rule; and

(C) applicable to the accreditation status under review.

(6) An accreditation status may be withheld pending completion of on-site or other investigative activities in order to achieve the purposes specified in §97.1053(a) of this title.

(7) The commissioner may withhold the assignment of an accreditation status to an open-enrollment charter school that is subject to TEC, §12.115(c) or §12.1141(d), or has otherwise surrendered its charter.

(8) An accreditation status may be raised or lowered based on the district's performance or may be lowered based on the performance of one or more campuses in the district that is below a standard required under this chapter or other applicable law.

(9) For purposes of determining multiple years of academically unacceptable or insufficient performance, the academic accountability ratings issued for the 2010-2011 school year and for the 2012-2013 school year are consecutive. An accreditation status assigned for the 2012-2013 school year shall be based on assigned academic accountability ratings for the applicable prior school years, as determined under subsections (b)-(d) of this section. Additionally, for purposes of determining multiple years of academically unacceptable or insufficient performance, the academic accountability ratings issued for the 2018-2019 school year and for the 2020-2021 school year are consecutive. An accreditation status assigned for the 2020-2021 school year shall be based on assigned academic and financial accountability ratings for the applicable prior school years, as determined under subsections (b)-(d) of this section.

(10) If a lowered accreditation status is assigned and a sanction is imposed, the subsequent issuance of a new accreditation status does not affect the commissioner's authority to proceed with the previously imposed sanction.

(11) Accreditation statuses are consecutive if they are not separated by an accreditation period in which the TEA assigned accreditation statuses to districts and charter schools generally. For example, if TEA does not assign accreditation statuses to districts and charter schools generally for the 2012-2013 school year, then the accreditation statuses issued for the 2011-2012 school year and for the 2013-2014 school year are consecutive. Additionally, if TEA does not assign accreditation statuses to districts and charter schools generally for the 2020-2021 school year, then the accreditation statuses issued for the 2019-2020 school year and for the 2021-2022 school year are consecutive.

(12) If a rating of Not Rated-Data Integrity or similar rating is issued to a school district, the commissioner may withhold the assignment of an accreditation status or withdraw a previously issued accreditation status. For purposes of determining multiple years of unacceptable or insufficient performance, the rating issued for the prior and subsequent school year are consecutive. The next accreditation status assigned shall be based on assigned accountability ratings for the applicable prior school years, as determined under subsections (b)-(d) of this section.

(13) When an accreditation status is withheld because either a financial or academic accountability rating is not available or the district is not rated due to data integrity, the commissioner may, but is not required to, consider the rating that is issued when assigning subse-

quent accreditation statuses in order to achieve the purposes specified in §97.1053(a) of this title. If the commissioner elects not to consider a rating, then the previous and subsequent rating is consecutive.

(b) Determination of Accredited-Warned status.

(1) A district shall be assigned Accredited-Warned status if the district is assigned:

(A) for two consecutive school years, an unacceptable academic accountability rating as indicated in the applicable year's accountability manual adopted under §97.1001 of this title (relating to Accountability Rating System);

(B) for two consecutive school years, a financial accountability rating of Substandard Achievement as indicated in the applicable year's financial accountability system manual adopted under §109.1001 of this title (relating to Financial Accountability Ratings);

(C) for two consecutive school years, any one of the ratings referenced in subparagraphs (A) and (B) of this paragraph; or

(D) for one school year, a combination of ratings referenced in both subparagraphs (A) and (B) of this paragraph.

(2) Notwithstanding the district's performance under paragraph (1) of this subsection, a district shall be assigned Accredited-Warned status if the commissioner determines this action is reasonably necessary to achieve the purposes of TEC, §39.051 and §39.052. Such action is generally required by the following circumstances:

(A) to an extent established under subsection (e) of this section, the district has failed to comply with requirements related to:

(i) the integrity of assessment or financial data used to measure performance under TEC, Chapter 39, 39A, or 48, and rules implementing those chapters;

(ii) the reporting of data under TEC, §48.008, and §61.1025 of this title (relating to Public Education Information Management System (PEIMS) Data and Reporting Standards);

(iii) other reports required by state or federal law or court order;

(iv) awarding high school graduation under TEC, §28.025; or

(v) any applicable requirement under TEC, §7.056(e)(3)(C)-(I); or

(B) after review and/or investigation under TEC, §39.056 or §39.057, the commissioner finds:

(i) the district's programs monitored under §97.1005 of this title (relating to Results Driven Accountability [~~Performance-Based Monitoring Analysis System~~]) exhibit serious or persistent deficiencies that, if not addressed, may lead to probation or revocation of the district's accreditation; or

(ii) the district otherwise exhibits serious or persistent deficiencies that, if not addressed, may lead to probation or revocation of the district's accreditation.

(3) Notwithstanding paragraph (2) of this subsection, a district shall be assigned Accredited-Warned status if the commissioner determines this action is reasonably necessary to achieve the purposes of TEC, §39.051 and §39.052.

(c) Determination of Accredited-Probation status.

(1) A district shall be assigned Accredited-Probation status if the district is assigned:

(A) for three consecutive school years, an unacceptable academic accountability rating as indicated in the applicable year's accountability manual adopted under §97.1001 of this title;

(B) for three consecutive school years, a financial accountability rating of Substandard Achievement as indicated in the applicable year's financial accountability system manual adopted under §109.1001 of this title;

(C) for three consecutive school years, any one of the ratings referenced in subparagraphs (A) and (B) of this paragraph; or

(D) for two consecutive school years, a combination of ratings referenced in both subparagraphs (A) and (B) of this paragraph.

(2) Notwithstanding the district's performance under paragraph (1) of this subsection, a district shall be assigned Accredited-Probation status if the commissioner determines this action is reasonably necessary to achieve the purposes of TEC, §39.051 and §39.052. Such action is generally required by the following circumstances:

(A) to an extent established under subsection (e) of this section, the district has failed to comply with requirements related to:

(i) the integrity of assessment or financial data used to measure performance under TEC, Chapter 39, 39A, or 48, and rules implementing those chapters;

(ii) the reporting of data under TEC, §48.008, and §61.1025 of this title;

(iii) other reports required by state or federal law or court order;

(iv) awarding high school graduation under TEC, §28.025; or

(v) any applicable requirement under TEC, §7.056(e)(3)(C)-(I); or

(B) after review and/or investigation under TEC, §39.056 or §39.057, the commissioner finds:

(i) the district's programs monitored under §97.1005 of this title exhibit serious or persistent deficiencies that, if not addressed, may lead to revocation of the district's accreditation; or

(ii) the district otherwise exhibits serious or persistent deficiencies that, if not addressed, may lead to revocation of the district's accreditation.

(3) Notwithstanding paragraph (2) of this subsection, a district shall be assigned Accredited-Probation status if the commissioner determines this action is reasonably necessary to achieve the purposes of TEC, §39.051 and §39.052.

(d) Determination of Not Accredited-Revoked status; Revocation of accreditation.

(1) The accreditation of a district shall be revoked if the district is assigned:

(A) for four consecutive school years, an unacceptable academic accountability rating as indicated in the applicable year's accountability manual adopted under §97.1001 of this title;

(B) for four consecutive school years, a financial accountability rating of Substandard Achievement as indicated in the applicable year's financial accountability system manual adopted under §109.1001 of this title;

(C) for four consecutive school years, any one of the ratings referenced in subparagraphs (A) and (B) of this paragraph; or

(D) for three consecutive school years, a combination of ratings referenced in both subparagraphs (A) and (B) of this paragraph.

(2) Notwithstanding paragraph (1) of this subsection, the commissioner may abate the assignment of a Not Accredited-Revoked status, issue another accreditation status, or elect to appoint a board of managers to govern the district in lieu of revoking the district's accreditation if the commissioner determines that revocation of the district's accreditation is not reasonably necessary to achieve the purposes of TEC, §39.051 and §39.052.

(3) Notwithstanding this section, if the commissioner appoints a board of managers under paragraph (2) of this subsection or as a result of a special accreditation investigation, the commissioner shall assign the district accreditation statuses during the period of the appointment of the board of managers as follows.

(A) In the school year following the appointment of the board of managers, the commissioner shall assign the district an accreditation status of Accredited.

(B) In the school years following the issuance of the accreditation rating under subparagraph (A) of this paragraph, the commissioner shall assign the accreditation status as provided by subsections (a)-(d) of this section. However, the commissioner shall not consider any academic rating that was issued for a school year in which the district was operated, in whole or in part, by the suspended board of trustees. The commissioner shall also not consider any financial accountability rating that was issued based on financial data from a fiscal year in which the district was operated, in whole or in part, by the suspended board of trustees. Notwithstanding this provision, the commissioner may consider academic or financial ratings attributable to performance that occurred in a school year in which the district was operated, in whole or in part, by the suspended board of trustees if the commissioner, in his sole discretion, determines such consideration is necessary to achieve the purposes of TEC, §39.051 and §39.052.

(C) For any district subject to this paragraph, the commissioner may lower the district's accreditation rating to Not Accredited-Revoked at any time if the commissioner determines that the district is not making acceptable progress to correct its academic or financial performance and that closure and annexation is necessary to achieve the purposes of TEC, §39.051 and §39.052, unless the district has earned an Accredited status absent the application of subparagraph (A) or (B) of this paragraph.

(D) For purposes of this subsection, the period of appointment of the board of managers includes any school year in which any member of the board of managers serves, including the school year during which the appointment of the board of managers expires.

(4) A district shall have its accreditation revoked if, notwithstanding its performance under paragraph (1) of this subsection, the commissioner determines this action is reasonably necessary to achieve the purposes of TEC, §39.051 and §39.052. Such action is generally required by the following circumstances:

(A) to an extent established under subsection (e) of this section, the district has failed to comply with requirements related to:

(i) the integrity of assessment or financial data used to measure performance under TEC, Chapter 39, 39A, or 48, and rules implementing those chapters;

(ii) the reporting of data under TEC, §48.008, and §61.1025 of this title;

(iii) other reports required by state or federal law or court order;

(iv) awarding high school graduation under TEC, §28.025; or

(v) any applicable requirement under TEC, §7.056(e)(3)(C)-(I); or

(B) after review and/or investigation under TEC, §39.056 or §39.057, the commissioner finds:

(i) the district's programs monitored under §97.1005 of this title exhibit serious or persistent deficiencies that require revocation of the district's accreditation; or

(ii) the district otherwise exhibits serious or persistent deficiencies that require revocation of the district's accreditation.

(5) Notwithstanding paragraph (3) of this subsection, a district's accreditation shall be revoked if the commissioner determines this action is reasonably necessary to achieve the purposes of TEC, §39.051 and §39.052.

(6) The commissioner's decision to revoke a district's accreditation may be reviewed under Chapter 157, Subchapter EE, of this title (relating to Informal Review, Formal Review, and Review by State Office of Administrative Hearings). If, after review, the decision is sustained, the commissioner shall appoint a management team or board of managers to bring to closure the district's operation of the public school.

(7) Issuance of an accreditation status of Not Accredited-Revoked does not invalidate a diploma awarded, course credit earned, or grade promotion granted by a school district before the effective date of the annexation of the district.

(e) Legal compliance. In addition to the district's performance as measured by ratings under §97.1001 and §109.1001 of this title, the accreditation status of a district is determined by its compliance with the statutes and rules specified in TEC, §39.052(b)(2). Notwithstanding satisfactory or above satisfactory performance on other measures, a district's accreditation status may be assigned based on its legal compliance alone, to the extent the commissioner determines necessary. In making this determination, the commissioner:

(1) shall assign the accreditation status that is reasonably calculated to accomplish the applicable provisions specified in §97.1053(a) of this title;

(2) may impose, but is not required to impose, an accreditation sanction under this subchapter in addition to assigning a status under paragraph (1) of this subsection; and

(3) shall lower the status assigned and/or impose additional accreditation sanctions as necessary to achieve compliance with the statutes and rules specified in TEC, §39.052(b)(2).

(f) Required notification of Accredited-Warned, Accredited-Probation, or Not Accredited-Revoked status.

(1) A district assigned an accreditation status of Accredited-Warned, Accredited-Probation, or Not Accredited-Revoked shall notify the parents of students enrolled in the district and property owners in the district as specified by this subsection.

(2) The district's notice must contain information about the accreditation status, the implications of such status, and the steps the district is taking to address the areas of deficiency identified by the commissioner. The district's notice shall use the format and language determined by the commissioner.

(3) Notice under this subsection must:

(A) not later than 30 calendar days after the accreditation status is assigned, appear on the home page of the district's website,

with a link to the notification required by paragraph (2) of this subsection, and remain until the district is assigned the Accredited status; and

(B) appear in a newspaper of general circulation, as defined in §97.1051 of this title (relating to Definitions), in the district for three consecutive days as follows:

(i) from Sunday through Tuesday of the second week following assignment of the status; or

(ii) if the newspaper is not published from Sunday through Tuesday, then for three consecutive issues of the newspaper beginning the second week following assignment of the status; or

(C) not later than 30 calendar days after the status is assigned, be sent by first class mail addressed individually to each parent of a student enrolled in the district and each property owner in the district; or

(D) not later than 30 calendar days after the status is assigned, be presented as a discussion item in a public meeting of the board of trustees conducted at a time and location that allows parents of students enrolled in the district and property owners in the district to attend and provide public comment.

(4) A district required to act under this subsection shall send the following to the TEA via certified mail, return receipt requested:

(A) the universal resource locator (URL) for the link required by paragraph (3)(A) of this subsection; and

(B) copies of the notice required by paragraph (3)(B) of this subsection showing dates of publication, or a paid invoice showing the notice content and its dates of publication; or

(C) copies of the notice required by paragraph (3)(C) of this subsection and copies of all mailing lists and postage receipts; or

(D) copies of the notice required by paragraph (3)(D) of this subsection and copies of the board of trustees meeting notice and minutes for the board meeting in which the notice was presented and publicly discussed.

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 November 2, 2020.

TRD-202004569
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: December 13, 2020
For further information, please call: (512) 457-1497

TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 170. PRESCRIPTION OF CONTROLLED SUBSTANCES

SUBCHAPTER D. ELECTRONIC PRESCRIBING OF CONTROLLED SUBSTANCES

22 TAC §170.10

The Texas Medical Board (Board) proposes new Subchapter D, of 22 TAC Chapter 170 entitled Electronic Prescribing of Controlled Substances, and new §170.10, Electronic Prescribing of Controlled Substances.

New §170.10 proposes to outline the process and circumstances in which a physician may obtain a waiver from controlled substance e-prescribing requirements, in accordance with Texas Health and Safety Code §481.0756, as set forth by H.B. 2174 (86th Leg. (2019)).

Scott Freshour, General Counsel for the Texas Medical Board, has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the proposed amendments will be to clarify the process and circumstances in which a physician may obtain a waiver from controlled substance e-prescribing requirements consistent with rules proposed by the Texas Pharmacy Board in the October 2, 2020 Texas Register issue, in compliance with the statutory mandate under Section 481.0756 of the Texas Health and Safety Code.

Mr. Freshour has also determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal impact or effect on government growth as a result of enforcing the proposed amendments.

Mr. Freshour has also determined that for the first five-year period the proposed amendments are in effect there will be no probable economic cost to individuals required to comply with the proposed amendments.

Pursuant to Texas Government Code §2006.002, the agency provides the following economic impact statement for the proposed rule amendments and has determined that for each year of the first five years the proposed amendments will be in effect, there will be no effect on small businesses, micro businesses, or rural communities. The agency has considered alternative methods of achieving the purpose of the proposed rule amendments and found none.

Pursuant to Texas Government Code §2001.024(a)(4), Mr. Freshour certifies that this proposal has been reviewed and the agency has determined that for each year of the first five years the proposed amendments are in effect:

(1) there will be no additional estimated cost to the state or to local governments expected as a result of enforcing or administering the proposed amendments;

(2) there will be no estimated reductions in costs to the state or to local governments as a result of enforcing or administering the proposed amendments;

(3) there will be no estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the proposed amendments; and

(4) there will be no foreseeable implications relating to cost or revenues of the state or local governments with regard to enforcing or administering the proposed amendments.

Pursuant to Texas Government Code §2001.024(a)(6) and §2001.022, the agency has determined that for each year of the

first five years the proposed amendments will be in effect, there will be no effect on local economy and local employment.

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

(1) The proposed amendments will not create or eliminate a government program.

(2) Implementation of the proposed amendments will not require the creation of new employee positions or the elimination of existing employee positions.

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

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

(5) The proposed amendments will create a new regulation.

(6) The proposed amendments will not expand, limit or repeal an existing regulation as described above.

(7) The proposed amendments will not increase the number of individuals subject to the rule's applicability.

(8) The proposed amendments will not positively or adversely affect this state's economy.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The new rule is proposed under the authority of Texas Health and Safety Code §481.0756, as set forth by H.B. 2174 (86th Leg. (2019)). The new rule is further authorized under Texas Occupations Code. §153.001.

No other statutes, articles or codes are affected by this proposal.

§170.10. Electronic Prescribing of Controlled Substances.

(a) A physician shall comply with all federal and state laws relating to prescribing of controlled substances in Texas, including requirements concerning electronic prescribing under Code of Federal Regulations, Title 21, Part 1311, and Texas Health and Safety Code, §§481.074 - 481.075.

(b) A prescription for a controlled substance is not required to be issued electronically and may be issued in writing if the prescription is issued:

(1) in circumstances in which electronic prescribing is not available due to temporary technological or electronic failure; or

(2) by a physician or physician's delegate to be dispensed by a pharmacy located outside this state.

(c) A physician may apply for a waiver from the electronic prescribing requirement by:

(1) submitting a waiver request and providing required information using a form approved by the Board; and

(2) demonstrating circumstances necessitating a waiver from the requirement, including:

(A) economic hardship, as determined by the Board on a physician-by-physician basis, taking into account factors including:

(i) any special situational factors affecting either the cost of compliance or ability to comply;

(ii) the likely impact of compliance on profitability or viability; and

(iii) the availability of measures that would mitigate the economic impact of compliance;

(B) technological limitations not reasonably within the control of the physician; or

(C) other exceptional circumstances demonstrated by the physician.

(3) A waiver may be issued to a physician for a period of one year as specified under Section 481.0756(f) of the Texas Controlled Substances Act. A waiver shall expire one calendar year from the date the waiver is issued. A physician may reapply for a subsequent waiver not earlier than the 30th day before the date the waiver expires if the circumstances that necessitated the waiver continue.

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 30, 2020.

TRD-202004562
Scott Freshour
General Counsel
Texas Medical Board
Earliest possible date of adoption: December 13, 2020
For further information, please call: (512) 305-7016

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PART 34. TEXAS STATE BOARD OF SOCIAL WORKER EXAMINERS

CHAPTER 781. SOCIAL WORKER LICENSURE
SUBCHAPTER C. APPLICATION AND LICENSING

22 TAC §781.420

The Texas Behavioral Health Executive Council proposes new §781.420, relating to Licensing Persons with Criminal Convictions.

Overview and Explanation of the Proposed Rule. The proposed rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507.

If a rule will pertain to the qualifications necessary to obtain a license then the rule must first be proposed to the Executive Council by the applicable board for the profession before the Executive Council may propose or adopt such a rule, see §507.153

of the Tex. Occ. Code. The proposed amendment pertains to licensing persons with criminal convictions as social workers; therefore, this rule is covered by §507.153 of the Tex. Occ. Code.

The Texas State Board of Social Worker Examiners, in accordance with §505.2015 of the Tex. Occ. Code, previously voted and, by a majority, approved to propose this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Tex. Occ. Code and may propose this rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

In accordance with §505.2015 of the Tex. Occ. Code the Board previously voted and, by a majority, approved to propose this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also proposes this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been

proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may propose this rule.

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

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

§781.420. Licensing of Persons with Criminal Convictions.

The following felonies and misdemeanors directly relate to the duties and responsibilities of a licensee:

(1) offenses listed in Article 42A.054 of the Code of Criminal Procedure;

(2) a sexually violent offense, as defined by Article 62.001 of the Code of Criminal Procedure;

(3) any felony offense wherein the judgment reflects an affirmative finding regarding the use or exhibition of a deadly weapon;

(4) any criminal violation of Chapter 505 (Social Work Practice Act) of the Occupations Code;

(5) any criminal violation of Chapter 35 (Insurance Fraud) or Chapter 35A (Medicaid Fraud) of the Penal Code;

(6) any criminal violation involving a federal health care program, including 42 USC Section 1320a-7b (Criminal penalties for acts involving Federal health care programs);

(7) any offense involving the failure to report abuse or neglect;

(8) any state or federal offense not otherwise listed herein, committed by a licensee while engaged in the practice of social work;

(9) any criminal violation of Section 22.041 (abandoning or endangering a child) of the Penal Code;

(10) any criminal violation of Section 21.15 (invasive visual recording) of the Penal Code;

(11) any criminal violation of Section 43.26 (possession of child pornography) of the Penal Code;

(12) any criminal violation of Section 22.04 (injury to a child, elderly individual, or disabled individual) of the Penal Code;

(13) three or more drug or alcohol related convictions within the last 10 years, evidencing possible addiction that will have an effect on the licensee's ability to provide competent services; and

(14) any attempt, solicitation, or conspiracy to commit an offense listed herein.

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 30, 2020.

TRD-202004541

Darrell D. Spinks

Executive Director

Texas State Board of Social Worker Examiners

Earliest possible date of adoption: December 13, 2020

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

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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 112. SCOPE OF LIABILITY FOR COMPENSATION

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) proposes to amend 28 TAC §§112.101, 112.102, 112.203, 112.301, and 112.401 concerning the scope of liability for compensation. These proposed amendments will conform DWC's rules to statutory changes made by House Bill 1665, 86th Legislature, Regular Session (2019).

EXPLANATION. DWC proposes to delete the headings for Subchapters B, C, D, and E in Chapter 112 to simplify how the rules are organized and make them easier to access and more-user friendly. Only the headings used for Subchapters B, C, D, and E will be deleted. The sections in Subchapters B, C, D, and E will not be deleted.

Section 112.101 addresses Agreement Regarding Workers' Compensation Insurance Coverage Between General Contractors and Subcontractors. This proposal amends §112.101(a), (b), (c)(2), (d), and (e) to replace "shall" with "must." The proposal also amends §112.101(d) to add "insurance" before "carrier" and §112.101(e) to remove "the" before "Texas" and the comma after "Code." The proposal also amends the title of §112.101 to replace "Regarding" with "regarding" and "Between" with "between." These amendments are nonsubstantive but clarify the meaning of the rules and conform them to current agency style.

Section 112.102 addresses Agreement between Motor Carriers and Owner Operators. This proposal amends §112.102(b), (d), (e), and (f) to replace "shall" with "must." The proposal also amends §112.102(f) to remove "the" before "Texas," as well as "Workers' Compensation Act" and the comma after "§406.005." The proposal adds "Labor Code" after "Texas." These amendments are nonsubstantive but clarify the meaning of the rules and conform them to current agency style.

Section 112.203 addresses Exception to Application of Agreement To Affirm Independent Relationship for Certain Building and Construction Workers. This proposal amends §112.203(a) to remove "the Commission and" from the hiring contractor filing requirements. It is consistent with Labor Code changes in HB 1665, 86th Legislature, Regular Session (2019) that now require a copy of a subsequent hiring agreement, to which the joint agreement does not apply, to be filed with DWC only on DWC's request. This amendment is necessary to reflect DWC's intent that the agreement no longer must be filed with DWC. DWC also proposes amending §§112.203(b) and 112.203(d) to replace "Commission" with "division." These amendments are necessary to reflect DWC's current agency name and are con-

sistent with the amendments DWC made to Chapter 112 in 2018. The proposal also amends the title of §112.203 to replace "To" with "to." This amendment is nonsubstantive but conforms it to current agency style.

Section 112.301 addresses Labor Agent's Notification of Coverage. This proposal amends the title of §112.301 to "Labor Agent's Notification of Coverage for Certain Farm or Ranch Employees." This amendment adds clarity to the section title in the absence of subchapter titles.

Section 112.401 addresses Election of Coverage by Certain Professional Athletes. This proposal amends §112.401(e) to expand the acceptable ways to deliver the agreement or contract between a professional athlete and a franchise. The proposal amends §112.401(b) to replace "Texas Workers' Compensation Commission" with "Texas Department of Insurance, Division of Workers' Compensation" and §112.401(d) to replace "Commission" with "division." The proposal also amends the required language of the agreement or contract between a professional athlete and a franchise. These proposed amendments are nonsubstantive changes to DWC rules and are necessary to reflect the division's current name and conform this section to current agency style. The proposed amendments to the required language of the agreement or contract between a professional athlete and a franchise will be effective March 1, 2021.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Joseph McElrath, deputy commissioner of Business Process, 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.

Mr. McElrath 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, Mr. McElrath expects that administering the proposed amendments will have the public benefit of ensuring that DWC's rules conform to the Texas Labor Code.

Mr. McElrath expects that the proposed amendments will not increase the cost to comply with Labor Code §406.145 because they do not impose requirements beyond those in the statute. Labor Code §406.145 permits a hiring contractor and an independent subcontractor to enter into a joint agreement declaring the subcontractor an independent contractor, not an employee of the hiring contractor, for workers' compensation insurance purposes. HB 1665 amended §406.145(f) to remove the requirement that a hiring contractor and an independent contractor file the joint agreement with DWC. The bill also included a new requirement that a copy be sent to DWC only when requested. These amendments result in cost savings to system participants by removing existing reporting requirements.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. DWC 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. Instead, the proposed amendments result in cost savings to system participants, including small or micro-businesses, by removing existing reporting requirements. As a result, and in accordance with Government Code §2006.002(c), DWC is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. DWC has determined that this proposal imposes a possible cost on regulated entities. However, no additional rule amendments are required under Government Code §2001.0045 because proposed §112.203 is necessary to implement legislation. The proposed rule implements Labor Code §406.145 enacted by HB 1665. Although there may be some costs associated with proposed §112.401, DWC proposes that the amendments to the language of the agreement or contract between a professional athlete and a franchise be effective March 1, 2021, so that the franchises have the flexibility to implement the changes in a cost-effective way. No additional rule amendments are required under Government Code §2001.0045 because proposed §§112.301 and 112.401 reduce the burden and responsibilities these rules impose on the regulated entities.

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

- will not create or eliminate a government program;

- will not require the creation of new employee positions or the elimination of existing employee positions;

- will not require an increase or decrease in future legislative appropriations to the agency;

- will not require an increase or decrease in fees paid to the agency;

- will not create a new regulation;

- will 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 positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. DWC has determined that no private real property interests are affected by this proposal, and this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. The proposed amendments to §112.401(b) make stylistic changes to the required language of the agreement or contract between a professional athlete and a franchise. These proposed amendments are nonsubstantive changes to DWC rules. Further, DWC proposes that these amendments be effective March 1, 2021, so that the franchises have the flexibility to implement the changes in a cost-effective way. 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. DWC will consider any written comments on the proposal that DWC receives no later than 5:00 p.m., Central time, on December 14, 2020. Send your comments to RuleComments@tdi.texas.gov; or to Cynthia Guillen, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, Legal Services, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

To request a public hearing on the proposal, submit a request before the end of the comment period, and separate from any comments, to RuleComments@tdi.texas.gov; or to Cynthia Guillen, MS-4D, Texas Department of Insurance, Division of Workers'

Compensation, Legal Services, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. The request for public hearing must be separate from any comments and received by DWC no later than 5:00 p.m., Central time, on December 14, 2020. If DWC holds a public hearing, it will consider written and oral comments presented at the hearing.

28 TAC §112.101, §112.102

STATUTORY AUTHORITY. DWC proposes amended Subchapter B under Labor Code §402.00111, Relationship between Commissioner of Insurance and Commissioner of Workers' Compensation; Separation of Authority; Rulemaking; Labor Code §402.00116, Chief Executive; Labor Code §402.061, Adoption of Rules; Labor Code §406.122, Status as Employee; and Labor Code §406.123, Election to Provide Coverage; Administrative Violation.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation will exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation will administer and enforce this title, other Texas workers' compensation laws, and other laws granting jurisdiction or applying to DWC or the commissioner.

Labor Code §402.061 authorizes the commissioner to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

Labor Code §406.122 states that a subcontractor and the subcontractor's employees are not employees of a general contractor if the subcontractor and general contractor have entered into a written agreement where the subcontractor assumes the responsibilities of an employer. The section further provides that an owner operator and the owner operator's employees are not employees of a motor carrier if the owner operator and motor carrier have entered into an agreement where the owner operator assumes the responsibilities of an employer.

Labor Code §406.123 provides that a general contractor and a subcontractor may enter into certain agreements and requires the general contractor to file a copy of the agreement with their insurance carrier. The general contractor must file a copy with the division only if they are a certified self-insurer. The section further allows motor carriers and owner operators to enter into agreements where the motor carrier agrees to provide workers' compensation insurance to the owner operator.

CROSS-REFERENCE TO STATUTE. Sections 112.101 and 112.102 implement Labor Code §406.123, enacted by HB 7, 79th Legislature, Regular Session (2005).

§112.101. Agreement regarding [~~Regarding~~] Workers' Compensation Insurance Coverage between [~~Between~~] General Contractors and Subcontractors.

(a) An agreement between a general contractor and a subcontractor made in accordance with [~~the~~] Texas Labor Code[~~,~~] §406.123(a), (d), (e), or (l) must [~~shall~~]:

(1) - (6) (No change.)

(b) The workers' compensation insurance coverage provided by the general contractor under the agreement will [~~shall~~] take effect no sooner than the date [~~on which~~] the agreement was executed, and deductions for the premiums must [~~shall~~] not be made for coverage provided before [~~prior to~~] that date.

(c) If a person who is covered by a subcontractor agreement signed under this section is found to be an employee of the general contractor, the person:

(1) (No change.)

(2) must [~~shall~~] receive a refund from the general contractor for all amounts improperly deducted as premium.

(d) The general contractor must [~~shall~~] maintain the original and file a legible copy of the agreement with the general contractor's workers' compensation insurance carrier within 10 days of the date of execution. An agreement is not considered filed if it is illegible or incomplete. If a general contractor and subcontractor enter into a written agreement in which the subcontractor assumes the responsibilities of an employer as provided in [~~the~~] Texas Labor Code[~~,~~] §406.122(b), the general contractor must [~~shall~~] provide a copy of the agreement to its insurance carrier within 10 days of execution. After January 1, 1993, a general contractor who is a certified self-insurer must [~~shall~~] file a copy of the agreement with the division within 10 days of the date of execution. The filing must [~~Filing shall~~] be made in the form and manner prescribed by the division.

(e) The general contractor must [~~shall be required to~~] give the subcontractor's employees the notice required under [~~the~~] Texas Labor Code[~~,~~] §406.005 when such an agreement is made.

(f) (No change.)

§112.102. Agreements between Motor Carriers and Owner Operators.

(a) (No change.)

(b) An agreement made under subsection (a) of this section must [~~shall~~] be made at or before the time the contract for the work is made and must [~~shall~~]:

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

(c) (No change.)

(d) An agreement made under subsection (c) of this section must [~~shall~~] be made at or before the time the contract for the work is made and must [~~shall~~]:

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

(e) The workers' compensation insurance coverage provided by the motor carrier under the agreement must [shall] take effect no sooner than the date [~~on which~~] the agreement was executed, and deductions for the premiums must [~~shall~~] not be made for coverage provided before [~~prior to~~] that date.

(f) The motor carrier must [~~shall~~] be required to give the owner operator's employees the notice required under [~~the~~] Texas Labor Code [~~Workers' Compensation Act,~~] §406.005[~~,~~] when such an agreement is made.

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

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Kara Mace
Deputy Commissioner of Legal Services
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4703

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28 TAC §112.203

STATUTORY AUTHORITY. DWC proposes amended §112.203 under Labor Code §402.00111, Relationship between Commissioner of Insurance and Commissioner of Workers' Compensation; Separation of Authority; Rulemaking; Labor Code §402.00116, Chief Executive; Labor Code §402.061, Adoption of Rules; Labor Code §406.122, Status as Employee; Labor Code §406.123, Election to Provide Coverage; Administrative Violation; Labor Code §406.144, Election to Provide Coverage; Agreement; and Labor Code §406.145, Joint Agreement.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation will exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation will administer and enforce this title, other Texas workers' compensation laws, and other laws granting jurisdiction or applying to DWC or the commissioner.

Labor Code §402.061 authorizes the commissioner to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

Labor Code §406.122 states that a subcontractor and the subcontractor's employees are not employees of a general contractor if the subcontractor and general contractor have entered into a written agreement where the subcontractor assumes the responsibilities of an employer. The section further provides that an owner operator and the owner operator's employees are not employees of a motor carrier if the owner operator and motor carrier have entered into an agreement where the owner operator assumes the responsibilities of an employer.

Labor Code §406.123 provides that a general contractor and a subcontractor may enter into certain agreements and requires the general contractor to file a copy of the agreement with their insurance carrier. The general contractor must file a copy with the division only if they are a certified self-insurer. The section further allows motor carriers and owner operators to enter into agreements where the motor carrier agrees to provide workers' compensation insurance to the owner operator.

Labor Code §406.144 states a hiring contractor is not responsible for providing workers' compensation insurance coverage for an independent contractor unless the hiring contractor and independent contractor enter into an agreement under which the hiring contractor, for the purpose of providing workers' compensation insurance coverage, is the employer of the independent contractor.

Labor Code §406.145 permits a hiring contractor and an independent subcontractor to enter into a joint agreement declaring the subcontractor as an independent contractor and not an employee of the hiring contractor for workers' compensation purposes. The joint agreement applies to each hiring agreement between the parties until the first anniversary of its filling date unless a later hiring agreement expressly states the joint agreement does not apply.

CROSS-REFERENCE TO STATUTE. Section 112.203 implements Labor Code §406.145, enacted by HB 1665, 86th Legislature, Regular Session (2019).

§112.203. Exception to Application of Agreement to [~~To~~] Affirm Independent Relationship for Certain Building and Construction Workers.

(a) If a subsequent hiring agreement is made that expressly states that the joint statement made under §112.202 of this title (relating to Joint Agreement To Affirm Independent Relationship for Certain Building and Construction Workers) does not apply to that hiring agreement, the hiring contractor must [~~shall~~] maintain the original and file a legible copy of the agreement with [~~the Commission and~~] the hiring contractor's insurance carrier. Nothing in this section otherwise nullifies the joint statement as it applies to other hiring agreements made during the term of the joint statement.

(b) The notification must [~~shall~~] be filed in the form and manner prescribed by the division [~~Commission~~] and must [~~shall~~]:

(1) - (4) (No change.)

(c) If a person who is covered by an independent contractor agreement signed under this section is found to be an employee of the hiring contractor, the person:

(1) (No change.)

(2) must [~~shall~~] receive a refund from the hiring contractor for all amounts improperly deducted as premium.

(d) The notification [notice] must [~~shall~~] be provided in the form and manner prescribed by the division [~~Commission,~~] no later than 10 days from the date the subsequent hiring agreement was executed. An agreement is not considered filed if it is illegible or incomplete.

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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Kara Mace
Deputy Commissioner of Legal Services
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4703

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28 TAC §112.301

STATUTORY AUTHORITY. DWC proposes amended §112.301 under Labor Code §402.00111, Relationship between Commissioner of Insurance and Commissioner of Workers' Compensation; Separation of Authority; Rulemaking; Labor Code §402.00116, Chief Executive; Labor Code §402.061, Adoption of Rules; and Labor Code §406.163, Liability of Labor Agent; Joint and Several Liability.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation will exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation will administer and enforce this title, other Texas workers' compensation laws, and other laws granting jurisdiction or applying to DWC or the commissioner.

Labor Code §402.061 authorizes the commissioner to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

Labor Code §406.163 states that a labor agent must notify each person the agent contracts with whether the agent has workers' compensation insurance coverage. If the agent has workers' compensation insurance coverage, they must present evidence of the coverage to each person the agent contracts with.

CROSS-REFERENCE TO STATUTE. Section 112.301 implements Labor Code §406.163, enacted by HB 752, 73rd Legislature, Regular Session (1993).

§112.301. Labor Agent's Notification of Coverage to Certain Farm or Ranch Employees.

(a) A labor agent must [~~shall~~] notify each person [~~with whom~~] the labor agent contracts with to provide the services of migrant and seasonal workers whether or not the labor agent has workers' compensation insurance coverage.

(b) The notification must [~~shall~~] be in writing and must [~~shall~~] be given at the time the contract for the services of the migrant or seasonal workers is made. The notification must [~~shall~~] be signed and dated by both parties and each party must [~~shall~~] retain a copy of the notice.

(c) If the labor agent does have workers' compensation insurance coverage, the labor agent must [~~shall~~] present evidence of the workers' compensation insurance coverage to each person [~~with whom~~] the agent contracts with to provide the services of migrant and seasonal workers. The evidence of coverage must [shall] be in writing and must [~~shall~~] be presented at the time the notification of coverage is made. Each party must [~~shall~~] retain a copy of the evidence of coverage with the copy of the notice. A certificate of insurance is [~~shall be~~] considered adequate evidence of coverage.

(d) The notice and evidence of coverage, if applicable, must [~~shall~~] be given each time a labor agent makes a contract with a person to provide migrant or seasonal workers. Any notice and evidence of coverage provided for a prior contract between the parties is [~~shall be~~] considered insufficient to meet the requirements of this section.

(e) If coverage is terminated during the period of the contract for employment, the labor agent must [~~shall~~] notify:

(1) - (2) (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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28 TAC §112.401

STATUTORY AUTHORITY. DWC proposes amended §112.401 under Labor Code §402.00111, Relationship between Commissioner of Insurance and Commissioner of Workers' Compensation; Separation of Authority; Rulemaking; Labor Code §402.00116, Chief Executive; Labor Code §402.061, Adoption of Rules; and Labor Code §406.095, Certain Professional Athletes.

Labor Code §402.00111(a) states that, except as otherwise provided, the commissioner of workers' compensation will exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00116 provides that the commissioner of workers' compensation will administer and enforce this title, other Texas workers' compensation laws, and other laws granting jurisdiction or applying to DWC or the commissioner.

Labor Code §402.061 authorizes the commissioner to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

Labor Code §406.095 states a professional athlete employed under a contract for hire or a collective bargaining agreement, who sustains an injury in the course and scope of the athlete's employment, must elect to receive either the benefits available under this subtitle or the benefits under the contract or agreement. Labor Code §406.095(b) states the commissioner by rule will establish the procedures and requirements for an election under this section.

CROSS-REFERENCE TO STATUTE. Section 112.401 implements the Texas Workers' Compensation Act, Labor Code, Title 5, Subtitle A.

§112.401. Election of Coverage by Certain Professional Athletes.

(a) A professional athlete employed by a franchise with workers' compensation insurance coverage and subject to [~~the~~] Texas Labor Code[~~,~~] §406.095[~~,~~] must [~~shall~~] elect to receive either the benefits available under the Act or the equivalent benefits available under the athlete's contract or collective bargaining agreement. The election must [~~shall~~] be made not later than the 15th day after the athlete sustains an injury in the course and scope of employment. If the athlete fails to make an election, the athlete will be presumed to have elected the option which provides the highest benefits.

(b) When a contract is signed by a professional athlete, the employer must [~~shall~~] give the athlete a copy of the following statement: "(Name of employer) has workers' compensation coverage from (name of insurance carrier). If the benefits available to you under your contract and any applicable collective bargaining agreement are equivalent to or greater than those available to you under [~~the~~] Texas Labor Code[~~,~~] §406.095, you are required to elect whether to receive the benefits available to you under the Act or the benefits available to you under your contract and any applicable collective bargaining agreement. You must make this election no later than 15 days after sustaining an injury. If you elect to receive the benefits available to you under your contract and any applicable collective bargaining agreement, you cannot obtain workers' compensation income or medical benefits if you are injured. You can get more information about your workers' compensation rights and the benefits available to you under the Act from any office of the Texas Department of Insurance, Division of Workers' Compensation, [~~Commission,~~] or by calling 1-800-252-7031."

(c) The election must [~~shall~~] be in writing and must [~~shall~~]:

(1) - (3) (No change.)

(d) If the athlete elects to receive the benefits available under the Act, a legible copy of the election must [~~shall~~] be provided to the division [~~Commission~~] in the form and manner prescribed by the division [~~Commission,~~] within 10 days of the date of execution. A copy must also be provided to the franchise's workers' compensation insurance carrier within 10 days of the date of execution. The franchise must [~~shall~~] maintain the original election and provide a copy to the athlete.

(e) If the athlete elects to receive the benefits available under the contract and any agreement, the election must [~~shall~~] be filed with the franchise's workers' compensation insurance carrier [~~by personal delivery or registered or certified mail~~] within 10 days of the date of execution. An agreement is not considered filed if it is illegible or incomplete. Both the athlete and the franchise must [~~shall~~] keep a copy of the election.

(f) (No change.)

(g) The 2020 amendments on the language of the agreement or contract between a professional athlete and a franchise are effective March 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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Kara Mace
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Texas Department of Insurance, Division of Workers' Compensation
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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.591

The Comptroller of Public Accounts proposes amendments to §3.591, concerning margin: apportionment. The amendments implement House Bill 500, 83rd Legislature, 2013, effective January 1, 2014 and House Bill 2896, 84th Legislature, 2015, effective January 1, 2018. The amendments also update the section to reflect current guidance and improve readability.

Throughout the section, where applicable, the comptroller adds titles to statutory citations; replaces the term intangibles with intangible assets; replaces the term receipts with gross receipts; replaces the term gross receipts everywhere with gross receipts from an entity's entire business; references other relevant sections; replaces the term apportioned with sourced; replaces the term legal domicile of payor with location of payor; replaces the term revenue with gross receipts; and makes minor revisions to improve readability.

The comptroller amends subsection (b)(1) to remove circular language.

The comptroller removes subsection (b)(2), the definition of commercial domicile, and renumbers the subsequent paragraphs as necessary. The definition of commercial domicile is no longer necessary as the term is no longer used in this section.

The comptroller amends renumbered subsection (b)(3) to revise the definition of gross receipts to reflect that certain non-receipt items excluded when calculating total revenue are not used in calculating gross receipts. Any item of revenue excluded from total revenue is not included in computing gross receipts under Tax Code, §171.1055(a). For most entities, gross receipts will equal the amount reported in total revenue unless the taxable entity has excluded non-receipt items from total revenue that must be added back when computing gross receipts, including: $500 per pro bono services case; the actual cost of uncompensated care; the direct cost of providing waterway transportation; the direct cost of providing agricultural aircraft services and the cost of a vaccine. For example, under Tax Code, §171.1011(g-3) (Determination of Total Revenue from Entire Business), an attorney may exclude $500 from total revenue for handling a pro bono case. Since the $500 is not a receipt, there is no exclusion for pro bono work when calculating gross receipts.

The comptroller adds new language to renumbered subsection (b)(4) specifying that the federal tax year beginning on January 1, 2007, is the operative federal tax year for references to the Internal Revenue Code (IRC). The new language replaces the reference to Tax Code, §171.0001 (General Definitions).

The comptroller adds new subsection (b)(5) to define inventory. This definition is based on the discussion of inventory from IRC §1221(a)(1) and incorporates the guidance provided by STAR Accession No. 201311792L (November 21, 2013).

The comptroller amends subsection (b)(6) concerning investments to make clear that inventory is not included in investments. The definition incorporates the guidance provided by STAR Accession No. 201311792L.

The comptroller amends subsection (b)(7) concerning the definition of legal domicile to remove the definition of principal place of business and define the term separately in subsection (b)(9).

The comptroller adds new subsection (b)(9) to define principal place of business for all taxable entities. The comptroller removes the principal place of business definition from the definition of legal domicile in subsection (b)(7) and replaces the current definition with a definition based on the United States Supreme Court decision, *Hertz Corp. v. Friend,* Case No. 08-1107, slip op. at 1 (2010) where the court concluded that "...'principal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities."

The comptroller adds new subsection (b)(10) to define regulated investment company. The definition is consistent with the language in Tax Code, §171.106(b) (Apportionment of Margin to this State). Subsequent paragraphs are renumbered accordingly.

The comptroller adds new subsection (b)(14) to define Texas gross receipts pursuant to Tax Code, §171.103 (Determination of Gross Receipts from Business Done in this State for Margin).

The comptroller amends subsection (c)(1) to provide guidance from Tax Code, §171.106(b) relating to the sourcing of receipts from services provided to a regulated investment company. New subparagraphs (A) and (B) provide guidance on how to determine Texas gross receipts and gross receipts from an entity's entire business, respectively, for a regulated investment company.

The comptroller amends subsection (c)(2) to track the statutory language in Tax Code, §171.106(c) relating to the sourcing of receipts from services provided to an employee retirement plan. New subparagraphs (A) and (B) provide guidance on how to determine Texas gross receipts and gross receipts from an entity's entire business, respectively, for an employee retirement plan.

The comptroller amends subsection (d)(1) to delete the reference to §3.595 (relating to Margin: Transition) as the transition period is no longer within the statute of limitations and §3.595 has been repealed.

The comptroller amends subsection (d)(2) to add language to limit the filing of an initial report to taxable entities with a beginning date prior to October 4, 2009, pursuant to §3.584(c)(1) (relating to Margin: Reports and Payments). The comptroller also adds reporting requirements for taxable entities with a beginning date on or after October 4, 2009, consistent with §3.584(c)(2).

The comptroller amends subsection (d)(5) to explain that exclusions under §3.587 of this title (relating to Margin: Total Revenue) that are non-receipt items are not deducted from receipts.

The comptroller amends the title to subsection (e) to more accurately reflect the contents of the subsection.

The comptroller deletes the original language in subsection (e)(1) concerning bad debt recoveries. The comptroller determines the guidance unnecessary and intends no change in policy by this deletion.

The comptroller adds language to subsection (e)(1) to consolidate the sourcing rules for receipts from advertising, which are currently addressed in subsection (e)(20) for newspapers or magazines, (e)(22) for radio/television, and (e)(26) for advertising services in other media. The proposed new language in subsection (e)(1) will provide a uniform sourcing rule across all media and will be consistent with the amendments to the general rule for sourcing receipts from services in subsection (e)(26), which states that a service is performed at the location of the receipt-producing, end-product act.

The comptroller restructures subsection (e)(2) concerning capital assets and investments into two new subparagraphs. The comptroller proposes to revise its treatment of the sale of investments and capital assets. Consistent with the Texas Supreme Court decision in *Hallmark Marketing Co. v. Hegar,* 488 S.W.3d 795 (Tex. 2016), net losses are no longer included in gross receipts. In addition, for reports originally due on or after January 1, 2021, net gains and losses will be determined on a sale-by-sale basis.

Under the current rule, gains and losses during an accounting period are offset to determine a "net" amount. The comptroller adopted this rule to comply with the holding in *Calvert v. Electro-Science Investors, Inc.,* 509 S.W.2d 700 (Tex. Civ. App. - Austin 1974, no writ). *See* Tex. Comp. of Pub. Accts., Rule 026.02.12.013(2)(k) (1975) (STAR Accession No. 7601R1000B02). In its *Electro-Science* opinion, the Court of Appeals held that the plain meaning of "net gain" in the apportionment statute required that "gains and losses be offset against one another in order that a net figure be obtained."

However, more recently, in *Hallmark Marketing Co. v. Combs,* No. 13-14-00093-CV (Tex. App. - Corpus Christi-Edinburg 2014) (mem. op.), rev'd on other grounds, 488 S.W.3d 795 (2016), the Court of Appeals found that the statute was ambiguous:

"The ambiguity arises because it is unclear, by examining only the plain language of the statute, what the term "net gain" means. On the one hand, "net gain" may refer to the particular gain or loss that results from each individual sale when proceeds are offset by costs. ... On the other hand, 'net gain' may instead refer to the taxpayer's cumulative gain or loss on its various investment and capital asset sales made throughout the year."

The Texas Supreme Court reversed the Court of Appeals' *Hallmark* decision on other grounds, holding that "we do not need to relitigate the question in order to determine Hallmark did not have a net gain under any calculation." 488 S.W.3d at 799.

In the process of revising its rule to comply with the Supreme Court's determination that net losses may not be included in gross receipts, the comptroller has also evaluated its rule regarding the calculation of net gains and losses. The comptroller has concluded that the only reasonable interpretation is that net gains and losses should be determined separately for each sale of a capital asset or investment.

The objective of the apportionment statute is to apportion an entity's total revenues based on the entity's business activity in Texas relative to the entity's entire business activity. The apportionment statute uses an entity's gross receipts as a proxy for business activity. Given this objective, it makes no sense to negate gains from one transaction with losses from another, resulting in one business activity essentially negating another.

Suppose a real estate investment company sold two Texas investment properties, with the loss on one sale equaling the gain on the other. If the loss offsets the gain for apportionment purposes, the company will have no Texas receipts and a zero Texas apportionment factor even though it had substantial business activity in the State. The comptroller has concluded that the Legislature could not have intended that absurd result. Rather, the only reasonable interpretation of legislative intent is the opposite -- the Legislature provided that only the net gain from a sale would be included in the calculation to prevent losses from being used to offset gains.

Accordingly, new subparagraph (A), which includes the statutory language from Tax Code, §171.105(b), also includes several clauses. New clause (i) provides the comptroller's revised interpretation; an entity's net gain or net loss is determined separately for each sale of a capital asset or investment. New clause (ii) provides the comptroller's previous interpretation of the provision and limits its applicability to reports originally due prior to January 1, 2021. New clause (iii) provides an example of the comptroller's revised interpretation and clause (iv) provides an example of the comptroller's previous interpretation.

New subparagraph (B) contains language from the original subsection (e)(2) on the sourcing of gains from the sale of intangible assets. The comptroller adds information on the sourcing of gains from the sale of capital assets and investments that are real property or tangible personal property.

In subsection (e)(3), the comptroller replaces the sourcing rules for receipts from the sale of computer software services and programs with the sourcing rules for receipts from the sale of computer hardware and digital property and adds new subparagraphs (A) through (J). The title is changed accordingly.

In new subparagraph (A), the comptroller treats the sale of software installed on computer hardware as part of the sale of the computer hardware.

In new subparagraph (B), the comptroller treats the lease of software installed on computer hardware as part of the leasing of the computer hardware.

In new subparagraph (C), the comptroller treats the sale of digital property on fixed physical media (such as compact discs) as the sale of tangible personal property. This treatment is consistent with the treatment of other intellectual property that is sold in non-digital fixed physical media (such as books).

In new subparagraph (D), the comptroller treats the lease of digital property on fixed physical media (such as compact discs) as the lease of tangible personal property.

In new subparagraph (E), the comptroller treats the sale of digital property transferred by means other than fixed physical media as the sale of intangible property, which is sourced to the location of the payor. This treatment is consistent with the former paragraph (e)(3) regarding computer software.

In new subparagraph (F), the comptroller treats the receipts from the delivery of digital property as a service as receipts from providing services.

In new subparagraph (G), the comptroller treats the receipts from the delivery of digital property as part of an internet hosting service as receipts from providing internet hosting services.

In new subparagraph (H), the comptroller treats the receipts from the use of digital property as receipts from the use of an intangible asset.

New subparagraphs (I) and (J) are examples of sourcing receipts from digital property. The examples illustrate that digital products lie at the intersection of multiple sourcing provisions, resulting in a complex roadmap for sourcing. Because the sourcing is dictated by statute, the complexity is unavoidable. However, many of the sourcing routes may lead to the same destination. For example, at least with regard to receipts received from individual consumers, the location where tangible personal property is delivered, the location where a service is performed, the location where the customer is located, and the location of the payor, may all be in the same state.

The comptroller moves subsection (e)(7) concerning the deemed sales of assets under IRC, §338 to new subsection (e)(22). The comptroller renumbers subsequent paragraphs accordingly.

The comptroller amends renumbered subsection (e)(7) concerning dividends and/ or interest to move the guidance related to interest to subsection (e)(12) and to retitle the paragraph accordingly. Subsection (e)(7) now contains guidance on dividends only.

The comptroller adds new subsection (e)(10) to provide guidance for sourcing receipts from the settlement of hedging contracts and other financial derivatives for risk management purposes. These types of investments are intangibles and the receipts are sourced to the location of the payor.

The comptroller adds new subsection (e)(12) to incorporate and reorganize the interest language moved from renumbered subsection (e)(7).

The comptroller amends renumbered subsection (e)(13) concerning Internet access fees to provide the comptroller's policy on sourcing receipts from internet hosting services to the location of the customer, pursuant to House Bill 500, 83rd Legislature, 2013, codified as Tax Code, §171.106(g), effective for reports originally due on or after January 1, 2014, and adds subparagraphs (A) through (E).

New subparagraph (A) defines "internet hosting service" using the language from Tax Code, §151.108(a), which Tax Code, §171.106(g) references.

New subparagraph (B) gives non-exhaustive examples of internet hosting services. These examples extend beyond what might be ordinarily considered as internet hosting services. However, the statutory definition extends beyond the ordinary meaning, as was noted by the analysis of the same definition that was proposed in House Bill 416 during the same legislative session. House Research Organization Analysis of House Bill 416, 83rd Legislature, 2013 ("A growing number of companies offering cloud computing services and products likely would fall under the definition of web hosting in the bill."). House Bill 500's specific exclusion of telecommunications service, which would not ordinarily be considered as an Internet hosting service, indicates that the Legislature was aware of the broad sweep of the definition. The specific meaning dictated by the legislation "elevate[s] the Legislature's substituted meaning even when it departs from the term's ordinary meaning." *Entergy Gulf States, Inc. v. Summers,* 282 S.W.3d 433, 442 (2009).

New subparagraph (C) gives non-exhaustive examples that are not internet hosting services.

New subparagraph (D) lists factors for distinguishing the purchase of access to computer services over the internet from the purchase or lease of digital property over the internet. The factors are taken from the Internal Revenue Service Notice of Proposed Rulemaking regarding "Classification of Cloud Transactions and Transactions Involving Digital Content," 84 Fed. Reg. 40317 (Aug. 14, 2019).

New subparagraph (E) provides guidance for determining the physical location of the customer. The statute refers to "the customer to whom the service is provided." The comptroller has concluded from these references that the "customer" means the purchaser, or the designee of the purchaser, that consumes the service. Thus, in a resale situation, the service provider should source the revenue to the customer's customer that actually receives the service.

The statute provides no further instruction for determining the location of the customer. New subparagraph (E) enables taxpayers to determine the most reasonable sourcing method based on the available information. The method will be subject to audit review for reasonableness under the circumstances.

The comptroller amends renumbered subsection (e)(14) addressing leases and subleases to standardize the language used throughout the section. The comptroller amends subparagraphs (C) - (E) to improve readability.

The comptroller amends renumbered subsection (e)(15) to improve readability.

The comptroller amends the title of renumbered subsection (e)(16) to include all loan servicing and adds two subparagraphs. New subparagraph (A) contains the original guidance for sourcing gross receipts from servicing loans secured by real property, pursuant to Tax Code, §171.103(a)(2). New subparagraph (B) provides guidance on sourcing gross receipts from servicing other loans that are not secured by real property.

The comptroller amends the title of renumbered subsection (e)(17) to reflect that the content applies only to loans and securities treated as inventory of the seller. The comptroller amends subparagraph (A) to state that loans and securities held by a taxable entity for investment or risk management purposes are not inventory. The comptroller adds references to information on sourcing receipts from the sale of loans and securities. The comptroller amends subparagraph (B) to reflect that the guidance applies to original reports due on or after January 1, 2008, pursuant to STAR Accession No. 201005671L (May 28, 2010).

The comptroller removes subsection (e)(20) concerning the sourcing of receipts from newspaper and magazine advertising from and incorporates the information into new subsection (e)(1) to consolidate sourcing rules for advertising.

The comptroller amends subsection (e)(21) on the sourcing of receipts from the licensing of intangibles to improve the readability of subparagraph (B) and add examples taken from *TGS-NOPEC Geophysical Co. v. Combs,* 340 S.W.3d 432 (Tex. 2011) in new subparagraph (C).

The comptroller moves the information on the sourcing of receipts from radio and television advertising from subsection (e)(22) to new subsection (e)(1) to consolidate sourcing rules for advertising. The comptroller moves information on sourcing receipts from qualified stock purchases under IRC, §338(h)(10) from subsection (e)(7) to subsection (e)(22). The comptroller retitles subsection (e)(22) to more accurately reflect the contents and amends the language to improve readability.

The comptroller amends subsection (e)(24) to improve readability.

The comptroller amends subsection (e)(25) to update the percentage that is applied to securities sold through an exchange when a buyer cannot be identified in order to use more current population data for Texas and the United States. The Comptroller's Revenue Estimating Division provided the current data.

The comptroller amends subsection (e)(26) to provide additional guidance on the sourcing of receipts from services and reorganizes the paragraph.

The statutory apportionment formula for the margin tax is based on "each service performed in this state," with a proviso that receipts from servicing loans secured by real property are apportioned based on the location of the property. Historically, the comptroller has interpreted the statute largely by ad hoc adjudications of specific cases, which were sometimes followed by codifications of specific outcomes for specific industries. *See, Southwestern Bell Tel. Co. v. Combs,* 270 S.W.3d 249, 266 at n. 39 (Tex. App. - Amarillo 2008, pet. denied). The current rule has special provisions for internet access fees, fees for loan servicing of real property, newspaper and magazine advertising revenue, radio and television advertising revenue, services procurement, telephone companies, and transportation companies. The proposed rule largely retains or consolidates these special provisions, and adds a new special provision for internet hosting services as a result of the 2013 legislation.

Subsection (e)(26) remains as the generic rule for apportioning all other service receipts. It has changed little over the years and provides little guidance. The current subsection tracks the statutory declaration that receipts from services are apportioned to the location where the service is performed and adds a second sentence: "If services are performed inside and outside Texas, then such receipts are Texas receipts on the basis of the fair value of the services rendered in Texas." Although this sentence explains the manner of apportionment *"if"* services are performed inside and outside Texas, neither the sentence nor the rest of the subsection text explains *when* services are considered to be performed inside and outside Texas.

In Comptroller's Decision No. 10,028 (1980), the comptroller added some additional meaning to the generic apportionment rule for services (emphasis added):

"To accomplish the goal of giving independent meaning and significance to the receipts factor from sales of services of a corporation, the phrase 'services performed within Texas' as used in Art. 12.02(1)(b)(ii) must be construed as 'units of service sold, the performance of which occurs within Texas,' thereby shifting the focus geographically from every activity performed by a corporation that generates service receipts, to those *specific, end-product acts for which a customer contracts and pays to receive.* If no distinction between *receipt-producing activities versus non-receipt- producing, albeit essential, support activities* were made, no independent meaning could be given to the 'receipts from sales of services' factor, since the determination of the dollar amount of such services performed within Texas would always be ascertained by looking at other factors, such as the property and payroll located in Texas, on the theory that no activity of a corporation that generates service receipts is any more important than any other activity, since all are essential to the end-product performance of the service that is sold."

The agency has cited this decision on a number of occasions, and the courts have acknowledged that the decision represents a "longstanding interpretation" of the agency. *Westcott Communications, Inc. v. Strayhorn,* 104 S.W.3d 141, 146 (Tex. App. - Austin 2003, pet. denied); *Hegar v. Sirius XM Radio, Inc.,* No. 03-18-00573-CV (Tex. App. - Austin 2020).

Comptroller's Decision No. 10,028 distinguishes between receipts-producing activities and non-receipts producing, albeit essential support activities and focuses on the end-product acts for which a customer contracts and pays to receive. The proposed rule expounds upon these principles.

The proposed rule may be inconsistent with some prior rulings. However, the objective of the proposed rule is to provide a consistent application of the statute in conformity with the concepts of Comptroller's Decision No. 10,028, even if not consistent with every individual ruling. The comptroller will supersede prior inconsistent rulings.

The comptroller amends subsection (e)(26) to add language concerning location of performance for services to subparagraph (A). The new language reflects current guidance that a service is performed at the location where the receipts-producing, end-product act occurs. New clauses (i)-(iii) are added to provide examples. The comptroller amends subparagraph (B) to provide additional guidance for determining the fair value of services performed in Texas. New clauses (i)-(iii) give examples. The comptroller amends subparagraph (C) to contain information originally provided in subparagraph (A). New subparagraph (D) contains information originally provided in subparagraph (B). New subparagraph (E) contains information originally provided in subparagraph (C).

The comptroller amends subsection (e)(27) to provide guidance on the sourcing of receipts from the sale of a membership interest in a single member limited liability company and delete the guidance regarding service procurement. Renumbered subsection (e)(13) on Internet hosting and subsection (e)(26), the general rule for services, cover the sourcing of receipts from service procurement.

The comptroller amends the title of subsection (e)(30) to accurately reflect that it applies to all taxable entities providing telecommunication services.

The comptroller adds new subsection (e)(31) concerning sourcing of broadcasting receipts to implement House Bill 2896, which enacted Tax Code, §171.106(h). The language in this paragraph tracks the statutory language. Subsequent paragraphs are renumbered accordingly.

The comptroller amends renumbered subsection (e)(33) to retitle the paragraph to accurately reflect that it applies to transportation services, to simplify the sourcing of transportation receipts, and to provide guidance on intrastate transportation. Subparagraph (A) rewords the sourcing policy for transportation receipts and includes guidance on intrastate transportation. Subparagraph (B) provides the alternate sourcing method based on mileage that is no longer applicable for reports due on or after January 1, 2021. The comptroller will supersede prior inconsistent rulings.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amendment is in effect, the amendment: 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. This proposal amends a current rule.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, proposed amendment would benefit the public by updating the rule to more clearly state comptroller interpretation of statute and to reflect statutory changes enacted by the Legislature. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. The proposed amendment would have no significant fiscal impact on the state government, units of local government, or individuals. There would be no anticipated significant economic costs to the public.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

This amendment is proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.106 (Apportionment of Margin to This State).

§3.591. Margin: Apportionment.

(a) Effective date. The provisions of this section apply to franchise tax reports originally due on or after January 1, 2008, except as otherwise noted.

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

(1) Capital asset--Any asset[, other than an investment,] that is held for use in the production of income, and that is subject to depreciation, depletion or amortization.

[(2) Commercial domicile--The principal place from which the trade or business of the entity is directed.]

(2) [(3)] Employee retirement plan--A plan or other arrangement that qualifies under Internal Revenue Code (IRC), §401(a) (Qualified pension, profit-sharing, and stock bonus plans), or that satisfies the requirement of IRC, §403 (Taxation of employee annuities), or a government plan described in IRC, §414(d) (Definitions and special rules).

(3) [(4)] Gross receipts--Revenue as determined [The amount determined as total revenue] under §3.587 of this title (relating to Margin: Total Revenue), except as provided in subsection (e)(2) (concerning capital assets and investments) and subsection (e)(17) ((concerning loans and securities) of this section. Non-receipt items excluded from total revenue under §3.587 of this title are not included in the calculation of total revenue under that section and are not deducted from gross receipts. These non-receipt items include the exclusion [except for a taxable entity taking a deduction] for uncompensated care, the $500 exclusion per [or] pro bono services case, the exclusion for the direct cost of providing waterway transportation, the exclusion for the direct cost of providing agricultural aircraft services, and the exclusion for the cost of a vaccine. See subsection (d)(5) of this section for gross receipts that are excluded from the apportionment calculation. [or an entity for which subsection (e)(16) of this section, applies.]

(4) [(5)] Internal Revenue Code--The Internal Revenue Code of 1986 in effect for the federal tax year beginning on January 1, 2007, not including any changes made by federal law after that date, and any regulations adopted under that code applicable to that period [a specified tax year as provided by Tax Code, §171.0001].

(5) Inventory--Property held primarily for sale to customers in the ordinary course of a trade or business. Securities and loans held for investment, hedging, or risk management purposes are not inventory.

(6) Investment--Any non-cash asset that is not a capital asset or inventory.

(7) Legal domicile--The legal domicile of a corporation or limited liability company is its state of formation. The legal domicile of a partnership, trust, or joint venture is the principal place of business of the partnership, trust, or joint venture. [The principal place of business of a partnership, trust, or joint venture is the location of its day-to-day operations. If the day-to-day operations are conducted equally or fairly evenly in more than one state, then the principal place of business is the commercial domicile.]

(8) Location of payor--The legal domicile of the payor.

(9) Principal place of business--The place where an entity's management directs, controls, and coordinates the entity's activities.

(10) Regulated investment company--Any domestic corporation defined under IRC, §851(a) (Definition of regulated investment company), including a taxable entity that includes trustees or sponsors of employee benefit plans that have accounts in a regulated investment company.

(11) [(9)] Security--An instrument defined under IRC [Internal Revenue Code], §475(c)(2) (Mark to market accounting method for dealers in securities). This term [, and] includes instruments described by §475(e)(2)(B), (C), and (D) of that code.

(12) [(10)] Tax reporting period--The period upon which the tax is based under Tax Code, §171.1532 (Business on Which Tax on Net Taxable Margin Is Based) or §171.0011 (Additional Tax).

(13) [(11)] Taxable entity--Any entity upon which tax is imposed under Tax Code, §171.0002(a) (Definition of Taxable Entity) and not specifically excluded under Tax Code, §171.0002(b) or §171.0002(c). See also §3.581 of this title (relating to Margin: Taxable and Nontaxable Entities).

(14) Texas gross receipts--The portion of a taxable entity's gross receipts that is from business done in Texas.

(c) Apportionment formula. Except as provided in paragraphs (1) and (2) of this subsection, a [A] taxable entity's margin is apportioned to Texas [this state] to determine the amount of franchise tax due by multiplying the taxable entity's margin by a fraction, the numerator of which is the taxable entity's Texas gross receipts [from business done in this state] and the denominator of which is the taxable entity's gross receipts from its entire business [except as provided by this subsection].

(1) Regulated investment company services. A taxable entity's margin derived, directly or indirectly, from the sale of management, distribution, or administration services to or on behalf of a regulated investment company, is apportioned to Texas by multiplying that portion of the taxable entity's total margin by a fraction: [Taxable entities that have margin that is derived, directly or indirectly from the sale of services to or on behalf of a regulated investment company as defined by IRC, §851(a), should refer to Tax Code, §171.106(b), relating to the apportionment of gross receipts from services for regulated investment companies.]

(A) the numerator of which is the average of the sum of shares owned at the beginning of the year and the sum of the shares owned at the end of the year by the investment company shareholders whose principal place of business is in this state or, if the shareholders are individuals, are residents of this state; and

(B) the denominator of which is the average of the sum of shares owned at the beginning of the year and the sum of shares owned at the end of the year by all investment company shareholders.

(2) Employee retirement plan services. A taxable entity's margin derived, directly or indirectly, from the sale of management, administration, or investment services to an employee retirement plan is apportioned to Texas by multiplying that portion of the taxable entity's total margin by a fraction: [Taxable entities that have margin that is derived, directly or indirectly, from the sale of management, administration, or investment services to an employee retirement plan, as defined in subsection (b)(3) of this section, should refer to Tax Code, §171.106(c), relating to the apportionment of gross receipts from services for employee retirement plans.]

(A) the numerator of which is the average of the sum of beneficiaries domiciled in Texas at the beginning of the year and the sum of beneficiaries domiciled in Texas at the end of the year; and

(B) the denominator of which is the average of the sum of all beneficiaries at the beginning of the year and the sum of all beneficiaries at the end of the year.

(d) General rules for reporting gross receipts.

(1) A taxable entity that files an annual report must report gross receipts based on the business done by the taxable entity beginning with the day after the date upon which the previous report was based, and ending with the last accounting period ending date for federal income tax purposes ending in the calendar year before the calendar year in which the report is originally due. [If the taxable entity has not filed a previous report and must file an annual report, see §3.595 of this title (relating to Margin: Transition).]

(2) A taxable entity with a beginning date prior to October 4, 2009 that files an initial report must report gross receipts based on its activities commencing with the beginning date, as described in §3.584 of this title (relating to Margin: Reports and Payments), and ending on the last accounting period ending date for federal income tax purposes that is at least 60 days before the original due date of the initial report. A taxable entity with a beginning date on or after October 4, 2009 that files a first annual report must report gross receipts based on its activities commencing with the beginning date and ending on the last accounting period ending date for federal income tax purposes in the same calendar year as the beginning date.

(3) Taxable entities that are members of an affiliated group that are part of a unitary business must file a combined franchise tax report. See §3.590 of this title (relating to Margin: Combined Reporting), for determining gross receipts for a combined report.

(4) When a taxable entity computes gross receipts for apportionment, the taxable entity is deemed to have elected to use the same methods that the taxable entity used in filing its federal income tax return.

(5) Any item of revenue that is excluded from total revenue under Texas law or United States law is excluded from gross receipts from an entity's entire business [everywhere] and Texas gross receipts [in Texas]as provided by Tax Code, §171.1055(a) (Exclusion of Certain Receipts for Margin Apportionment). For example, any amount that is excluded from total revenue under the IRC [Internal Revenue Code], §78 (Dividends received from certain foreign corporations by domestic corporations choosing foreign tax credit) or §§951 - 964(26 U.S. Code Subpart F - Controlled Foreign Corporations), is excluded from gross receipts. Non-receipt items that are excluded from total revenue under §3.587 of this title, such as $500 per pro bono services case; the actual cost of uncompensated care; the direct cost of providing waterway transportation; the direct cost of providing agricultural aircraft services and the cost of a vaccine, are not deducted from gross receipts under this section. See subsection (b)(3) of this section, concerning definition of gross receipts. For example, under Tax Code, §171.1011(g-3) (Determination of Total Revenue from Entire Business), an attorney may exclude $500 from total revenue for handling a pro bono case. Since the $500 is not a receipt, there is no exclusion for pro bono work when calculating gross receipts. Therefore, if a taxable entity starts with its total revenue amount to calculate its gross receipts, the taxable entity must add back the $500 per pro bono services case.

(6) A taxable entity that uses a 52 - 53 week accounting year end and that has an accounting year that ends during the first four days of January of the year in which the report is originally due may use the preceding December 31 as the date through which margin is computed.

(7) Any item of allocated revenue excluded under §3.587(c)(9) of this title is excluded from Texas gross receipts and gross receipts from an entity's entire business [everywhere].

(e) Computation and sourcing [Treatment of specific items in the computation] of gross receipts.

(1) Advertising services. Gross receipts from the dissemination of advertising are sourced to the locations of the advertising audience. The locations of the advertising audience should be determined in good faith using the most reasonable method under the circumstances, considering the information reasonably available. The method should be consistently applied from year to year and supported by records retained by the service provider. Locations that may be reasonable include the physical locations of the advertising, advertising audience locations recorded in the books and records of the service provider, and locations listed in published rating statistics. If the locations of nationwide advertising audiences cannot otherwise be reasonably determined, then 8.7% of the gross receipts are sourced to Texas [Bad debt recoveries. Bad debt recoveries are gross receipts].

(2) Capital assets and investments.

(A) Only the net gain from the sale of a capital asset or investment is included in gross receipts. A net loss from the sale of a capital asset or investment is not included in gross receipts.

(i) The net gain or net loss is determined separately for each sale of a capital asset or investment.

(ii) For reports originally due prior to January 1, 2021, a taxable entity must add the [~~Except as provided by paragraph (16) of this subsection,~~] net gains and losses from sales of investments and capital assets [~~must be added~~] to determine the total gross receipts from such transactions. If both Texas and out-of-state sales have occurred, then a separate calculation of net gains and losses on Texas sales must be made. [~~If the combination of net gains and losses results in a net loss, the taxable entity should net the loss against other receipts, but not below zero. In no instance shall the apportionment factor be greater than 1.~~]

(iii) Example 1. During a report year, a real estate investment company sells two Texas investment properties, reporting a gain on sale of one property and a loss on the sale of the other property. The company should include the net gain on the profitable sale in gross receipts from its entire business but should not include the net loss on the unprofitable sale. The company should not offset the net loss against the net gain. To determine Texas gross receipts, the company should include only the net gain on sale of the Texas investment property in Texas gross receipts and would not include the net loss on the sale of the other Texas investment property.

(iv) Example 2. The facts are the same as in *Example 1,* except the real estate investment company also had net gains and net losses from the sale of out-of-state properties and net gains and net losses from the out-of-state sale of capital assets. For reports originally due prior to January 1, 2021, the real estate investment company must offset all of the net losses from these sales against all of the net gains and, if the result is a net gain, include only the net gain in gross receipts from its entire business. If the result is a net loss, the net loss is not included in gross receipts from its entire business. To determine Texas gross receipts, the company should offset the net loss from the sale of the one Texas property against the net gain from the sale of the other Texas property. If the result is a net gain, only the net gain is included in Texas gross receipts. If the result is a net loss, the net loss is not included in Texas gross receipts.

(B) The net gain from the sale of a capital asset or investments is sourced based on the type of asset or investment sold. The net gain from the sale of an intangible asset is sourced to the location of the payor as provided in paragraph (21)(B) of this subsection, concerning gross receipts from the sale of intangible assets, and paragraph (25) of this subsection, concerning securities, of this subsection. [~~Net gain on sales of intangibles held as capital assets or investments is apportioned to the location of the payor.~~] Examples of intangible assets [~~intangibles~~] include, but are not limited to, stocks, bonds, commodity contracts [~~commodities~~], futures contracts, patents, copyrights, licenses, trademarks, franchises, goodwill, and general receivable rights. The net gain from the sale of real property is sourced as provided in paragraph (23) of this subsection, concerning real property. The net gain from the sale of tangible personal property is sourced as provided in paragraph (29) of this subsection, concerning tangible personal property.

(3) Computer hardware and digital property. [~~software services and programs. Gross receipts from the sale of computer software services are apportioned to the location where the services are performed. Gross receipts from the sale of a computer program (as the term "computer program" is defined in §3.308 of this title (relating to Computers--Hardware, Software, Services and Sales)), are receipts from the sale of an intangible asset and are apportioned to the legal domicile of the payor.~~]

(A) Gross receipts from the sale of computer hardware together with any software installed on the hardware are sourced as the sale or lease of tangible personal property under paragraph (29) of this subsection.

(B) Gross receipts from the lease of computer hardware together with any software installed on the hardware are sourced as the leasing of tangible personal property under paragraph (14)(B) of this subsection.

(C) Gross receipts from the sale of digital property (computer programs and any content in digital format that is either protected by copyright law or no longer protected by copyright law solely due to the passage of time) that is transferred by fixed physical media are sourced as the sale of tangible personal property under paragraph (29) of this subsection.

(D) Gross receipts from lease of digital property that is transferred by fixed physical media are sourced as the leasing of tangible personal property under paragraph (14)(B) of this subsection.

(E) Gross receipts from the sale or lease of digital property that is transferred by means other than by fixed physical media are sourced as the sale of intangible property under paragraph (21)(B) of this subsection.

(F) Gross receipts from the delivery of digital property as a service are sourced under paragraph (26) of this subsection, unless otherwise provided in this subsection.

(G) Gross receipts from the delivery of digital property as part of an internet hosting service are sourced as internet hosting receipts under paragraph (13) of this subsection.

(H) Gross receipts from the use (as opposed to the sale or licensing) of digital property are sourced under paragraph (21)(A) of this subsection.

(I) Example 1. Movie Studio produces a copyrighted movie in digital format and successively sells the theatrical rights to Movie Theater Chain Company, the broadcast rights to Cable Company, the internet streaming rights to Internet Company A, the internet rental rights to Internet Company B, the digital versatile disc (DVD) sale rights to DVD Company, DVD rental rights to Kiosk Company, and the permanent download sale rights to Download Company. In each instance, Movie Studio's receipts are from the right to use its copyrighted digital property and sourced to where the copyright is used under paragraph (21)(A) of this subsection. Movie Theater Chain Company receipts from ticket sales are from the sale of a service and sourced to the audience location under paragraph (26)(A)(i) of this subsection. Cable Company subscription receipts from broadcasting the movie are from the sale of a service and sourced to the audience location under paragraph (26)(A)(i) of this subsection. Internet Company A's subscription receipts for its streaming service using its website are from an internet hosting service and sourced to the location of the customer under paragraph (13) of this subsection. Internet Company B's receipts from the rental (access for a limited time) of the movie using the company's website are from an internet hosting service and sourced to the location of the customer under paragraph (13) of this subsection. DVD Company's receipts from the sale of DVDs are from the sale of tangible personal property and sourced under paragraph (29). Kiosk Company's receipts from the rental of DVDs are from the rental of property and sourced to the location of the property under paragraph (14). Download Company's receipts from the sale of permanent downloads of the movie are from the sale intangibles and sourced to the location of payor under paragraph (21)(B) of this subsection.

(J) Example 2. Software Company designs bookkeeping software for personal use. Software Company licenses the software

to Computer Company to include in the software sold with its computers. Software Company sells digital versatile discs (DVDs) of the bookkeeping software to Retail Company for resale to end users. Software Company sells downloads of its bookkeeping software directly to end users. Software Company sells an on-line version of its bookkeeping software in which end users can enter and store data on-line using the Software Company's website for a periodic fee. Software Company receipts from licensing the software to Computer Company are from the use of its digital product and sourced to the location of use under paragraph (21)(A) of this subsection. Computer Company's receipts from the sale of computers with pre-loaded software are from the sale of tangible personal property and sourced under paragraph (29) of this subsection. Software Company's receipts from the sale of DVDs to Retail Company are from the sale of tangible personal property and sourced under paragraph (29) of this subsection. Software Company's receipts from the sale of downloads to end users are from the sale of intangible property and sourced to the location of payor under paragraph (21)(B) of this subsection. Software Company's receipts from the sale of its on-line version are from the sale of an internet hosting service and sourced to the location of the customer under paragraph (13) of this subsection.

(4) Condemnation. Gross receipts [Revenues] from condemnation [that result from the taking] of property are sourced [gross receipts that are apportioned based on] to the location of the property condemned.

(5) Debt forgiveness. If a creditor releases any part of a debt, then the amount that the creditor forgives is a gross receipts that is sourced [apportioned] to the legal domicile of the creditor.

(6) Debt retirement. Gross receipts [Revenues] from the retirement of a taxable entity's own indebtedness, such as through the taxable entity's purchase of its own bonds at a discount, [are gross receipts that] are sourced [apportioned] to the taxable entity's legal domicile. The indebtedness is treated as an investment in the determination of the amount of gross receipts.

[(7) Deemed sales of assets under Internal Revenue Code, §338. Amounts that are deemed to have been received by the target taxable entity are treated as sales of assets by the target taxable entity, and are apportioned according to rules that otherwise apply to sales of such assets under Tax Code, Chapter 171, or this section. For the purposes of this paragraph, the purchaser of the target's stock is considered the purchaser of the assets.]

(7) [(8)] Dividends[, and/ or interest].

(A) Dividends that are recognized as a reduction of the taxpayer's basis in stock of a taxable entity for federal income tax purposes are not gross receipts. Dividends that exceed the taxpayer's basis for federal income tax purposes that are recognized as a capital gain are treated as dividends for apportionment purposes.

(B) The following are excluded from Texas gross receipts and gross receipts from an entity's entire business [everywhere]:

(i) dividends from a subsidiary, associate, or affiliated taxable entity that does not transact a substantial portion of its business or regularly maintain a substantial portion of its assets in the United States;

(ii) Form 1120, Schedule [schedule] C special deductions that are excluded from total revenue; and

(iii) dividends [and/or interest] on federal obligations that are excluded from total revenue.[;]

[(iv) interest that is exempt from federal income tax.]

(C) Dividends [and/or interest] that are received from a corporation or other sources are sourced [apportioned] to the location [legal domicile] of the payor.

(D) Dividends [and/or interest that are] received from a national bank are sourced [apportioned] to Texas if the bank's principal place of business is located in Texas. Dividends [and/or interest that are] received from a bank that is organized under the Texas Banking Code are sourced [apportioned] to Texas.

[(E) A banking corporation may exclude from its Texas gross receipts interest that is earned on federal funds and interest that is earned on securities that are sold under an agreement to repurchase and that are held in a correspondent bank that is domiciled in Texas, but the banking corporation must include the interest in its gross receipts everywhere.]

(8) [(9)] Exchanges of property. Exchanges of property are included in gross receipts to the extent that the exchange is recognized as a taxable transaction for federal income tax purposes. Such exchange must be included in gross receipts based on the gross exchange value, unless otherwise required under this section.

(9) [(10)] Federal enclave. Gross receipts [All revenues] from a taxable entity's sales, services, leases, or other business activities that are transacted on a federal enclave that is located in Texas are sourced to Texas [receipts], unless otherwise excepted by this section.

(10) Financial derivatives. Gross receipts from the settlement of financial derivatives contracts, including hedges, options, swaps, futures, and forward contracts, and other risk management transactions are sourced to the location of the payor.

(11) Insurance proceeds.

(A) Business interruption insurance proceeds are gross receipts when the proceeds are intended to replace lost profits. Such receipts are Texas gross receipts when [apportioned to] the location [legal domicile] of the payor is in Texas [of the proceeds].

(B) Gross receipts [Revenues] from fire and casualty insurance proceeds are sourced [apportioned] to the location of the damaged or destroyed property.

(12) Interest.

(A) Except as provided in subparagraph (B) of this paragraph, interest received is sourced to the location of the payor.

(B) Interest received from a national bank is a Texas gross receipt if the bank's principal place of business is located in Texas. Interest received from a bank that is organized under the Texas Banking Code is a Texas gross receipt.

(C) The following are excluded from Texas gross receipts and gross receipts from an entity's entire business:

(i) interest on federal obligations that is excluded from total revenue; and

(ii) interest that is exempt from federal income tax.

(D) A banking corporation may exclude from its Texas gross receipts interest that is earned on federal funds and interest that is earned on securities that are sold under an agreement to repurchase and that are held in a correspondent bank that is domiciled in Texas, but the banking corporation must include the interest in its gross receipts from an entity's entire business.

(13) [(12)] Internet hosting service. [access fee. A fee that is charged to obtain access to the World Wide Web in Texas is a Texas gross receipt.] For reports originally due on or after January 1, 2014,

receipts from Internet hosting are Texas gross receipts if the customer is located in Texas.

(A) Internet hosting service means providing to an unrelated user access over the Internet to computer services using property that is owned or leased and managed by the provider and on which the user may store or process the user's own data or use software that is owned, licensed, or leased by the user or provider.

(B) Internet hosting includes real-time, nearly real-time, and on-demand access over the Internet to computer services such as:

(i) data storage and retrieval;

(ii) video gaming;

(iii) database search services;

(iv) entertainment streaming services;

(v) processing of data; and

(vi) marketplace provider services.

(C) Internet hosting does not include:

(i) telecommunications service;

(ii) cable television service;

(iii) Internet connectivity service;

(iv) Internet advertising service; or

(v) Internet access solely to download digital content for storage and use on the customer's computer or other electronic device.

(D) The purchase of access over the Internet to computer services is distinguished from the purchase or lease of computer hardware or digital property by taking into account all relevant factors, the relevance of which may vary depending upon the circumstances. Some relevant factors indicating the purchase of access to a computer service rather than the purchase or lease of computer hardware or digital property include:

(i) the customer is not in physical possession of the property;

(ii) the customer does not control the property, beyond the customer's network access and use of the property;

(iii) the provider has the right to determine the specific property used in the transaction and replace such property with comparable property;

(iv) the property is a component of an integrated operation in which the provider has other responsibilities, including ensuring the property is maintained and updated;

(v) the customer does not have a significant economic or possessory interest in the property;

(vi) the provider bears any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract;

(vii) the provider uses the property concurrently to provide significant services to entities unrelated to the customer;

(viii) the provider's fee is primarily based on a measure of work performed or the level of the customer's use rather than the mere passage of time; and

(ix) the total contract price substantially exceeds the rental value of the property for the contract period.

(E) The customer location is determined by the physical location where the purchaser or the purchaser's designee consumes the service. The location should be determined in good faith using the most reasonable method under the circumstances, considering the information reasonably available. Receipts from some services may be sourced to multiple customer locations or to multiple customers. Locations that may be reasonable under the circumstances include the customer's principal place of business, the customer's business unit that is using the computer services, the delivery addresses for individual units of service provided to the customer, the primary place or places of consumption by the customer, the service address of the customer, the billing address of the customer, or a combination of methods. Examples:

(i) An individual purchases access to a dating application. The most reasonable customer location for consumption of the service may be the billing address of the individual in the absence of information regarding the individual's physical address.

(ii) A benefactor purchases access to a computer service for a charitable organization. The customer is the purchaser's designee for consuming the service - the charitable organization. The most reasonable customer location for consumption of the service may be the physical address of the charitable organization.

(iii) An intermediary purchases access to a computer service for resale to a third party. The customer is purchaser's designee for consuming the service - the third party. The most reasonable customer location for consumption of the service may be the physical location of the third party, if known.

(iv) A law firm purchases access to a database search program for attorneys in multiple offices. The customers are the purchaser's designees for consuming the service - its attorneys. The most reasonable customer locations for consumption of the service may be physical addresses of each office, with the access fee sourced proportionately based on the number of attorneys in each office.

(v) A retailer with multiple sales outlets purchases access to point of sales software that reports to the retailer's central office. The most reasonable customer locations for consumption of the service may be the physical addresses of the central office and each designated point of sale, with the access fee sourced proportionately between the central office and each designated point of sale.

(vi) A retailer with multiple sales outlets purchases access to federal income tax preparation software. The most reasonable customer location for consumption of the service may be the principal place of business of the retailer.

(vii) An individual pays a fee to an Internet ride-sharing service connecting the individual with a driver at a particular location. The most reasonable customer location for consumption of the service may be the physical address of rendezvous point for the ride.

(14) [~~(13)~~] Leases and subleases.

(A) Gross receipts [~~Revenues~~] from the lease, [~~or~~] sublease, [~~(or~~] rental, or subrental[~~)~~] of real property are sourced [~~apportioned~~] to the location of the property.

(B) Gross receipts [~~Revenues~~] from the lease, [~~or~~] sublease, [~~(or~~] rental, or subrental[~~)~~] of tangible personal property are sourced [~~apportioned~~] to the location of the property. If the property is used both inside and outside Texas, then lease payments are sourced [~~apportioned~~] based on the number of days that the tangible personal

property was used in Texas divided by the number of days that the tangible personal property was used everywhere. If the amount [of revenue that is] due under the lease is based on mileage, then the lease payments are sourced [apportioned] based on the number of miles in Texas divided by the number of miles everywhere.

(C) If a lump sum is charged for the lease, sublease, rental, or subrental of more than one item of [leased or subleased (or rented or subrented)] property, and the items are [that is] located both inside and outside Texas, the lump-sum is sourced to Texas [then the allocation of such revenue is] based on a ratio of the fair rental value of the items located in Texas[each item of property] to the fair value of the items located outside of Texas.

(D) Gross receipts [Revenues] from the lease, [or] sublease, [(or] rental, or subrental[)] of a vessel that engages in commerce are sourced [apportioned] to Texas based on the number of days that the vessel is engaged in commerce in Texas waters divided by the number of days that the vessel is engaged in commerce everywhere.

(E) Gross receipts from [If] a lease, sublease, rental, or subrental of real property or tangible personal property that is treated as a sale for federal income tax purposes[, then the receipts from the transaction] are sourced [apportioned] in the same manner as a sale. Any portion of the payments that the contracting parties designate as interest is sourced as provided in paragraph (12) of this subsection, concerning interest [receipts].

(15) [(14)] Litigation awards. Litigation [Revenues that are realized from litigation] awards are gross receipts that are sourced [apportioned] to the location [legal domicile] of the payor [of the proceeds]; however, if the litigation awards are intended to replace receipts for which another [apportionment] rule [is] provided in this section applies, then the gross receipts are sourced [apportionment must be made] in accordance with that rule. For example, if a taxable entity sues a Delaware corporation to recover on a sale of goods delivered to a Texas location, then a judgment for the amount of that sale would not convert the receipts from Texas gross receipts to Delaware receipts. See subsection (f) of this section, for the sourcing [apportionment] of receipts from judgments, compromises, or settlements that relate to natural gas production.

(16) [(15)] Loan servicing [of real property].

(A) Gross receipts [Receipts] from [the] servicing [of] loans secured by real property are sourced [apportioned] to the location of the collateral real property that secures the loan being serviced.

(B) Gross receipts from servicing loans that are not secured by real property are sourced as provided in paragraph (26) of this subsection, concerning services.

(17) [(16)] Loans and securities treated as inventory of the seller.

(A) Gross proceeds from the sale of [If] a loan or security [is] treated as inventory of the seller for federal income tax purposes are included in gross receipts even though the tax basis is not included in total revenue under §3.587(e)(4) of this title. Securities and loans held for investment or risk management purposes are not inventory. Gross receipts from the sale of a loan or security treated as inventory of the seller are sourced to the location of the payor as provided in paragraph (25) of this subsection, concerning securities. See paragraph (2) of this subsection, concerning capital assets and investments, or paragraph (10) of this subsection, concerning financial derivatives, for the treatment of gains and losses from sales of loans and securities not treated as inventory of the seller. [, the gross proceeds of the sale of that loan or security are considered gross receipts.]

(B) If [For reports originally due on or after January 1, 2010, if] a lending institution categorizes a loan or security as "Securities Available for Sale" or "Trading Securities" under Financial Accounting Standard No. 115, the gross proceeds of the sale of that loan or security are considered gross receipts. In this subparagraph, "Financial Accounting Standard No. 115" means the Financial Accounting Standard No. 115 in effect as of January 1, 2009, not including any changes made after that date.

(18) [(17)] Membership or enrollment fees paid for access to benefits. Membership or enrollment fees paid for access to benefits are [should be considered] gross receipts from the sale of an intangible asset and are sourced [apportioned] to the location [legal domicile] of the payor.

(19) [(18)] Mixed transactions. If a transaction involves elements of both a sale of tangible personal property and a service, but no documentation exists to show separate charges for the tangible personal property [sale] and service elements, then the comptroller may determine the amounts that are allocable to each element based on fair values or on any available evidence.

(20) [(19)] Net distributive income. The net distributive income or loss from a passive entity that is included in total revenue is sourced [apportioned] to the principal place of business of the passive entity.

[(20) Newspapers or magazines. All advertising revenues of a newspaper or magazine, including those revenues derived from out-of-state advertisements, are apportioned to Texas based on the number of newspapers or magazines distributed in Texas. All other receipts must be apportioned in accordance with the apportionment rules otherwise set out in this section. For example, receipts from sales of newspapers or magazines are to be apportioned based on paragraph (29) of this subsection.]

(21) Patents, copyrights, and other intangible assets [rights].

(A) Gross receipts [Receipts]from the use of intangible assets [intangibles].

(i) Revenues from a patent royalty are included in Texas receipts to the extent that the patent is utilized in production, fabrication, manufacturing, or other processing in Texas.

(ii) Revenues from a copyright royalty are included in Texas receipts to the extent that the copyright is utilized in printing or other publication in Texas.

(iii) Gross receipts [Revenues] that the owner of a patent, copyrighted material, trademark, franchise, or license receives from licensing the use of the patent, copyrighted material, trademark, franchise, or license are sourced to [included as] Texas [receipts] to the extent the patent, copyrighted material, trademark, franchise or license is used in Texas.

(iv) Royalties from an affiliated taxable entity that does not transact a substantial portion of its business or regularly maintain a substantial portion of its assets in the United States are excluded from Texas gross receipts and gross receipts from an entity's entire business [everywhere].

(B) Gross receipts from the sale of intangible assets. Except as otherwise provided in this section, gross receipts from the sale of intangible assets [Sales. Sales of intangibles] are sourced to the [apportioned based on the] location of payor.

(C) Examples.

(i) Example 1. The owner of seismic data grants a license to an oil company to access the seismic data. Even though a license is part of this transaction, the receipts are from the use of the underlying intangible property, the seismic data (which cannot be copyrighted), not from the use of a license. Accordingly, the receipts are sourced under subparagraph (B) of this paragraph to the location of the payor.

(ii) Example 2. An inventor licenses a patent to a manufacturer. When the manufacturer licensee thereafter produces the patented item, it uses the patent, and its payments to the inventor, owner of the patent, are receipts from the use of a patent under subparagraph (A) of this paragraph. The receipts that the inventor receives are included in Texas receipts to the extent that the patent is used in production, fabrication, manufacturing, or other processing in Texas.

(iii) Example 3. The owner of copyrighted material grants a license to a publisher to publish the copyrighted material. When the publisher publishes the copyrighted material, it uses the copyright, and its payments to the owner are receipts from the use of a copyright under subparagraph (A) of this paragraph. The receipts that the copyright owner receives from the use of its copyright is included in Texas receipts to the extent the copyright is used in Texas.

(22) Qualified stock purchase under IRC, §338(h)(10) (Certain stock purchases treated as asset acquisitions). Receipts that are treated as receipts from the sale of assets by the target taxable entity under IRC, §338(h)(10) are sourced according to the rules that apply to sales of such assets. For the purposes of this paragraph, the purchaser of the target's stock is considered the purchaser of the assets. [Radio/television. All advertising revenues of a radio or television station that broadcasts or transmits from a location in Texas constitute Texas receipts, even though some of the listening or viewing audiences are located outside Texas. All other receipts must be apportioned in accordance with the apportionment rules otherwise set out in this section.]

(23) Real property. Gross receipts [Revenues] from the sale, lease, rental, sublease, or subrental of real property, including mineral interests, are sourced [apportioned] to the location of the property. Royalties from mineral interests are considered revenue from real property.

(24) Sales taxes. State or local sales taxes that are imposed on the customer, but are collected by a seller are not included in the seller's gross receipts [of the seller]. However, discounts that a seller is allowed to take in remittance of the collected sales tax are gross receipts to the seller.

(25) Securities. Gross receipts [Receipts] from the sale of securities are sourced to [apportioned based on] the location of the payor. If securities are sold through an exchange, and the payor [buyer] cannot be identified, then 8.7% [7.9%] of the revenue is a Texas gross receipt.

(26) Services. Except as otherwise provided in this section, gross receipts [Receipts] from a service are sourced [apportioned] to the location where the service is performed. [If services are performed both inside and outside Texas, then such receipts are Texas receipts on the basis of the fair value of the services that are rendered in Texas.]

(A) Location of performance. Except as provided in other subparagraphs, a service is performed at the location of the receipts-producing, end-product act or acts. If there is a receipts-producing, end-product act, the location of other acts will not be considered even if they are essential to the performance of the receipts-producing acts. If there is not a receipts-producing, end-product act, then the locations of all essential acts may be considered. Examples: [Taxable entities that have margin that is derived, directly or indirectly, from the sale of services to or on behalf of a regulated investment company should refer to Tax Code, §171.106(b), for information on apportionment of such margin.]

(i) Admission fees, subscription fees, or other charges for an audience to observe live or pre-recorded performances are sourced to the locations where the recipients observe the performance. The location where the live performance was rehearsed, the location where the pre-recorded performance was recorded, and the location where the admission fee or other charge was paid are not determinative.

(ii) Gross receipts from the architectural design of a structure, are sourced to the location or locations where the architect performed the work. The delivery location of any tangible work product, such as a blueprint, is not determinative. However, if the tangible work product of the architect is considered to be the sale of tangible personal property rather than the sale of a service, such as the sale of house plan books, the gross receipts are sourced as provided in paragraph (29) of this subsection, concerning tangible personal property.

(B) If services are performed both inside and outside Texas for a single charge, then receipts from the services are Texas gross receipts on the basis of the fair value of the services that are performed in Texas. In determining fair value, the relative value of each service provided on a stand-alone basis may be considered. Units of service, such as hours worked, may also be considered. The cost of performing a service does not necessarily represent its value. If costs are considered, costs should be limited to costs directly related to the service and not overhead costs. Examples: [Taxable entities that have margin that is derived, directly or indirectly, from the sale of management, administration, or investment services to an employee retirement plan as defined in subsection (b)(3) of this section, should refer to the Tax Code, §171.106(c), for information on apportionment of such margin.]

(i) A law firm with offices in Texas and Louisiana charges a client by the hour. Hours billed for work conducted in Texas are Texas gross receipts.

(ii) A law firm with offices in Texas and Louisiana charges a client a lump sum fee of $5,000 to draft a document. Attorneys in the Texas office recorded 20 hours on the project, and attorneys in the Louisiana office recorded 5 hours on the project at the same billing rate. Texas gross receipts are $4,000. If the law firm does not record hours worked on a project, other measures of direct cost may be considered.

(iii) A Texas-based landscaper provides grounds maintenance services at its client's four offices in Texas, and one office in Oklahoma, for an annual fee of $50,000. The landscape services at each of the locations are substantially the same. Texas gross receipts are $40,000. Although the cost of performing the landscaping maintenance service at the Oklahoma office is higher than the cost of performing the service at the other locations because of the additional travel cost, the additional cost is not considered.

(C) Taxable entities that have margin that is derived, directly or indirectly, from the sale of services to or on behalf of a regulated investment company should refer to subsection (c)(1) of this section for information on apportionment of such margin [Receipts from services that a defense readjustment project performs in a defense economic readjustment zone are not Texas receipts].

(D) Taxable entities that have margin that is derived, directly or indirectly, from the sale of management, administration, or investment services to an employee retirement plan should refer to sub-

section (c)(2) of this section for information on apportionment of such margin.

(E) Receipts from services that a defense readjustment project performs in a defense economic readjustment zone are not Texas gross receipts.

(27) Single member limited liability company (SMLLC). For purposes of this section, the sale of a SMLLC by its sole owner is the sale of a membership interest in the SMLLC. The membership interest is an intangible asset, and receipts from the sale of a SMLLC are sourced to the location of payor. [Services procurement. Revenue for the procurement of services are apportioned to the place where the service procurement is performed.]

(28) Subsidies or grants. Proceeds of subsidies or grants that a taxable entity receives from a governmental agency are gross receipts, except when the funds are required to be expended dollar-for-dollar (i.e., passed through) to third parties on behalf of the agency. Receipts from a governmental subsidy or grant are sourced [apportioned] in the same manner as the item to which the subsidy or grant was attributed. For example, receipts from [if a taxable entity qualifies for] a grant to conduct research for the government[, then the receipts from that grant] are receipts from a service and are sourced [apportioned] to the location where the research is performed.

(29) Tangible personal property. Examples of transactions that involve the sale of tangible personal property and result in Texas gross receipts include, but are not limited to, the following:

(A) the sale of tangible personal property that is delivered in Texas to a purchaser. Delivery is complete upon transfer of possession or control of the property to the purchaser, an employee of the purchaser, or transportation vehicles that the purchaser leases or owns. FOB point, location of title passage, and other conditions of the sale are not relevant to the determination of Texas gross receipts;

(B) the sale of tangible personal property that is delivered in Texas to an employee or transportation agent of an out-of-state purchaser. A carrier is an employee or agent of the purchaser if the carrier is under the supervision and control of the purchaser with respect to the manner in which goods are transported;

(C) the sale and delivery in Texas of tangible personal property that is loaded into a barge, truck, airplane, vessel, tanker, or any other means of conveyance that the purchaser of the property leases and controls or owns. The sale of tangible personal property that is delivered in Texas to an independent contract carrier, common carrier, or freight forwarder that a purchaser of the property hires results only in gross receipts everywhere if the carrier transports or forwards the property to the purchaser outside this state;

(D) the sale of tangible personal property with delivery to a common carrier outside Texas, and shipment by that common carrier to a purchaser in Texas;

(E) the sale of oil or gas to an interstate pipeline company, with delivery in Texas;

(F) the sale of tangible personal property that is delivered in Texas to a warehouse or other storage facility that the purchaser owns or leases;

(G) the sale of tangible personal property that is delivered to and stored in a warehouse or other storage facility in Texas at the purchaser's request, as opposed to a necessary delay in transit, even though the property is subsequently shipped outside Texas;

(H) the drop shipment of tangible personal property in Texas. A drop shipment is a shipment of tangible personal property from a seller directly to a purchaser's customer, at the request of the purchaser, without passing through the hands of the purchaser. This results in Texas gross receipts for the seller and the purchaser.

(30) Telecommunication services [Telephone companies].

(A) Gross receipts [Revenues] from telephone calls that both originate and terminate in Texas are sourced to Texas [receipts].

(B) Gross receipts [Revenues] from telephone calls that originate in Texas but terminate outside of Texas or that originate outside of Texas but terminate in Texas are not sourced to [excluded from] Texas [receipts].

(C) Gross receipts [Revenues] from telecommunication services other than those services in subparagraph (A) or (B) of this paragraph are sourced to Texas [receipts] if the services are performed in Texas. For example, a telephone company that provides a long distance carrier access to the telephone company's local exchange network in Texas is performing a service in Texas. Any fee that the telephone company charges the long distance carrier for access to the local exchange network in Texas is a Texas receipt regardless of whether the access is related to an interstate call. A fee that is charged to obtain access to a local exchange network in Texas and that is based on the duration of an interstate telephone call are not sourced to [may be excluded from] Texas [receipts].

(31) Television broadcaster licensing income. For reports originally due on or after January 1, 2018, a broadcaster's gross receipts from licensing income from broadcasting or otherwise distributing film programming by any means are sourced to Texas if the legal domicile of the broadcaster's customer is in this state. In this subparagraph, the following words and terms shall have the following meaning:

(A) Broadcaster--A taxable entity, not including a cable service provider or a direct broadcast satellite service, that is a television station licensed by the Federal Communications Commission, television broadcast network, cable television network, or television distribution company.

(B) Customer--A person, including a licensee, who has a direct connection or contractual relationship with a broadcaster under which the broadcaster derives revenue.

(C) Film programming--All or part of a live or recorded performance, event, or production intended to be distributed for visual and auditory perception by an audience.

(D) Programming--Includes news, entertainment, sporting events, plays, stories, or other literary, commercial, educational, or artistic works.

(32) [(31)] Texas waters. Gross receipts [Revenues] from transactions that occur in Texas waters are sourced to Texas [receipts]. Texas waters are considered to extend to 10.359 statute miles, or nine nautical miles, from the Texas coastline.

(33) [(32)] Transportation services. [companies. Transportation companies must report Texas receipts from transportation services in intrastate commerce by:]

(A) Gross receipts from the transportation of goods or passengers are sourced to Texas by including gross receipts from the transportation of goods or passengers that both originates and terminates in Texas. [the inclusion of revenues that are derived from the transportation of goods or passengers in intrastate commerce within Texas; or]

(B) For reports originally due prior to January 1, 2021, Texas gross receipts may also be calculated by the multiplication of total transportation receipts by total mileage in the transportation of

goods and passengers that move in intrastate commerce within Texas divided by total mileage everywhere.

(f) Natural gas production.

(1) Gross receipts [~~Revenues~~] that a gas producer realizes from the contract price of gas that the gas producer produces and that the purchaser takes pursuant to the terms of sales [~~are gross receipts and~~] are sourced [~~apportioned~~] to Texas, if the gas is delivered in Texas.

(2) Gross receipts [~~Revenues~~] that a gas producer realizes from a purchaser's payment under a sale or purchase contract for gas to be produced even if no gas is produced and delivered to the purchaser, [~~are gross receipts and~~] are sourced [~~apportioned~~] to the location [~~legal domicile~~] of the payor.

(3) Gross receipts [~~Revenues~~] that a gas producer realizes from a purchaser's payments to terminate a gas purchase contract [~~are gross receipts and~~] are sourced [~~apportioned~~] to the location [~~legal domicile~~] of the payor.

(4) Gross receipts [~~Revenues~~] that a gas producer realizes from a contract amendment that relates to the price of the gas sold are treated as gross receipts from the sales of gas and are sourced [~~apportioned~~] to Texas if delivery is made to a location in Texas. Gross receipts [~~Revenues~~] that the gas producer realizes from a contract amendment that relates to a provision other than the price of gas sold [~~are gross receipts and~~] are sourced [~~apportioned~~] to the location [~~legal domicile~~] of the payor.

(5) Gross receipts [~~Revenues~~] that a gas producer realizes from litigation awards for a breach of contract, reimbursements for litigation-related expenses (e.g., documented attorney's fees or court costs), or interest (upon which the parties have agreed, that the records of the producer reflects, or in an amount that a court has ordered) [~~are gross receipts and~~] are sourced [~~apportioned~~] to the location [~~legal domicile~~] of the payor.

(6) Gross receipts [~~Revenues~~] that a gas producer realizes from a judgment, compromise, or settlement relating to the recovery of a contract price of gas produced [~~are gross receipts and~~] are sourced [~~apportioned~~] to Texas to the extent the contract specified delivery to a location in Texas. Gross receipts [~~Revenues~~] that a gas producer realizes from a judgment, compromise, or settlement that relates to several claims or causes of action shall be prorated based upon the documented amounts due under the contract for each claim or cause of action according to the records of the producer. For example, a settlement sum of $100,000 for a pricing dispute of $25,000 and for failure to pay for gas not taken in the amount of $225,000, would result in receipts of $10,000 from gas sales (100,000 X 25,000/250,000) and receipts from other business of $90,000 (100,000 X 225,000/250,000). Records of the producer shall include, but are not limited to the following: contracts, settlement agreements, accounting records and entries, court pleadings and worksheets, including calculations reflecting settlement amounts.

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 Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 148. SEX OFFENDER CONDITIONS OF PAROLE OR MANDATORY SUPERVISION

37 TAC §§148.45, 148.47, 148.48, 148.50, 148.52

The Texas Board of Pardons and Paroles proposed amendments to 37 TAC Chapter 148, §§148.45, 148.47, 148.48, 148.50 and 148.52, concerning sex offender conditions of parole or mandatory supervision.

The amendments to §§148.45, 148.47, 148.48 and 148.50 are proposed to provide edits for clarity, uniformity, and consistency throughout the rules and to correct grammatical errors. The amendments to §148.52 include changes related to responsibilities in the hearing process.

David Gutiérrez, Chair of the Board, determined that for each year of the first five-year period the proposed amendments are in effect, no fiscal implications exist for state or local government as a result of enforcing or administering these sections.

Mr. Gutiérrez also has determined that during the first five years that the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments to these sections will be to bring the rule into compliance with current board practice. There will be no effect on small businesses. There is no anticipated economic cost to persons required to comply with the amended rule as proposed. The amendments 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; does not create a new regulation; does not expand, limit or repeal an existing regulation; 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.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on micro-businesses, small businesses, or rural communities as defined in Texas Government Code, Section 2006.001.

Comments should be directed to Bettie Wells, General Counsel, Texas Board of Pardons and Paroles, 209 W. 14th Street, Suite 500, Austin, TX 78701, or by e-mail to bettie.wells@tdcj.texas.gov. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amended rules are proposed under §§508.036(b), 508.0441, 508.045, and 508.228, Government Code. Section

508.036(b) authorizes the Board to adopt rules relating to the decision-making processes used by the Board and parole panels. Section 508.0441 authorizes the Board to adopt reasonable rules as proper or necessary relating to the eligibility of an offender for release to parole or mandatory supervision and to act on matters of release to parole or mandatory supervision. Section 508.045 authorizes a parole panel to grant or deny parole, revoke parole or mandatory supervision, and conduct revocation hearings. Section 508.228 authorizes a parole panel to impose sex offender conditions after a hearing for offenses where a sex offense occurred during the commission of the offense.

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

§148.45. Witnesses.

(a) The Hearing Officer may determine whether a witness may be excused under the rule that excludes witnesses from the hearing.

(1) In no event shall the Hearing Officer exclude from the hearing a party under the authority of this section. For these purposes, the term "party" means the definition in §141.111 of this title (relating to Definition of Terms) and includes:

(A) the releasee;

(B) the releasee's attorney; and

(C) no more than one representative of the [~~Texas Department of Criminal Justice Parole~~] Division [~~(TDCJ PD)~~] who has acted or served in the capacity of supervising, advising, or agent officer in the case.

(2) In the event that it appears to the satisfaction of the Hearing Officer that an individual who is present at the hearing and intended to be called by a party as a witness has no relevant, probative, noncumulative testimony to offer on any material issue of fact or law, then the Hearing Officer, in his sound discretion, may determine that such individual should not be placed under the rule and excluded from the hearing.

(b) All witnesses who testify in person are subject to cross-examination unless the Hearing Officer specifically finds good cause for lack of confrontation and cross-examination.

(c) Witnesses personally served with a subpoena and who fail to appear at the hearing, and upon good cause determined by the Hearing Officer, may present testimony by written statement.

§148.47. Evidence.

(a) No later than five (5) days prior to the scheduled hearing, all parties shall submit all documents that will be introduced into evidence at the hearing to the other party and the Hearing Officer.

(b) All parties shall have an opportunity to present evidence in the form of testimony and written documentation. The Hearing Officer shall determine the order of presentation of evidence.

(c) The Texas Rules of Evidence shall apply. When necessary to ascertain facts not reasonably susceptible of proof under these rules, evidence not admissible [~~there under~~] thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

(d) The Hearing Officer shall give effect to the rules of privilege recognized by law.

(e) Relevant testimony shall be confined to the subject of the pending matter. In the event any party at a hearing shall pursue a line of questioning that is, in the opinion of the Hearing Officer, irrelevant, incompetent, unduly repetitious, or immaterial, such questioning shall be terminated.

(f) Relevant staff reports may be admitted as evidence in any hearing.

(g) Evidence may be stipulated by agreement of all parties.

(h) Objections may be made and shall be ruled upon by the Hearing Officer, and any objections and the rulings thereon shall be noted in the record.

§148.48. Record.

(a) The record in any case includes all pleadings, motions, and rulings; evidence received or considered; matters officially noticed; questions and offers of proof, objections, and rulings on them; all relevant [~~TDCJ PD~~] Division documents, staff memoranda or reports submitted to or considered by the Hearing Officer involved in making the decision; and any decision, opinion, or report by the Hearing Officer presiding at the hearing.

(b) All hearings shall be electronically recorded in their entirety.

(c) The hearing record is made a part of the official parole record maintained by the TDCJ Parole Division. All requests for copies of the hearing report or hearing recording shall be addressed to the TDCJ Parole Division.

§148.50. Procedure after Waiver of Hearing.

(a) The parole panel may accept a waiver of the hearing provided that a waiver of the hearing includes the following:

(1) information that releasee was served with written notice of the following:

(A) notice of the right to a hearing, the purpose of which is to determine whether sex offender conditions may be imposed as a special condition of the release;

(B) notice of the right to full disclosure of the evidence;

(C) notice that releasee has the opportunity to be heard in person and to present witnesses and documentary evidence;

(D) notice that the releasee has the right to confront and cross-examine witnesses unless the parole panel or designee of the Board specifically finds good cause is shown;

(E) notice that the matter will be heard by an impartial decision maker; and

(F) opportunity to waive in writing the right to a hearing.

(2) information [~~TDCJ PD~~] Division relied upon to identify the releasee as a sex offender.

(b) After reviewing the waiver of the right to a sex offender condition hearing and receipt of supporting documentation of evidence of the releasee's sexual deviant behavior in the offense for which the releasee is currently on supervision, the parole panel or designee of the Board must determine that, by a preponderance of the evidence, the releasee constitutes a threat to society by reason of his/her lack of sexual control. The parole panel shall make final disposition of the case by taking one of the following actions:

(1) impose sex offender conditions; or

(2) deny imposition of sex offender conditions.

§148.52. Hearing.

(a) The [~~parole panel or~~] designee of the Board shall conduct the hearing for the purpose of determining whether sex offender conditions may be imposed as a special condition of release.

(b) The [~~parole panel or~~] designee of the Board must determine, as shown by a preponderance of the evidence, the releasee constitutes a threat to society by reason of his/her lack of sexual control.

(c) At the close of the hearing, or within a reasonable time thereafter, the [~~parole panel or~~] designee of the Board shall collect, prepare and forward to the parole panel:

(1) all documents;

(2) a summary report of the hearing with a written statement as to the evidence relied upon to make a finding or no finding that the releasee constitutes a threat to society by reason of his/her lack of sexual control; and

(3) the recording of the hearing.

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 29, 2020.

TRD-202004526
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Earliest possible date of adoption: December 13, 2020
For further information, please call: (512) 406-5478

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 803. SKILLS DEVELOPMENT FUND

The Texas Workforce Commission (TWC) proposes following new section of Chapter 803, relating to the Skills Development Fund:

Subchapter A. General Provisions Regarding the Skills Development Fund, §803.4

TWC proposes amendments to the following sections of Chapter 803, relating to the Skills Development Fund:

Subchapter A. General Provisions Regarding the Skills Development Fund, §§803.1 - 803.2

Subchapter B. Program Administration, §803.11 and §§803.13 - 803.15

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 803 rule changes is to implement statutory changes related to the Skills Development Fund (SDF) program.

House Bill (HB) 700, 86th Texas Legislature, Regular Session (2019), amended sections of Texas Labor Code Chapter 303, relating to the SDF program. The bill amended §303.001(a) to add Local Workforce Development Boards (Boards) to the list of entities that are eligible to use SDF grants as an incentive to provide customized assessment and training.

Additionally, HB 108, 85th Texas Legislature, Regular Session (2017), amended the Texas Labor Code to add §303.0031 regarding the use of SDF grants to encourage employer expansion and recruitment. The section allows SDF grants to provide "an intensive and rapid response to, and support services for, employers expanding in or relocating their operations to this state, with a focus on recruiting employers that will provide complex or high-skilled employment opportunities in this state."

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

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

Texas Government Code §2001.039 requires that every four years each state agency review and consider for readoption, revision, or repeal each rule adopted by that agency. TWC has assessed whether the reasons for adopting or readopting the rules continue to exist. TWC finds that the rules in Chapter 803 are needed, reflect current legal and policy considerations, and reflect current TWC procedures. The reasons for initially adopting the rules continue to exist. TWC, therefore, proposes to readopt Chapter 803, Skills Development Fund, with amendments described in this proposed rulemaking.

SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE SKILLS DEVELOPMENT FUND

TWC proposes the following amendments to Subchapter A:

§803.1. Scope and Purpose

Section 803.1(a) is amended to provide a broad statement on the purpose of the SDF. This language reflects the statutory purpose in the Texas Labor Code, §303.001 and includes business expansion and relocation purpose in the Texas Labor Code, §303.003. The amended language removes references to required partnerships for community-based organization as this eligibility requirement is described in §803.2.

Section 803.1(a) is also amended to add Boards to the list of entities eligible to receive SDF grants to provide customized assessment and training pursuant to Texas Labor Code §303.001.

TWC notes that Texas Government Code §2308.264 prohibits Boards from directly providing workforce training or one-stop workforce services unless the Board requests and is approved for a waiver based on the lack of an existing qualified alternative for delivery of workforce services in the local workforce development area (workforce area). Chapter 303 (as amended by HB 700) allows Boards to apply for and use SDF funds:

--as an incentive to provide customized training;

--to develop customized training; and

--to sponsor small and medium-sized business networks and consortiums for job training purposes.

Chapter 303 does not state that Boards must provide the training directly and, therefore, does not conflict with §2308.264.

Section 803.1(a) is also amended to add "A&M" to complete the name of the Texas Engineering Extension Service, which reflects the language in Texas Labor Code §303.001.

§803.2. Definitions

Definitions in §803.2 are amended as follows:

--Section 803.2(1) is amended to include a Board as a design partner in the definition of a "customized training project."

--Section 803.2(2) is amended to include a Board in the definition of a "grant recipient."

--Section 803.2(4) is amended to remove "person" to alleviate any ambiguity or confusion with the word in the definition of Private Partner.

--Section 802.2(7) is amended to add "A&M" to the defined term "Texas Engineering Extension Service."

--Section 803.2(9) is amended to include a Board contractor in the definition of a "training provider."

§803.4. Use of Funds to Encourage Employer Expansion and Recruitment

New §803.4 is added to implement Texas Labor Code §303.0031, relating to the use of the SDF to support employers expanding in or relocating to Texas. The rule language reflects the statutory language in §303.0031.

Section 803.4(a) reflects the statutory language in the Texas Labor Code that the SDF may be used to provide an intensive and rapid response to, and support services for, employers expanding in or relocating their operations to Texas, with a focus on recruiting employers that will provide complex or high-skilled employment opportunities in the state.

New §803.4(b) reflects the statutory language in the Texas Labor Code that the SDF grand funds may be used to:

--provide leadership and direction to, and connections among, out-of-state employers, economic development organizations, Boards, public community colleges, and public technical colleges to support employers' recruitment and hiring for complex or high-skilled employment positions as necessary to facilitate the employers' relocation to or expansion of operations in Texas; and

--award grants to public community colleges or public technical colleges that provide workforce training and related support services to employers that commit to establishing a place of business in Texas.

New §803.4(c) reflects the statutory language in the Texas Labor Code that the SDF grant funds may be used to develop:

--customized workforce training programs for an employer's specific business needs;

--fast-track curriculum;

--workforce training--related support services for employers; and

--instructor certification necessary to provide workforce training.

New §803.4(d) reflects the statutory language in the Texas Labor Code that SDF grant funds may also be used to acquire training equipment necessary for instructor certification and employment. The rule language clarifies that the use of funds for this purpose is permitted only for SDF grants that are funded under §803.4 to support employers expanding in or relocating to Texas.

Section 303.0031 allows TWC to require grant recipients, as a condition of receiving grant funds under this section, to agree to repay the amount received and any related interest if TWC determines that the grant funds were not used for the purposes for which the funds were

awarded. New §803.4(e) includes this option.

SUBCHAPTER B. PROGRAM ADMINISTRATION

TWC proposes the following amendments to Subchapter B:

§803.11. Grant Administration

Section 803.11(3) is amended to correct the citation for Agency Monitoring Activities to Chapter 802, Subchapter D.

§803.13. Program Objectives

Section 803.13(2) is amended to promote collaboration of workforce activities in workforce areas as an SDF program objective. The amended language removes collaboration solely with Boards and expands the promotion of collaboration and awareness of workforce activities to a broader partnership of entities.

§803.14. Procedure for Requesting Funding

Section 803.14 is amended to remove the language stating that SDF applicants obtain the review and comments of the Board in the applicable workforce areas where there is a significant impact on job creation or incumbent worker training.

TWC notes that collaboration between grant applicants and Boards during the SDF project development review and evaluation process ensures that the needs of local industry and the workforce are being met effectively and efficiently. Collaboration among separate grant applicants during the project development phase ensures that potential SDF projects do not provide duplicative services.

However, with the passage of HB 700, which allows Boards to apply for SDF grants, TWC acknowledges that non-Board grant applicants may have concerns about requiring another potential grant applicant to review and comment on the application before submitting it to TWC--specifically that this may appear to provide a Board with a potential advantage in the development of the Board's SDF application.

Accordingly, §803.14(a) is amended to remove the requirement that Boards review and comment on SDF applicants before the application is submitted to TWC.

Section 803.14(f)(6) is amended to include Boards, along with the entities currently in rule, in the signed agreement outlining each entity's roles and responsibilities if a grant is awarded.

Section 803.14(f)(8) is amended to require grant applicants to include a comparison of costs per trainee for customized training projects for similar Board instruction in the grant application in order to align with the current requirement for comparison of costs with instruction at community and technical colleges or TEEX.

§803.15. Procedure for Proposal Evaluation

Section 803.15(b) is amended to remove the requirement that TWC must notify the Board in the applicable workforce area when it is evaluating an SDF application. The amended section adds the requirement that TWC must notify all eligible grant applicants when it is evaluating an SDF application. The intent of the amended language is that this notification is to promote collaboration and awareness of potential workforce activities in the workforce area.

TWC Chapter 802, Subchapter G, Corrective Actions, allows TWC to impose corrective actions when a Board or TWC

grantee--defined in §802.2(1) to include SDF grantees--has failed to comply with contract requirements.

TWC contends that if an entity has failed to comply with past contract requirements and continues to be on corrective action for this noncompliance at the time of the entity's application, the entity should not be eligible for an SDF grant. Therefore, §803.15(d) is added to prohibit SDF applicants on corrective action as described in Chapter 802, Subchapter G, from receiving an SDF grant.

PART III. IMPACT STATEMENTS

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

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

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

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

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

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

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

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

Takings Impact Assessment

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

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

Government Growth Impact Statement

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

--the proposed amendments will not create or eliminate a government program;

--implementation of the proposed amendments will not require the creation or elimination of employee positions;

--implementation of the proposed amendments will not require an increase or decrease in future legislative appropriations to TWC;

--the proposed amendments will not require an increase or decrease in fees paid to TWC;

--the proposed amendments will not create a new regulation;

--the proposed amendments will not expand, limit, or eliminate an existing regulation;

--the proposed amendments will not change the number of individuals subject to the rules; and

--the proposed amendments will not positively or adversely affect the state's economy.

Economic Impact Statement and Regulatory Flexibility Analysis

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

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

Courtney Arbour, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to implement statutory changes related to the SDF.

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

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, TWC sought the involvement of Texas' 28 Local Workforce Development Boards (Boards). TWC provided the concept paper regarding these rule amendments to the Boards for consideration and review on January 7, 2020. TWC also conducted a conference call with Board executive directors and Board staff on January 17, 2020, to discuss the concept paper. During the rulemaking process, TWC considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

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

SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE SKILLS DEVELOPMENT FUND

40 TAC §§803.1, 803.2, 803.4

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

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§803.1. Scope and Purpose.

(a) Purpose. The purpose of the Skills Development Fund is to develop customized training projects for businesses and trade unions and to support employers expanding or relocating to Texas by enhancing [~~enhance~~] the ability of public community and technical colleges, Local Workforce Development Boards (Boards), and the Texas A&M Engineering Extension Service (TEEX) to respond to industry and workforce training needs and to develop incentives for Boards, public community and technical colleges, TEEX, or community-based organizations [~~only in partnership with the public community and technical colleges or TEEX~~] to provide customized assessment and training in a timely and efficient manner.

(b) Goal. The goal of the Skills Development Fund is to increase the skills level and wages of the Texas workforce.

§803.2. Definitions.

In addition to the definitions contained in §800.2 of this title, the following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Customized training project--A project that:

(A) provides workforce training, with the intent of either adding to the workforce or preventing a reduction in the workforce, and is specifically designed to meet the needs and special requirements of:

(i) employers and employees or prospective employees of the private business or business consortium; or

(ii) members of the trade union; and

(B) is designed by a private business or business consortium, or trade union in partnership with:

(i) a public community college;

(ii) a technical college;

(iii) TEEX;

(iv) a Board; or

(v) [~~(iv)~~] a community-based organization only in partnership with the public community and technical colleges or TEEX.

(2) Grant recipient--A recipient of a Skills Development Fund grant that is:

(A) a public community college;

(B) a technical college;

(C) TEEX;

(D) a Board; or

(E) [~~(D)~~] a community-based organization only in partnership with the public community and technical colleges or TEEX.

(3) Non-local public community and technical college--A public community [~~college~~] or technical college providing training outside of its local taxing district.

(4) Private partner--A [~~person,~~] sole proprietorship, partnership, corporation, association, consortium, or private organization that enters into a partnership for a customized training project with:

(A) a public community college;

(B) a technical college;

(C) TEEX; or

(D) a community-based organization only in partnership with the public community and technical colleges or TEEX.

(5) Public community college--A state-funded, two-year educational institution primarily serving its local taxing district and service area in Texas and offering vocational, technical, and academic courses for certification or associate's degrees.

(6) Public technical college--A state-funded coeducational institution of higher education offering courses of study in vocational and technical education, for certification or associate's degrees.

(7) Texas A&M Engineering Extension Service (TEEX)--A higher education agency and service established by the Board of Regents of the Texas A&M University System.

(8) Trade union--An organization, agency, or employee committee in which employees participate and which exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(9) Training provider--An entity or individual that provides training, including:

(A) a public community college;

(B) a technical college;

(C) TEEX;

(D) a community-based organization only in partnership with the public community [~~college~~] or technical college or TEEX; or

(E) An individual [~~a person~~], sole proprietorship, partnership, corporation, association, consortium, governmental subdivision, or public or private organization with whom a Board, public community or technical college, or TEEX has subcontracted to provide training.

§§803.4. Use of Funds to Encourage Employer Expansion and Recruitment.

(a) Pursuant to Texas Labor Code §303.0031, the Skills Development Fund may be used to provide an intensive and rapid response to, and support services for, employers expanding in or relocating their operations to Texas, with a focus on recruiting employers that will provide complex or high-skilled employment opportunities in the state.

(b) Grant funds under this section may be used to:

(1) provide leadership and direction to, and connections among, out-of-state employers, economic development organizations, Boards, public community and technical colleges to support employers' recruitment and hiring for complex or high-skilled employment positions as necessary to facilitate the employers' relocation to or expansion of operations in Texas; and

(2) award grants to public community or technical colleges that provide workforce training and related support services to employers that commit to establishing a place of business in Texas.

(c) Grant funds under this section may be used only to develop:

(1) customized workforce training programs for an employer's specific business needs;

(2) fast-track curriculum;

(3) workforce training--related support services for employers; and

(4) instructor certification necessary to provide workforce training.

(d) Notwithstanding the use of funds restrictions in §803.3(d)(2), grant funds may also be used to acquire training equipment necessary for instructor certification and employment.

(e) As a condition of receiving grant funds under this section, grant recipients shall agree to repay the amount received and any related interest if the Agency determines that the grant recipients did not use the funds for the purposes for which the funds were awarded.

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 30, 2020.

TRD-202004542
Dawn Cronin
Director, Workforce Program Policy
Texas Workforce Commission
Earliest possible date of adoption: December 13, 2020
For further information, please call: (512) 689-9855

SUBCHAPTER B. PROGRAM ADMINISTRATION

40 TAC §§803.11, 803.13 - 803.15

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

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§803.11. Grant Administration.

Grant recipients must enter into an agreement with the Agency to comply with contract requirements that include, but are not limited to:

(1) submitting all required reports, including financial and performance reports, in the format and time frame required by the Agency;

(2) maintaining fiscal data needed for independent verification of expenditures of funds received for the customized training project;

(3) cooperating and complying with Agency monitoring activities as required by Chapter 802, Subchapter D, [~~Chapter 800, Subchapter~~ H] of this title (relating to Agency Monitoring Activities); and

(4) submitting contract completion reports:

(A) The final payment is contingent upon the executive director's, or designee's, determination that a project has met the training objectives, outcomes, and requirements (an attrition rate of up to 15% of the total number of trainees in the contract is allowed).

(B) The final payment of the contract will be withheld for 60 days after the completion of training and after receipt by the Agency of verification from the employer that the trainees are employed.

§803.13. Program Objectives.

The [~~following are the~~] program objectives in administering the Skills Development Fund are:

(1) to [~~To~~] ensure that funds from the program are spent in all local workforce development areas (workforce areas) of this state and expand the state's capacity to respond to workforce training needs;

(2) to promote collaboration and awareness of potential workforce activities in workforce areas [~~To develop projects in workforce areas through collaboration with the Boards~~];

(3) to [~~To~~] develop projects that, at completion of the training, will result in wages equal to or greater than the prevailing wage of individuals [~~persons~~] with similar knowledge and experience in that occupation in the local labor market for the participants in the customized training project;

(4) to [~~To~~] prioritize the processing of grant requests from workforce areas where the unemployment rate is higher than the state's annual average unemployment rate; [~~and~~]

(5) to [~~To~~] sponsor creation and attraction of high-value, high-skill jobs for the state that will facilitate the growth of industry and emerging occupations; and[~~.~~]

(6) to [~~To~~] the greatest extent practicable, [~~the Agency will~~] award Skills Development Fund grants as follows:

(A) Approximately 60 percent [~~%~~] of the funds may be for job retention training.[~~; and~~]

(B) The remaining funds may be for training for job creation.

§803.14. Procedure for Requesting Funding.

(a) A [~~After obtaining the review and comments of the Board in the applicable workforce area(s), where there is a significant impact on job creation or incumbent worker training, a~~] private partner or a trade union, together with a Board, public community or technical college, or TEEX, shall present to the executive director, or designee, a proposal requesting funding for a customized training project or other appropriate use of the fund.

(b) TEEX, or the public community or technical college that is a partner to a training proposal for a grant from the Skills Development Fund, may be non-local.

(c) The training proposal shall not duplicate a training project available in the workforce area in which the private partner or trade union is located.

(d) Proposals shall disclose other grant funds sought or awarded from the Agency or other state and federal entities for the proposed job training project.

(e) Applicants shall indicate whether they are submitting concurrent proposals for the Skills Development Fund and the Texas Enterprise Fund. For the purposes of this subsection, "concurrent proposal" shall mean:

(1) a proposal for the Skills Development Fund that has been submitted and is pending at the time an applicant submits a proposal for the Texas Enterprise Fund; or

(2) a proposal for the Texas Enterprise Fund that has been submitted and is pending at the time an applicant submits a proposal for the Skills Development Fund.

(f) Proposals shall be written and contain the following information:

(1) The number of proposed jobs created and/or retained;

(2) A brief outline of the proposed training project, including the skills acquired through training and the employer's involvement in the planning and design;

(3) A brief description of the measurable training objectives and outcomes;

(4) The occupation and wages for participants who complete the customized training project;

(5) A budget summary, disclosing anticipated project costs and resource contributions, including the dollar amount the private partner is willing to commit to the project;

(6) A signed agreement between the private partner or trade union and the Board, public community or technical college, or TEEX outlining each entity's roles and responsibilities if a grant is awarded;

(7) A statement explaining the basis for the determination that there is an actual or projected labor shortage in the occupation in which the proposed training project will be provided that is not being met by an existing institution or program in the workforce area;

(8) A comparison of costs per trainee for the customized training project and costs for similar instruction at the public community or technical college, [~~or~~] TEEX, and the Board;

(9) A statement describing the private partner's or trade union's equal opportunity employment policy;

(10) A list of the proposed employment benefits;

(11) An indication of a concurrent proposal as required by subsection (e) of this section; and

(12) Any additional information deemed necessary by the Agency to complete evaluation of a proposal.

§803.15. Procedure for Proposal Evaluation.

(a) The executive director, or designee, shall evaluate each proposal considering the purposes listed in §803.3(a) of this subchapter, the program objectives listed in §803.13 of this subchapter, and procedures in §803.14 of this subchapter, along with the prevailing wage for occupations in the local labor market area, the financial stability of the private partner, the regional economic impact, and any other factors unique to the circumstances that the Agency determines are appropriate.

(b) The Agency shall notify all eligible grant applicants [~~the Board in the applicable workforce area~~] when the Agency is evaluating a proposal so as to promote collaboration and awareness [~~inform the Board~~] of potential workforce activities in the workforce area.

(c) If the Agency determines that a proposal is appropriate for funding through the Skills Development Fund, the executive director[~~,~~] or designee[~~,~~] shall enter into a contract with the grant recipient on behalf of the Agency.

(d) Skills Development Fund applicants on corrective action pursuant to Chapter 802, Subchapter G, shall not be eligible to receive a Skills Development Fund grant.

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 30, 2020.

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Dawn Cronin
Director, Workforce Program Policy
Texas Workforce Commission
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For further information, please call: (512) 689-9855