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 351. COORDINATED PLANNING AND DELIVERY OF HEALTH AND HUMAN SERVICES

SUBCHAPTER B. ADVISORY COMMITTEES

DIVISION 1. COMMITTEES

1 TAC §351.839

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §351.839, concerning Nursing Facility Payment Methodology Advisory Committee.

BACKGROUND AND PURPOSE

The Centers for Medicare and Medicaid Services (CMS) is implementing a new payment model for Medicare skilled nursing facilities (SNFs) effective October 1, 2019. Due to changes resulting from this implementation, the data HHSC uses to calculate the current Texas Medicaid reimbursement methodology for multiple state programs will not be accessible through the current federal source after September 30, 2020. HHSC is using this opportunity to consider revisions to the Medicaid nursing facility (NF) payment rate methodology. The purpose of the proposal is to create a Nursing Facility Payment Methodology Advisory Committee (NF-PMAC) to advise HHSC on the establishment and implementation of recommended improvements to the NF payment methodology and other NF reimbursement topics. By establishing the NF-PMAC, HHSC will benefit from stakeholder knowledge and expertise as HHSC considers possible changes to the NF payment methodology.

SECTION-BY-SECTION SUMMARY

Proposed new §351.839 creates the NF-PMAC to advise HHSC on the establishment and implementation of, and to recommend improvements to, the NF payment methodology, and other reimbursement topics. Subsections (a), (b), and (c) describe the statutory authority, purpose, and tasks of the advisory committee. Subsection (d) provides a reporting requirement, specifically that the NF-PMAC file a written report with HHSC's Executive Commissioner by August 31 of each fiscal year. Subsections (e) and (f) establish open meeting and membership requirements. Subsection (g) describes selection of officers and terms of service. Subsection (h) discusses the training members must complete and subsection (i) provides the date the rule expires, thus abolishing the advisory committee.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

(3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;

(4) the proposed rule will not affect fees paid to HHSC;

(5) the proposed rule will create a new rule;

(6) the proposed rule will not expand, limit, or repeal existing rules;

(7) the proposed rule will not change the number of individuals subject to the rules; and

(8) the proposed rule will not affect the state's economy.

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

Trey Wood has also determined that there is no adverse economic effect on small businesses, micro-businesses, or rural communities. The proposed rule affects state government operations only.

LOCAL EMPLOYMENT IMPACT

The proposed rule will not affect a local economy. There are no anticipated economic costs to persons who are required to comply with the section as proposed.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule does not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Victoria Grady, Director of Rate Analysis, has determined for each year of the first five years the rule is in effect, the public benefit will be improved transparency in the process by creating an avenue for stakeholders through creation of the advisory committee to work in partnership with HHSC on potential changes to the NF payment methodology.

Trey Wood has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule because creating a new advisory committee will not impose a cost on regulated persons.

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 this proposal may be directed to the HHSC Rate Analysis Customer Information Center at (512) 424-6637.

Written comments on this proposal may be submitted to the HHSC Rate Analysis Department, Mail Code H-400, P.O. Box 85200, Austin, TX 78705-5200, by fax to (512) 730-7475, or by e-mail to RAD-LTSS@hhsc.state.tx.us within 31 days after 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.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; or (2) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 20R004" in the subject line.

STATUTORY AUTHORITY

The new §351.839 is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.012, which provides that the Executive Commissioner of HHSC shall establish and maintain advisory committees and adopt rules governing such advisory committees in compliance with Chapter 2110 of the Texas Government Code.

The new section affects Texas Government Code §531.0055, Texas Government Code Chapter 531, and Texas Human Resources Code Chapter 32.

§351.839. Nursing Facility Payment Methodology Advisory Committee.

(a) Statutory authority. The Nursing Facility Payment Methodology Advisory Committee (NF-PMAC) is established under Texas Government Code, §531.012 and is subject to §351.801 of this division (relating to Authority and General Provisions).

(b) Purpose. The NF-PMAC advises the Executive Commissioner and the Health and Human Services system on the establishment and implementation of recommended improvements to the nursing facility (NF) reimbursement methodology and other NF payment topics.

(c) Tasks. The NF-PMAC:

(1) studies and makes recommendations on the development of an NF reimbursement methodology that incentivizes quality care for individuals served in an NF, and is cost-effective, streamlined and transparent; and

(2) performs other tasks consistent with its purpose as requested by the Executive Commissioner.

(d) Reporting requirement. By August 31 of each fiscal year, the NF-PMAC files a written report with the Executive Commissioner covering the meetings and activities in the immediately preceding fiscal year. The report includes:

(1) a list of the meeting dates;

(2) the members' attendance records;

(3) a brief description of actions taken by the committee;

(4) a description of how the committee accomplished its tasks;

(5) a description of activities the committee anticipates undertaking in the next fiscal year;

(6) recommended amendments to this section, as needed; and

(7) the costs related to the committee, including the cost of HHSC staff time spent supporting the committee's activities and the source of funds used to support the committee's activities.

(e) Open meetings. The NF-PMAC complies with the requirements for open meetings under Texas Government Code, Chapter 551.

(f) Membership. The NF-PMAC is composed of one non-voting ex-officio HHSC representative and an odd number of voting members, not to exceed 15, appointed by the Executive Commissioner.

(1) The voting members of the NF-PMAC may consist of:

(A) Medicaid managed care organization representatives;

(B) an association or associations representing managed care organizations;

(C) private NF owners or operators;

(D) non-state government-owned NF owners or operators;

(E) an association or associations representing NF providers;

(F) an association or associations representing individuals receiving Medicaid services in an NF;

(G) rural NF providers;

(H) urban NF providers;

(I) NF providers serving 50 or fewer residents;

(J) NF providers serving 51 or more residents;

(K) NF resident advocates; and

(L) other disciplines with expertise in NF finance, delivery, or quality improvement.

(2) Voting members are appointed for three year terms. The terms will be staggered so that the terms of an equal or almost equal number of members expire on August 31 of each year. Regardless of the term limit, a member serves until the member's replacement has been appointed. This ensures sufficient, appropriate representation.

(3) If a vacancy occurs, a member is appointed by the Executive Commissioner to serve the unexpired portion of that term.

(4) Paragraphs (2) and (3) of this subsection do not apply to the ex-officio member, who serves at the pleasure of the Executive Commissioner. The ex-officio member provides informational updates about the NF-PMAC to the Long-Term Care Facilities Council, if such updates are requested by the Long-Term Care Facilities Council.

(g) Officers. NF-PMAC selects a chair of the advisory committee from its members.

(1) The chair serves until September 1 of each even-numbered year.

(2) A member serves no more than two consecutive terms as chair. A chair may not serve beyond their membership term.

(h) Required training. Each member shall complete all training on relevant statutes and rules, including this section, §351.801 of this division, and Texas Government Code, Chapters 551 and 2110, and §531.012. Training will be provided by HHSC.

(i) Date of abolition. The NF-PMAC is abolished, and this section expires, on August 31, 2022.

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 15, 2019.

TRD-201904259
Karen Ray
Chief Counsel
Texas Health and Human Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 424-6637

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CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §355.8065, concerning Disproportionate Share Hospital Reimbursement Methodology, §355.8066, concerning Hospital-Specific Limit Methodology, and §355.8212, concerning Waiver Payments to Hospitals for Uncompensated Charity Care.

BACKGROUND AND PURPOSE

The proposed rule amendments describe new payment caps for the Disproportionate Share Hospital (DSH) and Uncompensated Care (UC) Medicaid supplemental payment programs. When combined, DSH and UC represent almost $5.5 billion in Medicaid payments for Texas hospitals. The programs are meant to reimburse hospitals that provide services to predominantly Medicaid and low- income patients. So, the allocation methodology among such providers should account for the relative amounts of Medicaid and low-income patients served, as well as the overall payments hospitals receive for those patients.

In Texas, two payment caps exist for hospitals that participate in DSH and UC. There is a federal payment cap, known as the final hospital specific limit (final HSL), that is described in federal law. There is also a state payment cap, known as the interim hospital specific limit (interim HSL), that HHSC may define. The state payment cap is calculated in the payment year for DSH and UC but the federal payment cap is calculated two years after the payment year using updated data. HHSC linked the interim HSL to the final HSL so that there would be a limited chance that a recoupment would occur after the final HSL was calculated.

The federal payment cap has been the subject of ongoing federal litigation for several years. HHSC is monitoring this litigation and continually examines how the Texas payment cap should change in response to the outcome of the federal litigation. That litigation relates to the inclusion of payments from other insurance payors and Medicare when a Medicaid client also has other insurance or Medicare.

HHSC reviewed multiple options for the state payment cap. HHSC proposes to implement a full offset methodology for the state payment cap. That means any payment for services provided to a Medicaid client from any source will be included as an offset to all appropriate Medicaid costs.

HHSC also seriously considered two other options. HHSC considered an approach where the Texas payment caps would not contain either the costs or payments for a Medicaid client who also has other insurance or Medicare. HHSC also considered capping, in the aggregate, other insurance and Medicare payments at the Medicaid allowable cost. However, HHSC determined that including all Medicaid costs and all third-party payments provides a more appropriate measure of financial need given the purpose of the payment programs at issue. HHSC will consider all comments but is particularly interested in comments on the two other payment cap options discussed above; HHSC may make changes to the rule on adoption based on those comments.

SECTION-BY-SECTION SUMMARY

The proposed amendments to §355.8065 change the term "interim hospital-specific limit" to "state payment cap." Additionally, the amendments change the term "final hospital-specific limit" to "hospital-specific limit."

The proposed amendments to §355.8066 change the term "interim hospital-specific limit" to "state payment cap" and change the calculation of the state payment cap to include the offset of Medicare and other insurance payments.

The proposed amendments to §355.8212 change the term "interim hospital-specific limit" to "state payment cap."

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules will have foreseeable implications relating to the costs or revenues of state government.

The effect on state government for each year of the first five years the proposed rule is in effect is an estimated federal revenue loss of $(26,093,418) in federal fiscal year (FFY) 2020, $(26,487,669) in FFY 2021, $(26,487,669) in FFY 2022, $(26,487,669) in FFY 2023, and $(26,487,669) in FFY 2024.

The proposed change will affect local governments differently. The change for each local government hospital will depend on several factors, including that hospital's patient mix, third party claiming, and utilization changes from year to year. While certain local government-owned hospitals will see an increase in DSH and UC payments, the net impact of the proposed change is

a decrease of $2,901,147 (federal funds) in payments to these hospitals.

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

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

(4) the proposed amendments will not affect fees paid to the agency;

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

(6) the proposed amendments will not expand, limit, or repeal an existing rule; and

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

HHSC has insufficient information to determine the proposed amendments' effect on the state's economy.

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

Trey Wood, Chief Financial Officer, has determined that the economic impact to small and micro-businesses cannot be determined. However, Mr. Wood has determined that, due to the proposed change, certain rural hospitals will receive less DSH and UC payments. HHSC estimates the overall loss to rural hospitals (based on the definition of a rural hospital in 1 Texas Administrative Code §355.8212(b)(19) will be $3,993,112 (all funds). HHSC cannot extrapolate on how this reduction to hospital payments could in turn affect rural communities.

A purpose of the proposed rule amendments is to minimize recoupments following reconciliation audits. HHSC considered the alternative of leaving the rule language as is but has determined that minimizing recoupments is consistent with the economic welfare of the state.

LOCAL EMPLOYMENT IMPACT

There is a possibility of a negative impact on local employment in some communities and a positive impact in others. The change in calculation of the state payment cap to include the offset of Medicare and other insurance payments will impact distribution of DSH and UC funds to participating hospitals. Certain providers may receive greater reimbursement while others may receive less than they would under the current rules.

HHSC lacks sufficient data to both predict communities in which there may be an employment impact and to determine the potential impacts on local employment in those communities.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

Charles Greenberg, Director of Hospital Finance and Waiver Programs, has determined that for each year of the first five years the rules are in effect, the public benefit will be a more equitable distribution of DSH and UC funds.

Trey Wood, Chief Financial Officer, has also determined that for the first five years the rules are in effect, there will not be economic costs to persons who are required to comply with the proposed rules because there will be no additional requirements imposed on providers that could result in additional costs.

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 HEARING

Details for the public hearing will be published as a notice in the *Texas Register* at a later date.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to HHSRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register.* Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 20R005" in the subject line.

DIVISION 4. MEDICAID HOSPITAL SERVICES

1 TAC §355.8065, §355.8066

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for Medicaid payments under Texas Human Resources Code Chapter 32.

The amendments affect Texas Government Code §531.0055, Texas Government Code Chapter 531, and Texas Human Resources Code Chapter 32.

§355.8065. Disproportionate Share Hospital Reimbursement Methodology.

(a) Introduction. Hospitals participating in the Texas Medicaid program that meet the conditions of participation and that serve a disproportionate share of low-income patients are eligible for reim-

bursement from the disproportionate share hospital (DSH) fund. The Texas Health and Human Services Commission (HHSC) will establish each hospital's eligibility for and amount of reimbursement using the methodology described in this section.

(b) Definitions.

(1) Adjudicated claim--A hospital claim for payment for a covered Medicaid service that is paid or adjusted by HHSC or another payer.

(2) Available DSH funds--The total amount of funds that may be distributed to eligible qualifying DSH hospitals for the DSH program year, based on the federal DSH allotment for Texas (as determined by the Centers for Medicare & Medicaid Services) and available non-federal funds. HHSC may divide available DSH funds for a program year into one or more portions of funds to allow for partial payment(s) of total available DSH funds at any one time with remaining funds to be distributed at a later date(s). If HHSC chooses to make a partial payment, the available DSH funds for that partial payment are limited to the portion of funds identified by HHSC for that partial payment.

(3) Available general revenue funds--The total amount of state general revenue funds appropriated to provide a portion of the non-federal share of DSH payments for the DSH program year for non-state-owned hospitals. If HHSC divides available DSH funds for a program year into one or more portions of funds to allow for partial payment(s) of total available DSH funds as described in paragraph (2) of this subsection, the available general revenue funds for that partial payment are limited to the portion of general revenue funds identified by HHSC for that partial payment.

(4) Bad debt--A debt arising when there is nonpayment on behalf of an individual who has third-party coverage.

(5) Centers for Medicare & Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(6) Charity care--The unreimbursed cost to a hospital of providing, funding, or otherwise financially supporting health care services on an inpatient or outpatient basis to indigent individuals, either directly or through other nonprofit or public outpatient clinics, hospitals, or health care organizations. A hospital must set the income level for eligibility for charity care consistent with the criteria established in §311.031, Texas Health and Safety Code.

(7) Charity charges--Total amount of hospital charges for inpatient and outpatient services attributed to charity care in a DSH data year. These charges do not include bad debt charges, contractual allowances, or discounts given to other legally liable third-party payers.

(8) Children's hospital--A hospital within Texas that is recognized by Medicare as a children's hospital and is exempted by Medicare from the Medicare prospective payment system.

(9) Disproportionate share hospital (DSH)--A hospital identified by HHSC that meets the DSH program conditions of participation and that serves a disproportionate share of Medicaid or indigent patients.

(10) DSH data year--A twelve-month period, two years before the DSH program year, from which HHSC will compile data to determine DSH program qualification and payment.

(11) DSH program year--The twelve-month period beginning October 1 and ending September 30.

(12) Dually eligible patient--A patient who is simultaneously eligible for Medicare and Medicaid.

(13) Governmental entity--A state agency or a political subdivision of the state. A governmental entity includes a hospital authority, hospital district, city, county, or state entity.

(14) HHSC--The Texas Health and Human Services Commission or its designee.

(15) Hospital-specific limit--The maximum payment amount, as applied to payments made during a prior DSH program year, [~~applicable to a DSH program year~~] that a hospital may receive in reimbursement for the cost of providing Medicaid-allowable services to individuals who are Medicaid-eligible [~~Medicaid eligible~~] or uninsured. The hospital-specific limit is calculated using the methodology described in §355.8066 of this title (relating to Hospital-Specific Limit Methodology) using actual cost and payment data from the DSH program year.

[~~(A) Interim hospital-specific limit--Applies to payments that will be made for the DSH program year and is calculated using the methodology described in §355.8066 of this title using interim cost and payment data from the DSH data year.~~]

[~~(B) Final hospital-specific limit--Applies to payments made during a prior DSH program year and is calculated using the methodology as described in §355.8066 of this title using actual cost and payment data from the DSH program year.~~]

(16) Independent certified audit--An audit that is conducted by an auditor that operates independently from the Medicaid agency and the audited hospitals and that is eligible to perform the DSH audit required by CMS.

(17) Indigent individual--An individual classified by a hospital as eligible for charity care.

(18) Inpatient day--Each day that an individual is an inpatient in the hospital, whether or not the individual is in a specialized ward and whether or not the individual remains in the hospital for lack of suitable placement elsewhere. The term includes observation days, rehabilitation days, psychiatric days, and newborn days. The term does not include swing bed days or skilled nursing facility days.

(19) Inpatient revenue--Amount of gross inpatient revenue derived from the most recent completed Medicaid cost report or reports related to the applicable DSH data year. Gross inpatient revenue excludes revenue related to the professional services of hospital-based physicians, swing bed facilities, skilled nursing facilities, intermediate care facilities, other nonhospital revenue, and revenue not identified by the hospital.

(20) Institution for mental diseases (IMD)--A hospital that is primarily engaged in providing psychiatric diagnosis, treatment, or care of individuals with mental illness.

(21) Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(22) Low-income days--Number of inpatient days attributed to indigent patients, calculated as described in subsection (h)(4)(A)(ii) of this section.

(23) Low-income utilization rate--A ratio, calculated as described in subsection (d)(2) of this section, that represents the hospital's volume of inpatient charity care relative to total inpatient services.

(24) Mean Medicaid inpatient utilization rate--The average of Medicaid inpatient utilization rates for all hospitals that have received a Medicaid payment for an inpatient claim, other than a claim

for a dually eligible patient, that was adjudicated during the relevant DSH data year.

(25) Medicaid contractor--Fiscal agents and managed care organizations with which HHSC contracts to process data related to the Medicaid program.

(26) Medicaid cost report--Hospital and Hospital Health Care Complex Cost Report (Form CMS 2552), also known as the Medicare cost report.

(27) Medicaid hospital--A hospital meeting the qualifications set forth in §354.1077 of this title (relating to Provider Participation Requirements) to participate in the Texas Medicaid program.

(28) Medicaid inpatient utilization rate (MIUR)--A ratio, calculated as described in subsection (d)(1) of this section, that represents a hospital's volume of Medicaid inpatient services relative to total inpatient services.

(29) MSA--Metropolitan Statistical Area as defined by the United States Office of Management and Budget. MSAs with populations greater than or equal to 137,000, according to the most recent decennial census, are considered "the largest MSAs."

(30) Non-federal percentage--The non-federal percentage equals one minus the federal medical assistance percentage (FMAP) for the program year.

(31) Non-urban public hospital--A rural public-financed hospital, as defined in paragraph (37) of this subsection, or a hospital owned and operated by a governmental entity other than hospitals in Urban public hospital - Class one or Urban public hospital - Class two.

(32) Obstetrical services--The medical care of a woman during pregnancy, delivery, and the post-partum period provided at the hospital listed on the DSH application.

(33) PMSA--Primary Metropolitan Statistical Area as defined by the United States Office of Management and Budget.

(34) Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(35) Ratio of cost-to-charges (inpatient only)--A ratio that covers all applicable hospital costs and charges relating to inpatient care. This ratio does not distinguish between payer types such as Medicare, Medicaid, or private pay.

(36) Rural public hospital--A hospital owned and operated by a governmental entity that is located in a county with 500,000 or fewer persons, based on the most recent decennial census.

(37) Rural public-financed hospital--A hospital operating under a lease from a governmental entity in which the hospital and governmental entity are both located in the same county with 500,000 or fewer persons, based on the most recent decennial census, where the hospital and governmental entity have both signed an attestation that they wish the hospital to be treated as a public hospital for all purposes under both this section and §355.8201 of this title (relating to Waiver Payments to Hospitals for Uncompensated Care).

(38) State chest hospital--A public health facility operated by the Department of State Health Services designated for the care and treatment of patients with tuberculosis.

(39) State-owned teaching hospital--A hospital owned and operated by a state university or other state agency.

(40) State payment cap--The maximum payment amount, as applied to payments that will be made for the DSH program year, that a hospital may receive in reimbursement for the cost of providing Medicaid-allowable services to individuals who are Medicaid-eligible or uninsured. The state payment cap is calculated using the methodology described in §355.8066 of this title (relating to Hospital-Specific Limit Methodology) using interim cost and payment data from the DSH data year.

(41) [~~(40)~~] Third-party coverage--Creditable insurance coverage consistent with the definitions in 45 Code of Federal Regulations (CFR) Parts 144 and 146, or coverage based on a legally liable third-party payer.

(42) [~~(41)~~] Total Medicaid inpatient days--Total number of inpatient days based on adjudicated claims data for covered services for the relevant DSH data year.

(A) The term includes:

(i) Medicaid-eligible days of care adjudicated by managed care organizations or HHSC;

(ii) days that were denied payment for spell-of-illness limitations;

(iii) days attributable to individuals eligible for Medicaid in other states, including dually eligible patients;

(iv) days with adjudicated dates during the period; and

(v) days for dually eligible patients for purposes of the MIUR calculation described in subsection (d)(1) of this section.

(B) The term excludes:

(i) days attributable to Medicaid-eligible patients ages 21 through 64 in an IMD;

(ii) days denied for late filing and other reasons; and

(iii) days for dually eligible patients for purposes of the following calculations:

(I) Total Medicaid inpatient days, as described in subsection (d)(3) of this section; and

(II) Pass one distribution, as described in subsection (h)(4) of this section.

(43) [~~(42)~~] Total Medicaid inpatient hospital payments--Total amount of Medicaid funds that a hospital received for adjudicated claims for covered inpatient services during the DSH data year. The term includes payments that the hospital received:

(A) for covered inpatient services from managed care organizations and HHSC; and

(B) for patients eligible for Medicaid in other states.

(44) [~~(43)~~] Total state and local payments--Total amount of state and local payments that a hospital received for inpatient care during the DSH data year. The term includes payments under state and local programs that are funded entirely with state general revenue funds and state or local tax funds, such as County Indigent Health Care, Children with Special Health Care Needs, and Kidney Health Care. The term excludes payment sources that contain federal dollars such as Medicaid payments, Children's Health Insurance Program (CHIP) payments funded under Title XXI of the Social Security Act, Substance Abuse and Mental Health Services Administration, Ryan White Title I, Ryan White Title II, Ryan White Title III, and contractual discounts and allowances related to TRICARE, Medicare, and Medicaid.

(45) [~~(44)~~] Urban public hospital--Any of the urban hospitals listed in paragraph (46)[~~(45)~~] or (47)[~~(46)~~] of this subsection.

(46) [~~(45)~~] Urban public hospital - Class one--A hospital that is operated by or under a lease contract with one of the following entities: the Dallas County Hospital District, the El Paso County Hospital District, the Harris County Hospital District, the Tarrant County Hospital District, the Travis County Healthcare District dba Central Health, or the University Health System of Bexar County.

(47) [~~(46)~~] Urban public hospital - Class two--A hospital that is operated by or under a lease contract with one of the following entities: the Ector County Hospital District, the Lubbock County Hospital District, or the Nueces County Hospital District.

(c) Eligibility. To be eligible to participate in the DSH program, a hospital must:

(1) be enrolled as a Medicaid hospital in the State of Texas;

(2) have received a Medicaid payment for an inpatient claim, other than a claim for a dually eligible patient, that was adjudicated during the relevant DSH data year; and

(3) apply annually by completing the application packet received from HHSC by the deadline specified in the packet.

(A) Only a hospital that meets the condition specified in paragraph (2) of this subsection will receive an application packet from HHSC.

(B) The application may request self-reported data that HHSC deems necessary to determine each hospital's eligibility. HHSC may audit self-reported data.

(C) A hospital that fails to submit a completed application by the deadline specified by HHSC will not be eligible to participate in the DSH program in the year being applied for or to appeal HHSC's decision.

(D) For purposes of DSH eligibility, a multi-site hospital is considered one provider unless it submits separate Medicaid cost reports for each site. If a multi-site hospital submits separate Medicaid cost reports for each site, for purposes of DSH eligibility, it must submit a separate DSH application for each site.

(E) HHSC will consider a merger of two or more hospitals for purposes of the DSH program for any hospital that submits documents verifying the merger status with Medicare prior to the deadline for submission of the DSH application. Otherwise, HHSC will determine the merged entity's eligibility for the subsequent DSH program year. Until the time that the merged hospitals are determined eligible for payments as a merged hospital, each of the merging hospitals will continue to receive any DSH payments to which it was entitled prior to the merger.

(d) Qualification. For each DSH program year, in addition to meeting the eligibility requirements, applicants must meet at least one of the following qualification criteria, which are determined using information from a hospital's application, from HHSC, or from HHSC's Medicaid contractors, as specified by HHSC:

(1) Medicaid inpatient utilization rate. A hospital's Medicaid inpatient utilization rate is calculated by dividing the hospital's total Medicaid inpatient days by its total inpatient census days for the DSH data year.

(A) A hospital located outside an MSA or PMSA must have a Medicaid inpatient utilization rate greater than the mean Medicaid inpatient utilization rate for all Medicaid hospitals.

(B) A hospital located inside an MSA or PMSA must have a Medicaid inpatient utilization rate that is at least one standard deviation above the mean Medicaid inpatient utilization rate for all Medicaid hospitals.

(2) Low-income utilization rate. A hospital must have a low-income utilization rate greater than 25 percent.

(A) The low-income utilization rate is the sum (expressed as a percentage) of the fractions calculated in clauses (i) and (ii) of this subparagraph:

(i) The sum of the total Medicaid inpatient hospital payments and the total state and local payments paid to the hospital for inpatient care in the DSH data year, divided by a hospital's gross inpatient revenue multiplied by the hospital's ratio of cost-to-charges (inpatient only) for the same period: (Total Medicaid Inpatient Hospital Payments + Total State and Local Payments)/(Gross Inpatient Revenue x Ratio of Costs to Charges (inpatient only)).

(ii) Inpatient charity charges in the DSH data year minus the amount of payments for inpatient hospital services received directly from state and local governments, excluding all Medicaid payments, in the DSH data year, divided by the gross inpatient revenue in the same period: (Total Inpatient Charity Charges - Total State and Local Payments)/Gross Inpatient Revenue).

(B) HHSC will determine the ratio of cost-to-charges (inpatient only) by using information from the appropriate worksheets of each hospital's Medicaid cost report or reports that correspond to the DSH data year. In the absence of a Medicaid cost report for that period, HHSC will use the latest available submitted Medicaid cost report or reports.

(3) Total Medicaid inpatient days.

(A) A hospital must have total Medicaid inpatient days at least one standard deviation above the mean total Medicaid inpatient days for all hospitals participating in the Medicaid program, except;

(B) A hospital in a county with a population of 290,000 persons or fewer, according to the most recent decennial census, must have total Medicaid inpatient days at least 70 percent of the sum of the mean total Medicaid inpatient days for all hospitals in this subset plus one standard deviation above that mean.

(C) Days for dually eligible patients are not included in the calculation of total Medicaid inpatient days under this paragraph.

(4) Children's hospitals, state-owned teaching hospitals, and state chest hospitals. Children's hospitals, state-owned teaching hospitals, and state chest hospitals that do not otherwise qualify as disproportionate share hospitals under this subsection will be deemed to qualify. A hospital deemed to qualify must still meet the eligibility requirements under subsection (c) of this section and the conditions of participation under subsection (e) of this section.

(5) Merged hospitals. Merged hospitals are subject to the application requirement in subsection (c)(3)(E) of this section. HHSC will aggregate the data used to determine qualification under this subsection from the merged hospitals to determine whether the single Medicaid provider that results from the merger qualifies as a Medicaid disproportionate share hospital.

(6) Hospitals that held a single Medicaid provider number during the DSH data year, but later added one or more Medicaid provider numbers. Upon request, HHSC will apportion the Medicaid DSH funding determination attributable to a hospital that held a single Medicaid provider number during the DSH data year (data year hospital), but subsequently added one or more Medicaid provider numbers

(new program year hospital(s)) between the data year hospital and its associated new program year hospital(s). In these instances, HHSC will apportion the Medicaid DSH funding determination for the data year hospital between the data year hospital and the new program year hospital(s) based on estimates of the division of Medicaid inpatient and low income utilization between the data year hospital and the new program year hospital(s) for the program year, so long as all affected providers satisfy the Medicaid DSH conditions of participation under subsection (e) of this section and qualify as separate hospitals under subsection (d) of this section based on HHSC's Medicaid DSH qualification criteria in the applicable Medicaid DSH program year. In determining whether the new program year hospital(s) meet the Medicaid DSH conditions of participation and qualification, proxy program year data may be used.

(e) Conditions of participation. HHSC will require each hospital to meet and continue to meet for each DSH program year the following conditions of participation:

(1) Two-physician requirement.

(A) In accordance with Social Security Act §1923(e)(2), a hospital must have at least two licensed physicians (doctor of medicine or osteopathy) who have hospital staff privileges and who have agreed to provide nonemergency obstetrical services to individuals who are entitled to medical assistance for such services.

(B) Subparagraph (A) of this paragraph does not apply if the hospital:

(i) serves inpatients who are predominantly under 18 years of age; or

(ii) was operating but did not offer nonemergency obstetrical services as of December 22, 1987.

(C) A hospital must certify on the DSH application that it meets the conditions of either subparagraph (A) or (B) of this paragraph, as applicable, at the time the DSH application is submitted.

(2) Medicaid inpatient utilization rate. At the time of qualification and during the DSH program year, a hospital must have a Medicaid inpatient utilization rate, as calculated in subsection (d)(1) of this section, of at least one percent.

(3) Trauma system.

(A) The hospital must be in active pursuit of designation or have obtained a trauma facility designation as defined in §780.004 and §§773.111 - 773.120, Texas Health and Safety Code, respectively, and consistent with 25 TAC §157.125 (relating to Requirements for Trauma Facility Designation) and §157.131 (relating to the Designated Trauma Facility and Emergency Medical Services Account). A hospital that has obtained its trauma facility designation must maintain that designation for the entire DSH program year.

(B) HHSC will receive an annual report from the Office of EMS/Trauma Systems Coordination regarding hospital participation in regional trauma system development, application for trauma facility designation, and trauma facility designation or active pursuit of designation status before final qualification determination for interim DSH payments. HHSC will use this report to confirm compliance with this condition of participation by a hospital applying for DSH funds.

(4) Maintenance of local funding effort. A hospital district in one of the state's largest MSAs or in a PMSA must not reduce local tax revenues to its associated hospitals as a result of disproportionate share funds received by the hospital. For this provision to apply, the hospital must have more than 250 licensed beds.

(5) Retention of and access to records. A hospital must retain and make available to HHSC records and accounting systems related to DSH data for at least five years from the end of each DSH program year in which the hospital qualifies, or until an open audit is completed, whichever is later.

(6) Compliance with audit requirements. A hospital must agree to comply with the audit requirements described in subsection (o) of this section.

(7) Merged hospitals. Merged hospitals are subject to the application requirement in subsection (c)(3)(E) of this section. If HHSC receives documents verifying the merger status with Medicare prior to the deadline for submission of the DSH application, the merged entity must meet all conditions of participation. If HHSC does not receive the documents verifying the merger status with Medicare prior to the deadline for submission of the DSH application, any proposed merging hospitals that are receiving DSH payments must continue to meet all conditions of participation as individual hospitals to continue receiving DSH payments for the remainder of the DSH program year.

(8) Changes that may affect DSH participation. A hospital receiving payments under this section must notify HHSC's Rate Analysis Department within 30 days of changes in ownership, operation, provider identifier, designation as a trauma facility or as a children's hospital, or any other change that may affect the hospital's continued eligibility, qualification, or compliance with DSH conditions of participation. At the request of HHSC, the hospital must submit any documentation supporting the change.

(f) State payment cap and hospital-specific [~~Hospital-specific~~] limit calculation. HHSC uses the methodology described in §355.8066 of this title to calculate a state payment cap [~~an interim hospital-specific limit~~] for each Medicaid hospital that applies and qualifies to receive payments for the DSH program year under this section, and a [~~final~~] hospital-specific limit for each hospital that received payments in a prior program year under this section. For payments for each DSH program year beginning before October 1, 2017, the state payment cap [~~interim hospital-specific limit~~] calculated as described in §355.8066 will be reduced by the amount of prior payments received by each participating hospital for that DSH program year. These prior payments will not be considered anywhere else in the calculation.

(g) Distribution of available DSH funds. HHSC will distribute the available DSH funds as defined in subsection (b)(2) of this section among eligible, qualifying DSH hospitals using the following priorities:

(1) State-owned teaching hospitals, state-owned IMDs, and state chest hospitals. HHSC may reimburse state-owned teaching hospitals, state-owned IMDs, and state chest hospitals an amount less than or equal to their state payment caps [~~interim hospital-specific limits~~], except that aggregate payments to IMDs statewide may not exceed federally mandated reimbursement limits for IMDs.

(2) Other hospitals. HHSC distributes the remaining available DSH funds, if any, to other qualifying hospitals using the methodology described in subsection (h) of this section.

(A) The remaining available DSH funds equal the lesser of the funds as defined in subsection (b)(2) of this section less funds expended under paragraph (1) of this subsection or the sum of remaining qualifying hospitals' state payment caps [~~interim hospital-specific limits~~].

(B) The remaining available general revenue funds equal the funds as defined in subsection (b)(3) of this section.

(h) DSH payment calculation.

(1) Data verification. HHSC uses the methodology described in §355.8066(e) of this title to verify the data used for the DSH payment calculations described in this subsection. The verification process includes:

(A) notice to hospitals of the data provided to HHSC by Medicaid contractors; and

(B) an opportunity for hospitals to request HHSC review of disputed data.

(2) Establishment of DSH funding pools. From the amount of remaining DSH funds determined in subsection (g)(2) of this section, HHSC will establish three DSH funding pools.

(A) Pool One.

(i) Pool One is equal to the sum of the remaining available general revenue funds and associated federal matching funds; and

(ii) Pool One payments are available to all non-state-owned hospitals, including non-state-owned public hospitals.

(B) Pool Two.

(i) Pool Two is equal to the lesser of:

(I) the amount of remaining DSH funds determined in subsection (g)(2) of this section less the amount determined in paragraph (2)(A) of this subsection multiplied by the FMAP in effect for the program year; or

(II) the federal matching funds associated with the intergovernmental transfers received by HHSC that make up the funds for Pool Three; and

(ii) Pool Two payments are available to all non-state-owned hospitals except for any urban public hospital as defined in subsection (b)(45) [~~(44)~~] of this section; rural public hospital as defined in subsection (b)(36) of this section; or rural public-financed hospital as defined in subsection (b)(37) of this section owned by or affiliated with a governmental entity that does not transfer any funds to HHSC for Pool Three as described in subparagraph (C)(iii) of this paragraph.

(C) Pool Three.

(i) Pool Three is equal to the sum of intergovernmental transfers for DSH payments received by HHSC from governmental entities that operate or are under lease contracts with Urban public hospitals - Class one and Class two and non-urban public hospitals.

(ii) Pool Three payments are available to the hospitals that are operated by or under lease contracts with the governmental entities described in clause (i) of this subparagraph that provide intergovernmental transfers.

(iii) HHSC will allocate responsibility for funding Pool Three as follows:

(I) Urban public hospitals - Class two. Each governmental entity that operates or is under a lease contract with an Urban public hospital - Class two is responsible for funding an amount equal to the non-federal share of Pass One and Pass Two DSH payments from Pool Two (calculated as described in paragraphs (4) and (5) of this subsection) to that hospital.

(II) Non-urban public hospitals.

(-a-) Each governmental entity that operates or is under a lease contract with a non-urban public hospital is responsible for funding one-half of the non-federal share of the hospital's Pass One and Pass Two DSH payments from Pool Two (calculated as described in paragraphs (4) and (5) of this subsection) to that hospital.

(-b-) If general revenue available for Pool One does not equal at least one-half of the non-federal share of non-urban public hospitals' Pass One and Pass Two DSH payments from Pool Two, each governmental entity that operates or is under a lease contract with a non-urban public hospital is responsible for increasing its funding of the non-federal share of that hospital's Pass One and Pass Two DSH payments from Pool Two by an amount equal to the Pool One general revenue shortfall associated with the hospital.

(III) Urban public hospitals - Class one. Each governmental entity that operates or is under a lease contract with an Urban public hospital - Class one is responsible for funding the non-federal share of the Pass One and Pass Two DSH payments from Pool Two (calculated as described in paragraphs (4) and (5) of this subsection) to its affiliated hospital and a portion of the non-federal share of the Pass One and Pass Two DSH payments from Pool Two to private hospitals. For funding payments to private hospitals, HHSC will initially suggest an amount in proportion to each Urban public hospital - Class one's individual state payment cap [~~interim hospital-specific limit~~] relative to total state payment caps [~~hospital-specific limits~~] for all Urban public hospitals - Class one. If an entity transfers less than the suggested amount, HHSC will take the steps described in paragraph (5)(F) of this subsection.

(IV) Following the calculations described in paragraphs (4) and (5) of this subsection, HHSC will notify each governmental entity of its allocated intergovernmental transfer amount.

(3) Weighting factors.

(A) HHSC will assign each non-urban public hospital a weighting factor that is calculated as follows:

(i) Determine the non-federal percentage in effect for the program year and multiply by 0.50.

(ii) Add 1.00 to the result from clause (i) of this subparagraph and round the result to two decimal places; this rounded sum is the non-urban public hospital weighting factor.

(iii) If paragraph (2)(C)(iii)(II)(-b-) of this subsection is invoked, the 0.50 referenced in clause (i) of this subparagraph will be increased to represent the increased proportion of the non-federal share of non-urban public hospitals' Pass One and Pass Two DSH payments from Pool Two required to be funded by these hospitals' associated governmental entities.

(B) All other DSH hospitals not described in subparagraph (A) of this paragraph will be assigned a weighting factor of 1.00, except for DSH program years beginning before October 1, 2017, HHSC will assign weighting factors as follows to each non-state DSH hospital:

(i) Other Insurance Weight. HHSC will divide the amount of third party commercial insurance payments for that hospital from the DSH data year by the state payment cap [~~interim hospital-specific limit~~] calculated according to §355.8066(c)(1)(D)(ii)(I)(-b-) [~~§355.8066 (c)(1)(D)(ii)(I)(-a-)~~], except that costs are reduced by payments from all payors.

(I) The result, if greater than 1, will be used as a weighting factor.

(II) If the result is less than 1, no weighting factor will be applied.

(ii) Year-To-Date Payment Weight. HHSC will assign a weighting factor of 20 to any hospital that did not receive any prior payments for that DSH program year. This weighting factor will be added to the weighting factor calculated in clause (i) of this subparagraph.

(4) Pass One distribution and payment calculation for Pools One and Two.

(A) HHSC will calculate each hospital's total DSH days as follows:

(i) Weighted Medicaid inpatient days are equal to the hospital's Medicaid inpatient days multiplied by the appropriate weighting factors from paragraph (3) of this subsection.

(ii) Low-income days are equal to the hospital's low-income utilization rate as calculated in subsection (d)(2) of this section multiplied by the hospital's total inpatient days as defined in subsection (b)(18) of this section.

(iii) Weighted low-income days are equal to the hospital's low-income days multiplied by the appropriate weighting factors from paragraph (3) of this subsection.

(iv) Total DSH days equal the sum of weighted Medicaid inpatient days and weighted low-income days.

(B) Using the results from subparagraph (A) of this paragraph, HHSC will:

(i) Divide each hospital's total DSH days from subparagraph (A)(iv) of this paragraph by the sum of total DSH days for all non-state-owned DSH hospitals to obtain a percentage.

(ii) Multiply each hospital's percentage as calculated in clause (i) of this subparagraph by the amount determined in paragraph (2)(A) of this subsection to determine each hospital's Pass One projected payment amount from Pool One.

(iii) Multiply each hospital's percentage as calculated in clause (i) of this subparagraph by the amount determined in paragraph (2)(B)(i)(I) or (II) of this subsection, as appropriate, to determine each hospital's Pass One projected payment amount from Pool Two.

(iv) Sum each hospital's Pass One projected payment amounts from Pool One and Pool Two, as calculated in clauses (ii) and (iii) of this subparagraph respectively. The result of this calculation is the hospital's Pass One projected payment amount from Pools One and Two combined.

(v) Divide the Pass One projected payment amount from Pool Two as calculated in clause (iii) of this subparagraph by the hospital's Pass One projected payment amount from Pools One and Two combined as calculated in clause (iv) of this subparagraph. The result of this calculation is the percentage of the hospital's total Pass One projected payment amount accruing from Pool Two.

(5) Pass Two - Redistribution of amounts in excess of state payment caps [~~hospital-specific limits~~] from Pass One for Pools One and Two combined. In the event that the projected payment amount calculated in paragraph (4)(B)(iv) of this subsection plus any previous payment amounts for the program year exceeds a hospital's state payment cap [~~interim hospital-specific limit~~], the payment amount will be reduced such that the sum of the payment amount plus any previous payment amounts is equal to the state payment cap [~~interim hospital-specific limit~~]. HHSC will sum all resulting excess funds and redistribute that amount to qualifying non-state-owned hospitals that have projected payments, including any previous payment amounts for the program year, below their state payment caps [~~interim hospital-specific limits~~]. For each such hospital, HHSC will:

(A) subtract the hospital's projected DSH payment from paragraph (4)(B)(iv) of this subsection plus any previous payment amounts for the program year from its state payment cap [~~interim hospital-specific limit~~];

(B) sum the results of subparagraph (A) of this paragraph for all hospitals; and

(C) compare the sum from subparagraph (B) of this paragraph to the total excess funds calculated for all non-state-owned hospitals.

(i) If the sum of subparagraph (B) of this paragraph is less than or equal to the total excess funds, HHSC will pay all such hospitals up to their state payment cap [~~interim hospital-specific limit~~].

(ii) If the sum of subparagraph (B) of this paragraph is greater than the total excess funds, HHSC will calculate payments to all such hospitals as follows:

(I) Divide the result of subparagraph (A) of this paragraph for each hospital by the sum from subparagraph (B) of this paragraph.

(II) Multiply the ratio from subclause (I) of this clause by the sum of the excess funds from all non-state-owned hospitals.

(III) Add the result of subclause (II) of this clause to the projected DSH payment for that hospital to calculate a revised projected payment amount from Pools One and Two after Pass Two.

(D) If a governmental entity that operates or leases to an Urban public hospital - Class two does not fully fund the amount described in paragraph (2)(C)(iii)(I) of this subsection, HHSC will reduce the hospital's Pass One and Pass Two DSH payment from Pool Two to the level supported by the amount of the intergovernmental transfer.

(E) If a governmental entity that operates or is under a lease contract with a non-urban public hospital does not fully fund the amount described in paragraph (2)(C)(iii)(II) of this subsection, HHSC will reduce that portion of the hospital's Pass One and Pass Two DSH payment from Pool Two to the level supported by the amount of the intergovernmental transfer.

(F) If a governmental entity that operates or leases to an Urban public hospital - Class one does not fully fund the amount described in paragraph (2)(C)(iii)(III) of this subsection, HHSC will take the following steps:

(i) Provide an opportunity for the governmental entities affiliated with the other Urban public hospitals - Class one to transfer additional funds to HHSC;

(ii) Recalculate total DSH days for each Urban public hospital - Class one for purposes of the calculations described in paragraphs (4)(B) and (5)(A) - (C) of this subsection as follows:

(I) Divide the intergovernmental transfer made on behalf of each Urban public hospital - Class one by the sum of intergovernmental transfers made on behalf of all Urban public hospitals - Class one;

(II) Sum the total DSH days for all Urban public hospitals - Class one, calculated as described in paragraph (4)(A) of this subsection; and

(III) Multiply the result of subclause (I) of this clause by the result of subclause (II) of this clause to determine total DSH days for that hospital;

(iii) Recalculate Pass One payments from Pool Two and Pass Two payments from Pools One and Two for Urban public hospitals - Class one and private hospitals following the methodology described in paragraphs (4)(B) and (5)(A) - (C) of this subsection substituting the results from clause (ii) of this subparagraph for the results from paragraph (4)(A) of this subsection for Urban public hospitals - Class one;

(iv) Perform a second recalculation of Pass Two payments from Pools One and Two for Urban public hospitals - Class one as follows:

(I) Multiply each hospital's total Pass Two projected payment amount from Pools One and Two from paragraph (5) of this subsection, after performing the recalculation described in clause (iii) of this subparagraph, by the percentage of the hospital's total Pass One projected payment amount accruing from Pool Two from paragraph (4)(B)(v) of this subsection, after performing the recalculation described in clause (iii) of this subparagraph. The result is the hospital's Pass Two projected payment amount from Pool Two;

(II) Subtract the hospital's Pass Two projected payment amount from Pool Two from subclause (I) of this clause from the hospital's total Pass Two projected payment amount from Pools One and Two from paragraph (5) of this subsection, after performing the recalculation described in clause (iii) of this subparagraph. The result is the hospital's Pass Two projected payment amount from Pool One;

(III) Sum the total Pass Two projected payment amounts from Pool Two, calculated as described in subclause (I) of this clause, for all Urban public hospitals - Class one;

(IV) Multiply the result of clause (ii)(I) of this subparagraph for the hospital by the result of subclause (III) of this clause to determine the Pass Two payment from Pool Two for the hospital; and

(V) Sum the results of subclauses (II) and (IV) of this clause to determine the total Pass Two payment from Pools One and Two for that hospital; and

(v) Use the results of this subparagraph in the calculations described in paragraphs (6) and (7) of this subsection.

(6) Pass One distribution and payment calculation for Pool Three.

(A) HHSC will calculate the initial payment from Pool Three as follows:

(i) For each Urban public hospital - Class one and Class two--

(I) multiply its total Pool One and Pool Two payments after Pass Two from paragraph (5) of this subsection by the percentage of the hospital's total Pass One projected payment amount accruing from Pool Two from paragraph (4)(B)(v) of this subsection;

(II) divide the result from subclause (I) of this clause by the FMAP for the program year; and

(III) multiply the result from subclause (II) of this clause by the non-federal percentage. The result is the Pass One initial payment from Pool Three for these hospitals.

(ii) For each Non-urban public hospital--

(I) multiply its total Pool One and Pool Two payments after Pass Two from paragraph (5) of this subsection by the percentage of the hospital's total Pass One projected payment amount accruing from Pool Two from paragraph (4)(B)(v) of this subsection;

(II) divide the result from subclause (I) of this clause by the FMAP for the program year; and

(III) multiply the result from subclause (II) of this clause by the non-federal percentage and multiply by 0.50. The result is the Pass One initial payment from Pool Three for these hospitals.

(IV) If paragraph (2)(C)(iii)(II)(-b-) of this subsection is invoked, the 0.50 referenced in subclause (III) of this clause will be increased to represent the increased proportion of the non-federal share of non-urban public hospitals' Pass One and Pass Two DSH payments from Pool Two required to be funded by these hospitals' associated governmental entities.

(iii) For all other hospitals, the Pass One initial payment from Pool Three is equal to zero.

(B) HHSC will calculate the secondary payment from Pool Three for each Urban public hospital - Class one as follows:

(i) Sum the intergovernmental transfers made on behalf of all Urban public hospitals - Class one;

(ii) For each Urban public hospital - Class one, divide the intergovernmental transfer made on behalf of that hospital by the sum of the intergovernmental transfers made on behalf of all Urban public hospitals - Class one from clause (i) of this subparagraph;

(iii) Sum all Pass One initial payments from Pool Three from subparagraph (A) of this paragraph;

(iv) Subtract the sum from clause (iii) of this subparagraph from the total value of Pool Three; and

(v) Multiply the result from clause (ii) of this subparagraph by the result from clause (iv) of this subparagraph for each Urban public hospital - Class One. The result is the Pass One secondary payment from Pool Three for that hospital.

(vi) For all other hospitals, the Pass One secondary payment from Pool Three is equal to zero.

(C) HHSC will calculate each hospital's total Pass One payment from Pool Three by adding its Pass One initial payment from Pool Three and its Pass One secondary payment from Pool Three.

(7) Pass Two - Secondary redistribution of amounts in excess of state payment caps [~~hospital-specific limits~~] for Pool Three. For each hospital that received a Pass One initial or secondary payment from Pool Three, HHSC will sum the result from paragraph (5) of this subsection and the result from paragraph (6) of this subsection to determine the hospital's total projected DSH payment. In the event this sum plus any previous payment amounts for the program year exceeds a hospital's state payment cap [~~interim hospital-specific limit~~], the payment amount will be reduced such that the sum of the payment amount plus any previous payment amounts is equal to the state payment cap [~~interim hospital-specific limit~~]. HHSC will sum all resulting excess funds and redistribute that amount to qualifying non-state-owned hospitals eligible for payments from Pool Three that have projected payments, including any previous payment amounts for the program year, below their state payment caps [~~interim hospital-specific limits~~]. For each such hospital, HHSC will:

(A) subtract the hospital's projected DSH payment plus any previous payment amounts for the program year from its state payment cap [~~interim hospital-specific limit~~];

(B) sum the results of subparagraph (A) of this paragraph for all hospitals; and

(C) compare the sum from subparagraph (B) of this paragraph to the total excess funds calculated for all non-state-owned hospitals.

(i) If the sum of subparagraph (B) of this paragraph is less than or equal to the total excess funds, HHSC will pay all such hospitals up to their state payment cap [~~interim hospital-specific limit~~].

(ii) If the sum of subparagraph (B) of this paragraph is greater than the total excess funds, HHSC will calculate payments to all such hospitals as follows:

(I) Divide the result of subparagraph (A) of this paragraph for each hospital by the sum from subparagraph (B) of this paragraph.

(II) Multiply the ratio from subclause (I) of this clause by the sum of the excess funds from all non-state-owned hospitals.

(III) Add the result of subclause (II) of this clause to the projected total DSH payment for that hospital to calculate a revised projected payment amount from Pools One, Two and Three after Pass Two.

(8) Pass Three - additional allocation of DSH funds for rural public and rural public-financed hospitals. Rural public hospitals or rural public-financed hospitals that met the funding requirements described in paragraph (2)(C) of this subsection may be eligible for DSH funds in addition to the projected payment amounts calculated in paragraphs (4) - (7) of this subsection.

(A) For each rural public hospital or rural public financed hospital that met the funding requirements described in paragraph (2)(C) of this subsection, HHSC will determine the projected payment amount plus any previous payment amounts for the program year calculated in accordance with paragraphs (4) - (7) of this subsection, as appropriate.

(B) HHSC will subtract each hospital's projected payment amount plus any previous payment amounts for the program year from subparagraph (A) of this paragraph from each hospital's state payment cap [~~interim hospital-specific limit~~] to determine the maximum additional DSH allocation.

(C) The governmental entity that owns the hospital or leases the hospital may provide the non-federal share of funding through an intergovernmental transfer to fund up to the maximum additional DSH allocation calculated in subparagraph (B) of this paragraph. These governmental entities will be queried by HHSC as to the amount of funding they intend to provide through an intergovernmental transfer for this additional allocation. The query may be conducted through e-mail, through the various hospital associations or through postings on the HHSC website.

(D) Prior to processing any full or partial DSH payment that includes an additional allocation of DSH funds as described in this paragraph, HHSC will determine if such a payment would cause total DSH payments for the full or partial payment to exceed the available DSH funds for the payment as described in subsection (b)(2) of this section. If HHSC makes such a determination, it will reduce the DSH payment amounts rural public and rural public-financed hospitals are eligible to receive through the additional allocation as required to remain within the available DSH funds for the payment. This reduction will be applied proportionally to all additional allocations. HHSC will:

(i) determine remaining available funds by subtracting payment amounts for all DSH hospitals calculated in paragraphs (4) - (7) of this subsection from the amount in subsection (g)(2) of this section;

(ii) determine the total additional allocation supported by an intergovernmental transfer by summing the amounts supported by intergovernmental transfers identified in subparagraph (C) of this paragraph;

(iii) determine an available proportion statistic by dividing the remaining available funds from clause (i) of this subparagraph by the total additional allocation supported by an intergovernmental transfer from clause (ii) of this subparagraph; and

(iv) multiply each intergovernmental transfer supported payment from subparagraph (C) of this paragraph by the proportion statistic determined in clause (iii) of this subparagraph. The resulting product will be the additional allowable allocation for the payment.

(E) Rural public and rural public-financed hospitals that do not meet the funding requirements of paragraph (2)(C)(iii)(II) of this subsection are not eligible for participation on Pass Three.

(9) Reallocating funds if hospital closes, loses its license or eligibility, or files bankruptcy. If a hospital closes, loses its license, loses its Medicare or Medicaid eligibility, or files bankruptcy before receiving DSH payments for all or a portion of a DSH program year, HHSC will determine the hospital's eligibility to receive DSH payments going forward on a case-by-case basis. In making the determination, HHSC will consider multiple factors including whether the hospital was in compliance with all requirements during the program year and whether it can meet the audit requirements described in subsection (o) of this section. If HHSC determines that the hospital is not eligible to receive DSH payments going forward, HHSC will notify the hospital and reallocate that hospital's disproportionate share funds going forward among all DSH hospitals in the same category that are eligible for additional payments.

(10) HHSC will give notice of the amounts determined in this subsection.

(11) The sum of the annual payment amounts for state owned and non-state owned IMDs are summed and compared to the federal IMD limit. If the sum of the annual payment amounts exceeds the federal IMD limit, the state owned and non-state owned IMDs are reduced on a pro-rata basis so that the sum is equal to the federal IMD limit.

(12) For any DSH program year for which HHSC has calculated the [~~final~~] hospital-specific limit described in §355.8066(c)(2) of this chapter, HHSC will compare the interim DSH payment amount as calculated in subsection (h) of this section to the [~~final~~] hospital-specific limit.

(A) HHSC will limit the payment amount to the [~~final~~] hospital-specific limit if the payment amount exceeds the hospital's [~~final~~] hospital-specific limit.

(B) HHSC will redistribute dollars made available as a result of the capping described in subparagraph (A) of this paragraph to providers eligible for additional payments subject to their [~~final~~] hospital-specific limits, as described in subsection (l) of this section.

(i) Hospital located in a federal natural disaster area. A hospital that is located in a county that is declared a federal natural disaster

area and that was participating in the DSH program at the time of the natural disaster may request that HHSC determine its DSH qualification and interim reimbursement payment amount under this subsection for subsequent DSH program years. The following conditions and procedures will apply to all such requests received by HHSC:

(1) The hospital must submit its request in writing to HHSC with its annual DSH application.

(2) If HHSC approves the request, HHSC will determine the hospital's DSH qualification using the hospital's data from the DSH data year prior to the natural disaster. However, HHSC will calculate the one percent Medicaid minimum utilization rate, the state payment cap [~~interim hospital-specific limit~~], and the payment amount using data from the DSH data year. The [~~final~~] hospital-specific limit will be computed based on the actual data for the DSH program year.

(3) HHSC will notify the hospital of the qualification and interim reimbursement.

(j) HHSC determination of eligibility or qualification. HHSC uses the methodology described in §355.8066(e) of this title to verify the data and other information used to determine eligibility and qualification under this section. The verification process includes:

(1) notice to hospitals of the data provided to HHSC by Medicaid contractors; and

(2) an opportunity for hospitals to request HHSC review of disputed data and other information the hospital believes is erroneous.

(k) Disproportionate share funds held in reserve.

(1) If HHSC has reason to believe that a hospital is not in compliance with the conditions of participation listed in subsection (e) of this section, HHSC will notify the hospital of possible noncompliance. Upon receipt of such notice, the hospital will have 30 calendar days to demonstrate compliance.

(2) If the hospital demonstrates compliance within 30 calendar days, HHSC will not hold the hospital's DSH payments in reserve.

(3) If the hospital fails to demonstrate compliance within 30 calendar days, HHSC will notify the hospital that HHSC is holding the hospital's DSH payments in reserve. HHSC will release the funds corresponding to any period for which a hospital subsequently demonstrates that it was in compliance. HHSC will not make DSH payments for any period in which the hospital is out of compliance with the conditions of participation listed in subsection (e)(1) and (2) of this section. HHSC may choose not to make DSH payments for any period in which the hospital is out of compliance with the conditions of participation listed in subsection (e)(3) - (7) of this section.

(4) If a hospital's DSH payments are being held in reserve on the date of the last payment in the DSH program year, and no request for review is pending under paragraph (5) of this subsection, the amount of the payments is not restored to the hospital, but is divided proportionately among the hospitals receiving a last payment.

(5) Hospitals that have DSH payments held in reserve may request a review by HHSC.

(A) The hospital's written request for a review must:

(i) be sent to HHSC's Director of Hospital Rate Analysis, Rate Analysis Department;

(ii) be received by HHSC within 15 calendar days after notification that the hospital's DSH payments are held in reserve; and

(iii) contain specific documentation supporting its contention that it is in compliance with the conditions of participation.

(B) The review is:

(i) limited to allegations of noncompliance with conditions of participation;

(ii) limited to a review of documentation submitted by the hospital or used by HHSC in making its original determination; and

(iii) not conducted as an adversarial hearing.

(C) HHSC will conduct the review and notify the hospital requesting the review of the results.

(l) Recovery of DSH funds. Notwithstanding any other provision of this section, HHSC will recoup any overpayment of DSH funds made to a hospital, including an overpayment that results from HHSC error or that is identified in an audit. Recovered funds will be redistributed proportionately to DSH hospitals that had the same source of the non-federal share of the DSH payment in the program year in which the overpayment occurred and that are eligible for additional payments for that program year. For example, funds recovered from state-owned hospitals will be redistributed first to other state-owned hospitals that are eligible for additional payments for that program year. If there are no hospitals eligible for additional payments for that program year that had the same source of the non-federal share of the recovered funds, any remaining funds will be distributed as follows:

(1) the non-federal share will be returned to the governmental entity that provided it during the program year;

(2) the federal share will be distributed proportionately among all hospitals eligible for additional payments that have a source of the non-federal share of the payments; and

(3) the federal share that does not have a source of non-federal share will be returned to CMS.

(m) Failure to provide supporting documentation. HHSC will exclude data from DSH calculations under this section if a hospital fails to maintain and provide adequate documentation to support that data.

(n) Voluntary withdrawal from the DSH program.

(1) HHSC will recoup all DSH payments made during the same DSH program year to a hospital that voluntarily terminates its participation in the DSH program. HHSC will redistribute the recouped funds according to the distribution methodology described in subsection (l) of this section.

(2) A hospital that voluntarily terminates from the DSH program will be ineligible to receive payments for the next DSH program year after the hospital's termination.

(3) If a hospital does not apply for DSH funding in the DSH program year following a DSH program year in which it received DSH funding, even though it would have qualified for DSH funding in that year, the hospital will be ineligible to receive payments for the next DSH program year after the year in which it did not apply.

(4) The hospital may reapply to receive DSH payments in the second DSH program year after the year in which it did not apply.

(o) Audit process.

(1) Independent certified audit. HHSC is required by the Social Security Act (Act) to annually complete an independent certified audit of each hospital participating in the DSH program in Texas. Audits will comply with all applicable federal law and directives, including the Act, the Omnibus Budget and Reconciliation Act of 1993

(OBRA '93), the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA), pertinent federal rules, and any amendments to such provisions.

(A) Each audit report will contain the verifications set forth in 42 CFR §455.304(d).

(B) The sources of data utilized by HHSC, the hospitals, and the independent auditors to complete the DSH audit and report include:

(i) The Medicaid cost report;

(ii) Medicaid Management Information System data; and

(iii) Hospital financial statements and other auditable hospital accounting records.

(C) A hospital must provide HHSC or the independent auditor with the necessary information in the time specified by HHSC or the independent auditor. HHSC or the independent auditor will notify hospitals of the required information and provide a reasonable time for each hospital to comply.

(D) A hospital that fails to provide requested information or to otherwise comply with the independent certified audit requirements may be subject to a withholding of Medicaid disproportionate share payments or other appropriate sanctions.

(E) HHSC will recoup any overpayment of DSH funds made to a hospital that is identified in the independent certified audit and will redistribute the recouped funds to DSH providers that are eligible for additional payments subject to their [~~final~~] hospital-specific limits, as described in subsection (l) of this section.

(F) Review of preliminary audit finding of overpayment.

(i) Before finalizing the audit, HHSC will notify each hospital that has a preliminary audit finding of overpayment.

(ii) A hospital that disputes the finding or the amount of the overpayment may request a review in accordance with the following procedures.

(I) A request for review must be received by the HHSC Rate Analysis Department in writing by regular mail, hand delivery or special mail delivery, from the hospital within 30 calendar days of the date the hospital receives the notification described in clause (i) of this subparagraph.

(II) The request must allege the specific factual or calculation errors the hospital contends the auditors made that, if corrected, would change the preliminary audit finding.

(III) All documentation supporting the request for review must accompany the written request for review or the request will be denied.

(IV) The request for review may not dispute the federal audit requirements or the audit methodologies.

(iii) The review is:

(I) limited to the hospital's allegations of factual or calculation errors;

(II) solely a data review based on documentation submitted by the hospital with its request for review or that was used by the auditors in making the preliminary finding; and

(III) not an adversarial hearing.

(iv) HHSC will submit to the auditors all requests for review that meet the procedural requirements described in clause (ii) of this subparagraph.

(I) If the auditors agree that a factual or calculation error occurred and change the preliminary audit finding, HHSC will notify the hospital of the revised finding.

(II) If the auditors do not agree that a factual or calculation error occurred and do not change the preliminary audit finding, HHSC will notify the hospital that the preliminary finding stands and will initiate recoupment proceedings as described in this section.

(2) Additional audits. HHSC may conduct or require additional audits.

§355.8066. Hospital-Specific Limit Methodology.

(a) Introduction. The Texas Health and Human Services Commission (HHSC) uses the methodology described in this section to calculate a hospital-specific limit for each Medicaid hospital participating in either the Disproportionate Share Hospital (DSH) program, described in §355.8065 of this title (relating to Disproportionate Share Hospital Reimbursement Methodology), or in the Texas Healthcare Transformation and Quality Improvement Program (the waiver), described in §355.8201 of this title (relating to Waiver Payments to Hospitals).

(b) Definitions.

(1) Adjudicated claim--A hospital claim for payment for a covered Medicaid service that is paid or adjusted by HHSC or another payor.

(2) Centers for Medicare and Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(3) Data year--A 12-month period that is two years before the program year from which HHSC will compile data to determine DSH or uncompensated-care waiver program qualification and payment.

(4) Disproportionate share hospital (DSH)--A hospital identified by HHSC that meets the DSH program conditions of participation and that serves a disproportionate share of Medicaid or indigent patients.

(5) DSH survey--The HHSC data collection tool completed by each DSH hospital and used by HHSC to calculate the state payment cap and [~~interim and final~~] hospital-specific limit, as described in this section, and to estimate the hospital's DSH payments for the program year, as described in §355.8065 of this title. A hospital may be required to complete multiple surveys due to different data requirements between the state payment cap and [~~interim and final~~] hospital-specific limit calculations.

(6) Dually eligible patient--A patient who is simultaneously enrolled in Medicare and Medicaid.

(7) HHSC--The Texas Health and Human Services Commission or its designee.

(8) Hospital-specific limit--The maximum payment amount, as applied to payments made during a prior program year, that a hospital may receive in reimbursement for the cost of providing Medicaid-allowable services to individuals who are Medicaid-eligible [~~Medicaid eligible~~] or uninsured. The amount is calculated as described in subsection (c)(2) of this section using actual cost and payment data from that period. The term does not apply to payment for costs of providing services to non-Medicaid-eligible individuals who

have third-party coverage; costs associated with pharmacies, clinics, and physicians; or costs associated with Delivery System Reform Incentive Payment projects. The calculation of the hospital-specific limit must be consistent with federal law.

[~~(A) Interim hospital-specific limit--Applies to payments that will be made for the program year and is calculated as described in subsection (c)(1) of this section using cost and payment data from the data year.~~]

[~~(B) Final hospital-specific limit--Applies to payments made during a prior program year and is calculated as described in subsection (c)(2) of this section using actual cost and payment data from that period.~~]

(9) Inflation update factor--Cost of living index based on the annual CMS Prospective Payment System Hospital Market Basket Index.

(10) Institution for mental diseases (IMD)--A hospital that is primarily engaged in providing psychiatric diagnosis, treatment, or care of individuals with mental illness, defined in §1905(i) of the Social Security Act.

(11) Medicaid contractor--Fiscal agents and managed care organizations with which HHSC contracts to process data related to the Medicaid program.

(12) Medicaid cost-to-charge ratio (inpatient and outpatient)--A Medicaid cost report-derived cost center ratio calculated for each ancillary cost center that covers all applicable hospital costs and charges relating to inpatient and outpatient care for that cost center. This ratio is used in calculating the hospital-specific limit and does not distinguish between payor types such as Medicare, Medicaid, or private pay.

(13) Medicaid cost report--Hospital and Hospital Health Care Complex Cost Report (Form CMS 2552), also known as the Medicare cost report.

(14) Medicaid hospital--A hospital meeting the qualifications set forth in §54.1077 of this title (relating to Provider Participation Requirements) to participate in the Texas Medicaid program.

(15) Non-DSH survey--The HHSC data collection tool completed by non-DSH hospitals and used by HHSC to calculate the state payment cap [~~interim~~] and [~~final~~] hospital-specific limit, as described in this section, and to calculate uncompensated care waiver payments for the program year, as described in §355.8201 of this title. A hospital may be required to complete multiple surveys due to different data requirements between the state payment cap [~~interim~~] and [~~final~~] hospital-specific limit calculations.

(16) Outpatient charges--Amount of gross outpatient charges related to the applicable data year and used in the calculation of the hospital specific limit.

(17) Program year--The 12-month period beginning October 1 and ending September 30. The period corresponds to the waiver demonstration year.

(18) Ratio of cost-to-charges.

(A) Inpatient ratio of cost-to-charges--A ratio that covers all applicable hospital costs and charges relating to inpatient care. This ratio does not distinguish between payer types such as Medicare, Medicaid, or private pay.

(B) Outpatient ratio of cost-to-charges--A ratio that covers all applicable hospital costs and charges relating to outpatient care. This ratio does not distinguish between payer types such as Medicare, Medicaid, or private pay.

(C) The terms "ratio of cost-to-charges"; "inpatient ratio of cost-to-charges"; and "outpatient ratio of cost-to-charges" are only used in the definition of "Medicaid allowable cost" as laid out in subsection (b)(11) of this section.

(19) State payment cap--The maximum payment amount, as applied to payments that will be made for the program year, that a hospital may receive in reimbursement for the cost of providing Medicaid-allowable services to individuals who are Medicaid-eligible or uninsured. The amount is calculated as described in subsection (c)(1) of this section using interim cost and payment data from the data year. The term does not apply to payment for costs of providing services to non-Medicaid-eligible individuals who have third-party coverage; costs associated with pharmacies, clinics, and physicians; or costs associated with Delivery System Reform Incentive Payment projects.

(20) [~~(19)~~] The waiver--The Texas Healthcare Transformation and Quality Improvement Program, a Medicaid demonstration waiver under §1115 of the Social Security Act that was approved by CMS. Pertinent to this section, the waiver establishes a funding pool to assist hospitals with uncompensated-care costs.

(21) [~~(20)~~] Third-party coverage--Creditable insurance coverage consistent with the definitions in 45 Code of Federal Regulations (CFR) Parts 144 and 146, or coverage based on a legally liable third-party payor.

(22) [~~(21)~~] Total state and local payments--Total amount of state and local payments that a hospital received for inpatient care during the data year. The term includes payments under state and local programs that are funded entirely with state general revenue funds and state or local tax funds, such as County Indigent Health Care, Children with Special Health Care Needs, and Kidney Health Care. The term excludes payment sources that contain federal dollars such as Medicaid payments, Children's Health Insurance Program (CHIP) payments funded under Title XXI of the Social Security Act, Substance Abuse and Mental Health Services Administration, Ryan White Title I, Ryan White Title II, Ryan White Title III, and contractual discounts and allowances related to TRICARE, Medicare, and Medicaid.

(23) [~~(22)~~] Uncompensated-care waiver payments--Payments to hospitals participating in the waiver that are intended to defray the uncompensated costs of eligible services provided to eligible individuals.

(24) [~~(23)~~] Uninsured cost--The cost to a hospital of providing inpatient and outpatient hospital services to uninsured patients as defined by CMS.

(c) Calculating a state payment cap and hospital-specific limit. Using information from each hospital's DSH or non-DSH survey, Medicaid cost report and from HHSC's Medicaid contractors, HHSC will determine the hospital's state payment cap [~~interim hospital-specific limit~~] in compliance with paragraph (1) of this subsection. The state payment cap [~~interim hospital-specific limit~~] will be used for both DSH and uncompensated care waiver interim payment determinations. HHSC will determine the hospital's hospital-specific limit [~~Final hospital-specific limits will be determined~~] in compliance with paragraph (2) of this subsection.

(1) State Payment Cap [~~Interim Hospital-Specific Limit~~].

(A) Uninsured charges and payments.

(i) Each hospital will report in its survey its inpatient and outpatient charges for services that would be covered by Medicaid that were provided to uninsured patients discharged during the data

year. In addition to the charges in the previous sentence, for DSH calculation purposes only, an IMD may report charges for Medicaid-allowable services that were provided during the data year to Medicaid-eligible and uninsured patients ages 21 through 64.

(ii) Each hospital will report in its survey all payments received during the data year, regardless of when the service was provided, for services that would be covered by Medicaid and were provided to uninsured patients.

(I) For purposes of this paragraph, a payment received is any payment from an uninsured patient or from a third party (other than an insurer) on the patient's behalf, including payments received for emergency health services furnished to undocumented aliens under §1011 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, except as described in subclause (II) of this clause.

(II) State and local payments to hospitals for indigent care are not included as payments made by or on behalf of uninsured patients.

(B) Medicaid charges and payments.

(i) HHSC will request from its Medicaid contractors the inpatient and outpatient charge and payment data for claims for services provided to Medicaid-enrolled individuals that are adjudicated during the data year.

(I) The requested data will include, but is not limited to, charges and payments for:

(-a-) claims associated with the care of dually eligible patients, including Medicare charges and payments;

(-b-) claims or portions of claims that were not paid because they exceeded the spell-of-illness limitation;

(-c-) outpatient claims associated with the Women's Health Program; and

(-d-) claims for which the hospital received payment from a third-party payor for a Medicaid-enrolled patient.

(II) HHSC will exclude charges and payments for:

(-a-) claims for services that do not meet the definition of "medical assistance" contained in §1905(a) of the Social Security Act. Examples include:

(-1-) claims for the Children's Health Insurance Program; and

(-2-) inpatient claims associated with the Women's Health Program or any successor program; and

(-b-) claims submitted after the 95-day filing deadline.

(ii) HHSC will request from its Medicaid contractors the inpatient and outpatient Medicaid cost settlement payment or recoupment amounts attributable to the cost report period determined in subparagraph (C)(i) of this paragraph.

(iii) HHSC will notify hospitals following HHSC's receipt of the requested data from the Medicaid contractors. A hospital's right to request a review of data it believes is incorrect or incomplete is addressed in subsection (e) of this section.

(iv) Each hospital will report on the survey the inpatient and outpatient Medicaid days, charges and payment data for out-of-state claims adjudicated during the data year.

(v) HHSC may apply an adjustment factor to Medicaid payment data to more accurately approximate Medicaid payments following a rebasing or other change in reimbursement rates under other sections of this division.

(C) Calculation of in-state and out-of-state Medicaid and uninsured total costs for the data year.

(i) Cost report period for data used to calculate cost-per-day amounts and cost-to-charge ratios. HHSC will use information from the Medicaid cost report for the hospital's fiscal year that ends during the calendar year that falls two years before the end of the program year for the calculations described in clauses (ii)(I) and (iii)(I) of this subparagraph. For example, for program year 2013, the cost report year is the provider's fiscal year that ends between January 1, 2011, and December 31, 2011.

(I) For hospitals that do not have a full year cost report that meets this criteria, a partial year cost report for the hospital's fiscal year that ends during the calendar year that falls two years before the end of the program year will be used if the cost report covers a period greater than or equal to six months in length.

(II) The partial year cost report will not be prorated. If the provider's cost report that ends during this time period is less than six months in length, the most recent full year cost report will be used.

(ii) Determining inpatient routine costs.

(I) Medicaid inpatient cost per day for routine cost centers. Using data from the Medicaid cost report, HHSC will divide the allowable inpatient costs by the inpatient days for each routine cost center to determine a Medicaid inpatient cost per day for each routine cost center.

(II) Inpatient routine cost center cost. For each Medicaid payor type and the uninsured, HHSC will multiply the Medicaid inpatient cost per day for each routine cost center from subclause (I) of this clause times the number of inpatient days for each routine cost center from the data year to determine the inpatient routine cost for each cost center.

(III) Total inpatient routine cost. For each Medicaid payor type and the uninsured, HHSC will sum the inpatient routine costs for the various routine cost centers from subclause (II) of this clause to determine the total inpatient routine cost.

(iii) Determining inpatient and outpatient ancillary costs.

(I) Inpatient and outpatient Medicaid cost-to-charge ratio for ancillary cost centers. Using data from the Medicaid cost report, HHSC will divide the allowable ancillary cost by the sum of the inpatient and outpatient charges for each ancillary cost center to determine a Medicaid cost-to-charge ratio for each ancillary cost center.

(II) Inpatient and outpatient ancillary cost center cost. For each Medicaid payor type and the uninsured, HHSC will multiply the cost-to-charge ratio for each ancillary cost center from subclause (I) of this clause by the ancillary charges for inpatient claims and the ancillary charges for outpatient claims from the data year to determine the inpatient and outpatient ancillary cost for each cost center.

(III) Total inpatient and outpatient ancillary cost. For each Medicaid payor type and the uninsured, HHSC will sum the ancillary inpatient and outpatient costs for the various ancillary cost centers from subclause (II) of this clause to determine the total ancillary cost.

(iv) Determining total Medicaid and uninsured cost. For each Medicaid payor type and the uninsured, HHSC will sum the result of clause (ii)(III) of this subparagraph and the result of clause (iii)(III) of this subparagraph plus organ acquisition costs to determine the total cost.

(D) Calculation of the state payment cap [~~interim hospital-specific limit~~].

(i) Total hospital cost. HHSC will sum the total cost by Medicaid payor type and the uninsured from subparagraph (C)(iv) of this paragraph to determine the total hospital cost for Medicaid and the uninsured.

(ii) State payment cap [~~Interim hospital-specific limit~~].

(I) HHSC will reduce the total hospital cost under clause (i) of this subparagraph by total payments as follows:

(-a-) For program periods beginning on or after October 1, 2019, from all payor sources, including graduate medical services and out-of-state payments.

(-b-) [~~(-a-)~~] For program periods beginning on or after October 1, 2017, and ending on or before September 30, 2019, payments for inpatient and outpatient claims, under Title XIX of the Social Security Act, including graduate medical services and out-of-state payments, and payments on behalf of the uninsured; and

(-c-) [~~(-b-)~~] For program periods beginning on or after October 1, 2013 and ending on or before September 30, 2017, from all payor sources, including graduate medical services and out-of-state payments, excluding third-party commercial insurance payors for inpatient and outpatient claims.

(II) HHSC will not reduce the total hospital cost under clause (i) of this subparagraph by supplemental payments (including upper payment limit payments), or uncompensated-care waiver payments for the data year to determine the state payment cap [~~interim hospital-specific limit~~]. HHSC may reduce the total hospital cost by supplemental payments or uncompensated-care waiver payments (excluding payments associated with pharmacies, clinics, and physicians) attributed to the hospital for the program year if necessary to prevent total interim payments to a hospital for the program year from exceeding the state payment cap [~~interim hospital-specific limit~~] for that program year.

(E) Inflation adjustment.

(i) HHSC will trend each hospital's state payment cap [~~interim hospital-specific limit~~] using the inflation update factor.

(ii) HHSC will trend each hospital's state payment cap [~~hospital's-specific limit~~] from the midpoint of the data year to the midpoint of the program year.

(2) Hospital-specific [~~Final hospital-specific~~] limit.

(A) HHSC will calculate the individual components of a hospital's [~~final~~] hospital-specific limit using the calculation set out in paragraph (1)(A) - (D)(ii)(I)(-a-) of this subsection, except that HHSC will:

(i) use information from the hospital's Medicaid cost report(s) that cover the program year and from cost settlement payment or recoupment amounts attributable to the program year for the calculations described in paragraphs (1)(C)(ii)(I) and (1)(C)(iii)(I) of this subsection. If a hospital has two or more Medicaid cost reports that cover the program year, the data from each cost report will be pro-rated based on the number of months from each cost report period that fall within the program year;

(ii) include supplemental payments (including upper payment limit payments) and uncompensated-care waiver payments (excluding payments associated with pharmacies, clinics, and physicians) attributable to the hospital for the program year when calculating the total payments to be subtracted from total costs as described in paragraph (1)(D)(ii)(I)(-a-) of this subsection;

(iii) use the hospital's actual charges and payments for services described in paragraph (1)(A) and (B) of this subsection provided to Medicaid-eligible and uninsured patients during the program year; and

(iv) include charges and payments for claims submitted after the 95-day filing deadline for Medicaid-allowable services provided during the program year unless such claims were submitted after the Medicare filing deadline.

(B) For payments to a hospital under the DSH program, the [~~final~~] hospital-specific limit will be calculated at the time of the independent audit conducted under §355.8065(o) of this title.

(d) Due date for DSH or non-DSH survey.

(1) HHSC Rate Analysis must receive a hospital's completed survey no later than 30 calendar days from the date of HHSC's written request to the hospital for the completion of the survey, unless an extension is granted as described in paragraph (2) of this subsection.

(2) HHSC Rate Analysis will extend this deadline provided that HHSC receives a written request for the extension by email no later than 30 calendar days from the date of the request for the completion of the survey.

(3) The extension gives the requester a total of 45 calendar days from the date of the written request for completion of the survey.

(4) If a deadline described in paragraph (1) or (3) of this subsection is a weekend day, national holiday, or state holiday, then the deadline for submission of the completed survey is the next business day.

(5) HHSC will not accept a survey or request for an extension that is not received by the stated deadline. A hospital whose survey or request for extension is not received by the stated deadline will be ineligible for DSH or uncompensated-care waiver payments for that program year.

(e) Verification and right to request a review of data. This subsection applies to calculations under this section beginning with calculations for program year 2014.

(1) Claim adjudication. Medicaid participating hospitals are responsible for resolving disputes regarding adjudication of Medicaid claims directly with the appropriate Medicaid contractors as claims are adjudicated. The review of data described under paragraph (2) of this subsection is not the appropriate venue for resolving disputes regarding adjudication of claims.

(2) Request for review of data.

(A) HHSC will pre-populate certain fields in the DSH or non-DSH survey, including data from its Medicaid contractors.

(i) A hospital may request that HHSC review any data in the hospital's DSH or non-DSH survey that is pre-populated by HHSC.

(ii) A hospital may not request that HHSC review self-reported data included in the DSH or non-DSH survey by the hospital.

(B) A hospital must submit via email a written request for review and all supporting documentation to HHSC Hospital Rate Analysis within 30 days following the distribution of the pre-populated DSH or non-DSH survey to the hospital by HHSC. The request must allege the specific data omissions or errors that, if corrected, would result in a more accurate HSL.

(3) HHSC's review.

(A) HHSC will review the data that is the subject of a hospital's request. The review is:

(i) limited to the hospital's allegations that data is incomplete or incorrect;

(ii) supported by documentation submitted by the hospital or by the Medicaid contractor;

(iii) solely a data review; and

(iv) not an adversarial hearing.

(B) HHSC will notify the hospital of the results of the review.

(i) If changes to the Medicaid data are made as a result of the review process, HHSC will use the corrected data for the HSL calculations described in this section and for other purposes described in §355.8065 and §355.8201 of this title.

(ii) If no changes are made, HHSC will use the Medicaid data from the Medicaid contractors.

(C) HHSC will not consider requests for review submitted after the deadline specified in paragraph (2)(B) of this subsection.

(D) HHSC will not consider requests for review of the following calculations that rely on the Medicaid data and other information described in this subsection:

(i) the state payment cap or hospital-specific limit calculated as described in this section;

(ii) DSH program qualification or payment amounts calculated as described in §355.8065 of this title;

(iii) uncompensated-care payment amounts calculated as described in §355.8201 of this title.

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

Filed with the Office of the Secretary of State on November 15, 2019.

TRD-201904310
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Texas Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 424-6863

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DIVISION 11. TEXAS HEALTHCARE TRANSFORMATION AND QUALITY IMPROVEMENT PROGRAM REIMBURSEMENT

1 TAC §355.8212

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for Medicaid payments under Texas Human Resources Code Chapter 32.

The amendments affect Texas Government Code §531.0055, Texas Government Code Chapter 531, and Texas Human Resources Code Chapter 32.

§355.8212. Waiver Payments to Hospitals for Uncompensated Charity Care.

(a) Introduction. Texas Healthcare Transformation and Quality Improvement Program §1115(a) Medicaid demonstration waiver payments are available under this section to help defray the uncompensated cost of charity care provided by eligible hospitals on or after October 1, 2019. Waiver payments to hospitals for uncompensated care provided before October 1, 2019, are described in §355.8201 of this division (relating to Waiver Payments to Hospitals for Uncompensated Care). Waiver payments to hospitals must be in compliance with the Centers for Medicare & Medicaid Services approved waiver Program Funding and Mechanics Protocol, HHSC waiver instructions, and this section.

(b) Definitions.

(1) Affiliation agreement--An agreement, entered into between one or more privately-operated hospitals and a governmental entity that does not conflict with federal or state law. HHSC does not prescribe the form of the agreement.

(2) Allocation amount--The amount of funds approved by the Centers for Medicare & Medicaid Services for uncompensated-care payments for the demonstration year that is allocated to each uncompensated-care provider pool or individual hospital, as described in subsections (f)(2) and (g)(6) of this section.

(3) Anchor--The governmental entity identified by HHSC as having primary administrative responsibilities on behalf of a Regional Healthcare Partnership (RHP).

(4) Centers for Medicare & Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(5) Charity care--Healthcare services provided without expectation of reimbursement to uninsured patients who meet the provider's charity-care policy. The charity-care policy should adhere to the charity-care principles of the Healthcare Financial Management Association Principles and Practices Board Statement 15 (December 2012). Charity care includes full or partial discounts given to uninsured patients who meet the provider's financial assistance policy. Charity care does not include bad debt, courtesy allowances, or discounts given to patients who do not meet the provider's charity-care policy or financial assistance policy.

(6) Data year--A 12-month period that is described in §355.8066 of this subchapter (relating to Hospital-Specific Limit Methodology) and from which HHSC will compile cost and payment

data to determine uncompensated-care payment amounts. This period corresponds to the Disproportionate Share Hospital data year.

(7) Delivery System Reform Incentive Payments (DSRIP)--Payments related to the development or implementation of a program of activity that supports a hospital's efforts to enhance access to health care, the quality of care, and the health of patients and families it serves. These payments are not considered patient-care revenue and are not offset against the hospital's costs when calculating the hospital-specific limit as described in §355.8066 of this subchapter.

(8) Demonstration year--The 12-month period beginning October 1 for which the payments calculated under this section are made. This period corresponds to the Disproportionate Share Hospital (DSH) program year. Demonstration year one corresponded to the 2012 DSH program year.

(9) Disproportionate Share Hospital (DSH)--A hospital participating in the Texas Medicaid program that serves a disproportionate share of low-income patients and is eligible for additional reimbursement from the DSH fund.

(10) Governmental entity--A state agency or a political subdivision of the state. A governmental entity includes a hospital authority, hospital district, city, county, or state entity.

(11) HHSC--The Texas Health and Human Services Commission or its designee.

(12) Institution for mental diseases (IMD)--A hospital that is primarily engaged in providing psychiatric diagnosis, treatment, or care of individuals with mental illness.

(13) Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(14) Large public hospital--An urban public hospital - Class one as defined in §355.8065 of this subchapter (relating to Disproportionate Share Hospital Reimbursement Methodology).

(15) Mid-Level Professional--Medical practitioners which include the following professions only:

(A) Certified Registered Nurse Anesthetists;

(B) Nurse Practitioners;

(C) Physician Assistants;

(D) Dentists;

(E) Certified Nurse Midwives;

(F) Clinical Social Workers;

(G) Clinical Psychologists; and

(H) Optometrists.

(16) Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(17) Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform. Regional Healthcare Partnerships will support coordinated, efficient delivery of quality care and a plan for investments in system transformation that is driven by the needs of local hospitals, communities, and populations.

(18) RHP plan--A multi-year plan within which participants propose their portion of waiver funding and DSRIP projects.

(19) Rural hospital--A hospital enrolled as a Medicaid provider that is:

(A) located in a county with 60,000 or fewer persons according to the 2010 U.S. Census; or

(B) designated by Medicare as a Critical Access Hospital (CAH) or a Sole Community Hospital (SCH); or

(C) designated by Medicare as a Rural Referral Center (RRC); and

(i) is not located in a Metropolitan Statistical Area (MSA), as defined by the U.S. Office of Management and Budget; or

(ii) is located in an MSA but has 100 or fewer licensed beds.

(20) Service Delivery Area (SDA)--The counties included in any HHSC-defined geographic area as applicable to each MCO.

(21) Uncompensated-care application--A form prescribed by HHSC to identify uncompensated costs for Medicaid-enrolled providers.

(22) Uncompensated-care payments--Payments intended to defray the uncompensated costs of charity care as defined in paragraph (5) of this subsection.

(23) Uninsured patient--An individual who has no health insurance or other source of third-party coverage for the services provided. The term includes an individual enrolled in Medicaid who received services that do not meet the definition of medical assistance in section 1905(a) of the Social Security Act (Medicaid services), if such inclusion is specified in the hospital's charity-care policy or financial assistance policy and the patient meets the hospital's policy criteria.

(24) Waiver--The Texas Healthcare Transformation and Quality Improvement Program Medicaid demonstration waiver under §1115 of the Social Security Act.

(c) Eligibility. A hospital that meets the requirements described in this subsection may receive payments under this section.

(1) Generally. To be eligible for any payment under this section:

(A) a hospital must be enrolled as a Medicaid provider in the State of Texas at the beginning of the demonstration year; and

(B) if it is a hospital not operated by a governmental entity, it must have filed with HHSC an affiliation agreement and the documents described in clauses (i) and (ii) of this subparagraph.

(i) The hospital must certify on a form prescribed by HHSC:

(I) that it is a privately-operated hospital;

(II) that no part of any payment to the hospital under this section will be returned or reimbursed to a governmental entity with which the hospital affiliates; and

(III) that no part of any payment to the hospital under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the hospital's receipt of the supplemental funds.

(ii) The governmental entity that is party to the affiliation agreement must certify on a form prescribed by HHSC:

(I) that the governmental entity has not received and has no agreement to receive any portion of the payments made to any hospital that is party to the agreement;

(II) that the governmental entity has not entered into a contingent fee arrangement related to the governmental entity's participation in the waiver program;

(III) that the governmental entity adopted the conditions described in the certification form prescribed by or otherwise approved by HHSC pursuant to a vote of the governmental entity's governing body in a public meeting preceded by public notice published in accordance with the governmental entity's usual and customary practices or the Texas Open Meetings Act, as applicable; and

(IV) that all affiliation agreements, consulting agreements, or legal services agreements executed by the governmental entity related to its participation in this waiver payment program are available for public inspection upon request.

(iii) Submission requirements.

(I) Initial submissions. The parties must initially submit the affiliation agreements and certifications described in this subsection to the HHSC Rate Analysis Department on the earlier of the following occurrences after the documents are executed:

(-a-) the date the hospital submits the uncompensated-care application that is further described in paragraph (2) of this subsection; or

(-b-) the new affiliation cut-off date posted on HHSC Rate Analysis Departments' website for each payment under this section.

(II) Subsequent submissions. The parties must submit revised documentation to HHSC as follows:

(-a-) When the nature of the affiliation changes or parties to the agreement are added or removed, the parties must submit the revised affiliation agreement and related hospital and governmental entity certifications.

(-b-) When there are changes in ownership, operation, or provider identifiers, the hospital must submit a revised hospital certification.

(-c-) The parties must submit the revised documentation thirty days before the projected deadline for completing the IGT for the first payment under the revised affiliation agreement. The projected deadline for completing the IGT is posted on HHSC Rate Analysis Department's website for each payment under this section.

(III) A hospital that submits new or revised documentation under subclause (I) or (II) of this clause must notify the Anchor of the RHP in which the hospital participates.

(IV) The certification forms must not be modified except for those changes approved by HHSC prior to submission.

(-a-) Within 10 business days of HHSC Rate Analysis Department receiving a request for approval of proposed modifications, HHSC will approve, reject, or suggest changes to the proposed certification forms.

(-b-) A request for HHSC approval of proposed modifications to the certification forms will not delay the submission deadlines established in this clause.

(V) A hospital that fails to submit the required documentation in compliance with this subparagraph is not eligible to receive a payment under this section.

(2) Uncompensated-care payments. For a hospital to be eligible to receive uncompensated-care payments, in addition to the requirements in paragraph (1) of this subsection, the hospital must:

(A) submit to HHSC an uncompensated-care application for the demonstration year, as is more fully described in subsection (g)(1) of this section, by the deadline specified by HHSC; and

(B) submit to HHSC documentation of:

(i) its participation in an RHP; or

(ii) approval from CMS of its eligibility for uncompensated-care payments without participation in an RHP.

(3) Changes that may affect eligibility for uncompensated-care payments.

(A) If a hospital closes, loses its license, loses its Medicare or Medicaid eligibility, withdraws from participation in an RHP, or files bankruptcy before receiving all or a portion of the uncompensated-care payments for a demonstration year, HHSC will determine the hospital's eligibility to receive payments going forward on a case-by-case basis. In making the determination, HHSC will consider multiple factors including whether the hospital was in compliance with all requirements during the demonstration year and whether it can satisfy the requirement to cooperate in the reconciliation process as described in subsection (i) of this section.

(B) A hospital must notify HHSC Rate Analysis Department in writing within 30 days of the filing of bankruptcy or of changes in ownership, operation, licensure, Medicare or Medicaid enrollment, or affiliation that may affect the hospital's continued eligibility for payments under this section.

(d) Source of funding. The non-federal share of funding for payments under this section is limited to public funds from governmental entities. Prior to processing uncompensated-care payments for the final payment period within a waiver demonstration year for any uncompensated-care pool or sub-pool described in subsection (f)(2) of this section, HHSC will survey the governmental entities that provide public funds for the hospitals in that pool or sub-pool to determine the amount of funding available to support payments from that pool or sub-pool.

(e) Payment frequency. HHSC will distribute waiver payments on a schedule to be determined by HHSC and posted on HHSC's website.

(f) Funding limitations.

(1) Payments made under this section are limited by the maximum aggregate amount of funds allocated to the provider's uncompensated-care pool for the demonstration year. If payments for uncompensated care for an uncompensated-care pool attributable to a demonstration year are expected to exceed the aggregate amount of funds allocated to that pool by HHSC for that demonstration year, HHSC will reduce payments to providers in the pool as described in subsection (g)(6) of this section.

(2) HHSC will establish the following uncompensated-care pools: a state-owned hospital pool, a non-state-owned hospital pool, a physician group practice pool, a governmental ambulance provider pool, and a publicly owned dental provider pool.

(A) The state-owned hospital pool.

(i) The state-owned hospital pool funds uncompensated-care payments to state-owned teaching hospitals, state-owned IMDs, and the Texas Center for Infectious Disease.

(ii) HHSC will determine the allocation for this pool at an amount less than or equal to the total annual maximum uncompensated-care payment amount for these hospitals as calculated in subsection (g)(2) of this section.

(B) Non-state-owned provider pools. HHSC will allocate the remaining available uncompensated-care funds, if any, among the non-state-owned provider pools as described in this subparagraph. The remaining available uncompensated-care funds equal the amount of funds approved by CMS for uncompensated-care payments for the demonstration year less the sum of funds allocated to the state-owned hospital pool under subparagraph (A) of this paragraph. HHSC will allocate the funds among non-state-owned provider pools based on the following amounts.

(i) For the physician group practice pool, the governmental ambulance provider pool, and the publicly owned dental provider pool:

(I) for demonstration year nine, an amount to equal the percentage of the applicable total uncompensated-care pool amount paid to each group in demonstration year six; and

(II) for demonstration years ten and after, an amount to equal a percentage determined by HHSC annually based on factors including the amount of reported charity-care costs for the previous demonstration year and the ratio of reported charity-care costs to hospitals' charity-care costs.

(ii) For the non-state-owned hospital pool, all of the remaining funds after the allocations described in clause (i) of this subparagraph. HHSC will further allocate the funds in the non-state-owned hospital pool among all hospitals in the pool and create non-state-owned hospital sub-pools as follows:

(I) calculate a revised maximum payment amount for each non-state-owned hospital as described in subsection (g)(6) of this section and allocate that amount to the hospital; and

(II) group all non-state-owned hospitals into sub-pools based on their geographic location within one of the state's Medicaid service delivery areas (SDAs), as described in subsection (g)(7) of this section.

(3) Payments made under this section are limited by the availability of funds identified in subsection (d) of this section and timely received by HHSC. If sufficient funds are not available for all payments for which the providers in each pool or sub-pool are eligible, HHSC will reduce payments as described in subsection (h)(2) of this section.

(4) If for any reason funds allocated to a provider pool or to individual providers within a sub-pool are not paid to providers in that pool or sub-pool for the demonstration year, the funds will be redistributed to other provider pools based on each pool's pro-rata share of remaining uncompensated costs for the same demonstration year. The redistribution will occur when the reconciliation for that demonstration year is performed.

(g) Uncompensated-care payment amount.

(1) Application.

(A) Cost and payment data reported by a hospital in the uncompensated-care application is used to calculate the annual maximum uncompensated-care payment amount for the applicable demonstration year, as described in paragraph (2) of this subsection.

(B) Unless otherwise instructed in the application, a hospital must base the cost and payment data reported in the application on its applicable as-filed CMS 2552 Cost Report(s) For Electronic Filing Of Hospitals corresponding to the data year and must comply with the application instructions or other guidance issued by HHSC.

(i) When the application requests data or information outside of the as-filed cost report(s), a hospital must provide all requested documentation to support the reported data or information.

(ii) For a new hospital, the cost and payment data period may differ from the data year, resulting in the eligible uncompensated costs based only on services provided after the hospital's Medicaid enrollment date. HHSC will determine the data period in such situations.

(2) Calculation.

(A) A hospital's annual maximum uncompensated-care payment amount is the sum of the components described in clauses (i) - (iv) of this subparagraph.

(i) The hospital's inpatient and outpatient charity-care costs pre-populated in or reported on the uncompensated-care application, as described in paragraph (3) of this subsection, reduced by interim DSH payments for the same program period, if any, that reimburse the hospital for the same costs. To identify DSH payments that reimburse the hospital for the same costs, HHSC will:

(I) Use self-reported information on the application to identify charges that can be claimed by the hospital in both DSH and UC and convert the charges to cost;

(II) Calculate a DSH-only uninsured shortfall by reducing the hospital's total uninsured costs, calculated as described in §355.8066 of this chapter, by the result from subclause (I) of this clause;

(III) Reduce the interim DSH payment amount by the sum of:

(-a-) the DSH-only uninsured shortfall calculated as described in subclause (II) of this clause; and

(-b-) the hospital's Medicaid shortfall, calculated as described in §355.8066 of this chapter.

(ii) Other eligible costs for the data year, as described in paragraph (4) of this subsection;

(iii) Cost and payment adjustments, if any, as described in paragraph (5) of this subsection; and

(iv) For each large public hospital, the amount transferred to HHSC by that hospital's affiliated governmental entity to support DSH payments to that hospital and private hospitals for the same demonstration year.

(B) A hospital also participating in the DSH program cannot receive total uncompensated-care payments under this section (related to inpatient and outpatient hospital services provided to uninsured charity-care individuals) and DSH payments that exceed the hospital's total eligible uncompensated costs. For purposes of this requirement, "total eligible uncompensated costs" means the hospital's DSH hospital-specific limit (HSL) plus the unreimbursed costs of non-covered inpatient and outpatient services provided to uninsured charity-care patients.

(3) Hospital charity-care costs.

(A) For each hospital required by Medicare to submit schedule S-10 of the CMS 2552-10 cost report, HHSC will pre-populate the uncompensated-care application described in paragraph (1) of this subsection with the uninsured charity-care charges reported by the hospital on schedule S-10 for the hospital's cost reporting period ending in the calendar year two years before the demonstration year. For

example, for demonstration year 9, which coincides with federal fiscal year 2020, HHSC will use data from the hospital's cost reporting period ending in calendar year 2018.

(B) For each hospital not required by Medicare to submit schedule S-10 of the CMS 2552-10 cost report, the hospital must report its hospital charity-care charges for services provided to uninsured patients for the hospital's cost reporting period ending in the calendar year two years before the demonstration year on the uncompensated-care application described in paragraph (1) of this subsection.

(i) The instructions for reporting eligible charity-care costs in the application will be consistent with instructions contained in schedule S-10.

(ii) An IMD may not report charity-care charges for services provided during the data year to patients aged 21 through 64.

(4) Other eligible costs.

(A) In addition to inpatient and outpatient charity-care costs, a hospital may also claim reimbursement under this section for uncompensated charity care, as specified in the uncompensated-care application, that is related to the following services provided to uninsured patients who meet the hospital's charity-care policy:

(i) direct patient-care services of physicians and mid-level professionals; and

(ii) certain pharmacy services.

(B) A payment under this section for the costs described in subparagraph (A) of this paragraph are not considered inpatient or outpatient Medicaid payments for the purpose of the DSH audit described in §355.8065 of this subchapter.

(5) Adjustments. When submitting the uncompensated-care application, a hospital may request that cost and payment data from the data year be adjusted to reflect increases or decreases in costs resulting from changes in operations or circumstances.

(A) A hospital:

(i) may request that costs not reflected on the as-filed cost report, but which would be incurred for the demonstration year, be included when calculating payment amounts; and

(ii) may request that costs reflected on the as-filed cost report, but which would not be incurred for the demonstration year, be excluded when calculating payment amounts.

(B) Documentation supporting the request must accompany the application, and provide sufficient information for HHSC to verify the link between the changes to the hospital's operations or circumstances and the specified numbers used to calculate the amount of the adjustment.

(i) Such supporting documentation must include:

(I) a detailed description of the specific changes to the hospital's operations or circumstances;

(II) verifiable information from the hospital's general ledger, financial statements, patient accounting records or other relevant sources that support the numbers used to calculate the adjustment; and

(III) if applicable, a copy of any relevant contracts, financial assistance policies or other policies/procedures that verify the change to the hospital's operations or circumstances.

(ii) HHSC will deny a request if it cannot verify that costs not reflected on the as-filed cost report will be incurred for the demonstration year.

(C) Notwithstanding the availability of adjustments impacting the cost and payment data described in this section, no adjustments to the state payment cap [~~interim hospital-specific limit~~] will be considered for purposes of Medicaid DSH payment calculations described in §355.8065 of this subchapter.

(6) Reduction to stay within uncompensated-care pool allocation amounts. Prior to processing uncompensated-care payments for any payment period within a waiver demonstration year for any uncompensated-care pool described in subsection (f)(2) of this section, HHSC will determine if such a payment would cause total uncompensated-care payments for the demonstration year for the pool to exceed the allocation amount for the pool and will reduce the maximum uncompensated-care payment amounts providers in the pool are eligible to receive for that period as required to remain within the pool allocation amount.

(A) Calculations in this paragraph will be applied to each of the uncompensated-care pools separately.

(B) HHSC will calculate the following data points:

(i) For each provider, prior period payments to equal prior period uncompensated-care payments for the demonstration year.

(ii) For each provider, a maximum uncompensated-care payment for the payment period to equal the sum of:

(I) the portion of the annual maximum uncompensated-care payment amount calculated for that provider (as described in this section and the sections referenced in subsection (f)(2)(B) of this section) that is attributable to the payment period; and

(II) the difference, if any, between the portions of the annual maximum uncompensated-care payment amounts attributable to prior periods and the prior period payments calculated in clause (i) of this subparagraph.

(iii) The cumulative maximum payment amount to equal the sum of prior period payments from clause (i) of this subparagraph and the maximum uncompensated-care payment for the payment period from clause (ii) of this subparagraph for all members of the pool combined.

(iv) A pool-wide total maximum uncompensated-care payment for the demonstration year to equal the sum of all pool members' annual maximum uncompensated-care payment amounts for the demonstration year from paragraph (2) of this subsection.

(v) A pool-wide ratio calculated as the pool allocation amount from subsection (f)(2) of this section divided by the pool-wide total maximum uncompensated-care payment amount for the demonstration year from clause (iv) of this subparagraph.

(C) If the cumulative maximum payment amount for the pool from subparagraph (B)(iii) of this paragraph is less than the allocation amount for the pool, each provider in the pool is eligible to receive its maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph without any reduction to remain within the pool allocation amount.

(D) If the cumulative maximum payment amount for the pool from subparagraph (B)(iii) of this paragraph is more than the allocation amount for the pool, HHSC will calculate a revised maximum uncompensated-care payment for the payment period for each provider in the pool as follows:

(i) The physician group practice pool, the governmental ambulance provider pool, and the publicly owned dental provider pool. HHSC will calculate a capped payment amount equal to the product of each provider's annual maximum uncompensated-care payment amount for the demonstration year from paragraph (2) of this subsection and the pool-wide ratio calculated in subparagraph (B)(v) of this paragraph.

(ii) The non-state-owned hospital pool.

(I) For rural hospitals, HHSC will:

(-a-) sum the annual maximum uncompensated-care payment amounts from paragraph (2) of this subsection for all rural hospitals in the pool;

(-b-) in demonstration year:

(-1-) nine, set aside for rural hospitals the amount calculated in item (-a-) of this subclause; or

(-2-) ten and after, set aside for rural hospitals the lesser of the amount calculated in item (-a-) of this subclause or the amount set aside for rural hospitals in demonstration year nine;

(-c-) calculate a ratio to equal the rural hospital set-aside amount from item (-b-) of this subclause divided by the total annual maximum uncompensated-care payment amount for rural hospitals from item (-a-) of this subclause; and

(-d-) calculate a capped payment amount equal to the product of each rural hospital's annual maximum uncompensated-care payment amount for the demonstration year from paragraph (2) of this subsection and the ratio calculated in item (-c-) of this subclause.

(II) For non-rural hospitals, HHSC will:

(-a-) sum the annual maximum uncompensated-care payment amounts from paragraph (2) of this subsection for all non-rural hospitals in the pool;

(-b-) calculate an amount to equal the difference between the pool allocation amount from subsection (f)(2) of this section and the set-aside amount from subclause (I)(-b-) of this clause;

(-c-) calculate a ratio to equal the result from item (-b-) of this subclause divided by the total annual maximum uncompensated-care payment amount for non-rural hospitals from item (-a-) of this subclause; and

(-d-) calculate a capped payment amount equal to the product of each non-rural hospital's annual maximum uncompensated-care payment amount for the demonstration year from paragraph (2) of this subsection and the ratio calculated in item (-c-) of this subclause.

(III) The revised maximum uncompensated-care payment for the payment period equals the lesser of:

(-a-) the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph; or

(-b-) the difference between the capped payment amount from subclause (I) or (II) of this clause and the prior period payments from subparagraph (B)(i) of this paragraph.

(IV) HHSC will allocate to each non-state-owned hospital the revised maximum uncompensated-care payment amount from subclause (III) of this clause.

(7) Non-state-owned hospital SDA sub-pools. After HHSC completes the calculations described in paragraph (6) of this subsection, HHSC will place each non-state-owned hospital into a sub-pool based on the hospital's geographic location in a designated Medicaid SDA for purposes of the calculations described in subsection (h) of this section.

(8) Prohibition on duplication of costs. Eligible uncompensated-care costs cannot be reported on multiple uncompensated-care applications, including uncompensated-care applications for other programs. Reporting on multiple uncompensated-care applications is duplication of costs.

(9) Advance payments.

(A) In a demonstration year in which uncompensated-care payments will be delayed pending data submission or for other reasons, HHSC may make advance payments to hospitals that meet the eligibility requirements described in subsection (c)(2) of this section and submitted an acceptable uncompensated-care application for the preceding demonstration year from which HHSC calculated an annual maximum uncompensated-care payment amount for that year.

(B) The amount of the advance payments will:

(i) in demonstration year nine, be based on uninsured charity-care costs reported by the hospital on schedule S-10 of the CMS 2552-10 cost report used for purposes of sizing the UC pool, or on documentation submitted for that purpose by each hospital not required to submit schedule S-10 with their cost report; and

(ii) in demonstration years ten and after, be a percentage, to be determined by HHSC, of the annual maximum uncompensated-care payment amount calculated by HHSC for the preceding demonstration year.

(C) Advance payments are considered to be prior period payments as described in paragraph (6)(B)(i) of this subsection.

(D) A hospital that did not submit an acceptable uncompensated-care application for the preceding demonstration year is not eligible for an advance payment.

(E) If a partial year uncompensated-care application was used to determine the preceding demonstration year's payments, data from that application may be annualized for use in computation of an advance payment amount.

(h) Payment methodology.

(1) Notice. Prior to making any payment described in subsection (g) of this section, HHSC will give notice of the following information:

(A) the payment amount for each hospital in a pool or sub-pool for the payment period (based on whether the payment is made quarterly, semi-annually, or annually);

(B) the maximum IGT amount necessary for hospitals in a pool or sub-pool to receive the amounts described in subparagraph (A) of this paragraph; and

(C) the deadline for completing the IGT.

(2) Payment amount. The amount of the payment to hospitals in each pool or sub-pool will be determined based on the amount of funds transferred by the affiliated governmental entities as follows:

(A) If the governmental entities transfer the maximum amount referenced in paragraph (1) of this subsection, the hospitals in the pool or sub-pool will receive the full payment amount calculated for that payment period.

(B) If the governmental entities do not transfer the maximum amount referenced in paragraph (1) of this subsection, each hospital in the pool or sub-pool will receive a portion of its payment

amount for that period, based on the hospital's percentage of the total payment amounts for all hospitals in the pool or sub-pool.

(3) Final payment opportunity. Within payments described in this section, governmental entities that do not transfer the maximum IGT amount described in paragraph (1) of this subsection during a demonstration year will be allowed to fund the remaining payments to hospitals in the pool or sub-pool at the time of the final payment for that demonstration year. The IGT will be applied in the following order:

(A) to the final payments up to the maximum amount; and

(B) to remaining balances for prior payment periods in the demonstration year.

(i) Reconciliation. HHSC will reconcile actual costs incurred by the hospital for the demonstration year with uncompensated-care payments, if any, made to the hospital for the same period:

(1) If a hospital received payments in excess of its actual costs, the overpaid amount will be recouped from the hospital, as described in subsection (j) of this section.

(2) If a hospital received payments less than its actual costs, and if HHSC has available waiver funding for the demonstration year in which the costs were accrued, the hospital may receive reimbursement for some or all of those actual documented unreimbursed costs.

(3) Each hospital that received an uncompensated-care payment during a demonstration year must cooperate in the reconciliation process by reporting its actual costs and payments for that period on the form provided by HHSC for that purpose, even if the hospital closed or withdrew from participation in the uncompensated-care program. If a hospital fails to cooperate in the reconciliation process, HHSC may recoup the full amount of uncompensated-care payments to the hospital for the period at issue.

(j) Recoupment.

(1) In the event of an overpayment identified by HHSC or a disallowance by CMS of federal financial participation related to a hospital's receipt or use of payments under this section, HHSC may recoup an amount equivalent to the amount of the overpayment or disallowance. The non-federal share of any funds recouped from the hospital will be returned to the entity that owns or is affiliated with the hospital.

(2) Payments under this section may be subject to adjustment for payments made in error, including, without limitation, adjustments under §371.1711 of this title (relating to Recoupment of Overpayments and Debts), 42 CFR Part 455, and Chapter 403 of the Texas Government Code. HHSC may recoup an amount equivalent to any such adjustment.

(3) HHSC may recoup from any current or future Medicaid payments as follows:

(A) HHSC will recoup from the hospital against which any overpayment was made or disallowance was directed.

(B) If, within 30 days of the hospital's receipt of HHSC's written notice of recoupment, the hospital has not paid the full amount of the recoupment or entered into a written agreement with HHSC to do so, HHSC may withhold any or all future Medicaid payments from the hospital until HHSC has recovered an amount equal to the amount overpaid or disallowed.

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 15, 2019.

TRD-201904311
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 424-6863

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 30. COMMUNITY DEVELOPMENT

SUBCHAPTER A. TEXAS COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM

The Texas Department of Agriculture (Department) proposes amendments to Title 4, Part 1, Chapter 30, Subchapter A, Division 1, §30.3, relating to Program Overview; the repeal of Subchapter A, Division 3, §30.60, relating to the Disaster Relief Fund, and §30.61, relating to the Urgent Need Fund; and new Subchapter A, Division 3, §30.60, relating to the State Urgent Need Fund. The proposal repeals two funding categories in the Texas Community Development Block Grant (TxCDBG) program no longer administered by the Department and includes rules for a new category of funding that will be administered by the Department.

Sections 30.60 and 30.61 are proposed for repeal to remove rules relating to the Disaster Relief Fund and the Urgent Need Fund, two funding categories in the TxCDBG program which are no longer administered by the Department. New §30.60 adds rules related to the State Urgent Need Fund, which replaces the former disaster relief fund category. The proposed rules are related to the State Urgent Need Fund application cycle, eligibility requirements, and selection procedures. Amendments to §30.3 reflect the changes made as a result of the proposed repeal and new rules.

Suzanne Barnard, Director for CDBG Programs, has determined that for the first five years the proposal is in effect, there will be no adverse fiscal implications for state or local governments as a result of the proposal.

Ms. Barnard has also determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of administering the rules will be a more streamlined process to improve and increase access to emergency funding for local communities in need. There will be no adverse economic effect on micro-businesses, small businesses or individuals as a result of the proposal. There will be no adverse impact to rural communities.

Ms. Barnard has provided the following information related to the government growth impact statement, as required pursuant

to Texas Government Code, §2001.0221. During the first five years the proposal is in effect:

(1) no new or current government programs will be created or eliminated;

(2) no employee positions will be created or eliminated;

(3) there will be no increase or decrease in future legislative appropriations to the Department;

(4) there will be no increase or decrease in fees paid to the Department;

(5) there will be a repeal of existing regulations and new regulations will be created by the proposal;

(6) there will be no increase or decrease to the number of individuals subject to the proposal, as communities must comply with CDBG program rules and eligibility requirements in order to receive funding from the various TxCDBG programs; and

(7) the proposal is not anticipated to have an adverse effect on the Texas economy.

Written comments on the proposal may be submitted to Suzanne Barnard, Director for CDBG Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, or by email to *RuleComments@TexasAgriculture.gov.* Comments must be received no later than 5:00 p.m. on December 30, 2019.

DIVISION 1. GENERAL PROVISIONS

4 TAC §30.3

The proposal is made under Texas Government Code §487.051, which designates the Department as the agency to administer the federal community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the proposal is Texas Government Code, Chapter 487.

§30.3. Program Overview.

(a) Fund categories. TxCDBG Program assistance is available through the following seven fund categories.

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

(5) State Urgent Need (SUN) Fund is available for assistance and recovery following a disaster situation.

[~~(5) Disaster Relief/Urgent Needs Fund is available for assistance and recovery following a disaster situation or for qualifying urgent infrastructure needs. This fund is divided into two programs:~~]

[~~(A) Disaster Relief (DR) Fund provides assistance for eligible activities to address emergency situations where an official state or federal disaster declaration has been issued; and~~]

[~~(B) Urgent Need (UN) Fund provides assistance for eligible activities that will restore water or sewer infrastructure whose sudden failure has resulted in death, illness, injury or pose an imminent threat to life or health within the affected jurisdiction.~~]

(6) - (7) (No change.)

(b) (No change.)

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

Filed with the Office of the Secretary of State on November 18, 2019.

TRD-201904328
Tim Kleinschmidt
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 463-7476

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DIVISION 3. ADMINISTRATION OF PROGRAM FUNDS

4 TAC §30.60, §30.61

The proposal is made under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the proposal is Texas Government Code, Chapter 487.

§30.60. Disaster Relief (DR) Fund.

§30.61. Urgent Need (UN) Fund.

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 18, 2019.

TRD-201904329
Tim Kleinschmidt
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 463-7476

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4 TAC §30.60

The proposal is made under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the proposal is Texas Government Code, Chapter 487.

§30.60. State Urgent Need (SUN) Fund.

(a) Application cycle. Applications are accepted on an as-needed basis throughout a program year to support relief efforts and activities related to addressing a natural disaster in which a state disaster declaration has been issued.

(b) Eligibility determination.

(1) To be eligible to apply, a community must be named in:

(A) a Governor's proclamation of disaster; or

(B) a request by the Governor's designee for state agencies to assist the community in responding to the event.

(2) Disaster events which have received a Presidential declaration of disaster, or for which the Governor's Request for Presidential Disaster Declaration has been submitted and is pending, are not eligible for SUN funding.

(3) For drought-related disaster events, the community must also have reported to the Texas Commission on Environmental Quality that inadequate water is available, as described in the application guide.

(c) Eligible activities. Eligible SUN activities include repair, replacement, rehabilitation, or improvement of public infrastructure.

(1) SUN funded activities must address damage caused by the disaster event or resolve an issue that is a direct result of the disaster event.

(2) SUN funded activities must make permanent improvements and not be temporary in nature.

(3) Mitigation measures such as elevating critical equipment or installing generators to avoid future damage are not eligible as the primary SUN funded project but may be included to further improve an otherwise eligible project.

(4) Redundant or backup systems are not eligible for SUN funding.

(5) Activities to address privately-owned water and wastewater systems may be considered if matching funds are included in the application.

(d) Selection procedures. To qualify for the SUN Fund, a community must meet the following criteria. Detailed selection factors, and other eligibility and project requirements are available in the application guideline.

(1) The situation addressed by the community must be both unanticipated and beyond the community's control.

(2) The problem being addressed must be of recent origin. This means that the application for assistance must be submitted to the department no later than six months from the date of the state issued disaster declaration listing the community's jurisdiction.

(3) The community must demonstrate that adequate local funds are not available, i.e., the community has less than six months of unencumbered general operations funds available in its balance as evidenced by the last available audit required by state statute, or funds from other state or federal sources are not available to completely address the problem.

(4) The department may consider whether funds under an existing TxCDBG contract are available to be reallocated to address the situation.

(5) The department may determine that a community with a history of unsatisfactory performance and/or management capacity on previous TxCDBG contracts may still be eligible for funding under the SUN Fund; however, the contract administrator for the SUN Fund grant must be approved by the department.

(e) Award limits. A community may not apply for or receive more than one SUN Fund grant award to address a single disaster situation.

(1) Activities that benefit a utility system must include all beneficiaries of the system, unless a specific target area is identified based on the proposed improvements.

(2) The department will not consider multiple applications from different applicants that benefit substantially the same project area.

(3) Applications that address natural disaster events across multiple jurisdictions may be eligible for larger grant amounts as described in the application guide.

(f) Funding priorities.

(1) The department will prioritize applications for safe drinking water over other eligible activities.

(2) The department may also prioritize the use of SUN funds for other activities by announcing the priority on the department's website and/or the application guide.

(g) Funded projects. Due to the urgent nature of projects, activities funded under the SUN Fund must be completed within eighteen months from the start date of the contract agreement.

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 18, 2019.

TRD-201904331
Tim Kleinschmidt
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 463-7476

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes amendments to §25.5, relating to definitions; §25.130, relating to advanced metering; and §25.133, relating to non-standard metering service. The amendments to §25.130 and §25.133 conform the rules to Senate Bill 1145, 85th Legislature, Regular Session, which amended Public Utility Regulatory Act (PURA) §39.452, and to the following bills from the 86th Legislature, Regular Session: House Bill 853, which amended PURA §39.5521, House Bill 986, which amended PURA §39.402, and House Bill 1595, which amended PURA §39.5021. These bills encourage deployment of advanced metering and meter information networks by extending the applicability of PURA §39.107(h) and (k) to electric utilities providing service in areas outside the Electric Reliability Council of Texas (ERCOT).

The amendments also remove the requirement for an electric utility to offer the home area network (HAN) feature due to limited customer interest and set minimum capabilities for on-demand reads of a customer's advanced meter. In addition, the amendments clarify and define rule language; remove rule language relating to an electric utility's limitation of liability because

these provisions are addressed in the electric utility's tariff; and remove obsolete and other unnecessary rule language.

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rules, as required by Texas Government Code §2001.0221. The agency has determined that for each year of the first five years that the proposed amendments are in effect, the following statements will apply:

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

(2) implementation of the proposed amendments will not require the creation of new employee positions and will not require the elimination of existing employee positions;

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

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

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

(6) the proposed amendments will expand §25.130 by setting a requirement for the minimum provision of on-demand reads an electric utility must be capable of providing;

(7) the proposed amendments will conform §25.130 and §25.133 to the legislation described in the first paragraph by expressly applying §25.130 and §25.133 to electric utilities outside the ERCOT power region; and

(8) the proposed rules will not affect this state's economy.

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed amendments. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed amendments will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

Therese Harris, Director of Infrastructure Analysis and Mapping, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the amendments.

Public Benefits

Therese Harris has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefits expected as a result of the adoption of the proposed amendments will be conforming §25.130 and §25.133 to the legislation described in the first paragraph, setting minimum capabilities for on-demand reads of a customer's advanced meter an electric utility must provide, and removing unnecessary language from the rules.

There will be no probable economic cost to persons required to comply with the proposed amendments.

Local Employment Impact Statement

For each year of the first five years the proposed amendments are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the Public Utility Commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking, if requested in accordance with Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on January 17, 2020 at 9:00 a.m. The request for a public hearing must be received by January 13, 2019. If no request for a public hearing is received and the commission staff cancels the hearing, it will make a filing in this project prior to the scheduled date for the hearing.

Public Comments

Initial comments on the proposed amendments may be submitted to the commission's filing clerk at 1701 North Congress Avenue, P.O. Box 13326, Austin, TX 78711-3326 by January 13, 2019. Reply comments may be submitted by January 23, 2020. Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rules. The commission will consider the costs and benefits in deciding whether to modify the proposed rules on adoption. All comments should refer to project number 48525. Sixteen copies of comments are required to be filed under §22.71(c) of 16 Texas Administrative Code.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §25.5

Statutory Authority

These amendments are proposed under §14.001 of the Public Utility Regulatory Act, Tex. Util. Code Ann. (West 2016 and Supp. 2017) (PURA), which provides the commission with the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; PURA §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §36.003, which grants the commission the authority to ensure that each rate be just and reasonable and not unreasonably preferential, prejudicial, or discriminatory; PURA §39.107, which grants the commission the authority to approve electric utility surcharges for the deployment of advanced meters, adopt rules relating to the transfer of customer data, and approve non-discriminatory rates for metering service; and PURA §§39.402, 39.452, 39.5021 and 39.5521, which permit the electric utilities outside of the ERCOT region that elect to deploy advanced meters and meter information networks to recover reasonable and necessary deployment costs and subjects the de-

ployment to commission rules adopted under PURA §39.107(h) and (k).

Cross reference to statutes: Public Utility Regulatory Act §§14.001, 14.002, 36.003, 39.107, 39.402, 39.452, 39.5021 and 39.5521.

§25.5. Definitions.

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

(1) - (114) (No change.)

(115) Retail electric provider (REP) of record--The REP assigned to the electric service identifier (ESI ID) in ERCOT's database. There can be no more than one REP of record assigned to an ESI ID at any specific point in time.

(116) [~~(115)~~] Retail stranded costs--That part of net stranded cost associated with the provision of retail service.

(117) [~~(116)~~] Retrofit--The installation of control technology on an electric generating facility to reduce the emissions of nitrogen oxide, sulfur dioxide, or both.

(118) [~~(117)~~] River authority--A conservation and reclamation district created pursuant to the Texas Constitution, Article 16, Section 59, including any nonprofit corporation created by such a district pursuant to the Texas Water Code, Chapter 152, that is an electric utility.

(119) [~~(118)~~] Rule--A statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the commission. The term includes the amendment or repeal of a prior rule, but does not include statements concerning only the internal management or organization of the commission and not affecting private rights or procedures.

(120) [~~(119)~~] Separately metered--Metered by an individual meter that is used to measure electric energy consumption by a retail customer and for which the customer is directly billed by a utility, retail electric provider, electric cooperative, or municipally owned utility.

(121) [~~(120)~~] Service--Has its broadest and most inclusive meaning. The term includes any act performed, anything supplied, and any facilities used or supplied by an electric utility in the performance of its duties under the Public Utility Regulatory Act to its patrons, employees, other public utilities or electric utilities, an electric cooperative, and the public. The term also includes the interchange of facilities between two or more public utilities or electric utilities.

(122) [~~(121)~~] Spanish-speaking person--A person who speaks any dialect of the Spanish language exclusively or as their primary language.

(123) [~~(122)~~] Standard meter--The minimum metering device necessary to obtain the billing determinants required by the transmission and distribution utility's tariff schedule to determine an end-use customer's charges for transmission and distribution service.

(124) [~~(123)~~] Stranded cost--The positive excess of the net book value of generation assets over the market value of the assets, taking into account all of the electric utility's generation assets, any above-market purchased power costs, and any deferred debit related to a utility's discontinuance of the application of Statement of Financial Accounting Standards Number 71 ("Accounting for the Effect of Certain Types of Regulation") for generation-related assets if required by the provisions of the Public Utility Regulatory Act (PURA), Chapter 39. For purposes of PURA §39.262, book value shall be established as of December 31, 2001, or the date a market value is established through a market valuation method under PURA §39.262(h), whichever is earlier, and shall include stranded costs incurred under PURA §39.263.

(125) [~~(124)~~] Submetering--Metering of electricity consumption on the customer side of the point at which the electric utility meters electricity consumption for billing purposes.

(126) [~~(125)~~] Summer net dependable capability--The net capability of a generating unit in megawatts (MW) for daily planning and operational purposes during the summer peak season, as determined in accordance with requirements of the reliability council or independent organization in which the unit operates.

(127) [~~(126)~~] Supply-side resource--A resource, including a storage device, that provides electricity from fuels or renewable resources.

(128) [~~(127)~~] System emergency--A condition on a utility's system that is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property.

(129) [~~(128)~~] Tariff--The schedule of a utility, municipally-owned utility, or electric cooperative containing all rates and charges stated separately by type of service, the rules and regulations of the utility, and any contracts that affect rates, charges, terms or conditions of service.

(130) [~~(129)~~] Termination of service--The cancellation or expiration of a sales agreement or contract by a retail electric provider by notification to the customer and the registration agent.

(131) [~~(130)~~] Tenant--A person who is entitled to occupy a dwelling unit to the exclusion of others and who is obligated to pay for the occupancy under a written or oral rental agreement.

(132) [~~(131)~~] Test year--The most recent 12 months for which operating data for an electric utility, electric cooperative, or municipally-owned utility are available and shall commence with a calendar quarter or a fiscal year quarter.

(133) [~~(132)~~] Texas jurisdictional installed generation capacity--The amount of an affiliated power generation company's installed generation capacity properly allocable to the Texas jurisdiction. Such allocation shall be calculated pursuant to an existing commission-approved allocation study, or other such commission-approved methodology, and may be adjusted as approved by the commission to reflect the effects of divestiture or the installation of new generation facilities.

(134) [~~(133)~~] Transition bonds--Bonds, debentures, notes, certificates, of participation or of beneficial interest, or other evidences of indebtedness or ownership that are issued by an electric utility, its successors, or an assignee under a financing order, that have a term not longer than 15 years, and that are secured or payable from transition property.

(135) [~~(134)~~] Transition charges--Non-bypassable amounts to be charged for the use or availability of electric services, approved by the commission under a financing order to recover qualified costs, that shall be collected by an electric utility, its successors, an assignee, or other collection agents as provided for in a financing order.

(136) [~~(135)~~] Transmission and distribution business unit (TDBU)--The business unit of a municipally owned utility/electric cooperative, whether structurally unbundled as a separate legal entity or functionally unbundled as a division, that owns or operates for compensation in this state equipment or facilities to transmit or distribute electricity at retail, except for facilities necessary to interconnect a generation facility with the transmission or distribution network, a facility

not dedicated to public use, or a facility otherwise excluded from the definition of electric utility in a qualifying power region certified under the Public Utility Regulatory Act §39.152. Transmission and distribution business unit does not include a municipally owned utility/electric cooperative that owns, controls, or is an affiliate of the transmission and distribution business unit if the transmission and distribution business unit is organized as a separate corporation or other legally distinct entity. Except as specifically authorized by statute, a transmission and distribution business unit shall not provide competitive energy-related activities.

(137) [~~(136)~~] Transmission and distribution utility (TDU)--A person or river authority that owns, or operates for compensation in this state equipment or facilities to transmit or distribute electricity, except for facilities necessary to interconnect a generation facility with the transmission or distribution network, a facility not dedicated to public use, or a facility otherwise excluded from the definition of "electric utility", in a qualifying power region certified under the Public Utility Regulatory Act (PURA) §39.152, but does not include a municipally owned utility or an electric cooperative. The TDU may be a single utility or may be separate transmission and distribution utilities.

(138) [~~(137)~~] Transmission line--A power line that is operated at 60 kilovolts (kV) or above, when measured phase-to-phase.

(139) [~~(138)~~] Transmission service--Service that allows a transmission service customer to use the transmission and distribution facilities of electric utilities, electric cooperatives and municipally owned utilities to efficiently and economically utilize generation resources to reliably serve its loads and to deliver power to another transmission service customer. Includes construction or enlargement of facilities, transmission over distribution facilities, control area services, scheduling resources, regulation services, reactive power support, voltage control, provision of operating reserves, and any other associated electrical service the commission determines appropriate, except that, on and after the implementation of customer choice in any portion of the Electric Reliability Council of Texas (ERCOT) region, control area services, scheduling resources, regulation services, provision of operating reserves, and reactive power support, voltage control and other services provided by generation resources are not "transmission service".

(140) [~~(139)~~] Transmission service customer--A transmission service provider, distribution service provider, river authority, municipally-owned utility, electric cooperative, power generation company, retail electric provider, federal power marketing agency, exempt wholesale generator, qualifying facility, power marketer, or other person whom the commission has determined to be eligible to be a transmission service customer. A retail customer, as defined in this section, may not be a transmission service customer.

(141) [~~(140)~~] Transmission service provider (TSP)--An electric utility, municipally-owned utility, or electric cooperative that owns or operates facilities used for the transmission of electricity.

(142) [~~(141)~~] Transmission system--The transmission facilities at or above 60 kilovolts (kV) owned, controlled, operated, or supported by a transmission service provider or transmission service customer that are used to provide transmission service.

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 15, 2019.

TRD-201904267
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 936-7244

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SUBCHAPTER F. METERING

16 TAC §25.130, §25.133

Statutory Authority

These amendments are proposed under §14.001 of the Public Utility Regulatory Act, Tex. Util. Code Ann. (West 2016 and Supp. 2017) (PURA), which provides the commission with the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; PURA §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §36.003, which grants the commission the authority to ensure that each rate be just and reasonable and not unreasonably preferential, prejudicial, or discriminatory; PURA §39.107, which grants the commission the authority to approve electric utility surcharges for the deployment of advanced meters, adopt rules relating to the transfer of customer data, and approve non-discriminatory rates for metering service; and PURA §§39.402, 39.452, 39.5021 and 39.5521, which permit the electric utilities outside of the ERCOT region that elect to deploy advanced meters and meter information networks to recover reasonable and necessary deployment costs and subjects the deployment to commission rules adopted under PURA §39.107(h) and (k).

Cross reference to statutes: Public Utility Regulatory Act §§14.001, 14.002, 36.003, 39.107, 39.402, 39.452, 39.5021 and 39.5521.

§25.130. Advanced Metering.

(a) Purpose. This section addresses the deployment, operation, and cost recovery for advanced metering systems. [~~The purposes of this section are to authorize electric utilities to assess a nonbypassable surcharge to use to recover costs incurred for deploying advanced metering systems that are consistent with this section; increase the reliability of the regional electrical network; encourage dynamic pricing and demand response; improve the deployment and operation of generation, transmission and distribution assets, and provide more choices for electric customers.~~]

(b) Applicability. This section is applicable to all electric utilities, including transmission and distribution utilities. Any requirement applicable to an electric utility in this section that relates to retail electric providers (REPs) or REPs of record is applicable only to electric utilities operating in areas open to customer choice.[~~, other than an electric utility that, pursuant to Public Utility Regulatory Act (PURA) §39.452(d)(1), is not subject to PURA §39.107; and to the Electric Reliability Council of Texas (ERCOT).~~]

(c) Definitions. As used in this section, the following terms have the following meanings, unless the context indicates otherwise:

(1) Advanced meter--Any new or appropriately retrofitted meter that functions as part of an advanced metering system and that has the minimum system features specified in this section, except to the

extent the electric utility has obtained a waiver of a minimum feature from the commission.

(2) - (3) (No change.)

[(4) Dynamic Pricing--Retail pricing for electricity consumed that varies during different times of the day.]

(4) [(5)] Enhanced [Non-standard] advanced meter--A meter that contains features and functions in addition to the AMS features in the deployment plan approved by the commission.

(5) Web portal--The website made available on the internet in compliance with this section by an electric utility or a group of electric utilities through which read-only access to AMS usage data is made available to the customer, the customer's REP of record, and entities authorized by the customer.

(d) Deployment and use of advanced meters.

(1) Deployment and use of an AMS by an electric utility is voluntary unless otherwise ordered by the commission. However, deployment and use of an AMS for which an electric utility seeks a surcharge for cost recovery must [shall] be consistent with this section, except to the extent that the electric utility has obtained a waiver from the commission.

(2) Six months prior to initiating deployment of an AMS or as soon as practicable after the effective date of this section, whichever is later, an electric utility that intends to deploy an AMS must [shall] file a statement [Statement] of AMS functionality [Functionality], and either a notice [Notice] of deployment [Deployment] or a request [Request] for approval [Approval] of deployment [Deployment]. An electric utility may request a surcharge under [pursuant to] subsection (k) of this section in combination with a notice [Notice] of deployment [Deployment] or a request [Request] for approval [Approval] of deployment [Deployment], or separately. A proceeding that includes a request to establish or amend a surcharge will [shall] be a ratemaking proceeding and a proceeding involving only a request [Request] for approval [Approval] of deployment will [Deployment shall] not be a ratemaking proceeding.

(3) The statement [Statement] of AMS functionality must [Functionality shall]:

(A) state whether the AMS meets the requirements specified in subsection (g) of this section and what additional features, if any, it will have [perform];

(B) describe any variances between technologies and meter functions within the electric utility's [its] service territory; and

(C) state whether the electric utility intends to seek a waiver of any provision of this section in its request for surcharge.

(4) A deployment plan must [Deployment Plan shall] contain the following information:

(A) Type of meter technology;

(B) Type and description of communications equipment in the AMS;

(C) Systems that will be developed during the deployment period;

(D) A timeline for the web portal development or integration into an existing web portal;

(E) A deployment schedule by specific area (geographic information); and

[(F) When postings of monthly status reports on the electric utility's website will commence; and]

(F) [(G)] A schedule for deployment of web portal functionalities.

(5) An electric utility must [shall] file with the deployment plan [Deployment Plan], testimony and other supporting information, including estimated costs for all AMS components, estimated net operating cost savings expected in connection with implementing the deployment plan [Deployment Plan], and the contracts for equipment and services associated with the deployment plan [Deployment Plan], that prove the reasonableness of the plan.

(6) Competitively sensitive information contained in the deployment plan, [Deployment Plan] and the monthly progress reports required under paragraph (9) of this subsection may be filed confidentially. An electric utility's deployment plan must [Deployment Plan shall] be maintained and made available for review on the electric utility's website [for REP access]. Competitively sensitive information contained in the deployment plan must [Deployment Plan shall] be maintained and made available at the electric utility's offices in Austin. Any REP that wishes to review competitively sensitive information contained in the electric utility's deployment plan available at its Austin office[,] may do so during normal business hours upon reasonable advanced notice to the electric utility and after executing a non-disclosure agreement with the electric utility.

(7) If the request for approval of a deployment plan [Deployment Plan] contains the information described in paragraph (4) of this subsection and the AMS features described in subsection (g)(1) of this section, then the commission will [shall] approve or disapprove the deployment plan [Deployment Plan] within 150 days, but this deadline may be extended by the commission for good cause.

(8) An electric utility's treatment of AMS, including technology, functionalities, services, deployment, operations, maintenance, and cost recovery must [shall] not be unreasonably discriminatory, prejudicial, preferential, or anticompetitive.

(9) Each electric utility must [shall] provide progress reports on a monthly basis [and status reports every six months] following the filing of its deployment plan [Deployment Plan] with the commission until deployment is complete. Upon filing of such reports, an [the] electric utility operating in an area open to customer choice must [shall] notify all [certified] REPs of the filing through standard market notice procedures. A monthly progress report must [shall] be filed within 15 days of the end of the month to which it applies, and must [shall] include the following information:

(A) the number of advanced meters installed, listed by electric service identifier for meters in the Electric Reliability Council of Texas (ERCOT) region [ESI ID]. Additional deployment information if available must [may] also be provided [listed], such as county, city, zip code, feeder numbers, and any other easily discernable geographic identification available to the electric utility about the meters that have been deployed;

(B) significant delays or deviation from the deployment plan [Deployment Plan] and the reasons for the delay or deviation;

(C) a description of significant problems the electric utility has experienced with an AMS, with an explanation of how the problems are being addressed;

(D) the number of advanced meters that have been replaced as a result of problems with the AMS; and

(E) the status of deployment of features identified in the deployment plan [~~Deployment Plan~~] and any changes in deployment of these features.

(10) If an electric utility has received approval of its deployment plan [~~Deployment Plan~~] from the commission, the electric utility must [~~shall~~] obtain commission approval before making any changes to its AMS that would affect the [~~a REP's~~] ability of a customer, the customer's REP of record, or entities authorized by the customer to utilize any of the AMS features identified in the electric utility's deployment plan [~~Deployment Plan~~] by filing a request for amendment to its deployment plan [~~Deployment Plan~~]. In addition, an electric utility may request commission approval for other changes in its approved deployment plan [~~Deployment Plan~~]. The commission will [~~shall~~] act upon the request for an amendment to the deployment plan [~~Deployment Plan~~] within 45 days of submission of the request, unless good cause exists for additional time. If an electric utility filed a notice [~~Notice~~] of deployment [~~Deployment~~], the electric utility must [~~shall~~] file an amendment to its notice [~~Notice~~] of deployment [~~Deployment~~] at least 45 days before making any changes to its AMS that would affect the [~~a REP's~~] ability of a customer, the customer's REP of record, or entities authorized by the customer to utilize any of the AMS features identified in the electric utility's notice [~~Notice~~] of deployment [~~Deployment~~]. This paragraph does not in any way preclude the electric utility from conducting its normal operations and maintenance with respect to the electric utility's transmission and distribution system and metering systems.

(11) During and following deployment, any outage related to normal operations and maintenance that affects a REP's ability to obtain information from [~~with~~] the system must [~~shall~~] be communicated to the REP through the outage and [~~/~~] restoration notice process according to Applicable Legal Authorities, as defined in §25.214(d)(1) of this title (relating to Tariff for Retail Delivery Service). Notification of any planned or unplanned outage that affects access to customer usage data must be posted on the electric utility's web portal home page.

(12) An [~~The~~] electric utility subject to §25.343 of this title (relating to Competitive Energy Services) must [~~shall~~] not provide any advanced metering equipment or service that is deemed a competitive energy service under that section. [~~§25.343 of this title (relating to Competitive Energy Services).~~] Any functionality of the AMS that is a required feature [~~function~~] under this section or that is included in an approved deployment plan or otherwise approved by the commission [~~Deployment Plan~~] does not constitute a competitive energy service under §25.343 of this title.

~~[(13) An electric utility's deployment and provision of AMS services and features, including but not limited to the features required in subsection (g) of this section, are subject to the limitation of liability provisions found in the electric utility's tariff.]~~

(e) Technology requirements. Except for pilot programs, an electric utility must [~~shall~~] not deploy AMS technology that has not been successfully installed previously with at least 500 advanced meters in North America, Australia, Japan, or Western Europe.

(f) Pilot programs. An electric utility may deploy AMS with up to 10,000 meters that do not meet the requirements of subsection (g) of this section in a pilot program, to gather additional information on metering technologies, pricing, and management techniques, for studies, evaluations, and other reasons. A pilot program may be used to satisfy the requirement in subsection (e) of this section. An electric utility is not required to obtain commission approval for a pilot program. Notice of the pilot program and opportunity to participate must [~~shall~~] be sent by the electric utility to all REPs.

(g) AMS features.

(1) An AMS must [~~shall~~] provide or support the following minimum system features [~~in order to obtain cost recovery through a surcharge pursuant to subsection (k) of this section~~]:

(A) automated or remote meter reading;

(B) two-way communications between the meter and the electric utility;

(C) remote disconnection and reconnection capability for meters rated at or below 200 amps;[~~, provided that an electric utility shall be considered in compliance with this provision if it makes this function available in all advanced meters installed after the effective date of this rule, and the following meters shall also be considered in compliance with this provision: those advanced meters that were ordered prior to the effective date of this rule, not to exceed 65,000 meters over the number of meters received or ordered as of May 10, 2007, and are provisioned with all the features enumerated in this paragraph except remote disconnect and reconnect capability, if those advanced meters are installed by December 31, 2007, and the number of advanced meters installed with all the features enumerated in this paragraph except remote disconnect and reconnect capability does not exceed 18% of the total number of advanced meters installed by the electric utility pursuant to a Deployment Plan.~~]

(D) time-stamped [~~the capability to time-stamp~~] meter data sent to the independent organization or regional transmission organization for purposes of wholesale settlement, consistent with time tolerance and other standards adopted by the independent organization or regional transmission organization;

(E) [~~the capability to provide direct, real-time~~] access to customer usage data by [~~to~~] the customer, [~~and~~] the customer's REP of record, and entities authorized by the customer[~~,~~] provided that [~~:~~]

[~~(i)~~] 15-minute interval or shorter [~~hourly~~] data from the electric utility's AMS must [~~shall~~] be transmitted to the electric utility's or a group of electric utilities' web portal on a day-after basis;[~~.~~]

~~*[(ii)*~~ ~~the commission staff using a stakeholder process, as soon as practicable shall determine, subject to commission approval, when and how 15-minute IDR data shall be made available on the electric utility's web portal.]~~

(F) capability to provide on-demand reads of a customer's advanced meter through the graphical user interface of an electric utility's or a group of electric utilities' web portal when requested by a customer, the customer's REP of record, or entities authorized by the customer subject to network traffic such as interval data collection, market orders if applicable, and planned and unplanned outages [~~means by which the REP can provide price signals to the customer~~];

(G) for an electric utility that provides access through an application programming interface, the capability to provide at least two on-demand reads per hour per meter of a customer's advanced meter, subject to network traffic such as interval data collection, market orders if applicable, and planned and unplanned outages. An electric utility in the ERCOT region must be able to accommodate at least 6,000 on-demand read requests per day through this method, subject to network traffic [~~the capability to provide 15-minute or shorter interval data to REPs, customers, and the independent organization or regional transmission organization, on a daily basis, consistent with data availability, transfer and security standards adopted by the independent organization or regional transmission organization~~];

(H) on-board meter storage of meter data that complies with nationally recognized non-proprietary standards such as in American National Standards Institute (ANSI) C12.19 tables;

(I) open standards and protocols that comply with nationally recognized non-proprietary standards such as ANSI C12.22, including future revisions [~~thereto~~];

(J) for an electric utility in the ERCOT region, the capability to communicate with devices inside the premises, including, but not limited to, usage monitoring devices, load control devices, and prepayment systems through a home area network (HAN), based on open standards and protocols that comply with nationally recognized non-proprietary standards such as ZigBee, Home-Plug, or the equivalent through the electric utility's AMS. This requirement applies only to a HAN device paired to a meter and in use at the time that the version of the web portal approved in Docket Number 47472 was implemented and terminates when the HAN device is disconnected at the request of the customer or a move-out transaction occurs for the customer's premises; and

(K) the ability to upgrade these features [~~minimum capabilities~~] as the need arises [~~technology advances and, in the electric utility's determination, become economically feasible~~].

[~~(2) An electric utility shall offer, as discretionary services in its tariff, installation of non-standard meters and advanced meter features.~~]

[~~(A) A REP may require the electric utility to provide non-standard advanced meters, additional metering technology, or advanced meter features not specifically offered in the electric utility's tariff, that are technically feasible, generally available in the market, and compatible with the electric utility's AMS;~~]

[~~(B) The REP shall pay the reasonable differential cost for the non-standard advanced meters or features.~~]

[~~(C) Upon request by a REP, an electric utility shall expeditiously provide a report to the REP that includes an evaluation of the cost and a schedule for providing the nonstandard advanced meters or advanced meter features of interest to the REP. The REP shall pay a reasonable discretionary services fee for this report. This discretionary services fee shall be included in the electric utility's tariff.~~]

[~~(D) If an electric utility agrees to deploy non-standard advanced meters or advanced meter features not addressed in its tariff at the request of the REP, the electric utility shall expeditiously apply to amend its tariff to specifically include the non-standard advanced meters or meter features that it agreed to deploy.~~]

(2) [~~(3)~~] A [~~An electric utility may petition the commission for a~~] waiver from any of the requirements of paragraph (1) of this subsection may be granted by the commission if [~~for portions of its service area where~~] it would be uneconomic or technically infeasible to implement [~~particular system features. A waiver may also be granted for an AMS that exceeds~~] or there is an adequate substitute for that [~~the~~] particular requirement [~~requirements in paragraph (1) of this subsection~~]. The electric utility must meet its [~~shall provide all relevant studies and cost-benefit analysis and other evidence supporting its waiver request and shall bear the~~] burden of proof in its waiver request. [~~An electric utility that has received a waiver shall explain in the report required by subsection (d)(7) of this section, technology changes and changes in the cost of deployment or savings to the electric utility that would make it economic or technically feasible to offer the system features in the affected portions of its service area. Any waiver granted by the commission shall extend only to those costs and expenses for which the waiver is granted in any proceeding in which the electric utility seeks to recover its costs through the surcharge mechanism addressed in subsection (k) of this section.~~]

(3) [~~(4)~~] In areas where there is not a commission-approved independent regional transmission organization, standards referred to in this section for time tolerance and data transfer and security may be approved by a regional transmission organization approved by the Federal Energy Regulatory Commission or, if there is no approved regional transmission organization, by the commission.

(4) [~~(5)~~] Once an electric utility has deployed its advanced meters, it may add or enhance features provided by AMS, as technology evolves [~~and in accordance with Applicable Legal Authorities~~]. The electric utility must [~~shall~~] notify the commission and REPs of any such additions or enhancements at least three months in advance of deployment, with a description of the features, the deployment and notification plan, and the cost of such additions or enhancements, and must [~~shall~~] follow the monthly progress report process described in subsection (d)(9)[~~(8)~~] of this section until the enhancement process is complete.

[~~(6) Beginning January 1, 2008, or as soon as such meters are commercially available from the electric utility's current vendor, whichever is earlier, an electric utility shall replace, at no cost to the customer, an advanced meter with all the features enumerated in paragraph (1) of this subsection except remote disconnect and reconnect capability, if: the meter has reached the end of its useful life; the meter has been removed for repair; the premises at which the meter is located has experienced an unusually high number of disconnections and reconnections; or the REP has informed the electric utility that its customer has agreed to utilize a prepaid service and the REP has requested a meter with remote disconnection and reconnection capability. If by January 1, 2009, requests by REPs for replacement of advanced meters with all the features enumerated in paragraph (1) of this subsection except remote disconnect and reconnect capability exceed 20% of those meters, then the electric utility shall replace all of those meters as soon as possible with meters that meet the requirements of paragraph (1) of this subsection and have remote disconnect and reconnect capability.~~]

(h) Discretionary Meter Services. An electric utility that operates in an area that offers customer choice must offer, as discretionary services in its tariff, installation of enhanced advanced meters and advanced meter features.

(1) A REP may request the electric utility to provide enhanced advanced meters, additional metering technology, or advanced meter features not specifically offered in the electric utility's tariff, that are technically feasible, generally available in the market, and compatible with the electric utility's AMS.

(2) The REP must pay the reasonable differential cost for the enhanced advanced meters or features and system changes required by the electric utility to offer those meters or features.

(3) Upon request by a REP, an electric utility must expeditiously provide a report to the REP that includes an evaluation of the cost and a schedule for providing the enhanced advanced meters or advanced meter features of interest to the REP. The REP must pay a reasonable discretionary services fee for this report. This discretionary services fee must be included in the electric utility's tariff.

(4) If an electric utility deploys enhanced advanced meters or advanced meter features not addressed in its tariff at the request of the REP, the electric utility must expeditiously apply to amend its tariff to specifically include the enhanced advanced meters or meter features that it agreed to deploy. Additional REPs may request the tariffed enhanced advanced meters or advanced meter features under the process described in this paragraph of this subsection.

[~~(h) Settlement. It is the objective of this rule that ERCOT shall be able to use 15-minute meter information from advanced metering systems for wholesale settlement, not later than January 31, 2010.~~]

(i) Tariff. All [~~non-standard,~~] discretionary AMS features offered by the electric utility must [~~shall~~] be described in the electric utility's tariff.

(j) Access to meter data.

(1) An electric utility must [~~shall~~] provide a customer, the customer's REP of record, and other entities authorized by the customer read-only access to the customer's advanced meter data, including meter data used to calculate charges for service, historical load data, and any other proprietary customer information. The access must [~~shall~~] be convenient and secure, and the data must [~~shall~~] be made available no later than the day after it was created.

(2) The requirement to provide access to the data begins when the electric utility has installed 2,000 advanced meters for residential and non-residential customers. If an electric utility has already installed 2,000 advanced meters by the effective date of this section, the electric utility must [~~shall~~] provide access to the data in the timeframe approved by the commission in either the deployment plan [~~Deployment Plan~~] or request for surcharge proceeding. If only a notice [~~Notice~~] of deployment [~~Deployment~~] has been filed, access to the data must [~~shall~~] begin no later than six months from the filing of the notice [~~Notice~~] of deployment [~~Deployment~~] with the commission.

(3) An electric utility or group of electric utilities' web portal must [~~shall~~] use appropriate and reasonable [~~industry~~] standards and methods to provide [~~for providing~~] secure access for the customer, the customer's [~~and~~] REP of record, and entities authorized by the customer [~~access~~] to the meter data. The electric utility must [~~shall~~] have an independent security audit conducted within one year of providing that [~~the mechanism for customer and REP~~] access to meter data. The electric utility must [~~conducted within one year of initiating such access and~~] promptly report the audit results to the commission.

(4) The independent organization, regional transmission organization, or regional reliability entity must [~~shall~~] have access to information that is required for wholesale settlement, load profiling, load research, and reliability purposes.

[~~(5) A customer may authorize its data to be available to an entity other than its REP.~~]

(k) Cost recovery for deployment of AMS.

(1) Recovery Method. The commission will [~~shall~~] establish a nonbypassable surcharge for an electric utility to recover reasonable and necessary costs incurred in deploying AMS to residential customers and nonresidential customers other than those required by the independent system operator to have an interval data recorder meter. The surcharge must [~~shall~~] not be established until after a detailed deployment plan [~~Deployment Plan~~] is filed under [~~pursuant to~~] subsection (d) of this section. In addition, the surcharge must [~~shall~~] not ultimately recover more than the AMS costs that are spent, reasonable and necessary, and fully allocated, but may include estimated costs that will [~~shall~~] be reconciled pursuant to paragraph (6) of this subsection. As indicated by the definition of AMS in subsection (c)(2) of this section, the costs for facilities that do not perform the functions and have the features specified in this section must [~~shall~~] not be included in the surcharge provided for by this subsection unless an electric utility has received a waiver under [~~pursuant to~~] subsection (g)(2) [~~(g)(3)~~] of this section. The costs of providing AMS services include those costs of AMS installed as part of a pilot program under [~~pursuant to~~] this section. Costs of providing AMS for a particular customer class must [~~shall~~] be surcharged only to customers in that customer class.

(2) Carrying Costs. The annualized carrying-cost rate to be applied to the unamortized balance of the AMS capital costs must [~~shall~~] be the electric utility's authorized weighted-average cost of capital (WACC). If the commission has not approved a WACC for the electric utility within the last four years, the commission may set a new WACC to apply to the unamortized balance of the AMS capital costs. In each subsequent rate proceeding in which the commission resets the electric utility's WACC, the carrying-charge rate that is applied to the unamortized balance of the utility's AMS costs must [~~shall~~] be correspondingly adjusted to reflect the new authorized WACC.

(3) Surcharge Proceeding. In the request for surcharge proceeding, [~~an electric utility may propose a surcharge methodology, but~~] the commission will set the surcharge based on [~~prefers the stability of~~] a levelized amount, and an amortization period based [~~ranging from five to seven years, depending~~] on the useful life of the AMS [~~meter~~]. The commission may set the surcharge to reflect a deployment of advanced meters that is up to one-third of the electric utility's total meters over each calendar year, regardless of the rate of actual AMS deployment. The actual or expected net operating cost savings from AMS deployment, to the extent that the operating costs are not reflected in base rates, may be considered in setting the surcharge. If an electric utility that requests a surcharge does not have an approved deployment plan [~~Deployment Plan~~], the commission in the surcharge proceeding may reconcile the costs that the electric utility already spent on AMS in accordance with paragraph (6) of this subsection and may approve a deployment plan [~~Deployment Plan~~].

(4) General Base Rate Proceeding while Surcharge is in Effect. If the commission conducts a general base rate proceeding while a surcharge under this section is in effect, then the commission will [~~shall~~] include the reasonable and necessary costs of installed AMS equipment in the base rates and decrease the surcharge accordingly, and permit reasonable recovery of any non-AMS metering equipment that has not yet been fully depreciated but has been replaced by the equipment installed under an approved deployment plan [~~Deployment Plan~~].

(5) Annual Reports. An electric utility must [~~shall~~] file annual reports with the commission updating the cost information used in setting the surcharge. The annual reports must [~~shall~~] include the actual costs spent to date in the deployment of AMS and the actual net operating cost savings from AMS deployment and how those numbers compare to the projections used to set the surcharge. During the annual report process, an electric utility may apply to update its surcharge, and the commission may set a schedule for such applications. For a levelized surcharge, the commission may alter the length of the surcharge collection period based on review of information concerning changes in deployment costs or operating costs savings in the annual report or changes in WACC. An annual report filed with the commission will [~~shall~~] not be a ratemaking proceeding, but an application by the electric utility to update the surcharge must [~~shall~~] be a ratemaking proceeding.

(6) Reconciliation Proceeding. All costs recovered through the surcharge must [~~shall~~] be reviewed in a reconciliation proceeding on a schedule to be determined by the commission. Notwithstanding the preceding sentence, the electric utility may request multiple reconciliation proceedings, but no more frequently than once every three years. There is a presumption that costs spent in accordance with a deployment plan [~~Deployment Plan~~] or amended deployment plan [~~Deployment Plan~~] approved by the commission are reasonable and necessary. Any costs recovered through the surcharge that are found in a reconciliation proceeding not to have been spent or properly allocated, or not to be reasonable and necessary, must [~~shall~~] be refunded to electric utility's customers. In addition, the

commission will [shall] make a final determination of the net operating cost savings from AMS deployment used to reduce the amount of costs that ultimately can be recovered through the surcharge. Accrual of interest on any refunded or surcharged amounts resulting from the reconciliation must [shall] be at the electric utility's WACC and must [shall] begin at the time the under or over recovery occurred.

(7) Cross-subsidization and fees. The electric utility must [shall] account for its costs in a manner that ensures [that] there is no inappropriate cost allocation, cost recovery, or cost assignment that would cause cross-subsidization between utility activities and non-utility activities. The electric utility shall not charge a disconnection or reconnection fee that was approved by the commission prior to the effective date of this rule, for a disconnection or reconnection that is effectuated using the remote disconnection or connection capability of an advanced meter.

[(l) Time of Use Schedule. Commission approval of a time of use schedule ("TOUS") pursuant to ERCOT protocols is not necessary prior to implementation of the new TOUS.]

§25.133. Non-Standard Metering Service.

(a) Purpose. This section allows a customer [whose standard meter is an advanced meter] to choose to receive electric service through a non-standard meter from an electric utility that has deployed or is requesting to deploy advanced meters under a commission-approved deployment plan or notice of deployment and authorizes the electric utility [a transmission and distribution utility (TDU)] to assess fees to recover the costs associated with this section from a customer who elects to receive electric service through a non-standard [such a] meter.

(b) Applicability. This section is applicable to an electric utility, including a transmission and distribution utility, that has deployed or is requesting to deploy advanced meters under a commission-approved deployment plan or notice of deployment. Any requirement in this section that relates to retail electric providers (REPs) is applicable only to REPs and electric utilities that operate in areas open to customer choice.

(c) [(b)] Definitions. As used in this section, the following terms have the following meanings, unless the context indicates otherwise:

(1) Advanced meter--As defined in §25.130 of this title (relating to Advanced Metering).

(2) Non-standard meter--A meter that does not function as an advanced meter.

(3) Non-standard metering service--Provision of electric service through a non-standard meter from an electric utility that has deployed or is requesting to deploy advanced meters under a commission-approved deployment plan or notice of deployment.

(d) [(c)] Initiation and termination of non-standard metering service.

(1) Initiation of non-standard metering service. An electric utility that has deployed or is requesting to deploy advanced meters under a commission-approved deployment plan or notice of deployment must offer non-standard metering service to customers.

(A) An electric utility filing a deployment plan or notice of deployment under §25.130 of this title after the effective date of this section must include non-standard metering service as a part of the plan or notice. [This subparagraph applies to a TDU that, on the date that the TDU begins offering non-standard metering service pursuant to subsection (g) of this section, has completed deployment of advanced meters except for customers for whom the TDU did not install advanced meters because of the requests of the customers. The TDU shall serve on such a customer by certified mail return receipt requested notice consistent with subparagraph (D) of this paragraph within 30 days of the date that the TDU begins offering non-standard metering service pursuant to subsection (g) of this section.]

(i) Within 30 days of the date of commission approval of an electric utility's deployment plan or the filing of a notice of deployment, the electric utility must provide information on its website that describes its non-standard metering service, the process under this section to request non-standard metering service, and all the costs associated with the service.

(ii) An electric utility must provide a statement that non-standard metering service is available and provide a hyperlink to the information required under clause (i) of this subparagraph in all notices and messages delivered to a customer relating to the deployment date of advanced meters in the customer's geographic area.

[(B) This subparagraph applies to a TDU that has not completed deployment of advanced meters.]

[(i) This clause applies to a customer for whom the TDU has not, on the date that the TDU begins offering non-standard metering service pursuant to subsection (g) of this section, installed an advanced meter because of the request of the customer. The TDU shall serve on such a customer by certified mail return receipt requested notice consistent with subparagraph (D) of this paragraph within 30 days of the date that the TDU begins offering non-standard metering service pursuant to subsection (g) of this section.]

[(ii) This clause applies to a customer for whom, after the date that the TDU begins offering non-standard metering service pursuant to subsection (g) of this section, the TDU attempts to install an advanced meter as part of its advanced meter deployment plan but the customer requests non-standard metering service. The TDU shall promptly serve on such a customer by certified mail return receipt requested notice consistent with subparagraph (D) of this paragraph.]

(B) [(C)] An electric utility must [For circumstances not addressed by subparagraph (A) or (B) of this paragraph in which a customer requests from the TDU non-standard metering service, the TDU shall] provide notice to a customer consistent with subparagraph (C) [(D)] of this paragraph within seven days of the customer's request for non-standard metering service, using an appropriate means of service.

(C) [(D)] An electric utility must [Pursuant to subparagraphs (A)-(C) of this paragraph, a TDU shall] notify a customer that requests non-standard metering service of the following through a written acknowledgement.

(i) The customer will be required to pay the costs associated with the initiation of non-standard metering service and the ongoing costs associated with the manual reading of the meter, and other fees and charges that may be assessed by the electric utility [TDU] that are associated with the non-standard metering service;

(ii) The current one-time fees and monthly fee for non-standard metering service;

(iii) The customer may be required to wait up to 45 days to switch the customer's REP of record; [retail electric provider (REP),]

(iv) The customer [and] may experience longer restoration times in case of a service interruption or outage;

(v) [(iv)]The customer may be required by the customer's REP of record to choose a different product or service before initiation of the non-standard metering service, subject to any applica-

ble charges or fees required under the customer's existing contract, if the customer is currently enrolled in a product or service that relies on an advanced meter; and

(vi) [~~(v)~~] For a customer that does not currently have an advanced meter, the date (60 days after service of the notice) by which the customer must provide a signed, written acknowledgement and payment of the one-time fee to the electric utility [~~TDU~~] prescribed by subsection (f)[~~(e)~~](3) of this section. If the signed, written acknowledgement and payment are not received within 60 days, the electric utility [~~TDU~~] will install an advanced meter on the customer's premises.

(D) [~~(E)~~] The electric utility must [~~TDU shall~~] retain the signed, written acknowledgement for at least two years after the non-standard meter is removed from the premises. The commission may adopt a form for the written acknowledgement.

(E) [~~(F)~~] An electric utility must [~~A TDU shall~~] offer non-standard metering through the following means:

(i) disabling communications technology in an advanced meter if feasible;

(ii) if applicable, allowing the customer to continue to receive metering service using the existing meter if the electric utility [~~TDU~~] determines that it meets applicable accuracy standards;

(iii) if commercially available, an analog meter that meets applicable meter accuracy standards; and

(iv) a digital, non-communicating meter.

(F) [~~(G)~~] The electric utility must [~~TDU shall~~] not initiate the process to provide non-standard metering service before it has received the customer's payment and signed, written acknowledgement. The electric utility must [~~TDU shall~~] initiate the approved standard market process to notify the customer's REP of record within three days of the electric utility's [~~TDU's~~] receipt of the customer's payment and signed, written acknowledgement. Within 30 days of receipt of the payment of the one-time fee and the signed written acknowledgement from the customer, the electric utility [~~TDU~~], using the approved standard market process, must [~~shall~~] notify the customer's REP of record of the date the non-standard metering service was initiated.

(2) Termination of non-standard metering service. A customer receiving non-standard metering service may terminate that service by notifying the customer's electric utility [~~TDU~~]. The customer will [~~shall~~] remain responsible for all costs related to non-standard metering service.

(e) [~~(d)~~] Other electric utility [~~TDU~~] obligations.

(1) When an [~~a~~] electric utility [~~TDU~~] completes a move-out transaction for a customer who was receiving non-standard metering service, the electric utility must [~~TDU shall~~] install [~~and/~~]or activate an advanced meter at the premises.

(2) An electric utility must [~~A TDU shall~~] read a non-standard meter monthly. In order for the electric utility [~~TDU~~] to maintain a non-standard meter at the customer's premises, the customer must provide the electric utility [~~TDU~~] with sufficient access to properly operate and maintain the meter, including reading and testing the meter.

(f) [~~(e)~~] Cost recovery and compliance tariffs. All costs incurred by an electric utility [~~a TDU~~] to implement this section must [~~shall~~] be borne only by customers who choose non-standard metering service. A customer receiving non-standard metering service must [~~shall~~] be charged a one-time fee and a recurring monthly fee.

(1) An electric utility's application for approval of its non-standard metering service tariff or amended tariff must be [~~Not later than 25 days after the effective date of this section, each TDU shall file a compliance tariff that is~~] fully supported with testimony and documentation. The application must [~~compliance tariff shall~~] include one-time [~~onetime~~] fees and a monthly fee for non-standard metering service and must [~~shall~~] also include the fees for other discretionary services performed by the electric utility [~~TDU~~] that are affected by the customer's selection of non-standard metering service. The commission will allow the electric utility [~~Each TDU shall be allowed~~] to recover the reasonable rate case expenses that it incurs under this paragraph [~~subsection~~] as part of the one-time fee, the monthly fee, or both. The application must [~~compliance tariff filing shall~~] describe the extent to which the back-office costs that are new and fixed vary depending on the number of customers receiving non-standard metering service. Unless otherwise ordered, the electric utility must [~~TDU shall~~] serve notice of the approved rates and the effective date of the approved rates within five working days of the filing of the commission's final order [~~presiding officer's final decision,~~] to REPs that are authorized by the registration agent to provide service in the electric utility's [~~TDU's distribution~~] service area. Notice to REPs under this paragraph may be served by email and must[~~, consistent with subsection (g) of this section, shall~~] be served at least 45 days before the effective date of the rates [~~electric utility TDU begins offering non-standard metering service~~].

[~~(2) A TDU may apply to change the fees approved pursuant to paragraph (1) of this subsection. The application must be fully supported with testimony and documentation. Each TDU shall be allowed to recover the reasonable rate case expenses that it incurs under this subsection as part of the one-time fee, the monthly fee, or both. Unless otherwise ordered, the TDU shall serve notice of the approved rates and the effective date of the approved rates within five working days of the presiding officer's final decision, to REPs that are authorized by the registration agent to provide service in the TDU's distribution service area. Notice under this paragraph may be served by email and, if possible, shall be served at least 45 days before the effective date of the rates.~~]

(2) [~~(3)~~] An electric utility must [~~A TDU shall~~] have a single recurring monthly fee for non-standard metering service and several one-time fees, one of which must [~~shall~~] apply to the customer depending on the customer's circumstances. A one-time fee must [~~shall~~] be charged to a customer that does not have an advanced meter at the customer's premises and will continue receiving metering service through the meter currently at the premises. For a customer that currently has an advanced meter at the premises, the fee will [~~shall~~] vary depending on the type of meter that is installed to provide non-standard metering service, and the fee must [~~shall~~] include the cost to remove the advanced meter and subsequently re-install an advanced meter once non-standard metering service is terminated. The one-time fee must [~~shall~~] recover costs to initiate non-standard metering service. The monthly fee must [~~shall~~] recover ongoing costs to provide non-standard metering service, including costs for meter reading and billing. Fixed costs not related to the initiation of non-standard metering service may be allocated between the one-time and monthly fees[~~,~~] and recovered through the monthly fee over a shortened period of time.

(g) [~~(f)~~] Retail electric product compatibility. After receipt of the notice prescribed by subsection (d)(1)(C) [~~(e)(1)(D)~~] of this section, if the customer's current product is not compatible with non-standard metering service, the customer's REP of record must [~~shall~~] work with the customer to either promptly transition the customer to a product that is compatible with non-standard metering service or transfer the customer to another REP, subject to any applicable charges or fees required under the customer's existing contract. If the customer is unresponsive, the customer's REP of record may transition the customer without the customer's affirmative consent to a market-based, month-to-month product that is compatible with non-standard

metering service. Alternatively, if the customer is unresponsive, the customer's REP of record may transfer the customer to another REP under [~~pursuant to~~] §25.493 (relating to Acquisition and Transfer of Customers from One Retail Electric Provider or Another) so long as the new REP serves the customer using a market-based, month-to-month product with a rate (excluding charges for non-standard metering service or other discretionary services) no higher than one of the tests prescribed by §25.498(c)(15)(A)-(C) of this title (relating to Prepaid Service). The customer's REP of record must [~~shall~~] promptly provide the customer notice that the customer has been transferred to a new product and, if applicable, to a new REP, and must [~~shall~~] also promptly provide the new Terms of Service and Electricity Facts Label.

[~~(g) Implementation. A TDU shall begin offering non-standard metering service pursuant to this section the later of 160 days from the effective date of this section or 45 days after the notice to REPs prescribed by subsection (e)(1) of 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 15, 2019.

TRD-201904266
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 936-7244

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SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION

16 TAC §25.97

The Public Utility Commission of Texas (commission) proposes §25.97, relating to Line Inspection and Safety. The proposed rule will implement the reporting requirements in Public Utility Regulatory Act (PURA) §38.102.

Growth Impact Statement

The commission provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The commission has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

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

(2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;

(3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the commission because it will not increase or decrease agency staffing levels;

(4) the proposed rule will not require an increase and will not require a decrease in fees paid to the commission;

(5) the proposed rule will create a new regulation to implement PURA §38.102 enacted by the 86th Legislative Session;

(6) the proposed rule will not limit an existing regulation;

(7) the proposed rule will not change the number of individuals subject to the rule's applicability; and

(8) the proposed rule will not affect this state's economy.

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

Constance McDaniel Wyman, Director of Electric Utility Engineering, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the rule.

Public Benefits

Ms. McDaniel Wyman has also determined that for each year of the first five years the proposed rule is in effect, the anticipated public benefit expected as a result of the adoption of the proposed rule will be the implementation of PURA §38.102. There will be economic cost to affected entities required to comply with the rule under Texas Government Code §2001.024(a)(5).

Local Employment Impact Statement

For each year of the first five years the proposed rule is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking, because the Public Utility Commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking, if requested in accordance with Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Friday, January 17, 2020, at 9:00 a.m. The request for a public hearing must be received by Monday, January 13, 2020. If no request for a public hearing is received and the commission staff cancels the hearing, it will make a filing in this project prior to the scheduled date for the hearing.

Public Comments

Initial comments on the proposed rule may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, no later than January 6, 2020. Sixteen copies of comments to the proposed rule are required to be filed under §22.71(c) of 16 Texas Administrative Code. Reply comments may be submitted

in the same manner no later than January 13, 2020. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rule on adoption. All comments should refer to project number 49827.

Statutory Authority

This new rule is proposed under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and §38.102, which requires certain utilities to filed with the commission reports on safety processes and inspections.

Cross reference to statutes: Public Utility Regulatory Act §§14.002 and 38.102.

§25.97. Line Inspection and Safety.

(a) Purpose. This section implements the reporting requirements in Public Utility Regulatory Act (PURA) §38.102.

(b) Applicability. This section applies to electric utilities, municipally owned utilities, and electric cooperatives that own or operate overhead transmission or distribution assets.

(c) Definition. When used in this section, the term "affected entity" means an electric utility, electric cooperative, or municipally owned utility that owns or operates overhead transmission or distribution assets.

(d) Employee Training Report.

(1) Not later than May 1, 2020, each affected entity must submit to the Commission a report that includes:

(A) a summary description of hazard recognition training documents provided by the affected entity to its employees related to overhead transmission and distribution facilities; and

(B) a summary description of training programs provided to employees by the affected entity related to the National Electrical Safety Code (NESC) for construction of electric transmission and distribution lines.

(2) An affected entity must submit an updated report not later than the 30th day after the date the affected entity finalizes a material change to a document or training program included in a report submitted under paragraph (1) of this subsection.

(e) Five-Year Report.

(1) Not later than May 1 every five years, each affected entity that owns or operates overhead transmission facilities greater than 60 kilovolts must submit to the commission a report for the five-year period ending on December 31 of the preceding calendar year that includes:

(A) the percentage of overhead transmission facilities greater than 60 kilovolts inspected for compliance with the NESC relating to vertical clearance in the reporting period; and

(B) the percentage of the overhead transmission facilities greater than 60 kilovolts anticipated to be inspected for compliance with the NESC relating to vertical clearance during the five-year period beginning on January 1 of the year in which the report is submitted.

(2) The first report submitted under this subsection must be submitted not later than May 1, 2020.

(f) Annual Report. Not later than May 1 of each year, each affected entity must make a report to the commission for the preceding calendar year.

(1) For each affected entity that owns or operates overhead transmission facilities greater than 60 kilovolts, the report must include the following information related to those facilities:

(A) the number of identified occurrences of noncompliance with PURA §38.004 regarding vertical clearance requirements of the NESC for overhead transmission facilities;

(B) whether the affected entity has actual knowledge that any portion of the affected entity's transmission system is not in compliance with PURA §38.004 regarding vertical clearance requirements of the NESC for overhead transmission facilities; and

(C) whether the affected entity has actual knowledge of any violations of easement agreements with the United States Army Corps of Engineers relating to PURA §38.004 regarding the vertical clearance requirements of the NESC for overhead transmission facilities.

(2) For each affected entity that owns or operates overhead transmission facilities greater than 60 kilovolts or distribution facilities greater than 1 kilovolt, the report must include the following information related to those facilities:

(A) the number of fatalities or injuries of individuals other than employees, contractors, or other persons qualified to work in proximity to overhead high voltage lines involving transmission or distribution assets related to noncompliance with the requirements of PURA §38.004; and

(B) a description of corrective actions taken or planned to prevent the reoccurrence of fatalities or injuries described by subparagraph (A) of this paragraph.

(3) Violations resulting from, and incidents, fatalities, or injuries attributable to a violation resulting from, a natural disaster, weather event, or man-made act or force outside of an affected entity's control are not required to be included in the report under this subsection.

(g) Reporting Form. An affected entity must make a report required by this section on a form prescribed by the commission.

(h) Report Filing. An affected entity filing a report required under this subsection must include the project number designated by the commission for the report on the first page of the report and submit the correct number of copies of the report to the commission's central records for filing.

(i) Reports Publicly Available. Not later than September 1 each year, the commission will make the reports submitted under this section publicly available on the commission's Internet website.

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 15, 2019.

TRD-201904287
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 936-7244

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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes new 16 Texas Administrative Code (TAC) new 16 TAC §25.112, relating to Registration of Brokers, and new 16 TAC §25.486, relating to Customer Protections for Brokerage Services. The proposed rules will implement the requirements of Public Utility Regulatory Act (PURA) §39.3555 enacted by the 86th Texas Legislature.

Public Benefits

For each year of the first five years the proposed rules are in effect, the anticipated public benefit expected as a result of the adoption of the proposed rules will be the implementation of PURA §39.3555. There may be economic costs to affected entities required to comply with the rules under Texas Government Code §2001.024(a)(5), but those costs are necessary to implement PURA §39.3555 as enacted by the 86th Texas Legislature.

Growth Impact Statement

The commission provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The commission has determined that for each year of the first five years that the proposed rules are in effect, the following statements will apply:

(1) the proposed rules will not create a government program and will not eliminate a government program;

(2) implementation of the proposed rules will not require the creation of new employee positions and will not require the elimination of existing employee positions;

(3) implementation of the proposed rules will not require an increase and will not require a decrease in future legislative appropriations to the commission;

(4) the proposed rules will not require an increase and will not require a decrease in fees paid to the commission;

(5) the proposed rules will create new regulations to implement PURA §39.3555 as enacted by the 86th Texas Legislature;

(6) the proposed rules will not limit an existing regulation;

(7) the proposed rules will not increase the number of individuals subject to the rule's applicability; and

(8) the proposed rules will not affect this state's economy.

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed rules will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

James Kelsaw, Senior Utility Analyst, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the rule.

Local Employment Impact Statement

For each year of the first five years the proposed rules are in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking, because the Public Utility Commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking, if requested, in accordance with Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Friday, January 17, 2020 at 9:00 a.m. The request for a public hearing must be received by Monday, January 13, 2020. If no request for a public hearing is received and the commission staff cancels the hearing, it will file in this project a notification of the cancellation of the hearing prior to the scheduled date for the hearing.

Public Comments

Initial comments on the proposed rules may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, no later than January 6, 2020. Sixteen copies of comments on the proposed rules are required to be submitted under 16 TAC §22.71(c). Reply comments may be submitted in the same manner no later than January 13, 2020. Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rules. The commission will consider the costs and benefits in deciding whether to modify the proposed rules on adoption. All comments should refer to project number 49794.

SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

16 TAC §25.112

Statutory Authority

This rule is proposed under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and §39.3555, which requires entities that provide brokerage services in this state to register as brokers with the commission and to comply with customer protection provisions established by the commission and Chapters 17 and 39 of PURA and which requires the commission to adopt rules as necessary to implement the section.

Cross reference to statutes: Public Utility Regulatory Act §§14.002 and 39.3555.

§25.112. Registration of Brokers.

(a) Registration required. A person must not provide brokerage services, including brokerage services offered online, in this state for compensation or other consideration unless the person is registered with the commission as a broker. A retail electric provider (REP) is not permitted to register as a broker and must not knowingly provide bids or offers to a person who provides brokerage services in this state for compensation or other consideration and is not registered as a broker. A REP may rely on the publicly available list of registered brokers posted on the commission's website to determine whether a broker is registered with the commission.

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

(1) Broker--A person that provides brokerage services.

(2) Brokerage services--Providing advice or procurement services to, or acting on behalf of, a retail electric customer regarding the selection of a REP, or a product or service offered by a REP.

(c) Requirements for a person seeking to register as a broker. A person seeking to register under this section must provide the information listed in this subsection.

(1) all business names of the registrant limited to five business names;

(2) the mailing address, telephone number, and email address of the principal place of business of the registrant;

(3) the name, title, business mailing address, telephone number, and email address for the registrant's regulatory contact person;

(4) the name, title, business mailing address, telephone number, and email address of the registrant's customer service contact person;

(5) the name, title, business mailing address, telephone number, and email address of the registrant's commission complaint contact person;

(6) the form of business being registered (e.g., corporation, partnership, or sole proprietor); and

(7) an affidavit from the owner, partner, or officer of the registrant affirming that the registrant is authorized to do business in Texas under all applicable laws and is in good standing with the Texas Secretary of State; that all statements made in the application are true, correct, and complete; that any material changes in the information will be provided in a timely manner; and that the registrant understands and will comply with all applicable law and rules.

(d) Registration procedures. The following procedures apply to a person seeking to register as a broker:

(1) A registration application must be made on the form approved by the commission, verified by notarized oath or affirmation, and signed by an owner, partner, or officer of the registrant. The form may be obtained from the central records division of the commission or from the commission's Internet site. Each registrant must file its registration application form with the commission's filing clerk in accordance with the commission's procedural rules.

(2) The registrant may identify certain information or documents submitted that it believes to contain proprietary or confidential information. Registering entities may not designate the entire registration application as confidential. Information designated as proprietary or confidential will be treated in accordance with the confidentiality requirements in the Public Utility Regulatory Act (PURA), Tex. Gov't Code Chapter 552, and commission rules. If a public information act request is received for information designated as confidential, the registrant has the burden to establish that the requested information is proprietary or confidential.

(3) The registrant must promptly inform the commission of any material change in the information provided in the registration application while the application is being processed.

(4) An application will be processed as follows:

(A) Commission staff will review the submitted form for completeness. Within 20 working days of receipt of an application, the commission staff will notify the registrant by mail or e-mail of any deficiencies in the application. The registrant will have ten working days from the issuance of the notification to cure the deficiencies. If the deficiencies are not cured within ten working days, commission staff will notify the registrant that the registration application is rejected without prejudice.

(B) Commission staff will determine whether to accept or reject the application within 60 days of the receipt of a complete application.

(C) An applicant may contest commission staff's rejection of its application by filing a petition for formal review of the registration application in accordance with the commission's procedural rules. The registrant has the burden of proof to establish that its application meets the requirements of PURA and commission rules.

(e) Registration renewal. A broker registration expires three years after the date of the assignment of a broker registration number. Each registrant must submit the information required to renew its registration with the commission not less than 90 days prior to the expiration date of the current registration. An expired registration is no longer valid and the broker will be removed from the broker list on the commission's website.

(f) Registration amendment. A broker must amend its registration to reflect any changes in the information previously submitted, including business name, mailing address, email address, or telephone number within 30 calendar days from the date of the change.

(g) Suspension and revocation of registration and administrative penalty. The commission may impose an administrative penalty for violations of PURA or commission rules. The commission may also suspend or revoke a broker's registration for significant violations of PURA or commission rules. Significant violations include, but are not limited to, the following:

(1) providing false or misleading information to the commission;

(2) engaging in fraudulent, unfair, misleading, deceptive or anti-competitive practices;

(3) a pattern of failure to meet the requirements of PURA, commission rules, or commission orders;

(4) failure to respond to commission inquiries or customer complaints in a timely fashion;

(5) switching or causing to be switched the REP of a customer without first obtaining the customer's authorization; or

(6) billing an unauthorized charge or causing an unauthorized charge to be billed to a customer's retail electric service bill.

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 15, 2019.

TRD-201904273
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 936-7244

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SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE PROVIDERS

16 TAC §25.486

Statutory Authority

This rule is proposed under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and §39.3555, which requires entities that provide brokerage services in this state to register as brokers with the commission and to comply with customer protection provisions established by the commission and Chapters 17 and 39 of PURA and which requires the commission to adopt rules as necessary to implement the section.

Cross reference to statutes: Public Utility Regulatory Act §§14.002 and 39.3555.

§25.486. Customer Protections for Brokerage Services.

(a) Applicability. This section applies to all brokers.

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

(1) Broker--As defined in §25.112 of this title (relating to Registration of Brokers).

(2) Brokerage services--As defined in §25.112 of this title.

(3) Client--A person who receives or solicits brokerage services from a broker.

(4) Client agent--A broker who has the legal right and authority to act on behalf of a client regarding the selection of, enrollment for, or contract execution of a product or service offered by a retail electric provider (REP), including electric service.

(5) Proprietary client information--Any information that is compiled by a broker on a client that makes possible the identification of any individual client by matching such information with the client's name, address, retail electric account number, type or classification of retail electric service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual retail electric or brokerage services contract terms and conditions, price, current charges, billing records, or any information that the client has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the client to whom the information relates does not constitute proprietary client information.

(c) Voluntary alteration of customer protections. A client other than a residential or small commercial class customer or applicant, or a non-residential customer or applicant whose load is part of an aggregation in excess of 50 kilowatts, may agree to a different level of customer protections than is required by this section. Any agreements containing a different level of protections from those required by this section must be memorialized on paper or electronically and provided to the client. Copies of such agreements must be provided to commission staff upon request.

(d) Broker communications.

(1) All written, electronic, and oral communications, including advertising, websites, direct marketing materials, and billing statements produced by a broker must be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive. Prohibited communications include, but are not limited to:

(A) stating, suggesting, implying or otherwise leading a client to believe that receiving brokerage services will provide a customer with more reliable service from a transmission and distribution utility (TDU);

(B) falsely suggesting, implying or otherwise leading a client to believe that a person is a representative of a TDU, REP, aggregator, or another broker;

(C) falsely stating or suggesting that brokerage services are being provided without compensation; and

(D) falsely claiming to be the client agent of a customer.

(2) All printed advertisements, electronic advertising over the Internet, and websites must include the broker's registered name.

(e) Language requirements. A broker must provide customer service and any information required by this section to a client in the language used to market the broker's products and services to that client.

(f) Required disclosures. A broker must inform a client of the following prior to the initiation of brokerage services:

(1) the broker's registered name, business mailing address, and contact information;

(2) the broker's commission registration number;

(3) the registered name of any REP that is an affiliate of the broker;

(4) a clear description of the services the broker will provide for the client. If the broker will provide services for the client that have not been identified prior to the initiation of brokerages services, the broker must provide a description of those services to the client before the client is obligated to provide compensation for the provision of those services;

(5) the duration of the agreement to provide brokerage services, if applicable;

(6) a description of how the broker will be compensated for providing brokerage services and by whom; if the broker is compensated directly by the client, the broker must disclose the details of the compensation;

(7) how the client can terminate the agreement to provide brokerage services, if applicable;

(8) the amount of any fee or other cost the client will incur for terminating the agreement to provide brokerage services, if applicable; and

(9) the commission's telephone number and email address for complaints and inquiries.

(g) Client agent requirements.

(1) An agreement between a broker and a client that authorizes the broker to act as a client agent for the client must be memorialized on paper or electronically.

(2) In addition to the requirements of subsection (f) of this section, a broker that acts as a client agent for the client must inform the client of the following:

(A) a clear description of the actions the broker is authorized to take on the client's behalf;

(B) the duration of the agency relationship;

(C) how the client can terminate the agency agreement;

(D) the amount of any fee or other cost the client will incur for terminating the agency agreement; and

(E) how the client's customer data and account access information will be used, protected, and retained by the broker and disposed of at the conclusion of the agency relationship.

(3) A broker that is authorized to act as a client agent for the client must provide evidence of that authority upon request of the client, commission staff, or a REP with which the broker seeks to enroll the client.

(h) Broker enrollments. A broker that is not an agent of a REP under §25.471(d)(10) of this title (relating to General Provisions of Customer Protection Rules) may enter into an agreement with a REP to assume all or part of the REP's responsibilities under §25.474 of this title (relating to Selection of Retail Electric Provider) for the purpose of enrolling applicants or customers for retail electric service. A broker that assumes the responsibilities of a REP under §25.474 must comply with the requirements of §25.474. A REP that enters into an agreement with a broker to assume all or part of the REP's responsibilities under §25.474 remains accountable under §25.107(a)(3) of this title (relating to Certification of Retail Electric Providers) for compliance with all applicable laws and commission rules for all activities conducted by the broker related to those responsibilities. An agreement between a REP and a broker under this subsection must be memorialized on paper or electronically and provided to the commission upon request.

(i) Discrimination prohibited. A broker must not refuse to provide brokerage services or otherwise discriminate in the provision of brokerage services to any client because of race, creed, color, national origin, ancestry, sex, marital status, source or level of income, disability, or familial status; or refuse to provide brokerage services to a client because the client is located in an economically distressed geographic area or qualifies for low-income affordability or energy efficiency services; or otherwise unreasonably discriminate on the basis of the geographic location of a client.

(j) Proprietary client information.

(1) A broker must not release proprietary client information to any person unless the client authorizes the release in writing on paper or electronically. This prohibition does not apply to the release of such information to:

(A) the commission;

(B) the Office of Public Utility Counsel, upon request under PURA §39.101(d); or

(C) a REP or TDU as necessary to complete a required market transaction, under terms approved by the commission.

(2) A broker is not permitted to sell, make available for sale, or authorize the sale of any client-specific information or data obtained unless the client authorizes the sale in writing on paper or electronically.

(k) Customer service and complaint handling.

(1) Client access. Each broker must ensure that clients have reasonable access to its service representatives to make inquiries and complaints, discuss charges on bills, terminate service, and transact any other pertinent business. A broker must promptly investigate client complaints and advise the complainant of the results. A broker must inform the complainant of the commission's informal complaint resolution process and the following contact information for the commission: Public Utility Commission of Texas, Customer Protection Division, P.O. Box 13326, Austin, Texas 78711-3326; (512) 936-7120 or in Texas (toll-free) 1-888-782-8477, fax (512) 936-7003, e-mail address: customer@puc.texas.gov, Internet website address: www.puc.texas.gov, TTY (512) 936-7136, and Relay Texas (toll-free) 1-800-735-2989.

(2) Complaint handling. A client has the right to make a formal or informal complaint to the commission. A broker may not use a written or verbal agreement with a client to impair this right for a client that is a residential or small commercial customer. A broker must not require a client that is a residential or small commercial customer to engage in alternative dispute resolution, including requiring complaints to be submitted to arbitration or mediation by third parties.

(3) Informal complaints.

(A) A person may file an informal complaint with the commission by contacting the commission at: Public Utility Commission of Texas, Customer Protection Division, P.O. Box 13326, Austin, Texas 78711-3326; (512) 936-7120 or in Texas (toll-free) 1-888-782-8477, fax (512) 936-7003, e-mail address: customer@puc.texas.gov, Internet website address: www.puc.texas.gov, TTY (512) 936-7136, and Relay Texas (toll-free) 1-800-735-2989.

(B) A complaint should include the following information, as applicable:

(i) the complainant's name, billing and service address, telephone number and email address, if any;

(ii) the name of the broker;

(iii) the broker's registration number;

(iv) the name of any relevant REP;

(v) the customer account number or electric service identifier;

(vi) an explanation of the facts relevant to the complaint;

(vii) the complainant's requested resolution; and

(viii) any documentation that supports the complaint.

(C) The commission will forward the informal complaint to the broker.

(D) The broker must investigate each informal complaint forwarded to the broker by the commission and advise the commission in writing on paper or electronically of the results of the investigation within 21 days after the complaint is forwarded to the broker by the commission.

(E) The commission will review the complaint information and the broker's response and notify the complainant of the results of the commission's investigation.

(F) The broker must keep a record for two years after receiving notification by the commission that the complaint has been closed. This record must show the name and address of the com-

plainant, the date, nature and adjustment or disposition of the complaint.

(4) Formal complaints. If the complainant is not satisfied with the results of the informal complaint process, the complainant may file a formal complaint with the commission within two years of the date on which the commission closes the informal complaint. Formal complaints will be docketed as provided in the commission's procedural rules.

(l) Record retention.

(1) A broker must establish and maintain records and data that are sufficient to:

(A) verify its compliance with the requirements of any applicable commission rules; and

(B) support any investigation of customer complaints.

(2) All records required by this section must be retained for no less than two years, unless otherwise specified.

(3) Unless otherwise prescribed by the commission or its authorized representative, all records required by this subchapter must be provided to the commission within 15 calendar days of its request.

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 15, 2019.

TRD-201904274
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 936-7244

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 70. INDUSTRIALIZED HOUSING AND BUILDINGS

16 TAC §§70.22 - 70.25, 70.30, 70.60, 70.70, 70,73, 70.101

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 70, §§70.22 - 70.25, 70.30, 70.60, 70.70, 70.73, and 70.101, regarding the Industrialized Housing and Buildings Program. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC, Chapter 70 implement Texas Occupations Code, Chapter 1202, Industrialized Housing and Buildings (IHB).

The proposed rules are necessary to implement House Bill (HB) 1385 and HB 2546, 86th Legislature, Regular Session (2019) and make clean-up and clarification changes.

HB 1385 Changes

HB 1385 removed the height limit for industrialized housing and buildings regulated by the Department. The proposed rules are necessary to ensure the safety of the public as structures taller than four stories or 60 feet are now regulated by the Department. Specifically, the proposed rules ensure that persons who perform design review or inspections have necessary expertise in fire safety. The proposed rules also require builders who install structures taller than 75 feet to be registered with the Department as industrialized builders, rather than obtaining installation or alteration permits, so that the Department is better able to ensure that all necessary inspections are performed. In addition, the proposed rules remove an exemption that conflicts with the changes made by HB 1385. The proposed rules also require manufacturers to complete a certification update if they wish to construct modules or modular components that are outside the scope of their existing certification. This change is necessary to ensure that modules and modular components for new projects, such as taller structures that were not previously under the Department's regulation, will be constructed in accordance with the mandatory building codes. Furthermore, the proposed rules extend the deadline for completing work to 365 days for structures built to a code other than the International Residential Code (IRC), giving builders more time to complete more complex structures.

Additionally, the proposed rules update the site inspection requirements to account for taller, more complex structures built under the Department's program. The proposed rules do not create additional inspection requirements, but better describe the existing requirements so that they apply to all industrialized housing and buildings regulated by the Department. For example, the proposed rules delete existing language stating that on-site inspections are normally completed in three phases, as this is not true for taller and more complex structures. The proposed rules explicitly require all inspections required by the mandatory building codes, including special inspections, which may be required for taller structures. The proposed rules also require that special inspections be conducted by persons who are approved by the Industrialized Housing and Buildings Code Council (Council) and require Department approval in order to change the person or agency once the special inspection has already begun. These changes are necessary to ensure that taller structures are adequately inspected.

HB 2546 Changes

HB 2546 gives manufacturers and builders the option to construct single-family industrialized housing in accordance with certain local amendments to the statewide energy code in Texas for single-family residential construction. Those local amendments or alternative compliance paths must be requested by a municipality, county, or group of counties in the climate zone where the housing will be located and must be determined by the Energy Systems Laboratory at Texas A&M University to be equally or more stringent than the statewide energy code. The bill also required manufacturers and builders to make available all documentation necessary to evaluate the industrialized housing.

The proposed rules require manufacturers to send design review agencies information on the local amendments or alternative compliance paths to which the manufacturer will construct a modular home. This is necessary to enable the design review agency to properly review the plans for the home. The proposed rules also add an amendment to the mandatory building codes to allow single-family housing to be constructed in accordance with

the local amendments and alternative compliance paths that are authorized by HB 2546.

Clean-up and Clarification Changes

The proposed rules also include several changes designed to make the rules easier to understand by adding a new subsection to the amendments to the mandatory building codes, in order to clarify that electrical tests must be performed on modular buildings as well as homes. These tests are already required in the current rules, but there is some confusion because the current rules reference a section of the National Electrical Code (NEC) which pertains to manufactured housing. By adding a new Article 545.14 to the NEC, the proposed rules will make it clearer that electrical testing is to be performed on both housing and buildings.

The proposed rules also use new language to clarify which buildings are exempt from site inspections, as the proposed language is more precise than the existing language and may lessen any confusion about which buildings do not require site inspections. Additionally, the proposed rules clarify that the prohibition on destructive disassembly applies only to modules or modular components completed in the plant and certified by a Department-issued decal or insignia. This is necessary as projects may include a mixture of modular and site-built construction.

The proposed rules also make clean-up changes, including incorporating third-party inspection agencies into the rule regarding site inspections, and changing the description of how violations and corrective actions must be documented. The new description of how to document violations gives the Department flexibility to prescribe new, more efficient methods of documentation in the future. The clean-up change adding third-party inspection agencies is necessary because the agencies are already involved, through their inspectors, in the site inspection process.

The proposed rules were presented to six members of the Texas Industrialized Building Code Council (Council) on October 29, 2019. There were fewer than a quorum of members present, so the Council did not vote on the proposed rules. However, the Council members who were present did have an opportunity to discuss the proposed rules and make changes. The Council members did not have any changes, but after the meeting, staff made non-substantive changes to the proposed §70.101 to make the proposed rule amendments easier to understand.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §70.22 by requiring fire safety reviewers to have International Code Council (ICC) certification as a fire plans examiner.

The proposed rules amend §70.23 to require ICC fire inspector certifications for various third-party inspection agency personnel. Specifically, the third-party inspection agency supervisor of inspections must have ICC certification as a fire inspector I. Inspectors who perform in-plant inspections of modules or modular components that will be part of a project over 75 feet must have ICC certification as a fire inspector I and inspectors who perform installation inspections of a project over 75 feet must have ICC certification as a fire inspector II.

The proposed rules amend §70.24 by requiring third-party site inspectors who perform installation inspections of industrialized housing or buildings taller than 75 feet to have ICC certification as a fire inspector II.

The proposed rules amend §70.25 by prohibiting installation permits or alteration permits for structures that are taller than 75 feet.

The proposed rules amend §70.30 by removing an exemption for structures that are taller than 4 stories or 60 feet. The proposed amendments also renumber the subsection accordingly.

The proposed rules amend §70.60 by requiring a manufacturer, who wishes to construct modules or modular components outside the scope of the manufacturer's current certification, to complete a certification update inspection for the aspects of construction for which the manufacturer is not currently certified.

The proposed rules amend §70.70 by: (1) requiring manufacturers to send design review agencies any local amendments or alternative compliance paths, to which the manufacturer will construct a modular home; and (2) referring to a new section of the NEC, which is added in §70.101 of the proposed rules, and specifying the electrical tests that must be performed on industrialized houses and buildings.

The proposed rules amend §70.73 by:

-removing language stating that on-site inspections are normally accomplished in three phases, and instead explicitly requiring all inspections required by certain codes (the IBC, IMC, IPC, IFC, IFGC, IECC, IFC, and IRC), special inspections required by the IBC, a set inspection, and a final inspection;

-requiring that special inspections be conducted by persons who are approved by the Council and meet all applicable requirements;

-requiring Department approval to change the inspector or agency once the special inspection has already begun;

-providing a longer deadline for completion (365 days) for structures that are built to a code other than the IRC;

-clarifying which structures are exempt from site inspections;

-clarifying that the prohibition on destructive disassembly during site inspections applies only to modules or modular components completed in a plant and certified by a Department-issued decal or insignia;

-changing the word "assuring" to "ensuring" as this wording may be clearer;

-adding inspection agencies as persons who may be contacted to schedule inspections;

-adding that an industrialized builder or installation permit holder may not change the inspection agency for a project once started without written approval from the Department;

-requiring inspection violations and corrective actions to be documented in accordance with Council procedures, rather than on a specific form.

The proposed rules amend §70.101(h)(5) to allow single-family industrialized housing to be built in accordance with the energy code with any local amendments or alternative compliance paths that are requested by a municipality, county, or group of counties located in the climate zone where the house will be located and are determined by the Texas Energy Systems Laboratory to be equally or more stringent than the energy code adopted by the State Energy Conservation Office (SECO). The proposed amendments also renumber the subsection accordingly.

The proposed rules amend §70.101(j) by adding a new section of the NEC, specifying which electrical tests must be performed on industrialized housing and buildings.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs, or increase or loss in revenue, to state government as a result of enforcing or administering the proposed rules. The activities required to implement the proposed rule changes, if any, are one-time program administration tasks that are routine in nature. This will not result in an increase in program costs. Additionally, the proposed rules do not decrease program costs as they do not remove any activities performed by the Department that would cause a decrease in personnel or resources. Also, the proposed rules do not amend or impact the fees assessed by the licensing program, so the proposed rules do not increase or decrease the revenue to the State.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase in costs to local governments as a result of enforcing or administering the proposed rules. There is no increase in local governments' responsibilities related to the regulation of industrialized housing and buildings.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there may be a reduction in costs to local governments as a result of enforcing or administering the proposed rules. The proposed rules implement legislation which removed the height limits for modular construction regulated by the Department. Therefore, the Department rather than local jurisdictions will now oversee inspections of manufacturing facilities that construct high-rise buildings. This may reduce local governments' costs of inspecting manufacturing facilities. However, this reduction cannot be estimated because the number of inspections that local governments will no longer need to perform cannot be estimated.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to local governments as a result of enforcing or administering the proposed rules. The proposed rules do not affect the amounts local governments may collect for permits or site inspections of buildings.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022. Although the proposed rules might lead to more high-rise buildings being built through modular construction, the number of people needed to construct a modular building would not vary greatly from the number needed to construct a site-built building. Additionally, even if fewer workers are needed to construct a modular high-rise building than the number needed for a site-built high-rise building, that might be offset by more modular buildings being constructed.

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be increased access to modular housing and buildings. Modular housing and buildings provide significant cost savings related to the timely construction process using a factory as opposed to site building, which is subject to delays not found in a production environment. The public will also benefit from the construction of safe high-rise modular buildings that are designed, constructed, and inspected to comply with the International Fire Code. Additionally, clarifying and clean-up amendments will help licensees and the public to understand the applicable rules and requirements.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules. There may be minimal costs to licensees for fire inspection and plan reviewer certifications. However, these certifications can be used as continuing education for other certifications which are already required, thereby minimizing or even offsetting the cost.

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

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. The proposed rules do not impose additional fees on any licensee or small or micro-business. Any additional costs are voluntary and could be offset by cost reductions in other areas. Additionally, the proposed rules will have no anticipated adverse economic effect on rural communities because the rules will not decrease the availability of licensees in rural communities, nor will the rules increase the cost of licensee services in rural communities.

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

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

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

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

1. The proposed rules do not create or eliminate a government program.

2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

4. The proposed rules do not require an increase or decrease in fees paid to the agency.

5. The proposed rules do not create a new regulation.

6. The proposed rules do expand, limit, or repeal an existing regulation. The proposed rules expand regulations related to fire safety and alternative energy codes in order to implement legislation. Language regarding reviews, inspections, and permits for high-rise construction is added consistent with the International Building Code, which identifies high-rise buildings as 75 feet and above. The proposed rules also expand a regulation to implement new legislation related to energy code compliance for single-family modular residential construction. Additionally, clarifying language is added to ensure better understanding and compliance with existing rule requirements. The proposed rules also limit an existing regulation. Recent legislation removed height limits on modular construction which is regulated by the Department. The corresponding rule language has been removed.

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

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENTS

Comments on the proposed rules may be submitted to Vanessa Vasquez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: *erule.comments@tdlr.texas.gov.* The deadline for comments is 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 1202 which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 1202. No other statutes, articles, or codes are affected by the proposed rules.

§70.22. Criteria for Approval of Design Review Agencies.

(a) - (b) (No change.)

(c) The minimum personnel requirements and qualifications shall be as follows.

(1) (No change.)

(2) Technical staff members may qualify for more than one discipline. The agency does not need to have an individual staff member for each discipline. The technical staff shall consist of the following positions.

(A) - (E) (No change.)

(F) The fire safety reviewer shall have:

(i) - (ii) (No change.)

(iii) certification as a fire [~~building~~] plans examiner as granted by ICC.

(G) (No change.)

(3) (No change.)

§70.23. Criteria for Approval of Third Party Inspection Agencies and Inspectors.

(a) - (b) (No change.)

(c) The minimum personnel requirements and qualifications are as follows.

(1) (No change.)

(2) The supervisor of inspections shall have:

(A) - (B) (No change.)

(C) certification as a fire inspector II as granted by ICC; and

(D) [~~(C)~~] certification as a residential energy inspector/plans examiner as granted by ICC, as a commercial energy inspector as granted by ICC, and as:

(i) - (iii) (No change.)

(3) (No change.)

(4) An inspector who performs an in-plant inspection of modules or modular components that will be part of a housing or building project over 75 feet in height must also have ICC certification as a fire inspector I or II.

(5) An inspector who performs an installation inspection of industrialized housing or buildings over 75 feet in height must also have ICC certification as a fire inspector II.

§70.24. Criteria for Approval of Third Party Site Inspectors.

(a) (No change.)

(b) The minimum qualifications for a third party site inspector are as follows:

(1) (No change.)

(2) a minimum of three years experience in building code enforcement, building inspections, or building experience. At least one year of experience shall be in the performance of building inspections; [~~and~~]

(3) one of the following energy code certifications: certification as a residential energy inspector/plans examiner, as a commercial energy inspector, or both. The inspector must have a residential energy certification to inspect housing and a commercial energy certification to inspect buildings; [~~.~~]

(4) one of the following code certification combinations:

(A) - (B) (No change.)

(C) a combination inspector as granted by ICC. In lieu of a combination inspector the inspector may have one of each of the individual certifications that are needed for certification as a combination inspector. Inspectors with this certification may perform site inspections for any industrialized housing, buildings, or site-built REFs; and[~~.~~]

(5) ICC certification as a fire inspector II if the inspector will perform installation inspections of industrialized housing or buildings over 75 feet in height.

§70.25. Permits.

(a) General.

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

(5) An installation permit or alteration permit shall not be issued for a structure that is taller than 75 feet in height.

(b) - (d) (No change.)

§70.30. Exemptions.

(a) The scope of this chapter is limited by Chapter 1202; accordingly, it does not apply to:

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

[~~(4) any residential or commercial structure which is in excess of four stories or 60 feet in height;~~]

(4) [~~(5)~~] a commercial building or structure that is:

(A) installed in a manner other than on a permanent foundation; and

(B) either:

(i) is not open to the public; or

(ii) is less than 1,500 square feet in total area and used other than as a school or a place of religious worship;

(5) [~~(6)~~] buildings that are specifically referenced in the mandatory building codes as exempt from permits; or

(6) [~~(7)~~] construction site buildings.

(b) (No change.)

§70.60. Responsibilities of the Department--Plant Certification.

(a) - (h) (No change.)

(i) A manufacturer that wishes to construct modules or modular components outside the scope of the manufacturer's certification must successfully complete a certification update inspection for the aspects of construction for which the manufacturer is not currently certified.

(j) [~~(i)~~] If the department determines that the manufacturer is not capable of meeting the certification requirements or that the manufacturer is unable to complete the certification inspection requirements, then the certification team will issue a non-compliance report. The non-compliance report will detail the specific areas in which the manufacturer was found to be deficient and may make recommendations for improvement.

(k) [~~(j)~~] If any personnel of a design review agency or third party inspection agency participate as members of a certification team, the agency is considered a participant in the certification team and is responsible for compliance with Texas Occupations Code, Chapter 1202, rules adopted by the commission, and decision, actions, and interpretations of the council in performing the certification, inspection and related activities.

§70.70. Responsibilities of the Registrants--Manufacturer's Design Package and REF Builder's Construction Documents.

(a) (No change.)

(b) In-plant documentation for manufacturers and construction documents for REF builders. The manufacturer and REF builder shall provide the DRA the documentation necessary to demonstrate compliance with the mandatory building codes in §70.100 and §70.101. At a minimum the documentation shall include the following:

(1) - (8) (No change.)

(9) energy compliance details, including any local amendments or alternative compliance paths to which the structure will be constructed under Occupations Code, Section 1202.1536;

(10) - (20) (No change.)

(c) Compliance control program for manufacturers. The utilization of mass production techniques and assembly line methods in the construction of industrialized housing, buildings, modules, and modular components along with the fact that a large part of such construction cannot be inspected at the ultimate building site, requires manufacturers to develop an adequate compliance control program to assure that these structures meet or exceed mandatory code requirements and are in compliance with the rules and regulations of this chapter. The compliance control program shall be documented in the form of a manual that must be approved by the design review agency. A 100% inspection of the construction of industrialized housing or buildings may be authorized in lieu of a compliance control program and certification of the manufacturer in accordance with §70.60. The manufacturer shall provide the design review agency a compliance control manual that must, at the minimum, contain the following:

(1) - (8) (No change.)

(9) step-by-step test procedures, a description of the station at which each production test is performed, a description of required testing equipment, and procedures for periodic checking, recalibration, and readjustment of test equipment. Procedures shall be included for, but not limited to, electrical tests as specified in the National Electrical Code, Article 545-14 [~~550-17~~], gas supply pressure tests, water supply pressure tests, drain-waste-vent system tests, concrete slump tests, and concrete strength tests;

(10) - (14) (No change.)

(d) - (f) (No change.)

§70.73. Responsibilities of the Registrants--Building Site Construction and Inspections.

(a) - (b) (No change.)

(c) Responsibility for on-site construction. The industrialized builder or installation permit holder shall be responsible for assuring that the foundation and the installation of an industrialized house, building, or site-built REF complies with the manufacturer's or REF builder's on-site construction specifications or documentation that have been approved in accordance with §70.70 [~~of this chapter~~], any unique on-site construction details, the engineered foundation design, and the mandatory building codes.

(d) - (e) (No change.)

(f) Responsibility for inspections outside the jurisdiction of a municipality or within a municipality without a building inspection agency or department. When the building site is outside a municipality, or within a municipality that has no building department or agency, a council-approved inspector will perform the required inspections in accordance with this section and the inspection procedures established by the council to assure completion and attachment in accordance with the documents approved in accordance with §70.70, the mandatory building codes, the foundation system drawings, and any unique on-site construction detail drawings.

(1) Minimum inspection requirements are listed below. Re-inspections are required whenever deviations from the approved construction documents or mandatory building codes are noted. Inspections may occur concurrently. The industrialized builder or

installation permit holder shall ensure that work is not concealed prior to the inspection.

(A) Inspections completed during installation shall be as required by the inspection requirements of Chapter 1 of the IBC, IMC, IPC, IFC, IFGC, IECC, IFC, and IRC as applicable.

(B) A set inspection shall be completed for each module set or for each modular component installed.

(C) Special inspections shall be completed as required per Chapter 17 of the IBC.

(D) A final inspection shall be made after all construction and all corrections are complete.

[~~(1) The on-site inspection is normally accomplished in three phases: foundation inspection, set inspection, and final inspection. The foundation inspection shall be performed before the concrete is poured.~~]

(2) For structures built in accordance with the IRC, the [~~The~~] final inspection shall be completed within 180 days of the start of construction. For all other structures, the final inspection shall be completed within 365 days of the start of construction. The department may grant an extension upon receipt of a written request that demonstrates a justifiable cause.

(3) Site inspections are required for the first installation of all industrialized housing and permanent industrialized buildings. Exception: Site inspections are not required for the installation of equipment buildings or shelters where the structure is occupied only during installation and maintenance of the equipment housed in the structure, unless the structure is [~~unoccupied industrialized buildings not open to the public, such as communication equipment shelters, that are not~~] also classified as a hazardous occupancy by the mandatory building code.

(4) (No change.)

(5) The industrialized builder, or installation permit holder, is responsible for scheduling each phase of the inspection with the inspector or inspection agency and for ensuring that all inspections have been completed. [~~Additional inspections will be scheduled as required for larger structures and to correct violations.~~]

(A) The industrialized builder, or installation permit holder, may utilize a different inspector or inspection agency for different projects, but may not change the inspector or agency for a project once started without the written approval of the department.

(B) Special inspections required by the mandatory building codes shall be conducted by persons who are approved in accordance with Council procedures and meet the qualification requirements outlined in Chapter 17 of the IBC or as required by applicable State laws. Persons or agencies that perform special inspections may not be changed once the inspection has begun without approval from the department.

(6) The inspector shall give the industrialized builder or installation permit holder a copy of the site inspection report upon completion of each inspection including re-inspections. Violations shall be documented in accordance with the Council approved inspection procedures [~~on the Violations Report form~~]. The industrialized builder or installation permit holder is responsible for ensuring [~~assuring~~] that all violations are corrected.

(7) The industrialized builder, or installation permit holder, shall not permit occupancy, or release the house or building for occupation, until a successful final inspection has been completed. A final on-site inspection report shall be issued showing no outstanding violations prior to occupation, or release for occupation, of the house or building. Exception: Occupancy of the house or building may be permitted and approved with outstanding items provided that the items are not in violation of the mandatory building codes.

(A) The industrialized builder or installation permit holder shall maintain a copy of the on-site inspection reports in accordance with the requirements of §70.50 and make a copy of all on-site inspection reports available to the department upon request. The reports shall include a list of all violations and corrective action in accordance with the inspection procedures approved by the council. [~~documented on the Violations Report form.~~]

(B) - (C) (No change.)

(g) Destructive disassembly shall not be performed at the site in order to conduct tests or inspections on the modules or modular components completed in the plant and certified by the decal or insignia attached by the manufacturer, nor shall there be imposed standards or test criteria different from those required by the approved installation instructions, on-site construction documentation, and the applicable mandatory building code. Nondestructive disassembly may be performed only to the extent of opening access panels and cover plates.

(h) - (j) (No change.)

§70.101. Amendments to Mandatory Building Codes.

(a) - (g) (No change.)

(h) The 2015 *International Energy Conservation Code* shall be amended as follows.

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

(5) Add new item 4 to Section R401.2 Compliance to read as follows: "Alternative for single-family housing only. A manufacturer or builder may choose to use the energy code with any local amendments or alternative compliance paths that are requested by a municipality, county, or group of counties located in the climate zone where the house will be located and are determined by the Texas Energy Systems Laboratory to be equally or more stringent than the energy code adopted by the State Energy Conservation Office (SECO).

(6) [~~(5)~~] Add new *Section C501.7 Moved buildings* to add the following sentence: "Moved industrialized buildings that bear approved certification decals or insignia, and that may also bear an alteration decal, in accordance with the requirements of Texas Occupations Code, Chapter 1202 and 16 Texas Administrative Code, Chapter 70, and that have not been altered or modified since the decal, insignia, or alteration decal was attached, shall be considered to be in compliance with the current mandatory building codes adopted by the Texas Industrialized Building Code Council."

(7) [~~(6)~~] Amend *Chapter C6 Referenced Standards and Chapter R6 Referenced Standards* as follows.

(A) Add to Chapter C6 PNNL/DOE, Pacific Northwest National Laboratory/Department of Energy Conservation, https://www.energycodes.gov/software-and-webtools, as a promulgating agency, COMcheck Version 4.0.5.2 or later, Commercial Energy Compliance Software as the referenced standard, and section C102.1.2 as the referenced code section.

(B) Add to Chapter R6 PNNL/DOE, Pacific Northwest National Laboratory/Department of Energy Conservation, https://www.energycodes.gov/software-and-webtools, as a promulgating agency, REScheck Version 4.6.3 or later, Residential Energy Compliance Software as the referenced standard, and section R102.1.2 as the referenced code section.

(C) Add to Chapter R6 the Texas Energy Systems Laboratory, 402 Harvey Mitchell Parkway South, College Station, TX 77845-3581, as a promulgating agency, IC3, v 3.10 or later, International Code Compliance Calculator as the referenced standard, and section R102.1.2 as the referenced code section.

(i) (No change.)

(j) The 2014 *National Electrical Code* shall be amended as follows.

(1) Add [~~to add~~] the following to *Article 310.1 Scope*: "Aluminum and copper-clad aluminum shall not be used for branch circuits in buildings classified as a residential occupancy. Aluminum and copper-clad aluminum conductors, of size number 4 AWG or larger, may be used in branch circuits in buildings classified as occupancies other than residential."

(2) Add new *Article 545.14, Testing*, to read as follows.

(A) "(A) Dielectric Strength Test. The wiring of each modular house, building, or component shall be subjected to a 1-minute, 900-volt, dielectric strength test (with all switches closed) between live parts (including neutral conductor) and the house, building, or component ground. Alternatively, the test shall be permitted to be performed at 1080 volts for 1 second. This test shall be performed after branch circuits are complete and after luminaires or appliances are installed. Exception: Listed luminaires or appliances shall not be required to withstand the dielectric strength test. Exception: A DC dielectric tester can be used as an alternate to the use of an AC dielectric tester. The applied test voltage for testing with a DC tester shall be 1.414 times the value of the equivalent AC test voltage."

(B) "Continuity and Operational Tests and Polarity Checks. Each modular house, building, or component shall be subjected to all of the following: (1) An electrical continuity test to ensure that all exposed electrically conductive parts are properly bonded; (2) An electrical operational test to demonstrate that all equipment, except water heaters and electric furnaces, are connected and in working order; (3) Electrical polarity checks of permanently wired equipment and receptacle outlets to determine that connections have been properly 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.

Filed with the Office of the Secretary of State on November 15, 2019.

TRD-201904312
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 463-3671

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1034

The Texas Education Agency (TEA) proposes an amendment to §61.1034, concerning the new instructional facility allotment. The proposed amendment would modify the rule to reflect changes made by House Bill (HB) 3, 86th Texas Legislature, 2019, to increase the allotment.

BACKGROUND INFORMATION AND JUSTIFICATION: Texas Education Code (TEC), §42.158, enacted by Senate Bill 4, 76th Texas Legislature, 1999, created the New Instructional Facility Allotment (NIFA) for public school districts. The legislature did not provide funding under this allotment for the 2011-2012 through 2014-2015 school years. However, funding has been made available for the 2015-2016 through 2020-2021 school years. The NIFA is provided for operational expenses associated with the opening of a new instructional facility and is available to all public school districts and open-enrollment charter schools that meet the requirements of the statute and rule.

Former TEC, §42.158, was transferred to TEC, §48.152, by HB 3, 86th Texas Legislature, 2019. HB 3 increased funding for NIFA. The proposed amendment to 19 TAC §61.1034 is a conforming amendment that would update the rule to implement the increase in the maximum amount appropriated for allotments from $25 million to $100 million in a school year. The proposed amendment would update language related to NIFA distributions in subsection (e), including reference to excess local revenue provisions under TEC, §48.257. The proposed amendment would also update the authorizing statutory reference, changing TEC, §42.158, to §48.152.

FISCAL IMPACT: Leo Lopez, associate commissioner for school finance/chief school finance officer, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

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

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

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

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

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would not require an increase in future legislative appropriations to the agency, but the enabling legislation does allow an increase to future legislative appropriations to the agency from $23.75 million to $100 million per year of the biennium. The proposal would expand an existing regulation by increasing the allotment.

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 fees paid to the agency; would not create a new regulation; would not limit or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Lopez has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be ensuring that rule language is based on current law, which increased maximum funding for NIFA from $25 million to $100 million in a school year. There is no anticipated economic cost to persons who are required to comply with the proposal.

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

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

PUBLIC COMMENTS: The public comment period on the proposal begins November 29, 2019, and ends December 30, 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 29, 2019. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/. Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §48.004, as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019, authorizes the commissioner of education to adopt rules as necessary to implement and administer the Foundation School Program.

TEC, §48.152, as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019, requires the commissioner to reduce each district's allotment under this section in the manner provided by TEC, §48.266(f), if the total amount of allotments to which districts are entitled under this section for a school year exceeds the amount appropriated under this subsection.

TEC, §48.266(f), as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019, describes how the commissioner will reduce allotments if entitlements exceed the amounts appropriated.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§48.004, 48.152, and 48.266(f), as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019.

§61.1034. New Instructional Facility Allotment.

(a) Definitions. The following definitions apply to the new instructional facility allotment (NIFA) in accordance with the Texas Education Code (TEC), §48.152 [~~§42.158~~].

(1) Instructional campus--A campus that:

(A) has its own unique campus ID number registered with the Texas Education Agency (TEA), an assigned administrator, enrolled students who are counted for average daily attendance, and assigned instructional staff;

(B) receives federal and/or state and/or local funds as its primary support;

(C) provides instruction in the Texas Essential Knowledge and Skills (TEKS);

(D) has one or more grade groups in the range from early education through Grade 12; and

(E) is not a program for students enrolled in another public school.

(2) Instructional facility--A real property, an improvement to real property, or a necessary fixture of an improvement to real property that is used predominantly for teaching the curriculum required by the TEC, §28.002.

(3) New instructional facility--A facility that includes:

(A) a newly constructed instructional facility, which is a new instructional campus built from the ground up;

(B) a repurposed instructional facility, which is a facility that has been renovated to become an instructional facility for the first time for the applying school district or charter school; or

(C) a leased facility operating for the first time as an instructional facility for the applying school district or charter school with a minimum lease term of not less than 10 years. The lease must not be a continuation of or renegotiation of an existing lease for an instructional facility.

(b) Eligibility. The following eligibility criteria apply to the NIFA in accordance with the TEC, §48.152 [~~§42.158~~].

(1) Both school districts and open-enrollment charter schools are eligible to apply for the NIFA for eligible facilities.

(2) The facility for which NIFA funds are requested must meet the following requirements.

(A) The facility must qualify as an instructional campus and a new instructional facility used for teaching the curriculum required by the TEC, Chapter 28.

(B) To qualify for first-year funding, a new facility must not have been occupied in the prior school year. To qualify for follow-up funding, the facility must have been occupied for the first time in the prior school year and funded for the NIFA for that first year. If an instructional facility qualifies as a new instructional facility but did not receive the allotment in the first year of eligibility due to a failure to apply, the school district or open-enrollment charter school may still apply for and receive funding for the average daily attendance (ADA) earned only during the second year of occupation in the new instructional facility.

(C) With the exception of a covered walkway connecting the new facility to another building, the new facility must be physically separate from other existing school structures.

(D) If the applicant is an open-enrollment charter school, the facility must be a charter school site approved for instructional use in the original open-enrollment charter as granted by either the State Board of Education or the commissioner of education or in an amendment granted under §100.1033(b)(9)-(11) of this title (relating

to Charter Amendment), as described in §100.1001(3)(D) of this title (relating to Definitions).

(3) Expansion or renovation of existing instructional facilities, as well as portable and temporary structures, are not eligible for the NIFA.

(c) Application process. To apply for the NIFA, school districts and open-enrollment charter schools must complete the TEA's online application process requesting funding pursuant to the NIFA.

(1) The initial (first-year) application, or an application for one-year funding only, must be submitted electronically no later than July 15. The application must include the following:

(A) the electronic submission of the TEA's online application for initial funding; and

(B) the electronic submission of the following materials:

(i) a brief description and photograph of the newly constructed, repurposed, or leased instructional facility;

(ii) a copy of a legal document that clearly describes the nature and dates of the new or repurposed construction or a copy of the applicable lease;

(iii) a site plan;

(iv) a floor plan; and

(v) if applicable, a demolition plan.

(2) Second-year applications require only the electronic submission of the TEA's online application for follow-up funding no later than July 15 of the year preceding the applicable school year.

(d) Survey on days of instruction. In the fall of the school year after a school year for which an applicant received NIFA funds, the school district or open-enrollment charter school that received the funds must complete an online survey on the number of instructional days held in the new facility and submit the completed survey electronically. The TEA will use submitted survey information in determining the final (settle-up) amount earned by each eligible school district and open-enrollment charter school, as described in subsection (e)(6) of this section.

(e) Costs and payments. The costs and payments for the NIFA are determined by the commissioner.

(1) The allotment for the NIFA is a part of the cost of the first tier of the Foundation School Program (FSP). This allotment is not counted in the calculation of weighted average daily attendance for the second tier of the FSP.

(2) If, for all eligible applicants combined, the total cost of the NIFA exceeds the amount appropriated, each allotment is reduced so that the total amount to be distributed equals the amount appropriated. Reductions to allotments are made by applying the same percentage adjustment to each school district and charter school.

[~~(3) If an additional $1 million is appropriated for the NIFA for a school year under the TEC, §42.158(d-1), and if proration as described in paragraph (2) of this subsection is necessary for the school year, the additional appropriation must first be applied to prevent a reduction in the NIFA for eligible high school facilities. Any funds remaining after preventing all reductions in the NIFA for eligible high school facilities will be prorated as described in paragraph (2) of this subsection.~~]

(3) [~~(4)~~] Allocations will be made in conjunction with allotments for the FSP in accordance with the school district's or open-enrollment charter school's payment class. For school districts that are [~~not~~] subject to the excess local revenue provisions under TEC, §48.257, [~~requirements of the TEC, Chapter 41,~~] and do not receive payments from the Foundation School Fund, NIFA distributions will be reflected as reduced recapture payments [~~correspond to the schedule for payment class 3~~].

(4) [~~(5)~~] For school districts that are subject to the excess local revenue provisions under TEC, §48.257, NIFA distributions increase the amount of the FSP entitlement and so will automatically reduce any excess local revenue and reduce the requirement to send recapture to the state in the amount of the NIFA allocation [~~required to reduce wealth pursuant to the TEC, Chapter 41, any NIFA funds for which the school district is eligible are applied as credits to the amounts owed to equalize wealth~~].

(5) [~~(6)~~] For all school districts and open-enrollment charter schools receiving the NIFA, a final (settle-up) amount earned is determined by the commissioner when information reported through the survey described in subsection (d) of this section is available in the fall of the school year after the school year for which NIFA funds were received. The final amount earned is determined using the submitted survey information and final counts of ADA for the school year for which NIFA funds were received, as reported through the Texas Student Data System Public Education Information Management System.

(6) [~~(7)~~] The amount of funds to be distributed for the NIFA to a school district or open-enrollment charter school is in addition to any other state aid entitlements.

(f) Ownership of property purchased with NIFA funds. Property purchased with NIFA funds by an open-enrollment charter school is presumed to be public property under the TEC, §12.128, and remains public property in accordance with that 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 18, 2019.

TRD-201904324
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 475-1497

CHAPTER 100. CHARTERS
SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING OPEN-ENROLLMENT CHARTER SCHOOLS
DIVISION 2. COMMISSIONER ACTION AND INTERVENTION

19 TAC §100.1033

The Texas Education Agency (TEA) proposes an amendment to §100.1033, concerning charter amendment. The proposed amendment would modify the existing rule to reflect Senate Bill (SB) 668, 86th Texas Legislature, 2019, and clarify existing procedures.

BACKGROUND INFORMATION AND JUSTIFICATION: Section 100.1033 was established under the commissioner's rulemaking authority to provide guidance pertaining to amendments of a charter holder's contract, including the growth or expansion of an existing charter school.

SB 668, 86th Texas Legislature, 2019, amended Texas Education Code (TEC), Chapter 12, to allow a charter holder to provide written notice of a new open-enrollment charter school campus or request approval of an expansion amendment up to 18 months in advance of the campus's anticipated opening or the expansion's effective date. In addition, the bill requires notification to the superintendent of each school district from which a proposed open-enrollment charter school or campus is likely to draw students.

The proposed amendment to §100.1033 would implement SB 668 as well as update procedures, align the rule with statute, provide clarification, and make technical edits. Specifically, the following changes would be made.

The proposed amendment to §100.1033(b)(2), relating to timeline, would clarify applicable timelines for different types of amendments.

The proposed amendment to §100.1033(b)(3), relating to relevant information considered, would add that relevant information considered by the commissioner for charter amendment includes the Charter School Performance Frameworks (CSPF). Use of the CSPF to measure the performance of charter schools is important for TEA's goal of ensuring high-quality learning opportunities for Texas students.

The proposed amendment to §100.1033(b)(5)-(8), relating to relocation amendment, ineligibility, and amendment determination, respectively, would revise the rule text to remove redundant text and to clarify rule text.

The proposed amendment to §100.1033(b)(9), relating to expansion amendment standards, would establish an 18-month timeline for charter school expansion pursuant to TEC, §12.101(b-10), as added by SB 668, 86th Texas Legislature, 2019; specify that, as part of TEA's goal to ensure high-quality learning opportunities for Texas students, the commissioner would approve an expansion amendment only if the charter school is designated as "Tier 1" or "Tier 2" under the CSPF; and add language to align §100.1033 with 19 TAC §100.1035, Compliance Records on Nepotism, Conflicts of Interest, and Restrictions on Serving.

The proposed amendment to §100.1033(b)(10), relating to expansion amendments, would clarify the meaning of rule language.

The proposed amendment to §100.1033(b)(11), relating to expedited expansion, would implement SB 668, 86th Texas Legislature, 2019, by establishing an 18-month timeline for charter school expansion and adding to the list of entities required to be notified of an expansion.

The proposed amendment to §100.1033(b)(12), relating to new school designation, would clarify rule language regarding the definition of and qualification for new school designation. For a charter school to obtain such a designation, and thus be eligible to participate in the charter school program competitive grant process when federal funding for the Texas charter school program is available, the charter school will be required to operate a new campus with a new educational program.

The proposed amendment to §100.1033(b)(13), relating to High-Quality Campus Designation, would clarify rule language regarding the definition of and qualification for high-quality campus designation. The proposed amendment to §100.1033(b)(13)(A)(vi) would change the requirement that a school seeking high-quality designation serve at least 100 students in its first year to its third year to allow for a charter's planned grade phase-in over the school's first three years.

FISCAL IMPACT: Joe Siedlecki, associate commissioner for charters and innovations, 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 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 expand, limit, and repeal an existing regulation by revising and adding provisions to clarify rule language and align the rule with other rules in the TAC, make the rule consistent with new legislation passed by the 86th Texas Legislature, 2019, and remove redundant text. The proposed rulemaking would also increase the number of individuals subject to its applicability by requiring expansion amendment notice to district superintendents pursuant to new legislation passed by the 86th Texas Legislature, 2019.

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 any increase or decrease in fees paid to the agency; would not create a new regulation; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Siedlecki has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be ensuring that rule language is based on current law and updated to clarify the rule's applicability. There is no anticipated economic cost to persons who are required to comply with the proposal.

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

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: The TEA has determined that the proposal

would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins November 29, 2019, and ends December 30, 2019. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on November 29, 2019. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/. Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §12.101, which authorizes the commissioner of education to grant and oversee charters for open-enrollment charter schools; TEC, §12.1101, which directs the commissioner of education to adopt a procedure for providing notice of an application for charter or the establishment of a campus; TEC, §12.114, which describes the circumstances under which a revision of a charter of an open-enrollment charter school may be made; TEC, §12.1181, which requires the commissioner to develop a set of performance frameworks by which open-enrollment charter schools' performance is to be measured; and TEC, §29.259, which includes a description of performance frameworks by which adult high school diploma and industry certification charter schools' performance is to be measured.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§12.101, 12.1101, 12.114, 12.1181, and 29.259.

§100.1033. Charter Amendment.

(a) Amendments in writing. Subject to the requirements of this section, the terms of an open-enrollment charter may be revised with the consent of the charter holder by written amendment approved by the commissioner of education in writing.

(b) Types of amendments. An amendment includes any change to the terms of an open-enrollment charter, including the following: maximum enrollment, grade levels, geographic boundaries, approved campus(es), approved sites, relocation of campus, charter holder name, charter school (district) name, charter campus name, charter holder governance, articles of incorporation, corporate bylaws, management company, admission policy, or the educational program of the school. An amendment must be approved by the commissioner under this subsection. Expanding prior to receiving the commissioner's approval will have financial consequences as outlined in §100.1041(d)(1) of this title (relating to State Funding).

(1) Charter amendment request. Prior to implementation, the charter holder shall file a request, in the form prescribed, with the Texas Education Agency (TEA) division responsible for charter schools. As applicable, the request shall set forth the text and page references, or a photocopy, of the current open-enrollment charter language to be changed, and the text proposed as the new open-enrollment charter language. The request must be attached to a written resolution adopted by the governing body of the charter holder and signed by a majority of the members indicating approval of the requested amendment.

(2) Timeline. All non-expansion [~~charter amendment requests, with the exception of expansion~~] amendments [~~,~~] may be filed with the commissioner at any time. All other amendments must be filed within the timeframe specified on the relevant amendment form.

(3) Relevant information considered. As directed by the commissioner, a charter holder requesting an [~~a substantive~~] amendment shall submit current information required by the prescribed amendment form, as well as any other information requested by the commissioner. In considering the amendment request, the commissioner may consider any relevant information concerning the charter holder, including its performance on the Charter School Performance Frameworks (CSPF) adopted by rule in §100.1010 of this title (relating to Performance Frameworks); student and other performance; compliance, staff, financial, and organizational data; and other information.

(4) Best interest of students. The commissioner may approve an amendment only if the charter holder meets all applicable requirements, and only if the commissioner determines that the amendment is in the best interest of the students enrolled in the charter school. The commissioner may consider the performance of all charters operated by the same charter holder in the decision to finally grant or deny an amendment.

(5) Conditional approval. The commissioner may grant the amendment without condition, or may require compliance with such conditions and/or requirements as may be in the best interest of the students enrolled in the charter school. [~~An amendment receiving conditional approval shall not be effective until a written resolution accepting all conditions and/or requirements, adopted by the governing body of the charter holder and signed by the members voting in favor, is filed with the TEA division responsible for charter schools.~~]

(6) Relocation amendment. An amendment to relocate an existing campus or site [~~with the same administration and staff while still serving the same students and grade levels~~] is not an expansion amendment subject to paragraphs (9)(A) and (10)(D) of this subsection. An amendment to relocate solely permits a charter holder to relocate an existing campus or site to an alternate address while serving the same students and grade levels without a significant disruption to the delivery of the educational services. The alternate address of [~~in~~] the relocation [~~request~~] shall not be in excess of 25 miles from the existing campus address.

(7) Ineligibility. The commissioner will not consider any amendment that is submitted by a charter holder that has been notified by the commissioner of the commissioner's intent to allow the expiration of the charter or intent to revoke [~~or nonrenew~~] the charter. This [~~Nothing in this~~] subsection does not limit [~~limits~~] the commissioner's authority to accept the surrender of a charter.

(8) Amendment determination. The commissioner's decision on an amendment request shall be final and may not be appealed. The same amendment request may not be submitted prior to the first anniversary of the submission of the original [~~submitted~~] amendment request.

(9) Expansion amendment standards. An expansion amendment is an amendment that permits a charter school to increase its maximum allowable enrollment, extend the grade levels it serves, change its geographic boundaries, or add a campus or site.

(A) In addition to the requirements of this subsection, the commissioner may approve an expansion amendment only if:

(i) the expansion will be effective no earlier than the start of the fourth full school year at the affected charter school. This restriction does not apply if the affected charter school has a rating of "academically acceptable" as defined by §100.1001(26) of this title (relating to Definitions) as its most recent rating and is operated by a charter holder that operates multiple charter campuses and all of that

charter holder's most recent campus ratings are "academically acceptable" as defined by §100.1001(26) of this title;

(ii) the amendment request under paragraph (1) of this subsection is received no earlier than the first day of January [~~February~~] and no later than the first day of March, not to exceed 18 months [~~April~~] preceding the effective date of [~~school year in which~~] the expansion [~~will be effective. An additional year to implement the expansion may be granted if the expansion amendment requestor demonstrates a need for the additional year~~];

(iii) the most recent district rating for the charter school is "academically acceptable" and the most recent campus rating for at least 90% of the campuses operated under the charter school is "academically acceptable" as defined by §100.1001(26) of this title;

(iv) the most recent district financial accountability rating for the charter school in the Financial Integrity Rating System of Texas (FIRST) for Charter Schools is "satisfactory" as defined by §100.1001(27) of this title;

(v) the charter school has an accreditation status of Accredited;

(vi) the most recent district designation for the charter school under the CSPF is "Tier 1" or "Tier 2" as defined by §100.1010 of this title;

(vii) [~~(vi)~~] before voting to request an expansion amendment, the charter holder governing board has considered a business plan, has determined by majority vote of the board that the growth proposed is financially prudent relative to the financial and operational strength of the charter school, and includes such a statement in the board resolution. Upon request by the TEA, the business plan must be filed within ten business days. The business plan must be comprised of the following components:

(I) a statement discussing the need for the expansion;

(II) a statement discussing the current and projected financial condition of the charter holder and charter school;

(III) an unaudited statement of financial position for the current fiscal year;

(IV) an unaudited statement of financial activities for the current fiscal year;

(V) an unaudited statement of cash flows for the current fiscal year;

(VI) a pro forma budget that includes the costs of operating the charter school, including the implementation of the expansion amendment;

(VII) a statement or schedule that identifies the assumptions used to calculate the charter school's estimated Foundation School Program revenues;

(VIII) a statement discussing the use of debt instruments to finance part or all of the charter school's incremental costs;

(IX) a statement discussing the incremental cost of acquiring additional facilities, furniture, and equipment to accommodate the anticipated increase in student enrollment;

(X) a statement discussing the incremental cost of additional on-site personnel and identifying the additional number of full-time equivalents that will be employed; and

(XI) the required statement that the growth proposed is financially prudent relative to the financial and operational strength of the charter school;

(viii) [~~(vii)~~] the charter holder submits a signed statement attesting that within the last three years there have been no instances of nepotism, conflicts of interest, or revelations in criminal history checks that deemed any board member or employee ineligible to serve or submits, for the last three years [~~most recent year~~] of operation, copies of documents required by [~~the compliance information relating to~~] §100.1035 of this title (relating to Compliance Records on Nepotism, Conflicts of Interest, and Restrictions on Serving), including [~~to include~~] documents such as affidavits identifying a board member's substantial interest in a business entity or in real property, documentation of a board member's abstention from voting in the case of potential conflicts of interest, [~~and~~] affidavits or other documents identifying other family members within the third degree of affinity or consanguinity who serve as board members and/or employees, and affidavits or other documentation that board members or employees whose criminal history checks deemed them ineligible to serve were removed from service;

(ix) [~~(viii)~~] the commissioner determines that the amendment is in the best interest of the students of Texas; and

(x) [~~(ix)~~] the charter holder meets all other requirements applicable to expansion amendment requests and other amendments.

(B) Notice of the approval or disapproval of expansion amendments will be made by the commissioner within 60 days of the date the charter holder submits a completed expansion amendment request. The commissioner may provide notice electronically. The commissioner shall specify the earliest effective date for implementation of the expansion. In addition, the commissioner may require compliance with such conditions and/or requirements that may be in the best interest of the students of Texas.

(10) Expansion amendments.

(A) Maximum enrollment. In addition to the requirements of paragraph (9)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to increase maximum allowable enrollment not more than once each calendar year [~~only if within the calendar year preceding the request, the charter holder has not requested another expansion amendment seeking to increase maximum allowable enrollment~~].

(B) Grade span. In addition to the requirements of paragraph (9)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to extend the grade levels it serves only if it is accompanied by appropriate educational plans for the additional grade levels in accordance with Chapter 74, Subchapter A, of this title (relating to Required Curriculum), and such plan has been reviewed and approved by the charter governing board.

(C) Geographic boundary. In addition to the requirements of paragraph (9)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to expand the geographic boundaries of the charter school only if it is accompanied by evidence of notification, electronic or otherwise, to the relevant district(s).

(D) Additional campus. In addition to the requirements of paragraph (9)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to add a new campus only if it meets the following criteria:

(i) the charter holder has operated at least one charter school campus in Texas for a minimum of three consecutive years;

(ii) the charter school under which the proposed new campus will be assigned currently has at least 50% of the student population in [~~tested~~] grades assessed under TEC, Chapter 39, Subchapter B. For charter schools serving students in prekindergarten, the charter school may include the students in prekindergarten to count toward the 50% requirement if the charter school can demonstrate acceptable performance on a commissioner-approved prekindergarten assessment or monitoring tool as determined under §102.1003 of this title (relating to High-Quality Prekindergarten [~~Grant~~] Program) and the addition of the prekindergarten students meets the 50% threshold; and

(iii) the charter holder has provided evidence, via certified mail documented by return receipt, that each school district affected by the expansion was sent a notice to the district's central office of the proposed location and, if available, the address of any new campuses or sites, including proposed grade levels to be served and projected [~~likely~~] maximum enrollment.

(E) Additional site. In addition to the requirements of paragraph (9)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to add a new site under an existing campus only if it meets the following criteria:

(i) the charter school campus under which the proposed new site will be assigned currently has at least 50% of the student population in [~~tested~~] grades assessed under TEC, Chapter 39, Subchapter B. For charter school campuses serving students in prekindergarten, the charter school may include the students in prekindergarten to count toward the 50% requirement if the charter school can demonstrate acceptable performance on a commissioner-approved prekindergarten assessment or monitoring tool as determined under §102.1003 of this title and the addition of the prekindergarten students meets the 50% threshold; and

(ii) the site will be located within 25 miles of the campus with which it is associated.

(11) Expedited expansion. An expedited expansion amendment allows for the establishment of a new charter campus under TEC, §12.101(b-4).

(A) In order to submit an expedited expansion amendment, the charter school must meet the following requirements.

(i) The charter school must have an accreditation status of Accredited and meet the following criteria:

(I) currently has at least 50% of its student population in grades assessed under TEC, Chapter 39, Subchapter B, or has had at least 50% of the students in the grades assessed enrolled in the school for at least three years; and

(II) is currently evaluated under the standard accountability procedures for evaluation under TEC, Chapter 39, and received a district rating in the highest or second highest performance rating category under TEC, Chapter 39, Subchapter C, for three of the last five ratings [~~years~~] with:

(-a-) at least 75% of the campuses rated under the charter school also receiving a rating in the highest or second highest performance rating category in the most recent ratings; and

(-b-) no campus receiving a rating in the lowest performance rating category in the most recent ratings.

(ii) The charter holder must submit an expedited expansion amendment request in the time, manner, and form prescribed to the TEA division responsible for charter schools. The expansion amendment request will be:

(I) effective no earlier than the start of the fourth full school year at the affected charter school;

(II) received no earlier than the first day of January [~~February~~] and no later than the first day of March, not to exceed 18 months [~~April~~] preceding the effective date of [~~school year in which~~] the expansion [~~will be effective. An additional year to implement the expansion may be granted if the expansion amendment requestor demonstrates a need for the additional year~~];

(III) communicated via certified mail with a return receipt to the following entities:

(-a-) the superintendent and board of trustees of each school district affected by the expedited expansion as described in the amendment request form; and

(-b-) the members of the legislature who represent the geographic area affected by the expedited expansion as described in the amendment request form, noting that each entity has an opportunity to submit a statement regarding the impact of the amendment to the TEA division responsible for charter schools;

(IV) voted on by the charter holder governing body after consideration of a business plan determined by majority vote of the board affirming the growth proposed in the business plan is financially prudent relative to the financial and operational strength of the charter school. Such a statement must be included in the board resolution. Upon request by the TEA, the business plan must be filed within ten business days; and

(V) submitted with copies of the most recent compliance information relating to §100.1035 of this title to include documents such as affidavits identifying a board member's substantial interest in a business entity or in real property, documentation of a board member's abstention from voting in the case of potential conflicts of interest, and affidavits or other documents identifying other family members within the third degree of affinity or consanguinity who serve as board members and/or employees.

(B) Notice of eligibility to establish an expedited campus under this section will be made by the commissioner within 60 days of the date the charter holder submits a completed expedited expansion amendment.

(12) New school designation. A new school designation is a separate designation and must be paired with an expansion amendment. If approved by the commissioner, this designation permits a charter holder to establish a new charter school campus when it proposes to offer a new educational program at the new campus [~~an expansion amendment that permits a charter holder to establish an additional charter school campus under an existing open-enrollment charter school~~] pursuant to federal non-regulatory guidance in the Elementary and Secondary Education Act (ESEA), §5202(d)(1) [~~Section 5202(d)(1)~~], as amended. Charter holders of charter schools that receive new school designations from the commissioner will be eligible to participate in the charter school program competitive grant process when federal funding for the Texas charter school program is available.

(A) The commissioner may approve a new school designation for a charter only if:

(i) the charter holder meets all requirements applicable to an expansion amendment set forth in this section and has operated at least one charter school campus in Texas for a minimum of five consecutive years;

(ii) the charter school has been evaluated under the accountability rating system established in §97.1001 of this title (relating to Accountability Rating System) currently with at least 50% of the

student population in grades assessed by the state accountability system, has an accreditation status of Accredited, and meets the following:

(I) is currently evaluated under the standard accountability procedures, currently has the highest or second highest district rating, and received the highest or second highest district rating in two of the last four ratings [~~for three of the last five years~~] with at least 75% of the campuses operated under the charter also receiving the highest or second highest rating and no campus with an "academically unacceptable" rating, as defined by §100.1001(26) of this title, in the most recent state accountability ratings. A rating that does not meet the criteria for "academically acceptable" as defined in §100.1001(26) of this title shall not be considered the highest or second highest academic performance rating for purposes of this section; or

(II) is currently evaluated under the alternative education accountability (AEA) procedures and received the highest or second highest AEA district rating for five of the last five ratings [~~years~~] with:

(-a-) in the most recent applicable state accountability ratings, all rated campuses under the charter receiving an "academically acceptable" or higher rating, as defined by §100.1001(26) of this title; and

(-b-) if evaluated using AEA procedures, the district-level assessment data corresponding to the most recent accountability ratings demonstrate that at least 35% of the students in each of the following student groups (if evaluated) met the standard as reported by the sum of all grades tested on the standard accountability indicator in each subject area assessed: African American, Hispanic, white, special education, economically disadvantaged, limited English proficient, and at risk;

(iii) no charter campus has been identified for federal interventions in the most current report;

(iv) the charter school is not under any sanction imposed by TEA authorized under TEC, Chapter 39; Chapter 97, Subchapter EE, of this title (relating to Accreditation Status, Standards, and Sanctions); or federal requirements;

(v) the charter holder completes an application approved by the commissioner;

(vi) the new charter school campus that receives the new school designation will serve at least 100 students in its third [~~first~~] year of operation;

(vii) the amendment complies with all requirements of this paragraph; and

(viii) the commissioner determines that the designation is in the best interest of the students of Texas.

(B) In addition to the requirements of subparagraph (A) of this paragraph, the commissioner may approve a new school designation only if the campus with the proposed designation [~~on making the following written findings~~]:

(i) [~~the proposed school~~] satisfies each element of the definition of a public charter school as set forth in federal law;

(ii) [~~the proposed school~~] is not merely an extension of an existing charter school;

(iii) [~~the proposed school campus~~] is separate and distinct from the existing charter school campus(es) established under the open-enrollment charter school with a new facility and county-district-campus number; and

(iv) is governed, in the school's amended contract, by [~~the open-enrollment charter school, as amended, includes~~] a separate written performance agreement [~~for the proposed school campus~~] that meets the requirements of federal law and TEC, §12.111(a)(3) and (4).

(C) In making the findings required by subparagraph (B)(i) and (iii) of this paragraph, the commissioner shall consider:

(i) the terms of the open-enrollment charter school as a whole, as modified by the new school designation; and

(ii) whether the [~~proposed school~~] campus with the proposed designation shall be established and recognized as a separate school under Texas law.

(D) In making the findings required by subparagraph (B)(ii) and (iii) of this paragraph, the commissioner shall consider whether the [~~proposed school~~] campus with the proposed designation and the existing charter school campus(es) have separate sites, employees, student populations, and governing bodies and whether their day-to-day operations are carried out by different officers. The presence or absence of any one of these elements, by itself, does not determine whether the [~~proposed school~~] campus with the proposed designation will be found to be separate or part of an existing school. However, the presence or absence of several elements will inform the commissioner's decision.

(E) In making the finding required by subparagraph (B)(iv) of this paragraph, the commissioner shall consider:

(i) whether the [~~proposed school~~] campus with the proposed designation and the existing charter school campus(es) have distinctly different requirements in their respective written performance agreements; and

(ii) the extent to which the performance agreement for the [~~proposed school~~] campus with the proposed designation imposes higher standards than those imposed by TEC, §12.104(b)(2)(L).

(F) Failure to meet any standard or requirement outlined in this paragraph or agreed to in a performance agreement under subparagraph (B)(iv) of this paragraph shall mean the immediate termination of any federal charter school program grant and/or any waiver exempting a charter from some of the expansion amendment requirements that may have been granted to a charter holder as a result of the new school designation.

(13) High-quality campus designation [~~High-Quality Campus Designation~~]. A high-quality campus designation [~~High-Quality Campus Designation~~] is a separate designation and must be paired with an expansion amendment. If approved by the commissioner, this designation permits a charter holder to establish an additional charter school campus under an existing open-enrollment charter school pursuant to federal non-regulatory guidance. Charter holders of charter schools that receive high-quality campus designation [~~High-Quality Campus Designation~~] from the commissioner will be eligible to participate in the charter school program competitive grant process when federal funding for the Texas charter school program is available.

(A) The commissioner may approve a high-quality campus designation [~~High-Quality Campus Designation~~] for a charter only if:

(i) the charter holder meets all requirements applicable to an expansion amendment set forth in this section and has operated at least one charter school campus in Texas for a minimum of five consecutive years;

(ii) the charter school has been evaluated under the accountability rating system established in §97.1001 of this title, currently has [~~with~~] at least 50% of the student population in grades as-

sessed by the state accountability system, has an accreditation status of Accredited, [~~and~~] is currently evaluated under the standard accountability procedures, currently has [~~and received~~] the highest or second highest district rating, and received the highest or second highest rating in two of the last four ratings [~~for three of the last five years~~] with all of the campuses operated under the charter also receiving the highest or second highest rating as defined by §100.1001(26) of this title in the most recent state accountability ratings;

(iii) no charter campus has been identified for federal interventions in the most current report;

(iv) the charter school is not under any sanction imposed by TEA authorized under TEC, Chapter 39; Chapter 97, Subchapter EE, of this title [~~(relating to Accreditation Status, Standards, and Sanctions)~~]; or federal requirements;

(v) the charter holder completes an application approved by the commissioner;

(vi) the new charter school campus that receives the high-quality campus designation will serve at least 100 students in its third [~~first~~] year of operation;

(vii) the amendment complies with all requirements of this paragraph; and

(viii) the commissioner determines that the designation is in the best interest of the students of Texas.

(B) In addition to the requirements of subparagraph (A) of this paragraph, the commissioner may approve a high-quality campus designation [~~High-Quality Campus Designation~~] only if the campus with the proposed designation [~~on making the following written findings~~]:

(i) [~~the proposed school~~] satisfies each element of the definition of a public charter school as set forth in federal law;

(ii) [~~the proposed school campus~~] is separate and distinct from the existing charter school campus(es) established under the open-enrollment charter school with a separate facility and county-district-campus number; and

(iii) is governed, in the school's amended contract, by [~~the open-enrollment charter school, as amended, includes~~] a separate written performance agreement [~~for the proposed school campus~~] that meets the requirements of federal law and TEC, §12.111(a)(3) and (4).

(C) In making the findings required by subparagraph (B)(i) and (iii) of this paragraph, the commissioner shall consider:

(i) the terms of the open-enrollment charter school as a whole, as modified by the high-quality campus designation [~~High-Quality Campus Designation~~]; and

(ii) whether the [~~proposed school~~] campus with the proposed designation shall be established and recognized as a separate school under Texas law.

(D) In making the findings required by subparagraph (B)(ii) of this paragraph, the commissioner shall consider whether the [~~proposed school~~] campus with the proposed designation and the existing charter school campus(es) have separate sites, employees, student populations, and governing bodies and whether their day-to-day operations are carried out by different officers. The presence or absence of any one of these elements, by itself, does not determine whether the [~~proposed school~~] campus with the proposed designation will be found to be separate or part of an existing school. However, the presence or absence of several elements will inform the commissioner's decision.

(E) In making the finding required by subparagraph (B)(iii) of this paragraph, the commissioner shall consider:

(i) whether the [~~proposed school~~] campus with the proposed designation and the existing charter school campus(es) have distinctly different requirements in their respective written performance agreements;

(ii) whether an annual independent financial audit of the [~~proposed school~~] campus with the proposed designation is to be conducted. The high-quality campus must have a plan for a separate audit schedule apart from the open-enrollment charter school audit; and

(iii) the extent to which the performance agreement for the [~~proposed school~~] campus with the proposed designation imposes higher standards than those imposed by TEC, §12.104(b)(2)(L).

(F) Failure to meet any standard or requirement outlined in this paragraph or agreed to in a performance agreement under subparagraph (B)(iii) of this paragraph shall mean the immediate termination of any federal charter school program grant and/or any waiver exempting a charter from some of the expansion amendment requirements that may have been granted to a charter holder as a result of the high-quality campus designation [~~High-Quality Campus Designation~~].

(14) Delegation amendment. A delegation amendment is an amendment that permits a charter holder to delegate, pursuant to §100.1101(c) of this title (relating to Delegation of Powers and Duties), the powers or duties of the governing body of the charter holder to any other person or entity.

(A) The commissioner may approve a delegation amendment only if:

(i) the charter holder meets all requirements applicable to delegation amendments and amendments generally;

(ii) the amendment complies with all requirements of Chapter 100, Subchapter AA, Division 5, of this title (relating to Charter School Governance); and

(iii) the commissioner determines that the amendment is in the best interest of the students enrolled in the charter school.

(B) The commissioner may grant the amendment without condition or may require compliance with such conditions and/or requirements as may be in the best interest of the students enrolled in the charter school.

(C) The following powers and duties must generally be exercised by the governing body of the charter holder itself, acting as a body corporate in meetings posted in compliance with Texas Government Code, Chapter 551. Absent a specific written exception of this subparagraph, setting forth good cause why a specific function listed in clauses (i)-(vi) of this subparagraph cannot reasonably be carried out by the charter holder governing body, the commissioner may not grant an amendment delegating such functions to any person or entity through a contract for management services or otherwise. An amendment that is not authorized by such a specific written exception is not effective for any purpose. Absent such exception, the governing body of the charter holder shall not delegate:

(i) final authority to hear or decide employee grievances, citizen complaints, or parental concerns;

(ii) final authority to adopt or amend the budget of the charter holder or the charter school, or to authorize the expenditure or obligation of state funds or the use of public property;

(iii) final authority to direct the disposition or safekeeping of public records, except that the governing body may dele-

gate this function to any person, subject to the governing body's superior right of immediate access to, control over, and possession of such records;

(iv) final authority to adopt policies governing charter school operations;

(v) final authority to approve audit reports under TEC, §44.008(d); or

(vi) initial or final authority to select, employ, direct, evaluate, renew, non-renew, terminate, or set compensation for the superintendent or, as applicable, the administrator serving as the educational leader and chief executive officer.

(D) The following powers and duties must be exercised by the superintendent or, as applicable, the administrator serving as the educational leader and chief executive officer of the charter school. Absent a specific written exception of this subparagraph, setting forth good cause why a specific function listed in clauses (i)-(iii) of this subparagraph cannot reasonably be carried out by the superintendent or, as applicable, the administrator serving as the educational leader and chief executive officer of the charter school, the commissioner may not grant an amendment permitting the superintendent/chief executive officer to delegate such function through a contract for management services or otherwise. An amendment that is not authorized by such a specific written exception is not effective for any purpose. Absent such exception, the superintendent/chief executive officer of the charter school shall not delegate final authority:

(i) to organize the charter school's central administration;

(ii) to approve reports or data submissions required by law; or

(iii) to select and terminate charter school employees or officers.

(c) Required forms and formats. The TEA division responsible for charter schools may develop and promulgate, from time to time, forms or formats for requesting charter amendments under this section. If a form or format is promulgated for a particular type of amendment, it must be used to request an amendment of that type.

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 18, 2019.

TRD-201904325
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 216. CONTINUING COMPETENCY

22 TAC §216.8

The Texas Board of Nursing (Board) proposes amendments to §216.8, concerning Relicensure Process. The amendments make conforming changes to the section for consistency with §216.3, which was amended by the Board and published in the *Texas Register* on November 15, 2019.

The changes to §216.3 were adopted under the authority of the Texas Occupations Code §§301.151, 157.0513 and 301.308, the Texas Health and Safety Code §481.0764 and §481.07635, and House Bills (HB) 2454, 2059, 3285, and 2174, enacted by the 86th Texas Legislature. Those adopted amendments affected §216.3(c) and added new §216.3(i), making the current references in §216.8 inconsistent and outdated. The proposed changes to §216.8 align the section with the provisions of newly amended §216.3.

Section by Section Overview. Section 216.8(b) - (e) eliminate the references to §216.3(d) because targeted continuing competency requirements are contained in other subsections of §216.3 and may apply when a nurse seeks reinstatement pursuant to §216.8.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments are in effect, there will be no anticipated change in the revenue to state government as a result of the enforcement or administration of the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the adoption of rules that are internally consistent and easy to understand. There are no anticipated costs of compliance associated with the proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses and Rural Communities. The Government Code §2006.002(c) and (f) require, that if a proposed rule may have an economic impact on small businesses or micro businesses or rural communities, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and communities and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. However, the proposal does not impose any costs on any entity regulated by the Board. As such, the Board is not required to prepare an economic impact statement or regulatory flexibility analysis.

Government Growth Impact Statement. The Board is required, pursuant to Tex. Gov't Code §2001.0221 and 34 TAC §11.1, to prepare a government growth impact statement. The Board has determined for each year of the first five years the proposed amendments will be in effect: (i) the proposal does not create or eliminate a government program; (ii) the proposal does not affect existing employee positions by creating or eliminating any positions; (iii) implementation of the proposal does not require an increase or decrease in future legislative appropriations to the Board; (iv) the proposal does not affect fees paid to the Board; (v) the proposal does not create a new regulation; (vi) the proposal amends an existing regulation applicable to licensees consistent with changes in statute resulting from the 86th Legislative Session; (vii) the proposal does not extend to new entities not previously subject to the rule; and (viii) the proposal will not affect the state's economy.

Takings Impact Assessment. The Board has determined that no private real property interests are affected by this proposal

and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Request for Public Comment. Comments on this proposal should be submitted to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. Comments must be received no later than thirty (30) days from the date of publication of this proposal. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the Occupations Code §301.151.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Cross Reference To Statute. This proposal affects the Texas Occupations Code §301.151.

§216.8. Relicensure Process.

(a) (No change.)

(b) Persons licensed by examination. A candidate licensed by examination shall be exempt from the CNE contact hours or approved national nursing certification requirement for issuance of the initial Texas license and for the immediate licensing period following initial Texas licensure with the exception of applicable targeted continuing competency requirements in [~~under~~] §216.3[~~(d)~~] of this chapter (relating to Continuing Competency Requirements).

(c) Persons licensed by endorsement. An applicant licensed by endorsement shall be exempt from the CNE contact hours or approved national nursing certification requirement for issuance of the initial Texas license and for the immediate licensing period following initial Texas licensure with the exception of applicable targeted continuing competency requirements in [~~under~~] §216.3[~~(d)~~] of this chapter (relating to Continuing Competency Requirements).

(d) Delinquent license.

(1) A license that has been delinquent for less than four years may be renewed by the licensee submitting proof of having completed 20 contact hours of acceptable CNE or a current approved national nursing certification in his or her prior area of practice within the two years immediately preceding application for relicensure and by meeting all other Board requirements. A licensee shall be exempt from the continuing competency requirements for the immediate licensing period following renewal of the delinquent license with the exception of applicable targeted continuing competency requirements in [~~under~~] §216.3[~~(d)~~] of this chapter (relating to Continuing Competency Requirements).

(2) (No change.)

(e) Reactivation of a license.

(1) A license that has been inactive for less than four years may be reactivated by the licensee submitting proof of having completed 20 contact hours of acceptable CNE or a current approved national nursing certification in his or her prior area of practice within the two years immediately preceding application for reactivation and by meeting all other Board requirements. A licensee shall be exempt from the continuing competency requirements for the immediate licensing period following reactivation of the license with the exception of targeted continuing competency requirements in [~~under~~] §216.3[~~(d)~~] of this chapter (relating to Continuing Competency Requirements).

(2) (No change.)

(f) (No change.)

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

Filed with the Office of the Secretary of State on November 15, 2019.

TRD-201904285
Jena Abel
Deputy General Counsel
Texas Board of Nursing
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-6822

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CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.3

Introduction. The Texas Board of Nursing (Board) proposes an amendment to §217.3, concerning Temporary Authorization to Practice/Temporary Permit. The amendment is necessary to allow temporary authorizations to practice/temporary permits to be re-issued if a nurse is unable to complete the required courses/orientation within a six-month period. Due to scheduling challenges and an individual's performance pace, it sometimes takes a nurse longer than six months to complete a refresher course, extensive orientation, or academic course. The intent of §217.3 is to provide a mechanism for nurses to demonstrate their competency to return to nursing practice. Since they cannot practice nursing while completing a refresher course, extensive orientation, or academic course, they pose no risk of harm to the public during this time. The amendment merely allows the nurse a sufficient amount of time to re-establish current licensure after demonstrating he/she is safe and competent to do so. There is no cost associated with the issuance of a temporary authorization to practice/temporary permit under this section.

Section by Section Overview. Section 217.3 removes the current limitation from the rule that a temporary authorization to practice/temporary permit is unable to be re-issued/renewed. Under the proposal, a temporary authorization to practice/temporary permit may be re-issued/renewed if the nurse is unable to complete a refresher course, extensive orientation, or academic course within a six-month time period in order to grant the nurse additional time to complete the course/orientation.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments are in effect, there will be no anticipated change in the revenue to state government as a result of the enforcement or administration of the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the adoption of a rule that provides additional flexibility to nurses who are attempting to demonstrate competency necessary to obtain relicensure. There are no anticipated costs of compliance associated with the proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses and Rural Communities. The Government Code §2006.002(c) and (f) require, that if a proposed rule may have an economic impact on small businesses or micro businesses or rural communities, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and communities and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. However, the proposal does not impose any costs on any entity regulated by the Board. As such, the Board is not required to prepare an economic impact statement or regulatory flexibility analysis.

Government Growth Impact Statement. The Board is required, pursuant to Tex. Gov't Code §2001.0221 and 34 Texas Administrative Code §11.1, to prepare a government growth impact statement. The Board has determined for each year of the first five years the proposed amendments will be in effect: (i) the proposal does not create or eliminate a government program; (ii) the proposal does not affect existing employee positions by creating or eliminating any positions; (iii) implementation of the proposal does not require an increase or decrease in future legislative appropriations to the Board; (iv) the proposal does not affect fees paid to the Board; (v) the proposal does not create a new regulation; (vi) the proposal amends an existing regulation; (vii) the proposal does not extend to new entities not previously subject to the rule; and (viii) the proposal will not affect the state's economy.

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

Request for Public Comment. Comments on this proposal should be submitted to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. Comments must be received no later than thirty (30) days from the date of publication of this proposal. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the Occupations Code §301.151.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Cross Reference To Statute. This proposal affects the Texas Occupations Code §301.151.

§217.3. Temporary Authorization to Practice/Temporary Permit.

(a) (No change.)

(b) A nurse who has not practiced nursing for four or more years may be issued a temporary permit for the limited purpose of completing a refresher course, extensive orientation to the practice of professional or vocational nursing, whichever is applicable, or academic course. The permit is valid for six months [~~and is nonrenewable~~].

(c) (No change.)

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

Filed with the Office of the Secretary of State on November 15, 2019.

TRD-201904283
Jena Abel
Deputy General Counsel
Texas Board of Nursing
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-6822

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22 TAC §217.5

The Texas Board of Nursing (Board) proposes amendments to §217.5, concerning Temporary License and Endorsement. The amendments are proposed under the authority of the Texas Occupations Code §301.151 and §301.253 and implement the requirements of Senate Bill (SB) 1200, enacted by the 86th Texas Legislature, effective September 1, 2019.

SB 1200

SB 1200 requires agencies like the Board to establish a process to allow qualifying military spouses to practice nursing in Texas without obtaining a license. In order to qualify for this licensure exemption, the military spouse must be currently licensed in good standing by another jurisdiction that has licensing requirements that are substantially equivalent to the requirements in this state. Further, the military spouse must notify the agency of his/her intent to practice in this state; submit proof of the individual's residency in this state and a copy of the individual's military identification card; and receive confirmation from the agency that the agency has verified the individual's license in the other jurisdiction and that the individual is authorized to practice nursing in this state. The individual may not practice nursing in this state for a period to extend beyond three years from the date the agency approves the individual's practice. The bill also permits an agency to issue a license to a qualifying military spouse if the agency chooses to do so. However, the agency is prohibited from charging the military spouse a fee for the issuance of the license.

Because employers, consumers, and other members of the public routinely utilize the Board's on-line licensure verification system to determine the licensure status of nurses in Texas, the Board has determined that issuing licenses to qualifying military spouses is most consistent with its current licensure and verification processes. These licenses will be limited to three year terms and will be searchable through the Board's on-line verification system in the same manner as other license types. Further, individuals receiving a license under the proposal will not be required to complete continuing education requirements for

the duration of the license, which is limited to a three-year time period.

Canadian NCLEX-RN

The remainder of the proposed changes are necessary to allow the successful completion of the Canadian NCLEX-RN and licensure from a Canadian province by NCLEX-RN to satisfy a portion of the Board's endorsement requirements. On January 5, 2015, the NCLEX-RN replaced the CRNE as Canada's national examination for those applying to be a registered nurse. The Board currently requires the successful completion of the U.S. NCLEX-RN for licensure as a registered nurse in Texas if the applicant is applying by endorsement. The Board also currently requires licensure by another U.S jurisdiction for licensure as a registered nurse in Texas if the applicant is applying by endorsement. The proposed amendments extend this licensure opportunity to applicants successfully passing the Canadian NCLEX-RN and holding licensure from a Canadian province by NCLEX-RN. This opportunity will only apply to applicants seeking registered nurse licensure because the Canadian NCLEX-PN has not been approved for use at this time.

Section by Section Overview. Under the Board's current rules, a nurse may seek licensure in Texas through endorsement if certain criteria are met. Proposed §217.5(a)(2) allows a nurse to qualify for licensure in Texas through endorsement if he/she has successfully completed the Canadian NCLEX-RN in January 2015 or after. Proposed §217.5(a)(3) allows a nurse to qualify for licensure in Texas through endorsement if the nurse is licensed by a Canadian province by NCLEX-RN. The proposed amendments to §217.5(b) make similar conforming changes to the section.

Proposed §217.5(g)(1) sets forth the criteria that a military spouse must meet in order to be eligible for licensure under SB 1200. First, a military spouse must hold an active, current license to practice nursing in another state or territory that has licensing requirements, including education requirements, that are determined by the Board to be substantially equivalent to the requirements for nursing licensure in Texas. Second, the military spouse's license may not be subject to any current restriction, eligibility order, disciplinary order, probation, suspension, or other encumbrance. Third, the military spouse must submit proof of the military spouse's residency in Texas and a copy of the spouse's military identification card. Fourth, the military spouse must notify the Board of the military spouse's intent to practice nursing in Texas on a form prescribed by the Board. Finally, the military spouse must meet the Board's fitness to practice and eligibility criteria set forth in §213.27 (relating to Good Professional Character), §213.28 (relating to Licensure of Individuals with Criminal History), and §213.29 (relating to Fitness to Practice). Proposed §217.5(g)(2) provides that, if the military spouse meets this specified criteria, the Board will issue a license to the military spouse to practice nursing in Texas. Further, the license will expire no later than the third anniversary of the date of the issuance of the license and may not be renewed. The military spouse will not be charged a fee for the issuance of the license. Proposed §217.5(g)(3) provides that a military spouse who is unable to meet the specified criteria in (g)(1) may still seek licensure in Texas, pursuant to the requirements in §217.2 (relating to Licensure by Examination for Graduates of Nursing Education Programs Within the United States, its Territories, or Possessions), §217.4 (relating to Requirements for Initial Licensure by Examination for Nurses Who Graduate from Nursing Education Programs Outside of United States' Jurisdiction), §213.30 (relating to Declaratory Order of Eligibility for Licensure), §221.3 (relating to APRN Education Requirements for Licensure), §221.4 (relating to Licensure as an APRN), or the other remaining subsections of §217.5, as applicable. Finally, proposed §217.5(g)(4) requires a military spouse issued a license to practice nursing in Texas to comply with all laws and regulations applicable to the practice of nursing in Texas.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments are in effect, there will be no anticipated change in the revenue to state government as a result of the enforcement or administration of the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the adoption of a rule that complies with the statutory mandates of SB 1200 and extends licensure opportunities to qualifying Canadian nurses wishing to endorse into Texas.

There are no anticipated costs of compliance associated with the proposal. There are no licensure fees associated with issuing a license to a qualifying military spouse under the proposal. Further, there are no costs associated with the remaining amendments that expand the licensure opportunities for endorsement to nurses passing the Canadian NCLEX-RN and holding licensure in a Canadian province by NCLEX-RN. In contrast, the proposal may result in cost savings to some individuals who will be able to obtain a Texas nursing license in a more efficient and faster manner than under the Board's current licensure requirements. Because the proposal is not anticipated to result in new costs of compliance, the Board is not required to comply with the requirements of Tex. Gov't Code. §2001.0045(b).

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses and Rural Communities. The Government Code §2006.002(c) and (f) require that if a proposed rule may have an economic impact on small businesses or micro businesses or rural communities, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and communities and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The proposal does not impose any costs on any entity regulated by the Board. As such, the Board is not required to prepare an economic impact statement and regulatory flexibility analysis.

Government Growth Impact Statement. The Board is required, pursuant to Tex. Gov't Code §2001.0221 and 34 TAC §11.1, to prepare a government growth impact statement. As a result, the Board has determined for each year of the first five years the proposed amendments will be in effect: (i) the proposal does not create or eliminate a government program; (ii) the proposal does not affect existing employee positions by creating or eliminating any positions; (iii) implementation of the proposal does not require an increase or decrease in future legislative appropriations to the Board; (iv) the proposal does not affect fees paid to the Board; (v) the proposal creates a new process for military spouse licensure, in compliance with SB 1200; (vi) the proposal amends an existing regulation applicable to qualifying Canadian nurses wishing to endorse into Texas; (vii) the proposal extends to new entities not previously subject to the rule; namely military spouses qualifying for licensure under SB 1200 and Canadian

nurses wishing to endorse into Texas; and (viii) the proposal will not affect the state's economy.

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

Request for Public Comment. Comments on this proposal should be submitted James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. Comments must be received no later than thirty (30) days from the date of publication of this proposal. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the Occupations Code §§301.151, 301.253, and 55.0041.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Section 301.253(a) states that, except as provided by §301.452, an applicant is entitled to take the examination prescribed by the Board if: (1) the Board determines that the applicant meets the qualifications required by §301.252; and (2) the applicant pays the fees required by the Board.

Section 301.253(b) states that each examination administered under Section 301.253 must be prepared by a national testing service or the Board. The Board shall ensure that the examination is administered in various cities throughout the state.

Section 301.253(c) provides that the examination shall be designed to determine the fitness of the applicant to practice professional nursing or vocational nursing.

Section 301.253(c-1) states that the Board shall: (1) adopt policies and guidelines detailing the procedures for the testing process, including test admission, test administration, and national examination requirements; and (2) post on the Board's Internet website the policies that reference the testing procedures by the national organization selected by the board to administer an examination.

Section 301.253(d) states that the Board shall determine the criteria that determine a passing score on the examination. The criteria may not exceed those required by the majority of the states.

Section 301.253(e) provides that a written examination prepared, approved, or offered by the Board, including a standardized national examination, must be validated by an independent testing professional.

Section 301.253(f) states that the Board shall develop a written refund policy regarding examination fees that: (1) defines the reasonable notification period and the emergencies that would qualify for a refund; and (2) does not conflict with any examination fee or refund policy of the testing service involved in administering the examination.

Section 301.253(g) states that the Board may recommend to a national testing service selected by the Board to offer examinations under this section the Board's written policy for refunding an examination fee for an applicant who: (1) provides advance notice of the applicant's inability to take the examination; or (2) is unable to take the examination because of an emergency.

Section 55.041(a) provides that, notwithstanding any other law, a military spouse may engage in a business or occupation for which a license is required without obtaining the applicable license if the spouse is currently licensed in good standing by another jurisdiction that has licensing requirements that are substantially equivalent to the requirements for the license in this state.

Section 55.041(b) states that before engaging in the practice of the business or occupation, the military spouse must: (1) notify the applicable state agency of the spouse's intent to practice in this state; (2) submit to the agency proof of the spouse's residency in this state and a copy of the spouse's military identification card; and (3) receive from the agency confirmation that: (A) the agency has verified the spouse's license in the other jurisdiction; and (B) the spouse is authorized to engage in the business or occupation in accordance with this section.

Section 55.041(c) provides that the military spouse shall comply with all other laws and regulations applicable to the business or occupation in this state.

Section 55.041(d) states that a military spouse may engage in the business or occupation under the authority of this section only for the period during which the military service member to whom the military spouse is married is stationed at a military installation in this state but not to exceed three years from the date the spouse receives the confirmation described by §55.041(b)(3).

Section 55.041(e) provides that a state agency that issues a license shall adopt rules to implement this section. The rules must establish a process for the agency to: (1) identify, with respect to each type of license issued by the agency, the jurisdictions that have licensing requirements that are substantially equivalent to the requirements for the license in this state; and (2) verify that a military spouse is licensed in good standing in a jurisdiction described by Subdivision (1).

Section 55.041(f) provides that, in addition to the rules adopted under §55.041(e), a state agency that issues a license may adopt rules to provide for the issuance of a license to a military spouse to whom the agency provides confirmation under §55.041 (b)(3). A license issued under this subsection must expire not later than the third anniversary of the date the agency provided the confirmation and may not be renewed. A state agency may not charge a fee for the issuance of the license.

§217.5. Temporary License and Endorsement.

(a) A nurse who has practiced nursing in another state within the four years immediately preceding a request for temporary licensure and/or permanent licensure by endorsement may obtain a non-renewable temporary license, which is valid for 120 days, and/or a permanent license for endorsement by meeting the following requirements:

(1) (No change.)

(2) Satisfactory completion of the licensure examination according to Board established minimum passing scores:

(A) (No change).

(B) Registered Nurse Licensure Examination:

(i) (No change.)

(ii) Prior to February 1989--a minimum score of 1600 on the NCLEX-RN; [~~and~~]

(iii) February 1989 and after, must have achieved a passing report on the NCLEX-RN; and

(iv) January 2015 and after, for applicants taking the Canadian NCLEX-RN, must have achieved a passing report on the Canadian NCLEX-RN;

(3) Licensure by another U.S. jurisdiction or licensure from a Canadian province by NCLEX-RN;

(4) - (8) (No change.)

(b) A nurse who has not practiced nursing in another state or taken the NCLEX-RN within the four years immediately preceding a request for temporary licensure and/or permanent licensure by endorsement will be required to:

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

(c) - (f) (No change.)

(g) Out-of-State Licensure of Military Spouse.

(1) Pursuant to Texas Occupations Code §55.0041, a military spouse is eligible to practice nursing in Texas if the military spouse:

(A) holds an active, current license to practice nursing in another state or territory:

(i) that has licensing requirements, including education requirements, that are determined by the Board to be substantially equivalent to the requirements for nursing licensure in Texas; and

(ii) is not subject to any current restriction, eligibility order, disciplinary order, probation, suspension, or other encumbrance;

(B) submits proof of the military spouse's residency in Texas and a copy of the spouse's military identification card;

(C) notifies the Board of the military spouse's intent to practice nursing in Texas on a form prescribed by the Board; and

(D) meets the Board's fitness to practice and eligibility criteria set forth in §213.27 (relating to Good Professional Character), §213.28 (relating to Licensure of Individuals with Criminal History), and §213.29 (relating to Fitness to Practice) of this title.

(2) If a military spouse meets the criteria set forth in this subsection, the Board will issue a license to the military spouse to practice nursing in Texas. A license issued under this subsection expires no later than the third anniversary of the date of the issuance of the license and may not be renewed. The military spouse will not be charged a fee for the issuance of the license.

(3) A military spouse who is unable to meet the criteria set forth in this subsection remains eligible to seek licensure in Texas, as set forth in §217.2 (relating to Licensure by Examination for Graduates of Nursing Education Programs Within the United States, its Territories, or Possessions), §217.4 (relating to Requirements for Initial Licensure by Examination for Nurses Who Graduate from Nursing Education Programs Outside of United States' Jurisdiction), §221.3 (relating to APRN Education Requirements for Licensure), §221.4 (relating to Licensure as an APRN), §213.30 (relating to Declaratory Order of Eligibility for Licensure), or the other remaining subsections of this section.

(4) While practicing nursing in Texas, the military spouse must comply with all laws and regulations applicable to the practice of nursing in Texas.

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

Filed with the Office of the Secretary of State on November 15, 2019.

TRD-201904284
Jena Abel
Deputy General Counsel
Texas Board of Nursing
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-6822

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 322. PRACTICE

22 TAC §322.5

The Texas Board of Physical Therapy Examiners proposes amending §322.5. Telehealth in response to a petition for adoption of rule changes.

The amendment is proposed in order to clarify the role of the physical therapist assistant in the provision of physical therapy via telehealth.

Fiscal Note

Ralph A. Harper, Executive Director of the Executive Council of Physical Therapy & Occupational Therapy Examiners, has determined that for the first five-year period these amendments are in effect there would be no increase or loss of revenue to the state. No fiscal implication to units of local government is anticipated as a result of enforcing or administering the rules.

Public Benefits and Costs

Mr. Harper has also determined that for the first five-year period these amendments are in effect the public benefit will be increasing consumer access to physical therapy services by allowing physical therapist assistants to provide physical therapy treatment via telehealth under the delegation and supervision of a physical therapist. There will be no economic cost to physical therapist assistants who will provide treatment via telehealth as no new fee will be imposed.

Local Employment Economic Impact Statement

The amendments are not anticipated to impact a local economy, so a local employment economic impact statement is not required.

Small and Micro-Businesses and Rural Communities Impact

Mr. Harper has determined that there will be no costs or adverse economic effects to small or micro-businesses or rural communities; therefore, an economic impact statement or regulatory flexibility analysis is not required.

Government Growth Impact Statement

During the first five-year period these amendments are in effect, the impact on government growth is as follows: the proposed amendment will neither create nor eliminate a government program; will neither create new employee positions nor eliminate existing employee positions; will neither increase nor decrease future legislative appropriations to the agency; will neither require an increase nor a decrease in fees paid to the agency; amends an existing regulation by authorizing a physical therapist assistant to treat a patient via telehealth; will increase the number of licensees subject to the rule's applicability with the addition of physical therapist assistants authorized to provide physical therapy services via telehealth.

Takings Impact Assessment

The proposed rule amendments will not impact private real property as defined by Tex. Gov't Code §2007.003, so a takings impact assessment under Tex. Gov't Code §2001.043 is not required.

Requirement for Rule Increasing Costs to Regulated Persons

Tex. Gov't Code §2001.0045, Requirement for Rule Increasing Costs to Regulated Persons, does not apply to this proposed rule because the amendments will not increase costs to regulated persons and are necessary in response to a petition for adoption of rules changes.

Public Comment

Comments on the proposed amendments may be submitted to Karen Gordon, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: karen@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

Statutory Authority

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Cross-reference to Statute

The proposed amendment implements provisions in Sec. 453.005, Occupations Code in response to a petition for adoption of rule changes.

§322.5. Telehealth.

(a) When used in the rules of the Texas Board of Physical Therapy Examiners, telehealth is the use of telecommunications or information technology to provide physical therapy services to a patient who is physically located at a site in Texas other than the site where the physical therapist or physical therapist assistant is located, whether or not in Texas.

(b) Physical therapy telehealth services must be provided by a physical therapist or physical therapist assistant under the supervision of the physical therapist who possesses a current:

(1) unrestricted Texas license; or

(2) Compact Privilege to practice in Texas.

(c) The provision of physical therapy services via telehealth requires synchronous audiovisual or audio interaction between the physical therapist or physical therapist assistant and the patient/client, which may be accompanied by the use of asynchronous store and forward technology.

(d) Standard of Care. A physical therapist or physical therapist assistant that provides telehealth services:

(1) is subject to the same standard of care that would apply to the provision of the same physical therapy service in an in-person setting; and

(2) the physical therapist is responsible for determining whether an evaluation or intervention may be conducted via telehealth or must be conducted in an in-person setting.

(e) Informed Consent. A physical therapist that provides telehealth services must obtain and maintain the informed consent of the patient, or of another individual authorized to make health care treatment decisions for the patient, prior to the provision of telehealth services.

(f) Confidentiality. A physical therapist or physical therapist assistant that provides telehealth services must ensure that the privacy and confidentiality of the patient's medical information is maintained during and following the provision of telehealth services, including compliance with HIPAA regulations and other federal and state law.

(g) The failure of a physical therapist or physical therapist assistant to comply with this section shall constitute detrimental practice and could subject the licensee to disciplinary action by the Board.

(h) Provision of telehealth services by a physical therapist assistant, must occur under the supervision of the physical therapist is accordance with rule §322.3 of this title (relating to Supervision).

[~~(h) A physical therapist assistant may not provide telehealth services but may be present at the same location as the patient to assist the physical therapist in providing telehealth services.~~]

(i) Telehealth is a mode for providing one-on-one physical therapy services to a patient/client and is not a means for supervision of [~~physical therapist assistants or~~] physical therapy aides.

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 12, 2019.

TRD-201904217
Ralph A. Harper
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-6900

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

22 TAC §501.91

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.91, concerning Reportable Events.

Background, Justification and Summary

The amendment to §501.91 revises subsection (d) to make it clear that firms and licensees are not required to report an un-appealable adverse finding in any state or federal court or agreed settlement in a civil action or an agreed consent order or settlement with a regulatory authority or a negotiated settlement evidencing deficient accounting services when no Texas licensee is involved or no harm has been caused to an entity located in Texas.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed amendment will clarify when settlements or adverse findings in a civil court against a licensee must be reported to the Board.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; does not expand, limit or repeal an existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8) Texas Government Code).

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on December 30, 2019.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment 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 Board 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 Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.91. Reportable Events.

(a) A licensee or certificate holder shall report in writing to the board the occurrence of any of the following events within 30 days of the date the licensee or certificate holder has knowledge of these events:

(1) the filing of criminal charges or the conviction or imposition of deferred adjudication of the licensee or certificate holder of:

(A) a felony;

(B) a crime of moral turpitude as listed in §519.7(a)(2) of this title (relating to Criminal Offenses that May Subject a Licensee or Certificate Holder to Discipline or Disqualify a Person from Receiving a License);

(C) a crime of which fraud or dishonesty is an element as listed in §519.7(a)(1) of this title;

(D) a crime that involves alcohol abuse or controlled substances as listed in §519.7(a)(3) of this title;

(E) a crime of physical injury or threats of physical injury to a person as listed in §519.7(a)(4) of this title; or

(F) a crime related to the qualifications, functions, or duties of a public accountant or CPA, or to acts or activities in the course and scope of the practice of public accountancy or as a fiduciary;

(2) the cancellation, revocation, or suspension or a voluntary consent decree of the right to practice as a CPA or a public accountant by any governmental body or agency or state, foreign country, or other jurisdiction for a reason other than the failure to pay the appropriate authorization fee;

(3) an un-appealable adverse finding in any state or federal court, an agreed settlement in a civil action against the licensee or certificate holder, or an agreed consent order or settlement with a regulatory authority or licensing body concerning professional accounting services or professional accounting work;

(4) a negotiated settlement evidencing deficient accounting services; or

(5) the revocation, suspension, or voluntary consent decree or any limitation on a professional license from any state or federal regulatory agency such as an insurance license or a securities license, resulting from an un-appealable adverse finding.

(b) The report required by subsections (a) and (c) of this section shall be signed by the licensee or certificate holder and shall set forth the facts which constitute the reportable event. If the reportable event involves the action of an administrative agency or court, then the report shall set forth the title of the matter, court or agency name, docket number, and dates of occurrence of the reportable event.

(c) Regardless of whether a civil suit or administrative adjudicatory action has been filed, a licensee shall notify the board within 30 days of any written settlement agreement in which a licensee has been released from any or all claims or liabilities grounded, in whole or in part, upon an allegation of:

(1) professional negligence, gross negligence, dishonesty, fraud, misrepresentation, incompetence; or

(2) a violation of any consent order or settlement with a regulatory or licensing body concerning professional accounting services or professional accounting work.

(d) A licensee is not required to report to the board any of the events set forth in subsections (a)(3), (a)(4) and [~~subsection~~] (c) of this section when no Texas licensee is involved in the event or no harm has been caused to a person or entity located in Texas. The firm may contact the board to determine what may constitute involvement or harm to a person or entity located in Texas.

(e) Nothing in this section imposes a duty upon any licensee or certificate holder to report to the board the occurrence of any of the events set forth in subsections (a) and (c) of this section either by or against any other licensee or certificate holder.

(f) As used in this section, a conviction includes the initial plea, verdict, or finding of guilt, plea of no contest, or pronouncement of sentence by a trial court, even though that conviction may not be final or sentence may not be actually imposed until all appeals are exhausted.

(g) Confidentiality provisions in the terms of any settlement of the reportable events described in subsections (a) and (c) of this section shall not limit the licensee's or certificate holder's obligation to report such event and to cooperate fully with the board in any investigation. All information gathered or received by the board regarding a disciplinary action is confidential and not subject to disclosure under Chapter 552 of the Government Code (relating to Public Information) prior to public hearing.

(h) Interpretive Comment: A crime of moral turpitude is defined in this chapter as a crime involving grave infringement of the moral sentiment of the community and further defined in §501.90(19) of this chapter (relating to Discreditable Acts) and §519.7 of this title.

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

Filed with the Office of the Secretary of State on November 14, 2019.

TRD-201904250

J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-7842

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CHAPTER 513. REGISTRATION

SUBCHAPTER B. REGISTRATION OF CPA FIRMS

22 TAC §513.16

The Texas State Board of Public Accountancy (Board) proposes an amendment to §513.16, concerning Death or Incapacitation of Firm Owner.

Background, Justification and Summary

The amendment to §513.16 removes the requirement that medical affidavits be notarized.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The proposed amendment will eliminate the burden of an unnecessary notarization of the affidavit.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; does not expand, limit or repeal an existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8) Texas Government Code).

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on December 30, 2019.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment 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 Board 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 Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§513.16. Death or Incapacitation of Firm Owner.

(a) Upon written authorization from the executive director, a firm with only one CPA owner may continue to operate for a period of up to 15 months following the death or incapacitation of the sole CPA owner. The executive director, subject to ratification at the next board meeting, may permit the continued operation of the firm when he has been provided with:

(1) In the event of the death of the sole CPA owner:

(A) a certified copy of the sole CPA owner's death certificate;

(B) a copy of the power of attorney from the sole CPA owner's executor, administrator, or heir along with a document from the executor, administrator or heir designating a Texas CPA in good standing with the board with the authority and intention to manage the sole CPA owner's firm; and

(C) written evidence that a disruption in the continuation of the sole CPA owner's firm would jeopardize the survivability of the firm.

(2) In the event of the incapacitation of the sole CPA owner:

(A) an [~~a notarized~~] affidavit from the sole CPA owner's physician stating that the sole CPA owner, because of a severe ongoing physical, mental impairment or medical condition is not able to perform the day-to-day tasks necessary for the continued operation of the firm;

(B) a copy of a power of attorney or a court ordered guardianship along with a document from the holder of the power of attorney or the guardian designating a Texas CPA in good standing with the board with the authority and intention to manage the sole CPA owner's firm; and

(C) written evidence that a disruption of the continuation of the sole CPA owner's firm would jeopardize the survivability of the firm.

(b) Upon the death of a co-owner of a firm with a surviving CPA owner, the firm may continue to operate during the period the owner's estate is being probated. The firm's resident manager shall notify the board in the firm's next annual licensing application of the status of the firm's ownership.

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 14, 2019.

TRD-201904251
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-7842

CHAPTER 515. LICENSES

22 TAC §515.8

The Texas State Board of Public Accountancy (Board) proposes an amendment to §515.8, concerning Retired or Disability Status.

Background, Justification and Summary

The amendment to §515.8 removes the requirement that medical affidavits be notarized.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed amendment will eliminate the burden of an unnecessary notarization of the affidavit.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; does not expand, limit or repeal an existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8) Texas Government Code).

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on December 30, 2019.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment 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 Board 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 Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§515.8. Retired or Disability Status.

(a) Retired status. A licensee who is at least 60 years old and has filed a request on a form prescribed by the board stating that he has no association with accounting may be granted retired status at the time of license renewal. A licensee in retired status is exempt from the fingerprinting required in §515.1(d) of this chapter (relating to License). A licensee who has been granted retired status and who reenters the workforce in a position that has an association with accounting automatically loses the retired status except as provided for in subsection (a)(1) of this section, and must provide the fingerprinting required in §515.1(d) of this chapter unless previously submitted to the board.

(1) A licensee who serves without compensation on a Board of Directors, or Board of Trustees, or provides volunteer tax preparation services, participates in a government sponsored business mentoring program such as the Internal Revenue Service's Volunteer Income Tax Assistance (VITA) program or the Small Business Administration's SCORE program or participates in an advisory role for a similar charitable, civic or other non-profit organization continues to be eligible for retired status.

(2) Licensees providing such uncompensated volunteer services have the responsibility to maintain professional competence relative to the volunteer services they provide even though exempted from CPE requirements.

(3) The board shall require licensees to affirm in writing their understanding of the limited types of activities in which they may engage while in retired status and their understanding that they have a professional duty to ensure that they hold the professional competencies necessary to offer these limited volunteer services.

(4) Licensees may only convert to retired status if they hold a license in good standing and not be subject to any sanction or disciplinary action.

(5) Compensated services do not include routine reimbursement for travel costs and meals associated with the volunteer services or de minimis per diem amounts paid to cover such expenses.

(6) A retired licensee shall place the word "retired" adjacent to his CPA or Public Accountant title on any business card, letterhead or any other document. A licensee may be held responsible for a third party incorrectly repeating the CPA's title and shall make reasonable efforts to assure that the word "retired" is used in conjunction with CPA. Any of these terms must not be applied in such a manner that could likely confuse the public as to the current status of the licensee. The licensee will not be required to have a certificate issued with the word "retired" on the certificate.

(7) A licensee in "retired" status is not required:

(A) to maintain CPE; and

(B) provide fingerprinting in accordance with §515.1(d) of this chapter unless the retired status is removed.

(8) A retired licensee shall not offer or render professional services that requires his signature and use of the CPA title either with or without "retired" attached, except a retired licensee providing supervision of an applicant to take the UCPAE may sign the work experience form.

(9) Upon reentry into the workforce, the licensee must notify the board and request a new license renewal notice and:

(A) pay the license fee established by the board for the period since he became employed;

(B) complete a new license renewal notice; and

(C) meet the CPE requirements for the period since he was granted the retired status as required by §523.113(3) of this title (relating to Exemptions from CPE).

(b) Disability status. Disability status may be granted to an individual who submits to the board a statement and an [~~a notarized~~] affidavit from the licensee's physician which identifies the disability and states that the individual is unable to work because of a severe ongoing physical or mental impairment or medical condition that is not likely to improve within the next 12 consecutive months. This status may be granted only at the time of license renewal.

(1) Disability status is immediately revoked upon:

(A) the CPA reentering the workforce in a position that has an association with accounting work for which he receives compensation; or

(B) the CPA serving on a Board of Directors, Board of Trustees, or in a similar governance position unless the service is for a charity, civic, or similar non-profit organization.

(2) Upon reentry into the workforce under such conditions, the individual must notify the board and request a new license renewal notice and:

(A) pay the license fee established by the board for the period since he became employed;

(B) complete a new license renewal notice;

(C) meet the CPE requirements for the period pursuant to §523.113(3) of this title; and

(D) provide the fingerprinting required in §515.1(d) of this chapter unless previously submitted.

(c) For purposes of this section the term "association with accounting" shall include the following:

(1) working or providing oversight of accounting or supervising work performed in the areas of financial accounting and reporting; tax compliance, planning or advice; management advisory services; accounting information systems; treasury, finance, or audit; or

(2) representing to the public, including an employer, that the individual is a CPA or public accountant in connection with the sale of any services or products involving accounting services or work, as provided for in §501.52(22) of this title (relating to Definitions) including such designation on a business card, letterhead, proxy statement, promotional brochure, advertisement, or office; or

(3) offering testimony in a court of law purporting to have expertise in accounting and reporting, auditing, tax, or management services; or

(4) providing instruction in accounting courses; or

(5) for purposes of making a determination as to whether the individual fits one of the categories listed in this section the questions shall be resolved in favor of including the work as an "association with accounting."

(d) Nothing herein shall be construed to limit the board's disciplinary authority with regard to a license in retired or disabled status. All board rules and all provisions of the Act apply to an individual in retired or disability status.

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 14, 2019.

TRD-201904252

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Texas State Board of Public Accountancy
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-7842

CHAPTER 519. PRACTICE AND PROCEDURE
SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §519.2

The Texas State Board of Public Accountancy (Board) proposes an amendment to §519.2, concerning Definitions.

Background, Justification and Summary

The amendment to §519.2 revises the definition of deferred adjudication to eliminate the requirement for a pleading of guilt in order to be considered deferred adjudication.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed amendment will more clearly identify what constitutes deferred adjudication in light of the various methods used by the courts to defer a judgment contingent upon the defendant taking certain actions prior to trial or sentencing.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; does not expand, limit or repeal an existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8) Texas Government Code).

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on December 30, 2019.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment 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 Board 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 Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§519.2. Definitions.

In this chapter:

(1) "Address of record" means the last address provided to the board by a certificate or registration holder pursuant to §501.93 of this title (relating to Responses);

(2) "ALJ" means SOAH administrative law judge;

(3) "APA" means the Texas Administrative Procedure Act, Chapter 2001 of the Texas Government Code;

(4) "Board staff" means the agency's employees;

(5) "Committee" means an enforcement committee of the board;

(6) "Complainant" means the person or entity who initiates a complaint with the board against a certificate or registration holder;

(7) "Complaint" means information available to or provided to the board indicating that a certificate or registration holder may have violated the Act, board rules, or order of the board;

(8) "Contested case" means a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing;

(9) "Deferred Adjudication" means [~~a person entered a plea of guilty or nolo contendere,~~] the judge deferred further proceedings without entering an adjudication of guilt and placed the person under the supervision of the court or an officer under the supervision of the court and at the end of the period of supervision, the judge dismissed the proceedings and discharged the person;[~~.~~]

(10) "Direct Administrative Costs" means those costs actually incurred by the board through payment to outside vendors and the resources expended by the board in the investigation and prosecution of a matter within the board's jurisdiction, including but not limited to, staff salary, payroll taxes and benefits and other non-salary related expenses, expert fees and expenses, witness fees and expenses, filing fees and expenses of the support staff of the Office of the Attorney General, filing fees, SOAH utilization fees, court reporting fees, copying fees, delivery fees, case management fees, costs of exhibit creation, technical fees, travel costs and any other cost or fee that can reasonably be attributed to the matter;

(11) "Petitioner" means the Texas State Board of Public Accountancy;

(12) "PFD" means the proposal for decision prepared by an ALJ;

(13) "Respondent" means a licensee or certificate holder, individual or entity against whom a complaint has been filed; and

(14) "SOAH" means the State Office of Administrative Hearings.

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 14, 2019.

TRD-201904253
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-7842

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CHAPTER 525. CRIMINAL BACKGROUND INVESTIGATIONS

22 TAC §525.1

The Texas State Board of Public Accountancy (Board) proposes an amendment to §525.1, concerning Applications for the UCPAE, Issuance of the CPA Certificate, or Initial License.

Background, Justification and Summary

The amendment to §525.1 incorporates into the board's rules the standards found in Chapter 53 of the Occupations Code which were revised during the 86th Session of the Texas Legislature.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The proposed amendments will assist an applicant to better understand the criminal events that could affect their ability to take the Uniform CPA Exam.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; does not expand, limit or repeal an existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8) Texas Government Code).

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on December 30, 2019.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment 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 Board 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 Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§525.1. Applications for the UCPAE, Issuance of the CPA Certificate, or Initial License.

[~~(a) The board may prohibit an individual from taking the UCPAE, and may not issue the CPA certificate, or an initial license, for a period not to exceed five years from the date of the application, for an offense that does not directly relate to the duties and responsibilities of the practice of public accountancy when the conviction of the offense occurred less than five years before the person applied for the license.~~]

(a) [~~(b)~~] The [~~Regardless of the date of the offense, the~~] board may prohibit an individual from taking the UCPAE, and may not issue the CPA certificate, or an initial license, for up to five years from the date of the application, if the board finds that the applicant has been convicted of an offense listed in Article 42A.054 of the Texas Code of Criminal Procedure, a sexually violent offense as defined by Article 62.001 of the Texas Code of Criminal Procedure, or a criminal [~~a felony, or misdemeanor~~] offense which directly relates to the duties and responsibilities of the practice of public accountancy. The board may consider an individual to have been convicted of a criminal offense regardless of having received deferred adjudication and having the charges dismissed if the individual has not completed the period of supervision or the individual completed the supervision less than five years before the individual applied for the license. In determining whether the felony or misdemeanor conviction directly relates to the duties and responsibilities of the practice of public accountancy, the board shall consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purposes for requiring a license to engage in the [~~board's statutory responsibility to ensure that persons professing to~~] practice of public accountancy [~~maintain high standards of competence and integrity in light of the reliance of the public on professional accounting services~~];

(3) the extent to which a license to practice public accountancy might offer an opportunity to engage in further criminal activity of the same type as that in which the applicant [~~person~~] was previously involved;

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a CPA or public accountant; and

(5) any correlation between the elements of the crime and the duties and responsibilities of the practice of public accountancy. [~~fraud or dishonesty as an element of the offense; and~~]

[~~(6) all conduct indicating a lack of fitness to serve the public as a professional accountant.~~]

(b) [~~(c)~~] In addition to the factors stated in subsection (a) [~~(b)~~] of this section, the board shall consider: [~~§53.023 (Texas Occupations Code) in determining the present fitness of an applicant who has been convicted of a crime.~~]

(1) the extent and nature of the applicant's past criminal activity;

(2) the age of the applicant when the crime was committed;

(3) the amount of time that has elapsed since the applicant's last criminal activity;

(4) the conduct and work activity of the applicant before and after the criminal activity;

(5) evidence of the applicant's rehabilitation or rehabilitative effort while incarcerated or after release;

(6) evidence of the applicant's compliance with any conditions of community supervision, parole, or mandatory supervision; and

(7) other evidence of the applicant's fitness, including letters of recommendation from:

(A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the applicant;

(B) the sheriff or chief of police in the community where the applicant resides; and

(C) any other person in contact with the convicted applicant.

(c) It is the applicant's responsibility to obtain and provide to the board evidence regarding the factors listed in subsection (b) of this section.

(d) In addition to fulfilling the requirements of subsection (c) of this section, the applicant shall furnish proof in the form required by the board that the applicant has:

(1) maintained a record of steady employment;

(2) supported the applicant's dependents;

(3) maintained a record of good conduct; and

(4) paid all outstanding court costs, supervision fees, fines and restitution ordered in any criminal case in which the applicant has been convicted.

(e) As provided in §901.005(c) and (e)(3) of the Act (relating to Findings; Public Policy; Purpose), the public including the business community relies on the integrity of licensees and certificate holders in providing professional accounting services or professional accounting work. The board considers a conviction or placement on deferred adjudication for a felony or conviction or placement on deferred adjudication for the misdemeanor offenses listed in §519.7 of this title (relating to Criminal Offenses that May Subject a Licensee or Certificate Holder to Discipline or Disqualify a Person from Receiving a License) to be evidence of an individual lacking the integrity necessary to be trusted with confidential client information, client funds and assets which directly relates to the duties and responsibilities of a licensee in the practice of public accountancy. An applicant who is convicted of a felony or repeatedly violates the law may lack the integrity to enjoy the public's trust and the privilege of being a CPA.

(f) The board will not deny an applicant a license or the opportunity to be examined for a license because of the applicant's prior conviction of an offense until the board has:

(1) provided written notice to the applicant of the reason for the intended denial; and

(2) allowed the applicant 30 days to submit any relevant information to the board for its consideration.

(g) The notice required under subsection (f) of this section will contain as applicable:

(1) a statement that the applicant is disqualified from receiving the license or being examined for the license because of the applicant's prior conviction of the offense specified in the notice; and

(2) a statement that:

(A) the final decision of the board to deny the applicant a license or the opportunity to be examined for the license will be based on the factors listed in subsection (b) of this section; and

(B) it is the applicant's responsibility to obtain and provide to the board evidence regarding the factors listed in subsection (b) of this section.

[~~(d) Because an accountant is often placed in a position of trust with respect to client funds, and the public in general relies on professional accounting services, the Texas State Board of Public Accountancy considers that the following crimes directly relate to the practice of public accountancy:~~]

[~~(1) any felony or misdemeanor of which fraud or deceit is an essential element;~~]

[~~(2) any felony or misdemeanor conviction which results in the suspension or revocation of the right to practice before any state or federal agency for a cause which in the opinion of the board warrants its action; and~~]

[~~(3) any crime involving moral turpitude.~~]

(h) [~~(e)~~] The following procedures shall apply in the processing of an application to take the UCPAE.

(1) The applicant will be asked to affirm [~~respond~~], under penalty of perjury, to the question of whether or not the applicant [~~if he or she~~] has ever been convicted , as provided in subsection (a) of this section, of a felony or misdemeanor.

(2) The board shall require the applicant to arrange to provide [~~may submit identifying information~~] to the Texas Department of Public Safety a complete and legible set of fingerprints from a vendor approved by the Texas Department of Public Safety for the purpose of obtaining the applicant's criminal history record information unless fingerprints have been previously submitted for licensure on or after September 1, 2014 [~~and or other appropriate agencies requesting conviction records on all applicants about whom the executive director finds evidence to warrant a record search~~].

(3) The board will review the criminal history record information [~~conviction records of applicants~~] and will approve or disapprove applications as the evidence warrants. If the requested information is not provided [~~by the Texas Department of Public Safety and or other appropriate agencies~~] at least 10 days prior to the examination, an applicant may be permitted to take the UCPAE, with his or her scores subject to being voided. [~~An applicant may have his or her scores voided or may be denied the opportunity to take the UCPAE on the basis of a prior conviction pursuant to a hearing as provided for in the Act.~~]

(4) The examination eligibility fee of an applicant whose application to take the UCPAE has been denied under this section or §511.70 of this title (relating to Grounds for Disciplinary Action of Applicants) and who has not taken any portion of the examination shall be refunded.

(i) Unless an applicant has been convicted of an offense as described in subsection (a) of this section, the board will issue the license for which the applicant applied or a provisional license described in subsection (j) of this section.

(j) The board may issue a provisional license for a term of six months to an applicant who has been convicted of an offense described in subsection (a) of this section.

(k) The board shall revoke a provisional license if the provisional license holder:

(1) commits a new offense;

(2) commits an act or omission that causes the applicant's community supervision, mandatory supervision, or parole to be revoked, if applicable; or

(3) violates the law or rules governing the practice of public accountancy.

~~[(f) An applicant who has not been permitted to sit for the UCPAE as a result of having been convicted of a felony offense must provide evidence of rehabilitation as the board may request.]~~

~~[(g) The following procedure shall apply in the processing of an application for issuance of the CPA certificate.]~~

~~[(1) The applicant shall be asked to respond, under penalty of perjury, to the question if he or she has ever been convicted of a felony or misdemeanor.]~~

~~[(2) The board may submit identifying information to the Texas Department of Public Safety and or other appropriate agencies requesting conviction records on an applicant requesting issuance of the CPA certificate.]~~

~~[(3) The board shall review the individual applications and the conviction records of applicants and shall approve or disapprove applications as the evidence warrants. No CPA certificate or initial license may be issued to an applicant whose application for a CPA certificate has been denied. The board may disqualify a person from receiving a CPA certificate or initial license on the basis of a prior conviction pursuant to a hearing as provided for in the Act.]~~

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 14, 2019.

TRD-201904254
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-7842

22 TAC §525.2

The Texas State Board of Public Accountancy (Board) proposes an amendment to §525.2, concerning Applications for or Renewal of a License for Licensees with Criminal Backgrounds.

Background, Justification and Summary

The amendment to §525.2 incorporates into the board's rules the standards found in Chapter 53 of the Occupations Code which were revised during the 86th Session of the Texas Legislature.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed amendments will assist licensed CPAs in understanding what criminal events could cause disciplinary action to be taken against them by the board including the loss or suspension of their license or certificate.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; does not expand, limit or repeal an existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8) Texas Government Code).

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on December 30, 2019.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment 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 Board 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 Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§525.2. [~~Applications for or~~] Renewal of a License for Licensees with Criminal Backgrounds.

(a) The following [~~procedure~~] shall apply when renewing a license annually.

(1) Each licensee shall be asked in their license renewal application to affirm [~~to respond~~], under penalty of perjury, whether or not the licensee [~~to the question if he or she~~] has ever been convicted of a felony or misdemeanor of which the board has not previously been informed. [~~If the licensee responds in the negative and pays the required license fee, a renewal license shall be issued in accordance with established procedures. If the licensee responds affirmatively and pays the required license fee, the board may submit identifying information to the Texas Department of Public Safety and other appropriate agencies requesting conviction records on the licensee.~~]

(2) The board may consider an individual to have been convicted of an offense regardless of having received deferred adjudication and having the charges dismissed if the individual has not completed the period of supervision or the individual completed the supervision less than five years before the individual applied for license renewal. [~~The board shall review the conviction records and either approve or deny the application for a renewal license as the evidence warrants. The board shall refund any renewal fee submitted if the application is denied. The board may suspend or revoke or refuse to renew an annual license on the basis of a prior conviction pursuant to a hearing as provided for in the Act.~~]

(3) If the licensee has been convicted, as provided in paragraph (2) of this subsection, of an offense listed in Article 42A.054 of the Texas Code of Criminal Procedure, a sexually violent offense as defined by Article 62.001 of the Texas Code of Criminal Procedure, or a criminal offense which directly relates to the duties and responsibilities of the practice of public accountancy, the licensee may be subject to disciplinary action.

(4) In determining whether the felony or misdemeanor conviction directly relates to the duties and responsibilities of the practice of public accountancy, the board shall consider:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the purposes for requiring a licensee to engage in the practice of public accountancy;

(C) the extent to which a license to practice public accountancy might offer an opportunity to engage in further criminal activity of the same type as that in which the licensee was previously involved;

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a CPA or public accountant; and

(E) any correlation between the elements of the crime and the duties and responsibilities of the practice of public accountancy.

(b) In determining the fitness to perform the duties and discharge the responsibilities of the licensed occupation of a licensee who has been convicted of a crime, the board shall consider, in addition to the factors listed in subsection (a)(4) of this section:

(1) the extent and nature of the licensee's past criminal activity;

(2) the age of the licensee when the crime was committed;

(3) the amount of time that has elapsed since the licensee's last criminal activity;

(4) the conduct and work activity of the licensee before and after the criminal activity;

(5) evidence of the licensee's rehabilitation or rehabilitative effort while incarcerated or after release;

(6) evidence of the licensee's compliance with any conditions of community supervision, parole, or mandatory supervision; and

(7) other evidence of the licensee's fitness, including letters of recommendation from:

(A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the licensee;

(B) the sheriff or chief of police in the community where the licensee resides; and

(C) any other person in contact with the convicted licensee.

(c) It is the applicant's responsibility to obtain and provide to the board evidence regarding the factors listed in subsection (b) of this section.

(d) In addition to fulfilling the requirements of subsection (c) of this section, the licensee shall furnish proof in the form required by the board that the licensee has:

(1) maintained a record of steady employment;

(2) supported the licensee's dependents;

(3) maintained a record of good conduct; and

(4) paid all outstanding court costs, supervision fees, fines and restitution ordered in any criminal case in which the licensee has been convicted.

(e) As provided in §901.005(c) and (e)(3) of the Act (relating to Findings; Public Policy; Purpose), the public including the business community relies on the integrity of licensees and certificate holders in providing professional accounting services or professional accounting work. The board considers a conviction or placement on deferred adjudication for a felony or conviction or placement on deferred adjudication for the misdemeanor offenses listed in §519.7 of this title (relating to Criminal Offenses that May Subject a Licensee or Certificate Holder to Discipline or Disqualify a Person from Receiving a License) to be evidence of an individual lacking the integrity necessary to be trusted with confidential client information, client funds and assets which directly relates to the duties and responsibilities of a licensee in the practice of public accountancy. A licensee who is convicted of a

felony or repeatedly violates the law may lack the integrity to enjoy the public's trust and the privilege of being a CPA.

(f) The board shall require each licensee on a one-time basis seeking renewal of their license to arrange to provide to the Texas Department of Public Safety a complete and legible set of fingerprints from a vendor approved by the Texas Department of Public Safety for the purpose of obtaining the licensee's criminal history record information unless fingerprints have been previously submitted for licensure on or after September 1, 2014 by the licensee.

[~~(b) The board may suspend the license or revoke the certificate as a result of a licensee's prior conviction of a crime relevant to the license and/or certificate following the opportunity for a hearing as provided for in the Act. The board shall notify the person in writing of the reasons for the suspension, revocation, denial or disqualification.~~]

[~~(c) The board shall revoke a certificate for a felony offense that does not relate to the duties and responsibilities of a licensee when the felony conviction occurred less than five years before the date the person applies for a license renewal or the board becomes aware of the conviction and shall revoke a certificate for an offense listed in Article 42A.054 of the Code of Criminal Procedure or a sexually violent offense as defined in Article 62.001 of the Code of Criminal Procedure.~~]

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 14, 2019.

TRD-201904255
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-7842

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22 TAC §525.3

The Texas State Board of Public Accountancy (Board) proposes an amendment to §525.3, concerning Criminal Background Checks.

Background, Justification and Summary

The amendment to §525.3 clarifies the Board's requirement for the fingerprints of applicants and licensees and the review of their criminal history records to assure the public's protection.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit

The adoption of the proposed amendment is intended to help the licensee's awareness of the need for them to provide the board with a legible set of their fingerprints.

Probable Economic Cost and Local Employment Impact

Mr. Treacy, Executive Director, has determined that there will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business, Rural Community and Micro-Business Impact Analysis

William Treacy, Executive Director, has determined that the proposed amendment will not have an adverse economic effect on small businesses, rural communities or micro-businesses because the amendment does not impose any duties or obligations upon small businesses, rural communities or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis are not required.

Government Growth Impact Statement

William Treacy, Executive Director, has determined that for the first five-year period the amendment is in effect, the proposed rule: does not create or eliminate a government program; does not create or eliminate employee positions; does not increase or decrease future legislative appropriations to the Board; does not increase or decrease fees paid to the Board; does not create a new regulation; does not expand, limit or repeal an existing regulation; does not increase or decrease the number of individuals subject to the proposed rule's applicability; and does not positively or adversely affect the state's economy.

Takings Impact Assessment

No takings impact assessment is necessary because there is no proposed use of private real property as a result of the proposed rule revision.

The requirement related to a rule increasing costs to regulated persons does not apply to the Texas State Board of Public Accountancy because the rule is being proposed by a self-directed semi-independent agency. (§2001.0045(c)(8) Texas Government Code).

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on December 30, 2019.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment 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 Board 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 Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151, which authorizes

the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§525.3. Criminal Background Checks.

(a) Applicants to take the UCPAE and licensees applying for license renewal shall arrange to provide to the Texas Department of Public Safety a complete and legible set of fingerprints from a vendor approved by the Texas Department of Public Safety for the purpose of obtaining the applicant's or licensee's criminal history record information unless the fingerprints have been previously submitted after September 1, 2014. Once fingerprints have been provided, additional fingerprints will not be required so long as the fingerprints provided were complete and legible. [~~The board may require a Federal Bureau of Investigation criminal history records background check on applicants to become licensed, registered, or certified in Texas at any stage in the application process.~~]

[~~(b) Applicants required to provide the Federal Bureau of Investigation criminal history records background check will be responsible for the cost of searching the database.~~]

[~~(c) Applicants will be provided with information on how to obtain the Federal Bureau of Investigation criminal history records background check through the Texas Department of Public Safety, and the Texas Department of Public Safety will provide the records directly to the board.~~]

(b) [~~(d)~~] Criminal history record information obtained from the Texas Department of Public Safety and [~~and/or~~] the Federal Bureau of Investigation will be maintained pursuant to §411.084 of the Texas Government Code in order to protect the confidentiality of the information.

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 14, 2019.

TRD-201904256
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 305-7842

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 13. HEALTH PLANNING AND RESOURCE DEVELOPMENT

SUBCHAPTER A. RECRUITMENT OF PHYSICIANS TO UNDERSERVED AREAS

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes amendments to §13.1, concerning Priorities for Waiver Recommendations; and §13.2, concerning Application Fee; and proposes the repeal of §13.3, concerning Other Federal or State Requirements.

BACKGROUND AND PURPOSE

The Texas Conrad 30 J-1 Visa Waiver Program recommends up to 30 foreign medical graduates (physicians) each year to receive a waiver of the J-1 visa requirement to return home for two years. In exchange for this waiver, the physician must provide medical care for three years in an underserved area. The rules covering this program describe application prioritization criteria, application fees, and the refund policy for those fees.

The purpose of the proposal is to clarify the criteria used to prioritize applications; update references to the website; clarify the application fee process and refund policy; correct a grammatical error; remove an unnecessary section; and serve as the four-year review of rules required by Texas Government Code, §2001.039.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §13.1(a) clarifies the action the program takes regarding priorities for waiver recommendations, deletes unnecessary language, restructures sentences to be in active voice, deletes an outdated web address, and deletes items related to criteria which are now listed in §13.1(b).

The proposed amendment to §13.1(b) replaces the existing language with a comprehensive list of the criteria the program considers when setting priorities for waiver recommendations.

The proposed amendment to §13.2 clarifies the application fee process, deletes an outdated web address, replaces "withdrawals" to the verb "withdraws" to correct the grammatical error, and restructures sentences to improve clarity. The proposed amendment deletes "all 30 slots have been used for the fiscal year," as there are other circumstances under which DSHS refunds the application fee.

The proposed repeal of §13.3, Other Federal or State Requirements, deletes the rule as unnecessary, as the proposed amendment to §13.1 states these rules are consistent with Texas Health and Safety Code, §12.0127, and this statute lists the federal laws with which it is in accordance.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to DSHS;

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

(6) the proposed rules will repeal an existing rule;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

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

Donna Sheppard has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The proposed amendments and repeal do not change the program's operation or existing application fee.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and to comply with federal law.

PUBLIC BENEFIT AND COSTS

Lara Lamprecht, DrPH, Assistant Deputy Commissioner, has determined that for each year of the first five years the rules are in effect, the public benefit will be improved understanding of the program process and criteria for prioritizing applications, the application fee process, and the application fee refund policy.

Donna Shepard has also determined that for the first five years the rules are in effect, there are no anticipated additional economic costs to persons who are required to comply with the proposed rules because the proposed amendments and repeal do not change the program's operation or existing application fee.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Amanda Ingram, Research Specialist, Department of State Health Services, P.O. Box 149347 MC 1898, Austin, Texas 78714-9347; 1100 W. 49th Street, Austin, Texas 78756; by fax to (512) 776-7344; or by email to Conrad30@dshs.texas.gov.

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 e-mailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When faxing or emailing comments, please indicate "Comments on Proposed Rule 19R024" in the subject line.

25 TAC §13.1, §13.2

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which provides for the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services agencies; and under Texas Health and Safety Code, §12.0127, which authorizes the DSHS to request a waiver of the foreign country residence requirement for qualified alien physicians who agree to practice in medically underserved areas.

The amendments implement Texas Government Code, §531.0055, and Texas Health and Safety Code, §12.0127 and §1001.075.

§13.1. Priorities for Waiver Recommendations.

(a) Consistent with Health and Safety Code, §12.0127, [~~It is the intent of the Legislature that applications submitted under this program be prioritized by the Department of State Health Services (department) to the areas of greatest need and that the department consider relative specialty need as well, adhering to federal and state legislation (Health and Safety Code, §12.0127), therefore~~] the Texas Conrad 30 J-1 Visa Waiver Program (program) [~~program~~] will identify priorities for waiver recommendations [~~for the coming year,~~] and post the priorities [~~publish them~~] on the Department of State Health Services' [~~Texas Conrad 30~~] website for the program by [~~at http://www.dshs.state.tx.us/chpr/j1info.shtm, prior to~~] May 1 of each year.

(b) The program will identify priorities based on the following criteria:

(1) the physician specialty;

(2) the type of shortage designation;

(3) the relative degree of shortage;

(4) the relative health needs of the area; and

(5) the existence of an area described under Health and Safety Code, §12.0127(c)(1).

[~~(b) The following criteria will be applied in prioritizing applications for waiver recommendations:~~]

[~~(1) the needs of medically underserved areas will always be of importance in establishing the department's priorities; and~~]

[~~(2) the department will operate the program to conform to federal law as it may be amended.~~]

§13.2. Application Fee.

The Department of State Health Services (department) collects [~~department shall collect~~] a fee of $2,500 to $5,000 for each application submitted to the Texas Conrad 30 J-1 Visa Waiver Program (program) [~~from each applicant who is granted a waiver of the two-year home residency requirement from the Bureau of Citizenship and Immigration Services~~]. The [~~Texas Conrad 30~~] program assesses [~~shall assess~~] the fee [~~each year~~] based on its [~~the cost of~~] operating costs and posts the [~~program. The~~] amount [~~of the application fee will be identified~~] on the department's [~~Texas Conrad 30 program~~] website for the program [~~at http://www.dshs.state.tx.us/chpr/j1info.shtm~~] by May 1 of each year. The refund policy is as follows: [~~The fee shall be submitted to the department at the time of application. Part of the fees may be returned under the following circumstances:~~]

(1) If [~~if~~] the department recommends the waiver to the U.S. Department of State, the department does not refund [~~none of~~] the application fee. [~~will be returned to the applicant;~~]

(2) If [~~if~~] the applicant withdraws [~~withdrawals~~] the application before [~~a recommendation is submitted by~~] the department recommends the waiver, the department refunds 50% of the application fee. [~~will be returned to the applicant; or~~]

(3) If [~~if at the time the application is received by~~] the department does not recommend the waiver, the department refunds[~~, all 30 slots have been used for the fiscal year,~~] 100% of the application fee [~~will be returned to the applicant~~].

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 15, 2019.

TRD-201904290
Barbara L. Klein
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 776-3539

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25 TAC §13.3

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which provides for the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services agencies; and under Texas Health and Safety Code, §12.0127, which authorizes the DSHS to request a waiver of the foreign country residence requirement for qualified alien physicians who agree to practice in medically underserved areas.

The repeal implements Texas Government Code, §531.0055, and Texas Health and Safety Code, §12.0127 and §1001.075.

§13.3. Other Federal or State Requirements.

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

Filed with the Office of the Secretary of State on November 15, 2019.

TRD-201904291
Barbara L. Klein
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 776-3539

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CHAPTER 40. EPINEPHRINE AUTO-INJECTOR AND ANAPHYLAXIS POLICIES SUBCHAPTER A. EPINEPHRINE AUTO-INJECTOR POLICIES IN INSTITUTIONS OF HIGHER EDUCATION

25 TAC §§40.1 - 40.8

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes new §§40.1 - 40.8, in new Chapter 40, Epinephrine Auto-Injector and Anaphylaxis Policies, Subchapter A, concerning Epinephrine Auto-Injector Policies in Institutions of Higher Education.

BACKGROUND AND PURPOSE

The purpose of the proposed new sections is to implement Senate Bill (S.B) 1367, 85th Legislature, Regular Session, 2017, and House Bill (H.B.) 476 and H.B. 4260, 86th Legislature, Regular Session, 2019. S.B. 1367 added Texas Education Code, Chapter 51, Subchapter Y-1, which requires the adoption of rules for the maintenance, administration, and disposal of epinephrine auto-injectors in institutions of higher education who voluntarily adopt epinephrine auto-injector policies. H.B. 476 amended §51.882 of the Texas Education Code to require institutions of higher education who adopt a policy to submit the policy to DSHS. DSHS will maintain a record of the most recent policy and will make the information available upon request. H.B. 4260 added §773.0145 to the Texas Health and Safety Code, which authorizes private or independent institutions of higher education to adopt and implement epinephrine auto-injector policies. H.B. 4260 also allows a physician or person who has been delegated prescriptive authority under Chapter 157, Texas Occupations Code, to prescribe epinephrine auto-injectors in the name of an entity.

S.B. 1367 also requires the appointment of an employee of a general teaching institution and an employee of a public junior college or a public technical institute to the DSHS Stock Epinephrine Advisory Committee. The committee is tasked with advising DSHS on the storage and maintenance of epinephrine auto-injectors on campuses of institutions of higher education; the training of personnel and volunteers in the administration of an epinephrine auto-injector; and a plan for one or more personnel members or volunteers trained in the administration of an epinephrine auto-injector to be on each campus.

The proposed new rules set the minimum standards for institutions of higher education to follow when adopting an epinephrine auto-injector policy, based on recommendations of the DSHS Stock Epinephrine Advisory Committee. An institution of higher education that voluntarily adopts an unassigned epinephrine auto-injector policy must stock at least one unassigned adult epinephrine auto-injector pack on each campus and conduct individual campus assessments to determine if additional epinephrine auto-injectors are needed. The proposed new rules allow flexibility so that institutions of higher education may develop policies that address issues specific to each campus, including campus geography and student population size. Personnel and volunteers that are trained to administer unassigned epinephrine auto-injectors may administer an epinephrine auto-injector to a person suspected of experiencing anaphylaxis, including students, personnel, volunteers, and visitors. Public institutions of higher education that adopt epinephrine auto-injector policies are required to report the administration of an epinephrine auto-injector to DSHS within 10 business days.

SECTION-BY-SECTION SUMMARY

Proposed new §40.1 states the purpose of the subchapter, which is to establish minimum standards for administering, maintaining, and disposing of epinephrine auto-injectors in institutions of higher education that adopt epinephrine auto-injector policies.

Proposed new §40.2 addresses institutions of higher education voluntarily adopting epinephrine auto-injector policies and states that the epinephrine auto-injector policy must comply with Texas

Education Code, §51.882 or Texas Health and Safety Code, §773.0145, and this subchapter.

Proposed new §40.3 defines terms used in the rules relating to the maintenance, administration, and disposal of epinephrine auto-injectors in institutions of higher education.

Proposed new §40.4 states that the rules apply to any institution of higher education that chooses to adopt and implement a written policy regarding the maintenance, administration, and disposal of epinephrine auto-injectors on each institution's campus.

Proposed new §40.5 presents the minimum standards regarding the maintenance, administration, and disposal of unassigned epinephrine auto-injectors in institutions of higher education. Subsection (a) addresses obtaining a prescription for at least one adult epinephrine auto-injector pack (two doses) for each institution's campus. Subsection (a) also states that additional packs may be determined based on individual campus assessments. Subsection (a)(1) establishes what an institution may consider when performing a campus assessment. Subsection (a)(1)(A) addresses consultation with campus police, office of risk management, office of food services, office of housing, office of health services, or other departments involved with student well-being. Subsection (a)(1)(B) addresses campus geography. Subsection (a)(1)(C) addresses the size of the student population. Subsection (b) establishes the development of an epinephrine auto-injector policy. Subsection (b)(1) states that a designated campus department will coordinate and manage epinephrine auto-injector policy implementation. Subsection (b)(2) states that the policy shall include those who can be trained in the administration of an epinephrine auto-injector. Subsection (b)(3) states that the policy shall include the locations of the unassigned epinephrine auto-injectors. Subsection (b)(4) states that the policy shall include notifying local emergency medical services. Subsection (b)(5) states that the policy shall include replacing used or expired epinephrine auto-injectors as soon as reasonably possible. Subsection (c) states that the policy and locations of the unassigned epinephrine auto-injectors must be publicly available, and the unassigned epinephrine auto-injectors must be stored per the manufacturer's guidelines. Subsection (d) states that each public institution who adopts a policy must submit the policy to DSHS according to the DSHS procedure.

Proposed new §40.6(a) states that the training of institution personnel or institution volunteers must include recognizing the signs and symptoms of anaphylaxis. The training must include hands-on training. Subsection (b) addresses the training being consistent with the most recent Voluntary Guidelines for Managing Food Allergies in Schools and Early Care and Education Programs published by the U.S. Centers for Disease Control and Prevention. Subsection (c) states that the training records shall be maintained and made available upon request.

Proposed new §40.7(a) states that the records relating to the implementation and administration of epinephrine auto-injector policies shall be retained, per 13 TAC §6.10. Subsection (b) states that the institution of higher education shall submit a report no later than the 10th business day after the administration of an epinephrine auto-injector to the institution and to those outlined in Texas Education Code, §51.883. Subsection (c) addresses how to submit a report to DSHS. Subsection (c) also states that this section does not apply to a private or independent institution of higher education.

Proposed new §40.8 addresses the immunity from liability as outlined in Texas Education Code, §51.888 and Texas Health and Safety Code, §773.0145.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to DSHS;

(5) the proposed rules will create a new rule;

(6) the proposed rules will not expand, limit, or repeal existing rules;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

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

Donna Sheppard has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities, because the rules do not apply to small or micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Manda Hall, MD, Associate Commissioner, Community Health Improvement Division, has determined that for each year of the first five years the rules are in effect, the public benefit will be that the safety of individuals with undiagnosed allergies on the campuses of institutions of higher education with unassigned epinephrine auto-injector policies will be improved.

Donna Sheppard has also determined that for the first five years the rules are in effect, persons who are required to comply with the proposed rules may incur economic costs because one pack of epinephrine auto-injectors (two doses) costs between $300 and $600. Based on data from the Texas Higher Education Coordinating Board, there are 148 institutions of higher education in Texas. Each institution may have multiple campuses. Assuming each institution of higher education has only one campus and

purchases one adult pack of epinephrine auto-injectors for $300, the total cost will be $44,400. If the price of each pack is $600, the total cost will be $88,800. Assuming each campus purchases one adult epinephrine auto-injector pack at the beginning of the pack's (12 - 18 month) shelf life during the start of fiscal year one, each campus will have to replace the pack within the following year (within 18 months). DSHS is assuming that the cost for the hands-on training with an epinephrine auto-injector trainer will cost $20 per person. Assuming each institution of higher education trains at least one person to administer the epinephrine auto-injector, the total cost to train one person per campus will be $2,960 each year. Therefore, depending on the cost of the epinephrine auto-injector pack, the minimum total cost of compliance of all institutions of higher education is between $47,360 and $91,760 per year ($320-620 per institution per year). Because participation is voluntary, the overall cost could be less. This estimate does not include the cost to replace an epinephrine auto-injector that is used nor does it include the costs if an institution of higher education chooses to purchase more than one pack. Institutions of higher education may utilize free epinephrine auto-injector programs, if available.

TAKINGS IMPACT ASSESSMENT

DSHS 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 Anita Wheeler at (512) 776-7279 in DSHS, Community Health Improvement Division, School Health Program.

Written comments on the proposal may be submitted to the School Health Program, P.O. Box 149347, MC 1945, Austin, Texas 78714-9347, or 1100 W 49th Street, Austin, Texas 78756, or by email to SchoolHealth@dshs.texas.gov.

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) e-mailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 19R016" in the subject line.

STATUTORY AUTHORITY

The new sections are authorized by Texas Education Code, Chapter 51, Subchapter Y-1, which authorizes DSHS to adopt rules with advice from the advisory committee regarding the maintenance, administration, and disposal of an epinephrine auto-injector on the campus of an institution of higher education subject to a local policy being adopted. The new sections are authorized by Texas Health and Safety Code, §773.0145, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules regarding the maintenance, administration, and disposal of an epinephrine auto-injector by a private or independent institution of higher education subject to a local policy being adopted. The new sections are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

The new sections implement Texas Government Code, §531.0055; Texas Education Code, §51.887 and Texas Health and Safety Code, Chapter 773 and Chapter 1001.

§40.1. Purpose.

The purpose of this subchapter is to establish minimum standards for administering, maintaining, and disposing of epinephrine auto-injectors for an institution of higher education who adopts unassigned epinephrine auto-injector policies. These standards are implemented under Texas Education Code, Chapter 51, Subchapter Y-1 and Texas Health and Safety Code, Chapter 773, Subchapter A.

§40.2. Voluntary Unassigned Epinephrine Auto-injector Policies for an Institution of Higher Education.

An institution of higher education (institution) may adopt and implement a written policy regarding the maintenance, administration, and disposal of unassigned epinephrine auto-injectors at each institution's campus. If a written policy is adopted under this subchapter, the policy must comply with Texas Education Code, §51.882 or Texas Health and Safety Code, §773.0145, and this subchapter.

§40.3. Definitions.

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

(1) Anaphylaxis--As defined in Texas Education Code, §51.881.

(2) Authorized healthcare provider--A physician, as defined in Texas Education Code, §51.881, or person who has been delegated prescriptive authority by a physician under Texas Occupations Code, Chapter 157 as described in Texas Health and Safety Code, §773.0145.

(3) Campus--An educational unit under the management and control of an institution of higher education and may include, in addition to the main campus, off-campus and secondary locations, such as branch campuses, teaching locations, regional centers, and where students are housed.

(4) Institution of Higher Education--As defined in Texas Education Code, §61.003(8) and (15).

(5) Personnel--Employees of an institution of higher education who are authorized and trained to administer epinephrine auto-injectors.

(6) Unassigned epinephrine auto-injector--An epinephrine auto-injector prescribed by an authorized healthcare provider in the name of the institution of higher education issued with a non-patient-specific standing delegation order for the administration of an epinephrine auto-injector, and issued by an authorized healthcare provider.

(7) Volunteer--A person who is providing services for or on behalf of an institution of higher education on the premises of the institution's campus, at an institution of higher education-sponsored event or an institution of higher education-related activity on or off institution property, and who does not receive compensation in excess of reimbursement for expenses and is authorized and trained to administer an epinephrine auto-injector.

§40.4. Applicability.

This subchapter applies to any institution of higher education (institution) that voluntarily chooses to adopt and implement a written policy

regarding the maintenance, administration, and disposal of unassigned epinephrine auto-injectors on each institution's campus.

§40.5. Maintenance, Administration, and Disposal of Unassigned Epinephrine Auto-Injectors.

(a) An institution of higher education (institution) shall obtain a prescription from an authorized healthcare provider each year to stock, possess, and maintain at least one unassigned adult epinephrine auto-injector pack (two doses) on each institution's campus as described in Texas Education Code, §51.885 and Texas Health and Safety Code, §773.0145. The number of additional adult packs may be determined by an individual campus assessment led by an authorized healthcare provider, based on available resources.

(b) An institution performing an assessment may consider:

(1) consultation with campus police, office of risk management, office of food services, office of housing, office of health services, or any department involved with student well-being;

(2) campus geography, including high risk areas; and

(3) student population size.

(c) In development of an epinephrine auto-injector policy, an institution shall include:

(1) a designated campus department to coordinate and manage policy implementation that includes:

(A) conducting an assessment;

(B) training of institution personnel;

(C) acquiring or purchasing, storing, and using unassigned epinephrine auto-injectors; and

(D) disposing of expired unassigned epinephrine auto-injectors;

(2) personnel who can be trained to administer unassigned epinephrine auto-injectors;

(3) locations of unassigned epinephrine auto-injectors;

(4) procedures for notifying local emergency medical services when a person is suspected of experiencing anaphylaxis and when an epinephrine auto-injector is administered; and

(5) a plan to replace, as soon as reasonably possible, any unassigned epinephrine auto-injector that is used or close to expiration.

(d) The policy and the locations of the unassigned epinephrine auto-injector must be publicly available, and the unassigned epinephrine auto-injector must be stored in accordance with the manufacturer's guidelines.

(e) Each public institution of higher education's policy must be submitted to the Department of State Health Services (DSHS) in accordance with the DSHS procedure.

§40.6. Training.

(a) Each institution of higher education (institution) that adopts an unassigned epinephrine auto-injector written policy under this subchapter is responsible for training institution personnel and institution volunteers in the recognizing of anaphylaxis signs and symptoms and hands-on administration of an unassigned epinephrine auto-injector.

(b) Training shall be consistent with the most recent Voluntary Guidelines for Managing Food Allergies in Schools and Early Care and Education Programs published by the federal Centers for Disease Control and Prevention.

(c) Each institution shall maintain training records and each public institution shall make available upon request a list of those institution personnel or institution volunteers trained and authorized to administer the unassigned epinephrine auto-injector on the campus.

§40.7. Report on Administering Unassigned Epinephrine Auto-Injectors.

(a) Records relating to implementing and administrating the institution of higher education (institution) unassigned epinephrine auto-injector policy shall be retained per the record retention schedule for records of institutions of higher education found in 13 TAC §6.10.

(b) The institution shall submit a report no later than the 10th business day after the date institution personnel or an institution volunteer administers an epinephrine auto-injector in accordance with the unassigned epinephrine auto-injector policy adopted under this subchapter. The report shall be submitted to the institution and those identified in Texas Education Code, §51.883.

(c) Notifications to the commissioner of the Department of State Health Services (DSHS) shall be submitted on the designated electronic form available on DSHS's School Health Program website found at dshs.texas.gov.

(d) This section does not apply to a private or independent institution of higher education, as defined in Texas Education Code, §61.003(15).

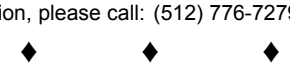
§40.8. Immunity from Liability.

A person who in good faith takes, or fails to take, any action under this subchapter or Texas Education Code, Chapter 51, Subchapter Y-1 or Texas Health and Safety Code, Chapter 773, Subchapter A, is immune from civil or criminal liability or disciplinary action resulting from that action or failure to act in accordance with the Texas Education Code, §51.888 or Texas Health and Safety Code, §773.0145.

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 18, 2019.

TRD-201904322
Barbara L. Klein
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 776-7279



CHAPTER 412. LOCAL MENTAL HEALTH AUTHORITY RESPONSIBILITIES

SUBCHAPTER D. MENTAL HEALTH SERVICES--ADMISSION, CONTINUITY, AND DISCHARGE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes the repeal of §§412.151 - 412.154, 412.161 - 412.163, 412.171 - 412.179, 412.191 - 412.195, 412.201 - 412.208, 412.221, and 412.231 - 412.233 in Title 25, Part 1, Chapter 412, Subchapter D, concerning Mental Health Services--Admission, Continuity, and Discharge.

BACKGROUND AND PURPOSE

As required by Texas Government Code §531.0201(a)(2)(C), client services functions previously performed by the Department of State Health Services (DSHS) were transferred to the Texas Health and Human Services Commission (HHSC) on September 1, 2016, in accordance with Texas Government Code §531.0201 and §531.02011. The purpose of the proposal is to repeal the rules in Title 25, Part 1, Chapter 412, Subchapter D, Mental Health Services--Admission, Continuity, and Discharge.

New rules in Title 26, Part 1, Chapter 306, Subchapter D, Mental Health Services--Admission, Continuity, and Discharge are proposed elsewhere in this issue of the *Texas Register.*

SECTION-BY-SECTION SUMMARY

The proposed repeal of §§412.151 - 412.154, 412.161 - 412.163, 412.171 - 412.179, 412.191 - 412.195, 412.201 - 412.208, 412.221, and 412.231 - 412.233 deletes the rules no longer necessary for DSHS, because similar content of these rules has been proposed in Title 26, Health and Human Services.

FISCAL NOTE

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

Fiscal implications to state government relating to the imposition of mental health services are addressed concurrently in the fiscal note to the rules in Title 26, Part 1, Chapter 306, Subchapter D, Mental Health Services--Admission, Continuity, and Discharge, as proposed elsewhere in this issue of the *Texas Register.*

GOVERNMENT GROWTH IMPACT STATEMENT

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

(1) the proposed repeal of rules will not create or eliminate a government program;

(2) implementation of the proposed repeal of rules will not affect the number of HHSC employee positions;

(3) implementation of the proposed repeal of rules will result in no assumed change in future legislative appropriations;

(4) the proposed repeal of rules will not affect fees paid to HHSC;

(5) the proposed repeal of rules will not create new rules;

(6) the proposed repeal of rules will repeal existing rules;

(7) the proposed repeal of rules will not increase the number of individuals subject to the rules; and

(8) the proposed repeal of rules will not affect the state's economy.

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

Trey Wood has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The proposed repeal does not impose any additional costs on any small businesses, micro-businesses, or rural communities required to comply.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

Sonja Gaines, Deputy Executive Commissioner of Intellectual and Developmental Disorders-Behavioral Health Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be to reduce or eliminate barriers to accessing care and to transitioning between and among system components for individuals receiving HHSC-funded mental health services by ensuring clinically appropriate treatment based on level of acuity and needs; timely access to evaluation and treatment services in the least restrictive and most appropriate setting of care; and uninterrupted services during transition between service types or providers.

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to *HHSRulesCoordinationOffice@hhsc.state.tx.us.*

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register.* Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 25R018" in the subject line.

DIVISION 1. GENERAL PROVISIONS

25 TAC §§412.151 - 412.154

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The repeals affect Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§412.151. Purpose.
§412.152. Application.
§412.153. Definitions.
§412.154. Utilization Management Agreement Between SMHF and LMHA.

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 15, 2019.

TRD-201904292
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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DIVISION 2. SCREENING AND ASSESSMENT FOR CRISIS SERVICES AND ADMISSION INTO LMHA SERVICES--LMHA RESPONSIBILITIES

25 TAC §§412.161 - 412.163

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The repeals affect Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§412.161. Screening and Assessment.
§412.162. Determining County of Residence.
§412.163. Most Appropriate and Available Treatment Alternative.

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 15, 2019.

TRD-201904294
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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DIVISION 3. ADMISSION TO SMHFS--SMHF RESPONSIBILITIES

25 TAC §§412.171 - 412.179

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The repeals affect Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§412.171. General Admission Criteria.
§412.172. Admission Criteria for Maximum Security Unit at North Texas State Hospital--Vernon Campus.
§412.173. Admission Criteria For Adolescent Forensic Unit at North Texas State Hospital--Vernon Campus.
§412.174. Admission Criteria for Waco Center for Youth.
§412.175. Voluntary Admission.
§412.176. Emergency Detention.
§412.177. Admission Under Order of Protective Custody or Court-ordered Inpatient Mental Health Services.
§412.178. Admission Procedures.
§412.179. Voluntary Treatment Following Involuntary Admission.

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 15, 2019.

TRD-201904295
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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DIVISION 4. TRANSFERS AND CHANGING LMHAS

25 TAC §§412.191 - 412.195

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The repeals affect Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§412.191. Transfers Between SMHFs.
§412.192. Transfers Between a SMHF and a SMRF.
§412.193. Transfers Between a SMHF and an Out-of-State Institution.
§412.194. Transfers Between a SMHF and Another Institution in Texas.
§412.195. Changing LMHAs.

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 15, 2019.

TRD-201904296
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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DIVISION 5. DISCHARGE AND ATP FROM SMHF

25 TAC §§412.201 - 412.208

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner

of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The repeals affect Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§412.201. Discharge Planning.

§412.202. Special Considerations.

§412.203. Discharge of Voluntary Patients.

§412.204. Discharge of Involuntary Patients.

§412.205. Absences From a SMHF.

§412.206. Absence for Trial Placement (ATP).

§412.207. Procedures Upon Discharge or ATP.

§412.208. Post Discharge/ATP: Contact and Implementation of Continuing Care Plan.

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 15, 2019.

TRD-201904297
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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DIVISION 6. DISCHARGE FROM LMHA SERVICES

25 TAC §412.221

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The repeal affects Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§412.221. Discharge From LMHA Services.

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 15, 2019.

TRD-201904298
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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DIVISION 7. TRAINING, REFERENCES, AND DISTRIBUTION

25 TAC §§412.231 - 412.233

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The repeals affect Texas Government Code §531.0055 and Texas Health and Safety Code §534.053 and §534.058.

§412.231. Assessment and Intake Training Requirements at a SMHF.

§412.232. References.

§412.233. Distribution.

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

Filed with the Office of the Secretary of State on November 15, 2019.

TRD-201904299
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 306. LOCAL MENTAL HEALTH AUTHORITY RESPONSIBILITIES

SUBCHAPTER D. MENTAL HEALTH SERVICES--ADMISSION, CONTINUITY, AND DISCHARGE

The Texas Health and Human Services Commission (HHSC) proposes new Chapter 306, Subchapter D, concerning Mental Health Services--Admission, Continuity, and Discharge. The new subchapter is comprised of Division 1, §§306.151 - 306.154, concerning General Provisions; Division 2, §§306.161 - 306.163, concerning Screening and Assessment for Crisis Services and Admission into Local Mental Health Authority or Local Behavioral Health Authority Services--Local Mental Health Authority or Local Behavioral Health Authority Responsibilities; Division 3, §§306.171 - 306.178, concerning Admission to a State Mental Health Facility or a Facility with a Contracted Psychiatric Bed--Provider Responsibilities; Division 4, §§306.191 - 306.195, concerning Transfers and Changing Local Mental Health Authorities or Local Behavioral Health Authorities; Division 5, §§306.201 - 306.207, concerning Discharge and Absences from a State Mental Health Facility or Facility with a Contracted Psychiatric Bed; and Division 6, §306.221, concerning Training.

BACKGROUND AND PURPOSE

As required by Texas Government Code §531.0201(a)(2)(C), client services functions previously performed by the Department of State Health Services (DSHS) were transferred to the Texas Health and Human Services Commission (HHSC) on September 1, 2016, in accordance with Texas Government

Code §531.0201 and §531.02011. HHSC proposes these new rules in Title 26, Chapter 306 to address the content of rules in Title 25, Chapter 412, Subchapter D, concerning Mental Health Services--Admission, Continuity, and Discharge. The rules in Chapter 412 are proposed for repeal elsewhere in this issue of the *Texas Register.* The purpose of these rules is to establish guidelines for admission, transfers, and discharges from state hospitals; admissions, discharges, and transfers for local mental health authorities (LMHAs) and local behavioral health authorities (LBHAs); and continuity of services for persons receiving LMHA or LBHA services and inpatient services at a state mental health facility (SMHF) or a facility with a contracted psychiatric bed (CPB). The proposed rules also implement certain provisions in Senate Bill (S.B.) 562, S.B. 1238, and House Bill 601, 86th Legislature, Regular Session, 2019, that relate to voluntary admission requirements and admission criteria for maximum security units.

SECTION-BY-SECTION SUMMARY

Proposed new §306.151 establishes the purpose of the subchapter and to whom it applies.

Proposed new §306.152 sets forth the subchapter's application to SMHFs, facilities with CPBs, and certain LMHAs, LBHAs, and managed care organizations (MCOs). The rule requires LMHAs and LBHAs to monitor network providers for compliance with Division 2 and Division 3 of the subchapter.

Proposed new §306.153 provides definitions for terminology used in the subchapter.

Proposed new §306.154 describes the rights of an individual to appeal, request a fair hearing, and receive a notification about an LMHA or LBHA decision to deny, reduce, suspend, discharge, transfer or terminate LMHA or LBHA services.

Proposed new §306.161 establishes the requirements for LMHA and LBHA screening and assessment of individuals in crisis; incorporates crisis alternative treatment options; defines individuals determined not to be in the mental health priority population; outlines the LMHA or LBHA responsibilities regarding the completion of an approved assessment tool to determine eligibility once the crisis has resolved; establishes the requirements for admission, continuity, and discharge practices for individuals in need of acute or extended acute mental health services provided through outpatient or inpatient treatment settings; and incorporates current organizational names and terminology.

Proposed new §306.162 sets forth the requirements for determining a county of residence for individuals seeking admission into LMHA or LBHA services. This section also requires the LMHA or LBHA to initiate or continue providing clinically necessary services, including discharge planning, during the dispute resolution process.

Proposed new §306.163 sets forth the requirements for LMHA or LBHA recommendation of the most appropriate and available treatment options, including outpatient and inpatient mental health services; requires the LMHA or LBHA to assign a continuity of care worker when an individual is admitted to a facility with a CPB or a SMHF; provides for community-based treatment alternatives; and allows an LMHA or LBHA referral to an alternate provider if an individual requests a referral.

Proposed new §306.171 establishes general admission criteria for SMHFs and CPBs; requires the LMHA or LBHA to screen and authorize an individual for admission to a SMHF or facility with a CPB and requires facilities notify the LMHA or LBHA if an individual arrives for treatment without being screened. The proposed rule also outlines the process for treatment and transfer, if necessary, of an individual with an emergency medical condition.

Proposed new §306.172 establishes admission criteria to a maximum security unit, and requires commitment pursuant to the Texas Code of Criminal Procedure or a determination of manifest dangerousness.

Proposed new §306.173 establishes criteria for admission to an adolescent forensic unit. An adolescent may be admitted to an adolescent forensic unit if determined manifestly dangerous, committed under the Texas Family Code, or the admission is a condition of the adolescent's probation or parole.

Proposed new §306.174 sets forth the admission criteria for Waco Center for Youth. The proposed new rule includes language regarding eligibility criteria and language to clarify endorsement of admission to an SMHF or facility with a CPB by the Community Resource Coordination Group is needed if the adolescent is currently receiving LMHA or LBHA services. If the Waco Center for Youth denies admission, the LAR has the opportunity to appeal the decision with the Ombudsman. The proposed new rule includes language to reflect the responsibilities of Waco Center for Youth when an adolescent requires admission to a psychiatric hospital and the requirements for discharge planning.

Proposed new §306.175 sets forth requirements for voluntary admission to a facility with a CPB or an SMHF in accordance with Texas Health and Safety Code, Chapter 572; describes a physician's responsibility to contact the LMHA or LBHA when an individual does not meet admission criteria to determine if community resources may appropriately serve the individual; and requires a physician to conduct a face-to-face examination of the individual requesting voluntary admission to a facility with the CPB or an SMHF.

Proposed new §306.176 sets forth the requirements for emergency detention to a facility with a CPB or to an SMHF and requires a preliminary examination by a physician no later than 12 hours after the individual is transported to a facility with a CPB or an SMHF for emergency detention. The proposed new rule also incorporates requirements concerning the intake assessment, which is to occur no later than 24 hours following admission for emergency detention.

Proposed new §306.177 establishes the requirements for admission to an SMHF or facility with a CPB for inpatient mental health services under an order of protective custody or court order.

Proposed new §306.178 sets forth the requirements for voluntary treatment following involuntary admission to an SMHF or facility with a CPB.

Proposed new §306.191 outlines the requirements for the transfer of individuals from one SMHF to another SMHF.

Proposed new §306.192 outlines the requirements for the transfer of individuals between an SMHF and SSLC.

Proposed new §306.193 outlines the requirements for the transfer of an individual between an SMHF and an out-of-state institution.

Proposed new §306.194 sets forth requirements for transfers between an SMHF and another facility in Texas, and establishes that the individual or individual's legally authorized representa-

tive, who made the request for voluntary admission, must consent to the transfer.

Proposed new §306.195 describes an LMHA's or LBHA's responsibilities when an individual transfers to a new LMHA or LBHA, and an SMHF's or facility with a CPB's responsibilities when an individual receiving inpatient services intends to transfer to a new LMHA or LBHA upon discharge from the SMHF or facility with a CPB.

Proposed new §306.201 establishes requirements regarding discharge planning responsibilities of the SMHF or the facility with a CPB and the LMHA or LBHA; describes the process for resolving disagreements between the LMHA or LBHA and the SMHF or facility with a CPB treatment team's decision concerning discharge; and the requirements for documenting unexpected discharges.

Proposed new §306.202 sets forth the requirements for special considerations for populations of individuals admitted to an SMHF or facility with a CPB including individuals admitted three or more times in a 180-day period, individuals eligible for preadmission screening and resident review (PASRR), individuals on absence for trial placement (ATP), individuals appropriate for assisted living post discharge, and offenders with special needs. The proposed new rule requires discharge planning to include recovery-based, trauma-informed, and person-centered models of care.

Proposed new §306.203 sets forth the requirements for when an SMHF or a facility with a CPB must discharge an individual who was voluntarily admitted to an SMHF or a facility with a CPB.

Proposed new §306.204 establishes the requirements for the discharge of an individual who was involuntarily admitted to an SMHF or facility with a CPB and directs the administrator of an SMHF or facility with a CPB to forward the discharge packet of an individual committed under the Code of Criminal Procedure to the jail and to the LMHA or LBHA.

Proposed new §306.205 sets forth the requirements for an authorized and unauthorized pass or furlough from an SMHF or facility with a CPB for an involuntary individual admitted under court order for inpatient mental health services.

Proposed new §306.206 sets forth the requirements for ATP from an SMHF or facility with a CPB and describes the responsibilities of an LMHA, LBHA, SMHF, and a facility with a CPB regarding the ATP.

Proposed new §306.207 requires an LMHA or LBHA to contact an individual following discharge or ATP from an SMHF or a facility with a CPB; implement the individual's recovery or treatment plan post discharge or ATP; develop or review an individual's recovery or treatment plan in accordance with 25 TAC §412.322 (relating to Provider Responsibilities for Treatment Planning and Service Authorization); and describes the LMHA's or LBHA's responsibility when an individual's recovery or treatment plan identifies the designated LMHA or LBHA as responsible for providing or paying for the individual's psychoactive medications.

Proposed new §306.221 sets forth training and documentation requirements related to screening staff and intake assessment professionals performed pursuant to the subchapter and codified in Texas Health and Safety Code §572.0025.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to HHSC;

(5) the proposed rules will create new rules;

(6) the proposed rules will not repeal existing rules;

(7) the proposed rules will increase the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

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

Trey Wood has also determined that there may be an adverse economic effect on small businesses, micro-businesses or rural communities.

The proposed rules require 37 LMHAs and 2 LBHAs to add specific requirements to provider contracts to ensure compliance with screening and assessment for crisis services, admission into LMHA or LBHA services, and admission into an SMHF or facility with a CPB. HHSC lacks sufficient data to estimate the number of those facilities designated as a small business, micro-business, or rural community impacted by the proposed rules.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

Sonja Gaines, Deputy Executive Commissioner of Intellectual and Developmental Disorders-Behavioral Health Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be to reduce or eliminate barriers to accessing care and to transition between and among system components for individuals receiving HHSC-funded mental health services by ensuring clinically appropriate treatment based on level of acuity and needs; timely access to evaluation and treatment services in the least restrictive and most appropriate setting of care; and uninterrupted services during transition between service types or providers.

Trey Wood has also determined that for the first five years the rules are in effect, persons who are required to comply may incur economic costs. The proposed rules require LMHAs and LBHAs to add specific requirements to provider contracts to ensure compliance with screening and assessment for crisis services, admission into LMHA or LBHA services, and admission

into an SMHF or facility with a contracted psychiatric bed. HHSC assumes that some LMHAs and LBHAs may be currently monitoring providers but lacks sufficient information regarding current monitoring practices. Therefore, the costs to persons required to comply cannot be determined at this time.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to *HHSRulesCoordinationOffice@hhsc.state.tx.us.*

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register.* Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or e-mailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 25R018" in the subject line.

DIVISION 1. GENERAL PROVISIONS

26 TAC §§306.151 - 306.154

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The proposed new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §§534.053 and 534.058.

§306.151. Purpose.

The purpose of this subchapter is to address the interrelated roles and responsibilities of state mental health facilities, local mental health authorities, and local behavioral health authorities in the delivery of mental health services to individuals. This subchapter establishes criteria and provides guidelines related to:

(1) clinically appropriate patient placement based on screening and assessment of the individual;

(2) timely access to evaluation and mental health treatment services in the least restrictive, most appropriate setting of care; and

(3) effectively, and without interruption, transitioning care between service types and providers for individuals receiving mental health services at state mental health facilities, local mental health authorities, and local behavioral health authorities.

§306.152. Application and Responsibility for Compliance.

(a) This subchapter applies to:

(1) a state mental health facility (SMHF);

(2) a facility with a contracted psychiatric bed (CPB);

(3) a local mental health authority (LMHA) or a local behavioral health authority (LBHA);

(4) an LMHA or LBHA with a local service area that is served by a managed care organization (MCO), to the extent the contract between the Health and Human Services Commission (HHSC) and the LMHA or LBHA requires compliance with one or more provisions of this subchapter; and

(5) an MCO, as required by the managed care contracts between HHSC and the MCO for delivery of Medicaid and CHIP managed care products.

(b) Responsibility for Compliance. An LMHA or LBHA:

(1) must require by contract with providers in its network, that the providers comply with Division 2 of this subchapter (relating to Screening and Assessment for Crisis Services and Admission into Local Mental Health Authority or Local Behavioral Health Authority Services--Local Mental Health Authority or Local Behavioral Health Authority Responsibilities) and Division 3 of this subchapter (relating to Admission to a State Mental Health Facility or a Facility with a Contracted Psychiatric Bed--Provider Responsibilities); and

(2) must monitor its providers for compliance with the contract and the requirements in Division 2 and Division 3 of this subchapter.

§306.153. Definitions.

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

(1) Absence--When an individual, previously admitted to an SMHF and not discharged from the SMHF, is physically away from the SMHF for any reason, including hospitalization, home visit, special activity, unauthorized departure, or absence for trial placement.

(2) Admission--

(A) An individual's acceptance to an SMHF's custody or a facility with a CPB for inpatient services, based on:

(i) a physician's order issued in accordance with §306.175(h)(2)(C) of this subchapter (relating to Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility);

(ii) a physician's order issued in accordance with §306.176(c)(3) of this subchapter (relating to Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility for Emergency Detention);

(iii) a court's order of protective custody issued in accordance with Texas Health and Safety Code §574.022;

(iv) a court's order for temporary inpatient mental health services issued in accordance with Texas Health and Safety Code §574.034, or Texas Family Code Chapter 55;

(v) a court's order for extended inpatient mental health services issued in accordance with Texas Health and Safety Code §574.035, or Texas Family Code Chapter 55; or

(vi) a court's order for commitment issued in accordance with the Texas Code of Criminal Procedure, Chapter 46B or Chapter 46C.

(B) The acceptance of an individual in the mental health priority population into LMHA or LBHA services.

(3) Adolescent--An individual at least 13 years of age, but younger than 18 years of age.

(4) Adult--An individual at least 18 years of age or older.

(5) Advance directive--As used in this subchapter, includes:

(A) an instruction made under Texas Health and Safety Code §§166.032, 166.034 or 166.035 to administer, withhold, or withdraw life-sustaining treatment in the event of a terminal or irreversible condition;

(B) an out-of-hospital DNR order, as defined by Texas Health and Safety Code §166.081; or

(C) a medical power of attorney under Texas Health and Safety Code, Chapter 166, Subchapter D.

(6) Alternate provider--An entity that provides mental health services or substance abuse treatment services in the community but not pursuant to a contract or memorandum of understanding with an LMHA or LBHA.

(7) APRN--Advanced practice registered nurse. A registered nurse licensed by the Texas Board of Nursing to practice as an advanced practice registered nurse as provided by Texas Occupations Code §301.152.

(8) Assessment--The administrative process an SMHF or a facility with a CPB uses to gather information from a prospective patient, including a medical history and the problem for which the prospective patient is seeking treatment, to determine whether a prospective patient should be examined by a physician to determine if admission is clinically justified, as defined by Texas Health and Safety Code §572.0025(h)(2).

(9) Assessment professional--In accordance with Texas Health and Safety Code §572.0025(c)-(d), a staff member of an SMHF or facility with a CPB whose responsibilities include conducting the intake assessment described in §306.175(g) and §306.176(e) of this subchapter, and who is:

(A) a physician licensed to practice medicine under Texas Occupations Code, Chapter 155;

(B) a physician assistant licensed under Texas Occupations Code, Chapter 204;

(C) an APRN licensed under Texas Occupations Code, Chapter 301;

(D) a registered nurse licensed under Texas Occupations Code, Chapter 301;

(E) a psychologist licensed under Texas Occupations Code, Chapter 501;

(F) a psychological associate licensed under Texas Occupations Code, Chapter 501;

(G) a licensed professional counselor licensed under Texas Occupations Code, Chapter 503;

(H) a licensed social worker licensed under Texas Occupations Code, Chapter 505; or

(I) a licensed marriage and family therapist licensed under Texas Occupations Code, Chapter 502.

(10) ATP--Absence for trial placement. When an individual, currently admitted to an SMHF, is physically away from the SMHF for the SMHF to evaluate the individual's adjustment to a particular living arrangement before the individual's discharge and as a potential residence following discharge. An ATP is a type of furlough, as referenced in Texas Health and Safety Code, Chapter 574, Subchapter F.

(11) Business day--Any day except a Saturday, Sunday, or legal holiday listed in Texas Government Code §662.021.

(12) Capacity--An individual's ability to understand and appreciate the nature and consequences of a decision regarding the individual's medical treatment, and the ability of the individual to reach an informed decision in the matter.

(13) Child--An individual at least three years of age, but younger than 13 years of age.

(14) Continuity of care--Activities designed to ensure an individual is provided uninterrupted services during a transition between inpatient and outpatient services and that provide assistance to the individual and the individual's LAR in identifying, accessing, and coordinating LMHA or LBHA services and other appropriate services and supports in the community needed by the individual, including:

(A) assisting with admissions and discharges;

(B) facilitating access to appropriate services and supports in the community, including identifying and connecting the individual with community resources, and coordinating the provision of services;

(C) participating in developing and reviewing the individual's recovery or treatment plan;

(D) promoting implementation of the individual's recovery or treatment plan; and

(E) coordinating between the individual and the individual's family, as requested by the individual.

(15) Continuity of care worker--An LMHA, LBHA, or LIDDA staff member responsible for providing continuity of care services. The staff member may collaborate with a peer specialist, recovery specialist, or family partner to provide continuity of services.

(16) COPSD--Co-occurring psychiatric and substance use disorder.

(17) COPSD model--An application of evidence-based practices for an individual diagnosed with co-occurring conditions of mental illness and substance use disorder.

(18) CPB--Contracted psychiatric bed. A state-funded contracted psychiatric bed that:

(A) is authorized by an LMHA or LBHA; and

(B) is used for inpatient care in the community, and this does not include a crisis respite unit, crisis residential unit, an extended observation unit, or a crisis stabilization unit.

(19) CRCG--Community Resource Coordination Group. A local interagency group comprised of public and private providers who collaborate to develop individualized service plans for individuals whose needs may be met through interagency coordination and cooperation. CRCGs are established and operate in accordance with a Memorandum of Understanding on Services for Persons Needing Multiagency Services, required by Texas Government Code §531.055.

(20) Crisis--A situation in which:

(A) an individual presents an immediate danger to self or others;

(B) an individual's mental or physical health is at risk of serious deterioration; or

(C) an individual believes he presents an immediate danger to self or others, or the individual's mental or physical health is at risk of serious deterioration.

(21) Crisis treatment alternatives--Community-based facilities or units providing short-term, residential crisis treatment to ameliorate a behavioral health crisis in the least restrictive environment, including crisis stabilization units, extended observation units, crisis residential units, and crisis respite units. The intensity and scope of services varies by facility type and is available in a local service area based upon the local needs and characteristics of the community.

(22) Day--Calendar day.

(23) DD--Developmental disability. As listed in the Texas Health and Safety Code §531.002, an individual with a severe, chronic disability attributable to a mental or physical impairment or a combination of mental and physical impairments that:

(A) manifests before the person reaches 22 years of age;

(B) is likely to continue indefinitely;

(C) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of a lifelong or extended duration and are individually planned and coordinated; and

(D) results in substantial functional limitations in three or more of the following categories of major life activity:

(i) self-care;

(ii) receptive and expressive language;

(iii) learning;

(iv) mobility;

(v) self-direction;

(vi) capacity for independent living; and

(vii) economic self-sufficiency.

(24) Designated LMHA or LBHA--The LMHA or LBHA:

(A) that serves the individual's county of residence, which is determined in accordance with §306.162 of this subchapter (relating to Determining County of Residence); or

(B) that does not serve the individual's county of residence, but has taken responsibility for ensuring the individual's LMHA or LBHA services.

(25) Discharge--

(A) From an SMHF or a facility with a CPB: The release of an individual from the custody and care of a provider of inpatient services.

(B) From LMHA or LBHA services: The termination of LMHA or LBHA services delivered to an individual by an LMHA or LBHA.

(26) Discharged unexpectedly--A discharge from an SMHF or facility with a CPB:

(A) due to an individual's unauthorized departure;

(B) at the voluntary individual's request;

(C) due to a court releasing the individual;

(D) due to the death of the individual; or

(E) due to the execution of an arrest warrant for the individual.

(27) Emergency medical condition--A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances, or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably result in:

(A) placing the health of the individual (or with respect to a pregnant woman, the health of the woman or her unborn child) or others in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part;

(D) serious disfigurement; or

(E) in the case of a pregnant woman having contractions:

(i) inadequate time to affect a safe transfer to another hospital before delivery; or

(ii) a transfer posing a threat to the health and safety of the woman or the unborn child.

(28) Face-to-face--A form of contact occurring in person or through the use of audiovisual or other telecommunications technology.

(29) Facility--A care facility including a state mental health facility, private psychiatric hospital, medical hospital, and community setting, but does not include a nursing facility or an assisted living facility.

(30) HHSC--Texas Health and Human Services Commission or its designee.

(31) ID--Intellectual disability. Consistent with Texas Health and Safety Code §591.003, significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and originating before age 18.

(32) Individual--A person seeking or receiving services under this subchapter.

(33) Inpatient services--Residential psychiatric treatment provided to an individual in an SMHF, a facility with a CPB, a hospital licensed under the Texas Health and Safety Code, Chapter 241 or Chapter 577, or a CSU licensed under 26 TAC Chapter 510 (relating to Private Psychiatric Hospitals and Crisis Stabilization Units).

(34) Intake assessment--The administrative process conducted by an assessment professional for gathering information about a prospective patient and giving a prospective patient information about the facility and the facility's treatment and services.

(35) Involuntary individual--An individual receiving inpatient services based on an admission to a state mental health facility or a facility with a CPB made in accordance with:

(A) §306.176 of this subchapter;

(B) §306.177 of this subchapter (relating to Admission Criteria Under Order of Protective Custody or Court-ordered Inpatient Mental Health Services);

(C) an order for temporary inpatient mental health services issued in accordance with Texas Health and Safety Code §574.034 or Texas Family Code, Chapter 55;

(D) an order for extended inpatient mental health services issued in accordance with Texas Health and Safety Code §574.035 or Texas Family Code, Chapter 55;

(E) an order for commitment issued in accordance with Texas Code of Criminal Procedure, Chapter 46B; or

(F) an order for commitment issued in accordance with Texas Code of Criminal Procedure, Chapter 46C.

(36) LAR--Legally authorized representative. A person authorized by state law to act on behalf of an individual for the purposes of:

(A) admission, transfer or discharge includes:

(i) a parent, non-Department of Family and Protective Services managing conservator or guardian of minor;

(ii) a Department of Family and Protective Service managing conservator of a minor acting pursuant to Texas Health and Safety Code §572.001 (c-2)-(c-4); and

(iii) a person eligible to consent to treatment for a minor under §32.001(a)(1)-(3), Texas Family Code, who may request from a district court authorization under Texas Family Code, Chapter 35 for the temporary admission of a minor who has been within their care for the past six months.

(B) consent on behalf of an individual with regard to a matter described in this subchapter other than admission, transfer or discharge includes:

(i) persons described by subparagraph (A) of this paragraph; and

(ii) an agent acting under a Medical Power of Attorney under Texas Health and Safety Code, Chapter 166 or a Declaration for Mental Health Treatment under Texas Civil Practice and Remedies Code, Chapter 137.

(37) LBHA--Local behavioral health authority. An entity designated as a local behavioral health authority by HHSC in accordance with Texas Health and Safety Code §533.0356.

(38) LIDDA--Local intellectual developmental disability authority. An entity designated by HHSC in accordance with Texas Health and Safety Code §533A.035.

(39) LMHA--Local mental health authority. An entity designated as a local mental health authority by HHSC in accordance with Texas Health and Safety Code §533.035(a).

(40) LMHA or LBHA network provider--An entity that provides mental health services in the community pursuant to a contract or memorandum of understanding with an LMHA or LBHA, including that part of an LMHA or LBHA directly providing mental health services.

(41) LMHA or LBHA services--Inpatient and outpatient mental health services provided by an LMHA or LBHA network provider to an individual in the individual's home community.

(42) Local service area--A geographic area composed of one or more Texas counties defining the population that may receive services from an LMHA or LBHA.

(43) MCO--Managed care organization. An entity governed by Chapter 843 of the Texas Insurance Code to operate as a health maintenance organization or to issue a private provider benefit plan.

(44) Mental illness--Any clinical disorder as defined in the current edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

(45) MH priority population--Mental health priority population. As identified in state performance contracts with LMHAs or LBHAs, those groups of children, adolescents, and adults with mental illness or serious emotional disturbance assessed as most in need of mental health services.

(46) Minor--An individual under 18 years of age.

(47) Nursing facility--A long-term care facility licensed by HHSC as a nursing home, nursing facility, or skilled nursing facility as defined in Texas Health and Safety Code, Chapter 242.

(48) Offender with special needs--An individual who has a terminal or serious medical condition, a mental illness, an ID, a DD, or a physical disability, and is served by the Texas Correctional Office on Offenders with Medical or Mental Impairments as provided in Texas Health and Safety Code, Chapter 614.

(49) Ombudsman--The Ombudsman for Behavioral Health Access to Care established by Texas Government Code §531.02251, which serves as a neutral party to help consumers, including consumers who are uninsured or have public or private health benefit coverage, and behavioral health care providers navigate and resolve issues related to consumer access to behavioral health care, including care for mental health conditions and substance use disorders.

(50) PASRR--Preadmission screening and resident review in accordance with 40 TAC Chapter 19, Subchapter BB (relating to Nursing Facility Responsibilities Related to Preadmission Screening and Resident Review (PASRR)).

(51) PASRR Level I screening--The process of screening an individual to identify whether the individual is suspected of having a mental illness, ID, or DD.

(52) PASRR Level II evaluation--A face-to-face evaluation of an individual suspected of having a mental illness, ID, or DD performed by a LIDDA, LMHA, or LBHA to determine if the individual has a mental illness, ID, or DD, and if so, to:

(A) assess the individual's need for care in a nursing facility;

(B) assess the individual's need for nursing facility specialized services, LIDDA specialized services, and LMHA or LBHA specialized services; and

(C) identify alternate placement options.

(53) Peer specialist--A person who uses lived experience with mental health challenges, in addition to skills learned in formal training, to deliver strengths-based, person-centered services to promote an individual's recovery and resiliency. A peer specialist must:

(A) be at least 18 years of age or older;

(B) have received:

(i) a high school diploma; or

(ii) a high school equivalency certificate issued in accordance with the law of the issuing state;

(C) be willing to appropriately share his or her own recovery story with individuals in services; and

(D) be able to demonstrate current self-directed recovery.

(54) Permanent residence--The physical location where an individual lives, or if a minor, where the minor's parents or legal guardian lives. A post office box is not a permanent residence.

(55) Preliminary examination--An assessment for medical stability and a psychiatric examination in accordance with Texas Health and Safety Code §573.022(a)(2).

(56) QMHP-CS--Qualified mental health professional-community services. A staff member who meets the requirements and performs the functions described in 25 TAC Chapter 412, Subchapter G (relating to Mental Health Community Services Standards).

(57) Recovery--A process of change through which individuals improve their health and wellness, live a self-directed life, and strive to reach their full potential.

(58) Recovery or treatment plan--A written plan:

(A) is developed in collaboration with an individual or the individual's LAR if required, and a QMHP-CS or Licensed Practitioner of the Healing Arts (LPHA) as defined in 25 TAC §412.303 (relating to Definitions);

(B) is amended at any time based on an individual's needs or requests;

(C) guides the recovery treatment process and fostering resiliency;

(D) is completed in conjunction with the uniform assessment;

(E) identifies the individual's changing strengths, capacities, goals, preferences, needs, and desired outcomes; and

(F) includes recommended services and supports or reasons for the exclusion of services and supports.

(59) Screening--Activities performed by a QMHP-CS to:

(A) collect triage information through face-to-face or telephone interviews with an individual or collateral contact;

(B) determine if the individual's need is emergent, urgent, or routine, conducted before the face-to-face assessment to determine the need for emergency services; and

(C) determine the need for in-depth assessment.

(60) SMHF--State mental health facility. A state hospital or a state center with an inpatient psychiatric component.

(61) SSLC--State supported living center. Consistent with Texas Health and Safety Code §531.002, a residential facility operated by the State to provide individuals with an ID a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills.

(62) Substance use disorder--The use of one or more drugs, including alcohol, which significantly and negatively impacts one or more major areas of life functioning and which meets the criteria for substance abuse or substance dependence as described in the current edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association.

(63) TAC--Texas Administrative Code.

(64) TCOOMMI--Texas Correctional Office on Offenders with Medical or Mental Impairments or its designee.

(65) Transfer--To move from one facility to another facility.

(66) Treating physician--A physician who coordinates and oversees an individual's treatment.

(67) Treatment team--A group of treatment providers, an individual, the individual's LAR (if any) and the LMHA, LBHA, or LIDDA who work together in a coordinated manner to provide comprehensive mental health services to the individual.

(68) Uniform assessment--An assessment tool adopted by HHSC under 25 TAC §412.322 (relating to Provider Responsibilities for Treatment Planning and Service Authorization) used for recommending an individual's level of care.

(69) Voluntary individual--An individual receiving inpatient services based on an admission made in accordance with:

(A) §306.175 of this subchapter; or

(B) §306.178 of this subchapter (relating to Voluntary Treatment Following Involuntary Admission).

§306.154. Notification and Appeals Process for Local Mental Health Authority or Local Behavioral Health Authority Services.

(a) Right of an individual eligible for Medicaid to request a fair hearing. Any individual eligible for Medicaid whose request for eligibility to receive LMHA or LBHA services is denied or is not acted upon with reasonable promptness, or whose services have been terminated, suspended, or reduced by HHSC, is entitled to a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A (relating to Uniform Fair Hearings Rules).

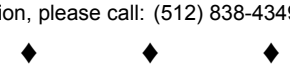
(b) Right of an individual not eligible for Medicaid to request an appeal. Any individual who has not applied for or is not eligible for Medicaid, whose request for eligibility to receive LMHA or LBHA services is denied or is not acted upon with reasonable promptness, or whose services have been terminated, suspended, or reduced by a provider, is entitled to notification and right of appeal in accordance with 25 TAC §401.464 (relating to Notification and Appeals Process).

(c) At any time, an individual may contact the Ombudsman for additional information and resources by calling toll-free (1-800-252-8154) or online at hhs.texas.gov/ombudsman.

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 15, 2019.

TRD-201904300
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349



DIVISION 2. SCREENING AND ASSESSMENT FOR CRISIS SERVICES AND ADMISSION INTO LOCAL MENTAL HEALTH AUTHORITY OR LOCAL BEHAVIORAL HEALTH AUTHORITY SERVICES--LOCAL MENTAL HEALTH AUTHORITY OR LOCAL BEHAVIORAL HEALTH AUTHORITY RESPONSIBILITIES

26 TAC §§306.161 - 306.163

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The proposed new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §§534.053 and 534.058.

§306.161. Screening and Assessment.

(a) If an individual is in crisis, an LMHA or LBHA ensures immediate screening and, if recommended based on the screening, a face-to-face intake assessment of an individual in the LMHA's or LBHA's local service area in accordance with 25 TAC §412.314 (relating to Access to Mental Health Community Services).

(b) When the crisis is resolved, the LMHA or LBHA must assess the individual using the uniform assessment and determine:

(1) referral for ongoing services at the LMHA or LBHA;

(2) referral to an alternate provider;

(3) referral to community-based crisis treatment alternative as described in §306.163 of this division (relating to Most Appropriate and Available Treatment Options);

(4) the individual's transportation by identifying and ensuring the individual's transportation needs were met; or

(5) no referral is needed.

(c) If an individual is not in crisis, an LMHA or LBHA screens each individual presenting for services at the LMHA or LBHA as follows:

(1) an LMHA or LBHA staff who is at least a QMHP-CS conducts a screening; and

(2) an LMHA or LBHA staff determines whether the individual's county of residence is within the LMHA's or LBHA's local service area.

(d) If the individual's county of residence is within the LMHA's or LBHA's local service area and the screenings described in subsections (a) and (c) of this section indicates an intake assessment is needed, the LMHA or LBHA conducts an assessment in accordance with 25 TAC §412.322(a) (relating to Provider Responsibilities for Treatment Planning and Service Authorization).

(1) LMHAs and LBHAs serve individuals in the MH priority population designated by HHSC. For an individual in the MH priority population, the LMHA or LBHA identifies which services the individual may be eligible to receive and, if appropriate, determines whether the individual receives services immediately or places the individual on a waiting list for services and refers the individual to other community resources.

(2) Individuals who are enrolled in Medicaid must receive services immediately.

(3) An LMHA or LBHA must serve an individual in accordance with 25 TAC §412.314.

(4) For an individual not in the MH priority population, the LMHA or LBHA must provide the individual with written notification regarding:

(A) the denial of services and the opportunity to appeal in accordance with §306.154 of this subchapter (relating to Notification and Appeals Process for Local Mental Health Authority or Local Behavioral Health Authority Services); and

(B) the availability of information and assistance from the Ombudsman by contacting the Ombudsman at 1-800-252-8154 or online at hhs.texas.gov/ombudsman.

§306.162. Determining County of Residence.

(a) County of Residence for Adults.

(1) An adult's county of residence is the county which the adult or the adult's LAR indicates is the county of the adult's permanent residence, unless there is a preponderance of evidence to the contrary. If the adult is not a Texas resident or indicates no permanent address, the adult's county of residence is the county in which the evidence indicates the adult resides.

(2) If an adult is unable to communicate the location of the adult's permanent residence and there is no evidence indicating the location of the adult's permanent residence or if an adult is not a Texas resident, the adult's county of residence is the county in which the adult is physically present when the adult requests or requires services.

(3) If an LMHA or LBHA is paying for an adult's community mental health services delivered in the local service area of another LMHA or LBHA, or if an LMHA or LBHA is paying for an adult's living arrangement that is located outside the LMHA's or LBHA's local service area, the county in which the paying LMHA or LBHA is located is the adult's county of residence.

(b) County of Residence for Minors.

(1) Except as provided in paragraph (2) of this subsection, a minor's county of residence is the county in which the minor's LAR's permanent residence is located.

(2) A minor's county of residence is the county in which the minor currently resides if:

(A) it cannot be determined in which county the minor's LAR's permanent residence is located;

(B) a state agency is the minor's LAR;

(C) the minor does not have an LAR; or

(D) the minor is at least 16 years of age and self-enrolling into services.

(c) Dispute regarding county of residence initiated by an LMHA or LBHA.

(1) The LMHA or LBHA must initiate or continue providing clinically necessary services, including discharge planning, during the dispute resolution process.

(2) If an LMHA or LBHA initiates a dispute that executive directors of the affected LMHAs or LBHAs cannot resolve, the HHSC performance contract manager(s) of the affected LMHAs or LBHAs resolves the dispute.

(d) Disputes regarding county of residence initiated by or on behalf of an individual. The Ombudsman may consult with the HHSC performance contract manager(s) of the affected LMHAs or LBHAs, and help resolve a dispute initiated by or on behalf of an individual.

(e) Changing county of residence status. Changing an individual's county of residence requires agreement between the LMHAs or LBHAs affected by the change, except as provided in §306.195 of this subchapter (relating to Changing Local Mental Health Authorities or Local Behavioral Health Authorities).

§306.163. Most Appropriate and Available Treatment Options.

(a) Recommendation for treatment. The designated LMHA or LBHA is responsible for recommending the most appropriate and available treatment alternative for an individual in need of mental health services.

(b) Inpatient services.

(1) Before an LMHA or LBHA refers an individual for inpatient services, the LMHA or LBHA must screen and assess the individual to determine if the individual requires inpatient services.

(2) If the screening and assessment indicates the individual requires inpatient services and inpatient services is the least restrictive setting available, the LMHA or LBHA refers the individual:

(A) to an SMHF or facility with a CPB, if the LMHA or LBHA determines that the individual meets the criteria for admission; or

(B) to an LMHA or LBHA network provider of inpatient services.

(3) If the individual is identified in the applicable HHSC automation system as having an ID, the LMHA or LBHA informs the designated LIDDA that the individual has been referred for inpatient services.

(4) If the LMHA, LBHA, or LMHA or LBHA-network provider refers the individual for inpatient services, the LMHA or LBHA must communicate necessary information to the contracted inpatient provider before or at the time of admission, including the individual's:

(A) identifying information, including address;

(B) legal status (e.g., regarding guardianship, charges pending, custody as applicable;

(C) pertinent medical and medication information, including known disabilities;

(D) behavioral information, including information regarding COPSD;

(E) other pertinent treatment information;

(F) finances, third-party coverage, and other benefits, if known; and

(G) advance directive.

(5) If an LMHA or LBHA, other than the individual's designated LMHA or LBHA, refers the individual for inpatient services, the SMHF or facility with a CPB notifies the individual's designated LMHA or LBHA of the referral for inpatient services by the end of the next business day.

(6) The designated LMHA or LBHA assigns a continuity of care worker to an individual admitted to an SMHF, a facility with a CPB, or an LMHA or LBHA inpatient services network provider

(7) If the individual has an ID, the designated LIDDA assigns a continuity of care worker to the individual.

(8) The LMHA or LBHA continuity of care worker, and LIDDA continuity of care worker as applicable, are responsible for the facilitation of the individual's continuity of services.

(c) Community-based crisis treatment options.

(1) An LMHA or LBHA must ensure the provision of crisis services to an individual experiencing a crisis while residing in its local service area.

(2) Individuals in need of a higher level of care, but not requiring inpatient services, have the option, as available, for admission to other services such as crisis respite, crisis residential, extended observation, or crisis stabilization unit.

(d) LMHA or LBHA Services.

(1) If an LMHA or LBHA admits an individual to LMHA or LBHA services, the LMHA or LBHA ensures the provision of services in the most integrated setting available.

(2) The LMHA or LBHA assigns, to an individual receiving services, a staff member who is responsible for coordinating the individual's services.

(e) Court Ordered Treatment. The LMHA or LBHA must provide services to an individual ordered by a court to participate in outpatient mental health services or competency restoration services, if available, when the court identifies the LMHA or LBHA as being responsible for those services.

(f) Referral to alternate provider.

(1) If an individual requests a referral to an alternate provider, and it is not court ordered to receive services from the LMHA or LBHA, the LMHA or LBHA makes a referral to an alternate provider in accordance with the request.

(2) If an individual has third-party coverage, but the coverage will not pay for needed services because the designated LMHA or LBHA does not have a provider in its network that is approved by the third-party coverage, the designated LMHA or LBHA takes action in accordance with 25 TAC §412.106(c)(2) (relating to Determination of Ability to Pay).

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 15, 2019.

TRD-201904301
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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DIVISION 3. ADMISSION TO A STATE MENTAL HEALTH FACILITY OR A FACILITY WITH A CONTRACTED PSYCHIATRIC BED--PROVIDER RESPONSIBILITIES

26 TAC §§306.171 - 306.178

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of ser-

vices by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The proposed new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §§534.053 and 534.058.

§306.171. General Admission Criteria for a State Mental Health Facility or Facility with a Contracted Psychiatric Bed.

(a) With the exceptions of Waco Center for Youth, a maximum security unit, and an adolescent forensic unit, an SMHF or facility with a CPB may admit an individual, who has been assessed by an LMHA or LBHA and recommended for inpatient admission, only if the individual has a mental illness and, as a result of the mental illness:

(1) presents a substantial risk of serious harm to self or others; or

(2) evidences a substantial risk of mental or physical deterioration.

(b) An individual's admission to an SMHF or facility with a CPB may not occur if the individual:

(1) requires specialized care that is not available at the SMHF or facility with a CPB; or

(2) has a physical medical condition that is unstable and could reasonably require inpatient medical treatment for the condition.

(c) If an individual arrives at an SMHF or facility with a CPB for mental health services, and the individual was not screened or referred by an LMHA or LBHA as described in §306.163 of this subchapter (relating to Most Appropriate and Available Treatment Options):

(1) the SMHF or facility with a CPB notifies the designated LMHA or LBHA that the individual has presented for services at the SMHF or facility with a CPB; and

(2) an SMHF or facility with a CPB physician determines if the individual has an emergency medical condition.

(d) An LMHA or LBHA must authorize an individual's admission to an SMHF or a facility with a CPB:

(1) If the physician of an SMHF or facility with a CPB determines the individual has an emergency medical condition, the physician decides whether the facility has the capability to treat the emergency medical condition.

(A) If the SMHF or facility with a CPB has the capability to treat the emergency medical condition, the facility admits the individual as required by the Emergency Medical Treatment and Active Labor Act (EMTALA) (42 USC §1395dd).

(B) If the SMHF or facility with a CPB does not have the capability to treat the emergency medical condition in accordance with EMTALA, the SMHF or facility with the CPB provides evaluation and treatment within its capability to stabilize the individual and arranges for the individual to be transferred to a hospital that has the capability to treat the emergency medical condition.

(2) If the SMHF or facility with a CPB determines that the individual does not have an emergency medical condition, the facility contacts the designated LMHA or LBHA to coordinate alternate services as appropriate.

§306.172. Admission Criteria for Maximum Security Units.

An individual's admission to a maximum security unit occurs only if the individual is:

(1) committed pursuant to Chapter 46B or Chapter 46C of the Texas Code of Criminal Procedure and determined to require admission to a maximum security unit; or

(2) determined manifestly dangerous in accordance with HHSC state hospital policies.

§306.173. Admission Criteria for an Adolescent Forensic Unit.

(a) An adolescent forensic unit admits an adolescent only if the adolescent meets the criteria described in a paragraph of this subsection.

(1) Condition of probation or parole. The adolescent's admission to an adolescent forensic unit fulfills a condition of probation or parole for a juvenile offense and the adolescent:

(A) on the basis of a clinical evaluation, is determined to be in need of specialized mental health treatment in a secure treatment setting to address violent behavior or delinquent conduct;

(B) has co-occurring psychiatric and substance use disorders; or

(C) has exhausted available community resources for treatment and has been recommended for admission by the local CRCG.

(2) Commitment under Texas Family Code, Chapter 55. The adolescent has been committed to a mental health facility under the Texas Family Code, Chapter 55, Subchapter C or D.

(3) Determined manifestly dangerous. The adolescent has been determined manifestly dangerous in accordance with HHSC state hospital policies.

(b) An adolescent may not be admitted to an adolescent forensic unit if a physician determines the adolescent has an ID.

§306.174. Admission Criteria for Waco Center for Youth.

(a) An individual's admission to Waco Center for Youth occurs only if the individual:

(1) is an adolescent whose age at admission allows adequate time for treatment programming before reaching 18 years of age;

(2) is diagnosed as emotionally disturbed;

(3) has a history of behavior adjustment problems;

(4) needs a structured treatment program in a residential facility; and

(5) is currently receiving LMHA or LBHA services or inpatient services at an SMHF or a facility with a CPB and has been referred for admission by:

(A) the LMHA or LBHA after presentation and endorsement by the local CRCG that all appropriate community-based resources have been exhausted and Waco Center for Youth is the least restrictive environment needed, the LMHA presents the CRCG letter of recommendation with the referral;

(B) the LMHA or LBHA, following a documented LMHA or LBHA assessment that local resources have been explored and exhausted (if the full CRCG cannot convene in a timely manner); or

(C) an SMHF.

(b) Waco Center for Youth may not admit an adolescent if the adolescent:

(1) has been found to have engaged in delinquent conduct or conduct indicating a need for supervision under the Texas Family Code, Title 3;

(2) is acutely psychotic, suicidal, homicidal, or seriously violent; or

(3) is determined by a physician to have an ID.

(c) If the Waco Center for Youth denies admission for services, Waco Center for Youth provides the adolescent's LAR written notification stating:

(1) the reason for the denial of services; and

(2) that the LAR may appeal the denial by contacting the LMHA or LBHA.

(d) If an adolescent receiving services at Waco Center for Youth requires admission to a psychiatric hospital, the discharge planning process includes the joint determination of the psychiatric hospital and Waco Center for Youth of the clinical appropriateness of readmission to Waco Center for Youth. With the agreement of the adolescent's treatment team, the Waco Center for Youth leadership, psychiatric hospital leadership, and the adolescent's LAR, the adolescent is prioritized for readmission to Waco Center for Youth.

§306.175. Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility.

(a) Request for voluntary admission.

(1) In accordance with Texas Health and Safety Code §572.001, a request for voluntary admission of an individual with a mental illness may only be made by:

(A) the individual, if the individual is at least 16 years of age or older;

(B) the LAR if:

(i) the individual is younger than 18 years of age; and

(ii) the LAR is described by §306.153(36)(A)(i) or (iii) of this subchapter (relating to Definitions); or

(C) the LAR, if the LAR is described by §306.153(36)(A)(ii), and admission is sought pursuant to the provisions of Texas Health and Safety Code §572.001(c-1)-(c-4).

(2) In accordance with Texas Health and Safety Code §572.001(b) and (e), a request for admission must:

(A) be in writing and signed by the LAR or individual making the request; and

(B) include a statement that the LAR or individual making the request:

(i) agrees that the individual remains in the SMHF or facility with a CPB until the individual's discharge; and

(ii) consents to diagnosis, observation, care, and treatment of the individual until:

(I) the discharge of the individual; or

(II) the individual is entitled to leave the SMHF or facility with a CPB, in accordance with Texas Health and Safety Code §572.004, after a request for discharge is made.

(3) The consent given under paragraph (2)(B)(ii) of this subsection does not waive an individual's rights described in:

(A) 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services);

(B) 25 TAC Chapter 405, Subchapter E (relating to Electroconvulsive Therapy (ECT));

(C) 25 TAC Chapter 414, Subchapter I (relating to Consent to Treatment with Psychoactive Medication--Mental Health Services); and

(D) 25 TAC Chapter 415, Subchapter F (relating to Interventions in Mental Health Services).

(b) Failure to meet admission criteria. If the physician of an SMHF or facility with a CPB determines that an individual does not meet admission criteria and that community resources may appropriately serve the individual, the physician contacts the LMHA or LBHA to discuss the availability and transfer of the individual to community services.

(c) Examination.

(1) A physician must conduct an examination on each individual requesting voluntary admission in accordance with this subsection.

(2) In accordance with Texas Health and Safety Code §572.0025(f)(1)(A), a physician conducts a physical and psychiatric examination, either in person or through the use of audiovisual or other telecommunications technology for the following:

(A) an assessment for medical stability; and

(B) a psychiatric examination, and, if indicated, a substance abuse assessment.

(3) In accordance with Texas Health and Safety Code §572.0025(f)(1); the physician may not delegate the examination to a non-physician.

(d) Meets admission criteria. If, after examination, the physician determines that the individual meets admission criteria of the SMHF or facility with a CPB, the SMHF or facility with a CPB admits the individual.

(e) Does not meet admission criteria. If, after the examination, the physician determines that the individual does not meet the admission criteria of the SMHF or facility with a CPB, the SMHF or the facility with a CPB contacts the designated LMHA or LBHA to coordinate alternate services as clinically indicated.

(f) Capacity to consent.

(1) If a physician determines that an individual whose consent is necessary for a voluntary admission does not have the capacity to consent to diagnosis, observation, care, and treatment, the SMHF or the facility with a CPB may not voluntarily admit the individual.

(2) When appropriate, the SMHF or the facility with a CPB initiates an emergency detention proceeding in accordance with Texas Health and Safety Code, Chapter 573, or files an application for court-ordered inpatient mental health services in accordance with Texas Health and Safety Code Chapter 574.

(g) Intake assessment. In accordance with Texas Health and Safety Code §572.0025(b), an assessment professional for an SMHF or facility with a CPB, before voluntary admission of an individual, conducts an intake assessment for:

(1) obtaining relevant information about the individual, including information about:

(A) finances;

(B) third-party coverage or insurance benefits; and

(C) advance directives;

(2) explaining, orally and in writing, the individual's rights described in 25 TAC Chapter 404, Subchapter E;

(3) explaining, orally and in writing, the SMHF's or facility with a CPB's services and treatment as they relate to the individual;

(4) explaining, orally and in writing, the existence, purpose, telephone number, and address of the protection and advocacy system established in Texas, pursuant to Texas Health and Safety Code §576.008; and

(5) explaining, orally and in writing, the individual trust fund account, charges for services, and the financial responsibility form.

(h) Requirements for voluntary admission. An SMHF or facility with a CPB may voluntarily admit an individual only if:

(1) a request for admission is made in accordance with subsection (a) of this section;

(2) a physician has:

(A) in accordance with Texas Health and Safety Code §572.0025(f)(1):

(i) conducted an examination in accordance with subsection (c) of this section within 72 hours before the admission or 24 hours after the admission; or

(ii) has consulted with a physician who has conducted an examination in accordance with subsection (c) of this section within 72 hours before the admission or 24 hours after the admission;

(B) determined that the individual meets the admission criteria of the SMHF or facility with a CPB and that admission is clinically justified; and

(C) issued an order admitting the individual; and

(3) in accordance with Texas Health and Safety Code §572.0025(f)(2), the administrator or designee of the SMHF or facility with a CPB has signed a written statement agreeing to admit the individual.

(i) Documentation of admission order. In accordance with Texas Health and Safety Code §572.0025(f)(1), the order described in subsection (h)(2)(C) of this section is issued:

(1) in writing and signed by the issuing physician; or

(2) orally or electronically if, within 24 hours after its issuance, the SMHF or facility with a CPB has a written order signed by the issuing physician.

(j) Periodic evaluation. To determine the need for continued inpatient treatment, a physician or physician's designee must evaluate a voluntary individual receiving acute inpatient treatment as often as clinically indicated, but no less than once a week.

§306.176. Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility for Emergency Detention.

(a) Acceptance for preliminary examination. In accordance with Texas Health and Safety Code §573.021 and §573.022, an SMHF or facility with a CPB accepts for a preliminary examination:

(1) an individual, of any age, who has been apprehended and transported to the SMHF or facility with a CPB by a peace officer or emergency medical services personnel in accordance with Texas Health and Safety Code §573.001 or §573.012; or

(2) an adult who has been transported to the SMHF or facility with a CPB by the adult's guardian in accordance with Texas Health and Safety Code §573.003.

(b) Preliminary examination.

(1) A physician conducts a preliminary examination of an individual as soon as possible but not more than 12 hours after the individual is transported to the SMHF or facility with a CPB for emergency detention.

(2) The preliminary examination consists of:

(A) an assessment for medical stability; and

(B) a psychiatric examination, including a substance abuse assessment if indicated, to determine if the individual meets the criteria described in subsection (c)(1) of this section.

(c) Requirements for emergency detention. The SMHF or facility with a CPB admits an individual for emergency detention if:

(1) in accordance with Texas Health and Safety Code §573.022(a)(2), a physician determines from the preliminary examination that:

(A) the individual has a mental illness;

(B) the individual evidences a substantial risk of serious harm to himself or others;

(C) the described risk of harm is imminent unless the individual is immediately detained; and

(D) emergency detention is the least restrictive means by which the necessary detention may be accomplished;

(2) in accordance with Texas Health and Safety Code §573.022(a)(3), a physician makes a written statement documenting the determination described in paragraph (1) of this subsection and describing:

(A) the nature of the individual's mental illness;

(B) the risk of harm the individual evidences, demonstrated either by the individual's behavior or by evidence of severe emotional distress and deterioration in the individual's mental condition to the extent that the individual cannot remain at liberty; and

(C) the detailed information on which the physician based the determination;

(3) the physician issues and signs a written order admitting the individual for emergency detention; and

(4) the individual meets the admission criteria of the SMHF or facility with a CPB.

(d) Release.

(1) The SMHF or facility with a CPB releases the individual accepted for a preliminary examination if:

(A) a preliminary examination of the individual has not been conducted within 12 hours after the individual is apprehended and transported to the facility by the peace officer or transported for emergency detention; or

(B) in accordance with Texas Health and Safety Code §573.023(a), the individual is not admitted for emergency detention on completion of the preliminary examination.

(2) If the SMHF or facility with a CPB does not admit the individual on an emergency detention, the SMHF or facility with a CPB contacts the designated LMHA or LBHA to coordinate alternate services as clinically indicated.

(3) In accordance with Texas Health and Safety Code §576.007(a), if an adult individual is not admitted on emergency detention, the SMHF or facility with a CPB makes a reasonable effort to notify the family of the adult individual before he or she is released, if the individual grants permission for the notification.

(e) Intake assessment. An assessment professional for an SMHF or facility with a CPB conducts an intake assessment as soon as possible, but not later than 24 hours after an individual is admitted for emergency detention. The intake assessment includes:

(1) obtaining relevant information about the individual, including information about:

(A) finances;

(B) third-party coverage or insurance benefits; and

(C) advance directives;

(2) explaining, orally and in writing, the individual's rights described in 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services);

(3) explaining, orally and in writing, the SMHF's or facility with a CPB's services and treatment as they relate to the individual;

(4) explaining, orally and in writing, the existence, purpose, telephone number, and address of the protection and advocacy system established in Texas, pursuant to Texas Health and Safety Code §576.008; and

(5) explaining, orally and in writing, the individual trust fund account, charges for services, and the financial responsibility form.

§306.177. Admission Criteria Under Order of Protective Custody or Court-ordered Inpatient Mental Health Services.

(a) An SMHF or facility with a CPB admits an individual:

(1) under a protective custody order only if a court has issued a protective custody order in accordance with Texas Health and Safety Code §574.022; or

(2) for court-ordered inpatient mental health services only if a court has issued:

(A) an order for temporary inpatient mental health services issued in accordance with Texas Health and Safety Code §574.034, or Texas Family Code Chapter 55;

(B) an order for extended inpatient mental health services issued in accordance with Texas Health and Safety Code §574.035, or Texas Family Code Chapter 55;

(C) an order for commitment issued in accordance with the Texas Code of Criminal Procedure, Chapter 46B; or

(D) an order for commitment issued in accordance with the Texas Code of Criminal Procedure, Chapter 46C.

(b) If an SMHF or facility with a CPB admits an individual in accordance with subsection (a) of this section, a physician, PA, or APRN issues and signs a written order admitting the individual. Admission of an individual in accordance with subsection (a) of this section is not a medical act and does not require the use of independent medical judgment or treatment by the physician, PA, or APRN issuing and signing the written order.

(c) An SMHF or a facility with a CPB conducts an intake assessment as soon as possible, but not later than 24 hours after the individual is admitted under a protective custody order or court-ordered inpatient mental health services. The intake assessment includes:

(1) obtaining relevant information about the individual, including information about:

(A) finances;

(B) third-party coverage or insurance benefits; and

(C) advance directives; and

(2) explaining, orally and in writing, the individual's rights described in 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services);

(3) explaining, orally and in writing, the SMHF's or facility with a CPB's services and treatment as they relate to the individual; and

(4) explaining, orally and in writing, the existence, purpose, telephone number, and address of the protection and advocacy system established in Texas, pursuant to Texas Health and Safety Code §576.008.

§306.178. Voluntary Treatment Following Involuntary Admission. An SMHF or a facility with a CPB continues to provide inpatient services to an involuntary individual after the involuntary individual is eligible for discharge as described in §306.204 of this subchapter (relating to Discharge of an Involuntary Individual), if, after consultation with the designated LMHA or LBHA:

(1) the SMHF or facility with a CPB obtains written consent for voluntary inpatient services that meets the requirements of a request for voluntary admission, as described in §306.175(a) of this subchapter (relating to Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility); and

(2) the individual's treating physician:

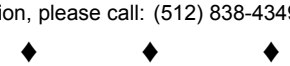
(A) examines the individual; and

(B) based on the examination in subparagraph (A) of this paragraph, issues an order for voluntary inpatient services that meets the requirements of §306.175(i) of this subchapter.

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 15, 2019.

TRD-201904302
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349



DIVISION 4. TRANSFERS AND CHANGING LOCAL MENTAL HEALTH AUTHORITIES OR LOCAL BEHAVIORAL HEALTH AUTHORITIES

26 TAC §§306.191 - 306.195

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The proposed new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §§534.053 and 534.058.

§306.191. Transfers Between State Mental Health Facilities.

(a) The individual, the individual's LAR, SMHF staff, the designated LMHA or LBHA, or another interested person may initiate a request to transfer an individual from one SMHF to another SMHF.

(b) A transfer between SMHFs may occur when deemed advisable by the administrator of the transferring SMHF with the agreement of the administrator of the receiving SMHF based on:

(1) the condition and desires of the individual;

(2) geographic residence of the individual;

(3) program and bed availability;

(4) geographical proximity to the individual's family; and

(5) input from the designated LMHA or LBHA.

(c) A voluntary individual may not be transferred without the consent of the individual or LAR who made the request for voluntary admission in accordance with §306.175(a)(1) of this subchapter (relating to Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility).

(d) If an SMHF transfers an individual receiving court-ordered inpatient mental health services from one SMHF to another SMHF, the transferring SMHF notifies the committing court of the transfer.

(e) If a prosecuting attorney has notified the SMHF administrator that an individual has criminal charges pending, the administrator notifies the judge of the court before which charges are pending if the individual transfers to another SMHF.

(f) 25 TAC Chapter 415, Subchapter G (relating to Determination of Manifest Dangerousness) or HHSC state hospital policies govern transfer of an individual between an SMHF and a maximum security unit or adolescent forensic unit.

§306.192. Transfers Between a State Mental Health Facility and a State Supported Living Center.

(a) For an individual transferring from an SMHF to an SSLC:

(1) the following rules and statutes govern the transfer:

(A) 25 TAC §412.272 (relating to Transfer of an Individual from a State MR Facility to a State MH Facility);

(B) 40 TAC Chapter 2, Subchapter F, Division 3 (relating to Transfers); and

(C) Texas Health and Safety Code §575.013 and §575.017; and

(2) the SMHF must not transfer the individual before the judge of the committing court enters an order approving the transfer.

(b) For an individual transferring from an SSLC to an SMHF:

(1) 25 TAC §412.272 and Texas Health and Safety Code §594.034 govern the transfer; and

(2) the receiving SMHF notifies the designated LMHA or LBHA or the designated LIDDA of the transfer.

§306.193. Transfers Between a State Mental Health Facility and an Out-of-State Institution.

A transfer between an SMHF and an out-of-state facility is governed by 1 TAC Chapter 383 (relating to Interstate Compact on Mental Health and Mental Retardation).

§306.194. Transfers Between a State Mental Health Facility and Another Facility in Texas.

(a) Texas Health and Safety Code §575.011, §575.014, and §575.017 govern transfer of an individual between an SMHF and a psychiatric hospital. An SMHF must not transfer a voluntary individual without the consent of the individual or LAR who made the request for voluntary admission in accordance with §306.175(a)(1) of this subchapter (relating to Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility).

(b) Texas Health and Safety Code §575.015 and §575.017 govern transfer of an individual from an SMHF to a federal correctional facility. The transferring SMHF notifies the designated LMHA or LBHA of the transfer.

(c) Texas Health and Safety Code §575.016 and §575.017 govern transfer of an individual from a facility of the institutional division of the Texas Department of Criminal Justice to an SMHF.

§306.195. Changing Local Mental Health Authorities or Local Behavioral Health Authorities.

(a) Requirements related to an individual currently receiving LMHA or LBHA services who intends to move his or her permanent residence to a county within the local service area of another LMHA or LBHA and seek services from the new LMHA or LBHA.

(1) The designated LMHA or LBHA must:

(A) initiate transition planning with the receiving LMHA or LBHA;

(B) educate the individual on the provisions of this subchapter regarding the individual's transfer, consisting of:

(i) open access processes where no appointment is scheduled for the individual's initial intake to determine eligibility;

(ii) the individual's rights as eligible for services; and

(iii) the receiving LMHA or LBHA is notified of the individual's intent to move the individual's permanent residence;

(C) obtain access information for the receiving LMHA or LBHA and communicate this to the individual;

(D) facilitate the intake at the new LMHA or LBHA once the relocation has been confirmed by either assisting with setting up an intake appointment or assuring the individual is aware of open access procedures;

(E) submit to the receiving LMHA or LBHA treatment information pertinent to the individual's continuity of care within seven days after approval of the transfer request;

(F) ensure the individual has sufficient medication for up to 90 days or to last until the medication management appointment date at the receiving LMHA or LBHA;

(G) maintain the individual's case in open status in the applicable HHSC automation system for 90 days or until notified that the individual has been admitted to services at the receiving LMHA or LBHA, whichever occurs first;

(H) conduct an intake assessment in accordance with 25 TAC §412.322(a) (relating to Provider Responsibilities for Treatment Planning and Service Authorization) and determine whether the individual should receive services immediately or be placed on a waiting list for services; and

(I) authorize an initial 180 days of services for an adult and 90 days for a child or an adolescent for transitioning and ongoing care, including the provision of medications, if the individual is eligible and not on the waiting list.

(2) If the individual seeks services from the new LMHA or LBHA without prior knowledge of the original LMHA or LBHA:

(A) the receiving LMHA or LBHA must:

(i) initiate transition planning with the original LMHA or LBHA;

(ii) promptly request records pertinent to the individual's treatment, with the individual's consent, if applicable;

(iii) conduct an intake assessment in accordance with 25 TAC §412.322(a) and determine whether the individual should receive services immediately or be placed on a waiting list for services; and

(iv) if the individual is eligible and the individual is not on the waitlist, authorize an initial 180 days of services for an adult and 90 days for a child or an adolescent for transitioning and ongoing care, including the provision of medications; and

(B) the original LMHA or LBHA must:

(i) submit requested information to the new LMHA or LBHA within seven days after the request; and

(ii) maintain the individual's case in open status in the applicable HHSC automation system for 90 days or until notified that the individual has been admitted to services at the new LMHA or LBHA, whichever occurs first.

(3) If the new LMHA or LBHA denies services to the individual during the transition period, or reduces or terminates services at the conclusion of the authorized period, the new LMHA or LBHA must notify the individual or LAR in writing of the proposed action and the right to appeal the proposed action in accordance with §306.154 of this subchapter (relating to Notification and Appeals Process for Local Mental Health Authority or Local Behavioral Health Authority Services).

(b) Requirements related to an individual receiving inpatient services at an SMHF or facility with a CPB. If an individual at an SMHF or facility with a CPB informs the SMHF or facility with a CPB that the individual intends to move the individual's permanent residence to a county within the local service area of another LMHA or LBHA and seek services from the new LMHA or LBHA:

(1) the SMHF or facility with a CPB notifies the following of the individual's intent to move the individual's permanent residence upon discharge:

(A) the original LMHA or LBHA, if the individual was receiving LMHA or LBHA services from the original LMHA or LBHA before admission to the SMHF or facility with a CPB; and

(B) the new LMHA or LBHA;

(2) the following participate in the individual's discharge planning in accordance with §306.201 of this subchapter (relating to Discharge Planning):

(A) the SMHF or facility with a CPB;

(B) the new LMHA or LBHA; and

(C) the original LMHA or LBHA, if the individual was receiving LMHA or LBHA services from the original LMHA or LBHA before admission to the SMHF or facility with a CPB; and

(3) if the individual was receiving LMHA or LBHA services from the original LMHA or LBHA before admission to the SMHF or facility with a CPB, the original LMHA or LBHA maintains the individual's case in open status in the applicable HHSC automation system for 90 days or until notified that the individual is admitted to services at the new LMHA or LBHA, whichever occurs first.

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 15, 2019.

TRD-201904303
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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DIVISION 5. DISCHARGE AND ABSENCES FROM A STATE MENTAL HEALTH FACILITY OR FACILITY WITH A CONTRACTED PSYCHIATRIC BED

26 TAC §§306.201 - 306.207

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The proposed new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §§534.053 and 534.058.

§306.201. Discharge Planning.

(a) At the time of an individual's admission to an SMHF or facility with a CPB, the designated LMHA or LBHA, if any, and the SMHF or facility with a CPB begins discharge planning for the individual.

(b) The designated LMHA or LBHA continuity of care worker or other designated staff; the designated LIDDA continuity of care worker, if applicable; the individual; the individual's LAR, if any; and

any other person authorized by the individual coordinates discharge planning with the SMHF or facility with a CPB.

(1) Except for the SMHF or facility with a CPB treatment team and the individual, involvement in discharge planning may be through teleconference or video-conference calls.

(2) The SMHF or the facility with a CPB must notify persons involved in discharge planning of scheduled staffings and reviews.

(3) The LMHA, LBHA, or LIDDA, if applicable, and the SMHF or facility with a CPB involved in discharge planning must coordinate all discharge planning activities and ensure the development and completion of the discharge plan before the individual's discharge.

(c) Discharge planning must consist of the following activities:

(1) Considering all pertinent information about the individual's clinical needs, the SMHF or facility with a CPB must identify and recommend specific clinical services and supports needed by the individual after discharge or while on ATP.

(2) The LMHA, LBHA, or LIDDA, if applicable, must identify and recommend specific non-clinical services and supports needed by the individual after discharge, including housing, food, and clothing resources.

(3) If an individual needs a living arrangement, the LMHA or LBHA continuity of care worker must identify a setting consistent with the individual's clinical needs and preference that is available and has accessible services and supports as agreed upon by the individual or LAR.

(4) The LMHA, LBHA, or LIDDA, if applicable must identify potential providers and resources for the services and supports recommended.

(5) The SMHF or facility with a CPB must counsel the individual and the individual's LAR, if any, to prepare them for care after discharge or while on ATP.

(6) The SMHF or facility with a CPB must provide the individual and the individual's LAR, if any, with written notification of the existence, purpose, telephone number, and address of the protection and advocacy system established in Texas, pursuant to Texas Health and Safety Code §576.008.

(7) The LMHA or LBHA must comply with the Preadmission Screening and Resident Review processes as described in 26 TAC Chapter 303 (relating to Preadmission Screening and Resident Review (PASRR)) for an individual recommended to move to a nursing facility.

(d) Before an individual's discharge:

(1) The individual's treatment team must develop a discharge plan to include the individual's stated wishes. The discharge plan must consist of:

(A) a description of the individual's recommended living arrangement after discharge, or while on ATP, that reflects the individual's preferences, choices, and available community resources;

(B) arrangements and referrals for the available and accessible services and supports agreed upon by the individual or LAR recommended in the individual's discharge plan;

(C) a written description of recommended clinical and non-clinical services and supports the individual may receive after discharge or while on ATP. The SMHF or facility with a CPB documents arrangements and referrals for the services and supports recommended upon discharge or ATP in the discharge plan;

(D) a description of problems identified at discharge or ATP, including any issues that may disrupt the individual's stability in the community;

(E) the individual's goals, interventions, and objectives as stated in the individual's discharge plan in the SMHF or facility with a CPB;

(F) comments or additional information;

(G) a final diagnosis based on the current edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) published by the American Psychiatric Association;

(H) the names, contact information, and addresses of providers to whom the individual will be referred for any services or supports after discharge or while on ATP; and

(I) in accordance with Texas Health and Safety Code §574.081(c), a description of:

(i) the types and amount of medication the individual needs after discharge or while on ATP until the individual is evaluated by a physician; and

(ii) the individual or entity responsible for providing and paying for the medication.

(2) The SMHF or facility with a CPB must request that the individual or LAR, as appropriate, sign the discharge plan, and document in the discharge plan whether the individual or LAR agree or disagree with the plan.

(3) If the individual or LAR refuses to sign the discharge plan described in paragraph (2) of this subsection, the SMHF or facility with a CPB documents in the individual's record if the individual or LAR agrees to the plan or not, reasons stated, and any other circumstances of the refusal.

(4) If applicable, the individual's treating physician must document in the individual's record reasons why the individual does not require continuing care or a discharge plan in accordance with Texas Health and Safety Code §574.081(g).

(5) If the LMHA or LBHA disagrees with the SMHF or facility with a CPB treatment team's decision concerning discharge:

(A) the treating physician of the SMHF or facility with a CPB consults with the LMHA or LBHA physician or designee to resolve the disagreement within 24 hours;

(B) and if the disagreement continues unresolved:

(i) the medical director or designee of the SMHF or facility with a CPB consults with the LMHA or LBHA medical director; and

(ii) if the disagreement continues unresolved after consulting with the LMHA or LBHA medical director:

(I) the medical director or designee of the SMHF or facility with a CPB refers the issue to the State Hospital System Chief Medical Officer; and

(II) the State Hospital System Chief Medical Officer collaborates with the Medical Director of the Behavioral Health Section to render a final decision within 24 hours of notification.

(e) Discharge notice to family or LAR.

(1) In accordance with Texas Health and Safety Code §576.007, before discharging an adult, the SMHF or facility with a CPB makes a reasonable effort to notify the adult's family of the discharge if the adult grants permission for the notification.

(2) Before discharging an individual at least 16 years of age or younger than 18 years of age, the SMHF or facility with a CPB makes a reasonable effort to notify the individual's family of the discharge if the individual grants permission for the notification.

(3) Before discharging an individual younger than 16 years of age, the SMHF or facility with a CPB notifies the individual's LAR of the discharge.

(f) Release of minors. Upon discharge, the SMHF or facility with a CPB may release a minor younger than 16 years of age only to the minor's LAR or the LAR's designee.

(1) If the LAR or the LAR's designee is unwilling to retrieve the minor from the SMHF or facility with a CPB and the LAR is not a state agency:

(A) the SMHF or facility with a CPB:

(i) notifies the Department of Family and Protective Services (DFPS), so DFPS can take custody of the minor from the SMHF or facility with a CPB;

(ii) refers the matter to the local CRCG to schedule a meeting with representatives from the required agencies described in subsection (f)(2)(A) of this section, the LAR, and minor to explore resources and make recommendations; and

(iii) documents the CRCG referral in the discharge plan; and

(B) the medical directors or their designees of the SMHF or facility with a CPB; designated LMHA, LBHA, or LIDDA; and DFPS meet to develop and solidify the discharge recommendations.

(2) If the LAR is a state agency unwilling to assume physical custody of the minor from the SMHF or facility with a CPB, the SMHF or the facility with a CPB:

(A) refers the matter to the local CRCG to schedule a meeting with representatives from the member agencies, in accordance with 40 TAC Chapter 702, Subchapter E (relating to Memorandum of Understanding with Other State Agencies) the LAR, and minor to explore resources and make recommendations; and

(B) documents the CRCG referral in the discharge plan.

(g) Notice to the designated LMHA, LBHA, or LIDDA. At least 24 hours before an individual's planned discharge or ATP, and no later than 24 hours after an unexpected discharge, an SMHF or facility with a CPB notifies the designated LMHA, LBHA, or LIDDA of the anticipated or unexpected discharge and conveys the following information about the individual:

(1) identifying information, including address;

(2) legal status (e.g., regarding guardianship, charges pending, or custody if the individual is a minor);

(3) the day and time the individual will be discharged or on an ATP;

(4) the individual's destination after discharge or ATP;

(5) pertinent medical information;

(6) current medications;

(7) behavioral data, including information regarding COPSD; and

(8) other pertinent treatment information, including the discharge plan.

(h) Discharge packet.

(1) At a minimum, a discharge packet must include:

(A) the discharge plan;

(B) referral instructions, including:

(i) SMHF or facility with a CPB contact person;

(ii) name of the designated LMHA, LBHA, or LIDDA continuity of care worker;

(iii) names of community resources and providers to whom the individual is referred, including contacts, appointment dates and times, addresses, and phone numbers;

(iv) a description of to whom or where the individual is released upon discharge, including the individual's intended residence (address and phone number);

(v) instructions for the individual, LAR, and primary care giver as applicable;

(vi) medication regimen and prescriptions, as applicable; and

(vii) dated signature of the individual or LAR and a member of the SMHF or facility with a CPB treatment team;

(C) copies of all available, pertinent, current summaries, and assessments; and

(D) the treating physician's orders.

(2) At discharge or ATP, the SMHF or facility with a CPB provides a copy of the discharge packet to the individual. Copies of available, pertinent, current summaries and assessments may be omitted.

(3) Within 24 hours after discharge or ATP, the SMHF or facility with a CPB sends a copy of the discharge packet to:

(A) the designated LMHA, LBHA, or LIDDA; and

(B) the providers to whom the individual is referred, including:

(i) an LMHA or LBHA network provider, if the LMHA or LBHA is responsible for ensuring the individual's services after discharge or while on an ATP;

(ii) an alternate provider, if the individual requested referral to an alternate provider; and

(iii) a county jail, if the individual will be taken to the county jail upon discharge and the county jail has agreed to provide the needed services.

(i) Unexpected Discharge.

(1) The SMHF or facility with a CPB and the designated LMHA, LBHA, or LIDDA must make reasonable efforts to provide discharge planning for an individual discharged unexpectedly.

(2) If there is an unexpected discharge, the facility social worker or a staff with an equivalent credential to a social worker must document the reason for not completing discharge planning activities in the individual's record.

(j) Transportation. An SMHF or facility with a CPB must:

(1) initiate and secure transportation in collaboration with an LMHA or LBHA to a planned location after an individual's discharge; and

(2) inform a designated LMHA, LBHA, or LIDDA of an individual's transportation needs after discharge or an ATP.

(k) Discharge summary.

(1) Within ten days after an individual's discharge, the individual's physician of the SMHF or facility with a CPB completes a written discharge summary for the individual.

(2) Within 21 days after an individual's discharge from a LMHA or LBHA the LMHA or LBHA must complete a written discharge summary for the individual.

(3) Written discharge summary includes:

(A) a description of the individual's treatment and their response to that treatment;

(B) a description of the individual's condition at discharge;

(C) a description of the individual's placement after discharge;

(D) a description of the services and supports the individual will receive after discharge;

(E) a final diagnosis based on the current edition of the DSM; and

(F) a description of the amount of medication the individual will need until the individual is evaluated by a physician.

(4) The discharge summary must be sent to the individual's:

(A) designated LMHA, LBHA, or LIDDA, as applicable; and

(B) providers to whom the individual was referred.

(5) Documentation of refusal. If the individual, the individual's LAR, or the individual's caregivers refuse to participate in the discharge planning, the circumstances of the refusal must be documented in the individual's record.

(l) Care after discharge. An individual discharged from an SMHF or facility with a CPB is eligible for:

(1) community transitional services for 90 days if referred to an LMHA or LBHA; or

(2) ongoing services.

§306.202. Special Considerations for Discharge Planning.

(a) Three Admissions Within 180 Days. An individual admitted to an SMHF or a facility with a CPB three times within 180 days is considered to be at risk for future admission to inpatient services. To prevent the unnecessary admissions to an inpatient facility, the designated LMHA or LBHA must:

(1) during discharge planning, review the individual's previous recovery or treatment plans to determine the best use of the clinical services, including recovery-based, trauma-informed, and person-centered models of care;

(2) include in the recovery or treatment plan:

(A) for non-clinical supports, such as those provided by a peer specialist or recovery coach, identified to support the individual's ongoing recovery; and

(B) recommendations for services and interventions from the individual's current or previous care plan(s) that support the individual's strengths and goals and prevent unnecessary admission to an SMHF or facility with a CPB;

(3) determine the availability of clinical and non-clinical supports, such as those provided by a peer specialist or recovery coach, that promote ongoing recovery and prevent unnecessary admission to an SMHF or facility with a CPB; and

(4) consider appropriateness of the individual's continued stay in the SMHF or facility with a CPB.

(b) Nursing Facility Referral or Admission.

(1) In accordance with 42 CFR Part 483, Subpart C, and as described in 40 TAC Chapter 19, Subchapter BB (relating to Nursing Facility Responsibilities Related to Preadmission Screening and Resident Review (PASRR)), a nursing facility must coordinate with the referring entity to ensure the referring entity screens the individual for admission to the nursing facility before the nursing facility admits the individual.

(2) As the referring entity, the SMHF or facility with a CPB must complete a PASRR Level I Screening and forward the completed form in accordance with 26 TAC §303.301 (relating to Referring Entity Responsibilities Related to the PASRR Process).

(3) The LMHA or LBHA must conduct a PASRR Level II Evaluation in accordance with 26 TAC Chapter 303.

(4) If a nursing facility admits an individual on an ATP, the designated LMHA or LBHA must conduct and document, including justification for its recommendations, the activities described in paragraphs (5) and (6) of this subsection.

(5) The designated LMHA or LBHA must make at least one face-to-face contact with the individual at the nursing facility on an ATP. The contact must consist of:

(A) a review of the individual's record at the nursing facility; and

(B) discussions with the individual and LAR, if any, the nursing facility staff, and other staff who provide care to the individual regarding:

(i) the individual's needs and the care the individual is receiving;

(ii) the ability of the nursing facility to provide the appropriate care;

(iii) the provision of mental health services, if needed by the individual; and

(iv) the individual's adjustment to the nursing facility.

(6) Before the end of the initial ATP period described in §306.206(b)(2) of this subchapter (relating to Absence for Trial Placement), the designated LMHA or LBHA must recommend to the SMHF or facility with a CPB one of the following:

(A) discharging the individual if the LMHA or LBHA determines that:

(i) the nursing facility is capable and willing to provide appropriate care to the individual after discharge;

(ii) any mental health services needed by the individual are being provided to the individual while residing in the nursing facility; and

(iii) the individual and LAR, if any, agrees to the nursing facility admission;

(B) extending the individual's ATP period in accordance with §306.206(b)(3) of this subchapter;

(C) returning the individual to the SMHF or facility with a CPB in accordance with §306.205 of this subchapter (relating to Pass or Furlough from a State Mental Health Facility or a Facility with a Contracted Psychiatric Bed); or

(D) initiating involuntary admission to the SMHF or facility with a CPB in accordance with §306.176 (relating to Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility for Emergency Detention) and §306.177 (relating to Admission Criteria Under Order of Protective Custody or Court-ordered Inpatient Mental Health Services) of this subchapter.

(c) Assisted Living.

(1) An SMHF, facility with a CPB, LMHA, or LBHA may not refer an individual to an assisted living facility that is not licensed under the Texas Health and Safety Code, Chapter 247.

(2) As required by Texas Health and Safety Code §247.063(b), if an SMHF, facility with a CPB, LMHA, or LBHA gains knowledge of an assisted living facility not operated or licensed by the state, the SMHF, facility with a CPB, LMHA, or LBHA reports the name, address, and telephone number of the facility to HHSC Complaint and Incident Intake at 1-800-458-9858.

(d) Minors.

(1) To the extent permitted by medical privacy laws, the SMHF or facility with a CPB and designated LMHA or LBHA must make a reasonable effort to involve a minor's LAR or the LAR's designee in the treatment and discharge planning process.

(2) A minor committed to or placed in an SMHF or facility with a CPB under Texas Family Code, Chapter 55, Subchapter C or D, shall be discharged in accordance with the Texas Family Code, Chapter 55, Subchapter C or D as applicable.

(e) An individual suspected of having an ID. If an SMHF or facility with a CPB suspects an individual has an ID, the SMHF or facility with a CPB must notify the designated LMHA or LBHA continuity of care worker and the designated LIDDA to:

(1) assign a LIDDA continuity of care worker to the individual; and

(2) conduct an assessment in accordance with 40 TAC Chapter 5, Subchapter D (relating to Diagnostic Assessment).

(f) Criminal Code.

(1) Texas Code of Criminal Procedure, Chapter 46B: Incompetency to stand trial.

(A) The SMHF or facility with a CPB must discharge an individual committed under Texas Code of Criminal Procedure, Article 46B.102 (relating to Civil Commitment Hearing: Mental Illness), in accordance with Texas Code of Criminal Procedure, Article 46B.107 (relating to Release of Defendant after Civil Commitment).

(B) The SMHF or facility with a CPB must discharge an individual committed under Texas Code of Criminal Procedure, Article 46B.073 (relating to Commitment for Restoration to Competency), in accordance with Texas Code of Criminal Procedure, Article 46B.083 (relating to Supporting Commitment Information Provided by Facility or Program).

(C) For an individual committed under Texas Code of Criminal Procedure, Chapter 46B, discharged and returned to the committing court, the SMHF or facility with a CPB, within 24 hours after discharge, must notify the following of the discharge:

(i) the individual's designated LMHA or LBHA; and

(ii) the TCOOMMI.

(2) Texas Code of Criminal Procedure, Chapter 46C: Insanity defense. An SMHF or facility with a CPB must discharge an individual acquitted by reason of insanity and committed to an SMHF or facility with a CPB under Texas Code of Criminal Procedure, Chapter 46C, only upon order of the committing court in accordance with Texas Code of Criminal Procedure, Article 46C.268.

(g) Offenders with special needs following discharge from an SMHF or facility with a CPB. The LMHA or LBHA must comply with the requirements as defined by the LMHA's and LBHA's TCOOMMI contract for offenders with special needs.

(1) An LMHA or LBHA that receives a referral for an offender with special needs in the MH priority population from a county or city jail at least 24 hours before the individual's release must complete one of the following actions:

(A) if the offender with special needs is currently receiving LMHA or LBHA services, the LMHA or LMHA:

(i) notifies the offender with special needs of the county or city jail's referral;

(ii) arranges a face-to-face contact between the offender with special needs and a QMHP-CS to occur within 15 days after the individual's release; and

(iii) ensures that the QMHP-CS, at the face-to-face contact, re-assesses the individual and arranges for appropriate services, including transportation needs at the time of release.

(B) if the individual is not currently receiving LMHA or LBHA services from the LMHA or LBHA that is notified of the referral, the LMHA or LMHA:

(i) ensures that at the face-to-face contact required in subparagraph (A) of this paragraph, the QMHP-CS conducts a pre-admission assessment in accordance with 25 TAC §412.322(a) (relating to Provider Responsibilities for Treatment Planning and Service Authorization); and

(ii) complies with §306.161(b) of this subchapter (relating to Screening and Assessment), as appropriate; or

(C) if the LMHA or LBHA does not conduct a face-to-face contact with the individual, the LMHA or LMHA must document the reasons for not doing so in the individual's record.

(2) If an LMHA or LBHA is notified of the anticipated release from prison or a state jail of an offender with special needs in the MH priority population who is currently taking psychoactive medication(s) for a mental illness and who will be released with a 30-day supply of the psychoactive medication(s), the LMHA or LBHA must arrange a face-to-face contact between the individual and QMHP-CS within 15 days after the individual's release.

(A) If the offender with special needs is released from state prison or state jail after hours or the LMHA or LBHA is otherwise unable to schedule the face-to-face contact before the individual's release, the LMHA or LBHA makes a good faith effort to locate and contact the individual. If the designated LMHA or LBHA does not have a face-to-face contact with the individual within 15 days, the LMHA or LBHA must document the reasons for not doing so in the individual's record.

(B) At the face-to-face contact:

(i) the QMHP-CS with appropriate supervision and training must perform an assessment in accordance with 25 TAC §412.322(a) and comply with §306.161(b) and (c) of this subchapter, as appropriate; and

(ii) if the LMHA or LBHA determines that the offender with special needs should receive services immediately, the LMHA or LBHA must arrange for the individual to meet with a physician or designee authorized by state law to prescribe medication before the individual requires a refill of the prescription.

(C) If the LMHA or LBHA does not conduct a face-to-face contact with the offender with special needs, the LMHA or LBHA must document the reasons for not doing so in the individual's record.

(3) If the offender with special needs is on parole or probation, the SMHF or facility with a CPB must notify a representative of TCOOMMI before the discharge of the individual known to be on parole or probation.

§306.203. Discharge of a Voluntary Individual.

(a) An SMHF or facility with a CPB must discharge a voluntary individual if the administrator or designee of the SMHF or facility with a CPB concludes that the individual can no longer benefit from inpatient services based on the physician's determination, as delineated in Division 5 of this subchapter (relating to Discharge and Absences from a State Mental Health Facility or Facility with a Contracted Psychiatric Bed).

(b) If a written request for discharge is made by a voluntary individual or the individual's LAR:

(1) the SMHF or facility with a CPB must discharge the individual in accordance with Texas Health and Safety Code §572.004; and

(2) the individual or individual's LAR signs, dates, and documents the time on the discharge request.

(c) In accordance with Texas Health and Safety Code §572.004, if an individual informs a staff member of an SMHF or facility with a CPB of the individual's desire to leave the SMHF or facility with a CPB, the SMHF or facility with a CPB must:

(1) as soon as possible, assist the individual in creating the written request and obtaining the necessary signature; and

(2) within four hours after a written request is made known to the SMHF or facility with a CPB, notify:

(A) the treating physician; or

(B) another physician who is an SMHF or facility with a CPB staff member, if the treating physician is not available during that time period.

(d) Results of physician notification required by subsection (c)(2) of this section.

(1) In accordance with Texas Health and Safety Code §572.004(c) and (d):

(A) an SMHF or facility with a CPB, based on a physician's determination, must discharge an individual within the four-hour time period described in subsection (c)(2) of this section; or

(B) if the physician who is notified in accordance with subsection (c)(3) of this section has reasonable cause to believe that the individual may meet the criteria for court-ordered inpatient mental health services or emergency detention, the physician must examine the individual as soon as possible, but no later than 24 hours, after the request for discharge is made known to the SMHF or facility with a CPB.

(2) Reasonable cause to believe that the individual may meet the criteria for court-ordered inpatient mental health services or emergency detention.

(A) If a physician does not examine an individual who may meet the criteria for court-ordered inpatient mental health services or emergency detention within 24 hours after the request for discharge is made known to the SMHF or the facility with a CPB, the facility must discharge the individual.

(B) If a physician, in accordance with Texas Health and Safety Code §572.004(d), examines the individual as described in paragraph (1)(B) of this subsection and determines that the individual does not meet the criteria for court-ordered inpatient mental health services or emergency detention, the SMHF or the facility with a CPB discharges the individual upon completion of the examination.

(C) If a physician, in accordance with Texas Health and Safety Code §572.004(d), examines the individual as described in paragraph (1)(B) of this subsection and determines that the individual meets the criteria for court-ordered inpatient mental health services or emergency detention, the SMHF or the facility with a CPB, by 4:00 p.m. on the next business day:

(i) if the SMHF or facility with a CPB intends to detain the individual, to file an application and obtain a court order for further detention of the individual in accordance with Texas Health and Safety Code §572.004(d), the physician:

(I) files an application for court-ordered inpatient mental health services or emergency detention and obtains a court order for further detention of the individual;

(II) notifies the individual of such intention; and

(III) documents in the individual's record the reasons for the decision to detain the individual; or

(ii) discharges the individual.

(e) In accordance with Texas Health and Safety Code §572.004(i), after a written request from a minor individual admitted under §306.175(a)(1)(B) of this subchapter (relating to Voluntary Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility), the SMHF or facility with a CPB must:

(1) notify the minor's parent, managing conservator, or guardian of the request and:

(A) if the minor's parent, managing conservator, or guardian objects to the discharge, the minor individual continues treatment as a voluntary patient; or

(B) if the minor's parent, managing conservator, or guardian does not object to the discharge, the minor individual is discharged; and

(2) document the request in the minor's record.

(f) In accordance with Texas Health and Safety Code §572.004(f)(1), an SMHF or facility with a CPB is not required to complete the requirements described in this section if the individual makes a written statement withdrawing the request for discharge.

§306.204. Discharge of an Involuntary Individual.

(a) Discharge from emergency detention.

(1) Except as provided by §306.178 of this subchapter (relating to Voluntary Treatment Following Involuntary Admission) and

in accordance with Texas Health and Safety Code §573.021(b) and §573.023(b), an SMHF or facility with a CPB immediately discharges an individual under emergency detention if:

(A) the SMHF administrator, administrator of the facility with a CPB, or designee concludes, based on a physician's determination, the individual no longer meets the criteria in §306.176(c)(1) of this subchapter (relating to Admission Criteria for a Facility with a Contracted Psychiatric Bed Authorized by an LMHA or LBHA or for a State Mental Health Facility for Emergency Detention); or

(B) except as provided in paragraph (2) of this subsection:

(i) 48 hours has elapsed from the time the individual was presented to the SMHF or facility with a CPB; and

(ii) the SMHF or facility with a CPB has not obtained a court order for further detention of the individual.

(2) In accordance with Texas Health and Safety Code §573.021(b), if the 48-hour period described in paragraph (1)(B)(i) of this subsection ends on a Saturday, Sunday, or legal holiday, or before 4:00 p.m. on the next business day after the individual was presented to the SMHF or facility with a CPB, the SMHF or facility with a CPB detains the individual until 4:00 p.m. on such business day.

(b) Discharge under order of protective custody. Except as provided by §306.178 of this subchapter and in accordance with Texas Health and Safety Code §574.028, an SMHF or facility with a CPB immediately discharges an individual under an order of protective custody if:

(1) the SMHF administrator, facility with a CPB administrator, or designee determines that, based on a physician's determination, the individual no longer meets the criteria described in Texas Health and Safety Code §574.022(a);

(2) the SMHF administrator, facility with a CPB administrator, or designee does not receive notice that the individual's continued detention is authorized after a probable cause hearing held within the time period prescribed by Texas Health and Safety Code §574.025(b);

(3) a final order for court-ordered inpatient mental health services has not been entered within the time period prescribed by Texas Health and Safety Code §574.005; or

(4) an order to release the individual is issued in accordance with Texas Health and Safety Code §574.028(a).

(c) Discharge under court-ordered inpatient mental health services.

(1) Except as provided by §306.178 of this subchapter and in accordance with Texas Health and Safety Code §574.085 and §574.086(a), an SMHF or facility with a CPB immediately discharges an individual under a temporary or extended order for inpatient mental health services if:

(A) the order for inpatient mental health services expires; or

(B) the SMHF administrator, administrator of the facility with a CPB, or designee concludes that, based on a physician's determination, the individual no longer meets the criteria for court-ordered inpatient mental health services.

(2) In accordance with Texas Health and Safety Code §574.086(b), before discharging an individual in accordance with paragraph (1) of this subsection, the SMHF administrator, administrator of the facility with a CPB, or designee considers whether the individual should receive court-ordered outpatient mental health services in accordance with a modified order described in Texas Health and Safety Code §574.061.

(3) Individuals committed under Texas Code of Criminal Procedure, Chapter 46B or 46C may only be discharged as provided by §306.202(f) of this division (relating to Special Considerations for Discharge Planning).

(d) Discharge packet. An SMHF administrator, administrator of a facility with a CPB, or designee forwards a discharge packet, as provided in §306.201(h) of this division (relating to Discharge Planning), of any individual committed under the Texas Code of Criminal Procedure to the jail and the LMHA or LBHA in conjunction with state and federal privacy laws.

§306.205. Pass or Furlough from a State Mental Health Facility or a Facility with a Contracted Psychiatric Bed.

(a) In accordance with Texas Health and Safety Code §574.082, an SMHF administrator, administrator of a facility with a CPB, or designee may, in coordination with the designated LMHA or LBHA, authorize absences for an involuntary individual admitted under court order for inpatient mental health services.

(1) If an individual's authorized absence is to exceed 72 hours, the SMHF or facility with a CPB notifies the committing court of the absence.

(2) The SMHF or facility with a CPB may not authorize an absence that exceeds the expiration date of the individual's order for inpatient mental health services.

(b) In accordance with Texas Health and Safety Code §574.083, an SMHF or facility with a CPB detains or readmits an individual if the SMHF administrator, administrator of the facility with a CPB, or the administrator's designee issues a certificate or affidavit establishing that the individual is receiving court-ordered inpatient mental health services and:

(1) the individual is absent without authority from the SMHF or facility with a CPB;

(2) the individual has violated the conditions of the absence; or

(3) the individual's condition has deteriorated.

(c) In accordance with Texas Health and Safety Code §574.084, an individual's authorized absence that exceeds 72 hours may be revoked only after an administrative hearing held in accordance with this subsection.

(1) The SMHF or facility with a CPB conducts a hearing by a hearing officer who is a mental health professional not directly involved in treating the individual.

(2) The SMHF or facility with a CPB:

(A) holds an informal hearing within 72 hours after the individual returns to the facility;

(B) provides the individual and facility staff members an opportunity to present information supporting their position; and

(C) provides the individual the option to select another person or staff member to serve as the individual's advocate.

(3) Within 24 hours after the conclusion of the hearing, the hearing officer:

(A) determines if the individual violated the conditions of the authorized absence, the authorized absence was justified, or the

individual's condition deteriorated to the extent the individual's continued absence was inappropriate; and

(B) renders the final decision in writing, including the basis for the hearing officer's decision.

(4) If the hearing officer's decision does not revoke the authorized absence, the individual may leave the SMHF or facility with a CPB pursuant to the conditions of the absence.

(5) The SMHF or facility with a CPB ensures the individual's record includes a copy of the hearing officer's report.

(d) Except in medical emergencies, only the committing criminal court may grant absences from a SMHF or facility with a CPB for individuals committed under Texas Code of Criminal Procedure, Chapter 46B or 46C.

§306.206. Absence for Trial Placement.

(a) An individual who is under consideration for discharge as described in §306.203 of this division (relating to Discharge of a Voluntary Individual) or §306.204(c) of this division (relating to Discharge of an Involuntary Individual), may leave the SMHF or facility with a CPB on ATP if the SMHF or facility with a CPB and the designated LMHA or LBHA agree that an ATP will be beneficial in implementing the individual's recovery or treatment plan. The designated LMHA or LBHA is responsible for monitoring the individual while on ATP.

(b) Time frames for ATP.

(1) An individual admitted under court-ordered inpatient mental health services may not be on ATP beyond the expiration date of the individual's order for inpatient mental health services.

(2) The initial ATP period for any individual may not exceed 30 days.

(3) The SMHF or facility with a CPB may extend an initial ATP period up to 30 days if:

(A) requested by the designated LMHA or LBHA; and

(B) clinically justified.

(4) Approval by the following persons is required for any ATP that exceeds 60 days:

(A) the SMHF administrator or designee, or the administrator of the facility with a CPB or designee; and

(B) the designated LMHA or LBHA executive director or designee.

(c) Only the committing criminal court may grant ATP from the SMHF or facility with a CPB for individuals committed under Texas Code of Criminal Procedure, Chapter 46B or 46C.

§306.207. Post Discharge or Absence for Trial Placement: Contact and Implementation of the Recovery or Treatment Plan.

The designated LMHA or LBHA is responsible for contacting the individual following discharge or ATP from an SMHF or a facility with a CPB and for implementing the individual's recovery or treatment plan in accordance with this section.

(1) LMHA or LBHA contact after discharge or ATP.

(A) The designated LMHA or LBHA makes face-to-face contact with an individual within seven days after discharge or ATP of an individual who is:

(i) discharged or on ATP from an SMHF or facility with a CPB and referred to the LMHA or LBHA for services or supports as indicated in the recovery or treatment plan;

(ii) discharged from an LMHA or LBHA- network provider of inpatient services and referred to the LMHA or LBHA for services or supports as indicated in the recovery or treatment plan;

(iii) discharged from an alternate provider of inpatient services and receiving LMHA or LBHA services from the designated LMHA or LBHA at the time of admission and who, upon discharge, is referred to the LMHA or LBHA for services or supports as indicated in the recovery or treatment plan;

(iv) discharged from the LMHA's or LBHA's crisis stabilization unit or any overnight crisis facility and referred to the LMHA or LBHA for services or supports as indicated in the discharge plan; or

(v) an offender with special needs discharged from an SMHF or facility with a CPB returning to jail.

(B) At the face-to-face contact after discharge required by subparagraph (A) of this paragraph, the designated LMHA or LBHA:

(i) re-assesses the individual;

(ii) ensures the provision of the services and supports specified in the individual's recovery or treatment plan by making the services and supports available and accessible; and

(ii) assists the individual in accessing the services and supports specified in the individual's recovery or treatment plan.

(C) The designated LMHA or LBHA develops or reviews an individual's recovery or treatment plan in accordance with 25 TAC §412.322(e) (relating to Provider Responsibilities for Treatment Planning and Service Authorization) and considers treatment recommendations in the SMHF or facility with a CPB's discharge plan within ten business days after the face-to-face contact required by subparagraph (A) of this paragraph.

(D) The designated LMHA or LBHA makes a good faith effort to locate and contact an individual who fails to appear for a face-to-face contact required by subparagraph (A) of this paragraph. If the designated LMHA or LBHA does not have a face-to-face contact with the individual, the LMHA or LBHA documents the reasons it did not occur in the individual's record.

(2) For an individual whose recovery or treatment plan identifies the designated LMHA or LBHA as responsible for providing or paying for the individual's psychoactive medications, the designated LMHA or LBHA is responsible for ensuring:

(A) the provision of psychoactive medications for the individual; and

(B) the individual has an appointment with a physician or designee authorized by state law to prescribe medication before the earlier of the following events:

(i) the individual's supply of psychoactive medication from the SMHF or facility with a CPB has been depleted; or

(ii) the 15th day after the individual is on ATP or discharged from the SMHF or facility with a CPB.

(3) The designated LMHA or LBHA documents in an individual's record the LMHA's or LBHA's activities described in this section, and the individual's responses to those activities.

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

Filed with the Office of the Secretary of State on November 15, 2019.

TRD-201904304
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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DIVISION 6. TRAINING

26 TAC §306.221

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies. In addition, Texas Health and Safety Code §534.053 requires the Executive Commissioner of HHSC to adopt rules ensuring the provision of community-based mental health services and §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractors.

The proposed new sections implement Texas Government Code §531.0055 and Texas Health and Safety Code §§534.053 and 534.058.

§306.221. Screening and Intake Assessment Training Requirements at a State Mental Health Facility and a Facility with a Contracted Psychiatric Bed.

(a) Screening training. As required by Texas Health and Safety Code §572.0025(e), an SMHF or facility with a CPB staff member whose responsibilities include conducting a screening described in Division 3 of this subchapter (relating to Admission to a State Mental Health Facility or Facility with a Contracted Psychiatric Bed--Provider Responsibilities) must receive at least eight hours of training in the SMHF's or facility with a CPB's screening.

(1) The screening training must provide instruction regarding:

(A) obtaining relevant information about the individual, including information about finances, third-party coverage or insurance benefits, and advance directives;

(B) explaining, orally and in writing, the individual's rights described in 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services);

(C) explaining, orally and in writing, the SMHF's or facility with a CPB's services and treatment as they relate to the individual;

(D) explaining, orally and in writing, the existence, purpose, telephone number, and address of the protection and advocacy system established in Texas, pursuant to Texas Health and Safety Code §576.008; and

(E) determining whether an individual comprehends the information provided in accordance with subparagraphs (B)-(D) of this paragraph.

(2) Up to six hours of the following training may count toward the screening training required by this subsection:

(A) 25 TAC §417.515 (relating to Staff Training in Identifying, Reporting, and Preventing Abuse, Neglect, and Exploitation); and

(B) 25 TAC §404.165 (relating to Staff Training in Rights of Persons Receiving Mental Health Services).

(b) Intake assessment training. As required by Texas Health and Safety Code §572.0025(e), if an SMHF or facility with a CPB's internal policy permits an assessment professional to determine whether a physician should conduct an examination on an individual requesting voluntary admission, the assessment professional must receive at least eight hours of training in conducting an intake assessment pursuant to this subchapter.

(1) The intake assessment training must provide instruction regarding assessing and diagnosing in accordance with 25 TAC §412.322 (relating to Provider Responsibilities for Treatment Planning and Service Authorization).

(2) An assessment professional must receive intake training:

(A) before conducting an intake assessment; and

(B) annually throughout the professional's employment or association with the SMHF or facility with a CPB.

(c) Documentation of training. An SMHF or facility with a CPB must document that each staff member and each assessment professional whose responsibilities include conducting the screening or intake assessment have successfully completed the training described in subsections (a) and (b) of this section, including:

(1) the date of the training;

(2) the length of the training session; and

(3) the name of the instructor.

(d) Performance in accordance with training. Each staff member and each assessment professional whose responsibilities include conducting the screening or intake assessment must perform the assessments in accordance with the training required by 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 15, 2019.

TRD-201904305
Karen Ray
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Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 838-4349

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CHAPTER 748. MINIMUM STANDARDS FOR GENERAL RESIDENTIAL OPERATIONS

SUBCHAPTER D. REPORTS AND RECORD KEEPING

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes in Title 26, Texas Administrative Code, Chapter 748, Minimum Standards for

General Residential Operations, the repeal of §748.301, concerning What is a serious incident; new §748.301, concerning What do certain terms mean in this subchapter; amendments to §748.303, concerning When must I report and document a serious incident, and §748.313, concerning What additional documentation must I include with a written serious incident report; and new Division 6, Unauthorized Absences, consisting of new §§748.451, 748.453, 748.455, 748.457, 748.459, 748.461, and 748.463.

BACKGROUND AND PURPOSE

The purpose of the proposal is to address the issue of unauthorized absences of children from General Residential Operations (GRO) by requiring GROs to take additional actions when a child leaves the operation without permission (unauthorized absence). Runaways are a national issue, particularly for children in foster care.

Current rules require GROs to document when a child is absent and cannot be located for a specified time frame, depending on the age and development level of the child. The proposed repeal, amendments, and new rules include additional requirements, such as: documenting each time a child has an unauthorized absence, regardless of the length of time the child is absent; maintaining an annual log of each unauthorized absence; debriefing the child after each unauthorized absence; conducting a triggered review for each child who has had three unauthorized absences within a 60-day time frame, to examine alternatives and create a written plan to reduce the number of unauthorized absences; and conducting an evaluation, every six months, of the frequency and patterns of unauthorized absences within each GRO.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §748.301 deletes the definition of serious incident, because definitions have been expanded in proposed new §748.301.

Proposed new §748.301 defines terms that are used in Subchapter D, Reports and Record Keeping, including the repealed content of §748.301 and new definitions for "triggered review of a child's unauthorized absences," and "unauthorized absence."

The proposed amendment to §748.303 replaces the phrase "absent from your operation and cannot be located, including the removal of a child by an unauthorized person" in (a)(7) - (9) with the term "unauthorized absence," which has been defined in §748.301; adds a reference to §748.311 in subsection (b) regarding how to document a serious incident; adds a new subsection (c) that requires a GRO to document an unauthorized absence that does not meet the reporting time requirements in subsection (a) in the same manner as a serious incident; re-letters subsections accordingly; and updates a reference in subsection (e)(6) to reflect the correct rule number and title.

The proposed amendment to §748.313 replaces the phrase "child absent without permission" in paragraph (3) with "unauthorized absence of a child," and adds requirements for a GRO to complete certain information when documenting the unauthorized absence of a child, including whether the child has returned to the operation, how long the child was gone, and an addendum to the serious incident report to finalize the documentation requirements if the child returns to the operation after 24 hours.

Proposed new §748.451 describes the additional requirements the operation must conduct related to the unauthorized absences of a child from an operation. This rule summarizes the requirements described in the remaining rules in proposed new Division 6.

Proposed new §748.453 requires the operation to maintain an annual summary log of each time a child has an unauthorized absence, document certain information in the log, maintain the annual log for five years, and make the log available to Licensing upon request.

Proposed new §748.455 describes the requirements for debriefing a child within 24 hours after an unauthorized absence, including what must be discussed with the child in the debriefing, allowing the child to return to routine activities as appropriate, and documenting the debriefing in the child's record.

Proposed new §748.457 requires an operation to conduct a triggered review of a child's unauthorized absences no later than 30 days after the child's third unauthorized absence within a 60-day time frame and describes when a regularly scheduled review of a child's service plan can serve as the triggered review.

Proposed new §748.459 outlines who must participate in a triggered review of a child's unauthorized absences: the child, an individual designated to make decisions regarding the child's participation in childhood activities, and the child's case manager. The rule also requires that the child's parent be notified at least two weeks before the triggered review to give the parent an opportunity to participate in the review.

Proposed new §748.461 requires that a triggered review of a child's unauthorized absences include a review of the child's records documenting previous unauthorized absences, a review of certain service plan elements, an examination of alternatives to minimize the unauthorized absences, and a written plan, documented in the child's record, to reduce the unauthorized absences.

Proposed new §748.463 requires the operation to conduct an overall operation evaluation every six months for unauthorized absences that have occurred during that time frame, which must include the frequency and patterns of unauthorized absences and specific strategies to reduce the number of unauthorized absences; maintain the results of the evaluation for five years; and make the evaluation available to Licensing upon request.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to HHSC;

(5) the proposed rules will create new rules;

(6) the proposed rules will expand existing rules;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

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

Greta Rymal has determined that there will be an adverse economic effect on small businesses and micro-businesses, but no adverse economic effect on rural communities. The HHSC 2018 Data Book for Child Care Licensing states that there are 258 GROs. Of the 258 GROs, it is estimated that only 25 percent (or 65 GROs) are small businesses, and 16 percent (or 41 GROs) are micro-businesses. No GROs are rural communities. These numbers are consistent with the responses obtained from an April 2013 Feedback Survey.

HHSC anticipates that GROs may incur a cost to comply with the proposed rules. The new rules will require residential facilities to maintain a summary log of all unauthorized absences (those that must be reported or otherwise), in addition to the current requirement to report certain unauthorized absences. Child Care Licensing does not currently have historical data on the total number of unauthorized absences of children from GROs and is unable to predict the number of unauthorized absences that may occur at each GRO and what the impact of the new and amended rules will be to each GRO. However, it is possible to project an average "unit cost" for certain activities required by the new and amended rules. To comply with these rule changes, GRO staff will be required to spend additional time documenting unauthorized absences in a child's record and in an annual summary log for unauthorized absences, participating in triggered reviews for each child who has three unauthorized absences within a 60-day time frame, and conducting overall operation evaluations every six months for those operations that have any unauthorized absences. Child Care Licensing also does not know the current workload of GRO case managers and administrators, which presumably varies with each GRO. In many instances, the staff may be able to incorporate these additional requirements into their current workload.

The staff time required to comply with these changes will impact GRO case managers and administrators. To estimate the wages for the GRO staff, Licensing gathered data from the Department of Family and Protective Services 2018 Data Book.

For use in the impact analysis, HHSC calculated hourly wages for each of these categories of GRO staff as follows (actual salaries paid to staff by a GRO may be greater or less than the averages used for these projections):

GRO Case Manager - The 2018 average salary for Child Protective Services (CPS) caseworkers was used to determine the salary costs for GRO case managers. The FY 2018 average salary for a CPS caseworker is $4,366.25 per month or $25.19 per hour ($4,366.25 ÷ 173.33 hours per month).

GRO Administrators - The 2018 average salary for CPS program administrators and district directors was used to determine the salary costs for GRO administrators. The FY 2018 average salary for a CPS administrator/director is $5,547.83 per month or $32.00 per hour ($5,547.83 ÷ 173.33 hours per month).

Fiscal impact relating to §748.303 and §748.453 for documenting unauthorized absences in a child's record and in an annual summary log for unauthorized absences: This fiscal impact results from the amendment in §748.303, which adds subsection (c) that requires documentation of unauthorized absences that do not meet the reporting requirements defined in §748.303 (a)(7) - (9). This fiscal impact also results from proposed new §748.453, which requires, in part, a GRO to document information regarding unauthorized absences for a child in an annual summary log. It is anticipated that the GRO case manager will spend an average of 30 minutes to an hour documenting an unauthorized absence. Therefore, the cost will be approximately between $12.60 and $25.19 per unauthorized absence ($25.19 X 0.5 hours and $25.19 X 1 hour). Some GROs may already be maintaining an annual summary log of unauthorized absences, so there would be no additional costs for those GROs.

Fiscal impact relating to §748.459 for triggered reviews for unauthorized absences: Proposed new §748.459 requires a child's case manager to participate in a triggered review for unauthorized absences when the child has incurred three unauthorized absences in a 60-day time frame. Licensing estimates that a GRO case manager will spend, on average, between one and two hours participating in a triggered review for unauthorized absences. Therefore, the cost will be approximately between $25.19 and $50.38 per triggered review ($25.19 X 1 hour and $25.19 X 2 hours).

Fiscal impact relating to §748.463 for overall operation evaluation for unauthorized absences: Proposed new §748.463 requires an operation to conduct an overall operation evaluation for unauthorized absences every six months. Licensing estimates that a GRO administrator and three case managers will spend approximately two hours in a meeting discussing the overall operation evaluation, and the GRO administrator will spend an additional four to six hours completing the evaluation. Therefore, the cost will be approximately between $343.14 and $407.14 [($25.19 X 2 hours X 3 case managers) + ($32 X 6 hours) or [($25.19 X 2 hours X 3 case managers) + ($32 X 8 hours) per evaluation, or $686.28 and $814.28 annually.

HHSC determined that alternative methods to achieve the purpose of the proposed rules for small businesses and micro-businesses would not be consistent with ensuring the health and safety of children in foster care.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas.

PUBLIC BENEFIT AND COSTS

Jean Shaw, Associate Commissioner for Child Care Licensing, has determined that for each year of the first five years the rules are in effect, the public benefit will be an increase in safety of children in residential care by clarifying provider requirements, preventing future absences of children who regularly have unauthorized absences, and decreasing the overall number of unauthorized absences.

Greta Rymal has also determined that for the first five years the rules are in effect, persons who are required to comply with the proposed rules may incur economic costs, as previously explained under the section entitled Small Businesses, Micro-Businesses, and Rural Community Impact Analysis.

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 Gerry Williams at (512) 438-5559 in the Child Care Licensing Department of the HHSC Regulatory Services Division or by e-mail to Gerry.Williams@hhsc.state.tx.us.

Written comments on the proposal may be submitted to Gerry Williams, Rules Developer (19R020), Child Care Licensing, Health and Human Services Commission E-550, P.O. Box 149030, Austin, Texas 78714-9030, and electronic comments may be submitted to CCLrules@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 calendar 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) e-mailed by midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 19R020" in the subject line.

DIVISION 1. REPORTING SERIOUS INCIDENTS AND OTHER OCCURRENCES

26 TAC §748.301

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The repeal affects Texas Government Code §531.0055 and Human Resources Code §42.042.

§748.301. What is a serious incident?

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 18, 2019.

TRD-201904313
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 438-5559

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26 TAC §§748.301, 748.303, 748.313

STATUTORY AUTHORITY

The new rule and amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The new rule and amendments affect Texas Government Code §531.0055 and Human Resources Code §42.042.

§748.301. What do certain terms mean in this subchapter?

These terms have the following meanings in this subchapter:

(1) Serious incident--A non-routine occurrence that has or may have dangerous or significant consequences for the care, supervision, or treatment of a child. The different types of serious incidents are noted in §748.303 of this title (relating to When must I report and document a serious incident?).

(2) Triggered review of a child's unauthorized absences--A review of a specific child's pattern of unauthorized absences when the child has had three unauthorized absences within a 60-day time frame.

(3) Unauthorized absence--A child is absent from an operation without permission from a caregiver and cannot be located. This includes when an unauthorized person has removed the child from the operation.

§748.303. When must I report and document a serious incident?

(a) You must report and document the following types of serious incidents involving a child in your care. The reports must be made to the following entities, and the reporting and documenting must be within the specified time frames:
Figure: 26 TAC §748.303(a)
[~~Figure: 26 TAC §748.303(a)~~]

(b) If there is a medically pertinent incident, such as a seizure, that does not rise to the level of a serious incident, you do not have to report the incident but you must document the incident in the same manner as for a serious incident, as described in §748.311 of this title (relating to How must I document a serious incident?).

(c) You must document an unauthorized absence that does not meet the reporting time requirements defined in subsection (a)(7) - (9) of this section within 24 hours after you become aware of the unauthorized absence. You must document the absence:

(1) in the same manner as for a serious incident, as described in §748.311 of this title; and

(2) complete an addendum to the serious incident report to finalize the documentation requirements, if the child returns to an operation after 24 hours.

(d) [~~(c)~~] If there is a serious incident involving an adult resident, you do not have to report the incident to Licensing, but you must document the incident in the same manner as a serious incident. You do have to report the incident to:

(1) law [~~Law~~] enforcement, as outlined in the chart above;

(2) the [~~The~~] parents, if the adult resident is not capable of making decisions about the resident's own care; and

(3) Adult Protective Services through the Texas Abuse and Neglect Hotline if there is reason to believe the adult resident has been abused, neglected or exploited.

(e) [~~(d)~~] You must report and document the following types of serious incidents involving your operation, an employee, a professional level service provider, contract staff, or a volunteer to the following entities within the specified time frame:

Figure: 26 TAC §748.303(e)
[~~Figure: 26 TAC §748.303(d)~~]

§748.313. What additional documentation must I include with a written serious incident report?
You must include the following additional documentation with a written serious incident report, as applicable:
Figure: 26 TAC §748.313
[~~Figure: 26 TAC §748.313~~]

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

Filed with the Office of the Secretary of State on November 18, 2019.

TRD-201904314
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 438-5559

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DIVISION 6. UNAUTHORIZED ABSENCES

26 TAC §§748.451, 748.453, 748.455, 748.457, 748.459, 748.461, 748.463

STATUTORY AUTHORITY

The new rules are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The new rules affect Texas Government Code §531.0055 and Human Resources Code §42.042.

§748.451. What additional requirements are there for unauthorized absences of children from my operation?

(a) For each unauthorized absence of a child, you must:

(1) document the unauthorized absence in an annual summary log, as required by §748.453 of this title (relating to What documentation must be included in an annual summary log for a child who has an unauthorized absence?); and

(2) debrief the child, as required by §748.455 of this title (relating to What are the requirements for debriefing a child after an unauthorized absence?).

(b) If a child has three unauthorized absences within a 60-day time frame, you must conduct a triggered review of the child's unauthorized absences that is consistent with the rules in this division.

(c) You must conduct an overall operation evaluation for unauthorized absences every six months, as required by §748.463 of this title (relating to What is an overall operation evaluation for unauthorized absences?).

§748.453. What documentation must be included in an annual summary log for a child who has an unauthorized absence?

(a) For each unauthorized absence during the relevant year, you must document the following information in an annual summary log:

(1) the name, age, gender, and date of admission of the child who was absent;

(2) the time and date the unauthorized absence was discovered;

(3) how long the child was gone or if the child did not return;

(4) the name of the caregiver responsible for the child at the time the child's absence was discovered; and

(5) whether law enforcement was contacted, including the name of any law enforcement agency that was contacted, if applicable.

(b) You must maintain each annual summary log for five years.

(c) You must make the annual summary logs available to Licensing for review and reproduction, upon request.

§748.455. What are the requirements for debriefing a child after an unauthorized absence?

(a) After a child returns to an operation from an unauthorized absence, the caregiver, or other appropriate person, must conduct a debriefing with the child as soon as possible, but no later than 24 hours after the child's return. The purpose of the debriefing is for the child and the caregiver, or other appropriate person, to discuss the following:

(1) the circumstances that led to the child's unauthorized absence;

(2) the strategies the child can use to avoid future unauthorized absences and how the operation can support those strategies;

(3) the child's condition; and

(4) what occurred while the child was away from the operation, including where the child went, who was with the child, the child's activities, and any other information that may be relevant to the child's health and safety.

(b) The caregiver must allow the child to return to routine activities, excluding any activity that the caregiver determines would be inappropriate because of the child's condition following the unauthorized absence or something that occurred during the unauthorized absence.

(c) The debriefing must be documented in the child's record, including any routine activity that would be inappropriate for the child to return to and the explanation for why the activity is inappropriate.

§748.457. When must a triggered review of a child's unauthorized absences occur?

(a) A triggered review of a child's unauthorized absences must occur as soon as possible, but no later than 30 days after the child's third unauthorized absence within a 60-day time frame.

(b) A regularly scheduled review of the child's service plan can serve as the triggered review of a child's unauthorized absences, if the regularly scheduled review:

(1) meets the requirements in §748.461 of this title (relating to What must the triggered review of a child's unauthorized absences include?); and

(2) takes place no later than 30 days after the child's third unauthorized absence within a 60-day time frame.

§748.459. Who must participate in a triggered review of a child's unauthorized absences?

(a) The triggered review of a child's unauthorized absences must include the following participants:

(1) the child;

(2) an individual designated to make decisions regarding the child's participation in childhood activities, as described in

§748.707 of this title (relating to Who makes the decision regarding a foster child's participation in childhood activities?); and

(3) the child's case manager.

(b) You must notify the child's parent at least two weeks before the triggered review of a child's unauthorized absences, so the parent will have an opportunity to participate in the review.

§748.461. What must a triggered review of a child's unauthorized absences include?

A triggered review of a child's unauthorized absences must include the following:

(1) a review of the child's records documenting previous unauthorized absences, including previous debriefings;

(2) a review of service plan elements identified in §748.1337(b)(1)(D) and (H) and, as applicable, §748.1337(b)(2) and (3) of this title (relating to What must a child's initial service plan include?);

(3) an examination of alternatives to minimize the unauthorized absences of the child; and

(4) a written plan to reduce the unauthorized absences of the child, which you must document in the child's record.

§748.463. What is an overall operation evaluation for unauthorized absences?

(a) Every six months, you must conduct an overall operation evaluation for unauthorized absences that have occurred at your operation during that time period.

(b) The objectives of the evaluation are to:

(1) develop and maintain an environment that supports positive and constructive behaviors by children in care; and

(2) ensure the overall safety and well-being of children in care.

(c) The evaluation must include:

(1) the frequency and patterns of unauthorized absences of children in your operation; and

(2) specific strategies to reduce the number of unauthorized absences in your operation.

(d) You must maintain the results of each six-month overall operation evaluation for unauthorized absences for five years.

(e) You must make the results of each overall operation evaluation for unauthorized absences available to Licensing for review and reproduction, upon request.

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 18, 2019.

TRD-201904315
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Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 438-5559

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CHAPTER 749. MINIMUM STANDARDS FOR CHILD-PLACING AGENCIES

SUBCHAPTER D. REPORTS AND RECORD KEEPING

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes the following rulemaking actions in Title 26, Texas Administrative Code, Chapter 749, Minimum Standards for Child-Placing Agencies: the repeal of §749.501, concerning What is a serious incident; new §749.501, concerning What do certain terms mean in this subchapter; amendments to §749.503, concerning When must I report and document a serious incident, and §749.513, concerning What additional documentation must I include with a written serious incident report; and new Division 5, Unauthorized Absences, consisting of new §§749.590 - 749.596.

BACKGROUND AND PURPOSE

The purpose of the proposal is to address the issue of unauthorized absences of children placed in foster homes by requiring child-placing agencies (CPAs) to take additional actions when a child leaves a foster home without permission (unauthorized absence). Runaways are a national issue, particularly for children in foster care.

Current rules require CPAs to document when a child is absent and cannot be located for a specified time frame, depending on the age and development level of the child. The proposed repeal, amendments, and new rules include additional requirements, such as: documenting each time a child has an unauthorized absence, regardless of the length of time the child is absent; maintaining an annual log of each unauthorized absence; debriefing the child after each unauthorized absence; conducting a triggered review for each child who has had three unauthorized absences within a 60-day time frame, to examine alternatives and create a written plan to reduce the number of unauthorized absences; and conducting an evaluation, every six months, of the frequency and patterns of unauthorized absences from foster homes within each agency.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §749.501 deletes the definition of serious incident, because definitions have been expanded in proposed new §749.501.

Proposed new §749.501 defines terms that are used in Subchapter D, Reports and Record Keeping, including the repealed content of §749.501 and new definitions for "triggered review of a child's unauthorized absences," and "unauthorized absence."

The proposed amendment to §749.503 replaces the phrase "absent from a foster home and cannot be located, including the removal of a child by an unauthorized person" in (a)(7) - (9) with the term "unauthorized absence," which has been defined in §749.501; adds a reference to §749.511 in subsection (b) regarding how to document a serious incident; adds a new subsection (c) that requires a CPA to document an unauthorized absence that does not meet the reporting time requirements in subsection (a) in the same manner as a serious incident; re-letters subsections accordingly; and updates a reference in subsection (e)(6) to reflect the correct rule number and title.

The proposed amendment to §749.513 replaces the phrase "child absent without permission" in paragraph (3) with "unauthorized absence of a child," and adds requirements for

agencies to complete certain information when documenting the unauthorized absence of a child, including whether the child has returned to the foster home, how long the child was gone, and completing an addendum to the serious incident report to finalize the documentation requirements if the child returns to the foster home after 24 hours.

Proposed new §749.590 describes the additional requirements the agency must conduct related to the unauthorized absence of a child from a foster home. This rule summarizes the requirements described in the remaining rules in proposed new Division 5.

Proposed new §749.591 requires the agency to maintain an annual summary log of each time a child has an unauthorized absence, document certain information in the log, maintain the annual log for five years, and make the log available to Licensing upon request.

Proposed new §749.592 describes the requirements for debriefing a child within 24 hours after an unauthorized absence, including what must be discussed with the child in the debriefing, allowing the child to return to routine activities as appropriate, and documenting the debriefing in the child's record.

Proposed new §749.593 requires an agency to conduct a triggered review of a child's unauthorized absences no later than 30 days after the child's third unauthorized absence within a 60-day time frame and describes when a regularly scheduled review of a child's service plan can serve as the triggered review.

Proposed new §749.594 outlines who must participate in a triggered review of a child's unauthorized absences: the child, foster parent, and child placement staff. The rule also requires that the child's parent be notified at least two weeks before the triggered review to give the parent an opportunity to participate in the review.

Proposed new §749.595 requires that a triggered review of a child's unauthorized absences include a review of the child's records documenting previous unauthorized absences, a review of certain service plan elements, an examination of alternatives to minimize the unauthorized absences, and a written plan in the child's record, to reduce the unauthorized absences.

Proposed new §749.596 requires the agency to conduct an overall agency evaluation every six months for unauthorized absences that have occurred during that time frame, which must include the frequency and patterns of unauthorized absences and specific strategies to reduce the number of unauthorized absences; maintain the results of the evaluation for five years; and make the evaluation available to Licensing upon request.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments. The Department of Family and Protective Services (DFPS) has a Child Protective Services (CPS) program that operates 11 certified CPAs in each region of the state, and the CPS foster and adoption development (FAD) staff would be responsible for performing the new duties required under these new rules. However, it is anticipated that the FAD staff time needed to perform these additional duties can be absorbed within existing resources.

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to HHSC;

(5) the proposed rules will create new rules;

(6) the proposed rules will expand existing rules;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

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

Greta Rymal has determined that there will be an adverse economic effect on small businesses and micro-businesses, but no adverse economic effect on rural communities. The amendments and new rules apply to CPAs that provide foster care services (which can be foster care services only, or both foster care and adoption services). The HHSC 2018 Data Book for Child Care Licensing states that there are 236 CPAs. Of those, it is estimated that 184 CPAs provide foster care services. The other estimated 52 CPAs provide adoption only services and will not be discussed in this fiscal impact analysis because the rule changes do not impact the CPAs that provide adoption only services.

Of the 184 CPAs that provide foster care service, 173 are private CPAs. There are also 11 CPS certified CPAs. The 11 CPS certified CPAs will not be discussed in this section of the fiscal impact analysis because they do not meet the legal definition of a small business or micro-business. However, the possible impact to DFPS was discussed in the Fiscal Note section concerning the impact to state and local government.

Of the remaining 173 CPAs that provide foster care services, it is estimated that only 15 percent (or 26 CPAs) would meet the definition of a small businesses, because most of the CPAs are not for-profit businesses. Of these 26 CPAs, it is estimated that almost all of them are small businesses and half of them (or 13 CPAs) are micro-businesses. (Note: Foster parents are not being counted as employees.) No CPAs are rural communities.

HHSC anticipates that CPAs may incur a cost to comply with the proposed rules. The new rules will require residential facilities to maintain a summary log of all unauthorized absences (those that must be reported or otherwise), in addition to the current requirement to report certain unauthorized absence Child Care Licensing does not currently have historical data on the total number of unauthorized absences of children from foster homes and is unable to predict the number of unauthorized absences that may occur under each CPA and what the impact of the new and amended rules will be to each CPA. However, it is possible to project an average "unit cost" for certain activities required by the new and amended rules. To comply with these rule changes, CPA child placement staff and administrators will be required to spend additional time documenting unauthorized absences in a child's record and in an annual summary log for unauthorized absences, participating in triggered reviews for each child who has three unauthorized absences within a

60-day time frame, and conducting overall agency evaluations every six months for those agencies that have any unauthorized absences. Child Care Licensing also does not know the workload of current CPA child placement staff and administrators, which presumably varies with each CPA. In many instances, the staff may be able to incorporate these additional requirements into their current workload.

The staff time required to comply with these changes will impact CPA child placement staff and administrators. To estimate the wages for the CPA staff, Licensing gathered data from the DFPS 2018 Data Book.

For use in the impact analysis, HHSC calculated hourly wages for each of these categories of CPA staff as follows (actual salaries paid to staff by a CPA may be greater or less than the averages used for these projections):

CPA Child Placement Staff - The 2018 average salary for CPS caseworkers was used to determine the salary costs for CPA child placement staff. The FY 2018 average salary for a CPS caseworker is $4,366.25 per month or $25.19 per hour ($4,366.25 ÷ 173.33 hours per month).

CPA Administrators - The 2018 average salary for CPS program administrators and district directors was used to determine the salary costs for CPA administrators. The FY 2018 average salary for a CPS administrator/director is $5,547.83 per month or $32.00 per hour ($5,547.83 ÷ 173.33 hours per month).

Fiscal impact relating to §749.503 and §749.591 for documenting unauthorized absences in a child's record and in an annual summary log for unauthorized absences: This fiscal impact results from the amendment in §749.503, which adds subsection (c) that requires documentation of unauthorized absences that do not meet the reporting requirements defined in §749.503 (a)(7) - (9). This fiscal impact also results from proposed new §749.591, which requires, in part, a CPA to document information regarding unauthorized absences for a child in an annual summary log. It is anticipated that the CPA child placement staff will spend an average of 30 minutes to an hour documenting an unauthorized absence. Therefore, the cost will be approximately between $12.60 and $25.19 per unauthorized absence ($25.19 X 0.5 hours and $25.19 X 1 hour). Some CPAs may already be maintaining an annual summary log of unauthorized absences, so there would be no additional costs for those CPAs.

Fiscal impact relating to §749.594 for triggered reviews for unauthorized absences: Proposed new §749.594 requires the CPA child placement staff to participate in a triggered review for unauthorized absences when the child has incurred three unauthorized absences in a 60-day time frame. Licensing estimates that the CPA child placement staff will spend, on average, between one and two hours participating in a triggered review for unauthorized absences. Therefore, the cost will be approximately between $25.19 and $50.38 per triggered review ($25.19 X 1 hour and $25.19 X 2 hours).

Fiscal impact relating to §749.596 for overall agency evaluation for unauthorized absences: Proposed new §749.596 requires an agency to conduct an overall agency evaluation for unauthorized absences every six months. Licensing estimates that a CPA administrator and three child placement staff members will spend approximately 2 hours in a meeting discussing the overall agency evaluation, and the CPA administrator will spend an additional four to six hours completing the evaluation. Therefore, the cost will be approximately between $343.14 and $407.14 [($25.19 X 2 hours X 3 child placement staff members) + ($32 X 6 hours) or [($25.19 X 2 hours X 3 child placement staff members) + ($32 X 8 hours) per evaluation, or $686.28 and $814.28 annually.

HHSC determined that alternative methods to achieve the purpose of the proposed rules for small businesses and micro-businesses would not be consistent with ensuring the health and safety of children in foster care.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas.

PUBLIC BENEFIT AND COSTS

Jean Shaw, Associate Commissioner for Child Care Licensing, has determined that for each year of the first five years the rules are in effect, the public benefit will be an increase in safety of children in residential care by clarifying provider requirements, preventing future absences of children who regularly have unauthorized absences, and decreasing the overall number of unauthorized absences.

Greta Rymal has also determined that for the first five years the rules are in effect, persons who are required to comply with the proposed rules may incur economic costs as previously explained under the section entitled Small Businesses, Micro-Businesses, and Rural Community Impact Analysis.

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 Gerry Williams at (512) 438-5559 in the Child Care Licensing Department of the HHSC Regulatory Services Division or by e-mail to Gerry.Williams@hhsc.state.tx.us.

Written comments on the proposal may be submitted to Gerry Williams, Rules Developer (19R020), Child Care Licensing, Health and Human Services Commission E-550, P.O. Box 149030, Austin, Texas 78714-9030, and electronic comments may be submitted to CCLrules@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 calendar 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) e-mailed by midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 19R020" in the subject line.

DIVISION 1. REPORTING SERIOUS INCIDENTS AND OTHER OCCURRENCES

26 TAC §749.501

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The repeal affects Texas Government Code §531.0055 and Human Resources Code §42.042.

§749.501. What is a serious incident?

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 18, 2019.

TRD-201904316
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 438-5559

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26 TAC §§749.501, 749.503, 749.513

STATUTORY AUTHORITY

The amendments and new section are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The amendments and new section affect Texas Government Code §531.0055 and Human Resources Code §42.042.

§749.501. What do certain terms mean in this subchapter?

These terms have the following meanings in this subchapter:

(1) Serious incident--A non-routine occurrence that has or may have dangerous or significant consequences for the care, supervision, or treatment of a child. The different types of serious incidents are noted in §749.503 of this title (relating to When must I report and document a serious incident?).

(2) Triggered review of a child's unauthorized absences--A review of a specific child's pattern of unauthorized absences when the child has had three unauthorized absences within a 60-day time frame.

(3) Unauthorized absence--A child is absent from a foster home without permission from the foster parent, or other temporary caregiver, and cannot be located. This includes when an unauthorized person has removed the child from the foster home.

§749.503. When must I report and document a serious incident?

(a) You must report and document the following types of serious incidents involving a child in your care. The reports must be made to the following entities, and the reporting and documenting must be within the specified time frames:

Figure: 26 TAC §749.503(a)

[~~Figure: 26 TAC §749.503(a)~~]

(b) If there is a medically pertinent incident, such as a seizure, that does not rise to the level of a serious incident, you do not have to report the incident but you must document the incident in the same manner as for a serious incident, as described in §749.511 of this title (relating to How must I document a serious incident?).

(c) You must document an unauthorized absence that does not meet the reporting time requirements defined in subsection (a)(7) - (9) of this section within 24 hours after you become aware of the unauthorized absence. You must document the absence:

(1) In the same manner as for a serious incident, as described in §749.511 of this title; and

(2) Complete an addendum to the serious incident report to finalize the documentation requirements, if the child returns to a foster home after 24 hours.

(d) [~~(c)~~] If there is a serious incident involving an adult resident, you do not have to report the incident to Licensing, but you must document the incident in the same manner as a serious incident. You do have to report the incident to:

(1) Law enforcement as outlined in the chart above;

(2) The parents, if the adult resident is not capable of making decisions about the resident's own care; and

(3) Adult Protective Services through the Texas Abuse and Neglect Hotline if there is reason to believe the adult resident has been abused, neglected or exploited.

(e) [~~(d)~~] You must report and document the following types of serious incidents involving your agency, one of your foster homes, an employee, professional level service provider, contract staff, or a volunteer to the following entities within the specified time frame:

Figure: 26 TAC §749.503(e)

[~~Figure: 26 TAC §749.503(d)~~]

§749.513. What additional documentation must I include with a written serious incident report?

You must include the following additional documentation with a written serious incident report, as applicable:

Figure: 26 TAC §749.513

[~~Figure: 26 TAC §749.513~~]

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 18, 2019.

TRD-201904318
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 438-5559

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DIVISION 5. UNAUTHORIZED ABSENCES

26 TAC §§749.590 - 749.596

STATUTORY AUTHORITY

The new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies.

The new sections affect Texas Government Code §531.0055 and Human Resources Code §42.042.

§749.590. What additional requirements are there for unauthorized absences of children from a foster home?

(a) For each unauthorized absence of a child, you must:

(1) Document the unauthorized absence in an annual summary log, as required by §749.591 of this title (relating to What documentation must be included in an annual summary log for a child who has an unauthorized absence?); and

(2) Debrief the child, as required by §749.592 of this title (relating to What are the requirements for debriefing a child after an unauthorized absence?).

(b) If a child has three unauthorized absences within a 60-day timeframe, you must conduct a triggered review of the child's unauthorized absences that is consistent with the rules in this division; and

(c) You must conduct an overall agency evaluation for unauthorized absences every six months, as required by §749.596 of this title (relating to What is an overall agency evaluation for unauthorized absences?).

§749.591. What documentation must be included in an annual summary log for a child who has an unauthorized absence?

(a) For each unauthorized absence during the relevant year, you must document the following information in an annual summary log:

(1) The name, age, gender, and date of admission of the child who was absent;

(2) The time and date the unauthorized absence was discovered;

(3) How long the child was gone or if the child did not return;

(4) The name of the caregiver responsible for the child at the time the child's absence was discovered; and

(5) Whether law enforcement was contacted, including the name of any law enforcement agency that was contacted, if applicable.

(b) You must maintain each annual summary log for five years.

(c) You must make the annual summary logs available to Licensing for review and reproduction, upon request.

§749.592. What are the requirements for debriefing a child after an unauthorized absence?

(a) After a child returns to the foster home from an unauthorized absence, the foster parent, or other appropriate person, must conduct a debriefing with the child as soon as possible, but no later than 24 hours after the child's return. The purpose of the debriefing is for the child and the foster parent, or other appropriate person, to discuss the following:

(1) The circumstances that led to the child's unauthorized absence;

(2) The strategies the child can use to avoid future unauthorized absences and how the foster parent can support those strategies;

(3) The child's condition; and

(4) What occurred while the child was away from the foster home, including where the child went, who was with the child, the child's activities, and any other information that may be relevant to the child's health and safety.

(b) The foster parent must allow the child to return to routine activities, excluding any activity that the foster parent determines would be inappropriate because of the child's condition following the unauthorized absence or something that occurred during the unauthorized absence.

(c) The debriefing must be documented in the child's record, including any routine activity that would be inappropriate for the child to return to and the explanation for why the activity is inappropriate.

§749.593. When must a triggered review of a child's unauthorized absences occur?

(a) A triggered review of a child's unauthorized absences must occur as soon as possible, but no later than 30 days after the child's third unauthorized absence within a 60-day timeframe.

(b) A regularly scheduled review of the child's service plan can serve as the triggered review of a child's unauthorized absences, if the regularly scheduled review:

(1) Meets the requirements in §749.595 of this title (relating to What must the triggered review of a child's unauthorized absences include?); and

(2) Takes place no later than 30 days after the child's third unauthorized absence within a 60-day timeframe.

§749.594. Who must participate in a triggered review of a child's unauthorized absences?

(a) The triggered review of a child's unauthorized absences must include the following participants:

(1) The child;

(2) The foster parent; and

(3) Child placement staff.

(b) You must notify the child's parent at least two weeks before the triggered review of a child's unauthorized absences, so the parent will have an opportunity to participate in the review.

§749.595. What must a triggered review of a child's unauthorized absences include?

A triggered review for a child's unauthorized absences must include the following:

(1) A review of the child's records documenting previous unauthorized absences, including previous debriefings;

(2) A review of service plan elements identified in §749.1309(b)(1)(D) and (H) and, as applicable, §749.1309(b)(2) and (3) of this chapter (relating to What must a child's initial service plan include?);

(3) An examination of alternatives to minimize the unauthorized absences of the child; and

(4) A written plan to reduce the unauthorized absences of the child, which you must document in the child's record.

§749.596. What is an overall agency evaluation for unauthorized absences?

(a) Every six months, you must conduct an overall agency evaluation for unauthorized absences that have occurred at your operation during that time period.

(b) The objectives of the evaluation are to:

(1) Develop and maintain an environment that supports positive and constructive behaviors by children in care; and

(2) Ensure the overall safety and well-being of children in care.

(c) The evaluation must include:

(1) The frequency and patterns of unauthorized absences of children in your agency; and

(2) Specific strategies to reduce the number of unauthorized absences in your agency.

(d) You must maintain the results of each six-month overall agency evaluation for unauthorized absences for five years.

(e) You must make the results of each overall agency evaluation for unauthorized absences available to Licensing for review and reproduction, upon request.

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 18, 2019.

TRD-201904319
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 438-5559

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

The Texas Water Development Board ("TWDB" or "board") proposes to repeal 31 TAC §§363.401 - 363.404 and proposes new Subchapter D, 31 TAC §§363.401 - 363.408, relating to the establishment of flood financial assistance by recent statutory amendments to Chapter 15 and 16 of the Texas Water Code.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED AMENDMENT.

Through Senate Bill 7 of the 86th Legislature, 2019, the Legislature created the Flood Infrastructure Fund and the Texas Infrastructure Resiliency Fund to ensure financial assistance is available for flood control, drainage, and mitigation projects. The new flood financial assistance will be administered by the TWDB and is designed to make the implementation of flood projects more affordable for Texas communities and to meet the immediate needs for funding from political subdivisions.

The TWDB is proposing the present rules to implement the establishment of flood financial assistance by creating a new subchapter in Chapter 363, relating to Financial Assistance Programs. By placing the flood financial assistance rules into this chapter, the general provisions of Chapter 363 will apply. This will allow the board to use the procedures and practices common to many of the board's existing financial programs rather than to recreate them separately in the flood financial assistance rules. Applicants will find the utilization of existing practices convenient and efficient, as opposed to having to navigate and understand new processes. To read and understand the rules in Chapter 363, Subchapter D that will apply to flood financial assistance, the rules must be read together with Subchapter A, relating to General Provisions.

The executive administrator envisions that the application process for flood financial assistance will be similar to the processes for the board's financial programs, as modified by any process improvements. The board will solicit initial abridged applications and then a longer application at the appropriate time. The abridged application will allow the applicant to describe the proposed project and provide information about the issues the project will address. After the board receives the abridged applications, staff will rate and prioritize the projects. The executive administrator will recommend a prioritized list of applications based on the criteria specified in proposed rule §363.404. The prioritized list of projects, as recommended by the executive administrator, will go to the board for deliberation and preliminary decision. The projects that are selected by the board for funding may be required to submit additional information by the board. The longer application will then be subject to the executive administrator's traditional analysis for evaluating projects.

Prior to proposing these rules, the board engaged in an extensive effort of outreach for suggestions on flood planning and financing. TWDB staff traveled across the state and solicited input from stakeholders on how to implement the flood financial assistance program.

SECTION BY SECTION DISCUSSION OF PROPOSED AMENDMENTS.

The proposed repeal of §§363.401 - 363.404 removes the current flood control provisions to allow for the implementation of the new flood financial assistance program.

Proposed Amendment to 31 TAC Chapter 363 by addition of a New Subchapter D (relating to Flood Financial Assistance)

31 TAC §363.401. Scope of Subchapter D.

Section 363.401 is proposed to specify the scope and coverage of Subchapter D. Subchapter D governs the board's new flood financial assistance program established by the Texas Water Code, Chapter 15, Subchapter I and Texas Water Code, Chapter 16, Subchapter L. The new section also clarifies that the provisions of Chapter 363, Subchapter A are applicable to the flood financial assistance program unless they are in conflict with Subchapter D.

31 TAC §363.402. Definitions.

Section 363.402 is proposed to clarify the definitions of words and terms used throughout Subchapter D.

31 TAC §363.403. Prioritization System.

Section 363.403 is proposed to provide a prioritization system for projects to be funded. The processing of applications and the steps in the proposed prioritization system is similar to the functioning of the prioritization for the current State Revolving Fund programs, but the dates and timing of flood financial assistance will not be fixed by rule to give the board additional flexibility in the timing of when it will make funds available. The factors to be evaluated in the prioritization will be outlined in a Flood Intended Use Plan, which will identify the uses of the funds for flood projects.

31 TAC §363.404. Use of Funds.

Section 363.404 incorporates the restrictions on the use of funds provided by Texas Water Code §15.534, as related to providing financial assistance to applicants. The board expects that the terms of the financial assistance provided to applicants will be tailored to best fit the needs of the applicants. After the board adopts the initial state flood plan, the flood financial assistance funds will be used for projects in the state flood plan, as required by Texas Water Code §§15.5341 and 16.4545.

31 TAC §363.405. Terms of Financial Assistance.

Section 363.405 is proposed to clarify when deferrals for principal and interest payments may be made, and to outline the terms that applicants will follow when receiving flood financial assistance.

31 TAC §363.406. Findings Required.

Section 363.407 is proposed to state the findings that are required prior to approval of an application for flood financial assistance, pursuant to Texas Water Code §15.536.

31 TAC §363.407. Application Requirements.

Section 363.407 is proposed to outline the requirements applicants will follow when applying for flood financial assistance. If an applicant proposes a flood control project, and that flood control project is located in a watershed with other political subdivisions, the applicant will be required to submit a memorandum of understanding that includes all the affected political subdivisions. This requirement is from Texas Water Code §15.005. Applicants will have to submit an affidavit demonstrating that they have acted cooperatively with the public and other political subdivisions in the area. The affidavit will fulfill the purposes of Texas Water Code §15.535, which requires political subdivisions to demonstrate their cooperation.

31 TAC §363.408. Investment and Administration of Funds.

Section 363.408 is proposed to implement the requirement from Texas Water Code §§15.537 and 16.460, which require that the board outline the investment and administration of funds.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENTS

Ms. Rebecca Trevino, Chief Financial Officer, has determined that there will not be fiscal implications for state government as a result of the proposed rulemaking. For the first five years these rules are in effect, there is no expected additional cost to state or local governments resulting from their administration. There are no fiscal implications to local governments in general as a result of enforcing or administering the rules, since no local government is required to apply for assistance under these programs. For local governments that choose to apply for funding under these programs, there will be costs associated with applying for and receiving funding, but those costs are anticipated to be more than offset by savings to the local government in financing costs for the projects.

These rules are not expected to result in reductions in costs to either state or local governments. These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

Because these rules will not impose a cost on regulated persons, the requirement included in Texas Government Code Section 2001.0045 to repeal a rule does not apply. However, §§363.401 - 363.404 are being repealed. Furthermore, the requirement in Section 2001.0045 does not apply because these rules are proposed in response to a natural disaster; are necessary to protect water resources of this state as authorized by the Water Code; are necessary to protect the health, safety, and welfare of the residents of this state; and are necessary to implement legislation.

The board invites public comment regarding this fiscal note. Written comments on the fiscal note may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

PUBLIC BENEFITS AND COSTS

Ms. Rebecca Trevino also has determined that for each year of the first five years the proposed rulemaking is in effect, the public will benefit from the rulemaking as applicants are able to receive low cost financing for flood projects or receive grants for flood projects.

LOCAL EMPLOYMENT IMPACT STATEMENT

The board has determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect because it will impose no new requirements on local economies. The board also has determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of enforcing this rulemaking. The board also has determined that there is no anticipated economic cost to persons who are required to comply with the rulemaking as proposed. Therefore, no regulatory flexibility analysis is necessary.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to implement legislation and create a new flood financial assistance program.

Even if the proposed rule were a major environmental rule, Texas Government Code, §2001.0225 still would not apply to this rulemaking because Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed a standard set by any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed

a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not proposed solely under the general powers of the agency, but rather is proposed under the authority of Texas Water Code §§15.537 and 16.460. Therefore, this proposed rule does not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The board invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submission of Comments section of this preamble.

TAKINGS IMPACT ASSESSMENT

The board evaluated this proposed rule and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this rule is to implement legislation and create a new flood financing program. The proposed rule would substantially advance this stated purpose by proposing new rules for flood financial assistance and guide applicants in the application process.

The board's analysis indicates that Texas Government Code, Chapter 2007 does not apply to this proposed rule because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The board is the agency that provides financial assistance for flood mitigation and flood control projects.

Nevertheless, the board further evaluated the proposed rules and performed an assessment of whether it constitutes a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007.

GOVERNMENT GROWTH IMPACT STATEMENT

The board reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rules would be in effect, the proposed rules will not: (1) require an increase or decrease in fees paid to the agency; (2) create a new regulation; (3) expand, limit, or repeal an existing regulation; (4) increase or decrease the number of individuals subject to the rule's applicability; or (5) positively or adversely affect this state's economy.

The board has reviewed the proposed rulemaking in light of the government growth impact statement requirements of Texas Government Code §2001.0221 and has determined, for the first five years the proposed rules would be in effect, the proposed rules will: (1) create or eliminate a government program; (2) require the creation of new employee positions or the elimination of existing employee positions; (3) require an increase or decrease in future legislative appropriations to the agency; and (6) expand, limit, or repeal an existing regulation. The board is required to implement a new financing program for flood projects as a result of legislation from the 86th Legislature.

SUBMISSION OF COMMENTS

Written comments on the proposed rulemaking may be submitted by mail to Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to *rulescomments@twdb.texas.gov,* or by fax to (512) 475-2053. COMMENTS MUST INCLUDE REFERENCE TO CHAPTER 363 IN THE SUBJECT LINE. Comments will be accepted until 5:00 p.m. on January 13, 2020.

SUBCHAPTER D. FLOOD CONTROL

31 TAC §§363.401 - 363.404

STATUTORY AUTHORITY

The repeals are proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

§363.401. Scope of Subchapter.

§363.402. Definitions of Terms.

§363.403. Projects Eligible.

§363.404. Flood Control.

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 18, 2019.

TRD-201904326
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 463-7847

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SUBCHAPTER D. FLOOD FINANCIAL ASSISTANCE [~~FLOOD CONTROL~~]

31 TAC §§363.401 - 363.408

STATUTORY AUTHORITY

This rulemaking is proposed under the authority of Texas Water Code §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and also under the authority of Texas Water Code §§15.537 and 16.460, which require that the TWDB adopt rules necessary to carry out the affected subchapters.

Chapters 15 and 16 of the Texas Water Code are affected by this rulemaking.

§363.401. Scope of Subchapter D.

This subchapter shall govern the board's programs of flood financial assistance under the programs established by the Texas Water Code,

Chapter 15, Subchapter I and Texas Water Code, Chapter 16, Subchapter L. Unless in conflict with the provisions in this subchapter, the provisions of Subchapter A of this chapter (relating to General Provisions) shall apply to projects under this subchapter.

§363.402. Definitions.

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

(1) Drainage--includes, but is not limited to, bridges, catch basins, channels, conduits, creeks, culverts, detention ponds, ditches, draws, flumes, pipes, pumps, sloughs, treatment works, and appurtenances to those items, whether natural or artificial, or using force or gravity, that are used to draw off surface water from land, carry the water away, collect, store, or treat the water, or divert the water into natural or artificial watercourses.

(2) Eligible political subdivision--a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, a district or river authority that is subject to Chapter 49 of the Texas Water Code and participates in cooperative flood control planning, a municipality, or a county.

(3) Flood control--structural mitigation or anything that diverts, redirects, impedes, or otherwise modifies the flow of water.

(4) Flood mitigation--the implementation of actions, including both structural and nonstructural solutions, to reduce flood risk to protect against the loss of life and property.

(5) Flood Intended Use Plan--a document prepared by the board which identifies the uses of the funds for flood projects.

(6) Flood project--a drainage, flood mitigation, or flood control project, including:

(A) planning and design activities;

(B) work to obtain regulatory approval to provide nonstructural and structural flood mitigation and drainage;

(C) construction of structural flood mitigation and drainage projects, including projects that use nature-based features to protect, mitigate, or reduce flood risk;

(D) construction and implementation of nonstructural projects, including projects that use nature-based features to protect, mitigate, or reduce flood risk;

(E) nonstructural or natural flood control strategies; and

(F) a federally authorized project to deepen a ship channel affected by a flooding event.

(7) Nonstructural flood mitigation--includes, but is not limited to, measures such as acquisition of floodplain land for use as public open space, acquisition and removal of buildings located in a floodplain, relocation of residents of buildings removed from a floodplain, flood warning systems, educational campaigns, and land use planning policies.

(8) Metropolitan statistical area--an area so designated by the United States Office of Management and Budget.

(9) Project Watershed--the area upstream and downstream substantially affected by the proposed flood project as documented in the project application and sealed by a Professional Engineer or Geoscientist. The Project Watershed shall be estimated using the best available data with analysis performed in accordance with sound engineering principles and practices.

(10) Structural flood mitigation--includes, but is not limited to, measures such as construction of storm water retention basins, enlargement of stream channels, modification or reconstruction of bridges, coastal erosion control measures, or beach nourishment.

§363.403. Prioritization System.

(a) The board will establish deadlines for application submittals. The executive administrator will provide the prioritization of those applications to the board for approval as soon thereafter as practicable. To be considered for prioritization, an applicant must provide adequate information to establish that the applicant qualifies for funding, to describe the project comprehensively, and to establish the cost of the project, as well as any other information requested by the executive administrator. The executive administrator will develop and provide an abridged application to gather information necessary for prioritization. If an applicant submits an abridged application for prioritization purposes, the applicant must submit a complete application to the board by the deadline established by the executive administrator, or the project will lose its priority ranking and the board may commit to other projects consistent with the prioritization.

(b) For each application that the executive administrator has determined has adequate information and is administratively complete for prioritization purposes and prior to each board meeting at which applications may be considered for prioritization, the executive administrator shall:

(1) prioritize the applications by the criteria identified in the Flood Intended Use Plan; and

(2) provide to the board a prioritized list of all complete applications as recommended by the executive administrator, the amount of funds requested, and the priority of each application received.

(c) The board will identify the amount of funds available for new applications by category, establish the structure of financing and the terms of any subsidy, and will consider applications in accordance with this title. The board reserves the right to limit the amount of funding available to an individual entity.

§363.404. Use of Funds.

The board may use the funds for financial assistance to eligible political subdivisions as follows:

(1) to make a loan to an eligible political subdivision at or below market interest rates for a flood project;

(2) to make a grant or loan at or below market interest rates to an eligible political subdivision for a flood project to serve an area outside of a metropolitan statistical area in order to ensure that the flood project is implemented;

(3) to make a loan at or below market interest rates for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a flood project;

(4) to make a grant to an eligible political subdivision to provide matching funds to enable the eligible political subdivision to participate in a federal program for a flood project;

(5) to make a grant to an eligible political subdivision for a flood project if the board determines that the eligible political subdivision does not have the ability to repay a loan;

(6) to meet matching requirements for projects funded partially by federal money; and

(7) to make a loan to an eligible political subdivision below market interest rates and under flexible repayment terms, including a

line of credit or loan obligation with early repayment terms, to provide financing for the local share of a federally authorized ship channel improvement project.

§363.405. Terms of Financial Assistance.

(a) Principal and interest payments on loans at or below market interest rates for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a flood project may be deferred for not more than 10 years or until construction of the flood project is completed, whichever is earlier.

(b) The board shall determine the amount and form of financial assistance and the amount and form of repayment.

(c) The board shall determine the method of evidence of debt.

(d) If the board determines non-performance on the terms of the grant, the board may require reimbursement of all or part of the funds provided by grant assistance or impose sanctions such as prohibition of further board financial assistance.

§363.406. Findings Required.

On review and recommendation by the executive administrator, the board may approve an application only if the board finds:

(1) the application and the assistance applied for meet requirements of this subchapter and board rules;

(2) the application demonstrates a sufficient level of cooperation among eligible political subdivisions and includes all of the eligible political subdivisions substantially affected by the flood project;

(3) the taxes or other revenue, or both the taxes and other revenue, pledged by the applicant will be sufficient to meet all the obligations assumed by the eligible political subdivision; and

(4) other findings as required in the Flood Intended Use Plan.

§363.407. Application Requirements.

In addition to the general application requirements of Subchapter A of this chapter (relating to General Provisions), the following are required to be considered an administratively complete application:

(1) if the project is a flood control project and there is more than one political subdivision located in a watershed, the applicant must submit a memorandum of understanding relating to management of the project watershed. The memorandum of understanding must be approved and signed by all governing bodies of political subdivisions located in the project watershed. The memorandum of understanding at a minimum, must contain a requirement that all political subdivisions in the project watershed agree to work cooperatively;

(2) an affidavit attesting to the following:

(A) that the applicant has acted cooperatively with other political subdivisions to address flood control needs in the area in which the eligible political subdivisions are located;

(B) that all eligible political subdivisions substantially affected by the proposed flood project have participated in the process of developing the proposed flood project;

(C) that the eligible political subdivisions, separately or in cooperation, have held public meetings to accept comment on proposed flood projects from interested parties; and

(D) that the technical requirements for the proposed flood project have been completed and compared against any other potential flood projects in the same area. This statement is not required for applications for assistance for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a flood project;

(3) an analysis of whether the proposed flood project could use floodwater capture techniques for water supply purposes, including floodwater harvesting, detention or retention basins, or other methods of capturing storm flow or unappropriated flood flow;

(4) a description of the Project Watershed sealed by a Professional Engineer or Geoscientist. Revisions to the Project Watershed may be necessary with additional data, development of more refined modeling tools, refinement of design criteria, or other factors. The applicant must provide the executive administrator with updates of the description of the Project Watershed as it is modified. If a revision to the Project Watershed results in the inclusion of additional political subdivisions, the Applicant must provide the executive administrator with the additional memoranda of understanding; and

(5) additional information as needed to allow the board to comply with its responsibility to act as a clearinghouse for information about flood planning and its reporting requirements.

§363.408. Investment and Administration of Funds.

The investment and administration of funds shall be managed in accordance with the Board's investment policy, in accordance with State of Texas Comptroller guidelines, and the Public Funds Investment Act, Texas Government Code, Chapter 2257.

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 18, 2019.

TRD-201904327
Todd Chenoweth
General Counsel
Texas Water Development Board
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 463-7847

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER F. LIMITATION ON APPRAISED VALUE ON CERTAIN QUALIFIED PROPERTIES

34 TAC §§9.1051 - 9.1053, 9.1055, 9.1058

The Comptroller of Public Accounts proposes amendments to §9.1051, concerning definitions, §9.1052, concerning forms, §9.1053, concerning entity requesting agreement to limit appraised value, §9.1055, concerning comptroller application review and agreement to limit appraised value, and §9.1058, concerning miscellaneous provisions.

The amendments to §9.1051 amend the definition of substantive document in paragraph (19) to clarify that employee names and

personal identifying information will not be treated as substantive documents that will be required to be posted on the comptroller's website; and update the definitions of average weekly wage for manufacturing jobs in paragraph (21), average weekly wage for non-qualifying jobs in paragraph (22) and unemployment in paragraph (29) to remove references to webpage links that are no longer correct.

The changes to §9.1052 only propose changes to Form 50-296A, Application for Appraised Value Limitation on Qualified Property and Form 50-826, Texas Economic Development Act Agreement and otherwise do not change the rule itself. Copies of the proposed Form 50-296A and Form 50-826 are available on the comptroller's website at https://comptroller.texas.gov/economy/local/ch313/forms.php. The revised Form 50-296A clarifies that only non-confidential application materials will be published on the comptroller website, requests additional information about the identity of the parent company and reporting entity for Texas franchise tax purposes, requests the applicant to identify the estimated beginning date of the limitation period under Tax Code, §313.027(a-1)(2), and identify all other state and local incentives applicable to the project. The revised Form 50-826 amends the definition of Force Majeure, changes Article VII, Annual Limitation of Payments by Applicant, to permit the district and applicant to negotiate the applicable terms, updates the reference to Exhibit 4 in the agreement for the description of the applicant's Qualified Property, amends Section 8.5.A to extend from 48 hours to 96 hours the time required for written notice by the school district to inspect the applicant's Qualified Property and amends Section 10.12 to require the applicant to provide notice to the comptroller's office of any actual or anticipated change in ownership of the applicant and of any legal or administrative investigations or proceedings initiated against the Applicant related to the project.

The amendments to §9.1053 update subsection (a)(1)(A) and (2)(B)(i) to remove the reference to Schedule D in the application because Schedule D no longer exists; amend subsection (f)(2) to change the deadline to provide the proposed agreement to the school district and comptroller from 20 days to 30 days prior to the meeting at which the governing body of the school district is scheduled to consider the application; and add subsection (f)(9) to require applicants to provide the comptroller with estimates of the gross tax benefit that would result from the limitation on appraised value on the qualified property within 30 days after filing a completed application with the school district to assist the comptroller in evaluating the applications.

The amendment to §9.1055 amends subsection (e) to extend from 10 business days to 20 business days the time the comptroller has to review a proposed 313 agreement and provide written notification to the school district after completing its review. The amendment also rewords subsection (e)(2) to enhance readability.

The amendment to §9.1058 amends subsection (f) to clarify that all agreements in a series under Tax Code, §313.027(h) must be submitted concurrently at application and the application must clearly state the agreement will be part of a series and set forth the other agreements that are intended to be included as part of the series of agreements.

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

Mr. Currah also has determined that the proposed amendment would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed amendment would benefit the public by improving the administration of local property valuation and taxation. There would be no anticipated significant economic cost to the public. The proposed amendment would have no significant fiscal impact on small businesses or rural communities.

Comments on the amendments may be submitted to John Villarreal, Manager, Data Analysis and Transparency Division, Comptroller of Public Accounts, at P.O. Box 13528, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendments are proposed under Tax Code, §313.031, which authorizes the comptroller to adopt rules necessary for the implementation and administration of Tax Code, Chapter 313.

The amendments implement Tax Code, Chapter 313.

§9.1051. Definitions.

The following phrases, words and terms, when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Tax Code, Chapter 313 and not defined in this subchapter shall have the meanings provided by Tax Code, Chapter 313.

(1) Agreement--The written agreement between the governing body of a school district and the approved applicant on the form adopted by reference in §9.1052 of this title (relating to Forms) to implement a limitation on the appraised value for school district maintenance and operations ad valorem property tax purposes on an entity's qualified property, required by Tax Code, §313.027(d).

(2) Applicant--An entity that has applied for a limitation on appraised value for school district maintenance and operations ad valorem property tax purposes on the entity's property as provided by Tax Code, Chapter 313.

(3) Application--An application for limitation of appraised value limitation for school district maintenance and operations ad valorem property tax purposes on an entity's qualified property on the form adopted by reference in §9.1052 of this title, the schedules attached thereto, and the documentation submitted by an entity for the purpose of obtaining an agreement for a limitation on appraised value from a school district.

(4) Application amendment--Information submitted by an applicant intended to be considered as part of or in support of the application that amends by replacing information that was previously submitted by applicant.

(5) Application supplement--Information submitted by an applicant intended to be considered as part of or in support of the application that has not been previously submitted.

(6) Approved applicant--An applicant whose application has been approved by a school district for a limitation on appraised value agreement according to the provisions of Tax Code, Chapter 313, including any assignees of that applicant.

(7) Application review start date--The later date of either the date on which the school district issues its written notice that an applicant has submitted a completed application or the date on which the comptroller issues its written notice that an applicant has submitted a completed application.

(8) Appraisal district--The county appraisal district that would appraise the property which is the subject of an application.

(9) Appraised value--The value of property as defined by Tax Code, §1.04(8).

(10) Completed application--An application in the form and number and containing all the information required pursuant to §9.1053 of this title (relating to Entity Requesting Agreement to Limit Appraised Value) that has been determined by the school district and the comptroller to include all minimum requirements for consideration.

(11) Comptroller--The Texas Comptroller of Public Accounts or the designated representative of the Texas Comptroller of Public Accounts acting on behalf of the comptroller.

(12) Entity--Any entity upon which a tax is imposed by Tax Code, §171.001 including a combined group as defined by Tax Code, §171.0001(7) or members of a combined group, provided however, an entity as defined herein does not include a sole proprietorship, partnership or limited liability partnership.

(13) Data Analysis and Transparency Division or DAT--The Data Analysis and Transparency Division of the comptroller's office, or the division of the comptroller's office responsible for the administration of Tax Code, Chapter 313, acting through the designated division director or a representative thereof.

(14) Non-qualifying job--A permanent position of employment to perform work:

(A) that includes at a minimum the following requirements:

(i) that is based on the qualified property;

(ii) that is in direct support of activity identified in Tax Code, §313.024(b);

(iii) for at least 1,600 hours a year;

(iv) over which the applicant has significant degree of control of:

(I) the creation of the job;

(II) the job description;

(III) the job characteristics or performance of the job through either a business, contractual or vendor relationship; and

(B) is not a qualifying job as that term is defined in Tax Code, §313.021(3) and these rules.

(15) Qualified investment--Property that meets the requirements of Tax Code, §313.021(1).

(16) Qualified property--Land, new building, or new improvement erected or affixed to the land after the application review start date, or eligible tangible personal property first placed in service after the application review start date that:

(A) meets the requirements of Tax Code, §313.021(2), and that is used either as an integral part, or as a necessary auxiliary part, in manufacturing, research and development, a clean coal project, an advanced clean energy project, renewable energy electric generation, electric power generation using integrated gasification combined cycle technology, nuclear electric power generation, a Texas Priority Project, or a computer center;

(B) is clearly distinguished from any existing property and clearly distinguished from any proposed property that is not a new improvement;

(C) is separate from, and not a component of, any existing property;

(D) if buildings or improvements, did not exist before the application review start date or if tangible personal property, was first placed in service after the application review start date;

(E) is not used to renovate, refurbish, upgrade, maintain, modify, improve, or functionally replace existing buildings or existing improvements;

(F) does not replace or modify existing buildings other than expansion of an existing building; and

(G) is not used solely for the transportation of product prior to the commencement, or subsequent to the completion, of an applicable qualifying activity described in subparagraph (A) of this paragraph.

(17) School district--A school district that has received an application for a limitation on appraised value pursuant to Tax Code, Chapter 313 or the designated representative of the school district acting on behalf of the school district.

(18) SOAH--State Office of Administrative Hearings.

(19) Substantive document--A document or other information or data in electronic media determined by the comptroller to substantially involve or include information or data significant to an application, the evaluation or consideration of an application, or the agreement or implementation of an agreement for limitation of appraised value pursuant to Tax Code, Chapter 313. The term includes, but is not limited to, any application requesting a limitation on appraised value and any amendments or supplements, any economic impact evaluation made in connection with an application, any agreement between applicant and the school district and any subsequent amendments or assignments, any school district written finding or report filed with the comptroller as required under this subchapter, and any completed Annual Eligibility Report (Form 50-772A) submitted to the comptroller. The term shall not include any employee names or other personal identifying information that is submitted to the comptroller. Positions can be described by job type, category, or general title.

(20) Agreement holder--An entity that has executed an agreement with a school district.

(21) Average weekly wage for manufacturing jobs--Either the average weekly wage:

(A) for all jobs primarily engaged in activities described in Sectors 31 - 33 of the 2007 North American Industry Classification System in a county as identified by the Texas Workforce Commission's Quarterly Employment and Wages (QCEW) webpage available on the Texas Workforce Commission' s website [~~at http://www.tracer2.com/cgi/dataanalysis/AreaSelection.asp?tableName=Industry~~]; or

(B) for all manufacturing jobs or if the information for subparagraph (A) of this paragraph is not available, as determined by data published annually by the Texas Workforce Commission for the purposes of Tax Code, Chapter 313 for each Council of Government Region, based on Bureau of Labor Statistics, Texas Occupational Employment and Wages (OES) data, as it is posted on the Texas

Workforce Commission' s website [at ~~http://www.tracer2.com/admin/uploadedPublications/COGWages.pdf~~].

(22) Average weekly wage for non-qualifying jobs--The average weekly wage as identified by the Texas Workforce Commission Quarterly Employment and Wages (QCEW) average weekly wages for all private industries for the most recent four quarterly periods for which data is available at the time that an application is deemed complete, as it is posted on the Texas Workforce Commission's website [at ~~http://www.tracer2.com/cgi/dataanalysis/AreaSelection.asp?tableName=Industry~~].

(23) First placed in service--The first use of the property by the agreement holder.

(24) New improvement--A building, structure, or fixture that, after the application review start date:

(A) is a discrete unit of property erected on or affixed to land eligible to be qualified property; and

(B) is not erected or affixed as part of maintenance, renovation, refurbishment, improvement, modification, or upgrade of existing property, nor is newly added or proposed to be added property functionally replacing existing property, provided however that a proposed improvement may be considered a new improvement if it is an addition to an existing building that will contain new tangible personal property that did not exist before the application review start date.

(25) Per capita income--Per capita money income in the past 12 months as determined by the United States Census Bureau and reported at its website http://www.census.gov.

(26) Strategic investment area--An area that is:

(A) a county within this state with unemployment above the state average and per capita income below the state average;

(B) an area within this state that is a federally designated urban enterprise community or an urban enhanced enterprise community; or

(C) a defense economic readjustment zone designated under Government Code, Chapter 2310.

(27) Texas Economic Development Act Agreement--The form, adopted by reference in §9.1052 of this title, which provides a template for the terms of an agreement to implement a limitation on appraised value on property within a school district and that has the title Agreement For Limitation On Appraised Value Of Property For School District Maintenance And Operations Taxes.

(28) Texas Priority Project--A project on which the applicant commits to place in service qualified investment of more than $1 billion during the qualifying time period, based on the comptroller review of the application submitted by the school district.

(29) Unemployment--The most recent calendar year unemployment rate, not seasonally adjusted, as determined by the Labor Market & Career Information Department (LMCI) of the Texas Workforce Commission and reported on [~~at~~] its website [~~http://www.tracer2.com/cgi/dataanalysis/AreaSelection.asp?tableName=Labforce~~].

(30) Qualifying job--A permanent position of employment that includes at a minimum the following requirements:

(A) provides work for at least 1600 hours a year;

(B) is in direct support of activity identified in Tax Code, §313.024(b);

(C) is based on the qualified property;

(D) is a job over which the applicant has significant degree of control of:

(i) the creation of the job;

(ii) the job description;

(iii) the job characteristics or performance of the job through either a business, contractual or vendor relationship;

(E) is covered by a group health benefit plan for which the applicant offers to pay at least 80% of the premiums or other charges assessed for employee-only coverage under the plan, regardless of whether an employee may voluntarily waive the coverage;

(F) pays at least 110% of the county average weekly wage for manufacturing jobs in the county where the job is located;

(G) that has not been transferred from another part of the state; and

(H) that has not been created to replace a previous employee.

§9.1052. Forms.

(a) The comptroller adopts by reference the following forms:

(1) Application for Appraised Value Limitation on Qualified Property (Form 50-296A);

(2) Annual Eligibility Report (Form 50-772A);

(3) Biennial Progress Report for Texas Economic Development Act; Three-Digit Tax Code, Chapter 313 Projects (Three-Digit Form 50-773A);

(4) Biennial Progress Report for Texas Economic Development Act: Four-Digit Tax Code, Chapter 313 Projects (Four-Digit Form 50-773B);

(5) Job Creation Compliance Report (Form 50-825);

(6) Texas Economic Development Act Agreement (Form 50-826);

(7) Three-Digit Biennial School District Cost Data Request (CDR) (Three-Digit Form 50-827A); and

(8) Four-Digit Biennial School District Cost Data Request (CDR) (Four-Digit Form 50-827B).

(b) Copies of the forms are available for inspection at the office of the *Texas Register* or may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711-3528. The forms may be viewed or downloaded from the comptroller's website, at https://www.comptroller.texas.gov/economy/local/ch313/forms.php. Copies may also be requested by calling our toll-free number, (800) 531-5441, extension 34679.

(c) In special circumstances, a school district may obtain prior approval in writing from the comptroller to use an application or agreement form that requires additional information, or sets out the required information in different language or sequence than that which this section requires.

(d) The comptroller may periodically update the dates, form version numbers, and/or years in the appropriately marked sections of the forms described in subsection (a) of this section.

§9.1053. Entity Requesting Agreement to Limit Appraised Value.

(a) Initial application contents. To request a limitation on appraised value for school district maintenance and operations ad valorem tax purposes pursuant to Tax Code, Chapter 313, an applicant shall file

a completed application with the school district in which the qualified property will be located.

(1) A completed application shall consist of, at a minimum, the following items:

(A) the comptroller's current application form and Schedules A1, A2, B[,] and C [~~and D~~] attached to the application form with all information boxes filled in with the information on which applicant intends to rely including but not limited to:

(i) a specific and detailed description of the proposed qualified property to which the appraised value limitation will apply sufficient to clearly distinguish the subject property from property to which the limitation does not apply and to establish that the property meets the criteria of qualified property pursuant to these rules and Tax Code, §313.021(2);

(ii) a specific and detailed description of the investment described in Tax Code, §313.021(1) that is proposed to be made in the property subject to the appraised value limitation and sound, good faith estimates of the dollar value of intended investment sufficient to establish that the investment meets minimum criteria for qualified investment pursuant to Tax Code, §313.023 or §313.053 if applicable, during the proposed qualifying time period;

(iii) if the land upon which the qualified property will be located contains existing improvements or tangible personal property, a specific and detailed description of the tangible personal property, buildings, or permanent, non-removable building components (including any affixed to or incorporated into real property) on the land that is sufficient to distinguish existing property from the proposed new improvements and any proposed property that is not new improvements which may include maps, surveys, appraisal district values and parcel numbers, inventory lists, property lists, model and serial numbers of existing property, or other information of sufficient detail and description to locate all existing property within the boundaries of the real property which is subject to the agreement; provided however, that the date of appraisal shall be within 15 days of the date the application is received by the school district;

(iv) the total number of any jobs related to construction or operation of the facility that the applicant chooses to disclose for the purpose of calculating the economic impact of the project;

(v) the total number of qualifying jobs the applicant commits to create and maintain during the full term of the agreement and a schedule which identifies the number of qualifying jobs created and maintained in each year of the agreement;

(vi) the wages, salaries, and benefits applicant commits to provide for each qualifying job;

(vii) the total number of non-qualifying jobs the applicant estimates it will create and maintain during the full term of the agreement and a schedule which identifies the number of non-qualifying jobs created and maintained in each year of the agreement;

(viii) the average wages the applicant estimates it will provide for non-qualifying jobs;

(ix) a statement:

(I) that for the purposes of this statement, "payments to the school district" include any and all payments or transfers of things of value made to the school district or to any person or persons in any form if such payment or transfer of thing of value being provided is in recognition of, anticipation of, or consideration for the agreement for limitation on appraised value; and

(II) as to whether:

(-a-) the amount of any and all payments or transfers made to the school district may result in payments that are or are not in compliance with Tax Code, §313.027(i); or

(-b-) as to whether the method for determining the amount may result in payments to the school district that are or are not in compliance with Tax Code, §313.027(i); and

(x) a description of the real property on which the intended investment will be made, identified additionally by the county appraisal district parcel number;

(B) such other written documents containing information on which applicant relies to qualify for and obtain a limitation on appraised value pursuant to Tax Code, Chapter 313;

(C) such other written documents containing information reasonably requested by either the school district or the comptroller which shall be provided within 20 days of the date of the request, provided however the applicant may request up to 10 additional days to provide the requested information;

(D) information identifying the applicant, and if applicant is a combined group, identifying each such combined group's members that intend to own a direct interest in the property subject to the proposed agreement, by:

(i) official name, street address, city, county, state and mailing address, if different from the street address, of the official place of business of the applicant and, if the applicant is a combined group, of each such combined group's members that intend to own a direct interest in the property subject to the proposed agreement;

(ii) designation of an authorized representative for the applicant and, if the applicant is a combined group, for each such combined group's members that intend to own a direct interest in the property subject to the proposed agreement; and

(iii) for each authorized representative, and if the applicant is a combined group for each such combined group's members that intend to own a direct interest in the property subject to the proposed agreement, provide telephone number, email address, street address, city, county, state, and mailing address if different from the street address;

(E) the signature of applicant's authorized representative(s) by which applicant confirms and attests to the truth and accuracy of the information submitted in the application to the best knowledge and belief of applicant and its representative(s);

(F) the total application fee required by the school district with which the application will be filed;

(G) a statement as to whether or not the project is an expansion of an existing operation on the land which will become qualified property, and if so, a description of the nature of the existing operation, and the nature of the expansion, including an explanation of how the expansion affects or interacts with current operations;

(H) a statement specifying the beginning date of the limitation period, which must be January 1 of the first tax year that begins after one of the following:

(i) the date of the completed application;

(ii) the date of the end of the qualifying time period, provided however that such date will begin no later than the beginning of the limitation period; or

(iii) the date commercial operations are to begin at the site of the project;

(I) a statement regarding the location and nature of other facilities that the applicant operates in the state, and a detailed description of any such facilities that will provide inputs to or use outputs from the project that is the subject of the application;

(J) a detailed description of any state and local incentives for which the applicant intends to apply; and

(K) any information that the applicant requests the comptroller to consider in making the determination under Tax Code, §313.026(c)(2) that the limitation on appraised value is a determining factor in the applicant's decision to invest capital and construct the project in the state, which may include:

(i) other locations not in Texas that the applicant considered or is considering for the project;

(ii) capital investment and return on investment information in comparison with other alternative investment opportunities; or

(iii) information related to the applicant's inputs, transportation and markets.

(2) The completed application contents shall be provided in the following formats:

(A) one original hard copy of the completed application in a three ring binder with tabs separating each section of the documents submitted; and

(B) an electronically digitized copy, formatted in searchable pdf format or other format acceptable to the comptroller, certified by the applicant as containing the identical information, maps, and schedules as the original hard copy. The digitized copy shall include:

(i) schedules A1, A2, B[~~,~~] and C[~~, and D~~] in Microsoft Excel format; and

(ii) high-resolution maps and graphics (300 dpi or higher).

(3) The application shall be submitted in any manner acceptable to the comptroller.

(b) Optional application requests. An applicant may include in an application:

(1) a request that the school district waive the requirement of Tax Code, §313.021(2)(A)(iv)(b) or §313.051(b), whichever is applicable, to create new jobs. In order for a completed application to include a job waiver request, applicant shall submit:

(A) a specific request to waive the job requirement of the applicable Tax Code section included with the application that includes all the minimum requirements set forth in subsection (a) of this section; and

(B) separated and clearly marked within the application materials, documentation on which applicant intends to rely that demonstrates that the applicable jobs creation requirement of the applicable Tax Code section exceeds the industry standard for the number of employees reasonably necessary for the operation of the facility of applicant that is described in the application; or

(2) a request to begin the qualifying time period on a date that is after the date that the application is approved. In order for a completed application to include a qualifying time period deferral request, applicant shall submit:

(A) specific information identifying the requested qualifying time period within an application that includes all the minimum requirements set forth in subsection (a) of this section; and

(B) all relevant economic information that is related to the impact of the investment during the proposed qualifying time period, the proposed limitation period, and a period of time after the limitation period considered appropriate by the comptroller.

(c) Application changes. At the request of the school district or the comptroller, or with the prior approval of the school district and the comptroller, applicant may submit an application amendment or application supplement at any time after the submission of the initial application. In order to be considered as part of the application, the application amendment or supplement shall:

(1) be submitted in the same form or schedule and manner as the information was initially submitted or should have been initially submitted;

(2) include a date for the submission and a sequential number identifying the number of submissions made by applicant;

(3) have the signature of the authorized representative(s) by which applicant confirms and attests to the truth and accuracy of the information submitted in the application amendment or supplement, as applicable, to the best knowledge and belief of applicant and its representative(s); and

(4) be submitted before the 120th day after the application was accepted by the school district or within another time period as provided in writing by the comptroller.

(d) Authorized representative(s). The person(s) identified in the application as applicant's authorized representative(s) shall serve as the person(s) to whom all correspondence and notifications from the school district and comptroller shall be sent. Notwithstanding subsection (c) of this section, applicant may change its authorized representative(s) if applicant submits to the school district and the comptroller a letter that provides the name of the new authorized representative(s), street and mailing address, telephone number, and official title, if any.

(e) Information confidentiality. At the time that applicant submits its application, application amendment, or application supplement, applicant may request that all or parts of such document not be posted on the internet and not otherwise be publicly released. In order to make such request, applicant shall:

(1) submit a written request that:

(A) specifically lists each document or portion of document and each entry in any form prescribed by the comptroller that applicant contends is confidential; and

(B) identifies specific detailed reasons stating why applicant believes each item listed should be considered confidential and identifies any relevant legal authority in support of the request;

(2) segregate the documents which are subject to the request from the other documents submitted with the application, application amendment, or application supplement that are not subject to the request; and

(3) adequately designate the documents subject to the request as "confidential."

(f) Continued eligibility for value limitation. In order to obtain and continue to receive a limitation on appraised value pursuant to Tax Code, Chapter 313, an applicant shall:

(1) have a completed application approved by the governing body of the school district in compliance with §9.1054(f) of this

title (relating to School District Application Review and Agreement to Limit Appraised Value);

(2) at least 30 [~~20~~] days prior to the meeting at which the governing body of the school district is scheduled to consider the application, provide to the school district and the comptroller a Texas Economic Development Act Agreement, as specified in §9.1052(a)(6) of this title, with terms acceptable to the applicant;

(3) if the applicant includes a combined group or members of the combined group, have the agreement executed by the authorized representative of each member of the combined group that owns a direct interest in property subject to the proposed agreement by which such members are jointly and severally liable for the performance of the stipulations, provisions, terms, and conditions of the agreement;

(4) comply with all stipulations, provisions, terms, and conditions of the agreement for a limitation on appraised value executed with the school district, this subchapter, and Tax Code, Chapter 313;

(5) be and remain in good standing under the laws of this state and maintain legal status as an entity, as defined in this subchapter;

(6) owe no delinquent taxes to the state;

(7) maintain eligibility for limitation on appraised value pursuant to Tax Code, Chapter 313; and

(8) provide to the school district, the comptroller, and the appraisal district any change to information provided in the application, including but not limited to:

(A) changes of the authorized representative(s);

(B) changes to the location and contact information for the approved applicant including all members of the combined group participating in the limitation agreement;

(C) copies of any valid assignments of the agreement and contact information for authorized representative(s) of any assignees.

(9) Within 30 days after filing a completed application with the school district, the applicant must provide the comptroller with estimates of the gross tax benefit resulting from the requested limitation on appraised value for school district maintenance and operations ad valorem tax and future revenues from the qualified property.

§9.1055. Comptroller Application Review and Agreement to Limit Appraised Value.

(a) Documents submitted to comptroller. Within 15 days of receiving or creating a substantive document, the comptroller shall post such document on the comptroller's Internet website, provided however, the comptroller shall not post any documents determined to be confidential in accordance with Tax Code, §313.028 and this section.

(1) The comptroller shall deem information as confidential only if the document:

(A) at the time that it is received by the comptroller, the party requesting confidentiality:

(i) has segregated the information for which confidentiality is being requested from the other information submitted to the comptroller and clearly and conspicuously labeled it confidential information;

(ii) provides a written list specifically identifying each document, portion of document, or entry in the form prescribed by the comptroller that applicant contends is confidential; and

(iii) provides in writing specific reasons, including any relevant legal authority, stating why the material is believed to be confidential; and

(B) the comptroller determines that the information for which confidentiality is sought describes:

(i) specific processes or business activities to be conducted by the applicant; or

(ii) specific tangible personal property to be located on real property covered by the application.

(2) Substantive documents deemed confidential will not be posted on the internet and will otherwise be withheld from public release unless and until the governing body of the school district acts on the application or the comptroller is directed to release the documents by a ruling from the Attorney General.

(3) All applications and parts of applications which are not segregated and marked as confidential as required under this section shall be considered substantive documents and shall be posted on the internet.

(4) When the governing body of the school district agrees to consider the application, information in the custody of a school district or the comptroller in connection with the application, including information related to the economic impact of a project or the essential elements of eligibility pursuant to Tax Code, Chapter 313, such as the nature and amount of the projected investment, employment, wages, and benefits, shall not be considered confidential business information.

(5) Any documents submitted in an electronic format (including searchable pdfs) to the comptroller must comply with the accessibility standards and specifications described in the 1 TAC Chapters 206 and 213.

(b) Application review. Upon receiving an application and accompanying documentation, the comptroller shall review the application to determine if it is complete.

(1) If the comptroller determines that the application was not submitted in compliance with or does not have documents or information required pursuant to §9.1053(a) and if applicable (b), of this title (relating to Entity Requesting Agreement to Limit Appraised Value), or does not provide all necessary information the comptroller determines is necessary to make the determinations required by Tax Code, §313.026, and subsection (d) of this section, the comptroller shall provide written notice to the school district, with a copy to applicant, identifying the information that is required or necessary to complete the application.

(A) Supplemental application information, amended application information, and additional information requested by the comptroller shall be promptly forwarded to the comptroller within 20 days of the date of the request.

(B) On request of the school district or applicant, the comptroller may extend the deadline for providing additional information for a period of not more than 10 working days.

(C) Additional information concerning investment, property value, property description, employment, and the qualifying time period that is not provided to the comptroller in a timely manner may or may not be used by the comptroller in making the determinations required by Tax Code, §313.026 or this section.

(2) Until the comptroller receives such information as is required and necessary to be submitted by applicant, the comptroller may discontinue further action on the application. The comptroller shall discontinue consideration of an application that remains incomplete for

more than 180 days after the date the comptroller first received the application plus the number of days of any extension, notice of which has been provided to the comptroller pursuant to §9.1054(d) of this title (relating to School District Application Review and Agreement to Limit Appraised Value).

(3) When the comptroller determines that the documentation submitted in support of an application meets the requirements for an application pursuant to §9.1053(a) and if applicable (b), of this title, and the comptroller has received from the school district a request to provide an economic impact evaluation and all necessary documents for an appropriate evaluation of the requested appraised value limitation from the applicant and the school district, the comptroller shall provide:

(A) written notice to the school district and applicant that applicant has submitted a completed application; and

(B) a copy of the completed application to the Texas Education Agency.

(c) Action on completed application. After issuing a notice of a completed application, and after receipt of the information from the school district required by §9.1054(c)(2) of this title, the comptroller shall determine whether the property meets the requirements of Tax Code, §313.024 for eligibility for a limitation on appraised value pursuant to the provisions of Tax Code, Chapter 313, Subchapter B or C, whichever is applicable.

(1) If the comptroller determines that the property is not eligible for a limitation on appraised value, the comptroller shall:

(A) notify the governing body of the school district and applicant of the comptroller's determination by certified mail return receipt requested; and

(B) discontinue consideration of the application.

(2) If an applicant disagrees with a denial of eligibility for limitation of appraised value under Tax Code, §313.024, applicant may appeal the eligibility determination pursuant to the procedures set forth in Tax Code, Chapter 313 and in §9.1056 of this title (relating to Eligibility Determination Appeal). If an appeal under §9.1056 of this title, results in a determination that the project is eligible, the comptroller shall re-commence review of the application.

(d) Action on an eligible completed application. After determining that property identified in an application is eligible for limitation for appraised value and upon receiving a request from the school district to prepare an economic impact analysis, the comptroller shall:

(1) review any information available to the comptroller including:

(A) the application;

(B) public documents or statements by the applicant concerning business operations or site location issues or in which the applicant is a subject;

(C) statements by officials of the applicant, public documents or statements by governmental or industry officials concerning business operations or site location issues;

(D) existing investment and operations at or near the site or in the state that may impact the proposed project;

(E) announced real estate transactions, utility records, permit requests, industry publications or other sources that may provide information helpful in making the determination; and

(F) market information, raw materials or other production inputs, availability, existing facility locations, committed incentives, infrastructure issues, utility issues, location of buyers, nature of market, supply chains, other known sites under consideration, or any other information;

(2) prepare an economic impact analysis on the investment proposed by the application as required by Tax Code, §313.025 which may include:

(A) estimates of the maintenance and operations taxes for the 25 year period after the beginning of the limitation period;

(B) estimated tax revenue to the state generated by expenditures by the project, including wages, construction and operational expenditures, or other expenditures; and

(C) tax impacts, positive or negative, to the state based on indirect effects of the project, as estimated by the agency and using publicly available economic modeling systems;

(3) make the following determinations whether:

(A) it is reasonable to conclude from all the information available that the application is true and correct;

(B) the applicant is eligible for the limitation on the appraised value of the applicant's qualified property;

(C) the project proposed by the applicant is reasonably likely to generate tax revenue in an amount sufficient to offset the school district maintenance and operations ad valorem tax revenue lost as a result of the agreement before the 25th anniversary of the beginning of the limitation period; and

(D) the limitation on appraised value is a determining factor in the applicant's decision to invest capital and construct the project in this state;

(4) not later than 90 days after written notice that the school district and the comptroller have determined that applicant has submitted a completed application that is eligible for a limitation of appraised value under Tax Code, §313.025(b), provide to the school district:

(A) an economic impact evaluation as required pursuant to Tax Code, §313.025(b);

(B) the comptroller's conclusion for each made pursuant to paragraph (3) of this subsection; and

(C) one of the three following:

(i) a comptroller certificate for a limitation;

(ii) a comptroller certificate for a limitation, subject to:

(I) conditions identified in the comptroller certificate for a limitation being completed prior to execution of the agreement; or

(II) the agreement including additional provisions as identified in the comptroller certificate for a limitation; or

(iii) a written explanation of the comptroller's decision not to issue a certificate.

(e) Action after agreement review. No later than 20 [~~10~~] business days after receiving an agreement for limitation on appraised value acceptable to an applicant, the comptroller:

(1) shall review the agreement for:

(A) compliance with Tax Code, Chapter 313, and this subchapter; and

(B) consistency with the application submitted to the comptroller and as amended or supplemented;

(2) may amend or withdraw the comptroller certificate for a limitation if the comptroller determines that the agreement as submitted by the applicant does not comply with Tax Code, Chapter 313 or this subchapter or that the agreement contains provisions that are not consistent with or represents information significantly different from that presented in the application as submitted to the comptroller[~~, may amend or withdraw the comptroller certificate for a limitation~~]; and

(3) provide written notification to the school district of the actions taken under this subsection.

(f) Application changes after the notice of completed application. If the comptroller receives an amended application or a supplemental application by an applicant after the comptroller has prepared or sent written notice that applicant has submitted a completed application, the comptroller shall:

(1) reject the amended application, supplemental application, or application, in whole or in part, and discontinue consideration of any submission by applicant;

(2) with the written concurrence of the school district, consider the completed application, as amended or supplemented, before the 91st day from application review start date; or

(3) review the documents submitted by applicant and complete the requirements according to subsection (d) of this section.

(g) Applications and agreements for deferred qualifying time period. When an eligible completed application for an agreement for limitation on appraised value requests to begin the qualifying time period after the date that the application is approved, the comptroller:

(1) to the extent possible, shall prepare the economic impact analysis for an estimated impact of the qualified investment during the proposed qualifying time period;

(2) if an appraised value limitation agreement which defers the time at which the qualifying time period starts for more than one year is executed, may request at any time prior to the commencement of the qualifying time period additional information to revise the economic impact analysis for the qualified investment; and

(3) based on the revised economic impact analysis, may revise the comptroller certificate for a limitation that was previously submitted, or determine to not issue such a certificate; and

(4) if a revised comptroller certificate for a limitation is prepared, or a determination is made not to issue such a certificate, shall provide the revised comptroller certificate for a limitation, or a written explanation of the decision not to issue such certificate, and revised economic impact analysis to the school district and approved applicant.

§9.1058. Miscellaneous Provisions.

(a) A recipient of limited value under Tax Code, Chapter 313 shall notify immediately the comptroller, school district, and appraisal district in writing of any change in address or other contact information for the owner of the property subject to the limitation agreement for the purposes of Tax Code, §313.032. An assignee's or its reporting entity's Texas Taxpayer Identification Number shall be included in the notification.

(b) Changes in property values, population data, or strategic investment area designations that occur after an agreement is executed do not affect the job requirements or value limitation in the agreement.

(c) The comptroller may promulgate guidelines for the administration of Tax Code, Chapter 313.

(d) The comptroller shall provide information for determining the category in which a school district is classified pursuant to either Tax Code, §313.022 or §313.052 using the following procedure:

(1) No later than October 1 of each year, the comptroller shall publish on its website a list and map of the areas that qualify as a strategic investment area using the most recently completed full calendar year data available as of September 1 of that year.

(2) The school district and the comptroller shall apply the information from this list and property tax values published by the comptroller's Property Tax Assistance Division to determine school district categories applicable to applications for agreements for value limitation for the succeeding calendar year starting on January 1 of such year.

(e) Unless expressly stated otherwise, applications and the agreements executed for such application are governed by the statutes and applicable rules and guidelines in effect at the time the application is determined to be complete.

(f) To qualify as a series of agreements under Tax Code, §313.027(h), all agreements in the series must be submitted concurrently at application and all agreements in the series must be held by the same agreement holder on closely related projects in which the first year of limitation for each agreement begins in different years. Additionally, the application must clearly state the agreement will be part of a series of agreements under Tax Code, §313.027(h) and set forth the other agreements that are intended to be included as part of such series.

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 15, 2019.

TRD-201904258
Don Neal
Chief Counsel for Operations and Support
Comptroller of Public Accounts
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 35. PRIVATE SECURITY
SUBCHAPTER O. MILITARY SERVICE MEMBERS, MILITARY VETERANS, AND MILITARY SPOUSES - SPECIAL CONDITIONS

37 TAC §§35.181, 35.182, 35.184

(Editor's note: Due to an error by the Texas Register, this proposal was inadvertently omitted from the printed version of the October 25, 2019, issue. However, it was included in the online database as part of the October 25, 2019, issue. Due to the error, the proposal has been is reprinted in its entirety.)

The Texas Department of Public Safety (the department) proposes amendments to §§35.181, 35.182, and 35.184, concerning Military Service Members, Military Veterans, and Military Spouses - Special Conditions. These rule changes implement the 86th Legislative Session's Senate Bill 616, which amends Chapter 1702, Occupations Code (the Private Security Act).

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

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

Ms. Whittenton has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be the effective implementation of legislation, and greater clarity and consistency in the regulation of the private security industry.

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

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

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

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at *https://www.dps.texas.gov/rsd/contact/default.aspx.* Select "Private Security." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Occupations Code, §1702.061(a), which authorizes the Public Safety Commission to adopt rules to guide the department in its administration of Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(a), are affected by this proposal.

§35.181. Exemption from Penalty for Failure to Renew in Timely Manner.

An individual who holds a [~~registration, commission, or~~] license issued under the Act is exempt from any increased fee or other penalty for failing to renew the license in a timely manner if the individual establishes to the satisfaction of the department the individual failed to renew the license in a timely manner because the individual was serving as a military service member.

§35.182. Extension of License Renewal Deadlines for Military Service Members.

A military service member who holds a [~~registration, commission, or~~] license issued under the Act is entitled to two (2) years of additional time to complete:

(1) Any continuing education requirements; and

(2) Any other requirement related to the renewal of the military service member's license.

§35.184. Credit for Military Experience and Training.

(a) Verified military service, training, or education that relates to the [~~registration,~~] commission[~~,~~] or license for which a military service member or military veteran has applied will be credited toward the respective experience or training requirements.

(b) This section does not apply to an applicant who:

(1) Holds a restricted licensed issued by another jurisdiction; or

(2) Is ineligible for the [~~registration, commission, or~~] license under the Act or this chapter, based on a disqualifying criminal history.

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

Filed with the Office of the Secretary of State on October 14, 2019.

TRD-201903728
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 24, 2019
For further information, please call: (512) 424-5848

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PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 427. TRAINING FACILITY CERTIFICATION

The Texas Commission on Fire Protection (the commission) proposes amendments to 37, Texas Administrative Code Chapter 427, Training Facility Certification, Subchapter A, On-Site Certified Training Provider, §427.13, concerning Records; Subchapter B, Distance Training Provider, §427.203, concerning

Records; and Subchapter C, Training Programs For On-Site and Distance Training Provider, §427.305, concerning Procedures for Testing Conducted by On-Site and Distance Training Providers.

BACKGROUND AND PURPOSE

The purpose of the proposed amendment to rule §427.13(A)(3) and rule §427.203(A)(4) is to add language requiring that skills contained in the applicable curriculum skills manual, including instructional and testing skills, be taught and documented for each person who applies to take a written certification exam. The proposed amendment to §427.305 clarifies when an applicant is eligible to take a written certification exam.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Paul Maldonado, Interim Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments as a result of enforcing or administering these amendments as proposed under Texas Government Code §2001.024(a)(4) because enforcing or administering the rule does not have foreseeable implications relating to cost or revenues for the state or local governments.

PUBLIC BENEFIT AND COST

Mr. Maldonado has also determined under Texas Government Code §2002.024(a)(5) that for each year of the first five years the proposed amendments are in effect the public benefit will be that all individuals will have documentation of completing and passing all requirements before taking a written certification examination.

LOCAL ECONOMY IMPACT STATEMENT

There is no anticipated effect on the local economy for the first five years that the proposed new section is in effect because there are no implications relating to cost or revenue for local governments; therefore, no local employment impact statement is required under Texas Government Code §2001.022 and §2001.024(a)(6).

ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES:

Mr. Maldonado has determined there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these amendments as proposed. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Texas Government Code §2006.002, is not required.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined under Texas Government Code §2006.0221 that during the first five years the amended rules are in effect:

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

(2) the rules will not require the creation or elimination of employee positions;

(3) the rules will not require an increase or decrease in future legislative appropriation;

(4) the rules will not result in an increase or decrease in fees paid to the agency;

(5) the rules will not create a new regulation;

(6) the rules will not expand or repeal an existing regulation;

(7) the rules will not change the number of individuals subject to the rule; and

(8) the rules are not anticipated to have an adverse impact on the state's economy.

TAKINGS IMPACT ASSESSMENT

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

COSTS TO REGULATED PERSONS

The proposed sections do 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.

ENVIRONMENTAL IMPACT STATEMENT

The commission has determined that the proposed amendments do not require an environmental impact analysis because the amendments are not major environmental rules under Texas Government Code §2001.0225.

REQUESTS FOR PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Paul Maldonado, Interim Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to deborah.cowan@tcfp.texas.gov. Please add "Rule Comments" to the subject line of comments sent by email.

SUBCHAPTER A. ON-SITE CERTIFIED TRAINING PROVIDER

37 TAC §427.13

STATUTORY AUTHORITY

The amended rules are proposed under Texas Government Code §419.032 which authorizes the commission to adopt rules establishing the qualifications of fire protection personnel. The amended rules are also proposed under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission.

CROSS REFERENCE TO STATUTE

The proposed amendments implement Texas Government Code §419.008 and §419.032. No other statutes, articles, or codes are affected by these amendments.

§427.13. Records.

(a) Training records shall be maintained by the onsite training facility that reflect:

(1) who was trained, subject, instructor, and date of instruction. (Note: Individual records are required rather than class records); and

(2) individual trainee test scores to include performance testing.

(3) All skills listed in the applicable curriculum skills manual shall be practiced and documented on the provided skill sheets in-

cluding any shown as instructional skills in addition to the listed testing skills.

(b) All training records must be maintained by the onsite training facility for a minimum of three years or in accordance with the requirement of the Texas State Library and Archives Commission, State and Local Records Management Division, whichever is greater.

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 12, 2019.

TRD-201904204
Paul Maldonado
Interim Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 936-3812

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SUBCHAPTER B. DISTANCE TRAINING PROVIDER

37 TAC §427.203

The amended rules are proposed under Texas Government Code §419.032 which authorizes the commission to adopt rules establishing the qualifications of fire protection personnel. The amended rules are also proposed under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission.

CROSS REFERENCE TO STATUTE

The proposed amendments implement Texas Government Code §419.008 and §419.032. No other statutes, articles, or codes are affected by these amendments.

§427.203. Records.

(a) Training records shall be maintained by the distance training provider that reflect:

(1) Who was trained, subject, instructor, and date of instruction. (Note: Individual records are required rather than class records);

(2) Individual trainee test scores to include performance testing; and

(3) Evidence to substantiate the test scores received by each trainee to include performance testing. Such records will include materials (completed tests and/or answer sheets, other documents, video or audio recording, etc.), and will provide identification of the examinee, identification of the evaluating field examiner, and the observer as defined in Chapter 439 of this title (relating to Examinations for Certification).

(4) All skills listed in the applicable curriculum skills manual shall be practiced and documented on the provided skill sheets including any shown as instructional skills in addition to the listed testing skills.

(b) All distance training provider records must be maintained by the distance training provider for commission review for a minimum of three years or in accordance with the requirement of the Texas State Library and Archives Commission, State and Local Records Management Division, whichever is greater.

(c) A master copy of tests will be maintained for review by commission representatives. The certified distance training provider shall maintain copies of all tests for a minimum of three years.

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

Filed with the Office of the Secretary of State on November 12, 2019.

TRD-201904205
Paul Maldonado
Interim Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 936-3812

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SUBCHAPTER C. TRAINING PROGRAMS FOR ON-SITE AND DISTANCE TRAINING PROVIDERS

37 TAC §427.305

The amended rules are proposed under Texas Government Code §419.032 which authorizes the commission to adopt rules establishing the qualifications of fire protection personnel. The amended rules are also proposed under Texas Government Code §419.008, which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission.

CROSS REFERENCE TO STATUTE

The proposed amendments implement Texas Government Code §419.008 and §419.032. No other statutes, articles, or codes are affected by these amendments.

§427.305. Procedures for Testing Conducted by On-Site and Distance Training Providers.

(a) The requirements and provisions in this section apply to procedures for periodic and final testing conducted by training providers. For procedures regarding examinations for certification that occur after a training program is completed, see Chapter 439 of this title (relating to Examinations for Certification).

(b) Periodic and comprehensive final tests shall be given by the training provider in addition to the commission examination required in Chapter 439 of this title.

(c) Periodic tests shall be administered at the ratio of one test per 50 hours of recommended training, or portion thereof. An average score of 70% must be achieved on all required periodic tests.

(d) In addition to periodic tests, a comprehensive final test must be administered. The final test must be conducted in a proctored setting. For purposes of this section, a proctor can be an approved TCFP Field Examiner, or a member or testing center of an educational institution. A passing score of 70% must be achieved. The final test must be successfully completed by the examinee before they will be allowed to take any written certification exam.

(e) If a course is taught in phases, a comprehensive exam for each phase shall be administered upon completion of each phase and a passing score of 70% must be achieved.

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 12, 2019.

TRD-201904206
Paul Maldonado
Interim Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 936-3812

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 15. FINANCING AND CONSTRUCTION OF TRANSPORTATION PROJECTS

SUBCHAPTER O. COUNTY TRANSPORTATION INFRASTRUCTURE FUND GRANT PROGRAM

43 TAC §§15.185, 15.188, 15.191

The Texas Department of Transportation (department) proposes amendments to §15.185, Allocation to Counties, §15.188, Application Procedure, and §15.191, Agreement, all concerning procedures related to the County Transportation Infrastructure Fund Grant Program.

EXPLANATION OF PROPOSED AMENDMENTS

H.B. No. 4280, 86th Regular Session, 2019, amended Subchapter C, Chapter 256, Transportation Code, by modifying the statutory allocation formula for the County Transportation Infrastructure Fund Grant Program (program) and adding certain program requirements for county grant recipients. The department's procedures for administering the program, located in Title 43, Part 1, Chapter 15, Subchapter O of the Texas Administrative Code, must be amended to reflect the changes to the program made by H.B. 4280.

Amendments to §15.185, Allocation to Counties, provide that the department will make allocations from the transportation infrastructure fund in accordance with Transportation Code, §256.103(b). The prior rules merely restated the statutory requirements verbatim. An express reference to the applicable statute provides the necessary allocation formula without conflict if the legislature modifies that statute in the future.

Amendment to §15.188, Application Procedure, deletes the requirement that an application by a county include a map delineating project locations and termini. This is to simplify the preparation of an application by no longer requiring information that can be determined through other information included in an application.

Amendments to §15.191, Agreement, add, as a provision in the award agreement, that the county will comply with the requirements of Transportation Code, §256.107, relating to bidding requirements, and §256.108, relating to the period during which grant funds must be spent. These references alert counties to new statutory requirements enacted by the legislature.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Brian Barth, Director, Project Planning and Development, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules and, therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Mr. Barth has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rules are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be consistency in the regulatory and statutory procedures and requirements for the County Transportation Infrastructure Fund Grant Program.

COSTS ON REGULATED PERSONS

Mr. Barth has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and, therefore, Government Code, §2001.0045, does not apply to this rulemaking.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government Code, §2006.001, and, therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

GOVERNMENT GROWTH IMPACT STATEMENT

Mr. Barth has considered the requirements of Government Code, §2001.0221 and has determined that for the first five years in which the proposed rules are in effect:

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

(2) implementation of the proposed rule will not affect the number of the department's employee positions;

(3) implementation of the proposed rule will not increase or decrease future legislative appropriations to the department;

(4) the proposed rule will not affect fees paid to the department;

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

(6) the proposed rule will not expand, limit, or repeal existing regulation;

(7) the proposed rule will not change the number of individuals subject to the rule's applicability; and

(8) the proposed rule will not affect the state's economy.

TAKINGS IMPACT ASSESSMENT

Mr. Barth has determined that a written takings impact assessment in not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§15.185, 15.188 and 15.191 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "CTIF 2019 Program." The deadline for receipt of comments is 5:00 p.m. on December 30, 2019. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §256.103, which authorizes the commission to adopt rules to administer the County Transportation Infrastructure Fund Grant Program.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, Chapter 256.

§15.185. Allocation to Counties.

The department will allocate [~~(a) Allocation formula. Of~~] the total amount awarded from the fund during a state fiscal year in accordance with Transportation Code, §256.103(b).[~~:~~]

[~~(1) 20 percent will be allocated under subsection (b) of this section according to the weight tolerance permits ratio;~~]

[~~(2) 20 percent will be allocated under subsection (c) of this section according to the oil and gas production taxes ratio;~~]

[~~(3) 50 percent will be allocated under subsection (d) of this section according to the well completion ratio; and~~]

[~~(4) 10 percent will be allocated under subsection (e) of this section according to the volume of oil and gas waste injected ratio.~~]

[~~(b) Weight tolerance permits ratio. The amount allocated to a county under subsection (a)(1) of this section in a fiscal year is determined by:~~]

[~~(1) dividing the weight tolerance permits issued in the preceding state fiscal year for that county, as determined by the Texas Department of Motor Vehicles, by the weight tolerance permits issued in the preceding state fiscal year for all counties that will receive money under subsection (a)(1) of this section in that year; and~~]

[~~(2) multiplying the quotient determined under paragraph (1) of this subsection by the total amount allocated under subsection (a)(1) of this section.~~]

[~~(c) Oil and gas production taxes ratio. The amount allocated to a county under subsection (a)(2) of this section in a state fiscal year is determined by:~~]

[~~(1) dividing the amount of oil and gas production taxes collected by the Texas Comptroller of Public Accounts (comptroller) in that county in the preceding state fiscal year by the total amount of oil and gas production taxes collected by the comptroller in the preceding state fiscal year in all counties that will receive money under subsection (a)(2) of this section in that year; and~~]

[~~(2) multiplying the quotient determined under paragraph (1) of this subsection by the total amount allocated under subsection (a)(2) of this section.~~]

[~~(d) Well completion ratio. The amount allocated to a county under subsection (a)(3) of this section in a state fiscal year is determined by:~~]

[~~(1) dividing the number of well completions in that county in the preceding state fiscal year, as determined by the Railroad Commission of Texas, by the total number of well completions in the preceding state fiscal year in all counties that will receive money under subsection (a)(3) of this section in that year; and~~]

[~~(2) multiplying the quotient determined under paragraph (1) of this subsection by the total amount allocated under subsection (a)(3) of this section.~~]

[~~(e) Oil and gas waste injected ratio. The amount allocated to a county under subsection (a)(4) of this section in a state fiscal year is determined by:~~]

[~~(1) dividing the volume of oil and gas waste injected in the preceding state fiscal year in that county, as determined by the Railroad Commission of Texas, by the total volume of oil and gas waste injected in the preceding state fiscal year in all counties that will receive money under subsection (a)(4) of this section in that year; and~~]

[~~(2) multiplying the quotient determined under paragraph (1) of this subsection by the total amount allocated under subsection (a)(4) of this section.~~]

§15.188. Application Procedure.

(a) Application form. An eligible county may submit to the department an application for a grant from the fund.

(1) The application must be submitted electronically using the department's automated system designated for the grant program.

(2) A county is responsible for obtaining its use of a computer system and access to the Internet.

(3) Upon request, a county may use the department's computer system at any district office location.

(4) For an application to be valid, the county must submit the application during a period designated under §15.187 of this subchapter (relating to Acceptance of Applications) and satisfy the requirements of this section.

(b) Plan requirements. An application must contain a plan that:

(1) provides a prioritized list of transportation infrastructure projects to be funded by the grant;

(2) describes the scope of each listed transportation infrastructure project including:

(A) a clear and concise description of the proposed work;

(B) [~~a map delineating project location and termini;~~]

[~~(C) an implementation plan, including a schedule of proposed activities;~~]

(C) [~~(D)~~] an estimate of project costs;

(D) [~~(E)~~] the project funding sources; and

(E) [~~(F)~~] other information required by the department;

(3) specifies the total amount of grant funds being requested in the application;

(4) identifies matching funds required under §15.183 of this subchapter (relating to Matching Funds); and

(5) identifies other potential sources of funding to maximize resources available for the listed transportation infrastructure projects.

(c) Additional submissions. In addition to the application form, the county must also submit a road condition report described by Transportation Code, §251.018 made by the county for the preceding year.

(d) Information for previous grant. If the county has received a grant under this subchapter, it must also submit:

(1) a certification that all previous grants have been or are being spent in accordance with the applicable plan submitted under subsection (b) of this section; and

(2) an accounting of expenditures under the previous grant, including any amounts spent on administrative costs.

§15.191. Agreement.

(a) Requirement; content. Before receiving a grant from the fund, a county must enter into an agreement with the department under this section. The agreement must include, in addition to other provisions, a commitment by the county to:

(1) place the transportation infrastructure project on the county road system, if it is a county road not already on the system;

(2) expend grant money received only on allowable costs as provided in §15.192 of this subchapter (relating to Payment of Money);

(3) comply with all applicable federal, state, and local environmental laws and regulations and permitting requirements;

(4) maintain the road after completion of the proposed work, if it is a county road; [~~and~~]

(5) contribute to the department for each transportation infrastructure project located on the state highway system, from the amount awarded to the county from the fund and the county's matching funds, if applicable, an amount equal to the allowable costs, as defined by §15.192 of this subchapter, incurred by the department for that project; and~~.~~

(6) satisfy the requirements applicable to the county under Transportation Code, §256.107 and §256.108.

(b) Amendment to agreement. Any amendment to the agreement described in subsection (a) of this section must be in writing and executed jointly by the executive director and the county. A county may add a transportation infrastructure project to the prioritized list described in its application submitted under §15.188 of this subchapter (relating to Application Procedure), or a project on the list may be moved forward or backward in priority if the county submits to the department the requested revision and, for any added project, contains the information required by §15.188(b)(1) and (2) of this subchapter.

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 14, 2019.

TRD-201904235
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 463-8630

CHAPTER 21. RIGHT OF WAY
SUBCHAPTER B. UTILITY ADJUSTMENT, RELOCATION, OR REMOVAL

43 TAC §21.25

The Texas Department of Transportation (department) proposes new §21.25 concerning state participation in the relocation of certain publicly-owned utility facilities.

EXPLANATION OF PROPOSED NEW SECTION

S.B. No. 1512, 86th Legislature, Regular Session, 2019, added subsections (a-4) and (e) to Transportation Code, Section 203.092. Subsection (a-4) provides that a utility will make a relocation of a utility facility required by an improvement to the state highway system at the expense of the state if the Texas Transportation Commission (commission) determines that: (1) the utility is a political subdivision or is owned or operated by a political subdivision; (2) a financial condition would prevent the utility from being able to pay the cost in full or in part or, if paid at that time, the payment would adversely affect the utility's ability to operate or provide essential services to its customers; and (3) the utility would not be able to receive a state infrastructure bank loan to finance the cost of the relocation and is otherwise unable to finance that cost or is a political subdivision, or is owned or operated by a political subdivision, that has a population of less than 5,000 and that is located in a county that has been included in at least five presidential disaster declarations in the six-year period preceding the proposed date of the relocation. Subsection (e) limits the total amount paid by the department for those relocations to not more than $10 million in any fiscal year.

New §21.25, State Participation in the Relocation of Certain Publicly-Owned Utility Facilities, prescribes the procedures to be taken by the utility to apply for state participation in the relocation of utility facilities and by the department and commission in determining whether all or part of the expense of the relocation of the facility will be paid for by the state.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that for each of the first five years in which the proposed rules are in effect, there will be fiscal implications for state and local governments as a result of enforcing or administering the statutory changes made by S.B. 1512, rather than as a result of an administrative decision by the commission. The cost to the state is limited by statute to $10 million a year. The affected local governments will receive benefits equal to the cost to the state.

LOCAL EMPLOYMENT IMPACT STATEMENT

Kyle Madsen, Right of Way Division Director, has determined that there will be no significant impact on local economies or

overall employment as a result of enforcing or administering the proposed rules and, therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Kyle Madsen, Right of Way Division Director, has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rules are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be providing financial relief to the local political subdivisions that might not otherwise be able to fund the relocation of their facilities. Furthermore, implementation of this program will reduce delays to the transportation projects that are often caused by utility relocations.

COSTS ON REGULATED PERSONS

Kyle Madsen, Right of Way Division Director, has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency other than the department, special district, or local government, required to comply with the proposed rules and, therefore, Government Code, §2001.0045, does not apply to this rulemaking.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government Code, §2006.001, and, therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

GOVERNMENT GROWTH IMPACT STATEMENT

Kyle Madsen, Right of Way Division Director, has considered the requirements of Government Code, §2001.0221 and anticipates that during the first five years that the rule would be in effect:

(1) it would implement a government program that is required by statute;

(2) its implementation would not require the creation of new employee positions or the elimination of existing employee positions;

(3) its implementation would not require an increase or decrease in future legislative appropriations to the agency; however, its implementation would require reprioritization of legislative appropriations within the agency;

(4) it would not require an increase or decrease in fees paid to the agency;

(5) it would create new regulations;

(6) it would not expand, limit, or repeal an existing regulation;

(7) it would not increase or decrease the number of individuals subject to its applicability; and

(8) it would positively affect this state's economy by helping move utilities that would otherwise cause delays to transportation projects.

TAKINGS IMPACT ASSESSMENT

Kyle Madsen, Right of Way Division Director, has determined that a written takings impact assessment is not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on new §21.25 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "New §21.25 State Participation." The deadline for receipt of comments is 5:00 p.m. on December 30, 2019. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, Section 203.095, which requires the commission to adopt rules to implement statutes relating to the relocation of utility facilities.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, Section 203.092(a-4) and (e).

§21.25. State Participation in the Relocation of Certain Publicly-Owned Utility Facilities.

(a) A utility that is a political subdivision or owned or operated by a political subdivision may request the relocation of its utility facilities required by a state highway improvement project be at the expense of the state under Transportation Code, Section 203.092(a-4).

(b) To request relocation under this section, the utility must make a written request to the department and submit:

(1) documentation that the utility, because of an existing financial condition, would be unable to pay the cost of relocation in full or in part at the time of relocation or that the utility's ability to operate or provide essential services to its customers would be adversely affected by such a payment made at that time; and

(2) documentation:

(A) on the utility's ability to obtain a state infrastructure bank loan under Chapter 6 of this title (relating to State Infrastructure Bank) and its ability to obtain other financing for the relocation, including relevant financial information described in §6.23 of this title (relating to Application Procedure); or

(B) that the utility is a political subdivision, or owned or operated by a political subdivision, that has a population of less than 5,000 and is located within a county that has been included in at least five disaster declarations made by the president of the United States of America in the six-year period preceding the proposed date of the relocation; and

(3) any other information or documentation requested by the department.

(c) As soon as practicable after review and analysis of the documentation and information provided under subsection (b) of this section, the department will submit findings and recommendations to the commission for consideration.

(d) The commission will find that all or a part of the utility facility relocation is an expense of the state if:

(1) payment for all or a part of the relocation of the utility facility would not cause the department to exceed $10 million for the

relocation of utilities authorized under Section 203.092(a-4) in any fiscal year; and

(2) the commission determines that:

(A) the utility is a political subdivision or is owned or operated by a political subdivision;

(B) a financial condition exists, as described in subsection (b)(1) of this section; and

(C) the utility:

(i) would not be able to receive a state infrastructure bank loan under Chapter 6 of this title to finance the cost of the relocation and is otherwise unable to finance that cost; or

(ii) meets the description provided in subsection (b)(2)(B) of this section.

(e) If the commission finds that all or a part of the utility facility relocation is an expense of the state, the department and the utility shall include the terms of the department's payment of relocation expenses in an agreement concerning the relocation.

(f) Because of the fiscal constraint provided under Transportation Code, Section 203.092(e), the department:

(1) may prioritize the utility requests based on the needs of the department, including the construction schedules of the projects requiring relocation of utility facilities;

(2) may delay until the next fiscal year the payment of all or part of a claim made by a utility if at the time the claim is received by the department, the payment is prohibited by Section 203.092(e); and

(3) will not pay a claim for payment that is received by the department later than one year after the date that the relocation of the utility facility is completed.

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 14, 2019.

TRD-201904236
Becky Blewett
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 29, 2019
For further information, please call: (512) 463-8630