PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 12. SWORN COMPLAINTS

SUBCHAPTER D. PRELIMINARY REVIEW HEARING

1 TAC §12.86

The Texas Ethics Commission (the Commission) proposes new Texas Ethics Commission Rules §12.86, regarding Motions for Continuance, of Chapter 12, Subchapter C, of Title 1, Part 2, of the Texas Administrative Code.

On occasion, a respondent to a sworn complaint requests a postponement of a preliminary review hearing, in some cases within a week or less before the hearing. In fairness to all parties involved, a clear rule regarding such requests will provide direction as to when such requests must be made and how they will be addressed. The new draft rule uses similar criteria as the Commission’s rule §12.155 for formal hearings, except that a motion must be filed at least 21 days before the hearing (instead of 5 days before) and a response must be filed at least 7 business days before the hearing (instead of within three days after). A motion must also include the specific reasons for the motion and the dates of any previous motions for continuance filed. The presiding officer of the Commission would rule on the motion. If a motion is received late, there must be good cause with supporting evidence for the motion to be considered.

Ian M. Steusloff, General Counsel, has determined that for the first five-year period the proposed new rule is in effect, there will be no additional costs or loss or increase in revenue to the state or local governments expected as a result of enforcing or administering the rule.

The General Counsel has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits will be clarity in the procedures for motions for continuances of preliminary review hearings. There will not be an effect on small businesses, microbusinesses or rural communities. There is no anticipated economic cost to persons who are required to comply with the proposed new rule.

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

The rule creates a new procedural regulation by providing clear guidelines for a person requesting a continuance of a preliminary review hearing.

The Commission invites comments on the proposed new rule from any member of the public. A written statement should be emailed to public_comment@ethics.state.tx.us, or mailed or delivered to Anne Temple Peters, Executive Director, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070. A person who wants to offer spoken comments to the Commission concerning the proposed new rule may do so at any Commission meeting during the agenda item relating to the proposed new rule. Information concerning the date, time, and location of Commission meetings is available by telephoning (512) 463-6800 or on the Commission’s website at www.ethics.state.tx.us.

The new rule is proposed under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Chapter 571 of the Government Code, and Texas Government Code Section 571.1244, which requires the Commission to adopt procedures for the conduct of preliminary review hearings.

The proposed new rule affects Subchapter E of Chapter 571 of the Government Code.

§12.86. Motions for Continuance.

(a) Contents of a motion for continuance. A request to postpone a preliminary review hearing must be in writing and include the specific reasons and supporting evidence for the continuance and the dates of any previous motions for continuance.

(b) Date of filing. Motions for continuance must be received by the Commission no later than 21 days before the date of the proceeding or must provide good cause with supporting evidence for presenting the motion after that time. If the presiding officer finds good cause has been demonstrated, the presiding officer may consider a motion that is not timely filed.

(c) Responses to motions for continuance. Responses to motions for continuance must be in writing and include the date the complaint was filed and the number of previous requests to postpone filed in the case. Unless otherwise ordered or allowed by the presiding officer, responses to motions for continuance must be made no later than seven business days after receipt of the motion.

(d) Rulings on motions for continuance. A motion for continuance is not granted until it has been ruled on by the presiding officer, even if the motion is uncontested or agreed. A case is subject to default under §12.23 of this chapter for a party’s failure to appear at a scheduled hearing in which a motion for continuance has not been ruled on by the presiding officer.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency’s legal authority to adopt.
SUBCHAPTER E. FORMAL HEARING
DIVISION 7. DISPOSITION OF FORMAL HEARING

1 TAC §12.174

The Texas Ethics Commission (the Commission) proposes new Texas Ethics Commission Rules §12.174, regarding Summary Disposition, of Chapter 12, Subchapter E, Division 7, of Title 1, Part 2, of the Texas Administrative Code.

The proposed new rule states that the Commission shall grant summary disposition on an allegation if a motion is made and the evidence shows that there is no genuine issue as to any material fact and the movant is entitled to a decision in its favor as a matter of law on the issues set out in the motion. The motion must be filed at least 45 days before a hearing on the merits and a response is due within 15 days. The proposed new rule is similar to 1 TAC §155.505 of the State Office of Administrative Hearings ("SOAH").

Ian M. Steusloff, General Counsel, has determined that for the first five-year period the proposed new rule is in effect, there will be no additional costs or loss or increase in revenue to the state or local governments expected as a result of enforcing or administering the rule.

The General Counsel has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits will be clarity in the procedures for obtaining summary disposition in a formal hearing and a potential reduction in costs to the Commission or to a respondent when a matter is resolved by summary disposition instead of at a formal hearing. There will not be an effect on small businesses, microbusinesses or rural communities. There is no anticipated economic cost to persons who are required to comply with the proposed new rule.

The General Counsel has determined that during the first five years that the proposed new rule is in effect, it will not: create or eliminate a government program; require the creation of new employee positions or the elimination of existing employee positions; require an increase in future legislative appropriations to the agency; require an increase or decrease in fees paid to the agency; expand, limit, or repeal an existing regulation; increase or decrease the number of individuals subject to the rules’ applicability; or positively or adversely affect this state’s economy. The rule creates a new procedural regulation that would authorize any party to a complaint to file a motion for summary disposition.

The Commission invites comments on the proposed new rule from any member of the public. A written statement should be emailed to public_comment@ethics.state.tx.us, or mailed or delivered to Anne Temple Peters, Executive Director, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78771-2070. A person who wants to offer spoken comments to the Commission concerning the proposed new rule may do so at any Commission meeting during the agenda item relating to the proposed new rule. Information concerning the date, time, and location of Commission meetings is available by telephoning (512) 463-5800 or on the Commission’s website at www.ethics.state.tx.us.

The new rule is proposed under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Chapter 571 of the Government Code and Texas Government Code Section 571.131(c), which requires the Commission to adopt rules governing hearings.

The proposed new rule affects Subchapter E of Chapter 571 of the Government Code.


(a) Granting of summary disposition. Summary disposition shall be granted on all or part of a complaint’s allegations if the allegations, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law on all or some of the issues expressly set out in the motion. Summary disposition is not permitted based on the ground that there is no evidence of one or more essential elements of a claim or defense on which the opposing party would have the burden of proof at the formal hearing.

(b) Deadlines. Unless otherwise ordered by the presiding officer:

(1) A party may file a motion for summary disposition at any time after the commission orders a formal hearing, but the motion must be filed at least 45 days before a scheduled hearing on the merits.

(2) The response and opposing summary disposition evidence shall be filed no later than 15 days after the filing of the motion.

(c) Contents of Motion. A motion for summary disposition shall include the contents listed below. A motion may be denied for failure to comply with these requirements.

(1) The motion shall state the specific issues upon which summary disposition is sought and the specific grounds justifying summary disposition.

(2) The motion shall also separately state all material facts upon which the motion is based. Each material fact stated shall be followed by a clear and specific reference to the supporting summary disposition evidence.

(3) The first page of the motion shall contain the following statement in at least 12-point, bold-face type: "Notice to parties: This motion requests the commission to decide some or all of the issues in this case without holding an evidentiary hearing on the merits. You have 15 days after the filing of the motion to file a response. If you do not file a response, this case may be decided against you without an evidentiary hearing on the merits.

(d) Responses to motions.

(1) A party may file a response and summary disposition evidence to oppose a motion for summary disposition.

(2) The response shall include all arguments against the motion for summary disposition, any objections to the form of the motion, and any objections to the summary disposition evidence offered in support of the motion.

(e) Summary disposition evidence.
(1) Summary disposition evidence may include deposition transcripts; interrogatory answers and other discovery responses; pleadings; admissions; affidavits; materials obtained by discovery; matters officially noticed; stipulations; authenticated or certified public, business, or medical records; and other admissible evidence. No oral testimony shall be received at a hearing on a motion for summary disposition.

(2) Summary disposition may be based on uncontested written testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the presiding officer must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

(3) All summary disposition evidence offered in support of or in opposition to a motion for summary disposition shall be filed with the motion or response. Copies of relevant portions of materials obtained by discovery that are relied upon to support or oppose a motion for summary disposition shall be included in the summary disposition evidence.

(f) Proceedings on motions.

(1) The presiding officer may order a hearing on a motion for summary disposition and the commission may rule on the motion without a hearing.

(2) The affirmative vote of six commissioners is necessary to grant summary disposition finding a violation by a preponderance of the evidence.

(3) If summary disposition is granted on all contested issues in a case, the record shall close on the date ordered by the presiding officer or on the later of the filing of the last summary disposition arguments or evidence, the date the summary disposition response was due, or the date a hearing was held on the motion. The commission shall issue a final decision and written report, including a statement of reasons, findings of fact, and conclusions of law in support of the summary disposition rendered.

(4) If summary disposition is granted on some but not all of the contested issues in a case, the commission shall not take evidence or hear further argument upon the issues for which summary disposition has been granted. The commission shall issue an order:

(A) specifying the facts about which there is no genuine issue;

(B) specifying the issues for which summary disposition has been granted; and

(C) directing further proceedings as necessary. If an evidentiary hearing is held on the remaining issues, the facts and issues resolved by summary disposition shall be deemed established, and the hearing shall be conducted accordingly. After the evidentiary hearing is concluded, the commission shall include in the final decision a statement of reasons, findings of fact, and conclusions of law in support of the partial summary disposition rendered.

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 December 12, 2019.
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Ian Steusloff
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 463-5800

CHAPTER 18. GENERAL RULES CONCERNING REPORTS

1 TAC §§18.9 - 18.11

The Texas Ethics Commission (the Commission) proposes an amendment to Texas Ethics Commission Rules §18.9, regarding Corrected/Amended Reports, and new Texas Ethics Commission Rules §18.10, regarding Guidelines for Substantial Compliance for a Corrected/Amended 8-day Pre-election Report, and §18.11, regarding Guidelines for Waiver or Reduction of a Late Fine for a Corrected/Amended 8-day Pre-election Report, of Chapter 18, of Title 1, Part 2, of the Texas Administrative Code.

The proposed rules authorize the Executive Director to apply the guidelines approved by the Commission in 2014 to resolve waiver requests administratively, but appeals would be presented to the Commission on a case-by-case basis. These rules only address corrections/amendments to eight-day pre-election reports.

Ian M. Steusloff, General Counsel, has determined that for the first five-year period the proposed new and amended rules are in effect, there will be no additional costs or loss or increase in revenue to the state or local governments expected as a result of enforcing or administering the rules.

The General Counsel has also determined that for each year of the first five years the proposed amended and new rules are in effect, the public benefits will be clarity in the rules authorizing the executive director to resolve filers' requests to waiver civil penalties for correcting 8-day pre-election reports. There will not be an effect on small businesses, microbusinesses or rural communities. There is no anticipated economic cost to persons who are required to comply with the proposed amended and new rules.

The General Counsel has determined that during the first five years that the proposed amended and new rules are in effect, they will not: create or eliminate a government program; require the creation of new employee positions or the elimination of existing employee positions; require an increase in future legislative appropriations to the agency; require an increase or decrease in fees paid to the agency; expand, limit, or repeal an existing regulation; increase or decrease the number of individuals subject to the rules' applicability; or positively or adversely affect this state's economy. The rules create new regulations in the form of procedures for determining when an 8-day pre-election report substantially complies with the applicable law and by which the Executive Director will waive or reduce fines for such reports. In every case, a filer has an opportunity to appeal the outcome of a fine waiver request under these proposed rules to the board of the Commission.

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

The amended and new rules are proposed under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Chapter 571 of the Government Code and Title 15 of the Election Code.

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

§18.9. Corrected/Amended Reports.

(a) A filer may correct/amend a report filed with the commission or a local filing authority at any time.

(b) A corrected/amended report must clearly identify how the corrected/amended report is different from the report being corrected/amended.

(c) A filer who files a corrected/amended report must submit an affidavit identifying the information that was corrected/amended.

(d) A corrected/amended report filed with the commission after the original report is due is subject to a late fine as provided by §18.13 of this title (relating to Fine for a Late Report). [is not subject to a late fine if filed in accordance with §§571.0771 or §305.033(f) of the Government Code or §254.0405 of the Election Code, as applicable.]

(e) Subsection (d) of this section does not apply to:

(1) a lobbying registration or report, other than an activities report, that is corrected/amended not later than the 14th business day after the date the filer became aware of the errors or omissions in the original registration or report;

(2) a semiannual report that is corrected/amended before the eighth day after the original report was filed;

(3) a semiannual report that is corrected/amended on or after the eighth day after the original report was filed if:

(A) the correction/amendment is made before a sworn complaint is filed with regard to the subject of the correction/amendment; and

(B) the original report was made in good faith and without an intent to mislead or misrepresent the information contained in the report;

(4) an 8-day pre-election report that is corrected/amended in accordance with §18.10 of this title (relating to Guidelines for Substantial Compliance for a Corrected/Amended 8-day Pre-election Report);

(5) a report other than an 8-day pre-election report that is corrected/amended not later than the 14th business day after the date the filer learns the report as originally filed is inaccurate or incomplete if:

(A) the errors or omissions were made in good faith; and

(B) the filer files an affidavit stating that the errors or omissions in the original report were made in good faith.

(f) In this section, "8-day pre-election report" has the same meaning assigned by §18.10(c) of this title (relating to Guidelines for Substantial Compliance for a Corrected/Amended 8-day Pre-election Report).

(g) [ (e)] Except as provided by subsections (b) and (c) of this section, this section does not apply to a civil penalty assessed through the [corrected/amended report filed under §571.069, Government Code, or a corrected/amended report filed in response to a] sworn complaint or facial compliance review process.

§18.10. Guidelines for Substantial Compliance for a Corrected/Amended 8-day Pre-election Report.

(a) A corrected/amended 8-day pre-election report substantially complies with the applicable law and will not be assessed a late fine under §18.9 of this title (relating to Corrected/Amended Reports) if:

(1) The original report was filed in good faith and the corrected/amended report was filed not later than the 14th business day after the date the filer learned of the errors or omissions; and

(2) The only corrections/amendments needed were to correct the following types of errors or omissions:

(A) a technical, clerical, or de minimis error, including a typographical error, that is not misleading and does not substantially affect disclosure;

(B) an error in or omission of information that is solely required for the commission's administrative purposes, including a report type or filer identification number;

(C) an error that is minor in context and that, upon correction/amendment, does not result in changed monetary amounts or activity disclosed, including a descriptive change or a change to the period covered by the report;

(D) one or more errors in disclosing contributions that, in total:

(i) do not exceed $2,000; or

(ii) do not exceed the lesser of 10% of the total contributions on the corrected/amended report or $10,000;

(E) one or more errors in disclosing expenditures that, in total:

(i) do not exceed $2,000; or

(ii) do not exceed the lesser of 10% of the total expenditures on the corrected/amended report or $10,000;

(F) one or more errors in disclosing loans that, in total:

(i) do not exceed $2,000; or

(ii) do not exceed the lesser of 10% of the amount originally disclosed or $10,000; or

(G) an error in the amount of total contributions maintained that:

(i) does not exceed $250; or

(ii) does not exceed the lesser of 10% of the amount originally disclosed or $2,500.

(b) The executive director shall determine whether an 8-day pre-election report as originally filed substantially complies with applicable law by applying the criteria provided in this section.

(c) In this section, "8-day pre-election report" means a report due eight days before an election filed in accordance with the requirements of §§20.213(d), 20.325(e), or 20.425(d) of this title (relating to a candidate, a specific-purpose committee, or a general-purpose commit-
§18.11. Guidelines for Waiver or Reduction of a Late Fine for a Corrected/Amended 8-day Pre-election Report.

(a) A filer who has filed a corrected/amended 8-day pre-election report may request the executive director to waive or reduce a late fine assessed under §18.9 of this title (relating to Corrected/Amended Reports) by submitting an affidavit to the executive director. The executive director shall waive a late fine if the report meets the criteria in subsection (b) of this section and shall reduce a late fine if the report meets the criteria in subsection (c) of this section.

(b) A late fine for a correction/amendment to an 8-day pre-election report shall be waived if:

(1) The corrected report was filed not later than the fourth day after the original report due date;

(2) The only correction/amendment by a candidate or officeholder was to add to or delete from the outstanding loans total an amount of loans made from personal funds;

(3) The only correction/amendment by a political committee was to add the name of each candidate supported or opposed by the committee, when each name was originally disclosed on the appropriate schedule for disclosing political expenditures; or

(4) The only correction/amendment was to disclose the actual amount of a contribution or expenditure, when:

(A) the amount originally disclosed was an overestimation;

(B) the difference between the originally disclosed amount and the actual amount did not vary by more than 10%; and

(C) the original report clearly included an explanation of the estimated amount disclosed and the filer's intention to file a correction/amendment as soon as the actual amount was known.

(c) A late fine for a correction/amendment to an 8-day pre-election report that does not meet the criteria for a waiver under subsection (b) of this section shall be reduced as follows:

(1) If the corrected/amended report was filed more than four days after the original report due date but was filed before the election day, the late fine is reduced to $500;

(2) If the corrected/amended report was filed after the election and the amount of the incorrectly reported or unreported activity was more than 10% of the total amount disclosed on the corrected/amended report but did not exceed the lesser of 25% of the total amount of activity, or $5,000, the late fine is reduced to $1,000; or

(3) If the amount of the incorrectly reported or unreported activity was more than 40% of the total amount disclosed in the corrected/amended report and the corrected/amended report was filed over a year after the election, the late fine is reduced to 10% of the amount at issue.

(d) A late fine that is reduced under this section will revert to the full amount originally assessed if the reduced fine is not paid on or before the 30th calendar day after the date of the notice informing the filer of the reduction.

(e) A filer may appeal a determination made under this section by submitting a request in writing to the commission.

(1) The request for appeal should state the filer's reasons for requesting an appeal, provide any additional information needed to support the request, and state whether the filer would like the opportunity to appear before the commission and offer testimony regarding the appeal.

(2) After hearing a request for appeal, the commission may affirm the determination made under this section or make a new determination based on facts presented in the appeal.

(f) This section does not apply to a civil penalty assessed through the sworn complaint process or facial compliance review process.

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

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Ian Steusloff

General Counsel

Texas Ethics Commission

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For further information, please call: (512) 463-5800

CHAPTER 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES

SUBCHAPTER A. GENERAL RULES

1 TAC §20.1

The Texas Ethics Commission (the Commission) proposes an amendment to Texas Ethics Commission Rules §20.1, regarding Definitions, to repeal certain definitions made obsolete by the 86th Texas Legislature, of Chapter 20, Subchapter A of Title 1, Part 2, of the Texas Administrative Code.

HB 2586 from the 86th Texas Legislature codifies, with slight variations, several definitions established by Commission rule. This renders the definitions unnecessary and, where in variance with a statutory definition, in conflict. The rulemaking repeals those definitions.

Ian M. Steusloff, General Counsel, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional costs or loss or increase in revenue to the state or local governments expected as a result of enforcing or administering the rule.

The General Counsel has also determined that for each year of the first five years the proposed amendment is in effect, the public benefits will be clarity in the definitions used in campaign finance law. There will not be an effect on small businesses, microbusinesses or rural communities. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

The General Counsel has determined that during the first five years that the proposed amendment is in effect, it will not: create or eliminate a government program; require the creation of new employee positions or the elimination of existing employee positions; require an increase in future legislative appropriations to the agency; require an increase or decrease in fees paid to the agency; create a new regulation; expand or limit an existing
The following words and terms, when used in Title 15 of the Election Code, in this chapter, Chapter 22 of this title (relating to Restrictions on Contributions and Expenditures), and Chapter 24 of this title (relating to Restrictions on Contributions and Expenditures Applicable to Corporations and Labor Organizations), shall have the following meanings, unless the context clearly indicates otherwise.

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

(A) [§20.1. Definitions.]

Direct campaign expenditure--A campaign expenditure that does not constitute a contribution by the person making the expenditure. A campaign expenditure is not a contribution from the person making the expenditure if--

(A) it is made without the prior consent or approval of the candidate or officeholder on whose behalf the expenditure was made; or

(B) it is made in connection with a measure, but is not a political contribution to a political committee supporting or opposing the measure.

(Election cycle--A single election and any related primary or runoff election.

Identified measure--A question or proposal submitted in an election for an expression of the voters' will and includes the circulation and submission of a petition to determine whether a question or proposal is required to be submitted in an election for an expression of the voters' will.

In-kind contribution--A contribution of goods, services, or any other thing of value, except money, and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make such a contribution. The term does not include a direct campaign expenditure.

Non-political expenditure--An expenditure from political contributions that is not an officeholder expenditure or a campaign expenditure.

Opposed candidate--A candidate who has an opponent whose name is to appear on the ballot. The name of a write-in candidate does not appear on the ballot.

Out-of-state political committee--A political committee that makes political expenditures outside Texas and in the 12 months immediately preceding the making of a political expenditure by the committee inside Texas (other than an expenditure made in connection with a campaign for a federal office or made for a federal officeholder), makes 80% or more of the committee's total political expenditures in any combination of elections outside this state and federal offices not voted on in this state. Section 20.13 of this title (relating to Out-of-State Committees) explains the practical application of this definition.

(Pledge--A contribution in the form of an unfulfilled promise or unfulfilled agreement, whether enforceable or not, to provide a specified amount of money or specific goods or services. The term does not include a contribution actually made in the form of a check.

Political advertising:

(A) A communication that supports or opposes a political party, a public officer, a measure, or a candidate for nomination or election to a public office or office of a political party, and:

(i) is published in a newspaper, magazine, or other periodical in return for consideration;

(ii) is broadcast by radio or television in return for consideration;

(iii) appears in a pamphlet, circular, flier, billboard, or other sign, bumper sticker, or similar form of written communication; or

(iv) appears on an Internet website.

(B) The term does not include an individual communication made by e-mail but does include mass e-mails involving an expenditure of funds beyond the basic cost of hardware messaging software and bandwidth.

Political committee--Two or more persons that have as a principal purpose accepting political contributions or making political expenditures to support or oppose candidates, officeholders, or measures. The term does not include a group composed exclusively of two or more individual filers or political committees required to file reports under Election Code, Title 15 (concerning Regulating Political Funds and Campaigns), who make reportable expenditures for a joint activity such as a fundraiser or an advertisement.

Political subdivision--A county, city, or school district or any other governmental entity that:

(A) embraces a geographic area with a defined boundary;

(B) exists for the purpose of discharging functions of government; and

(C) possesses authority for subordinate self-government through officers selected by it.

Report--Any document required to be filed by this title, including an appointment of campaign treasurer, any type of report of contributions and expenditures, and any notice.

Special pre-election report--A shorthand term for a report filed in accordance with the requirements of §§20.221, 20.333, or 20.435 of this title (relating to Special Pre-Election Report by Certain Candidates; Special Pre-Election Report by Certain Specific-Purpose Committees; Special Pre-Election Reports by Certain General-Purpose Committees) and §§254.038 and 254.039 of the Election Code (relating to Special Report Near Election by Certain Candidates and Political Committees and Special Report Near Election By Certain General-Purpose Committees).
(15) Specific-purpose committee--A political committee that does not meet the definition of general-purpose committee and that has among its principal purposes:

(A) supporting or opposing one or more:
   (i) candidates, all of whom are identified and are seeking offices that are known; or
   (ii) measures, all of which are identified;

(B) assisting one or more officeholders, all of whom are identified; or

(C) supporting or opposing only one candidate who is unidentified or who is seeking an office that is unknown.

(16) Unidentified measure--A question or proposal that is intended to be submitted in an election for an expression of the voters' will and that is not yet legally required to be submitted in an election, except that the term does not include the circulation or submission of a petition to determine whether a question or proposal is required to be submitted in an election for an expression of the voters' will. The circulation or submission of a petition to determine whether a question or proposal is required to be submitted in an election for an expression of the voters' will is considered to be an identified measure.

(17) Principal purpose--A group has as a principal purpose of accepting political contributions or making political expenditures, including direct campaign expenditures, when that activity is an important or a main function of the group.

(A) A group may have more than one principal purpose.

(B) A group has as a principal purpose accepting political contributions if the proportion of the political contributions to the total contributions to the group is more than 25 percent within a calendar year. A contributor intends to make a political contribution if the solicitations that prompted the contribution or the statements made by the contributor about the contribution would lead to no other reasonable conclusion than that the contribution was intended to be a political contribution.

(C) The group may maintain specific evidence of contributions related only to political contributions or only to nonpolitical contributions. For example, the group may ask the contributor to make an indication when the contribution is made that the contribution is only a nonpolitical contribution.

(D) A group has as a principal purpose making political expenditures, including direct expenditures, if the group expends more than 25 percent of its annual expenses to make political expenditures within a calendar year. The following shall be included for purposes of calculating the threshold:

(i) the amount of money paid in compensation and benefits to the group's employees for work related to making political expenditures;

(ii) the amount of money spent on political expenditures; and

(iii) the amount of money attributable to the proportional share of administrative expenses related to political expenditures. The proportional share of administrative expenses is calculated by comparing the political expenditures in clause (ii) with nonpolitical expenditures. (For example, if the group sends three mailings a year and each costs $10,000, if the first two are issue based newsletters and the third is a direct advocacy sample ballot, and there were no other outside expenditures, then the proportion of the administrative expenses attributable to political expenditures would be 33%). Administrative expenses include:

   (I) fees for services to non-employees;
   (II) advertising and promotion;
   (III) office expenses;
   (IV) information technology;
   (V) occupancy;
   (VI) travel expenses;
   (VII) interest; and
   (VIII) insurance.

(E) The group may maintain specific evidence of administrative expenses related only to political expenditures or only to nonpolitical expenditures. Specifically identified administrative expenses shall not be included in the proportion established by subparagraph (D) (iii) but allocated by the actual amount of the expense.

(F) In this section, the term "political expenditures" includes direct campaign expenditures.

(18) In connection with a campaign:

(A) An expenditure is made in connection with a campaign for an elective office if it is:

   (i) made for a communication that expressly advocates the election or defeat of a clearly identified candidate by:

      (I) using such words as "vote for," "elect," "support," "vote against," "defeat," "reject," "cast your ballot for," or "Smith for city council;" or

      (II) using such phrases as "elect the incumbent" or "reject the challenger," or such phrases as "vote pro-life" or "vote pro-choice" accompanied by a listing of candidates described as "pro-life" or "pro-choice;"

   (ii) made for a communication broadcast by radio, television, cable, or satellite or distributed by print or electronic media, including any print publication, mailing, Internet website, electronic mail, or automated phone bank, that:

      (I) refers to a clearly identified candidate;

      (II) is distributed within 30 days before a contested election for the office sought by the candidate;

      (III) targets a mass audience or group in the geographical area the candidate seeks to represent; and

      (IV) includes words, whether displayed, written, or spoken; images of the candidate or candidate's opponent; or sounds of the voice of the candidate or candidate's opponent that, without consideration of the intent of the person making the communication, are susceptible of no other reasonable interpretation than to urge the election or defeat of the candidate;

   (iii) made by a candidate or political committee to support or oppose a candidate; or

   (iv) a campaign contribution to:

      (I) a candidate; or

      (II) a group that, at the time of the contribution, already qualifies as a political committee.

(B) An expenditure is made in connection with a campaign on a measure if it is:
(i) made for a communication that expressly advocates the passage or defeat of a clearly identified measure by using such words as "vote for," "support," "vote against," "defeat," "reject," or "cast your ballot for;"

(ii) made for a communication broadcast by radio, television, cable, or satellite or distributed by print or electronic media, including any print publication, mailing, Internet website, electronic mail, or automated phone bank, that:
   (I) refers to a clearly identified measure;  
   (II) is distributed within 30 days before the election in which the measure is to appear on the ballot;  
   (III) targets a mass audience or group in the geographical area in which the measure is to appear on the ballot; and  
   (IV) includes words, whether displayed, written, or spoken, that, without consideration of the intent of the person making the communication, are susceptible of no other reasonable interpretation than to urge the passage or defeat of the measure;

(iii) made by a political committee to support or oppose a measure; or

(iv) a campaign contribution to a group that, at the time of the contribution, already qualifies as a political committee.

(C) Any cost incurred for covering or carrying a news story, commentary, or editorial by a broadcasting station or cable television operator, Internet website, or newspaper, magazine, or other periodical publication, including an Internet or other electronic publication, is not a campaign expenditure if the cost for the news story, commentary, or editorial is not paid for by, and the medium is not owned or controlled by, a candidate or political committee.

(D) For purposes of this section:

(i) a candidate is clearly identified by a communication that includes the candidate's name, office sought, office held, likeness, photograph, or other apparent and unambiguous reference; and

(ii) a measure is clearly identified by a communication that includes the measure's name or ballot designation (such as "Proposition 1"), purposes, election date, or other apparent and unambiguous reference.

19 [§22] Discount--The provision of any goods or services without charge or at a charge which is less than fair market value. A discount is an in-kind political contribution unless the terms of the transaction reflect the usual and normal practice of the industry and are typical of the terms that are offered to political and non-political persons alike, or unless the discount is given solely in order to comply with §253.041 of the Election Code. The value of an in-kind contribution in the form of a discount is the difference between the fair market value of the goods or services at the time of the contribution and the amount charged.

20 [§22] School district--For purposes of §254.130 of the Election Code and §§20.3 (relating to Reports Filed with the Commission), 20.7 (relating to Reports Filed with Other Local Filing Authority), and 20.315 (relating to Termination of Campaign Treasurer Appointment) of this title, the term includes a junior college district or community college district.

21 [§22] Vendor--Any person providing goods or services to a candidate, officeholder, political committee, or other filer under this chapter. The term does not include an employee of the candidate, officeholder, political committee, or other filer.

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 December 12, 2019.

TRD-201904727
Ian Steusloff
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: January 26, 2020

For further information, please call: (512) 463-5800

CHAPTER 22. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

1 TAC §22.5

The Texas Ethics Commission (the Commission) proposes the repeal of Texas Ethics Commission Rules §22.5, regarding Contributions to Direct Campaign Expenditure Only Committees, to repeal certain definitions made obsolete by the 86th Texas Legislature, of Chapter 22 of Title 1, Part 2, of the Texas Administrative Code.

HB 2586 from the 86th Texas Legislature codifies, with variations, Commission Rules §22.5, related to the affidavit required for direct campaign expenditure only committees, rendering the rule unnecessary. The rulemaking repeals those definitions.

Ian M. Steusloff, General Counsel, has determined that for the first five-year period the proposed repeal is in effect, there will be no additional costs or loss or increase in revenue to the state or local governments expected as a result of enforcing or administering the repeal.

The General Counsel has also determined that for each year of the first five years the proposed repeal is in effect, the public benefit will be clarity in the definitions regulating campaign finance filers. There will not be an effect on small businesses, microbusinesses or rural communities. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

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

The Commission invites comments on the proposed repeal from any member of the public. A written statement should be emailed to public_comment@ethics.state.tx.us, or mailed or delivered to Anne Temple Peters, Executive Director, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070. A person who wants to offer spoken comments to the Commission concerning the proposed repeal may do so at any Commission meeting during the agenda item relating to the proposed repeal. Infor-
The Texas Ethics Commission (the Commission) proposes an amendment to Texas Ethics Commission Rules §22.6, regarding Reporting Direct Campaign Expenditures, to repeal a definition made obsolete by the 86th Texas Legislature, in Chapter 22 of Title 1, Part 2, of the Texas Administrative Code.

HB 2586 from the 86th Texas Legislature codifies, defines activities that do not constitute "acting in concert," which conflicts with Commission Rules §22.6, defining the term "acting in concert" for certain purposes. The rulemaking repeals that definition.

Ian M. Steusloff, General Counsel, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional costs or loss or increase in revenue to the state or local governments expected as a result of enforcing or administering the amendment.

The General Counsel has also determined that for each year of the first five years the proposed amendment is in effect, the public benefit will be clarity in the definitions regulating campaign finance filers. There will not be an effect on small businesses, microbusinesses or rural communities. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

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

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

The amendment is proposed under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code.

The proposed amendment affects Title 15 of the Election Code.

§22.6. Reporting Direct Campaign Expenditures.

[(a)] Section 254.261 of the Election Code applies to a person who, not acting in concert with another person, makes one or more direct campaign expenditures that exceed $100 in an election from the person's own property.

[(b)] For purposes of Section 254.261 of the Election Code, "acting in concert" means acting in cooperation or consultation with another, or under an express or implied agreement, to pursue a common activity. Evidence of acting in concert can be provided by showing that persons are:

- using the same consultants;
- using the same person to purchase media;
- sharing mailing lists;
- sharing email lists;
- sharing telephone lists;
- exchanging drafts or final proofs of political advertising;
- meeting with a candidate, or a candidate's agent or staff regarding campaign communications, including but not limited to talking points, campaign themes, campaign communication schedules, and campaign events;
- sharing research on candidates or measures; or
- sharing polling data.

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

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Ian Steusloff
General Counsel
Texas Ethics Commission
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For further information, please call: (512) 463-5800

1 TAC §22.33

The Texas Ethics Commission (the Commission) proposes the repeal of Texas Ethics Commission Rules §22.33, regarding Expenditure Limits of the Judicial Campaign Fairness Act, in response to House Bill 3233, which repealed the voluntary expen-
diture limits under the Judicial Campaign Fairness Act ("JCFA"), of Chapter 22 of Title 1, Part 2, of the Texas Administrative Code.

The JCFA previously imposed expenditure limits on judicial candidates and officeholders, located in Chapter 253 of the Election Code. The law required a judicial candidate to file a declaration stating whether the candidate intended to comply with those limits. Rule 22.33 was adopted to clarify when a declaration was required and how long it remained effective. However, the 2019 legislature passed House Bill 3233, which repealed the expenditure limits. Therefore, the rule is obsolete and must be repealed.

Ian M. Steusloff, General Counsel, has determined that for the first five-year period the proposed repeal is in effect, there will be no additional costs or loss or increase in revenue to the state or local governments expected as a result of enforcing or administering the repeal.

The General Counsel has also determined that for each year of the first five years the proposed repeal is in effect, the public benefits will be clarity in the rules regarding the Judicial Campaign Fairness Act by repealing a rule that is in conflict with the JCFA. There will not be an effect on small businesses, microbusinesses or rural communities. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

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

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

The repeal is proposed under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code.

The proposed repeal affects Title 15 of the Election Code.

§22.33. Expenditure Limits of the Judicial Campaign Fairness 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 December 12, 2019.

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Ian Steusloff
General Counsel
Texas Ethics Commission
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For further information, please call: (512) 463-5800

CHAPTER 27. JUDICIAL CAMPAIGN FAIRNESS ACT

The Texas Ethics Commission (the Commission) proposes the repeal of Texas Ethics Commission Rules §27.1, regarding Applicability, of Chapter 27, Subchapter A of Title 1, Part 2, of the Texas Administrative Code; and §27.101, regarding When a Declaration of Compliance or Declaration of Intent is Required, of Chapter 27, Subchapter C of Title 1, Part 2, of the Texas Administrative Code.

The JCFA previously imposed expenditure limits on judicial candidates and officeholders, located in Chapter 253 of the Election Code. The law required a judicial candidate to file a declaration stating whether the candidate intended to comply with those limits. Rules 27.1 and 27.101 were adopted to clarify when a declaration was required and how long it remained effective. However, the 2019 legislature passed House Bill 3233, which repealed the expenditure limits and the requirement to file the declaration. Therefore, these rules are obsolete and must be repealed.

Ian M. Steusloff, General Counsel, has determined that for the first five-year period the proposed repeals are in effect, there will be no additional costs or loss or increase in revenue to the state or local governments expected as a result of enforcing or administering the repeals.

The General Counsel has also determined that for each year of the first five years the proposed repeals are in effect, the public benefits will be clarity in the rules regarding the Judicial Campaign Fairness Act by repealing a rule that is in conflict with the JCFA. There will not be an effect on small businesses, microbusinesses or rural communities. There is no anticipated economic cost to persons who are required to comply with the proposed repeals.

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

The Commission invites comments on the proposed repeals from any member of the public. A written statement should be emailed to public_comment@ethics.state.tx.us, or mailed or delivered to Anne Temple Peters, Executive Director, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070. A person who wants to offer spoken comments to the Commission concerning the proposed repeals may do so at any Commission meeting during the agenda item relating to the proposed repeals. Information concerning the date, time, and location of Commis-
1 TAC §27.1
The repeal is proposed under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code.
The proposed repeal affects Title 15 of the Election Code.

§27.101. When a Declaration of Compliance or Declaration of Intent Is Required
The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency’s legal authority to adopt.

DIVISION 3. ADMINISTRATION OF PROGRAM FUNDS
The Texas Department of Agriculture (Department) proposes the repeal of Title 4, Part 1, Chapter 30, Subchapter A, Division 3, §30.50, relating to the Community Development Fund, and new Subchapter A, Division 3, §30.50, relating to the Community Development Fund.
The Department has determined that due to the extensive changes to the Community Development Fund program, repeal of the entire section and replacement with a new rule is more efficient than proposing numerous amendments to make the required changes. The proposed rule actions will allow the Department to make changes to existing provisions to ensure compliance with all statutory requirements, formalize existing policy and guidelines, and include revisions of necessary policy and administrative changes to further enhance operations. The department will seek stakeholder feedback on the results of the revised process following the 2021-2022 Community Development Fund application cycle.

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 access to grant funding for local communities. 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 Community Development Fund program; 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 February 3, 2020.

PROPOSED RULES  December 27, 2019  44 TexReg 8135
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.

§30.50. Community Development (CD) 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 December 12, 2019.

TRD-201904754
Tim Kleinschmidt
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 463-7476

4 TAC §30.50

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.

§30.50. Community Development (CD) Fund.

(a) Eligibility. In addition to meeting the application threshold requirements in §30.25 of this subchapter (relating to Application Threshold Requirements), in order to be eligible to apply for community development funds, a community must document that at least 51.00% of the persons who would directly benefit from the implementation of each activity and target area proposed in the application are of low to moderate income.

(b) Application cycle. Applications are accepted on a biennial basis and selected for award pursuant to regional competitions held during the first year of the biennial cycle. An eligible community may submit one application per cycle as prescribed in the most recent application guide for this fund.

(c) Regional allocations. Each state planning region is provided with a regional CD Fund allocation for each program year of the biennial cycle once HUD releases the state's annual CDBG allocation.

(d) Selection procedures.

(1) Initial review. Upon receipt of an application, the department performs an initial review for application completeness and eligibility in accordance with §30.29 of this subchapter (relating to Application Review). Only the department may disqualify an application from consideration.

(2) Scoring process. During the first program year of the application cycle, eligible applications are scored and ranked by the department using criteria determined by the state planning region, the Unified Scoring Committee, and the department as described in subsection (e) of this section.

(3) Awards. After the department determines the final rankings of applications, awards are made based on each region's allocation and awarded until funds allocated to the region are depleted. If the program year allocation is insufficient to completely fund the next highest ranked application in the region, projects may be funded using TxCDBG deobligated funds or other funds, to the extent available. The department may also pool the remaining funds from each region to maximize the total number of applications to be fully funded.

(e) Scoring criteria.

(1) Regional project priority category. Each state planning region, as defined by Chapter 391 of the Local Government Code, is responsible for establishing the project types that will be considered first, second, or third priority projects.

(A) The governing body of the state planning region shall establish the priorities and communicate the decision to the department or may appoint a committee to carry out these tasks.

(B) Public meeting. The public must be given an opportunity to comment on the project priorities to be considered. The designated committee must convene in an open meeting for discussion and action to adopt project priorities.

(i) Notice of the public meeting must be advertised to the general public through a regional newspaper or other similar media. Each community eligible to participate in the application cycle must also be contacted directly with written notice of the public meeting.

(ii) The public meeting is subject to the Texas Open Meetings Act.

(C) The department will provide a format for establishing the criteria and a deadline for submitting the regional decision to the department to be incorporated into the application guide.

(D) State planning regions that use internal staff to prepare applications and administer CDBG grants must address the potential conflicts of interest of regional participation in selecting project priorities. For these regions, staff responsible for any part of the grant application process:

(i) may not participate in the planning or administration of the public meeting or committee duties, including distributing public meeting notices, explaining public meeting requirements to committee members, conducting the committee meeting, or submitting the results of the committee to the department; and

(ii) may attend the public meeting but may not present recommendations to the committee except during the public comment portion of the meeting, subject to the same time limits applied to other commenters.

(E) Twenty-five percent of the total available points will be determined by regional project priority categories.

(2) Department scoring criteria. The following factors are considered by the department when scoring CD Fund applications (detailed application and scoring information are available in the application guidelines):

(A) past performance—the department will consider a community's past performance on all previously awarded TxCDBG contracts within the past 4 years preceding the application deadline. Evaluation of a community's past performance will include the following:

(i) completion of contract activities within the original contract period;
(ii) submission of environmental review requirements within prescribed deadlines;

(iii) submission of the required close-out documents within the period prescribed for such submission; and

(iv) maximum utilization of grant funds awarded.

(B) Other programmatic priorities—the department may establish other scoring criteria to meet programmatic goals, so long as the application cycle allows sufficient time after the publication of such scoring criteria for communities to take action to maximize their score.

(C) Ten percent of the total available points will be determined by department scoring criteria.

(3) Unified Scoring Committee (USC) criteria. The USC is responsible for determining objective scoring factors for all regions in accordance with the requirements of this section and the current TxCDBG Action Plan. The USC must establish the numerical value of each region's points assigned to each scoring factor as described in the Committee Guidelines provided by the department.

(A) USC composition. The Agriculture Commissioner will appoint each member of the USC, to serve at the discretion of the Commissioner.

(i) Twenty-four (24) members shall be appointed to the USC. The Commissioner shall consider geographic representation when appointing members.

(ii) Each member must be either an elected or appointed official of a non-entitlement community at the time of appointment.

(iii) The governing body of each state planning region may nominate one individual to be considered for appointment. The department will establish a timeline for such nominations.

(B) Public hearing. The public must be given an opportunity to comment on the scoring criteria considered. The department will convene a public hearing for the USC to discuss and select the objective scoring criteria that will be used to score and rank applications within each region.

(i) Notice of public hearing. USC proceedings are subject to the Texas Open Meetings Act. The department will publish notice of the hearing in the Texas Register, post the notice on its website, and announce the hearing details through the CDBG email listserve that is available for all stakeholders.

(ii) Attendance at meetings. A quorum is required for the USC public meeting. A USC member may designate a proxy to attend the meeting. Proxies are counted for purposes of determining the presence of a quorum and may participate in the discussion regarding potential scoring criteria but may not vote on matters before the USC.

(C) Requirements for scoring criteria.

(i) All scoring criteria selected by the USC must be in compliance with 24 CFR §91.320(k)(1)(i), which states in relevant part, "The statement of method of distribution must provide sufficient information so that units of general local government will be able to understand and comment on it, understand what criteria and information their application will be judged, and be able to prepare responsive applications."

(ii) Prior to the scheduled USC public hearing, the department will publish a list of previously approved scoring criteria that comply with objective scoring requirements. The department will also provide an opportunity for USC members, communities, and other stakeholders to submit additional scoring criteria to the department to be reviewed for compliance prior to the public hearing.

(iii) The USC may not adopt scoring factors that directly negate or offset the department's scoring factors.

(D) Final selection of scoring criteria.

(i) The final selection of the scoring criteria is the responsibility of the USC and must be consistent with the requirements of the current TxCDBG Action Plan.

(ii) The department will review the scoring factors selected to ensure that all scoring factors are objective and publish the approved scoring methodology in the application guide. The department may provide further details or elaboration on the objective scoring methodology, data sources, and other clarifying details without the necessity of a subsequent USC meeting.

(E) Sixty-five percent of the total available points will be determined by USC scoring criteria.

(f) Other department responsibilities. The department may:

(1) establish the maximum number of USC scoring factors that may be used in order to improve review and verification efficiency, or exclude certain scoring factors if the data is not readily available or verifiable in a timely manner. To ensure consistency, the department may determine the acceptable data source for a particular scoring factor;

(2) establish a deadline for each state planning region to select and submit to the department its project type priorities and nomination for the USC;

(3) publish Committee Guidelines to assist the USC in selecting scoring criteria that meet federal, state and program requirements:

(A) For any region for which no project priorities are submitted, applications will be scored according to the priorities published in the Committee Guidelines.

(B) In the event the USC fails to approve an objective scoring methodology to the satisfaction of the department consistent with the requirements in the current TxCDBG Action Plan, the department will establish scoring factors using the scoring factors identified in the Committee Guidelines; and

(4) make a site visit to recommended application localities.

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

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Tim Kleinschmidt
General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-7476

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TITLE 7. BANKING AND SECURITIES
PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 33. MONEY SERVICES BUSINESSES

7 TAC §33.54

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes new §33.54, concerning an exemption for registered securities dealers and agents of securities dealers (securities agents). The new rule is proposed to exempt securities dealers and securities agents from money transmission licensing if they are registered and in good standing with the Texas State Securities Board (the board), to the extent they are operating in their capacity as securities dealers and agents.

Summary of Proposed New Rule

Proposed subsection (a) provides that the terms "agent," "dealer" and "securities" have the meanings assigned by the Texas Securities Act.

Proposed subsection (b) provides that a dealer or an agent of a dealer who, in the course of providing dealer or agent services as to securities, receives or has control over a customer's money or monetary value, is exempt from money transmission licensing requirements if they are: 1) registered and in good standing with the board as a dealer or dealer's agent; 2) only conducting money transmission as defined by the Texas Finance Code to the extent reasonable and necessary to provide securities dealer or securities agent services for contractual customers.

The department regulates money transmission, defined by the Texas Finance Code, §151.301(b)(4) as the receipt of money or monetary value by any means in exchange for a promise to make the money or monetary value available at a later time or different location. A money transmission license is required to engage in the business of money transmission in Texas. See Texas Finance Code, §151.302(a).

Many registered securities dealers and securities agents include money transmission in their business models and as part of the services provided to their clients. Both securities dealers and securities agents, however, are already regulated by, and subject to registration requirements enforced by, the Texas State Securities Board. As such, further regulation by the department would be duplicative to the extent that such persons operate only as securities dealers and securities agents. The department does not intend for this rule to exempt securities dealers and securities agents from money transmission licensing if they perform separate money transmission activities as defined by the Texas Finance Code, unrelated to their operation as securities dealers or agents.

Securities dealers and securities agents whose business includes non-securities related activities, that may constitute money transmission under the Texas Finance Code, should submit their business plan for review and obtain a determination letter from the Texas Department of Banking.

Analysis of Fiscal Impact and Public Benefits

Russell Reese, Assistant Deputy Commissioner, Texas Department of Banking, has determined that for the first five year period the proposed rule is in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rule.

Mr. Reese has also determined that, for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing the rule is potentially decreased administrative costs for securities dealers and securities agents, that may be passed down to Texas consumers doing business with securities dealers and securities agents, as well as to Texans employed by, or doing business as, securities dealers or securities agents. Additionally, this rule will reduce the regulatory burden faced by securities dealers and securities agents, and may decrease regulatory redundancies.

For each year of the first five years that the rule will be in effect, there will be no economic costs to persons required to comply with the rule as proposed. There will be no adverse economic effect on persons required to comply with the rule as proposed.

Government Growth Impact Statement

Pursuant to Government Code, §2001.0221, the department provides the following Government Growth Impact Statement for the proposed rule. During the first five years that the rule will be in effect, the rule will not:

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 department;
4) require an increase in fees paid to the department - in fact such fees will likely decrease;
5) create a new regulation;
6) increase or decrease the number of individuals subject to the rule's applicability; and,
7) adversely affect this state's economy - in fact, the proposed new rule has the potential to positively affect this state's economy.

Additionally, during the first five years that the rule will be in effect, the rule will limit existing regulation of some entities engaged in money transmission, such as registered securities dealers and securities agents, who are operating as such.

Analysis of Economic Impact

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities. There will be no difference in the cost of compliance for these entities.

Comment Requested

To be considered, comments on the proposed new section must be submitted no later than 5:00 p.m. on January 27, 2020. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@dob.texas.gov.

Statutory Authority

The new rule is proposed under Texas Finance Code, §151.102(a), which authorizes the commission to adopt rules necessary or appropriate to preserve and protect the safety and soundness of money services businesses and the public.
Texas Finance Code, §151.301(b)(4) and §151.302(a) are affected by the proposed new rule.

§33.54. Exemption for Registered Securities Dealers and Agents.

(a) For purposes of this section, the terms "agent," "dealer," and "securities" have the meanings assigned by the Texas Securities Act.

(b) A dealer or dealer agent who, in the course of providing dealer or dealer agent services as to securities, receives or has control over a customer’s money or monetary value, need not obtain a money transmission license if they are:

(1) registered and in good standing with the Texas State Securities Board as a dealer or dealer agent; and

(2) only conducting money transmission as defined by Texas Finance Code, §151.301, to the extent reasonable and necessary to provide dealer or dealer agent services for contractual customers as to securities.

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 December 13, 2019.

TRD-201904825
Catherine Reyer
General Counsel
Texas Department of Banking
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 475-1301

TITLE 10. COMMUNITY DEVELOPMENT
PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
CHAPTER 1. ADMINISTRATION
SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES
10 TAC §1.23

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 1, Subchapter A, General Policies and Procedures, §1.23, State of Texas Low Income Housing Plan and Annual Report (SLIHP). The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action, in order to adopt by reference the 2020 SLIHP.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption by reference the 2020 SLIHP, as required by Tex. Gov’t Code 2306.0723.

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

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

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

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

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous readoption in order to adopt by reference the 2020 SLIHP.

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

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

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

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

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

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

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(5). Mr. Wilkinson, has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated more germane rule that will adopt by reference the 2020 SLIHP. There will be no economic costs to individuals required to comply with the repealed section.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held Friday, December 27, 2019, to Wednesday, January 15, 2020, to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department
of Housing and Community Affairs, Attn: Elizabeth Yevich, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0070, or email info@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, WEDNESDAY, JANUARY 15, 2020.

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

Except as described herein the proposed repealed section affects no other code, article, or statute.


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 December 12, 2019.

TRD-201904738
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 475-1762

10 TAC §1.23

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 1, Subchapter A, General Policies and Procedures, §1.23 State of Texas Low Income Housing Plan and Annual Report (SLIHP). The purpose of the proposed new section is to provide compliance with Tex. Gov't Code §2306.0723 and to adopt by reference the 2020 SLIHP, which offers a comprehensive reference on statewide housing needs, housing resources, and strategies for funding allocations. The 2020 SLIHP reviews TDHCA's housing programs, current and future policies, resource allocation plans to meet state housing needs, and reports on performance during the preceding state fiscal year (September 1, 2018, through August 31, 2019).

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it is exempt under item (c)(9) because it is necessary to implement legislation. Tex. Gov't Code §2306.0721 requires that the Department produce a state low income housing plan, and Tex. Gov't Code §2306.0722 requires that the Department produce an annual low income housing report. Tex. Gov't Code §2306.0723 requires that the Department consider the annual low income housing report to be a rule. This rule provides for adherence to that statutory requirement. Further no costs are associated with this action, and therefore no costs warrant being offset.

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


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

1. The proposed new rule does not create or eliminate a government program, but relates to the adoption, by reference, of the 2020 SLIHP, as required by Tex. Gov't Code 2306.0723.
2. The proposed new rule does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.
3. The proposed new rule changes do not require additional future legislative appropriations.
4. The proposed new rule changes will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.
5. The proposed new rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.
6. The proposed new rule will not expand, limit, or repeal an existing regulation.
7. The proposed new rule will not increase nor decrease the number of individuals subject to the rule's applicability.
8. The proposed new rule will not negatively nor positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.0723.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.
2. There are no small or micro-businesses subject to the proposed rule for which the economic impact of the rule is projected to be null. There are no rural communities subject to the proposed rule for which the economic impact of the rule is projected to be null.
3. The Department has determined that because the proposed rule will adopt by reference the 2020 SLIHP, there will be no economic effect on small or micro-businesses or rural communities.

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

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

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule has no economic effect on local employment because the proposed rule will adopt by reference the 2020 SLIHP; therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that the proposed rule will adopt by reference the 2020 SLIHP there are no "probable" effects of the new rule on particular geographic regions.
e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be an updated and more germane rule that will adopt by reference the 2020 SLIHP, as required by Tex. Gov't Code §2306.0723. There will not be any economic cost to any individuals required to comply with the new section because the adoption by reference of prior year SLIHP documents has already been in place through the rule found at this section being repealed.

f. FISCAL NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because the new rule will adopt by reference the 2020 SLIHP.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held Friday, December 27, 2019, to Wednesday, January 15, 2020, to receive input on the new proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Elizabeth Yevich, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0070, or email info@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, WEDNESDAY, JANUARY 15, 2020.

STATUTORY AUTHORITY. The new section is proposed pursuant to Tex. Gov’t Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed new section affects no other code, article, or statute.


The Texas Department of Housing and Community Affairs (TDHCA or the Department) adopts by reference the 2020 State of Texas Low Income Housing Plan and Annual Report (SLIHP). The full text of the 2020 SLIHP may be viewed at the Department’s website: www.tdhca.state.tx.us. The public may also receive a copy of the 2020 SLIHP by contacting the Department’s Housing Resource Center at (512) 475-3800.

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 December 12, 2019.

TRD-201904739
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 475-1762

CHAPTER 8. PROJECT RENTAL ASSISTANCE PROGRAM RULE

10 TAC §8.7

The Texas Department of Housing and Community Affairs (the Department) proposes an amendment to 10 TAC §8.7, relating to tenant selection and screening. The purpose of this amendment is to correct a citation referenced in the rule.

Tex. Gov’t Code §2001.0045(b) does apply to the amendment being proposed and no exceptions are applicable. However, the rule already exists and the correction is only administrative in nature. There are no costs associated with this rule action, therefore no costs or impacts warrant a need to be offset.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed amendment would be in effect, the proposed amendment does not create or eliminate a government program, but relates to correcting a citation in the rule.

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

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

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

5. The proposed amendment is not creating a new regulation.

6. The proposed amendment will not repeal an existing regulation.

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

8. The proposed amendment will not negatively or positively affect this state’s economy.

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

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

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV’T CODE §2007.043. The proposed amendment does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

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

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

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

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held December 20, 2019, to January 20, 2020, to receive input on the proposed amended section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, January 20, 2020.

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

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

§8.7. Program Regulations and Requirements.

(a) Participation in the 811 PRA Program is encouraged and incentivized through the Department’s Multifamily Rules. Once committed to the Multifamily Application, a Development must not accept a fund source that would prevent it from participating in the 811 PRA Program.

(b) An Existing Development that is already participating in the 811 PRA Program is eligible to have an additional commitment of 811 PRA Units as long as the integrated housing requirements as noted in §8.3(c) of this chapter (relating to Participation as a Proposed Development) are not violated.

(c) The types (e.g., accessible, one bedroom, first floor, etc.) and the specific number of Assisted Units (e.g., units 101, 201, etc.) will be “floating” (flexible) and dependent on the needs of the Department and the availability of the Assisted Units on the Eligible Multifamily Property.

(d) Occupancy Requirements. Owner is required to follow all applicable Program Requirements including but not limited to the following occupancy requirements found in HUD Handbook 4550.3 REV-1 and Housing Notices:

1. H 2012-06, Enterprise Income Verification (EIV) System;
2. H 2012-26, Extension of Housing Notice 2011-25, Enterprise Income Verification (EIV) & You Brochure-Requirements for Distribution and Use;
3. H 2012-22, Further Encouragement for O/As to Adopt Optional Smoke-Free Housing Policies;
4. H 2012-11, State Registered Lifetime Sex Offenders in Federally Assisted Housing;
5. H 2012-09, Supplemental Information to Application for Assistance Regarding Identification of Family Member, Friend or Other Persons or Organization Supportive of a Tenant for Occupancy in HUD Assisted Housing; or


(e) Use Agreements. The Owner must execute the Use Agreement, as found in Exhibit 10 of the Cooperative Agreement, before the execution of the RAC and comply with the following:

1. Use Agreement should be properly recorded according to local laws in the official public records on the Eligible Multifamily Property. The Owner shall provide to TDHCA within 30 days of its receipt of the recorded Use Agreement, a copy of the executed, recorded Use Agreement.
2. From the date the Property Agreement is entered into, the Owner shall not enter into any future use agreements or other subsidy programs that would diminish the number of Assisted Units that can be placed on the Eligible Multifamily Property.
3. TDHCA will enforce the provisions of the Use Agreement and RAC consistent with HUD’s internal control and fraud monitoring requirements.

(f) Tenant Certifications, Reporting and Compliance.

1. TRACS & EIV Systems. The Owner shall have appropriate software to access the Tenant Rental Assistance Certification System (TRACS) and the EIV System. The Owner shall be responsible for ensuring Program information is entered into these systems. TRACS is the only system by which an Eligible Multifamily Property can request Project Rental Assistance payments.
2. Outside Vendors. The Owner has the right to refuse assistance from outside vendors hired by TDHCA, but is still required to satisfy the Program Requirements.
3. Tenant Certification. The Owner shall transmit Eligible Tenant’s certification and recertification data, transmit voucher data, and communicate errors electronically in a form consistent with HUD reporting requirements for HUD Secure Systems.
4. Tenant Selection and Screening.

1. Target Population. TDHCA will screen Eligible Applicants for compliance with TDHCA’s Program Target Population criteria and do an initial screening for Program Requirements. The Inter-Agency Partnership Agreement describes the specific Target Population eligible for TDHCA’s Program. The Target Population may be revised, with HUD approval.
2. Tenant Selection Plan. Upon the execution of the Participation Agreement, the Owner will submit the Eligible Multifamily Property’s Tenant Selection Criteria, as defined by and in accordance with 10 TAC §10.802 (§10.610) (relating to Written Policies and Procedures), to TDHCA for approval. TDHCA will review the Tenant Selection Plan for compliance with existing Tenant Selection Criteria requirements, and consistent with TDHCA’s Section 811 PRA Participant Selection Plan.
3. Tenant Eligibility and Selection. The Owner is responsible for ultimate eligibility and selection of an Eligible Tenant and will comply with the following:

A. The Owner must accept referrals of an Eligible Tenant from TDHCA and retain copies of all applications received. The Owner is responsible for notifying the prospective Eligible Tenant and TDHCA in writing regarding any denial of a prospective Eligible Tenant’s application to an Eligible Multifamily Property and the reason for said denial. In the notice of denial, the Owner is responsible for notifying the Eligible Tenant of the right to dispute a denial, as outlined in
Eligible

(B) The Owner is responsible for determining age of the qualifying member of the Eligible Families. Eligible Family member must be at least 18 years of age and under the age of 62.

(C) The Owner is responsible for criminal background screening as required by HUD Handbook 4350.3.

(D) Verification of Income. The Owner is responsible for determining income of Eligible Families. The Owner shall verify income through the Enterprise Income Verification (EIV) System. The Owner must certify an Eligible Tenant and Eligible Families at least annually and verify their income. If the household is also designated under the Housing Tax Credit or other Department administered program, the Owner must obtain third party, or first hand, verification of income in addition to using the EIV system.

(h) Rental Assistance Contracts.

(1) Applicability. If requested by TDHCA, the Owner shall enter into a RAC. Not all properties with an Owner Participation Agreement will have a RAC, but when notified by TDHCA, the Eligible Multifamily Property must enter into a RAC(s) and begin serving Eligible Applicants.

(2) Notice. TDHCA will provide written notice to the Owner if and when it intends to enter into a RAC with the Owner.

(3) Assisted Units. TDHCA will determine the number of Units (up to the maximum listed in the Property Agreement) to place in the RAC(s) which may be fewer than the number of Units identified in the Property Agreement.

(4) TDHCA will designate the bedroom composition of the Assisted Units, as required by the RAC. However, based on an actual Eligible Tenant, this may fluctuate. It is possible that an Eligible Multifamily Property will have a RAC for fewer units than the number committed in the Participation Agreement.

(5) If no additional applicants are referred to the property, the RAC may be amended to reduce the number of Assisted Units. Owners who have an executed RAC must continue to notify TDHCA of any vacancies for units not under a RAC if additional units were committed under the Agreement. For instance, if the Owner has committed 10 units under the Agreement and only has a RAC for five Assisted Units, the Owner must continue to notify TDHCA of all vacancies until there is a RAC for 10 Assisted Units.

(6) Amendments. The Owner agrees to amend the RAC(s) upon request of TDHCA. Some examples are amendments that may either increase or decrease the total number of Assisted Units or increase or decrease the associated bedroom sizes; multiple amendments to the RAC may occur over time. The total number of Assisted Units in the RAC will not exceed the number of Assisted Units committed in the Participation Agreement, unless by request of the Owner.

(7) Contract Term. TDHCA will specify the effective date of the RAC. During the first year of the RAC and with approval from HUD, the Owner may request to align the anniversary date of the RAC with existing federal or state housing programs layered on the Eligible Multifamily Property.

(8) Rent Increase. Owners must submit a written request to TDHCA 30 days prior to the anniversary date of the RAC to request an annual increase.

(9) Utility Allowance. The RAC will identify the TDHCA approved Utility Allowance being used for the Assisted Units for the Eligible Multifamily Property. The Owner must notify TDHCA if there are changes to the Utility Allowance calculation methodology being used.

(10) Termination. Although TDHCA has discretion to terminate a RAC due to good cause, an Owner cannot opt-out of a RAC. The RAC survives a foreclosure, assignment, sale in lieu of foreclosure, or sale of the Eligible Multifamily Property to the extent allowed by law.

(11) Foreclosure of Eligible Multifamily Property. Upon foreclosure, assignment, sale in lieu of foreclosure, or sale of the Eligible Multifamily Property to the extent allowed by law:

(A) The RAC shall be transferred to new owner by contractual agreement or by the new owner’s consent to comply with the RAC, as applicable;

(B) Rental Assistance Payments will continue uninterrupted in accordance with the terms of the RAC; and

(C) Voluntary and involuntary transfers or conveyances of property must adhere to the ownership transfer process in 10 TAC §10.406, (as amended), regarding Ownership Transfer requests.

(i) Advertising and Affirmative Marketing.

(1) Advertising Materials. Upon the execution of the Property Agreement, the Owner must provide materials for the purpose of advertising the Eligible Multifamily Property, including but not limited to:

(A) Depictions of the units including floor plans;

(B) Brochures;

(C) Tenant selection criteria;

(D) House rules;

(E) Number and size of available units;

(F) Number of units with accessible features (including, but not limited to units designed to meet Uniform Federal Accessibility Standards, the Fair Housing Act, or the Americans with Disabilities Act);

(G) Documentation on access to transportation and commercial facilities; and

(H) A description of onsite amenities.

(2) Affirmative Marketing. TDHCA and its service partners will be responsible for affirmatively marketing the Program to Eligible Applicants.

(3) At any time, TDHCA may choose to advertise the Eligible Multifamily Property, even if the Eligible Multifamily Property has not yet entered into a RAC.

(j) Leasing Activities.

(1) Segregation of Assisted Units. The Owner must take actions or adopt procedures to ensure that the Assisted Units are not segregated to one area of a building (such as in a particular floor or part of a floor in a building) or in certain sections within the Eligible Multifamily Property.

(2) Form of Lease. The Owner will use the HUD Section 811 PRA Model Lease (HUD-92236-PRA), Exhibit 11 of the Cooperative Agreement and any Department approved Addendums, for all Eligible Families once a RAC is signed. The initial lease will be for not less than one year.

(3) Communication. Owners are required to document in writing all communication between the Eligible Tenant and the Owner,
or Owner-designated agent regarding applications, notifications, evictions, complaints, non-renewals and move outs.

(4) Lease Renewals and Changes. The Owner must notify TDHCA of renewals of leases with Eligible Families and any changes to the terms of the lease.

(k) Rent.

(1) Tenant Rent Payment. The Owner is responsible for remitting any Tenant Rent payment due to the Eligible Tenant if the Utility Allowance exceeds the Total Tenant Payment. The Owner will determine the Tenant Rent payment of the Eligible Tenant, based on HUD Handbook 4350.3, and is responsible for collecting the Tenant Rent payment.

(2) Rent Increase. Owner must provide the Eligible Tenant with at least 30 days notice before increasing rent.

(3) Rent Restrictions. Owner will comply with the following rent restrictions:

(A) If the Development has a TDHCA enforced rent restriction that is equal to or lower than Fair Market Rent (FMR), the initial rent is the maximum TDHCA enforced rent restriction at the Development.

(B) If there is no existing TDHCA enforced rent restriction on the Unit, or the existing TDHCA enforced rent restriction is higher than FMR, TDHCA will work with the Owner to conduct a market analysis of the Eligible Multifamily Property to support that a rent higher than FMR is attainable.

(C) After the signing of the original RAC with TDHCA, the Owner may request a new anniversary date to be consistent with other rent restrictions on the Eligible Multifamily Property allowed by TDHCA.

(D) After the signing of the original RAC, upon request from the Owner to TDHCA, Rents may be adjusted on the anniversary date of the RAC.

(E) Adjustments may not result in higher rents charged for an Assisted Unit as compared to a non-assisted unit. The calculation or methodology used for the annual increase amount will be identified in the Eligible Multifamily Property’s RAC.

(F) Owner can submit a request for a rent increase or to change the contract anniversary date using HUD Form 92458.

(l) Vacancy; Transfers; Eviction; Household Changes.

(1) Holding Assisted Units. Once an Owner signs a RAC, the Eligible Multifamily Property must hold an available Assisted Unit for 60 days while a qualified Eligible Applicant applies for and moves into the Assisted Unit.

(2) Notification. Owner will notify TDHCA of determination of ineligibility or the termination of any participating Eligible Families or any member of a participating Eligible Family.

(3) Initial Lease-up. Owners of newly constructed, acquired or [and/or] rehabilitated Eligible Multifamily Property must notify TDHCA no later than 180 days before the Eligible Multifamily Property will be available for initial move-in.

(4) Vacancy. Once a RAC is executed, the Owner must notify TDHCA of the vacancy of any Unit, including those that have not previously been occupied by an Eligible Tenant, as soon as possible, not to exceed seven calendar days from when the Owner learns that an Assisted Unit will become available. TDHCA will acknowledge receipt of the notice by responding to the Owner in writing within three business days from when the notice is received by the Department stating whether or not TDHCA will be accepting the available Unit, and making a subsequent referral for the Unit. If the qualifying Eligible Tenant vacates the Assisted Unit, TDHCA will determine if the remaining family members are eligible for continued assistance from the Program.

(5) Vacancy Payment. An Owner of an Eligible Multifamily Property that is not under a RAC may not receive a vacancy payment. TDHCA may make vacancy payments not to exceed 80% of the Contract Rent, during this time to the Eligible Multifamily Property, potentially for up to 60 days. After 60 days, the Owner may lease that Assisted Unit to a non-Eligible Tenant.

(6) Household Changes; Transfers. Owners must notify TDHCA if the Eligible Tenant requests an Assisted Unit transfer. Owner will notify TDHCA of any household changes in an Assisted Unit within three business days. If the Owner determines that, because of a change in household size, an Assisted Unit is smaller than appropriate for the Eligible Tenant to which it is leased or that the Assisted Unit is larger than appropriate, the Owner shall refer to TDHCA’s written policies regarding family size, unit transfers, and waitlist management. If the household is determined by TDHCA to no longer be eligible, TDHCA will notify the Owner. Rental Assistance Payments with respect to the Assisted Unit will not be reduced or terminated until the eligible household has been transferred to an appropriately sized Assisted Unit.

(7) Eviction and Nonrenewal. Owners are required to notify the Department by sending a copy of the applicable notice via email to the 811 TDHCA Point of Contact, as identified in the Owner Participation Agreement, at least three calendar days before providing a Notice to Vacate or a Notice of Nonrenewal to the Tenant.

(m) Construction Standards, Accessibility, Inspections and Monitoring.

(1) Construction Standards. Upon execution of a RAC, the Eligible Multifamily Property shall be required to conform to Uniform Physical Conditions Standards (UPCS) which are uniform national standards established by HUD for housing that is decent, safe, sanitary, and in good repair. The site, building exterior, building systems, dwelling units and common areas of the Eligible Multifamily Property, as more specifically described in 24 CFR §5.703, must be inspected in any physical inspection of the property.

(2) Inspection. Prior to occupancy, the Eligible Tenant must be given the opportunity to be present for the move-in unit inspection.

(3) Repair and Maintenance. Owner will perform all repair and maintenance functions, including ordinary and extraordinary maintenance; will replace capital items; and will maintain the premises and equipment, appurtenant thereto, in good repair, safe and sanitary condition consistent with HUD and TDHCA requirements.

(4) Accessibility. Owner must ensure that the Eligible Multifamily Property will meet or exceed the accessibility requirements under 24 CFR Part 8, which implements Section 504 of the Rehabilitation Act of 1973; the Fair Housing Act Design Manual; Titles II and III of the Americans with Disabilities Act (42 U.S.C. §§12131 - 12189), as implemented by the U.S. Department of Justice regulations at 28 CFR Parts 35 and 36; and the Federal Fair Housing Act as implemented by HUD at 24 CFR Part 100. However, Assisted Units can consist of a mix of accessible units for those persons with physical disabilities and non-accessible units for those persons without physical disabilities.
(n) Owner Training. The Owner is obligated to train all property management staff on the requirements of the Program. The Owner will ensure that any new property management staff who is involved in serving Eligible Families review training materials found on the Program's webpage including webinars, manuals and checklists.

(o) Reporting Requirements. Owner shall submit to TDHCA such reports on the operation and performance of the Program as required by the Participation Agreement and as may be required by TDHCA. Owner shall provide TDHCA with all reports necessary for TDHCA's compliance with 24 CFR Part 5, or any other federal or state law or regulation.

(p) Environmental Laws and Regulations.

(1) Compliance with Laws and Regulations. Owner must comply with, as applicable, any federal, state, or local law, statute, ordinance, or regulation, whether now or hereafter in effect, pertaining to health, industrial hygiene, or the environmental conditions on, under, or about the Land or the Improvements, including without limitation, the following, as now or hereafter amended:

(A) Hazardous Materials Transportation Act (49 U.S.C.A. §1801 et seq.);

(B) Insecticide Fungicide and Rodenticide Act (7 U.S.C.A. §136 et seq.);

(C) National Environmental Policy Act (42 U.S.C. §4321 et seq.) (NEPA);


(E) Resource, Conservation and Recovery Act (24 U.S.C. §6901 et seq.) (RCRA);

(F) Toxic Substances Control Act, (15 U.S.C. §2601 et seq.);

(G) Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. §1101 et seq.);

(H) Clean Air Act (42 U.S.C. §7401 et seq.) (CAA);

(I) Federal Water Pollution Control Act and amendments (33 U.S.C. §1251 et seq.) (Clean Water Act or CWA);

(J) Any corresponding state laws or ordinances including but not limited to Chapter 26 of the Texas Water Code regarding Water Quality Control;


(L) Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act (Chapter 363 of the Texas Health & Safety Code);

(M) County Solid Waste Control Act (Chapter 364 of the Texas Health & Safety Code);

(N) Texas Clean Air Act (Chapter 382 of the Texas Health & Safety Code);

(O) Hazardous Communication Act (Chapter 502 of the Texas Health & Safety Code); and

(P) Regulations, rules, guidelines, or standards promulgated pursuant to such laws, statute and regulations, as such statutes, regulations, rules, guidelines, and standards, as amended from time to time.

(2) Environmental Review. The environmental effects of each activity carried out with funds provided under this Agreement must be assessed in accordance with the provisions of the Program Requirements, National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. §4321 et seq.). Each such activity must have an environmental review completed and support documentation prepared in accordance with 10 TAC §10.305 complying with the NEPA, including screening for vapor encroachment following American Society for Testing and Materials (ASTM) 2600-10.

(q) Labor Standards.

(1) Owner understands and acknowledges that every contract for the construction (rehabilitation, adaptive reuse, or new construction) of housing that includes 12 or more units assisted with Program funds must contain provisions in accordance with Davis-Bacon Regulations.


(3) Owner further acknowledges that if more housing units are constructed than the anticipated 11 or fewer housing units, it is the Owner's responsibility to ensure that all the housing units will comply with these federal labor standards and requirements under the Davis-Bacon Act as supplemented by the U.S. Department of Labor regulations ("Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction" at 29 CFR Part 5).

(4) Owner also understands that structuring the proposed assistance for the rehabilitation or construction of housing under this Agreement to avoid the applicability of the Davis-Bacon Act is prohibited.

(5) Construction contractors and subcontractors must comply with regulations issued under these federal acts described herein, with other federal laws, regulations pertaining to labor standards, including but not limited to "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction" at 29 CFR Part 5, HUD Federal Labor Provisions (HUD form 4010).

(r) Lead-Based Paint. Housing assisted with Program funds is subject to the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§4821 - 4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. §4851 - 4856), and implementing regulations Title X of the 1992 Housing and Community Development Act at 24 CFR Part 35, (including subparts A, B, J, K, M and R). Owner shall also comply with the Lead: Renovation, Repair, and Painting Program Final Rule, 40 CFR Part 745 and Response to Children with Environmental Intervention Blood Lead Levels. Failure to comply with the lead-based paint requirements may be subject to sanctions and penalties pursuant to 24 CFR §35.170.

(s) Limited English Proficiency. Owner shall comply with the requirements in Executive Order 13166 of August 11, 2000, reprinted at 65 FR 50121, August 16, 2000, Improving Access to Services for Persons with Limited English Proficiency and 67 FR 41455. To ensure compliance the Owner must take reasonable steps to assure that LEP persons have meaningful access to the program and activities. Meaningful access may entail providing language assistance services, including oral and written translation, where necessary.
(i) Procurement of Recovered Materials. Owner, its subrecipients, and its contractors must comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired by the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.


(v) Nondiscrimination, Fair Housing, Equal Access and Equal Opportunity.

(1) Equal Opportunity. The Owner agrees to carry out an Equal Employment Opportunity Program in keeping with the principles as provided in President's Executive Order 11246 of September 24, 1965, as amended, and its implementing regulations at 41 CFR Part 60.

(2) Fair Housing Poster. The Owner is required to place a fair housing poster (HUD-928,1 and HUD-9281.A) provided by TDHCA in the leasing office, online, or anywhere else rental activities occur pursuant to 24 CFR §200.620(e). A copy of the poster in Spanish and in English can be found at http://www.tdhca.state.tx.us/sec-


(4) Affirmatively Furthering Fair Housing. By Owner's execution of the Agreement and pursuant to Section 808(e)(5) of the Fair Housing Act, Owner agrees to use funds in a manner that follows the State of Texas' "Analysis of Impediments" or "Assessment of Fair Housing", as applicable and as amended, and will maintain records in this regard.

(5) Protections for Victims of Domestic Violence, Dating Violence, Sexual Assault, or Stalking. Subpart L of 24 CFR part 5 shall apply to the Assisted Units in Eligible Multifamily Properties.

(w) Security of Confidential Information.

(1) Systems Confidentiality Protocols. Owner must undertake customary and industry standard efforts to ensure that the systems developed and utilized under this Agreement protect the confidentiality of every Eligible Applicant's and Eligible Tenant's personal and financial information, both electronic and paper, including credit reports, whether the information is received from the Eligible Applicants, Tenants or from another source. Owner must undertake customary and industry standard efforts so that neither they nor their systems vendors disclose any Eligible Applicant's or Tenant's personal or financial information to any third party, except for authorized personnel in accordance with this Agreement.

(2) Protected Health Information. If Owner collects or receives documentation for disability, medical records or any other medical information in the course of administering the Program, Owner shall comply with the Protected Health Information state and federal laws and regulations, as applicable, under 10 TAC §1.24, (relating to Protected Health Information), Chapter 181 of the Texas Health and Safety Code, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104-191, 110 Stat. 1936, enacted August 21, 1996), and the HIPAA Privacy Rules (45 CFR Part 160 and Subparts A and E of 45 CFR Part 164). When accessing confidential information under this Program, Owner hereby acknowledges and further agrees to comply with the requirements under the Interagency Data Use Agreement between TDHCA and the Texas Health and Human Services Agencies dated October 1, 2015, as amended.

(x) Real Property Acquisition and Relocation. Except as otherwise provided by federal statute, HUD-assisted programs or projects are subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act or URA) (42 U.S.C. §4601), and the government wide implementing regulations issued by the U.S. Department of Transportation at 49 CFR Part 24. The Uniform Act's protections and assistance apply to acquisitions of real property and displacements resulting from the acquisition, rehabilitation, or demolition of real property for federal or federally assisted programs or projects. With certain limited exceptions, real property acquisitions for a HUD-assisted program or project must comply with 49 CFR Part 24, Subpart B. To be exempt from the URA's acquisition policies, real property acquisitions conducted without the threat or use of eminent domain, commonly referred to as voluntary acquisitions, the Owner must satisfy the applicable requirements of 49 CFR §24.101(b)(1) - (5). Evidence of compliance with these requirements must be maintained by the recipient. The URA's relocation requirements remain applicable to any tenant who is displaced by an acquisition that meets the requirements of 49 CFR §24.101(b)(1) - (5). The relocation requirements of the Uniform Act, and its implementing regulations at 49 CFR Part 24, cover any person who moves permanently from real property or moves personal property from real property as a direct result of acquisition, rehabilitation, or demolition for a program or project receiving HUD assistance. While there are no statutory provisions for temporary relocation under the URA, the URA regulations recognize that there are circumstances where a person will not be permanently displaced but may need to be moved from a project for a short period of time. Appendix A of the URA regulation (49 CFR §24.2(a)(9)(ii)(D)) explains that any tenant who has been temporarily relocated for a period beyond one year must be contacted by the displacing agency and offered URA relocation assistance.

(y) Dispute Resolution; Conflict Management.

(1) Eligible Tenant Disputes. The Owner or Owner's representative is required to participate in a Dispute Resolution process, as required by HUD, to resolve an appeal of an Eligible Tenant dispute with the Owner.
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(2) Agreement Disputes. In accordance with Tex. Gov't Code 2306.082, it is TDHCA's policy to encourage the use of appropriate alternative dispute resolution procedures (ADR) under the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act (Chapters 2009 and 2006 respectively, Tex. Gov't Code), to assist in the fair and expeditious resolution of internal and external disputes involving the TDHCA and the use of negotiated rulemaking procedures for the adoption of TDHCA rules. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by TDHCA's ex parte communications policy, TDHCA encourages informal communications between TDHCA staff and the Owner, to exchange information and informally resolve disputes. TDHCA also has administrative appeals processes to fairly and expeditiously resolve disputes. If at any time the Owner would like to engage TDHCA in an ADR procedure, the Owner may send a proposal to TDHCA's Dispute Resolution Coordinator. For additional information on TDHCA's ADR policy, see TDHCA's Alternative Dispute Resolution and Negotiated Rulemaking at 10 TAC §1.17.

(3) Conflict Management. The purpose of the Conflict Management process is to address any concerns that Owner or Owner's agent or representative may have with an Eligible Family. At any time, an Eligible Family may choose to give consent to their Section 811 service coordinator to work directly with the property manager of the Eligible Multifamily Property. However, such consent cannot be made a condition of tenancy.

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 December 13, 2019.

TRD-201904806

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: January 26, 2020

For further information, please call: (512) 475-1762

CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER F. COMPLIANCE MONITORING

10 TAC §§10.602 - 10.605, 10.607, 10.609 - 10.618, 10.622-10.625

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to 10 TAC §10.602 Notice to Owners and Corrective Action Periods; §10.605 Elections under IRC §42(g); §10.607 Reporting Requirements; §10.609 Notices to the Department; §10.610 Written Policies and Procedures; §10.611 Determination, Documentation and Certification of Annual Income; §10.612 Tenant File Requirements; §10.613 Lease Requirements; §10.614 Utility Allowances; §10.615 Elections under IRC §42(g) and Additional Income and Rent Restrictions for HTC, Exchange, and TCAP Developments; §10.616 Household Unit Transfer Requirements for All Programs; §10.617 Affirmative Marketing Requirements; §10.618 Onsite Monitoring; §10.622 Special Rules Regarding Rents and Rent Limit Violations; §10.623 Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period; §10.624 Compliance Requirements for Developments with 811 PRA Units; and Figure §10.625. The amendments clarify the requirements of the Section 811 PRA program, delete unnecessary requirements, delete requirements related to written policies and procedures and refer readers to the new section of the TAC where that information is being relocated, require the application used by owners screen for veteran status and provide information, define the circumstances under which an Owner may change the designation given a household at the time of move in, in deregulated areas require a rate that is available for 12 months when calculating a utility allowance, delete requirements related to affirmative marketing and refer readers to the new section of the TAC where that information is being relocated notify Owners of HOME, TCAP RF and NHTF that if their Land Use Restriction Agreement requires a specific Unit mix that staff will confirm compliance with the exact requirements, and prohibits rent increases during a lease term.

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

a. GOVERNMENT GROWTH IMPACT STATEMENT REOUIRED BY TEX. GOV'T CODE §2001.0221.

1. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed amendments would be in effect, the proposed amendments do not create or eliminate a government program, but relates to changes to an existing activity, compliance monitoring.

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

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

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

5. The proposed amendments are not creating a new regulation.

6. The proposed amendments will not repeal an existing regulation.

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

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

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

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

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed amendments do not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.
d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV’T CODE §2001.024(a)(6).

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV’T CODE §2001.024(a)(5). Mr. Wilkinson has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amended sections would be an updated and more germane rule. There will not be economic costs to individuals required to comply with the repealed section.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held December 27, 2019, to January 27, 2020, to receive input on the proposed amended sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Patricia Murphy, Rule Comments, P.O. Box 139341, Austin, Texas 78711-3941 or email patricia.murphy@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, JANUARY 27, 2020.

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


(a) The Department will provide written notice to the Owner if the Department does not receive the Annual Owner Compliance Report (AOCR) timely or if the Department discovers through monitoring, audit, inspection, review, or any other manner that the Development is not in compliance with the provisions of the LURA, deed restrictions, application for funding, conditions imposed by the Department, this subchapter, or other program rules and regulations, including but not limited to §42 of the Internal Revenue Code.

(b) For a violation other than a violation that poses an imminent hazard or threat to health and safety, the notice will specify a 30 day Corrective Action Period for noncompliance related to [failure to file] the AOCR, and a 90 day Corrective Action Period for other violations. During the Corrective Action Period, the Owner has the opportunity to show that either the Development was never in noncompliance or that the Event of Noncompliance has been corrected. Documentation of correction must be received during the Corrective Action Period for an event to be considered corrected during the Corrective Action Period. The Department may extend the Corrective Action Period for up to six months from the date of the notice to the Development Owner only if there is good cause for granting an extension and the Owner [owner] requests an extension during the original 90 day Corrective Action Period, and the request would not cause the Department or the Owner to miss a federal deadline. Requests for an extension may be submitted to: compliance.extensionrequest@tdhca.state.tx.us. If an Owner submits evidence of corrective action during the Corrective Action Period that addresses each finding, but does not fully address all findings, the Department will give the Owner written notice and an additional 10 calendar day period to submit evidence of full corrective action. References in this subchapter to the Corrective Action Period include this additional 10 calendar day period.

(c) If any communication to the Owner under this section is returned to the Department as refused, unclaimed, or undeliverable, the Development may be considered not in compliance without further notice to the Owner. The Owner is responsible for providing the Department with current contact information, including address(es) (physical and electronic) and phone number(s). The Owner must also provide current contact information to the Department as required by §1.22 of this title (relating to Providing Contact Information to the Department), and ensure that such information is at all times current and correct.

d. Treasury Regulations require the Department to notify Housing Tax Credit Owners of upcoming reviews and instances of noncompliance. The Department will rely solely on the information supplied by the Owner in the Department’s web-based Compliance Monitoring and Tracking System (CMTS) to meet this requirement. It is the Owner’s sole responsibility to ensure at all times that such information is current, accurate, and complete. Correspondence sent to the email or physical address shown in CMTS will be deemed delivered to the Owner. Correspondence from the Department may be directly uploaded to the property’s CMTS account using the secure electronic document attachment system. Once uploaded, notification of the attachment will be sent electronically to the email address listed in CMTS. The Department is not required to send a paper copy, and if it does so it does as a voluntary and non-precedential courtesy only.

(e) Unless otherwise required by law or regulation, Events of Noncompliance will not be reported to the IRS, referred for enforcement action, considered as cause for possible debarment, or reported to an applicant’s compliance history or Previous Participation Review [previous participation review] , until after the end of the Corrective Action Period described in this section.

(f) Upon receipt of facially valid complaints the Department may contact the Owner and request submission of documents or written explanations to address the issues raised by the complainant. The deadline to respond to the issue will be specific to the matter. Whenever possible and not otherwise prohibited or limited by law, regulation, or court order, the complaint received by the Department will be provided along with the request for documents or Owner response.

§10.605. Elections under IRC §42(g).

(a) Under the Code, HTC Development Owners elect a minimum set-aside requirement of 20/50 (20% of the Units restricted at the 50% income and rent limits), 40/60 (40% of the Units restricted at the 60% income and rent limits), or the average income test.

(b) HTC projects must meet the required election under IRC §42(g) no later than the end of the first year of the Credit Period. [Developments in the first year of the credit period that elect the average income test should lease Units in a manner to ensure that at all times, the average income and rent of the occupied units at the project does not exceed 60%. Example 605(1): A 100 Unit project places in service in April. If by October of that year, 50 of the Units are occupied and the other 50 have never been occupied, the designations of the 50 occupied Units must be equal to or less than 60% AMI and the percentage represented at application.]

(c) An Owner [Owners] that elects [elect] the average income test under IRC §42(g) must disperse 20%, 30%, 40%, 50%, 60%, 70%, and 80% Unit designations across all Unit Types to the greatest extent feasible, and in a manner that does not violate fair housing laws.
§10.607. Reporting Requirements.

(a) The Department requires reports to be submitted electronically through CMTS [the Department's web-based Compliance Monitoring and Tracking System (CMTS)] and in the format prescribed by the Department. The Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Accountants of Accounts forms must be emailed to cmts.requests@tdhca.state.tx.us [filed] for:

(1) 9% Housing Tax Credit Developments - no later than the date prescribed in §10.402(g) of this chapter (relating to the 10% Test);

(2) 4% Housing Tax Credit Developments - no later than the date prescribed in §10.402(e) of this chapter (relating to Post Bond Closing Documentation requirements); or

(3) For all other rental Developments [multifamily developments], no later than September 1st of the year following the award.

(b) Each Development is required to submit an Annual Owner's Compliance Report (AOCR). Depending on the Development, some or all of the Report must be submitted. The first AOCR is due the second year following the award in accordance with the deadlines set out in subsection (c) of this section. Example 607(1): A Development was allocated Housing Tax Credits in July 2015. The first report is due April 30, 2017, even if the Development has not yet commenced leasing activities.

(c) The AOCR is comprised of four parts:

(1) Part A "Owner's Certification of Program Compliance." All Owners must annually certify compliance with applicable program requirements. The AOCR Part A shall include answers to all questions required by the U. S. Department of the Treasury to be addressed, including those required by Treasury Regulation 1.42-5(b)(1) or the applicable program rules;

(2) Part B "Unit Status Report." All Developments must annually report and certify the information related to individual household income, rent, certification dates and other necessary data to ensure compliance with applicable program regulations. In addition, Owners are required to report on the race and ethnicity, family composition, age, use of rental assistance, disability status, and monthly rental payments of individuals and families applying for and receiving assistance or if the household elects not to disclose the information, such election;

(3) Part C "Housing for Persons with Disabilities." The Department is required to establish a system that requires Owners of state or federally assisted housing Developments with 20 or more housing Units to report information regarding housing Units designed for persons with disabilities. The certified answers to the questions on Part C satisfy this requirement; and

(4) Part D "Form 8703." Tax exempt bond properties must file Form 8703 each calendar year of the qualified project period. The form is due to the IRS by March 31 after the close of the calendar year for which the certification is made. The Department requires Tax Exempt Bond Development Owners to submit a copy of the filed Form 8703 for the preceding calendar year.

(d) The Owner [owner] is required to report certain financial information to the Department electronically through CMTS. If supplemental information is required, it must be uploaded to the Development's CMTS account.

§10.608. Notices to the Department.

If any of the events described in paragraphs (1) - (7) [paragraphs (4) - (6)] of this section occur, written notice must be provided to the Department within the respective timeframes. Failure to do so will result in an Event of Noncompliance, a [finding of noncompliance] and may be taken into consideration during Previous Participation Reviews [previous participation reviews] in accordance with Chapter 1 Subchapter C of this title, or in Enforcement [enforcement] actions in accordance with Chapter 2 of this title.

(1) "Annual Owner's Financial Certification" (formerly Part D of the AOCR). Developments funded by the Department must annually provide and certify to the data requested in the Annual Owner's Financial Certification (AOFC).

(2) Developments funded with Exchange or TCAP must also submit a "Quarterly Owner's Financial Certification" and these must be submitted in January, April, July, and October on the 15th business day of the month.

(c) Parts A, B, C, and D of the AOCR and the Annual Owner's Financial Certification must be provided to the Department no later than April 30th of each year, reporting data current as of December 31st of the previous year (the reporting year).

(f) Periodic Unit Status Reports. All Developments must submit a Quarterly Unit Status Report to the Department through the Compliance Monitoring and Tracking System. Quarterly reports are due in January, April, July, and October on the 10th day of the month. The report must report occupancy as of the last day of the previous month for the reporting period. For example, the report due October 10th should report occupancy as of September 30th of the preceding month. The first quarterly report is due on the first quarterly reporting date after leasing activity commences. Failure to report occupancy timely will result in a finding of noncompliance.

(g) Owners are encouraged to continuously maintain current resident data in the Department's CMTS. Under certain circumstances, such as in the event of a natural disaster, the Department may alter the reporting schedule and require all Developments to provide current occupancy data through CMTS.

(h) All rental Developments funded or administered by the Department will be required to submit a current Unit Status Report prior to an onsite monitoring visit.
losses) or Notice of Disaster Casualty Loss (specific to loss as a result of a Presidentially Declared Disaster);

(3) Owners of Bond Developments shall notify the Department of the date on which 10% of the Units are occupied and the date on which 50% of the Units are occupied, and notice must occur within 90 days of each such date;

(4) Within 30 days after a foreclosure, the Department must be provided with documentation evidencing the foreclosure and a rent roll establishing occupancy on the day of the foreclosure; [and]

(5) Within 10 days of a change in the contact information (including contact persons, physical addresses, mailing addresses, email addresses, phone numbers, and/or the name of the property as known by the public) for the Ownership entity, management company, and/or Development the Department's CMTS must be updated;

(6) Within 30 days of completion of the American Institute of Architects form G704- Certificate of Substantial Completion, or Form HUD-92485 for instances in which a federally insured HUD loan is utilized, an Owner must request a Final Construction Inspection; and

(7) Owners of Developments that participate in the Section 811 PRA program are required to notify the Department about the availability of Units [units] as described in §10.624 of this chapter.

§10.610. Written Policies and Procedures.

Written Policies and Procedures are a requirement of the Department on monitored Developments as provided for in more specificity at §10.802 of this chapter (relating to Written Policies and Procedures).

(a) The purpose of this section is to outline policies and/or procedures that are required to have written documentation. If an owner fails to follow their written policies and procedures it will be cited as noncompliance with this section.

(1) Owners must inform applicants/tenants in writing, at the time of application or other action described in this section, that such policies/procedures are available, and that the Owner will provide copies upon request to applicants/tenants or their representatives.

(2) The Owner must have all policies and related documentation required by this section available in the leasing office and anywhere else where applications are taken. Developments that accept electronic applications must post to their website the tenant selection criteria and the TDHCA application form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation."

(3) All policies must have an effective date. Any changes require a new effective date.

(4) In general, policies cannot be applied retroactively. Tenants who already reside in the development or applicants on the wait list at the time new or revised tenant selection criteria are applied and who are otherwise in good standing under the lease or wait list, must not receive notices of termination or non-renewal based solely on their failure to meet the new or revised tenant selection criteria or be passed over on the wait list. However, criteria related to program eligibility may be applied retroactively when a market development receives a new award of tax credits, federal or state funds and a household is not eligible under the new program requirements, or when prior criteria violate federal or state law.

(b) Tenant Selection Criteria. Owners must maintain written Tenant Selection Criteria. The criteria under which an applicant was screened must be included in the household's file.

(1) The criteria must be reasonably related to the applicant's ability to perform under the lease and include:

(A) Requirements that determine an applicant's basic eligibility for the property, including any preferences, restrictions, and any other tenancy requirements. The tenant selection criteria must specifically list:

(i) The income and rent limits;

(ii) When applicable, restrictions on student occupancy and any exceptions to those restrictions; and

(iii) Fees and/or deposits required as part of the application process. Developments with HOME, NHTF, NSP, Section 811 and/or TCAP RF units cannot collect an application deposit for units designated under these programs. Owners of HTC, TCAP and Exchange Developments are discouraged from collecting an application deposit. If an application deposit is collected it must soon after be converted into a refundable security deposit. No fees or deposits may be collected to place a household or applicant on a waiting list.

(B) Applicant screening criteria, including what is screened and what scores or findings would result in ineligibility.

(C) Occupancy Standards. If fewer than two persons (over the age of six) per bedroom for each rental unit are required for reasons other than those directed by local building code or safety regulations, a written justification must be provided.

(D) The following statement: Screening criteria will be applied in a manner consistent with all applicable laws, including the Texas and Federal Fair Housing Acts, the Federal Fair Credit Reporting Act, program guidelines, and the Department's rules.

(E) Specific age requirements if the Development is operating as an Elderly Property either under the Housing for Older Persons Act of 1995 as amended (HOPA), or the age related eligibly criteria required by its use of federal funds.

(2) The criteria must not:

(A) Include preferences for admission. A property may not have a preference unless it is either in a recorded LURA which has been approved by the Department or is required by a program in which the Owner is participating which requires the preference. Owners that include preferences in their leasing criteria due to other federal financing must provide either written approval from HUD, USDA, or VA for such preference or identify the statute, written agreement, or federal guidance documentation that permits the adoption of this preference;

(B) Exclude an individual or family from admission to the Development solely because the household participates in the HOME Tenant Based Rental Assistance Program, the housing choice voucher program under Section 8, United States Housing Act of 1937 (42 U.S.C. §1-437), or other federal, state, or local government rental assistance program. If an Owner adopts a minimum income standard for households participating in a voucher program, it is limited to the greater of a monthly income of 2.5 times the household's share of the total monthly rent amount or $2,500 annually; or

(C) In accordance with VAWA, deny admission on the basis that the applicant has been a victim of domestic violence, dating violence, sexual assault, or stalking.
If the Development is funded with HOME, TCAP RF, NHTF, or NSP funds, in accordance with 24 CFR §93.356 and 24 CFR §92.359, the criteria may have a preference for persons who have experienced domestic violence, dating violence, sexual assault, or stalking.

(c) Reasonable Accommodations Policy. Owners must maintain a written Reasonable Accommodations policy. The policy must be maintained at the Development. Owners are responsible for ensuring that their employees and contracted third party management companies are aware of and comply with the reasonable accommodation policy.

(1) The policy must provide:

(A) Information on how an applicant or current resident with a disability may request a reasonable accommodation; and

(B) A timeframe in which the Owner will respond to a request that is compliant with 10 TAC §1.204(b)(3) and (d) (relating to Reasonable Accommodations).

(2) The policy must not:

(A) Require a household to make a reasonable accommodation request in writing;

(B) Require a household whose need is readily apparent to provide third party documentation of a disability;

(C) Require a household to provide specific medical or disability information other than the disability verification that may be requested to verify eligibility for reasonable accommodation;

(D) Exclude a household with person(s) with disabilities from admission to the Development because an accessible unit is not currently available; or

(E) Require a household to rent a unit that has already been made accessible.

(d) Wait List Policy. Owners must maintain a written wait list policy, regardless of current unit availability. The policy must be maintained at the Development.

(1) The policy must include procedures the Development uses in:

(A) Opening, closing, and selecting applicants from the wait list;

(B) Determining how lawful preferences are applied; and

(C) Procedures for prioritizing applicants needing accessible units in accordance with 24 CFR §8.27 and Chapter 1, Subchapter B of this title.

(2) Developments with additional rent and occupancy restrictions must maintain a waiting list for their lower rent restricted units. The Development's wait list policy must inform applicants and current residents of the availability of lower rent units and the process for renting a lower rent unit. Unless otherwise approved at application, underwriting and cost certification, all unit sizes must be available at the lower rent limits. The wait list policy for Developments with lower rent restricted units must address how the waiting list for their lower rent restricted units will be managed and must include policies regarding changes in income that address the options available in §10.615 of this subchapter. The policy must not give a preference to prospective applicants over existing households. However, a Development may, but is not required to, prioritize existing households over prospective applicants.

(e) Developments that elect the income averaging test and all Developments with additional rent and occupancy restrictions must have written policies regarding changes in income that address the options available in §10.615 of this subchapter.

(f) Denied Application Policies. Owners must maintain a written policy regarding procedures for denying applications and notifying denied applicants of their rights.

(1) The policy must address the manner by which rejections of applications will be handled, including timeframes and appeal procedures, if any.

(2) Within seven days after the determination is made to deny an application, the owner must provide any rejected or ineligible applicant that completed the application process a written notification of the grounds for rejection. The written notification must include:

(A) The specific reason for the denial and reference the specific leasing criteria upon which the denial is based;

(B) Contact information for any third parties that provided the information on which the rejection was based and information on the appeals process, if one is used by the Development. An appeals procedure is required for HOME Developments that are owned by Community Housing Development Organizations, and units at Developments that lease units under the Department's Section 811-PRA program. The appeals process must provide a 14 day period for the applicant to contest the reason for the denial and comply with other requirements of the HUD Handbook 4350.3 4-9; and

(C) The TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation."

(3) The Development must keep a log of all denied applicants that completed the application process to include:

(A) Basic household demographic and rental assistance information, if requested during any part of the application process;

(B) The specific reason for which an applicant was denied, the date the decision was made; and

(C) The date the denial notice was mailed or hand-delivered to the applicant.

(4) A file of all rejected applications must be maintained the length of time specified in the applicable program's recordkeeping requirements and include:

(A) A copy of the written notice of denial; and

(B) The Tenant Selection Criteria policy under which an applicant was screened.

(5) If an 811 applicant is being denied, within three calendar days the Department point of contact must be notified and provided with a copy of the written notice that was provided to the applicant.

(g) Non-renewal and/or Termination Notices. Owners must maintain a written policy regarding procedures for providing households non-renewal and termination notices.

(1) The owner must provide in any non-renewal or termination notice, a specific and lawful reason for the termination or non-renewal.

(2) The notification must:

(A) Be delivered as required under applicable program rules.
[(B)] Include the TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation." To avoid providing applicants and residents with duplicate information, TDHCA administered Developments layered with other federal funds are permitted to amend the TDHCA VAWA forms to incorporate requirements of other funders. However, none of the information included in the TDHCA created form may be omitted.

[(C)] State how a person with a disability may request a reasonable accommodation in relation to such notice; and

[(D)] Include information on the appeals process if one is used by the property.

[(h)] Unit Transfer Policies. Owners must maintain a written policy regarding procedures for households to request a unit transfer. The policy must address the following:

[(1)] How security deposits will be handled for both the current unit and the new unit;

[(2)] How transfers related to a reasonable accommodation will be addressed; and

[(3)] For HTC Developments, how transfers will be handled with regard to the multiple building project election on IRS Form(s) 8609 line 8(b) and accompanying statements in accordance with §10.616 of this subchapter, concerning Household Unit Transfer Requirements for All Programs.

[(i)] At the time of application Owners must provide each adult in the household the TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation." To avoid providing applicants and residents with duplicate information, TDHCA administered Developments layered with other federal funds are permitted to amend the TDHCA VAWA forms to incorporate requirements of other funders. However, none of the information included in the TDHCA created form may be omitted.

[(j)] HTC Developments that have elected average income test must describe in their leasing criteria how units will be leased and inform applicants of the set asides that the Development offers. Owners must disperse 20%, 30%, 40%, 50%, 60%, 70%, and 80% units designations across all unit types in a manner that does not violate fair housing laws. HTC Developments that have elected the income averaging test must maintain separate waiting lists for each of the set asides offered by the Development. The waiting lists must be available to both existing households and prospective tenants. The Development cannot provide a preference for applicants over existing households. The Development is not required to place existing households that receive rental assistance on a waiting list for a lower rent unit. Owners are encouraged to designate households that receive rental assistance at the level indicated by the contract rent for the unit.

[(k)] Developments that participate in the Section 811 program must have a written EIV policy that includes security practices and complies with the HUD Handbook 4350.3, Chapter 9. Owners are discouraged from adopting policies that exceed the minimum requirements established by HUD.

[(l)] Policies and procedures will be reviewed during monitoring visits, through resident complaints or through an owner initiated written policies and procedures review. Owners may request a review of the written policies and procedures for a portfolio of Developments by submitting a request to wpp@tdhca.state.tx.us. After review by the Department, Owners may make non-substantive changes to their policies. Significant changes to reviewed policies without Department approval may result in findings of noncompliance.

[(m)] Development Owners must allow applicants to submit applications via mail and at the Development site or leasing office; if the Development is electronically equipped, the Development may also allow applications to be submitted via email, website form, or fax. The Development's tenant selection criteria must state available alternate means of submission and include address, email, or other necessary contact information on the form or its attached leasing criteria.

§10.611. Determination, Documentation and Certification of Annual Income.

(a) For all rental programs administered by the Department, annual income shall be determined consistent with the Section 8 Program administered by HUD, using the definitions of annual income described in 24 CFR §5.609 as further described in the HUD Handbook 4350.3, as amended from time to time. For the Housing Tax Credit program, where there is a conflict between the HUD Handbook 4350.3 and the IRS Guide for Completing IRS Form 8823, the IRS guidance will be controlling. At the time of program designation as a low income [low-income] household, Owners must certify and document household income. In general, all low income [low-income] households must be certified prior to move in. Certification and documentation of household income is an Owner's responsibility, even if the Owner is using a manager's services to handle tenant intake and leasing. Accordingly, Owners should ensure that they hire competent and properly trained managers and that they exercise appropriate oversight of any manager's activities.

(b) For the initial certification of a household residing in a HOME, NHTF, NSF, or TCAP RF assisted unit at a Development committed HOME funds after August 23, 2013, Owners [owners] must examine at least two months of source documents evidencing annual income (e.g., wage statement, interest statement, unemployment compensation).

(c) A household's income designation at the time of move in cannot be changed unless:

(1) The household goes over income and they are replaced with another low income household;

(2) The Development has a written policy and procedure for changing household designations as household income changes;

(3) The household receives rental assistance, and due to changes in their income, their portion of required rent exceeds the rent limit of their move in designation;

(4) The household is designated as Market Rate and a certification is performed that completely and clearly documents that the household is qualified as low income; or

(5) The household has been designated as low income and they become, or it is determined that they have been, an ineligible full time student household. If the Development has Units that do not have student restrictions, the household can continue occupancy, and their designation may be removed.

§10.612. Tenant File Requirements.

(a) At the time of program designation as a low income [low-income] household, typically at initial occupancy, Owners must create and maintain a file at that a minimum contains:

(1) A Department approved Income Certification form signed by all adults. At the time of program designation as a low income [low-income] household, Owners must certify and document

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household income. In general, all low-income households must be certified prior to move in. The Department requires the use of the TD-HCA Income Certification form, unless the Development [properties] also participates in the Rural Development or a Project Based HUD Program, in which case, the other program's Income Certification form will be accepted;

(2) Documentation to support the Income Certification form including, but not limited to, applications, first hand or third party verification of income and assets, and documentation of student status (if applicable). The application must provide a space for applicants to indicate if they are a veteran. In addition, the application must include the following statement: "Important Information for Former Military Services Members. Women and men who served in any branch of the United States Armed Forces, including, Army, Navy, Marines, Coast Guard, Reserves or National Guard, may be eligible for additional benefits and services. For more information please visit the Texas Veterans Portal at https://veterans.portal.texas.gov/.

(3) The Department permits Owners to use check stubs or other firsthand documentation of income and assets provided by the applicant or household in lieu of third party verification forms. It is not necessary to first attempt to obtain a third party verification form. Owners should scrutinize these documents to identify and address any obvious attempts at forgery, alteration, or generation of falsified documents; and

(4) [4] A lease with all necessary addendums to ensure that compliance with applicable federal regulations and §10.613 of this subchapter [chapter] (relating to Lease Requirements).

(b) Annually thereafter on the anniversary date of the household's move in or initial designation:

(1) Throughout the Affordability Period, all Owners of Housing Tax Credit, TCAP, and Exchange Developments must collect and maintain current data on each household that includes the number of household members, age, ethnicity, race, disability status, and rental assistance (if any). This information can be collected on the Department's Annual Eligibility Certification form or the Income Certification form or HUD Income Certification form or USDA Income Certification form.

(2) During the Compliance Period for all Housing Tax Credit, TCAP, and Exchange Developments and throughout the Affordability Period [affordability period] for all Bond developments and HOME, [NSP] and TCAP RF Developments [committed funds after August 23, 2013], Owners must collect and maintain current student status data for each low-income household. This information must be collected within 120 days before the anniversary of the effective date of the original student verification and can be collected on the Department's Annual Eligibility Certification or the Department's Certification of Student Eligibility form or the Department's Income Certification form. Throughout the Compliance Period for HTC, TCAP, and Exchange developments, low-income households comprised entirely of full-time students must qualify for a HTC program exception, and supporting documentation must be maintained in the household's file. For Bond Developments [developments], if the household is not an eligible student household, it may be possible to re-designate the full-time student household to an Eligible Tenant (ET). For HOME [NSP] and TCAP RF Developments [committed funds after August 23, 2013], an individual does not qualify as a low income [low-income] or very low income [low-income] family if the individual is a student who is not eligible to receive Section 8 assistance under 24 CFR §§5.612.

(3) The types of Developments [properties] described in subparagraphs (A) - (D) of this paragraph are required to recertify annually the income of each low-income household using a Department approved Income Certification form and documentation to support the Income Certification (see subsection (a)(1) - (2) of this section):

(A) Mixed income Housing Tax Credit, TCAP and Exchange projects (as defined by line 8(b) of IRS Form(s) 8609 and accompanying statements, if any) that have not completed the 15 year Compliance Period.

(B) All Bond Developments [developments] with less than 100% of the units set aside for households with an income less than 50% or 60% of area median income.

(C) THTF [HTE] Developments with Market Rate units. However, THTF [HTE] Developments with other Department administered programs will comply with the requirements of the other program.

(D) HOME, TCAP RF, and NHTF Developments. Refer to subsection (c) of this section.

(c) Ongoing tenant file requirements for HOME, [and] TCAP RF, and NHTF Developments:

(1) HOME, TCAP RF, and NHTF Developments must complete a recertification with verifications of each [HOME] assisted Unit every sixth year of the Development's affordability period. The recertification is due on the anniversary of the household's move-in date. For purposes of this section the beginning of a HOME, TCAP RF and NHTF Development affordability period is the effective date in [on the first page of] the HOME, TCAP RF, and NHTF LURA. For example, a HOME Development with a LURA effective date of May 2011, will have the years of the affordability determined in Example 612(1):

(A) Year 1: May 15, 2011 - May 14, 2012;

(B) Year 2: May 15, 2012 - May 14, 2013;

(C) Year 3: May 15, 2013 - May 14, 2014;

(D) Year 4: May 15, 2014 - May 14, 2015;

(E) Year 5: May 15, 2015 - May 14, 2016;

(F) Year 6: May 15, 2016 - May 14, 2017;

(G) Year 7: May 15, 2017 - May 14, 2018;

(H) Year 8: May 15, 2018 - May 14, 2019;

(I) Year 9: May 15, 2019 - May 14, 2020;

(J) Year 10: May 15, 2020 - May 14, 2021;

(K) Year 11: May 15, 2021 - May 14, 2022; and


(2) In the scenario described in paragraph (1) of this subsection, all households in HOME, TCAP RF, and NHTF Units must be recertified with source documentation during the sixth and twelfth years or between May 15, 2016, to May 14, 2017, and between May 15, 2022, and May 14, 2023.

(3) In the intervening years the Development must collect a self certification by the effective date of the original Income Certification from each household that is assisted with HOME, TCAP RF, and NHTF funds. The Development must use the Department's Income Certification form, unless the property also participates in the Rural Development or a Project Based HUD program, in which case, the other program's Income Certification form will be accepted. If the household reports on their self certification that their annual income exceeds the current 80% applicable income limit or there is evidence that the
household's written statement failed to completely and accurately provide information about the household's characteristics and/or income, then an annual income recertification with verifications is required.

(d) Tenant File requirements for Section 811 PRA Units [units]. Files for households assisted under the Section 811 program must document the household's eligibility for the program, the deductions for which the household qualifies and the following HUD forms:

(1) Section 811 Project Rental Assistance Application;
(2) Verification of disability, HUD 90102;
(3) House Rules;
(4) Move in move out inspection form HUD 90106, or TD-HCA Section 811 Waiver of Move-in;

[[5] TDHCA Section 811 Waiver of Move-in inspection;]
[[6] Damages (Security deposit Deductions);]
[[7] Tenant acknowledgement of the Fact Sheet "How your rent is determined";
[[8] Tenant acknowledgement of Resident Rights and Responsibilities;

(7) [9] Tenant acknowledgement of EIV and You Brochure;
(8) [[10] Verification of Age;
(9) [[11] Verification of Social Security number;
(10) [[12] Screening for drug abuse and other criminal activity;
(11) [[13] 811 Tenant Selection Plan;
(12) [[14] Supplement to Application for Federally Assisted Housing: Form 92006;
(13) [[15] Annual Recertification Initial Notice;
(14) [[16] Annual Recertification First Reminder Notice;
(15) [[17] Annual Recertification Second Reminder Notice;
(16) [[18] Annual Recertification Third Reminder Notice;
(17) [[19] Race and Ethnic Data Reporting form: HUD 27061-H;
(18) [[20] HUD 9887 and HUD 9887-A;
(19) [[21] Annual Unit [unit] inspection;
(20) [[22] Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures: HUD form 50059; and
(21) [[23] HUD Model lease 92336-PRA.

§10.613. Lease Requirements.

(a) Eviction and/or termination of a lease. HTC, TCAP, and Exchange Developments must specifically state in the lease or in an addendum attached to the lease that evictions or terminations of tenancy for other than good cause are prohibited. To terminate tenancy, the Owner must serve written notice to the tenant specifying the tenancy period for Transitional Housing [transitional housing] (if applicable), or for other good cause. It must be specifically stated in the lease or in an addendum attached to the lease that evictions or non-renewal of leases for other than good cause are prohibited (24 CFR §92.253 and 24 CFR §93.303). Owners must also comply with all other lease requirements and prohibitions stated in 24 CFR §92.253 or 24 CFR §93.303, as applicable. To terminate or refuse to renew tenancy in HOME, TCAP RF, and NSF Developments, the Owner must serve written notice to the tenant specifying the grounds for the action at least 30 days before the termination of tenancy.

(c) In accordance with the Violence Against Women Act, an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking against the documented victim of such actual or threatened domestic violence, dating violence, sexual assault, or stalking shall not be construed as a serious or repeated violation of a lease or good cause for termination of tenancy. The Department does not determine if an Owner has good cause or if a resident has violated the lease terms for other reasons. Challenges for evictions or terminations of tenancy must be made by a court of competent jurisdiction or an agreement of the parties (including an agreement made in arbitration), and the Department will rely on that determination.

(d) A Development [Developments] must use a lease or lease addendum that requires households to report changes in student status.

(e) Owners of HTC Developments are prohibited from locking out or threatening to lock out any Development resident, except by judicial process, unless the exclusion is necessary for the purpose of performing repairs or construction work, or in cases of emergency. Owners are further prohibited from seizing or threatening to seize the personal property of a resident except by judicial process unless the resident has abandoned the premises. These prohibitions must be included in the lease or lease addendum.

(f) For HOME, TCAP, TCAP RF, NHTF, 811 PRA, and NSF Developments, properties that were initially built for occupancy prior to 1978 must include in their lease or lease addendum a Lead Warning Statement. To demonstrate compliance, the Department will monitor that all households at HOME, TCAP, TCAP RF, NHTF, and NSF Developments have signed the Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. (24 CFR §92.355, 24 CFR §93.361 and §570.487(c)). The addendum and disclosure are not required if all lead has been certified to have been cleared from the Development in accordance with 24 CFR §35.130, and the Owner has the required certification in its on-site records.

(g) An Owner [All Owners] may bifurcate a lease to terminate the tenancy of an individual who is a tenant or lawful occupant and engages in criminal activity directly related to domestic violence, dating violence, sexual assault, or stalking against another lawful occupant living in the [Unit] or other affiliated individual as defined in the VAWA 2013.

(h) All NHTF, TCAP RF, NSF, [811 PRA], and HOME Developments for which the contract is executed on or after December 16, 2016, must use the Department created VAWA lease addendum which provides the ability for the tenant to terminate the lease without penalty if the Department determines that the tenant qualifies for an emergency transfer under 24 CFR §5.2005(e). 811 PRA Units are prohibited from using the expired 2005 VAWA lease addendum. After OMB approval of a VAWA lease addendum, all 811 PRA households must have a valid and executed VAWA lease addendum. For the 811 PRA program certain addenda for the HUD model lease may be required such as Lead Based Paint Disclosure form, house rules, and pet rules. No other attachments to the lease are permissible without approval from the Department's 811 PRA staff.
(i) Leasing of HOME, [NSP def] TCAP RF, or NHTF Units [units] to an organization that, in turn, rents those Units [units] to individuals is not permissible for Developments with contracts dated on or after August 23, 2013. Leases must be between the Development and an eligible household. NSP Developments may only utilize Master Leases if specifically allowed in the Development’s LURA.

(j) Housing Tax Credit Units [units] leased to an organization through a supportive housing program where the [Owners] receives a rental payment for the unit regardless of physical occupancy will be found out of compliance if the Unit [unit] remains vacant for over 60 days. The Unit [unit] will be found out of compliance under the Event of Noncompliance [finding] “Violation of the Unit Vacancy Rule.”

(k) It is a Development Owner’s responsibility at all times to know what it has agreed to provide by way of common amenities, Unit [unit] amenities, and services.

(l) A Development Owner shall post in a common area of the leasing office a [unlaminated] copy and provide each household, during the application process and upon a subsequent change to the items described in paragraph (2) of this subsection, the brochure made available by the Department, A Tenant Rights and Resources Guide, which includes:

(1) Information about Fair Housing and tenant choice;

(2) Information regarding common amenities, Unit [unit] amenities, and services; and

(3) A certification that a representative of the household must sign prior to, but no more than 120 days prior to, the initial lease execution acknowledging receipt of this brochure.

(4) In the event this brochure is not provided timely or the household does not certify to receipt of the brochure, correction will be achieved by providing the household with the brochure and receiving a signed certification that it was received.

(m) For Section 811 PRA Units [units], Owners must use the HUD Model lease, HUD form 92236-PRA.


(a) Purpose. The purpose of this section is to provide the guidelines for calculating a Utility Allowance under the Department’s multifamily programs. The Department will cite noncompliance and/or not approve a Utility Allowance if it is not calculated in accordance with this section. Owners are required to comply with the provisions of this section as well as any existing federal or state program guidance.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. Other capitalized terms used in this section herein have the meanings assigned in Chapters 1, 2, 10, 11, and 12 of this title.

(1) Building Type. The HUD Office of Public and Indian Housing (PIH) characterizes building and Unit [unit] configurations for HUD programs. The Department will defer to the guidance provided by HUD found at: http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11608.pdf (or successor Uniform Resource Locator (URL)) when making determinations regarding the appropriate building type(s) at a Development.

(2) Power to Choose. The Public Utility Commission of Texas database of retail electric providers in the areas of the state where the sale of electricity is open to retail competition: http://www.powertochoose.org/ (or successor URL). In areas of the state where electric service is deregulated, the Department will verify the availability of residential service directly with the Utility Provider. If the Utility Provider is not listed as a provider of residential service in the Development’s ZIP code for an area that is deregulated, the request will not be approved.

(3) Component Charges. The actual cost associated with the billing of a residential utility. Each Utility Provider may publish specific utility service information in varying formats depending on the service area. Such costs include, but are not limited to:

(A) Rate(s). The cost for the actual unit of measure for the utility (e.g., cost per kilowatt hour for electricity);

(B) Fees. The cost associated with a residential utility that is incurred regardless of the amount of the utility the household consumes (e.g., Customer Charge); and

(C) Taxes. Taxes for electricity and gas are regulated by the Texas Comptroller of Public Accounts and can be found http://comptroller.texas.gov/ (or successor URL). Local Utility Providers have control of the tax structure related to water, sewer and trash. To identify if taxes are imposed for these utilities, obtain documentation directly from the Utility Provider.

(4) Multifamily Direct Loan (MFDL). Funds provided through the HOME Program (HOME), Neighborhood Stabilization Program (NSP), National Housing Trust Fund (NHTF), Repayments from the Tax Credit Assistance Program (TCAP RF), or other program available through the Department, local political subdivision, or administering agency for multifamily development that require a Utility Allowance. MFDLs may also include deferred forgivable loans or other similar direct funding, regardless if it is required to be repaid. Housing Tax Credits, Tax Exempt Bonds, and Project Based Vouchers are not MFDLs.

(5) Renewable Source. Energy produced from energy property described in IRC §48 or IRC §45(d)(1) through (4), (6), (9), or (11). The manner in which a resident is billed is limited to the rate at which the local Utility Provider would have charged the residents for the utility if that entity had provided it to them, and as may be further limited by the Texas Utilities Code or by regulation.

(6) Submetered Utility. A utility purchased from or through a local Utility Provider by the building Owner where the resident is billed directly by Owner of the building or to a third party billing company and the utility is:

(A) Based on the residents’ actual consumption of that utility and not an allocation method or Ratio Utility Billing System (RUBS); and

(B) The rate at which the utility is billed does not exceed the rate incurred by the building Owner for that utility.

(7) Utility Allowance. An estimate of the expected monthly cost of any utility for which a resident is financially responsible, other than telephone, cable television, or internet.

(A) For HTC, TCAP, Exchange buildings, Bonds [s] and NHTF [HHTF] include:

(i) Utilities paid by the resident directly to the Utility Provider;

(ii) Submetered Utilities; and

(iii) Renewable Source Utilities.

(B) For a Development with an MFDL, unless otherwise prescribed in the program’s Regulatory Agreement, include all utilities regardless of how they are paid.
(8) Utility Provider. The company that provides residential utility service (e.g., electric, gas, water, wastewater, and/or trash) to the buildings.

c) Methods. The following options are available to establish a Utility Allowance for all programs except Developments funded with MFDL funds, which are addressed in subsection (d) of this section.

(1) Rural Housing Services (RHS) buildings or buildings with RHS assisted residents. The applicable Utility Allowance for the Development will be determined under the method prescribed by the RHS (or successor agency). No other utility method described in this section can be used by RHS buildings or buildings with RHS assisted residents.

(2) HUD-Regulated buildings layered with any Department program. If neither the building nor any resident in the building receives RHS rental assistance payments, and the rents and the Utility Allowances of the building are regulated by HUD (HUD-regulated building), the applicable Utility Allowance for all rent restricted Units in the building is the applicable HUD Utility Allowance. No other utility method described in this section can be used by HUD-regulated buildings. Unless further guidance is received from the U.S. Department of Treasury or the Internal Revenue Service (IRS), the Department considers Developments awarded an MFDL (e.g., HOME) to be HUD-Regulated buildings.

(3) Other Buildings. For all other rent-restricted Units, Development Owners must use one of the methods described in subparagraphs (A) - (E) of this paragraph:

(A) Public Housing Authority (PHA). The Utility Allowance established by the applicable PHA for the Housing Choice Voucher Program. The Department will utilize the Texas Local Government Code, Chapter 392 to determine which PHA is the most applicable to the Development.

(i) If the PHA publishes different schedules based on Building Type, the Owner is responsible for implementing the correct schedule based on the Development's Building Type(s). Example 614(1): The applicable PHA publishes a separate Utility Allowance schedule for Apartments (5+ Units [units]), one for Duplex/Townhomes and another for Single Family Homes. The Development consists of 20 buildings, 10 of which are Apartments (5+ Units [units]) and the other 10 buildings are Duplexes. The Owner must use the correct schedule for each Building Type.

(ii) In the event the PHA publishes a Utility Allowance schedule specifically for energy efficient Units [units], and the Owner desires to use such a schedule, the Owner must demonstrate that the building(s) meet the housing authority's specifications for energy efficiency once every five years.

(iii) If the applicable PHA allowance lists flat fees for any utility, those flat fees must be included in the calculation of the Utility Allowance if the resident is responsible for that utility.

(iv) If the individual components of a Utility Allowance are not in whole number format, the correct way to calculate the total allowance is to add each amount and then round the total up to the next whole dollar. Example 614(2): Electric cooking is $8.63, Electric Heating is $5.27, Other Electric is $24.39, Water and Sewer is $15. The Utility Allowance in this example is $54.00.

(v) If an Owner chooses to implement a methodology as described in subparagraph (B), (C), (D), or (E) of this paragraph, for Units occupied by Section 8 voucher holders, the Utility Allowance remains the applicable PHA Utility Allowance established by the PHA from which the household's voucher is received.

(vi) If the Development is located in an area that does not have a municipal, county, or regional housing authority that publishes a Utility Allowance schedule for the Housing Choice Voucher Program, Owners must select an alternative methodology, unless the building(s) is located in the published Housing Choice Voucher service area of:

(I) A Council of Government created under Texas Local Government Code, Chapter 303, that operates a Housing Choice Voucher Program;

(II) The Department's Housing Choice Voucher Program; or

(III) Another PHA which publishes a separate utility allowance schedule specific to the Development's location.

(B) Written Local Estimate. The estimate must come from the local Utility Provider, be signed by the Utility Provider representative, and specifically include all Component Charges for providing the utility service. In deregulated areas, the rate plan used to calculate the estimate must have a term of at least 12 months.

(C) HUD Utility Schedule Model. The HUD Utility Schedule Model and related resources can be found at http://www.huduser.gov/portal/resources/utallowance.html (or successor URL). Each item on the schedule must be displayed out two decimal places. The total allowance must be rounded up to the next whole dollar amount. The Component Charges used can be no older than those in effect 60 days prior to the beginning of the 90 day period described in subsection (f)(3) of this section related to Effective Dates.

(i) The allowance must be calculated using the MS Excel version available at http://www.huduser.gov/portal/resources/utilmodel.html (or successor URL), as updated from time to time, with no changes or adjustments made other than entry of the required information needed to complete the model.

(ii) In the event that the PHA code for the local PHA to the Development is not listed in "Location" tab of the workbook, the Department will use the PHA code for the PHA that is closest in distance to the Development using online mapping tools (e.g., MapQuest).

(iii) Green Discount. If the Owner elects any of the Green Discount options for a Development, documentation to evidence that the Units [units] and the buildings meet the Green Discount standard as prescribed in the model is required for the initial approval and every subsequent annual review.

(I) In the event the allowance is being calculated for an application of Department funding (e.g., 9% Housing Tax Credits), upon request, the Department will provide both the Green Discount and the non-Green Discount results for application purposes.

(II) At lease up, the Owner [owner] may use the utility allowance taking into consideration the green discount if they obtain written documentation from a qualified professional (e.g., a qualified energy efficiency consultant) indicating that the Units [units] and buildings will meet the qualifications for the Green Discount within six months of the placed in service date or for MFDL within six months of the construction completion date.

(iv) Do not take into consideration any costs (e.g., penalty) or credits that a consumer would incur because of their actual usage. Example 614(3): The Electric Fact Label for ABC Electric Utility Provider provides a Credit Line of $40 per billing cycle that is applied to the bill when the usage is greater than 999 kWh and less than [that] 2000 kWh. Example 614(4): A monthly minimum usage fee of $9.95 is applied when the usage is less than 1000 kWh in the
billing cycle. When calculating the allowance, disregard these types of costs or credits.

(i) In deregulated areas, the rate plan used to calculate the allowance must have a term of at least 12 months.

(D) Energy Consumption Model. The model must be calculated by a properly licensed mechanical engineer. The individual must not be related to the Owner within the meaning of §267(b) or §707(b) of the Code. The utility consumption estimate must, at minimum, take into consideration specific factors that include, but are not limited to, Unit size, building type and orientation, design and materials, mechanical systems, appliances, characteristics of building location, and available historical data. In deregulated areas, the rate plan used to calculate the allowance must have a term of at least 12 months. Component Charges used must be no older than in effect 60 days prior to the beginning of the 90 day period described in subsection (f)(3) of this section related to Effective Dates; and

(E) An allowance based upon an average of the actual use of similarly constructed and sized Units in the building using actual utility usage data and Component Charges, provided that the Development Owner has the written permission of the Department. This methodology is referred to as the "Actual Use Method." For a Development Owner to use the Actual Use Method they must:

(i) Provide a minimum sample size of usage data for at least five Continuously Occupied Units of each Unit Type or 20% of each Unit Type, whichever is greater. If there are less than five Units of any Unit Type, data for 100% of the Unit Type must be provided; and

(ii) Upload the information in subclauses (I) - (IV) of this clause to the Development's CMTS account no later than the beginning of the 90 day period after which the Owner intends to implement the allowance, reflecting data no older than 60 days prior to the 90 day implementation period described in subsection (f)(3) of this section related to Effective Dates.

(I) An Excel spreadsheet listing each Unit for which data was obtained to meet the minimum sample size requirement of a Unit Type, the number of bedrooms, bathrooms and square footage for each Unit, the household's move-in date, the utility usage (e.g., actual kilowatt usage for electricity) for each month of the 12 month period for each Unit for which data was obtained, and the Component Charges in place at the time of the submission;

(II) All documentation obtained from the Utility Provider (or billing entity for the utility provider) and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider;

(III) The rent roll showing occupancy as of the end of the month for the month in which the data was requested from the utility provider; and

(IV) Documentation of the current Utility Allowance used by the Development.

(iii) Upon receipt of the required information, the Department will determine if the Development Owner has provided the minimum information necessary to calculate an allowance using the Actual Use Method. If so, the Department shall calculate the Utility Allowance for each bedroom size using the guidelines described in subclauses (I) - (V) of this clause;

(I) If data is obtained for more than the sample requirement for the Unit Type, all data will be used to calculate the allowance;

(II) If more than 12 months of data is provided for any Unit, only the data for the most current 12 will be averaged;

(III) The allowance will be calculated by multiplying the average units of measure for the applicable utility (i.e., kilowatts over the last 12 months by the current rate) for all Unit Types within that bedroom size. For example, if sufficient data is supplied for 18 two bedroom/one bath Units, and 12 two bedroom/two bath Units, the data for all 30 Units will be averaged to calculate the allowance for all two bedroom Units;

(IV) The allowance will be rounded up to the next whole dollar amount. If allowances are calculated for different utilities, each utility's allowance will be rounded up to the next whole dollar amount and then added together for the total allowance; and

(V) If the data submitted indicates zero usage for any month, the data for that Unit will not be used to calculate the Utility Allowance.

(iv) The Department will complete its evaluation and calculation within 45 days of receipt of all the information requested in clause (ii) of this subparagraph;

(d) In accordance with 24 CFR §§92.252 and 93.302, for an MFBD in which the Department is the funding source, the Utility Allowance will be established in the following manner:

(1) For Developments that, as a result of funding, must calculate the Utility Allowance under HUD Multifamily Notice H-2015-4, as revised from time to time, the applicable Utility Allowance for all rent restricted Units in the building is the applicable Utility Allowance calculated under that Notice. No other utility method described in this section can be used.

(2) Other Buildings. The Utility Allowance may be initiated by the Owner using the methodologies described in subsection (c)(3)(B), (C), (D), or (E) of this section related to Methods.

(3) If a request is not received by October 1st, the Department will calculate the Utility Allowance using the HUD Utility Schedule Model. For property specific data, the Department will use:

(A) The information submitted in the Annual Owner's Compliance Report;

(B) Entrance Interview Questionnaires submitted with prior onsite reviews; or

(C) The Owner [owner] may be contacted and required to complete the Utility Allowance Questionnaire. In such case, a five day period will be provided to return the completed questionnaire.

(D) Utilities will be evaluated in the following manner:

(i) For regulated utilities, the Department will contact the Utility Provider directly and apply the Component Charges in effect no later than 60 days before the allowance will be effective.

(ii) For deregulated utilities:

(I) The Department will use the Power to Choose website and search available Utility Providers by ZIP code;

(II) The plan chosen will be the median cost per kWh based on average price per kWh for the average monthly use of 1000 kWh of all available plans of at least 12 months; and

(III) The actual Component Charges from the plan chosen in effect no later than 60 days before the allowance will be effective will be entered into the Model.
(E) The Department will notify the Owner contact in CMTS of the new allowance and provide the backup for how the allowance was calculated. The Owner [owner] will be provided a five day period to review the Department's calculation and note any errors. Only errors related to the physical characteristics of the building(s) and utilities paid by the residents will be reconsidered; the utility plan and Utility Provider selected by the Department and Component Charges used in calculating the allowance will not be changed. During this five day period, the Owner [owner] also has the opportunity to submit documentation and request use of any of the available Green Discounts.

(F) The allowance must be implemented for rent due in all program Units [units] thirty days after the Department notifies the Owner of the allowance.

(4) HTC Buildings in which there are Units [units] under an MFDL program are considered HUD-Regulated buildings and the applicable Utility Allowance for all rent restricted Units in the building is the Utility Allowance calculated under the MFDL program. No other utility method described in this section can be used by HUD-regulated buildings. If the Department is not the awarding jurisdiction, Owners are required to obtain the Utility Allowance established by the awarding jurisdiction, and to document all efforts to obtain such allowance to evidence due diligence in the event that the jurisdiction is not responsive. In such an event, provided that, sufficient evidence of due diligence is demonstrated, the Department, in its sole discretion, may allow for the use of the methods described in subsection (c)(3)(A)–(F), (C), [AE], (D), or (E) of this section related to Methods to calculate and establish its utility allowance.

(e) Acceptable Documentation. For the Methods where utility specific information is required to calculate the allowance (e.g., base charges, cost per unit of measure, taxes) Owners should obtain documentation directly from the Utility Provider and/or Regulating State Agency. If the allowance is for a building in a deregulated area, the utility rate selected for use in calculation must have a term of at least 12 months, unless the allowance is calculated using the method described in subsection (c)(3)(E) of this section, in which case the Unit's effective utility rate will be used regardless of the rate's term. Any Component Charges related to the utility that are published by the Utility Provider and/or Regulating State Agency must be included. In the case where a utility is billed to the Owner of the building(s) and the Owner is billing residents through a third party billing company, the Component Charges published by the Utility Provider and not the third party billing company will be used.

(f) Changes in the Utility Allowance. An Owner may not change Utility Allowance methods, start or stop charging residents for a utility without prior written approval from the Department. Example 614(5): A Housing Tax Credit Development has been paying for water and sewer since the beginning of the Compliance Period. In year eight, the Owner decides to require residents to pay for water and sewer. Prior written approval from the Department is required. Any such request must include the Utility Allowance Questionnaire found on the Department's website and supporting documentation.

(1) The Department will review all requests, with the exception of the methodology prescribed in subsection (c)(3)(E) of this section related to Methods, within 90 days of the receipt of the request.

(2) If the Owner fails to post the notice to the residents and simultaneously submit the request to the Department by the beginning of the 90 day period, the Department's approval or denial will be delayed for up to 90 days after Department notification. Example 614(6): The Owner has chosen to calculate the electric portion of the Utility Allowance using the written local estimate. The annual letter is dated July 5, 2014, and the notice to the residents was posted in the leasing office on July 5, 2014. However, the Owner failed to submit the request to the Department for review until September 15, 2014. Although the Notice to the Residents was dated the date of the letter from the utility provider, the Department was not provided the full 90 days for review. As a result, the allowance cannot be implemented by the Owner [owner] until approved by the Department.

(3) Effective dates. If the Owner uses the methodologies as described in subsection (c)(3)(A) of this section related to Methods, any changes to the allowance can be implemented immediately, but must be implemented for rent due at least 90 days after the change. For methodologies as described in subsection (c)(3)(B), (C), (D) and (E) of this section related to Methods, the allowance cannot be implemented until the estimate is submitted to the Department and is made available to the residents by posting in a common area of the leasing office at the Development. This action must be taken by the beginning of the 90 day period in which the Owner intends to implement the Utility Allowance. Nothing in this section prohibits an Owner from reducing a resident's rent prior to the end of the 90 day period when the proposed allowance would result in a gross rent issue. Figure: 10 TAC §10.614(f)(3) (No change.)

(g) Requirements for Annual Review.

(1) RHS and HUD-Regulated Buildings. Owners must demonstrate that the utility allowance has been reviewed annually and in accordance with the RHS or HUD regulations.

(2) Buildings using the PHA Allowance. Owners are responsible for periodically determining if the applicable PHA released an updated schedule to ensure timely implementation. When the allowance changes or a new allowance is made available by the PHA, it can be implemented immediately, but must be implemented for rent due 90 days after the PHA releases an updated schedule.

(3) Written Local Estimate, HUD Utility Model Schedule and Energy Consumption Model. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than October 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review. At the same time the request is submitted to the Department, the Owner must post, at the Development, the Utility Allowance estimate in a common area of the leasing office where such notice is unobstructed and visible in plain sight. The Department will review the request for compliance with all applicable requirements and reasonableness. If, in comparison to other approved Utility Allowances for properties of similar size, construction and population in the same geographic area, the allowance does not appear reasonable or appears understated, the Department may require additional support and/or deny the request.

(4) Actual Use Method. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than August 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review.

(h) For Owners participating in the Department's Section 811 Project Rental Assistance (PRA) Program, the Department will establish the Utility Allowance for all 811 PRA Units [units]. On an annual basis, the Department will calculate a Utility Allowance and provide the Owner with a property-specific rent schedule containing the approved Utility Allowance. The allowance listed on the rent schedule only applies to 811 PRA Units [units], not the entire building, and is the only allowance approved for use on 811 PRA Units [units].
(i) Combining Methods. In general, Owners may combine any methodology described in this section for each utility service type paid directly by the resident and not by or through the Owner of the building (e.g., electric, gas). For example, if residents are responsible for electricity and gas, an Owner may use the appropriate PHA allowance to determine the gas portion of the allowance and use the Actual Use Method to determine the electric portion of the allowance. RHS and certain HUD-Regulated buildings (e.g., buildings with HOME/TCAP RF funds) are not allowed to combine methodologies.

(j) The Owner shall maintain and make available for inspection by the resident all documentation, including, but not limited to, the data, underlying assumptions and methodology that was used to calculate the allowance. Records shall be made available at the resident manager’s office during reasonable business hours or, if there is no resident manager, at the dwelling Unit of the resident at the convenience of both the Owner and resident.

(k) Utility Allowances for Applications.

(1) If the application includes RHS assisted buildings or tenants, the utility allowance is prescribed by the RHS program. No other method is allowed.

(2) If the application includes HUD-Regulated buildings for HUD programs other than an MFDDL program the applicable Utility Allowance for all rent restricted Units in the building is the applicable HUD Utility Allowance. No other utility method is allowed.

(3) If the application includes MFDDL funds from the Department, Applicants may calculate the utility allowance in accordance with subsection (c)(3)(B), (C), (D), or (E) of this section related to Methods. Applicants must submit their utility allowance to the Compliance Division prior to full application submission. In the event that the application has an MFDDL from the Department, and receives federal funds from a unit of local government, the Department will require the use of the allowance approved by the Department.

(4) If the application includes federal funds from a unit of local government but no MFDDL from the Department, Applicants are required to request in writing the Utility Allowance from the awarding jurisdiction. If the awarding jurisdiction does not respond or requests the Department to calculate the allowance, the Department will establish the initial Utility Allowance in accordance with subsection (d)(3) of this section.

(5) For all other applications, Applicants may calculate the utility allowance in accordance with subsection (c)(3)(A), (B), (C), (D), or (E) of this section related to Methods.

(A) Upon request, the Compliance Division will calculate or review an allowance within 21 days but no earlier than 90 days from when the application is due.

(B) Example 614(8): An application for a 9% HTC is due March 1, 2017. The applicant would like Department approval to use an alternative method by February 15, 2017. The request must be submitted to the Compliance Division no later than January 25, 2017, three weeks before February 15, 2017.

(C) Example 614(9): An Applicant intends to submit an application for a 4% HTC with Tax Exempt Bonds on August 11, 2017, and would like to use an alternative method. Because approval is needed prior to application submission, the request can be submitted no earlier than May 13, 2017, (90 days prior to August 11, 2017) and no later than July 21, 2017, (21 days prior to August 11, 2017).

(6) All Utility Allowance requests related to applications of funding must:

(A) Be submitted directly to ua.application@tdhca.state.tx.us. Requests not submitted to this email address will not be recognized.

(B) Include the "Utility Allowance Questionnaire for Applications" along with all required back up based on the method.

(l) If Owners want to change to a utility allowance other than what was used for underwriting the Owner must submit Utility Allowance documentation for Department approval, at minimum, 90 days prior to the commencement of leasing activities. The Owner is not required to review the utility allowances, or implement new utility allowances, until the building has achieved 90% occupancy for a period of 90 consecutive days or the end of the first year of the Credit Period (if applicable), whichever is earlier.

(m) The Department reserves the right to outsource to a third party the review and approval of all or any Utility Allowance requests to use the Energy Consumption Model or when review requires the use of expertise outside the resources of the Department. In accordance with Treasury Regulation §1.42-10(c) any costs associated with the review and approval shall be paid by the Owner.

(n) All requests described in this subsection must be complete and uploaded directly to the Development’s CMTS account using the "Utility Allowance Documents" in the type field and "Utility Allowance" as the TDHCA Contact. The Department will not be able to approve requests that are incomplete and/or are not submitted correctly.

§10.615. Elections under IRC §42(g) and Additional Income and Rent Restrictions for HTC, Exchange, and TCAP Developments.

(a) Under the Code, HTC Development Owners may elect 20% of the Units restricted at the 50% income and rent limits (20/50), 40% of the Units restricted at the 60% income and rent limits (40/60) or the average income minimum set aside [averaging]. Many Developments have additional income and rent requirements (e.g., 30%, 40% and 50%) that are lower than or in addition to the election requirement. This requirement is referred to as "additional occupancy restrictions" and is reflected in the Development's LURA.

(b) A Development with additional rent and occupancy restrictions must maintain a waiting list for their lower rent restricted Units. The Development's waitlist policy must inform applicants and current residents of the availability of lower rent Units and the process for renting a lower rent Unit. Unless otherwise approved at Application, underwriting, and cost certification, all Unit sizes must be available at the lower rent limits. The waitlist policy for Developments with lower rent restricted Units must address how the waiting list for their lower rent restricted Units will be managed. The policy must not give a preference to prospective applicants over existing households. However, a Development may, but is not required to, prioritize existing households over prospective applicants.

(c) [Repealed]
[c] One hundred percent HTC Developments (developments with no Market Rate units) with additional rent and occupancy restrictions are neither required nor prohibited from completing annual income recertifications. The Development’s written policies and procedures must specify the Development’s choice.

 [1] If a 100% low income development that elects the 20/50 or 40/60 test under IRC §42(g) chooses to perform annual income recertifications, all households designated as meeting the additional rent and occupancy set aside must be recertified on an annual basis; failure to do so will be cited as noncompliance with written policies and procedures but not reported to the IRS on form 8823.

 [2] If a 100% low income development elects the average income test and chooses to do annual income recertifications, all households must be recertified on an annual basis; failure to do so will be cited as noncompliance with written policies and procedures but not reported to the IRS on form 8823.

 [3] If the income level of the household changes, the Owner may adjust the Unit’s designation and rent (up or down) in accordance with all applicable lease terms. Owners that elect the average income test under IRC §42(g) must ensure that the project still has an average income equal to or less than 60% and the percentage represented at the time of Application.

 [4] Owners that do not perform annual income recertifications may not increase the rent level of a household designated towards the Development’s additional rent and occupancy restrictions. Example 615(1): A household was designated as a 50% household at the time of move in. The Development is not required to and does not perform annual income recertifications. New rent limits are released and they are higher. The Development may increase the household’s rent in accordance with the lease, but not above the new 50% rent limit.

 [d] Developments that elect the 20/50 or 40/60 test under IRC §42(g) and have Market Units will be monitored as described in this subsection.

 [1] The HTC program requires Mixed Income projects to complete annual income recertifications and comply with the Available Unit Rule. When a household’s income at recertification exceeds 140% of the applicable current income limit elected by the minimum set aside, the Owner must comply with the Available Unit Rule and lease the next available unit (same size or smaller) in the building to a low-income household to maintain compliance.

 [2] HTC Developments that elect the 20/50 or 40/60 test under IRC §42(g) with market rate units and additional rent and occupancy restrictions must have written policies and procedures that address changes in income at recertification. Owners may comply in the following ways:

 [(A)] Households initially certified at the 30, 40, or 50% income and rent limits may maintain the designation they had at initial move in unless the household’s income exceeds 440% of the highest income tier established by the minimum set aside. The Unit will continue to meet the designation from the initial certification provided that the Owner does not change gross rent in excess of the additional rent and occupancy rent limit.

 [(B)] Owners may change the designation of a household at recertification and increase the rent accordingly provided that another household’s rent is decreased to maintain the set aside requirement. Example 615(2): A 100 Unit development elected the 40/60 minimum set aside, and has an additional rent and occupancy restriction of 10 Units at 30% and 10 Units at 50%. A 30% household recertifies and their income exceeds the 30%. In accordance with the provisions of the lease, the owner may offer this household rent at a higher designation, and simultaneously lower the rent for another household that has been on the Development’s waiting list for a 30% Unit; or

 [(C)] If the household’s income exceeds 140% of the highest income tier established by the minimum set aside, the household must be redesignated as over income and the Next Available Unit Rule must be followed.

 [(e)] HTC Developments that elect income averaging test and have market rate units must have written policies and procedures that address changes in income at recertification.

 [(1)] If the income tier of a household changes, Owners are permitted but not required to adjust the household’s rent to their new designation (higher or lower) as long as the project still has a average rent of equal to or less than the federally required 60% average, or the additional occupancy restriction reflected in the LURA. If the household income increases, and re-designating the rent to the new AMI tier would cause the project average to exceed the required AMI average, the Owner will remain in compliance if the rent is restricted to the limit that maintains the required AMI average.

 [(d)] Until and unless the Internal Revenue Service or the Treasury Department issue conflicting or additional guidance, the Department will monitor the Available Unit Rule in the following manner for Developments that elected the average income minimum set aside [income averaging developments]:

 [(1)] [(A)] If the income of the household who, at the last certification, had an income and rent less than the 60% limits exceeds 140% of the 60% limit, the household must be redesignated as over income.

 [(2)] [(B)] If the income of a household with an income or rent above the 60% level and less than or equal to the 70% limits exceeds 140% of the 70% limit, the household must be designated as over income.

 [(3)] [(C)] If the income of a household with an income or rent above the 70% level and less than or equal to the 80% limits exceeds 140% of the 80% limit, the household must be designated as over income.

 [(4)] [(D)] Owners are not required to terminate the tenancy of over income households. When the Unit occupied by an over income household is vacated, it must be reoccupied by a household with an income and rent level equal to or less than the rent level of the household that went over income. In addition, the Unit must be reoccupied by a household that restores the low income average of the project to 60% or less.

 [(e)] [(E)] Units at 80% area median income and rent on HTC Developments [developments]. In certain years, the Department’s Qualified Allocation Plan provided incentives to lease 10% of the Development’s [developments] Market Rate Units [units] to households at 80% income and rents. This section provides guidance for implementation. If the LURA requires 10% of the Market Rate Units [units] be leased to households at 80% income and rent limits, the Owner [owner] must certify the 80% households at the time of move in only. Recertifications will not be required. Student rules do not apply to Units [units] occupied by 80% households. Noncompliance with the requirement to lease to 80% households is not reportable to the IRS on IRS Form 8823 but will be cited as noncompliance under the event “Development failed to meet additional state required rent and occupancy restrictions.”

 [(f)] The Department does not require Developments to lease more Units under the additional occupancy restrictions than established in their LURA. However, if a Development inadvertently des-
ignates more households than required under the additional rent and occupancy restrictions, they may only decrease to the minimum number through attrition and new move ins, not by removing designations.

§10.616. Household Unit Transfer Requirements for All Programs.

(a) The requirements and restrictions regarding household transfers for HTC, Exchange, and TCAP Developments are based on whether the tax credit project is 100% low-income or mixed income and if the Owner [owner] elected to treat buildings in the project as part of a multiple building project. To determine if a Development is a multiple building project, refer to the election on IRS Form(s) 8609 line 8(b) and accompanying statements (if any). If IRS Form(s) 8609 have not yet been issued by the Department and filed by the Owner [owner], each building is its own project. The Department may allow Owners to indicate their intended 8(b) elections and will monitor accordingly. Failure to file the same elections with the IRS may result in noncompliance, additional monitoring, an additional monitoring fee and findings of noncompliance.

(1) 100% low-income multiple building projects: Households may transfer to any Unit [unit] in a 100% low-income multiple building project and retain their program designation. The household does not need to be and should not be certified at the time of transfer. The move in date remains the date the household was first designated under the program.

(2) Each building is its own project (100% low-income and mixed income projects). Developments that made the 20/50 or 40/60 election: at the time of transfer, the household must be certified and have a current annual income less than the income limit established by the minimum set aside the Owner [owner] selected. Developments that elected the average income test under IRC §42(g): the household must be certified and their current designation averaged together with the designations of the other households in the project must be equal to or less than the percentage represented at the time of Application [application].

(3) Mixed income multiple building projects: Low-income households retain their program designation when they transfer to any Unit [unit] in a multiple building project if at the last annual certification their income was less than 140% of area median income level set by the minimum set aside.

(b) Household transfers for Bond, THTF [HTF], NHTF, HOME, TCAP RF, and NSP with floating Units [units]. Households may transfer to any Unit within the Development. A certification is not required at the time of transfer. If the household transfers to a different Unit Type, the Development must maintain the Unit Type dispersion as reflected in its LURA, by re-leasing the vacated Unit [unit] to a program eligible household. If the Development is required to perform annual income recertifications, the recertification is due on the anniversary date the household originally moved into the Development. If the Development is layered with Housing Tax Credits, use the transfer guidelines described in subsection (a) of this section (relating to Household Unit Transfer Requirements).

(c) Household transfers for NHTF, HOME, TCAP RF, and NSP with fixed Units [units]. Households may transfer to any Unit and do not need to be certified at the time of the transfer. If the household transfers to a Unit that is not fixed, the Development must re-lease the vacated Unit to a program eligible household. If the Development is required to perform annual income recertifications, the recertification is due on the anniversary date the household originally moved into the Development. If the Development is layered with Housing Tax Credits, use the transfer guidelines described in subsection (a) of this section (relating to Household Unit Transfer Requirements).

(d) Household transfers in the same building for the HTC Programs. A Household may transfer to a new Unit within the same building (for the HTC program within the meaning of IRS Notice 88-91). The Unit [unit] designations will swap status.

(e) Household transfers for the Section 811 PRA must be approved by the Department in writing.

§10.617. Affirmative Marketing Requirements.

Affirmative Marketing Requirements are a requirement of the Department on monitored Developments as provided for in more specificity at §10.801 of this chapter (relating to Affirmative Marketing Requirements).

(a) Applicability. Effective April 1, 2015, compliance with this section is required for all Developments with five or more total units to further the objectives of Title VIII of the Civil Rights Act of 1968 and Executive Order 13166.

(b) General. Owners of Developments with five or more total units must affirmatively market their units to promote equal housing choice for prospective tenants, regardless of race, color, religion, sex, national origin, familial status, or disability and must develop and carry out an Affirmative Fair Housing Marketing Plan or (Affirmative Marketing Plan) to provide for marketing strategies and documentation of outreach efforts to prospective applicants identified as “least likely to apply.” In general, those populations that are least likely to apply may include: African Americans, Native Americans, Alaskan Natives, Asians, Native Hawaiians, Other Pacific Islanders, Caucasians (non-Hispanic), Hispanics or Latinos, and families with children. All Affirmative Marketing Plans must provide for affirmative marketing to persons with disabilities. Some Developments may be required by their LURAs to market units specifically to veterans or other populations.

(c) Plan format. Owners are encouraged to use any version of HUD Form 935.2A to meet Affirmative Marketing requirements. Owners participating in HUD funded programs administered by the Department must use the version required by the program.

(d) Marketing and Outreach.

(1) The plan must include special outreach efforts to the “least likely to apply” populations through specific media, organizations, or community contacts that work with least likely to apply populations or work in areas where least likely to apply populations live.

(2) Advertisements and or marketing materials must contain:

(A) The fair housing logo and

(B) The contact information for the individual who can assist if reasonable accommodations are needed in order to complete the application process. The information about reasonable accommodations must be in both English and Spanish.

(e) Timeframes.

(1) An Owner must begin its affirmative marketing efforts for each of the identified populations at least six months prior to the anticipated date the first building is to be available for occupancy. As a condition of an award to a new Development, the Board may require affirmative marketing efforts to begin more than six months prior to the anticipated date the first building is to be placed in service and

(2) An Owner must update its Affirmative Marketing Plan and populations that are least likely to apply every five years from the effective date of the current plan or, for HUD funded or USDA properties, as otherwise required by HUD or USDA.
[44] Record keeping. Owners must maintain records of each Affirmative Marketing Plan and specific outreach efforts completed for the greater of three years or the recordkeeping requirement identified in the LURA.

[49] Exception to Affirmative Marketing. If the Development has closed its waiting list, Affirmative Marketing is not required. Affirmative Marketing is required as long as the Owner is accepting applications, has an open waiting list, or is marketing prior to placement in service as required under subsection (c)(1) of this section.

§10.618. Onsite Monitoring.

(a) The Department may perform an onsite monitoring review, a mail in desk review and physical inspection of any Development, and review and photocopy all documents and records supporting compliance with Departmental programs through the end of the Compliance Period or the end of the period covered by the LURA, whichever is later. The Development Owner shall permit the Department access to the Development premises and records.

(b) The Department will perform onsite monitoring reviews of each low-income Development. The Department will conduct:

(1) The first review of HTC Developments by the end of the second calendar year following the year the last building in the Development is placed in service;

(2) The first review of all Developments, other than those described in paragraph (1) of this subsection, as leasing commences;

(3) During the Federal Compliance Period subsequent reviews will be conducted at least once every three years;

(4) After the Federal Compliance Period, Developments [developments] will be monitored in accordance with §10.623 of this chapter (relating to Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period);

(5) A physical inspection of the Development including the exterior of the Development, Development amenities, and an interior inspection of a sample of Units;

(6) Limited reviews of physical conditions, including follow-up inspections to verify completion of reported corrective action, may be conducted without prior notice (unless access to tenant units is required, in which case at least 48 hours notice will be provided); and

(7) Reviews, meetings, and other appropriate activity in response to complaints or investigations.

(c) The Department will perform onsite file reviews or a mail in desk review and monitor:

(1) Low-income resident files in each Development, and review the Income Certifications;

(2) The documentation the Development Owner has received to support the certifications;

(3) The rent records; and

(4) Any additional aspects of the Development or its operation that the Department deems necessary or appropriate.

(d) The LURA for most HOME, NSP, TCAP RF, and NHTF Developments specifies a required Unit Mix. During onsite monitoring visits it will be determined if the minimum number of affordable Units and exact square footage has been provided. Failure to provide the exact square footage listed in the LURA will be cited as “Failure to provide correct square footage”. Failure to provide the required number of Units required by the LURA will be cited as “Household income above income limit upon initial occupancy”.

(1) Example 612(2). A TCAP RF LURA requires eight low-income units with the following Unit mix:

(A) Three one bedroom, one bath units with a Net Rentable Area (NRA) of 770 sq ft;

(B) One two bedroom one bath units with a NRA of 900 sq ft; and

(C) Four three bedroom two bath units with a NRA of 1000 sq ft.

(2) If during the onsite review the Development has eight units designated as TCAP RF, but is not exactly the Units and square footage mix shown in subparagraphs (A) - (C) of this paragraph in Example 612(2) (even if the actual square footage provided is greater) the noncompliance “Failure to provide correct square footage” will be cited.

(e) [44] At times other than onsite reviews, the Department may request for review, in a format designated by the Department, information on tenant income and rent for each Low-Income Unit and may require a Development Owner to submit copies of the tenant files, including copies of the Income Certification, the documentation the Development Owner has received to support that certification, and the rent record for any low-income tenant.

(f) [44] The Department will select the Low-Income Units and tenant records that are to be inspected and reviewed. Original records are required for review. The Department will not give Development Owners advance notice that a particular Unit, tenant record, or a particular year will be inspected or reviewed. However, the Department will give reasonable notice, as defined in Treasury Regulation 1.42-5, to the Development Owner that an onsite inspection or a tenant record review will occur so the Development Owner may notify tenants of the inspection or assemble original tenant records for review. If a credible complaint of fraud or other egregious alleged or suspected noncompliance is received, the Department reserves the right to conduct unannounced onsite monitoring visits.

(g) [44] In order to prepare for monitoring reviews and physical inspections and to reduce the amount of time spent onsite, Department staff must review certain requested documentation described in the onsite notification announcement. Owners are required to submit documentation by the required deadline indicated in the onsite notification announcement. Failure to submit required documentation will result in a finding of noncompliance.

§10.622. Special Rules Regarding Rents and Rent Limit Violations.

(a) Rent or Utility Allowance Violations of the maximum allowable limit for the HTC program. Under the HTC program, the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees, cannot exceed the maximum allowable limit (as determined by the minimum set-aside elected by the Owner) published by the Department. If it is determined that an HTC Development, during the Compliance Period, collected rent in excess of the rent limit established by the minimum set-aside, the Owner [owner] must correct the violation by reducing the rent charged. The Department will report the violation as corrected on January 1st of the year following the violation. The refunding of overcharged rent does not avoid the disallowance of the credit by the IRS.

(b) Rent or Utility Allowance Violations of additional rent restrictions under the HTC program. [(For Developments that elected the 20/50 and 40/60 rent under IRC §42(a) only.)] If Owners agreed to additional rent and occupancy restrictions, the Department will monitor to confirm compliance. If noncompliance is discovered, the Department will require the Owner to restore compliance by refunding (not a
credit to amounts owed the Development) any excess rents to a sufficient number of households to meet the set aside.

(c) Rent Violations of the maximum allowable limit due to application fees or application deposits not promptly converted into a security deposit under the HTC program. Under the HTC program, Owners may not charge tenants any overhead costs as part of the application fee. Owners must only charge the actual cost for application fees as supported by invoices from the screening company the Owner uses.

(1) The amount of time Development staff spends checking an applicant's income, credit history, and landlord references may be included in the Development's application fee. Development Owners may add up to $5.50 per Unit for their other out of pocket costs for processing an application without providing documentation. Example 622(2): A Development's out of pocket cost for processing an application is $17.00 per adult. The property may charge $22.50 for the first adult and $17.00 for each additional adult.

(2) Documentation of Development costs for application processing or screening fees must be made available during onsite visits or upon request. The Department will review application fee documentation during onsite monitoring visits. If the Development pays a flat monthly fee to a third party for credit or criminal background checks, Owners must calculate the appropriate fee to be charged applicants by using the total number of applications processed, not just approved applications. Development that pay a flat monthly fee must determine the appropriate application fee at least annually based on the prior year's activity. If the Department determines from a review of the documentation that the Owner has overcharged residents an application fee or collected impermissible deposits, the noncompliance will be reported to the IRS on Form 8823 under the category "gross rent(s) exceeds tax credit limits." The noncompliance will be corrected on January 1st of the next year.

(3) Owners are not required to refund the overcharged fee amount. To correct the issue, Owners must reduce the application fee for prospective applicants. Once the fee is reduced for prospective applicants, the Department will report the affected Units back in compliance on January 1st of the year after they were overcharged the application fee or an impermissible deposit.

(4) Throughout the Affordability Period, Owners may not charge a deposit or any type of fee (other than an application fee) for a household to be placed on a waiting list.

(d) Rent or Utility Allowance Violations on Non-HTC Developments. HTC Developments after the Compliance Period, and foreclosed HTC properties for three years after foreclosure. If it is determined that the Development collected rent in excess of the allowable limit, the Department will require the Owner to refund (not a credit to amounts owed the Development) to the affected residents the amount of rent that was overcharged.

(e) Trust Account to be established. If the Owner is required to refund rent under subsection (b) or (d) of this section and cannot locate the resident, the excess monies must be deposited into a trust account for the tenant. The account must remain open for the shorter of a four year period, or until all funds are claimed. If funds are not claimed after the four year period, the unclaimed funds must be remitted to the Texas Comptroller of Public Accounts Unclaimed Property Holder Reporting Section to be disbursed as required by Texas unclaimed property statutes.

(f) Rent Adjustments for HOME [s] and TCAP RF Developments:

(1) 100% HOME/TCAP-RF assisted Developments. If a household's income exceeds 80% at recertification, the Owner [owner] must charge rent equal to 30% of the household's adjusted income;

(2) HOME/TCAP-RF Developments with any Market Rate units. If a household's income exceeds 80% at recertification, the Owner [owner] must charge rent equal to the lesser of 30% of the household's adjusted income or the comparable Market rent; and

(3) HOME/TCAP-RF Developments layered with other Department affordable housing programs. If a household's income exceeds 80% at recertification, the owner must charge rent equal to the lesser of 30% of the household's adjusted income or the rent allowable under the other Program [program].

(g) Special conditions for NSP Developments. To determine if a Unit is rent restricted, the amount of rent paid by the household, plus an allowance for utilities, plus any rental assistance payment must be less than the applicable limit.

(h) Employee Occupied Units (HTC and THTF [HTF] Developments). IRS Revenue Rulings 92-61, 2004-82 and Chief Counsel Advice Memorandum POSTN-111812-14 provide guidance on employee occupied units. In general, employee occupied units are considered facilities reasonably required for the project(s) and not residential rental units. Since the building's applicable fraction is calculated using the residential rental units/space in a building, employee occupied units are taken out of both the numerator and the denominator.

(i) Owners of HOME, NSP, TCAP-RF, and NHTF must comply with §10.403 of this chapter which requires annual rent review and approval by the Department's Asset Management Division. Failure to do so will result in an Event of Noncompliance [a finding of noncompliance].

(j) Unless the household receives rental assistance, and due to changes in their income, the household's portion of required rent changes. Owners are not permitted to increase the tenant portion of rent during a period which is the lesser of 12 months or the lease term, even if there are increases in rent limits or decreases in utility allowances.

§10.623. Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period.

(a) HTC properties allocated credit in 1990 and after are required under §42(h)(6) of the Code to record a LURA restricting the Development for at least 30 years. Various sections of the Code specify monitoring rules State Housing Finance Agencies must implement during the Compliance Period.

(b) After the Compliance Period, the Department will continue to monitor HTC Developments using the criteria detailed in paragraphs (1) - (14) of this subsection:

(1) The frequency and depth of monitoring household income, rents, social services and other requirements of the LURA will be determined based on risk. Factors will include changes in ownership or management, compliance history, timeliness of reports and timeliness of responses to Department requests;

(2) At least once every three years the property will be physically inspected including the exterior of the Development, all building systems and 10% of Low-Income Units. No less than five but no more than 35 of the Development's HTC Low-Income Units will be physically inspected to determine compliance with HUD's Uniform Physical Condition Standards;

(3) Each Development shall submit an annual report in the format prescribed by the Department;
(4) Reports to the Department must be submitted electronically as required in §10.607 of this subchapter (relating to Reporting Requirements);

(5) Compliance monitoring fees will continue to be submitted to the Department annually in the amount stated in the LURA;

(6) All HTC households must be income qualified upon initial occupancy of any Low Income [Low Income] Unit. Proper verifications of income are required, and the Department's Income Certification form must be completed unless the Development participates in the Rural Rental Housing Program or a project-based HUD program, in which case the other certification form will be accepted;

(7) Rents will remain restricted for all HTC Low-Income Units. After the Compliance Period, utilities paid to the Owner are accounted for in the utility allowance. TCAP, Exchange, Bond, and THTF Developments layered with Housing Tax Credits no longer within the Compliance Period also include utilities paid to the Owner as part of the utility allowance. The tenant paid portion of the rent plus the applicable utility allowance must not exceed the applicable limit. Any excess rent collected must be refunded;

(8) All additional income and rent restrictions defined in the LURA remain in effect;

(9) For Additional Use Restrictions, defined in the LURA (such as supportive services, nonprofit participation, elderly, etc.), refer to the Development's LURA to determine if compliance is required after the completion of the Compliance Period or if the Compliance Period was specifically extended beyond 15 years;

(10) The Owner shall not terminate the lease or evict low-income residents for other than good cause;

(11) The total number of required HTC Low-Income Units can be maintained Development wide;

(12) Owners may not charge fees for amenities that were included in the Development’s Eligible Basis;

(13) Once a calendar year, Owners must continue to collect and maintain current data on each household that includes the number of household members, age, ethnicity, race, disability status, rental amounts and rental assistance (if any). This information can be collected on the Department’s Annual Eligibility Certification form or the Income Certification form or HUD Income Certification form or USDA Income Certification form; and

(14) Employee occupied units will be treated in the manner prescribed in §10.622(h) of this chapter (relating to Special Rules Regarding Rents and Rent Limit Violations).

(c) After the first 15 years of the Extended Use Period, certain requirements will not be monitored as detailed in paragraphs (1) - (4) of this subsection.

(1) The student restrictions found in §42(i)(3)(D) of the Code. An income qualified household consisting entirely of full time students may occupy a Low-Income Unit. If a Development markets to students or leases more than 15% of the total number of units to student households, the property will be found in noncompliance unless the LURA is amended through the Material Amendments procedures found in §10.405 of this chapter (relating to Amendments);

(2) All households, regardless of income level or 8609 elections, will be allowed to transfer between buildings within the Development;

(3) The Department will not monitor the Development’s application fee after the Compliance Period is over; and

(4) Mixed income Developments are not required to conduct annual income recertifications. However, Owners must continue to collect and report data in accordance with subsection (b)(13) of this section.

(d) While the requirements of the LURA may provide additional requirements, right and remedies to the Department or the tenants, the Department will monitor post year 15 in accordance with subsection (b)(13) of this section as amended.

(e) Unless specifically noted in this section, all requirements of this chapter, the LURA and §42 of the Code remain in effect for the Extended Use Period. These Post-Year 15 Monitoring Rules apply only to the HTC Developments administered by the Department. Participation in other programs administered by the Department may require additional monitoring to ensure compliance with the requirements of those programs.

§10.624. Compliance Requirements for Developments with 811 PRA Units.

(a) One hundred and eighty days prior to the date an Owner expects to begin leasing, Developments that have agreed to rent Units to households assisted by Section 811 PRA must contact Department staff and begin accepting referrals. Failure to reserve the agreed upon number of Units for 811 households will be cited as noncompliance, be referred for administrative penalties, and be considered possible grounds for debarment.

(b) Throughout the term of an 811 PRA Use Agreement, Owners must maintain the required number of 811 PRA households, and provide notice to the Department when an 811 PRA household is expected to vacate. Notice must be provided when the Development is notified that [30 days prior to the date] the household will vacate in the event that the resident vacates without notice, upon discovery that the unit is vacant, whichever is earlier. Failure to notify the Department will be cited as noncompliance, be referred for administrative penalties, and be considered possible grounds for debarment.

(c) Compliance with 811 PRA requirements will be monitored at least once every three years, either through an onsite review or a desk review. During the review, Department staff will monitor for compliance with program eligibility which includes the following:

(1) The household must include at least one person with a disability and who is 18 years of age or older and less than 62 years of age at the time of admission into the Development; and the person with a disability must be part of one or more of the target populations for the 811 program.

(2) The household’s income is less than the extremely low income limit at move in.

(3) The Owner must check the following criminal history related to drug use of the household. Households [Participants] in the 811 PRA program must not include:

   (A) Any member(s) who was evicted in the last three years from federally assisted housing for drug-related criminal activity;

   (B) Any member that is currently engaged in illegal use of drugs or for which the Owner has reasonable cause to believe that a member's illegal use or pattern of illegal use of a drug may interfere with the health, safety, and right to peaceful enjoyment of the property by other residents; and

   (C) Any household member who is subject to a State sex offender lifetime registration requirement.

(4) Student Status. If the household includes a student, the student must meet all of the criteria described in HUD handbook 4350.3
par. 3-13B, as modified by the September 21, 2016, Federal Register Notice 5969-N-01.

(d) Noncompliance will be cited if the Development:

(1) Leased [Leases] a Unit to a household that is not qualified for the 811 PRA program [eligible] in accordance with the requirements of subsection (c)(1) - (4) of this section;

(2) Fails to Use the Enterprise Income Verification system for documenting the household's income;

(3) Fails to properly document and calculate deductions in order to determine adjusted income (dependent, child care, disability assistance, elderly/disabled family, unreimbursed medical expenses);

(4) Fails to use the required HUD forms listed in §10.612(d) of this subchapter or the following forms when applicable:

(A) EIV summary report;
(B) EIV income report;
(C) EIV income discrepancy report;
(D) EIV No income reported;
(E) EIV no income report by health and human services or social security administration;
(F) EIV new hires report;
(G) Existing tenant search;
(H) Multiple Subsidy report;
(I) Failed EIV pre-screening report;
(J) Failed verification report;
(K) Deceased tenants report;
(L) Owner approval letter authorizing access to EIV for the EIV [EX] coordinators;
(M) EIV Coordinator Access Authorization form (CAAF);
(N) The rules of behavior for staff that use EIV reports/data to perform their job functions; and
(O) Cyber awareness challenge certificates of completion for anyone that uses EIV or has access to EIV data (annually);

(5) Accepts funding that limits the ability for the Department to place the agreed upon number of 811 Units at the Development;

(6) Violates §1.15 of this title (relating to Integrated Housing);

(7) Fails to properly calculate the tenant portion of rent;

(8) Fails to properly calculate the tenant security deposit;

(9) [9] Fails to use the HUD model lease;

(10) [9] Egregiously fails to disperse 811 PRA Units throughout the Development;

[10] [10] Fails to conduct required interim certifications;

[11] [10] Fails to conduct required annual income recertification;

or

(13) Fails to prominently display, as required by 24 CFR Part 110, Fair Housing Poster HUD-928.1 (English), HUD 928.1A (Spanish), and in other languages as required by Limited English Proficiency Requirements.

§10.625. Events of Noncompliance.

Figure: 10 TAC §10.625 lists events for which a multifamily rental Development [development] may be found to be in noncompliance for compliance monitoring purposes. This list is not an exclusive list of events and issues for which an Owner may be subject to an administrative penalty, debarment, or other enforcement action. The first column of the chart identifies the noncompliance event. The second column indicates to which program(s) the noncompliance event applies. The last column indicates if the issue is reportable on IRS Form 8823 for HTC Developments.

Figure: 10 TAC §10.625

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 December 13, 2019.

TRD-201904790

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: January 26, 2020

For further information, please call: (512) 475-1762

SUBCHAPTER G. AFFIRMATIVE MARKETING REQUIREMENTS AND WRITTEN POLICIES AND PROCEDURES

10 TAC §§10.800 - 10.803

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 10, Subchapter G, §§10.800 - 10.803, relating to Affirmative Marketing Requirements and Written Policies and Procedures. The purpose of the proposed new sections is to provide compliance with Tex. Gov't Code §2306.053 and to update the rules to move requirements on the Department's multifamily portfolio relating to Affirmative Marketing and Written Policies and Procedures out of Subchapter F, detailing Compliance Monitoring requirements, and into a new subchapter to consolidate Fair Housing related requirements on the Department's multifamily portfolio into one separate location within the Uniform Multifamily Rules.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it was determined that no changes to the rule generate costs to the properties in the Department's multifamily portfolio, and therefore no costs warrant being offset.

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

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOVT CODE §2001.0221.

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

1. The proposed rule does not create or eliminate a government program. This rule provides for an assurance that Fair Housing
requirements relating to Affirmative Marketing and Written Policies and Procedures for Multifamily Activities are clearly relayed to participating properties in the Department's portfolio.

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

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

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

5. The proposed rule is not creating a new regulation, except that it is moving a rule from one existing Subchapter to a new Subchapter and making minor revisions. The existing Subchapter is being amended to delete sections relating to Affirmative Marketing and Written Policies and Procedures for Multifamily Activities and those sections are being proposed as a new rule-making simultaneously to provide for revisions.

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

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

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

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.053.

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

2. To the extent that multifamily properties in the Department's portfolio are considered small or micro-businesses, the economic impact of the rule on them is projected to be $0 as the revisions being proposed are minor and do not cost the property's operations. There are no rural communities subject to the proposed rule as these properties are not owned directly by municipalities; therefore the economic impact of the rule on rural communities is projected to be $0.

3. The Department has determined that because the rules apply to existing multifamily developments, there will be no economic effect on small or micro-businesses or rural communities.

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

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6). The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule has no economic effect on local employment because the rules relate only to a process which has already been in effect for existing multifamily properties in the Department's portfolio; therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that this new rule only administratively consolidates an existing set of rules relating to Fair Housing requirements into one separate Subchapter of the Uniform Multifamily Rules, while making minimal revisions, there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections will be a consolidation of Fair Housing related requirements into one separate Subchapter of the Uniform Multifamily Rules. There will not be any economic cost to any individuals required to comply with the new sections because the processes described by the rule have already been in place through the rule found at Subchapter F of this Chapter relating to Uniform Multifamily Rules.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held from December 27, 2019, to January 27, 2020, to receive input on the new proposed sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, January 27, 2020.

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

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

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

§10.801. Affirmative Marketing Requirements.
(a) Applicability. Compliance with this section is required for all Developments with five or more total units to further the objectives of Title VIII of the Civil Rights Act of 1968 and Executive Order 13166.

(b) General. A Development Owner with five or more total Units must affirmatively market the Units to promote equal housing
choice for prospective tenants, regardless of race, color, religion, sex, national origin, familial status, or disability and must develop and carry out an Affirmative Fair Housing Marketing Plan (or Affirmative Marketing Plan) to provide for marketing strategies and documentation of outreach efforts to prospective applicants identified as "least likely to apply." To determine the "least likely to apply" populations, a Development Owner is encouraged to use Worksheet 1 of HUD Form 935.2A, but at a minimum the Owner must document that they have compared the demographic composition of the Development to the market area to determine the populations least likely to apply. All Affirmative Marketing Plans must provide for affirmative marketing to Persons with Disabilities. Some Developments may be required by their LURAs to market units specifically to veterans or other populations.

(c) Plan format. A Development Owner must prepare, have in its onsite records, and submit to the Department upon request, a written Affirmative Marketing Plan. Owners are encouraged to use any version of HUD Form 935.2A to meet Affirmative Marketing requirements. An Owner participating in a HUD funded program administered by the Department must use the version utilized by the program.

(d) Marketing and Outreach.

(1) The plan must include special outreach efforts to the "least likely to apply" populations through specific media, organizations, or community contacts that work with least likely to apply populations or work in areas where least likely to apply populations live. The outreach efforts identified in the Affirmative Marketing Plan must be performed by the Development at least once per calendar year.

(2) To the extent that advertisements and/or marketing materials are utilized for the Development, those materials must contain:

(A) The Fair Housing logo;

(B) The contact information for the individual who can assist if reasonable accommodations are needed in order to complete the application process; and

(C) Property contact information must be provided in both English and Spanish, and may be required to be provided in other languages in accordance with Limited English Proficiency Requirements.

(e) Timeframes.

(1) An Owner must begin its affirmative marketing efforts for each of the identified populations least likely to apply at least 90 calendar days prior to the anticipated date the first building is to be available for occupancy.

(2) An Owner must update its Affirmative Marketing Plan and populations that are least likely to apply every five years from the effective date of the current plan or, for HUD funded or USDA properties, as otherwise required by HUD or USDA.

(f) Recordkeeping. Owners must maintain records of each Affirmative Marketing Plan and specific outreach efforts completed for the greater of three years or the recordkeeping requirement identified in the LURA.

(g) Exception to Affirmative Marketing. If the Development has closed its waitlist, Affirmative Marketing is not required. Affirmative Marketing is required as long as the Owner is accepting applications, has an open waitlist, or is marketing prior to placement in service as required under subsection (e)(1) of this section.

§10.802 Written Policies and Procedures.

(a) The purpose of this section is to outline the policies and/or procedures of the Department (also called tenant section criteria) that are required to have written documentation. If an Owner fails to have such written policies and procedures, or fails to follow their written policies and procedures it will be handled as an Event of Noncompliance as further provided in §10.803 of this subchapter (relating to Compliance and Events of Noncompliance).

(1) Owners must inform applicants/tenants in writing, at the time of application, or at the time of other actions described in this section, that such policies/procedures as described in this section are available, and that the Owner will provide copies upon request to applicants/tenants or their representatives.

(2) The Owner must have all policies and related documentation required by this section and the TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation" available in the leasing office and anywhere else where applications are taken; Developments that accept electronic applications must maintain on their website these written policies and procedures and the same noted forms.

(3) All policies must have an effective date. Any changes made to the policies require a new effective date, and a notice regarding the availability of new policies must be communicated to tenants in writing.

(4) In general, policies addressing credit, criminal history, and occupancy standards cannot be applied retroactively. Tenants who already reside in the Development or applicants on the waitlist at the time new or revised tenant selection criteria are applied, and who are otherwise in good standing under the lease or waitlist, must not receive notices of termination or non-renewal based solely on their failure to meet the new or revised tenant selection criteria or be passed over on the waitlist. However, criteria related to program eligibility may be applied retroactively when a market development receives a new award of tax credits, federal, or state funds and a household is not eligible under the new program requirements, or when prior criteria violate federal or state law.

(b) Tenant Selection Criteria. A Development Owner must maintain current and prior versions of the written Tenant Selection Criteria, for the longer of the records retention period that applies to the program, or for as long as tenants who were screened under the historical criteria are occupying the Development.

(1) The criteria identified by a Development must be reasonably related to an applicant’s ability to perform under the lease (for a Development with MFDL funding this means to pay the rent, not to damage the housing, and not to interfere with the rights and quiet enjoyment of other tenants) and include at a minimum:

(A) Requirements that determine an applicant’s basic eligibility for the Development, including any preferences, restrictions, and any other tenancy requirements. Any restrictions on student occupancy and any exceptions to those restrictions, as documented in the tenant file as provided for in 10 TAC §10.612(b)(2) of this chapter (relating to Tenant File Requirements) must be stated in the policies;

(B) Applicant screening criteria, including what applicant attributes are screened and what scores or findings would result in ineligibility;

(C) The following statement: Screening criteria will be applied in a manner consistent with all applicable laws, including the Texas and Federal Fair Housing Acts, the Federal Fair Credit Reporting Act, program guidelines, and TDHCA’s rules;

(D) Specific age requirements if the Development is operating as an Elderly Property either under the Housing for Older Pe-
sons Act of 1995 as amended (HOPA), or the age related eligibly cri-
tera required by its use of federal funds.

(2) The criteria must not:

(A) Include preferences for admission, unless it is in a
recorded LURA which has been approved by the Department (preference
are required to be in a LURA when the Development makes MDL
funding, except for the preference allowed by paragraph (3) of this sub-
section), is required by a program in which the Owner is participating
which requires the preference, or is allowed by paragraph (3) of this
subsection. Owners that include preferences in their leasing criteria due
to other federal financing must provide to the Department either written
approval from HUD, USRA, or VA for such preference, or identify the
statute, written agreement, or federal guidance documentation that
permits the adoption of this preference;

(B) Exclude an individual or family from admission
to the Development solely because the household participates in the
HOME Tenant Based Rental Assistance Program, the housing choice
voucher program under Section 8, United States Housing Act of 1937
(42 U.S.C. §1-437), or other federal, state, or local government rental
assistance program. If an Owner adopts a minimum income standard
for households participating in a voucher program, it is limited to the
greater of a monthly income of 2.5 times the household's share of the
total monthly rent amount or $2,500 annually; or

(C) In accordance with VAWA, deny admission on the
basis that the applicant has been a victim of domestic violence, dating
violence, sexual assault, or stalking.

(3) If the Development is funded with HOME, TCAP RF,
NHTF, or NSP funds, in accordance with 24 CFR §93.356 and 24 CFR
§92.359, the criteria may have a preference for persons who have expe-
rrienced domestic violence, dating violence, sexual assault, or stalking.

(4) Occupancy Standard Policy.

(A) If the Development restricts the number of occu-
pants in a Unit in a more restrictive manner than found in Section
92.010 of the Texas Property Code, the Occupancy Standard Policy
must allow at least two persons per Bedroom plus one additional per-
son per Unit. An Efficiency Unit that is greater than 600 square feet,
must also have an Occupancy Standard Policy of at least three persons
per Unit. In an SRO or in an Efficiency that is less than 600 square
feet, the Occupancy Standard Policy must allow at least two persons
per Unit. Supportive Housing or Transitional Housing Developments
where all Units in the Development are SROs or Efficiencies, are not
required by the Department to have an Occupancy Standard Policy,
except as required for the 811 PRA Program or as reflected in the De-
velopment's LURA.

(B) A Development may adopt a more restrictive stan-
dard than described in subparagraph (A) of this paragraph, if the De-
velopment is required to utilize a more restrictive standard by a local
governmental entity, or a federal funding source. However, the De-
velopment must have this information available onsite for Department
review.

(C) Except for an Elderly Development that meets the
requirements of the Housing for Older Persons Act exception under
the Fair Housing Act, the Occupancy Standard Policy must state that
children that join the household after the start of a lease term will not
cause a household to be in violation of the lease.

(c) Reasonable Accommodations Policy. Owners must main-
tain a written Reasonable Accommodations policy. The policy must be
maintained at the Development. Owners are responsible for ensuring
that their employees and contracted third party management companies
are aware of and comply with the reasonable accommodation policy.

(1) The policy must provide:

(A) Information on how an applicant or current resident
with a disability may request a reasonable accommodation;

(B) How transfers related to a reasonable accommoda-
tion will be addressed; and

(C) A timeframe in which the Owner will respond to a
request that is compliant with §1.204(b)(3) and (d) of this title (relating
to Reasonable Accommodations).

(2) The policy must not:

(A) Require a household to make a reasonable accom-
modation request in writing;

(B) Require a household whose need is readily apparent
to provide third party documentation of a disability;

(C) Require a household to provide specific medical or
disability information other than the disability verification that may be
requested to verify eligibility for reasonable accommodation;

(D) Exclude a household with person(s) with disabili-
ies from admission to the Development because an accessible unit is
not currently available; or

(E) Require a household to rent a unit that has already
been made accessible.

(d) Waitlist Policy. Owners must maintain a written waitlist
policy, regardless of current Unit availability. The policy must be main-
tained at the Development. The policy must include procedures the
Development uses in:

(1) Opening, closing, and selecting applicants from the
waitlist, including but not limited to the requirements in §10.615(b)
of this title (relating to Elections under IRC §42(g) and Additional
Income and Rent Restrictions for HTC, Exchange, and TCAP Devel-
opments);

(2) Determining how lawful preferences are applied; and

(3) Procedures for prioritizing applicants needing accessi-
ble Units in accordance with 24 CFR §8.27, and Chapter 1, Subchapter
B of this title (relating to Accessibility and Reasonable Accommoda-
tions).

(e) Changes in Household Designation Policy. This is ap-
licable if a Development has adopted a policy in accordance with
§10.611(c) of this subchapter (relating to Determination, Documen-
tation and Certification of Annual Income).

(f) Denied Application Policies. Owners must maintain a writ-
en policy regarding the procedures they will follow when denying an
application and when notifying denied applicants of their rights.

(1) The policy must address the manner by which rejec-
tions of applications will be handled, including timelines and appeal
procedures, if any.

(2) Within seven days after the determination is made to
deny an application, the owner must provide any rejected or ineligible
applicant that completed the application process a written notification
of the grounds for rejection. The written notification must include:

(A) The specific reason for the denial and reference the
specific leasing criteria upon which the denial is based:
(B) Contact information for any third parties that provided the information on which the rejection was based and information on the appeals process, if one is used by the Development. An appeals procedure is required for HOME Developments that are owned by Community Housing Development Organizations, and Units at Developments that lease Units under the Department's Section 811 PRA program. The appeals process must provide a 14-day period for the applicant to contest the reason for the denial, and comply with other requirements of the HUD Handbook 4350.3 4-9; and

(C) The TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation."

(3) The Development must keep and may periodically be requested to submit to the Department a log of all denied applicants that completed the application process to include:

(A) Basic household demographic and rental assistance information, if requested during any part of the application process; and

(B) The specific reason for which an applicant was denied.

(4) If an 811 applicant is being denied, within three calendar days of the denial the Department's 811 PRA Program point of contact must be notified and provided with a copy of the written notice that was provided to the applicant.

(g) Non-renewal and/or Termination Notices. A Development Owner must maintain a written policy regarding procedures for providing households non-renewal and termination notices.

(1) The owner must provide in any non-renewal or termination notice, a specific and lawful reason for the termination or non-renewal.

(2) The notification must:

(A) Be delivered as required under applicable program rules and the lease. For HOME, TCAP RF, NHTF, NSP, HTC, TCAP and Exchange Developments, see 10 TAC §10.613(a) - (b) of this chapter (relating to Lease Requirements). For Section 811 PRA, see 24 CFR §247.4(a) - (f);

(B) Include the TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation."

To avoid providing applicants and residents with duplicate information, TDHCA administered Developments layered with other federal funds are permitted to amend the TDHCA VAWA forms to incorporate requirements of other funders. However, none of the information included in the TDHCA created form may be omitted;

(C) State how a person with a disability may request a reasonable accommodation in relation to such notice; and

(D) Include information on the appeals process if one is used by the Development (this is required under some LURAs, for HOME Developments that are owned by Community Housing Development Organizations, and for 811 PRA units).

(h) At the time of application Owners must provide each adult in the household the TDHCA form based on HUD form 5380 "Notice of Occupancy Rights under the Violence Against Women Act" and the HUD form 5382 "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking and Alternate Documentation."

To avoid providing applicants and residents with duplicate information, TDHCA administered Developments layered with other federal funds are permitted to amend the TDHCA VAWA forms to incorporate requirements of other funders. However, none of the information included in the TDHCA created form may be omitted.

(i) Policies and procedures will be reviewed periodically by the Department's Fair Housing staff, as a result of complaints, or through an owner initiated written policies and procedures review. Owners may request a review of the written policies and procedures for a portfolio of Developments by submitting a request to fair.housing@tdhca.state.tx.us. After review by the Department, an Owner may make non-substantive changes to the policies.

(j) Development Owners must allow applicants to submit applications via mail and at the Development site or leasing office; if the Development is electronically equipped, the Development may also allow applications to be submitted via email, website form, or fax. The Development's tenant selection criteria must state available alternate means of submission and include address, email, or other necessary contact information on the form or its attached leasing criteria.

§10.803. Compliance and Events of Noncompliance.

(a) The Department will provide written notice to the Owner if the Department discovers through monitoring, review, resident complaint, or any other manner that the Development is not in compliance with the provisions of this subchapter. A 90 day Corrective Action Period will be provided. Documentation of correction must be received during the Corrective Action Period for an Event of Noncompliance to be considered corrected during the Corrective Action Period. The Department may extend the Corrective Action Period for up to six months from the date of the notice to the Development Owner only if there is good cause for granting an extension and the owner requests an extension during the original 90 day Corrective Action Period, and the request would not cause the Department or the Owner to miss a federal deadline. Requests for an extension may be submitted to: fair.housing@tdhca.state.tx.us.

(b) If an Owner submits evidence of corrective action during the Corrective Action Period that addresses each issue, but does not fully address all issues, the Department will give the Owner written notice and an additional 10 calendar day period to submit evidence of full corrective action.

(c) If communications to the Owner under this subchapter have a pattern of being returned to the Department as refused, unclaimed, or undeliverable, the Development may be considered not in compliance without further notice to the Owner. The Owner is responsible for providing the Department with current contact information, including address(es) (physical and electronic) and phone number(s). The Owner must also provide current contact information to the Department as required by §1.22 of this title (relating to Providing Contact Information to the Department), and ensure that such information is at all times current and correct.

(d) The Department will rely solely on the information supplied by the Owner in the Department's web-based Compliance Monitoring and Tracking System (CMTS) for notifications under this subchapter. It is the Owner's sole responsibility to ensure at all times that such information is current, accurate, and complete. Correspondence sent to the email or physical address shown in CMTS will be deemed delivered to the Owner. Correspondence from the Department may be directly uploaded to the property's CMTS account using the secure electronic document attachment system. Once uploaded, notification of the attachment will be sent electronically to the email address listed in CMTS. The Department is not required to send a paper copy, and if it does so it does as a voluntary and non-precedential courtesy only.
(e) Events of Noncompliance identified in the evaluation of the requirements of this subchapter will be those specified in §10.625 of this title (relating to Events of Noncompliance).

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 December 13, 2019.
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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 475-1762

CHAPTER 23. SINGLE FAMILY HOME PROGRAM
SUBCHAPTER F. TENANT-BASED RENTAL ASSISTANCE PROGRAM
10 TAC §23.61

The Texas Department of Housing and Community Affairs (the Department) proposes an amendment to 10 TAC §23.61, Tenant-Based Rental Assistance (TBRA) General Requirements. The purpose of this amendment is to correct a citation referenced in the rule.

Tex. Gov't Code §2001.0045(b) does apply to the amendment being proposed and no exceptions are applicable. However, the rule already exists and the correction is only administrative in nature. There are no costs associated with this rule action, therefore no costs or impacts warrant a need to be offset.

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed amendment would be in effect, the proposed amendment does not create or eliminate a government program, but relates to correcting a citation in the rule.
2. The proposed amendment does not require a change in work that would require the creation of new employee positions, nor is the proposed repeal significant enough to reduce workload to a degree that any existing employee positions are eliminated.
3. The proposed amendment does not require additional future legislative appropriations.
4. The proposed amendment does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.
5. The proposed amendment is not creating a new regulation.
6. The proposed amendment will not repeal an existing regulation.
7. The proposed amendment will not increase nor decrease the number of individuals subject to the rule's applicability.
8. The proposed amendment will not negatively or positively affect this state's economy.

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

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

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

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

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

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

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held November 22, 2019, to December 23, 2019, to receive input on the proposed amended section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, December 23, 2019.

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

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

§23.61. Tenant-Based Rental Assistance (TBRA) General Requirements.

(a) The Household must participate in a self-sufficiency program.

(b) The amount of assistance will be determined using the Housing Choice Voucher method.
(c) Households certifying to zero income must also complete a questionnaire which includes a series of questions regarding how basic hygiene, dietary, transportation, and other living needs are met.

(d) The minimum Household contribution toward gross monthly rent must be ten percent of the Household's gross monthly income.

(e) Activity funds are limited to:

(1) rental subsidy: Each rental subsidy term is limited to no more than twenty-four (24) months. Total lifetime assistance to a Household may not exceed thirty-six (36) months cumulatively, except that a maximum of twenty-four (24) additional months of assistance, for a total of sixty (60) months cumulatively may be approved if:

(A) the Household has applied for a Section 8 Housing Choice Voucher, HUD Section 811 Supportive Housing for Persons with Disabilities, HUD Section 811 Project Rental Assistance Demonstration, or HUD Section 202 Supportive Housing for the Elderly Program, and is placed on a waiting list during their TBRA participation tenure; and

(B) the Household has not been removed from the waiting list for the Section 8 Housing Choice Voucher, HUD Section 811 Supportive Housing for Persons with Disabilities, HUD Section 811 Project Rental Assistance Demonstration, or HUD Section 202 Supportive Housing for the Elderly Program due to failure to respond to required notices or other ineligibility factors; and

(C) the Household has not been denied participation in the Section 8 Housing Choice Voucher, HUD Section 811 Supportive Housing for Persons with Disabilities, HUD Section 811 Project Rental Assistance Demonstration, or HUD Section 202 Supportive Housing for the Elderly Program while they were being assisted with HOME TBRA; and

(D) the Household did not refuse to participate in the Section 8 Housing Choice Voucher, HUD Section 811 Supportive Housing for Persons with Disabilities, HUD Section 811 Project Rental Assistance Demonstration, or HUD Section 202 Supportive Housing for the Elderly Program when a voucher was made available.

(2) security deposit: no more than the amount equal to two (2) month's rent for the unit.

(3) utility deposit in conjunction with a TBRA rental subsidy.

(f) The payment standard is determined at the date of assistance. The payment standard utilized by the Administrator must be:

(1) for metropolitan counties and towns, the current U.S. Department of Housing and Urban Development (HUD) Small Area Fair Market Rent for the Housing Choice Voucher Program;

(2) for nonmetropolitan counties and towns, the current HUD Fair Market Rent for the Housing Choice Voucher Program;

(3) for a HOME assisted unit, the current applicable HOME rent; or

(4) the Administrator may submit a written request to the Department for approval of a different payment standard. The request must be evidenced by a market study or documentation that the PHA serving the market area has adopted a different payment standard. An Administrator may request a Reasonable Accommodation as defined in §1.204 of this title for a specific Household if the Household, because of a disability, requires the features of a specific unit, and units with such features are not available in the Service Area at the payment standard.

(g) Administrators must select the method under which funds for administrative costs and Activity soft costs may be reimbursed prior to execution of an RSP agreement or at Application for an award of funds. Administrators of an existing RSP Agreement may request an amendment to an existing Agreement in accordance with Section 23.1 of this Chapter. Applicants and Administrators may choose from one of the following options, and in any case funds for Administrative costs may be increased by an additional 1 percent of Direct Activity Costs if Match is provided in an amount equal to 5 percent or more of Direct Activity Costs:

(1) Funds for Administrative costs are limited to 4 percent of Direct Activity Costs, excluding Match funds, and Activity soft costs are limited to $1,200 per Household assisted. Activity soft costs may reimburse expenses for costs related to determining Household income eligibility, including recertification, and conducting Housing Quality Standards (HQS) inspections. All costs must be reasonable and customary for the Administrator's Service Area; or

(2) Funds for Administrative costs are limited to 8 percent of Direct Activity Costs, excluding Match funds, and Administrator may not be reimbursed for Activity soft costs.

(h) Administrators must have a written agreement with Owner that the Owner will notify the Administrator within one (1) month if a tenant moves out of an assisted unit prior to the lease end date.

(i) Administrator must not approve a unit if the owner is by consanguinity, affinity, or adoption the parent, child, grandparent, grandchild, sister, or brother of any member of the assisted Household, unless the Administrator determines that approving the unit would provide Reasonable Accommodation for a Household member who is a Person with Disabilities. This restriction against Administrator approval of a unit only applies at the time the Household initially receives assistance under a Contract or Agreement, but does not apply to Administrator approval of a recertification with continued tenant-based assistance in the same unit.

(j) Administrators must maintain Written Policies and Procedures established for the HOME Program in accordance with §10.802 (10.610) of this Title, except that where the terms Owner, Property, or Development are used Administrator or Program will be substituted, as applicable. Additionally, the procedures in subsection (l) of this section (relating to the Violence Against Women Act (if in conflict with the provisions in §10.802 (10.610) of this Title)) will govern.

(k) Administrators serving a Household under a Reservation Agreement may not issue a Certificate of Eligibility to the Household prior to reserving funds for the Activity.

(l) Administrators are required to comply with regulations and procedures outlined in the Violence Against Women Act (VAWA), and provide tenant protections as established in the Act.

(1) An Administrator of Tenant-Based Rental Assistance must provide all Applicants (at the time of admittance or denial) and Households (before termination from the Tenant-Based Rental Assistance program or from the dwelling assisted by the Tenant-Based Rental Assistance Coupon Contract) the Department's "Notice of Occupancy Rights under the Violence Against Women Act", (based on HUD form 5380) and also provide to Households "Certification of Domestic Violence, Dating Violence, Sexual Assault, or Stalking" (HUD form 5382) prior to execution of a Rental Coupon Contract and before termination of assistance from the Tenant-Based Rental Assistance program or from the dwelling assisted by the Tenant-Based Rental Assistance coupon contract.

(2) Administrator must notify the Department within three (3) calendar days when tenant submits a Certification of Domestic Vi-
olence, Dating Violence, Sexual Assault, or Stalking and/or alternate documentation to Administrator and must submit a plan to Department for continuation or termination of assistance to affected Household members.

(3) Notwithstanding any restrictions on admission, occupancy, or terminations of occupancy or assistance, or any Federal, State or local law to the contrary, Administrator may "bifurcate" a rental coupon contract, or otherwise remove a Household member from a rental coupon contract, without regard to whether a Household member is a signatory, in order to evict, remove, terminate occupancy rights, or terminate assistance to any individual who is a recipient of TBRA and who engages in criminal acts of physical violence against family members or others. This action may be taken without terminating assistance to, or otherwise penalizing the person subject to the violation.

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

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TITLE 16. ECONOMIC REGULATION
PART 2. PUBLIC UTILITY COMMISSION OF TEXAS
CHAPTER 24. SUBSTANTIVE RULES APPLICABLE TO WATER AND SEWER SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes amendments to 16 Texas Administrative Code (TAC) §§24.3, 24.11, 24.14, 24.25, 24.27, 24.29, 24.33, 24.35, 24.49, 24.127, 24.129, 24.227, and 24.363, relating to classifications and reporting requirements for water and sewer utilities. The proposed amendments will implement the changes required by sections 1, 2 (in part), 3, 7, 8, 9, and 11 of Senate Bill 700, passed in the 86th Regular Legislative Session and effective in 2019, relating to changes in the classification of water and sewer utilities, the issuance of emergency orders by the commission and the Texas Commission on Environmental Quality (TCEQ), and the continuation of temporary rates for nonfunctioning utilities that are acquired by another utility. The proposed amendments make changes to 16 TAC §24.3 to conform certain definitions to the definitions found in TWC §13.002, delete terms that are defined using language that is repeated elsewhere in 16 TAC Chapter 24, delete terms that are also defined in 16 TAC Chapter 22, and delete terms that appear only in 16 TAC §24.3 and nowhere else in 16 TAC Chapter 24. Definitions of some commonly-used ratemaking terms are also deleted.

Growth Impact Statement

The commission provides the following governmental growth impact statement for the proposed amendments, as required by Texas Government Code §2001.0221. The commission has determined that for each year of the first five years that the amendments are 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 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 not repeal an existing regulation;
7. the proposed amendments will not change the number of individuals subject to the rule's applicability; and
8. the proposed amendments 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

Debi Loockerman, Director of Water Rates Analysis, 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 sections.

Public Benefits

Ms. Loockerman 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 implementation of Senate Bill 700, including conforming the commission’s rules to reflect newly defined rate classes for water and sewer utilities and clarification of the definitions used in Chapter 24. The probable economic cost to persons required to comply with the proposed amendments will be negligible under Texas Government Code §2001.024(a)(5).

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; there-
before, 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 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 March 4, 2020. Requests for hearing must be received by February 18, 2020. If no hearing is requested, a filing will be made in Project No. 49798 to inform interested persons that no hearing will be held.

Public Comments

Comments and reply comments on the proposed amendments may be filed with the commission's filing clerk at 1701 North Congress Avenue, Austin, Texas or mailed to P.O. Box 13326, Austin, TX 78711-3326. Comments must be received by February 3, 2020. Reply comments must be received by February 18, 2020. Sixteen copies of comments on the proposed amendments are required to be filed by 16 TAC §22.71(c). Comments should be organized in a manner consistent with the organization of the proposed amendments. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendments. The commission will consider the costs and benefits in deciding whether to adopt the proposed amendments. All comments should refer to Project Number 49798.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §§24.3, 24.11, 24.14

Statutory Authority

The amendments are proposed under Texas Water Code (TWC) §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; TWC §13.041(d), which grants the commission the authority to issue emergency orders to compel a retail public utility to provide continuous and adequate service if discontinuance of service is imminent or has occurred because of the retail public utility’s actions or inactions; TWC §13.041(i), which grants the commission the authority to establish reasonable compensation for temporary service to a neighboring retail public utility when TCEQ has ordered an emergency interconnection and has requested that the commission set such compensation; TWC §13.046, which grants the commission the authority to adopt rules establishing a procedure that allows a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate to the customers of the nonfunctioning system; TWC §13.131, which allows the commission to prescribe the forms of books, accounts, records, and memoranda to be kept by water and sewer utilities; TWC §13.136(b), which directs the commission to require by rule the filing of an annual service, financial, and normalized earnings report; TWC §13.181(b), which provides the commission with the authority to fix and regulate rates of utilities, including rules and regulations for determining the classification of customers and services for determining the applicability of rates; TWC §13.1871, which grants the commission the authority to adopt rules governing the contents of an application to change rates and the authority to suspend the effective date of a proposed rate change; TWC §13.1872, which requires the commission to adopt rules establishing procedures to allow a Class D utility to receive an annual rate adjustment; TWC §13.1873, which requires the commission to adopt rules that allow a Class B utility to file a less burdensome application than the application for a Class A utility, and a Class C or D utility to file a less burdensome application than the applications for a Class A or B utility; and TWC §13.246, which authorizes the commission to grant or amend a certificate of convenience and necessity.


§24.3. Definitions of Terms.

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

[(1) Acquisition adjustment--]  
[(A) The difference between:]  
[(B) the lesser of the purchase price paid by an acquiring utility or the current depreciated replacement cost of the plant, property, and equipment comparable in size, quantity, and quality to that being acquired, excluding customer contributed property, less accumulated depreciation; and]  
[(C) the original cost of the plant, property, and equipment being acquired, excluding customer contributed property, less accumulated depreciation.]  
[(D) A positive acquisition adjustment results when subparagraph (A)(i) of this paragraph is greater than subparagraph (A)(ii) of this paragraph.]  
[(E) A negative acquisition adjustment results when subparagraph (A)(ii) of this paragraph is greater than subparagraph (A)(i) of this paragraph.]  
[(2) Active connections—Water or sewer connections currently being used to provide retail water or sewer service.]  
[(3) ADLET—Accumulated deferred federal income tax—The amount of income-tax deferral, typically reflected on the balance sheet, produced by deferring the payment of federal income taxes by using tax-advantageous methods such as accelerated depreciation.]  
[(2) [55] Affected person—Any landowner within an area for which a [an application for a new or amended] certificate of public convenience and necessity is filed, [filed] any retail public utility affected by any action of the regulatory authority, [authority] any person or corporation whose utility service or rates are affected by any proceeding before the regulatory authority, [authority] or any person or corporation that is a competitor of a retail public utility with respect to any service performed by the retail public utility or that desires to enter into competition.]  
[(3) [66] Affiliated interest or affiliate—  
(A) - (G) [No change.]  
[(7) Agency—Any state board, commission, department, or officer having statewide jurisdiction (other than an agency wholly financed by federal funds, the legislature, the courts, the Texas Depart-]
Allocations—For all retail public utilities, the division of plant, revenues, expenses, taxes, and reserves between municipalities, or between municipalities and unincorporated areas, where such items are used for providing water or sewer utility service in a municipality or for a municipality and unincorporated area. A non-municipal allocation is the division of plant, revenues, expenses, taxes and reserves between the two governmental bodies. If there are multiple jurisdictions, rate regions, business units, functions, or customer classes defined within a retail public utility’s operations for all retail public utilities and affiliates.

Amortization—The gradual extinguishment of an amount in an account by distributing the amount over a fixed period (such as over the life of the asset or liability to which it applies).

Annualization—An adjustment to bring a utility’s accounts to a 12-month level of activity.

Base rate—The portion of a consumer’s utility bill that is paid for the opportunity to receive utility service, which does not vary due to changes in utility service consumption patterns.

Billing period--The [usage] period between meter reading dates for which a bill is issued or, [or in nonmetered situations] the period between bill issuance dates.

Block rates—A rate structure set by using blocks, typically including cost for increased usage, which changes the cost per 1,000 gallons as usage increases to the next block.

Certificate of Convenience and Necessity (CCN)—A permit issued by the commission which authorizes and obligates a retail public utility to furnish, make available, render, or extend continuous and adequate retail water or sewer utility service to a specified geographic area. Certificate or Certificate of Public Convenience and Necessity have the same meaning.

Class A Utility—A public utility that provides retail water or sewer utility service to 10,000 or more taps or active connections. If a public utility provides both water and sewer utility service, the number of active water connections determines how the utility is classified.

Class B Utility—A public utility that provides retail water or sewer utility service to 2,300 [500] or more taps or active connections but fewer than 10,000 taps or active connections. If a public utility provides both water and sewer utility service, the number of active water connections determines how the utility is classified.

Class C Utility—A public utility that provides retail water or sewer utility service to [fewer than] 500 or more taps or active connections but fewer than 2,300 taps or active connections. [A Class C utility filing an application under TWC §13.1871 shall be subject to all requirements applicable to Class B utilities filing an application under TWC §13.1871.] If a public utility provides both water and sewer utility service, the number of active water connections determines how the utility is classified.

Class D Utility—A public utility that provides retail water or sewer utility service to fewer than 500 taps or active connections. If a public utility provides both water and sewer utility service, the number of active water connections determines how the utility is classified.

Commission—The Public Utility Commission of Texas, of a presiding officer, as applicable.

Corporation—Any corporation, joint-stock company, or association, domestic or foreign, and its lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers or [and] privileges of corporations not possessed by individuals or partnerships, but does [shall] not include municipal corporations unless expressly provided [otherwise] in TWC Chapter 13, [the TWC],

Customer—Any person, firm, partnership, corporation, municipality, cooperative, organization, or governmental agency provided with services by any retail public utility.

Customer class—A [description of utility service provided to a customer that denotes such characteristics as nature of use or type of rate. For rate setting purposes, a group of customers with similar cost-of-service characteristics that take utility service under a single set of rates.

Customer service line [or pipe]—The pipe connecting the water meter to the customer’s point of consumption or the pipe that conveys sewage from the customer’s premises to the service provider’s service line.

District—District has the meaning assigned to it by TWC §49.001(a).

Facilities—All the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.

Financial assurance—The demonstration that sufficient or adequate financial resources exist to operate and manage the utility and to provide continuous and adequate service to the utility’s service area and/or requested area.

Functional cost category—Costs related to a particular operational function of a utility for which annual operations & maintenance expenses and utility plant investment records are maintained.

Functionalization—The assignment or allocation of costs to utility functional cost categories.

General rate revenue—A rate or the associated revenues designed to recover the cost of service other than certain costs separately identified and recovered through a pass-through or any specific rate such as a surcharge. For water and wastewater utilities, rates typically include the base rate and gallonage rate.

Inactive connection—A water [connections—Water] or wastewater connection [connections tapped to the applicant’s utility and] that is [are] not currently receiving service from a retail public [the] utility.

Incident of tenancy—Water or sewer service [service] provided to tenants of rental property, for which no separate or additional service fee is charged other than the rental payment.

Intervenor—A person, other than the applicant, respondent, or the commission staff representing the public interest, who is permitted by this chapter or by ruling of the presiding officer to become a party to a proceeding.

Known and measurable (K&M)—Verifiable on the record as to amount and certainty of effectuation. Reasonably certain to occur within 12 months of the end of the test year.

Landowner—An owner [or owners] of a tract of land, including multiple owners of a single [deeded] tract of land, as
shown on the appraisal roll of the appraisal district established for each county in which the property is located.

[(34) License--The whole or part of any commission permit, certificate, registration, or similar form of permission required by law.]

[(35) Licensing--The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license, certificates of convenience and necessity, or any other authorization granted by the commission in accordance with its authority under the TWC.]

[(36) Main--A pipe operated by a utility service provider that is used for transmission or distribution of water or to collect or transport sewage.]

[(37) Mandatory water use reduction--The temporary reduction in the use of water imposed by court order, government agency, or other authority with appropriate jurisdiction. This does not include water conservation measures that seek to reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling or reuse of water so that a water supply is made available for future or alternative uses.]

[(19) [(38) Member--A person who holds a membership in a water supply or sewer service corporation and who is a record owner of a fee simple title to property in an area served by [within] a water supply or sewer service corporation [corporation's service area,] or a person who is granted a membership and who either currently receives or will be eligible to receive water or sewer utility service from the corporation. In determining member control of a water supply or sewer service corporation, a person is entitled to only one vote regardless of the number of memberships the person owns.]

[(39) Membership fee--A fee assessed each water supply or sewer service corporation service applicant that entitles the applicant to one connection to the water or sewer main of the corporation. The amount of the fee is generally defined in the corporation's bylaws and payment of the fee provides for issuance of one membership certificate in the name of the applicant, for which certain rights, privileges, and obligations are allowed under said bylaws. For purposes of TWC §13.043(g), a membership fee is a fee not exceeding approximately 12 times the monthly base rate for water or sewer service or an amount that does not include any materials, labor, or services required for or provided by the installation of a metering device for the delivery of service, capital recovery, extension fees, buy-in fees, impact fees, or contributions in aid of construction.]

[(40) Multi-jurisdictional--A utility that provides water and/or wastewater service in more than one state, country, or separate rate jurisdiction by its own operations, or through an affiliate.]

[(20) Minimum Monthly Charge--The fixed amount billed to a customer each month even if the customer uses no water or wastewater.]

[(21) [(41) Municipality--Cities [A city,] existing, created, or organized under the general, home rule, or special laws of this state.]

[(22) [(42) Municipally owned utility--Any retail public utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.]

[(43) Net Book Value--The amount of the asset that has not yet been recovered through depreciation. It is the original cost of the asset minus accumulated depreciation.]

[(23) [(44) Nonfunctioning system or utility--A system that is operating as a retail public utility and

(A) [that] is required to have a CCN and is operating without a CCN; or

(B) is [a retail public utility] under supervision in accordance with §24.353 of this title (relating to Supervision of Certain Utilities); or

(C) is [a retail public utility] under the supervision of a receiver, temporary manager, or [that] has been referred for the appointment of a temporary manager or receiver, in accordance with §24.353 of this title (relating to Operation of Utility That Discontinues Operation or Is Referred for Appointment of a Receiver) and §24.357 of this title (relating to Operation of a Utility by a Temporary Manager).]

[(24) [(45) Person--Natural [Includes natural] persons, partnerships of two or more persons having a joint or common interest, mutual or cooperative associations, water supply or sewer service corporations, and corporations.

[(46) Point of use or point of ultimate use--The primary location where water is used or sewage is generated; for example, a residence or commercial or industrial facility.]

[(25) [(47) Potable water--Water that is used for or intended to be used for human consumption or household use.]

[(26) [(48) Potential connections--Total number of active plus inactive connections.]

[(27) [(49) Premises--A tract of land or real estate including buildings and other appurtenances thereon.]

[(50) Protestor--A person who is not a party to the case who submits oral or written comments. A person classified as a protestor does not have rights to participate in a proceeding other than by providing oral or written comments.]

[(51) Public utility--The definition of public utility is that definition given to a water and sewer utility in this subchapter.]

[(52) Purchased sewage treatment--Sewage treatment purchased from a source outside the retail public utility's system to meet system requirements.]

[(53) Purchased water--Raw or treated water purchased from a source outside the retail public utility's system to meet system demand requirements.]

[(28) [(54) Rate--Every [includes every] compensation, tariff, charge, fare, toll, rental, and classification or any of those items [them] demanded, observed, charged, or collected, whether directly or indirectly, by any retail public utility, [or water or sewer service supplier,] for any service, product, or commodity described in TWC §13.002(23), and any rules, regulations, practices, or contracts affecting that [any such] compensation, tariff, charge, fare, toll, rental, or classification.]

[(55) Rate region--An area within Texas for which the applicant has set or proposed uniform tariffed rates by customer class.]

[(56) Ratepayer--Each person receiving a separate bill shall be considered as a ratepayer, but no person shall be considered as being more than one ratepayer notwithstanding the number of bills received. A complaint or a petition for review of a rate change shall be considered properly signed if signed by any person, or spouse of any such person, in whose name utility service is carried.]

[(57) Reconnect fee--A fee charged for restoration of service where service has previously been provided. It may be charged to
restore service after disconnection for reasons listed in §24.167 of this title (relating to Discontinuance of Service) or to restore service after disconnection at the customer's request.

(29) [659] Requested area—The area that a petitioner or applicant seeks to obtain, add to, or remove from a retail public utility’s certified service area.

(30) [659] Retail public utility—Any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water service or sewer service, or both, for compensation.

(31) [660] Retail water or sewer utility service—Potable water service or sewer service, or both, provided by a retail public utility to the ultimate consumer for compensation.

(32) [661] Return on invested capital—The rate of return on invested capital.

(33) [662] Service—Any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under [the] TWC Chapter 13 to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.

(34) [663] Service area—Area to which a retail public utility is obligated to provide retail water or sewer utility service.

(35) [664] Service line or pipe—A pipe connecting the utility service provider’s main and the water meter or for sewage, connecting the main and the point at which the customer’s service line is connected, generally at the customer’s property line.

(36) [665] Sewage—Ground garbage, human and animal, and all other waterborne type waste normally disposed of through the sanitary drainage system.

(37) [666] Stand-by fee—A charge, other than a tax, imposed on undeveloped property:

(A) with no water or wastewater connections; and

(B) for which water, sanitary sewer, or drainage facilities and services are available; water supply, wastewater treatment plant capacity, or drainage capacity sufficient to serve the property is available; or major water supply lines, wastewater collection lines, or drainage facilities with capacity sufficient to serve the property are available.

(38) [667] Tap fee—A tap fee is the charge to new customers for initiation of service where no service previously existed. A tap fee for water service may include the cost of physically tapping the main and installing meters, meter boxes, fittings, and other materials and labor. A tap fee for sewer service may include the cost of physically tapping the main and installing the utility’s service line to the customer’s property line, fittings, and other materials and labor. Water or sewer taps may include setting up the new customer’s account, and allowances for equipment and tools used. Extraordinary expenses such as road boxes and street crossings and grinder pumps may be added if noted on the utility’s approved tariff. Other charges, such as extension fees, buy-in fees, impact fees, or contributions in aid of construction (CIAC) are not to be included in a tap fee.

(39) [668] Tariff—The schedule of a retail public utility containing all rates, tolls, and charges stated separately by type or kind of service and the customer class, and the rules and regulations of the retail public utility stated separately by type or kind of service and the customer class.

(40) [669] TCEQ—Texas Commission on Environmental Quality.

(41) [670] Temporary rate for services provided for a nonfunctioning system—A rate charged under TWC §13.046 to the customers of a nonfunctioning system by a retail public utility that takes over the provision of service for a nonfunctioning retail public water or sewer utility service provider.

(42) [671] Temporary water rate provision for mandatory water use reduction—A provision in a utility’s tariff that allows a utility to adjust its rates in response to mandatory water use reduction.

(43) [672] Test year—The most recent 12-month period, beginning on the first day of a calendar or fiscal year quarter, for which operating data for a retail public utility are available.

(44) [673] Tract of land—An area of land that has common ownership and is not severed by other land under different ownership, whether owned by government entities or private parties; such other land includes roads and railroads. A tract of land may be acquired through multiple deeds or shown in separate surveys.

(45) [674] TWC—Texas Water Code.

(46) [675] Utility—The definition of utility is that definition given to water and sewer utility in this subchapter.

(47) [676] Water—Potable water, used by member-owned, member-controlled, and member-licensed water or sewer service corporation to supply water to the public.

(48) [677] Water utility—Any person, corporation, cooperative corporation, affected county, or any combination of those persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the provision, transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others.

(49) [678] Water supply or sewer service corporation—Any nonprofit corporation organized and operating under TWC chapter 67, that provides potable water or sewer service for compensation that has adopted and is operating in accordance with bylaws or articles of incorporation which ensure that it is member-owned and member-controlled. The term does not include a corporation that provides retail water or sewer utility service to a person who is not a member, except that the corporation may provide retail water or sewer utility service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold. For purposes of this chapter, to qualify as member-owned, member-controlled a water supply or sewer service corporation must also meet the following conditions:

(A) All members of the corporation meet the definition of “member” under this section, and all members are eligible to vote in those matters specified in the articles and bylaws of the corporation. Payment of a membership fee in addition to other conditions of service.
may be required provided that all members have paid or are required to pay the membership fee effective at the time service is requested:]

[(B) Each member is entitled to only one vote regardless of the number of memberships owned by that member.]

[(C) A majority of the directors and officers of the corporation must be members of the corporation.]

[(D) The corporation’s bylaws include language indicating that the factors specified in subparagraphs (A) - (C) of this paragraph are in effect:]

[(78) Water use restrictions—Restrictions implemented to reduce the amount of water that may be consumed by customers of the utility due to emergency conditions or drought:]

(40) [(79)] Wholesale water or sewer service—Potable water or sewer service, or both, provided to a person, political subdivision, or municipality who is not the ultimate consumer of the service.


(a) (No change.)

(b) Application. This section applies to new and existing owners or operators of retail public utilities that are required to provide financial assurance under [pursuant to] this chapter.

(c) (No change.)

(d) Irrevocable stand-by letter of credit. Irrevocable stand-by letters of credit must be issued by a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Governor of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation. The retail public utility must use the standard form irrevocable stand-by letter of credit approved by the commission. The irrevocable stand-by letter of credit must be irrevocable for a period not less than five years, be payable to the commission, and permit a draw to be made in part or in full. The irrevocable stand-by letter of credit must permit the commission’s executive director or the executive director’s designee to draw on the irrevocable stand-by letter of credit if the retail public utility has failed to provide continuous and adequate service or the retail public utility cannot demonstrate its ability to provide continuous and adequate service.

(e) Financial test.

(1) An owner or operator may demonstrate financial assurance by satisfying [a financial test including] the leverage and operations tests that conform to the requirements of this section, unless the commission finds good cause exists to require only one of these tests.

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

(4) To demonstrate that the requirements of the leverage and operations tests are being met, the owner or operator must [shall] submit the following items to the commission:

(A) An affidavit signed by the owner or operator attesting to the accuracy of the information provided. The owner or operator may use the Applicant’s Oath adopted by the commission as part of [affidavit included with] an application filed under [pursuant to] §24.233 of this title (relating to Contents of Certificate of Convenience and Necessity Applications) [pursuant to the commission’s form] for the purpose of meeting the requirements of this subparagraph; and

(B) A copy of one of the following:

(i) - (ii) (No change.)

(iii) internally produced financial statements meeting the following requirements:

(I) (No change.)

(II) for a proposed or new utility, start up information and five years of pro forma projections including a balance sheet, income statement and expense statement or evidence that the utility will be moving toward proper accountability and transparency during the first five years of operations. All assumptions must be clearly defined and the utility must [shall] provide all documents supporting projected lot sales or customer growth.

(C) (No change.)

(5) If the applicant is proposing service to a new CCN area or a substantial addition to its current CCN area requiring capital improvements in excess of $100,000, the applicant must provide the following:

(A) (No change.)

(B) The owner must submit loan approval documents or firm capital commitments affirming funds are available to install:

(i) the [to install] plant and equipment necessary to serve projected customers in the first two years of projections; or

(ii) a new water system or substantial addition to an existing [a currently operating] water system if the applicant is proposing service to [application includes added CCN area with the intention of serving] a new CCN area or a new subdivision.

(6) If the applicant is a nonfunctioning utility, as defined in §24.3(23) [§24.3(44)] of this title (relating to Definitions of Terms), the commission may consider other information to determine if the proposed certificate holder is capable [has the capability] of meeting the leverage and operations tests.


(a) The commission may issue an emergency order [orders] in accordance with the Texas Water Code (TWC) Chapter 13, Subchapter K-1 under Chapter 22, Subchapter P of this title (relating to Emergency Orders for Water and Sewer Utilities), with or without a hearing:

(1) to appoint a person under §24.355 of this title (relating to Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver), §24.357 of this title (relating to Operation of a Utility by a Temporary Manager), or TWC [Texas Water Code] §13.4132 to temporarily manage and operate a utility that has discontinued or abandoned operations or that is being referred to the Office of the Texas Attorney General for the appointment of a receiver under TWC [Texas Water Code] §13.412;

(2) to compel a retail public utility [water or sewer provider] that has obtained or is required to obtain a certificate of public convenience and necessity to provide continuous and adequate retail water service, sewer service, or both, if the discontinuance of the service is imminent or has occurred because of the retail public utility’s [service provider’s] actions or inactions;

(3) (No change.)

(4) to authorize an emergency rate increase if necessary to ensure the provision of continuous and adequate retail water or sewer service to the utility’s customers under [pursuant to] TWC [Texas Water Code] §13.4133:

(A) for a utility for which a person has been appointed under TWC [Texas Water Code] §13.4132 to temporarily manage and operate the utility; or

(B) for a utility for which a receiver has been appointed under TWC [Texas Water Code] §13.412;
(5) to establish, on an expedited basis, in response to a request by the Texas Commission on Environmental Quality (TCEQ), reasonable compensation for the temporary service required under TWC §13.041(h)(2) and to allow the retail public utility receiving the service to make a temporary adjustment to its rate structure to ensure proper payment;

(6) [(d)] to compel a retail public utility to make specified improvements and repairs to a [the] water or sewer system owned or operated by the utility under TWC [pursuant to Texas Water Code] §13.253(b):

(A) - (B) (No change.)

(C) if the retail public utility has provided financial assurance under Texas Health and Safety Code §341.0355 or TWC [Texas Water Code] Chapter 13;

(7) [(e)] to order an improvement in service or an interconnection under TWC [pursuant to Texas Water Code] §13.253(a)(1)-(3).

(b) (No change.)

c) For an emergency order issued under [pursuant to] subsection (a)(4) of this section [and in accordance with §22.296 of this title (relating to Additional Requirements for Emergency Rate Increases)]:

(1) the commission will [shall] coordinate with the TCEQ as needed;

(2) - (5) (No change.)

(6) the utility must [shall] maintain adequate books and records for a period not less than 12 months to allow for the determination of a cost of service as set forth in §24.41 of this title (relating to Cost of Service); and

(7) (No change.)

d) The costs of any improvements ordered under [pursuant to] subsection (a)(6) [(d)] of this section may be paid by bond or other financial assurance in an amount determined by the commission not to exceed the amount of the bond or financial assurance. After notice and hearing, the commission may require a retail public utility to obligate additional money to replace the financial assurance used for the improvements.

c) - (f) (No change.)

g) An emergency order may be renewed once for a period not to exceed 180 days, except an emergency order issued under [pursuant to] subsection (a)(4) 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 December 13, 2019.

TRD-201904800
Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 936-7244

SUBCHAPTER B. RATES AND TARIFFS
16 TAC §§24.25, 24.27, 24.29, 24.33, 24.35, 24.49

Statutory Authority

The amendments are proposed under Texas Water Code (TWC) §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; TWC §13.041(d), which grants the commission the authority to issue emergency orders to compel a retail public utility to provide continuous and adequate service if discontinuance of service is imminent or has occurred because of the retail public utility's actions or inactions; TWC §13.041(i), which grants the commission the authority to establish reasonable compensation for temporary service to a neighboring retail public utility when TCEQ has ordered an emergency interconnection and has requested that the commission set such compensation; TWC §13.046, which grants the commission the authority to adopt rules establishing a procedure that allows a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate to the customers of the nonfunctioning system; TWC §13.131, which allows the commission to prescribe the forms of books, accounts, records, and memoranda to be kept by water and sewer utilities; TWC §13.136(b), which directs the commission to require by rule the filing of an annual service, financial, and normalized earnings report; TWC §13.181(b), which provides the commission with the authority to fix and regulate rates of utilities, including rules and regulations for determining the classification of customers and services for determining the applicability of rates; TWC §13.1871, which grants the commission the authority to adopt rules governing the contents of an application to change rates and the authority to suspend the effective date of a proposed rate change; TWC §13.1872, which requires the commission to adopt rules establishing procedures to allow a Class D utility to receive an annual rate adjustment; TWC §13.1873, which requires the commission to adopt rules that allow a Class B utility to file a less burdensome application than the application for a Class A utility, and a Class C or D utility to file a less burdensome application than the applications for a Class A or B utility; and TWC §13.246, which authorizes the commission to grant or amend a certificate of convenience and necessity.


§24.25. Form and Filing of Tariffs.

(a) Approved tariff. A utility may not directly or indirectly demand, charge, or collect any rate or charge, or impose any classifications, practices, rules, or regulations different from those prescribed in its approved tariff filed with the commission or with the municipality exercising original jurisdiction over the utility, except as follows:

(1) A utility may charge the rates proposed under [the] Texas Water Code (TWC) §§13.187, 13.1871, 13.18715, or 13.1872(c)(2) [§13.187 or §13.18715] on or after the proposed effective date, unless the proposed effective date of the proposed rates is suspended or the regulatory authority sets interim rates.

(2) (No change.)

(3) A person who possesses facilities used to provide retail water utility service or a utility that holds a certificate of public convenience and necessity (CCN) to provide retail water service that enters into an agreement in accordance with TWC §13.250(b)(2), may collect charges for sewer services on behalf of another retail public utility on the same bill with its water charges and must [shall] at the earliest op-
portunity include a notation on its tariff that it has entered into such an agreement.

(4) A utility may enter into a contract with a county to collect solid waste disposal fees and include those fees on the same bill with its water or sewer charges and must [shall] at the earliest opportunity include a notation on its tariff that it has entered into such an agreement.

(b) Requirements as to size, form, identification, minor changes, and filing of tariffs.

(1) Tariffs filed with applications for CCNs.

(A) When applying to obtain or amend a CCN, or to add a new water or sewer system or subdivision to its certificated service area, each [every] utility must [shall] file its proposed tariff with the commission and any regulatory authority with original rate jurisdiction over the utility.

(i) For a utility that is under the original rate jurisdiction of the commission, the tariff must include [shall contain] schedules of all the utility's rates, [tolls, charges] rules, and regulations pertaining to all [of] its utility services [services(s)] when it applies for a CCN to operate as a utility. The tariff must be on the form prescribed by the commission or another form acceptable to the commission.

(ii) (No change.)

(B) If a person applying for a CCN is not currently a retail public utility and would be under the original rate jurisdiction of the commission if the CCN application were approved, the person must [shall] file a proposed tariff with the commission. The person filing the proposed tariff must [shall] also:

(i) - (iii) (No change.)

(iv) provide an estimated completion date [date(s)] for the construction of the physical plant [plant(s)]

(v) provide an estimate of the date [date(s)] service will begin for all phases of construction; and

(vi) (No change.)

(C) A person under the original rate jurisdiction of the commission who has obtained an approved tariff for the first time must [and is under the original rate jurisdiction of the commission shall] file a rate change application within 18 months from the date service begins in order to revise its rates to be based on [toll to adjust the rates to] a historic test [year and to true up the new tariffs rates to the historic test year]. Any dollar amount collected under the rates initially approved by the commission that exceeds [charged during the test year in excess of] the revenue requirement established by the commission during the rate change proceeding must [shall] be reflected as customer contributed capital going forward as an offset to rate base for ratemaking purposes. A Class D utility must file a rate change application under TWC §13.1872(c)(2) to [An application for a price index rate adjustment under TWC §13.1872 does not] satisfy the requirements of this subparagraph.

(D) A [Every] water supply or sewer service corporation must [shall] file with the commission a complete tariff containing schedules of all its rates, [tolls, charges] rules, and regulations pertaining to all of its utility services when it applies to operate as a retail public utility and to obtain or amend a CCN.

(2) Minor tariff changes. Except for an affected county or a utility under the original rate jurisdiction of a municipality, a utility's approved tariff may not be changed or amended without commission approval. Changes to [Minor tariff changes shall not be allowed for] any fees charged by affiliates, the [affiliates. The] addition of a new extension policy to a tariff, or modification of an existing extension policy are [is] not [a] minor tariff changes. [changes.]

An affected county may change rates for retail water or sewer service without commission approval, but must [shall] file a copy of the revised tariff with the commission within 30 days after the effective date of the rate change.

(A) The commission, or regulatory authority, as appropriate, may approve the following minor changes to utility tariffs:

(i) - (ii) (No change.)

(iii) addition of the regulatory assessment fee payable to the Texas Commission on Environmental Quality (TCEQ) [TCEQ] as a separate item or to be included in the currently authorized rate;

(iv) - (viii) (No change.)

(ix) modifications, updates, or corrections that do not affect a rate may be made to the following information contained in the tariff:

(I) (No change.)

(II) the public water system name [name(s)] and corresponding identification number [number(s)] issued by the TCEQ; and

(III) the sewer systems name and corresponding discharge permit number [number(s)] issued by the TCEQ.

(B) The commission, or other regulatory authority, as appropriate, may approve a minor tariff change for a utility to establish reduced rates for a minimal level of retail water service to be provided solely to a class of elderly customers 65 years of age or older to ensure that those customers receive that level of retail water service at more affordable rates. The [regulatory authority shall allow a] utility may [may] establish a fund to receive donations to cover [cover] the cost [costs] of providing the reduced rates. A utility may not recover the cost of the reduced rates [those costs] through charges to [the] other customer classes.

(i) To request approval of a rate as defined in this subparagraph, the utility must file a proposed plan for consideration [review] by the commission. The plan must [shall] include:

(I) (No change.)

(II) the account or subaccount name and number, as included in the system of accounts described in §24.127(1) of this title (relating to Financial Records and Reports--Uniform System of Accounts. [The National Association of Regulatory Utility Commissioners (NARUC) account or subaccount name and number in which the donations will be accounted for, and a clear definition of how the administrative costs of operation of the program will be [are] accounted for and removed from the cost of service for rate making purposes. Any interest earned on donated funds will be considered a donation to the fund.

(III) The proposed [Any] effective date of the program and an example of an annual accounting for donations received and a calculation of all lost revenues and the journal entries that transfer the funds from the account described in this subparagraph to the utility's revenue account. The annual accounting must [shall] be available for [the] audit by the commission upon request.

(IV) (No change.)

(iii) For the purpose of clause (i) of this subparagraph, recovery of lost revenues from donations is limited to [shall only include] the lost revenues due to the difference in the utility's
tariffed retail water rates and the reduced rates established by this subparagraph.

(iii) The minimal level of retail water service requested by the utility must not exceed [shall be no more than] 3,000 gallons per month per connection. Additional gallons used must [shall] be billed at the utility's tariffed rates.

(iv) (No change.)

(C) If a utility has provided [proper] notice as required in subparagraph (F) of this paragraph, the commission may approve a pass-through provision as a minor tariff change, even if the utility has never had an approved pass-through provision in its tariff. A pass-through provision may not be approved for a charge already included in the utility's cost of service used to calculate the rates approved by the commission in the utility's most recently approved rate change under TWC §§13.187, 13.1871, 13.18715, or 13.1872. [§13.187 or TWC § 13.1871.] A pass-through provision may only include passing through the actual costs charged to the utility. Only the commission staff or the utility may request a hearing on a proposed pass-through provision or a proposed revision or change to a pass-through provision. A pass-through provision may be approved as follows: [in the following situation(s):]

(i) - (vi) (No change.)

(D) A change in the combined pass-through provision may [only] be implemented only once per year. The utility must file a true-up report within one month after the end of the true-up period. The report must reconcile both expenses and revenues related to the combined pass-through charge for the true-up period. If the true-up report reflects an over-collection from customers, the utility must change its combined pass-through rate using the confirmed rate changes to charges being passed through and the over-collection from customers reflected in the true-up report. If the true-up report does not reflect an over-collection from the customers, the implementation of a change to the pass-through rate is optional. The change may be effective in a billing cycle within three months after the end of the true-up period as long as the true-up clearly shows the reconciliation between charges by pass-through entities and collections from the customers, and charges from previous years are reconciled. Only expenses charged by the pass-through provider may [provider(s) shall] be included in the provision. The true-up report must [shall] include:

(i) - (vi) (No change.)

(E) For any pass-through provision granted under this section, all charges approved for recovery of pass-through costs must [shall] be stated separately from all charges by the utility to recover the revenue requirement. Except for a combined pass-through provision, the calculation for a pass-through gallonage rate for a utility with one source of water may be made using the following equation, which is provided as an example: R = G / (1-L), where R is the utility's new proposed pass-through rate, G equals the new gallonage charge by source supplier or conservation district, and L equals the actual line loss reflected as a percentage expressed in decimal format (for example, 8.5% would be expressed as 0.085). Line loss will be considered on a case-by-case basis.

(F) A utility that requests [wishes] to revise or implement an approved pass-through provision must [shall] take the following actions prior to the beginning of the billing period in which the revision takes effect:

(i) file a written notice with the commission that must include:

(1) each [the] affected CCN [number(s)];

(2) a list of each [the] affected subdivision (subdivision(s),] public water system (including name [name(s)] and corresponding number [number(s)] issued by the TCEQ,[TCEQ], and [the] water quality system (including name [name(s)] and corresponding number [number(s)] issued by the TCEQ), if applicable;

(III) - (VIII) (No change.)

(ii) (No change.)

(G) The following provisions apply to surcharges:

(i) - (ii) (No change.)

(iii) A utility must [shall] use the revenues collected through a surcharge approved by the commission to cover the costs listed in clause (ii) of this subparagraph or [only] for any purpose [the purposes] noted in the order approving the surcharge. [A utility shall handle the funds in the manner specified in the order approving the surcharge.] The utility may redirect or use the revenues for other purposes only after first obtaining the approval of the commission.

(iv) (No change.)

(3) Tariff revisions and tariffs filed with rate changes.

(A) If the commission is the regulatory authority, the utility must [shall] file its revisions with the commission. If a proposed tariff revision constitutes an increase in existing rates of a particular customer class or classes, then the commission may require that notice be given.

(B) (No change.)

(4) Rate schedule. Each rate schedule must clearly state:

(A) the name of each public water system [name(s)] and [the] corresponding identification number [number(s)] issued by the TCEQ, or the name of each sewer system [name(s)] and [the] corresponding identification number [number(s)] issued by the TCEQ for each discharge permit, to which the schedule is applicable; and [permit,]

(B) the name of each subdivision, city, and county in which the schedule is applicable.

(5) (No change.)

(c) Composition of tariffs. A utility's tariff, including those utilities operating within the corporate limits of a municipality, must contain sections setting forth:

(1) (No change.)

(2) a list of the cities, counties, and subdivisions (subdivision(s)] in which service is provided, along with each [the] public water system name [name(s)] and corresponding identification number [number(s)] issued by the TCEQ and each sewer system name [name(s)] and corresponding discharge permit number(s) issued by the TCEQ to which the tariff applies;

(3) each [the] CCN [number(s)] under which service is provided;

(4) - (8) (No change.)

(d) (No change.)

(e) Availability of tariffs. Each utility must [shall] make available to the public at each of its business offices and designated sales offices within Texas all of its tariffs currently on file with the commission or regulatory authority, and its employees must [shall] lend assistance
to persons requesting information and afford these persons an opportunity to examine any such tariffs upon request. The utility must also [shall] provide copies of any portion of the tariffs at a reasonable cost to a requesting party.

(f) Rejection. Any tariff filed with the commission and found not to be in compliance with this section must [shall] be returned to the utility with a brief explanation of the reasons for rejection.

(g) Change by other regulatory authorities. Each utility operating within the corporate limits of a municipality exercising original jurisdiction must [shall] file with the commission its current tariff that has been authorized by the municipality. If changes are made to the utility’s tariff for one or more service areas under the jurisdiction of the municipality, the utility must [shall] file its tariff reflecting the changes along with the ordinance, resolution or order issued by the municipality to authorize the change.

(h) Effective date. The effective date of a tariff change is the date of approval by the regulatory authority, unless otherwise specified by the regulatory authority, in a commission order, or by rule. The effective date of a proposed rate increase under TWC §§13.1871, 13.1871, 13.18715, or 13.1872 [§13.187 or §13.1871] is the proposed date on the notice to customers and the regulatory authority, unless suspended by the regulatory authority.

(i) Tariffs filed by water supply or sewer service corporations. A [Every] water supply or sewer service corporation must file with the commission, [shall file,] for informational purposes only, its tariff showing all rates that are subject to the appellate jurisdiction of the commission and that are in force for any utility service, product, or commodity offered. The tariff must include all rates, rules, and regulations relating to utility service or extension of service, each [the] CCN number under which service is provided, [number(s),] and all affected counties or cities. If changes are made to the water supply or sewer service corporation’s tariff, the water supply or sewer service corporation must [shall] file the tariff reflecting the changes, along with a cover letter with the effective date of the change. Tariffs filed under this subsection must [shall] be filed in conformance with §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials) and §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission).

(j) Temporary water rate provision for mandatory water use reduction.

(1) - (2) (No change.)

(3) A utility may request a temporary water rate provision for mandatory water use reduction using the formula in this paragraph to recover 50% or less of the revenues that would otherwise have been lost due to mandatory water use reductions. The formula for a temporary water rate provision for mandatory water use reduction under this paragraph is TGC = cgc + [(prr)(cgc)(r)/(1.0-r)] where, TGC = Temporary gallonage charge cgc = current gallonage charge r = water use reduction expressed as a decimal fraction (the pumping restriction) prr = percentage of revenues to be recovered expressed as a decimal fraction (i.e., 50% = 0.5). [is:] [Figure: 16 TAC §24.25(j)(3)]

(A) The utility must [shall] file a request for a temporary water rate provision for mandatory water use reduction [request] and provide customer notice as required by the regulatory authority, but is not required to provide complete financial data to support its existing rates. Notice must include a statement of when the temporary water rate provision would be implemented, a list of all [the] customer classes [class(es)] affected, the rates affected, information on how to protest or [and/or] intervene in the rate change, the address of the regulatory authority, the time frame for protests, and any other information that is required by the regulatory authority. The utility’s existing rates are not subject to review in this proceeding and the utility is only required to support the need for the temporary rate. A request for a temporary water rate provision for mandatory water use reduction under this paragraph is not considered a statement of intent to increase rates subject to the 12-month limitation in §24.29 of this title (relating to Time Between Filings).

(B) The utility must [shall] establish that the projected revenues that will be generated by the temporary water rate provision are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect.

(4) A utility may request a temporary water rate provision for mandatory water use reduction using the formula in paragraph (3) of this subsection or any other method acceptable to the regulatory authority to recover up to 100% of the revenues that would otherwise have been lost due to mandatory water use reductions.

(A) If the utility requests authorization to recover more than 50% of lost revenues, the utility must [it shall] submit financial data to support its existing rates as well as the temporary water rate provision for mandatory water use reduction even if no other rates are proposed to be changed. The utility’s existing rates are subject to review in addition to the temporary water rate provision for mandatory water use reduction.

(B) The utility must [shall] establish that the projected revenues that will be generated by the temporary water rate provision for mandatory water use reduction are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect; that the rate of return granted by the regulatory authority in the utility’s last rate case does not adequately compensate the utility for the foreseeable risk that mandatory water use reductions will be ordered; and that revenues generated by existing rates do not exceed reasonable cost of service.

(5) - (6) (No change.)

(7) A utility implementing a temporary water rate for mandatory water use reduction must [shall] take the following actions prior to the beginning of the billing period in which the temporary water rate provision takes effect:

(A) - (B) (No change.)

(8) A utility must [shall] stop charging a temporary water rate provision as soon as is practicable after the order that required mandatory water use reduction is ended, but in no case later than the end of the billing period that was in effect when the order was ended. The utility must [shall] notify its customers of the date that the temporary water rate provision ends and that its rates will return to the level authorized before the temporary water rate provision was implemented. The notice provided to customers regarding the end of the temporary water rate provision must [shall] be filed with the commission.

(9) (No change.)

(k) (No change.)

(l) Regional rates. The regulatory authority, where practicable, will [shall] consolidate the rates by region for applications submitted by a Class A, B, or C utility, or a Class D utility filing under TWC §13.1872(c)(2), [§13.187 or §13.1871] with a consolidated tariff and rate design for more than one system.

(m) (No change.)

(n) Energy cost adjustment clause.
(1) (No change.)

(2) A utility that requests the inclusion of an energy cost adjustment clause in its tariff must [shall] file a request with the commission. The utility must [shall] also give notice of the proposed energy cost adjustment clause by mail, either separately or accompanying customer billings, by e-mail, [email] or by hand delivery to all affected utility customers at least 60 days prior to the proposed effective date. Proof of notice in the form of an affidavit stating that proper notice was delivered to affected customers and stating the date [dates] of such delivery must [shall] be filed with the commission by the utility as part of the request. Notice must be provided on a [the] form prescribed by the commission [for a rate application package filed under TWC §§13.187 or §13.1871] and must contain the following information:

(A) the utility name and address, a description of how the increase or decrease in energy costs will be calculated, the effective date of the proposed change, and the classes [classes] of utility customers affected. The effective date of the proposed energy cost adjustment clause must be the first day of a billing period, which should correspond to the day of the month when meters are typically read, and the clause may not apply to service received before the effective date of the clause;

(B) - (C) (No change.)

(3) The commission's review of the utility's request is [an uncontested matter] not subject to a contested case hearing. However, the commission will [shall] hold a [an uncontested public meeting if requested by a member of the legislature who represents an area served by the utility or if the commission determines that there is substantial public interest in the matter.

(4) Once an energy cost adjustment clause has been approved, documented changes in energy costs must be passed through to the utility's customers within a reasonable time. The pass-through, whether an increase or decrease, must [shall] be implemented on at least an annual basis, unless the commission determines otherwise. Before making a change to the energy cost adjustment clause, [a special circumstance applies. Anytime changes are being made using this provision,] notice must [shall] be provided as required by paragraph (5) of this subsection. Copies of notices to customers must [shall] be filed with the commission.

(5) Before a utility implements a change in its energy cost adjustment clause as required by paragraph (4) of this subsection, the utility must [shall] take the following actions prior to the beginning of the billing period in which the implementation takes effect:

(A) - (B) (No change.)

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

(8) A proceeding under this subsection is not a rate case under TWC §§13.187, 13.1871, 13.18715, or 13.1872.

§24.27. Notice of Intent and Application to Change Rates. [Rates Pursuant to Texas Water Code §§13.187 or §13.1871.]

(a) Purpose. This section describes the requirements for the contents of an application to change rates and the requirements for the provision of notice of an application to change rates filed by a Class A, B, or C utility, or a Class D utility filing under Texas Water Code (TWC) §§13.1872(c)(2). [Rates Pursuant to TWC §§13.187 or §13.1871.]

(b) Contents of the application. An application to change rates [pursuant to TWC §§13.187 or §13.1871] is initiated by the filing of the applicable rate filing package, a statement of intent to change rates, and the proposed form and method of notice to customers and other affected entities under [pursuant to] subsection (c) of this section.

(1) The application must [shall] include the commission's rate filing package form and include all required schedules.

(2) The application must [shall] be based on a test year as defined in §24.3(36) [§24.3(72)] of this title (relating to Definitions of Terms).

(3) For an application filed by a Class A utility, [pursuant to TWC §§13.1871] the rate filing package, including each schedule, must [shall] be supported by pre-filed direct testimony. The pre-filed direct testimony must [shall] be filed at the same time as the application to change rates.

(4) For an application filed by a Class B utility, Class C utility, or Class D utility filing under TWC §§13.1872(c)(2), [pursuant to TWC §§13.1871,] the applicable rate filing package, including each schedule, must [shall] be supported by affidavit. The affidavit must [shall] be filed at the same time as the application to change rates. The utility may file pre-filed direct testimony at the same time as the application to change rates. If the application is set for a hearing, the presiding officer may require the filing of pre-filed direct testimony at a later date.

(5) Proof of notice. Proof of notice in the form of an affidavit stating that proper notice was mailed, e-mailed, or delivered to customers and affected municipalities and stating the dates [dates] of such delivery must [shall] be filed with the commission by the applicant utility as part of the rate change application.

(c) Notice requirements specific to applications filed by a Class A Utility under [pursuant to TWC §13.187.]

(1) Notice of the application. In order to change rates under [pursuant to] TWC §13.187, a utility must comply with the following requirements at least 35 days before the effective date of the proposed change.

(A) (No change.)

(B) Notice must [shall] be provided using the commission-approved form and must [shall] include a description of the process by which a ratepayer may intervene in the proceeding.

(C) This notice must [shall] state the docket number assigned to the rate application. Prior to the provision of notice, the utility must [shall] file a request for the assignment of a docket number for the rate application.

(D) - (E) (No change.)

(2) Notice of the hearing. After the rate application is set for a hearing, the commission will [shall] give reasonable notice of the hearing, including notice to the governing body of each affected municipality and county. The commission may require the utility to complete this notice requirement. The commission may delegate to an administrative law judge of the State Office of Administrative Hearings the responsibility and authority to give reasonable notice of the hearing, including notice to the governing body of each affected municipality and county.

(d) Notice requirements specific to applications filed by Class B, C, and D utilities. [pursuant to TWC §13.1871.]

(1) Notice of the application. In order to change rates, a Class B or C utility, or a Class D utility filing under TWC §13.1872(c)(2), [rates pursuant to TWC §§13.1871, a utility] must comply with the following requirements at least 35 days before the effective date of the proposed change.

(A) The utility must file a notice with the commission and provide a copy of the notice to all customers of the utility affected.


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by the proposed rate change, [change and] to the appropriate offices of each municipality affected by the proposed rate change, and to the Office of Public Utility Counsel.

(B) Notice must [shall] be provided using the commission-approved form and must [shall] include a description of the process by which a ratepayer may file a protest under [pursuant to] TWC §13.187(1).

(C) The [For Class B utilities the] notice must [shall] state the docket number assigned to the rate application. Prior to providing notice, a Class B or C utility, or a Class D utility filing under TWC §13.1872(c)(2), must [B utilities shall] file a request for the assignment of a docket number for the rate application.

(D) - (E) (No change.)

(2) Notice of the hearing. After the rate application is set for a hearing, the following notice requirements [shall] apply.

(A) The commission will [shall] give reasonable notice of the prehearing conference, [hearings] including notice to the governing body of each affected municipality and county. The commission may require the utility to provide [complete] this notice. [Notice requirement.] The commission may delegate to an administrative law judge of the State Office of Administrative Hearings the responsibility and authority to give reasonable notice for the prehearing conference, [hearing] including notice to the governing body of each affected municipality and county.

(B) A Class B [The] utility must [shall] mail notice of the prehearing conference [hearing] to each affected ratepayer at least 20 days before the prehearing conference. [hearing.] The notice must include a description of the process by which a ratepayer may intervene in the proceeding.

(C) A Class C utility, or a Class D utility filing under TWC §13.1872(c)(2), must mail, e-mail, or hand deliver notice of the prehearing conference to each affected ratepayer at least 20 days before the prehearing conference.

(D) A notice provided under subparagraph (B) or (C) of this paragraph must include a description of the process by which a ratepayer may intervene in the proceeding.

(e) Line extension and construction policies. A request to approve or amend a utility's line extension and construction policy must [shall] be filed in a rate change application under TWC §§13.187, 13.1871, or 13.1872(c)(2). [§13.187 or §13.1871.] The application [filed under TWC §13.187 or §13.1871] must include the proposed tariff and other information required by the commission. The request may be made with a request to change one or more of the utility's other rates.

(f) Capital improvements surcharge. In a rate proceeding under [pursuant to] TWC §§13.187, 13.1871, or 13.1872(c)(2), [TWC §13.187 or TWC §13.1871,] the commission may approve [authorize collection of additional revenues from the customers pursuant to] a surcharge to collect [provide] funds for capital improvements necessary to provide facilities capable of providing continuous and adequate utility service, and for the preparation of design and planning documents.

(g) Debt repayments surcharge. In a rate proceeding under [pursuant to] TWC §§13.187, 13.1871, or 13.1872(c)(2), [TWC §13.187 or TWC §13.1871,] the commission may approve [authorize collection of additional revenues from customers pursuant to] a surcharge to collect [provide] funds for debt repayments and associated costs, including funds necessary to establish contingency funds and reserve funds. Surcharge funds may be collected to meet all [of] the requirements of the Texas Water Development Board regarding [in regard to] financial assistance from the Safe Drinking Water Revolving Fund.

§24.29. Time Between Filings.

(a) Application. The following provisions are applicable to utilities, including those with consolidated or regional tariffs, under common control or ownership with any utility that has filed a statement of intent to increase rates under [pursuant to] TWC §§13.187, 13.1871, or 13.18715. [§13.187 or §13.1871.]

(b) A utility, [utility] or two or more utilities under common control and ownership, may not file a statement of intent to increase rates [pursuant to TWC §13.187 or §13.1871] more than once in a 12-month period except:

1) - (6) (No change.)

(c) A Class D [C] utility under common control or ownership with a utility that has filed an application to change rates under [pursuant to] TWC §§13.187, 13.1871, or 13.18715 [§13.187 or §13.1871] within the preceding 12 months may not file an application to change rates under [pursuant to] TWC §13.1872(c)(2) [§13.187 or §13.1871] unless one of the exceptions [it is filed pursuant to an exception] listed in subsection (b) of this section applies. [section.]
§24.35. Processing and Hearing Requirements for an Application to Change Rates. [Filed Pursuant to Texas Water Code §13.187 or §13.1871.]

(a) Purpose. This section describes the requirements for the processing of applications to change rates filed by a Class A, B, or C utility, or a Class D utility filing under Texas Water Code (TWC) §13.1872(c)(2). [pursuant to TWC §13.187 or §13.1871.]

(b) Proceedings under [pursuant to] TWC §13.187. The following criteria apply to applications to change rates filed by Class A utilities under [pursuant to] TWC §13.187.

(1) Not later than the 30th day after the effective date of the change, the commission will [shall] begin a hearing to determine the propriety of the change.

(2) The matter may be referred to the State Office of Administrative Hearings and the referral will [shall] be deemed to be the beginning of the hearing required by paragraph (1) of this subsection.

(3) If the matter is not referred to the State Office of Administrative Hearings, an order establishing a date for a prehearing conference will [shall] be deemed to be the beginning of the hearing required by paragraph (1) of this subsection.

(c) Proceedings under [pursuant to] TWC §13.1871. The following criteria apply to applications to change rates filed by a Class B, C, or D utility, using the procedures in [B utility or a Class C utility pursuant to] TWC §13.1871.

(1) (No change.)

(2) The commission will [shall] set the matter for a hearing if it receives a complaint from any affected municipality or protests from the lesser of 1,000 or 10 percent of the affected ratepayers of the utility over whose rates the commission has original jurisdiction, during the first 90 days after the effective date of the proposed rate change.

(A) Ratepayers may file individual protests or joint protests. Each protest must contain the following information:

   (i) (No change.)

   (ii) the name and service address or other identifying information of each signatory ratepayer. The protest must [shall] list the address of the location where service is received if it differs from the residential address of the signatory ratepayer.

(B) (No change.)

(3) Referral to the State Office of Administrative Hearings [S.O.A.H.] at any time during the pendency of the proceeding is deemed to be setting the matter for hearing as required by paragraphs (1) and (2) of this subsection.

(4) If the matter is not referred to the State Office of Administrative Hearings, an order establishing a date for a prehearing conference is [shall be] deemed to be the beginning of the hearing required by paragraph (2) of this subsection.

(d) If, after hearing, the regulatory authority finds the rates currently being charged or those proposed to be charged are unreasonable or in violation of the law, the regulatory authority will [shall] determine the rates to be charged by the utility and will [shall] fix the rates by order served on the utility.

(e) The utility may begin charging the proposed rates on the proposed effective date, unless the proposed rate change is suspended by the commission under [pursuant to] §24.33 of this title (relating to Suspension of the Effective Date of Rates) or interim rates are set by the presiding officer under [pursuant to] §24.37 of this title (relating to Interim Rates). Rates charged under a proposed rate during the pendency of a proceeding are subject to refund to the extent the commission ultimately approves rates that are lower than the proposed rates.


(a) Purpose. This section establishes procedures for a Class D [C] utility to apply for an adjustment to its water or wastewater rates as allowed by Texas Water Code (TWC) §13.1872(c)(1). [TWC §13.1872-]

(b) Definitions. In this section, the term application means [The following words and terms when used in this section have the following meaning unless the context clearly indicates otherwise]:

   (1) [Application] an application for a rate adjustment filed under this section and TWC §13.1872(c)(1), §13.1872-

   (2) Price index—a price index established annually by the commission for the purposes of this section.

(c) Requirements for filing of the application. Subject to the limitations set out in subsection (f) of this section, a Class D [C] utility may file an application with the commission.

(1) The utility may request to increase its tarifed monthly fixed customer or meter charges and monthly gallonage charges by no more than five percent. [the lesser of:

   [(A) five percent; or]

   [(B) the percentage increase in the price index between the year preceding the year in which the utility requests the adjustment and the year in which the utility requests the adjustment.]

   (2) (No change.)

(d) (No change.)

(e) Notice of Approved Rates. After the utility receives a written order by the commission approving or modifying the utility's application, including the proposed notice of approved rates, and at least 30 days before the effective date of the proposed change established in the commission's order, the utility must send by mail, or by e-mail if the ratepayer has agreed to receive communications electronically, the approved or modified notice to each ratepayer describing the proposed rate adjustment. The notice must include:

   (1) a statement that the utility requested an annual [a] rate adjustment and specifying the percent amount requested; [based on the commission's approved price index and must state the percentage change in the price index during the previous year, and]

   (2) - (4) (No change.)

(f) Time between filings. The following criteria apply to the timing of the filing of an application.

   (1) A Class D [C] utility may adjust its rates under this section not more than once each calendar year and not more than four times between rate proceedings filed under TWC §13.1872(c)(2). [described by TWC §13.1871-]

   (2) (No change.)
[14] Establishing the price index. The commission must, on or before December 1 of each year, establish a price index as required by TWC §13.1872(b) based on the following criteria. The price index will be established in an informal project to be initiated by commission staff. The price index must be equal to the water and sewerage maintenance expenditure category of the Consumer Price Index for All Urban Consumers for the prior 12 months ending on September 30, unless the commission finds that good cause exists to establish a different price index for that year.

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

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SUBCHAPTER E. RECORDS AND REPORTS

16 TAC §24.127, §24.129

Statutory Authority

The amendments are proposed under Texas Water Code (TWC) §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; TWC §13.041(d), which grants the commission the authority to issue emergency orders to compel a retail public utility to provide continuous and adequate service if discontinuance of service is imminent or has occurred because of the retail public utility’s actions or inactions; TWC §13.041(i), which grants the commission the authority to establish reasonable compensation for temporary service to a neighboring retail public utility when TCEQ has ordered an emergency interconnection and has requested that the commission set such compensation; TWC §13.046, which grants the commission the authority to adopt rules establishing a procedure that allows a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate to the customers of the nonfunctioning system; TWC §13.131, which allows the commission to prescribe the forms of books, accounts, records, and memoranda to be kept by water and sewer utilities; TWC §13.136(b), which directs the commission to require by rule the filing of an annual service, financial, and normalized earnings report; TWC §13.181(b), which provides the commission with the authority to fix and regulate rates of utilities, including rules and regulations for determining the classification of customers and services for determining the applicability of rates; TWC §13.1871, which grants the commission the authority to adopt rules governing the contents of an application to change rates and the authority to suspend the effective date of a proposed rate change; TWC §13.1872, which requires the commission to adopt rules establishing procedures to allow a Class D utility to receive an annual rate adjustment; TWC §13.1873, which requires the commission to adopt rules that allow a Class B utility to file a less burdensome application than the application for a Class A utility, and a Class C or D utility to file a less burdensome application than the applications for a Class A or B utility; and TWC §13.246, which authorizes the commission to grant or amend a certificate of convenience and necessity.


Each [Every] public utility, except a utility operated by an affected county, must [shall] keep uniform accounts as prescribed by the commission of all business transacted. The classification of utilities, index of accounts, definitions, and general instructions pertaining to each uniform system of accounts, as amended from time to time, must [shall] be adhered to at all times, unless provided otherwise by these sections or by rules of a federal regulatory body having jurisdiction over the utility, or unless specifically permitted by the commission.

(1) System of accounts. For the purpose of accounting and reporting to the commission, each public [water and sewer] utility must [shall] maintain its books and records in accordance with the commission's approved system of accounts, or if the commission has not approved a system of accounts, the following prescribed uniform system of accounts:

(A) Class A Utility, as defined by §24.3(5) [§24.3(15)] of this title (relating to Definitions of Terms); the uniform system of accounts as adopted and amended by the National Association of Regulatory Utility Commissioners (NARUC) for a utility classified as a NARUC Class A utility.

(B) Class B Utility, as defined by §24.3(6) [§24.3(16)] of this title; the uniform system of accounts as adopted and amended by NARUC for a utility classified as a NARUC Class B utility.

(C) Class C Utility, as defined by §24.3(7) [§24.3(17)] of this title; the uniform system of accounts as adopted and amended by NARUC for a utility classified as a NARUC Class C utility.

(D) Class D Utility, as defined by §24.3(8) of this title; the uniform system of accounts as adopted and amended by NARUC for a utility classified as a NARUC Class D utility.

(2) Accounting period. Each utility must [shall] keep its books on a monthly basis so that for each month all transactions applicable thereto are [shall be] entered in the books of the utility.

§24.129. Water and Sewer Utilities Annual Reports.

(a) Each utility, except a utility operated by an affected county, must [shall] file a service, financial, and normalized earnings report by June 1 of each year.

(b) Contents of report. The annual report must [shall] disclose the information required on the forms approved by the commission and may include any additional information required by the commission.

(c) A Class D [C] utility's normalized earnings must [shall] be equal to its actual earnings during the reporting period for the purposes of compliance with Texas Water Code [TWC] §13.136.

(d) For reporting year 2019 due on June 1, 2020, each utility, except a utility operated by an affected county, must file the report that corresponds to the Class A, B, or C classification that applied to the utility on August 31, 2019.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.
The amendments are proposed under Texas Water Code (TWC) §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; TWC §13.041(d), which grants the commission the authority to issue emergency orders to compel a retail public utility to provide continuous and adequate service if discontinuance of service is imminent or has occurred because of the retail public utility's actions or inactions; TWC §13.041(i), which grants the commission the authority to establish reasonable compensation for temporary service to a neighboring retail public utility when TCEQ has ordered an emergency interconnection and has requested that the commission set such compensation; TWC §13.045, which grants the commission the authority to adopt rules establishing a procedure that allows a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate to the customers of the nonfunctioning system; TWC §13.131, which allows the commission to prescribe the forms of books, accounts, records, and memoranda to be kept by water and sewer utilities; TWC §13.136(b), which directs the commission to require by rule the filing of an annual service, financial, and normalized earnings report; TWC §13.181(b), which provides the commission with the authority to fix and regulate rates of utilities, including rules and regulations for determining the classification of customers and services for determining the applicability of rates; TWC §13.1871, which grants the commission the authority to adopt rules governing the contents of an application to change rates and the authority to suspend the effective date of a proposed rate change; TWC §13.1872, which requires the commission to adopt rules establishing procedures to allow a Class D utility to receive an annual rate adjustment; TWC §13.1873, which requires the commission to adopt rules that allow a Class B utility to file a less burdensome application than the application for a Class A utility, and a Class C or D utility to file a less burdensome application than the applications for a Class A or B utility; and TWC §13.246, which authorizes the commission to grant or amend a certificate of convenience and necessity.


(a) In determining whether to grant or amend a certificate of convenience and necessity (CCN), the commission will [shall] ensure that the applicant possesses the financial, managerial, and technical capability to provide continuous and adequate service.

(1) For retail water utility service, the commission will [shall] ensure that the applicant has:

(a) a [TCEQ-approved] public water system approved by the Texas Commission on Environmental Quality (TCEQ) that is capable of providing drinking water that meets the requirements of Texas Health and Safety Code, chapter 341, TCEQ rules, and the TWC; and

(b) (No change.)

(2) For retail sewer utility service, the commission will [shall] ensure that the applicant has:

(A) - (B) (No change.)

(b) (No change.)

(c) Notwithstanding any other provision of this chapter, a Class A utility may apply to the commission for an amendment of a water or sewer CCN held by a municipal utility district to allow the Class A utility to have the same rights and powers under the CCN as the municipal utility district. The Class A utility must file an application that complies with the requirements of §24.233(a) and (b) of this title (relating to Contents of Certificate of Convenience and Necessity Applications) and meet the criteria set forth in §24.227 of this title (relating to Criteria for Granting or Amending a Certificate of Convenience and Necessity).

(d) [ei] The commission may approve applications and grant or amend a CCN only after finding that granting or amending the CCN is necessary for the service, accommodation, convenience, or safety of the public. The commission may grant or amend the CCN as applied for, or refuse to grant it, or grant it for the construction of only a portion of the contemplated facilities or extension thereof, or for only the partial exercise of the right or privilege and may impose special conditions necessary to ensure that continuous and adequate service is provided.

(e) [id] In considering whether to grant or amend a CCN, the commission will [shall] also consider:

(1) - (9) (No change.)

(f) [ee] The commission may require an applicant seeking to obtain a new CCN or a CCN amendment to provide a bond or other form of financial assurance to ensure that continuous and adequate retail water or sewer utility service is provided. The commission will [shall] set the amount of financial assurance. The form of the financial assurance will be as specified in §24.11 of this title (relating to Financial Assurance). The obligation to obtain financial assurance under this chapter does not relieve an applicant from any requirements to obtain financial assurance in satisfaction of another state agency's rules.

(g) [ff] Where applicable, in addition to the other factors in this chapter the commission will [shall] consider the efforts of the applicant to extend retail [water and/or sewer] utility service to any economically distressed areas located within the applicant's certificated service area. For purposes of this subsection, "economically distressed area" has the meaning assigned in TWC §15.001.

(h) [gg] For two or more retail public utilities that apply for a CCN to provide retail water [and/or sewer] utility service to an unserved area located in an economically distressed area as defined in TWC §15.001, the commission will [shall] conduct an assessment of the applicants to determine which applicant is more capable financially, managerially and technologically of providing continuous and adequate service. The assessment will [shall] be conducted after the preliminary hearing and only if the parties cannot agree among themselves regard-
that the a considering the following information:

(1) all criteria from subsections (a) - (p) [(a)-(e)] of this section;

(2) - (11) (No change.)

(i) [(ii)] Except as provided by subsection (j) [(ii)] of this section, a landowner who owns a tract of land that is at least 25 acres and that is wholly or partially located within the requested area may elect to exclude some or all of the landowner's property from the requested area by providing written notice to the commission before the 30th day after the date the landowner receives notice of an application for a CCN or for a CCN amendment. The landowner's election is effective without a further hearing or other process by the commission. If a landowner makes an election under this subsection, the requested area must [shall] be modified to remove the electing landowner's property. An applicant that has land removed from its requested area because of a landowner's election under this subsection may not be required to provide retail water or sewer utility service to the removed land for any reason, including a violation of law or commission rules.

(1) The landowner's request to opt out of the requested area must [shall] be filed with the commission and must [shall] include the following information:

(A) - (C) (No change.)

(2) The applicant must [shall] file the following mapping information to address each landowner's opt-out request:

(A) a detailed map identifying the revised requested area after removing the tract of land subject to each landowner's opt-out request. The map must [shall] also identify the outer boundary of each tract of land subject to each landowner's opt-out request, in relation to the revised requested area. The map must [shall] identify the tract of land and the requested area in reference to verifiable man-made and [additional] natural landmarks such as roads, rivers, and railroads;

(B) digital mapping data in a shapefile (SHP) format georeferenced in either NAD 83 Texas State Plane Coordinate System (US Feet) or in NAD 83 Texas Statewide Mapping System (Meters) for the revised requested area after removing each tract of land subject to any landowner's opt-out request. The digital mapping data must [shall] include a single, continuous polygon record; and

(C) (No change.)

(i) [(ii)] If the requested area is located within the boundaries or extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or a retail public utility owned by the municipality is the applicant, a landowner is not entitled to make an election under subsection (i) [(ii)] of this section but is entitled to file a request to intervene in order to contest the inclusion of the landowner's property in the requested area at a hearing regarding the application.

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

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SUBCHAPTER K. ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP

16 TAC §24.363

Statutory Authority

The amendments are proposed under Texas Water Code (TWC) §13.041(b), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; TWC §13.041(d), which grants the commission the authority to issue emergency orders to compel a retail public utility to provide continuous and adequate service if discontinuance of service is imminent or has occurred because of the retail public utility's actions or inactions; TWC §13.041(i), which grants the commission the authority to establish reasonable compensation for temporary service to a neighboring retail public utility when TCEQ has ordered an emergency interconnection and has requested that the commission set such compensation; TWC §13.046, which grants the commission the authority to adopt rules establishing a procedure that allows a retail public utility that takes over the provision of services for a nonfunctioning retail water or sewer utility service provider to charge a reasonable rate to the customers of the nonfunctioning system; TWC §13.131, which allows the commission to prescribe the forms of books, accounts, records, and memoranda to be kept by water and sewer utilities; TWC §13.136(b), which directs the commission to require by rule the filing of an annual service, financial, and normalized earnings report; TWC §13.181(b), which provides the commission with the authority to fix and regulate rates of utilities, including rules and regulations for determining the classification of customers and services for determining the applicability of rates; TWC §13.1871, which grants the commission the authority to adopt rules governing the contents of an application to change rates and the authority to suspend the effective date of a proposed rate change; TWC §13.1872, which requires the commission to adopt rules establishing procedures to allow a Class D utility to receive an annual rate adjustment; TWC §13.1873, which requires the commission to adopt rules that allow a Class B utility to file a less burdensome application than the application for a Class A utility, and a Class C or D utility to file a less burdensome application than the applications for a Class A or B utility; and TWC §13.246, which authorizes the commission to grant or amend a certificate of convenience and necessity.


§24.363. Temporary Rates for Services Provided for a Nonfunctioning System.

(a) - (c) (No change.)

(d) At the time the commission approves an acquisition of a nonfunctioning retail water or sewer utility service provider under Texas Water Code (TWC) §13.301, the commission must:
The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER O. UNBUNDLING AND MARKET POWER

DIVISION 2. INDEPENDENT ORGANIZATIONS

16 TAC §25.367

The Public Utility Commission of Texas (commission) proposes new 16 TAC §25.367, relating to cybersecurity monitor. The proposed new rule will establish a cybersecurity coordination program to monitor cybersecurity efforts among electric utilities, electric cooperatives, and municipally owned electric utilities in the state, as required by Senate Bill 64, relating to cybersecurity for information resources, 86th Legislature, Regular Session; and will establish a cybersecurity monitor, a cybersecurity monitor program, and the method to fund the cybersecurity monitor, as required by Senate Bill 936, relating to cybersecurity monitor for certain electric utilities, 86th Legislature, Regular Session.

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The agency 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 beyond those required by statute 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 agency;

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

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

(6) the proposed rule will not expand 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

Chuck Bondurant, Director of Critical Infrastructure Security and Risk Management, 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

Mr. Bondurant has also determined that for each year of the first five years the proposed rule is in effect, the anticipated public benefits expected as a result of the adoption of the proposed rule will be collaboration among the commission, electric utilities, electric cooperatives, municipally owned electric utilities, and the Electric Reliability Council of Texas (ERCOT) regarding efforts to secure critical electric infrastructure from cyber vulnerabilities. The probable economic cost for ERCOT to implement PURA §39.1516, added by SB 936 in the 86th Legislature, will be funding the cybersecurity monitor's activities from the rate authorized by PURA §39.151(e). For a monitored utility operating in the ERCOT power region, the cost of the cybersecurity monitor's activities will be paid by the ERCOT system administration fee. This fee is unlikely to increase as a result of the implementation of PURA §39.1516. The probable economic cost for an electric utility, electric cooperative, or municipally owned electric utility operating solely outside the ERCOT power region that elects to participate in the cybersecurity monitor program is the cost of their contribution to the costs incurred for the cybersecurity monitor's activities. There is no anticipated economic cost for an electric utility, electric cooperative, or municipally owned electric utility to participate in the statewide cybersecurity coordination program.

Local Employment Impact Statement

For each year of the first five years the proposed section 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

44 TexReg 8188  December 27, 2019  Texas Register
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 March 4, 2020, at 9:00 a.m. The request for a public hearing must be received by February 10, 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 to cancel the hearing.

Public Comments

Initial comments on the proposed rule may be filed with the commission’s filing clerk at 1701 North Congress Avenue, Austin, Texas or mailed to P.O. Box 13326, Austin, Texas 78711-3326, by January 27, 2020. Reply comments may be submitted by February 10, 2020. Sixteen copies of comments on the proposed rule are required to be filed by §22.71(c) of 16 Texas Administrative Code. 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 49819.

Statutory Authority

This new rule is proposed under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code Ann. (West 2016 and Supp. 2017) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and specifically, PURA §31.052 which grants the commission the authority to establish a cybersecurity coordination program; and PURA §39.1516 which grants the commission authority to adopt rules as necessary to implement statute relating to the cybersecurity monitor and the cybersecurity monitor program.


§23.367. Cybersecurity Monitor

(a) Purpose. This section establishes requirements for the commission’s cybersecurity coordination program, the cybersecurity monitor program, the cybersecurity monitor, and participation in the cybersecurity monitor program; and establishes the methods to fund the cybersecurity monitor.

(b) Applicability. This section is applicable to all electric utilities, including transmission and distribution utilities; corporations described in Public Utility Regulatory Act (PURA) §32.053; municipally owned utilities; electric cooperatives; and the Electric Reliability Council of Texas (ERCOT).

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

(1) Cybersecurity monitor (CSM) -- The entity selected by the commission to serve as the commission’s cybersecurity monitor and its staff.

(2) Cybersecurity coordination program -- The program established by the commission to monitor the cybersecurity efforts of all electric utilities, municipally owned utilities, and electric cooperatives in the state of Texas.

(3) Cybersecurity monitor program -- The comprehensive outreach program for monitored utilities managed by the CSM.

(4) Monitored utility -- A transmission and distribution utility; a corporation described in PURA §32.053; a municipally owned utility or electric cooperative that owns or operates equipment or facilities in the ERCOT power region to transmit electricity at 60 or more kilovolts; or an electric utility, municipally owned utility, or electric cooperative that operates solely outside the ERCOT power region that has elected to participate in the cybersecurity monitor program.

(d) Selection of the CSM. The commission and ERCOT will contract with an entity selected by the commission to act as the commission’s CSM. The CSM must be independent from ERCOT and is not subject to the supervision of ERCOT. The CSM must operate under the supervision and oversight of the commission.

(e) Qualifications of CSM.

(1) The CSM must have the qualifications necessary to perform the duties and responsibilities under subsection (f) of this section.

(2) The CSM must collectively possess a set of technical skills necessary to perform cybersecurity monitoring functions that include:

(A) developing, reviewing, and implementing cybersecurity risk management programs, cybersecurity policies, cybersecurity strategies, and similar governance documents;

(B) working knowledge of North American Electric Reliability Corporation Critical Infrastructure Protection (NERC CIP) standards and implementation of those standards; and

(C) conducting vulnerability assessments.

(3) The CSM director and staff are subject to background security checks as determined by the commission.

(4) The CSM director and every CSM staff member who has access to confidential information must each have a federally-granted secret level clearance and maintain that level of security clearance throughout the term of the contract.

(f) Responsibilities of the CSM. The CSM will gather and analyze information and data as needed to manage the cybersecurity coordination program and the cybersecurity monitor program.

(1) Cybersecurity Coordination Program. The cybersecurity coordination program is available to all electric utilities, municipally owned utilities, and electric cooperatives in the state of Texas. The cybersecurity coordination program must include the following functions:

(A) guidance on best practices in cybersecurity;

(B) facilitation of sharing cybersecurity information among utilities;

(C) research and development of best practices regarding cybersecurity;

(D) guidance on best practices for cybersecurity controls for supply chain risk management of cybersecurity systems used by utilities, which may include, as applicable, best practices related to:

(i) software integrity and authenticity;
(ii) vendor risk management and procurement controls, including notification by a vendor of incidents related to the vendor's products and services; and

(iii) vendor remote access.

(2) Cybersecurity Monitor Program. The cybersecurity monitor program is available to all monitored utilities. The cybersecurity monitor program must include the functions of the cybersecurity coordination program listed in paragraph (1) of this subsection and the following functions:

(A) holding regular meetings with monitored utilities to discuss emerging threats, best business practices, and training opportunities;

(B) reviewing self-assessments of cybersecurity efforts voluntarily disclosed by monitored utilities; and

(C) reporting to the commission on monitored utility cybersecurity preparedness.

(g) Authority of the CSM.

(1) The CSM has the authority to conduct monitoring, analysis, reporting, and related activities but has no enforcement authority.

(2) The CSM has the authority to request information from a monitored utility about activities that may be potential cybersecurity threats.

(3) The CSM is authorized to require that each monitored utility designate one or more points of contact who can answer questions the CSM may have regarding a monitored utility's cyber and physical security activities.

(h) Ethics standards governing the CSM.

(1) During the period of a person's service with the CSM, the person must not:

(A) have a specific interest in the commission's regulation and must not have a direct financial interest in the provision of electric service in the state of Texas, or have a current contract to perform services for any entity as described by PURA §31.051 or a corporation described by PURA §32.053;

(B) serve as an officer, director, partner, owner, employee, attorney, or consultant for ERCOT or any entity as described by PURA §31.051 or a corporation described by PURA §32.053;

(C) directly or indirectly own or control securities in any entity, an affiliate of any entity, or direct competitor of any entity as described by PURA §31.051 or a corporation described by PURA §32.053, except that it is not a violation of this rule if the person indirectly owns an interest in a retirement system, institution or fund that in the normal course of business invests in diverse securities independently of the control of the person; or

(D) accept a gift, gratuity, or entertainment from ERCOT, any entity, an affiliate of any entity, or an employee or agent of any entity as described by PURA §31.051 or a corporation described by PURA §32.053.

(2) The CSM director or a CSM staff member must not directly or indirectly solicit, request from, suggest, or recommend to any entity, an affiliate of any entity, or an employee or agent of any entity as described by PURA §31.051 or a corporation described by PURA §32.053, the employment of a person by any entity as described by PURA §31.051 or a corporation described by PURA §32.053 or an affiliate.

(3) The commission may impose post-employment restrictions for the CSM and its staff:

(i) Confidentiality standards. The CSM and commission staff must protect confidential information and data in accordance with the confidentiality standards established in PURA, the ERCOT protocols, commission rules, and other applicable laws. The requirements related to the level of protection to be afforded information protected by these laws and rules are incorporated in this section.

(j) Reporting requirement. All reports prepared by the CSM must reflect the CSM's independent analysis, findings, and expertise. The CSM must prepare and submit to the commission:

(1) monthly, quarterly, and annual reports; and

(2) periodic or special reports on cybersecurity issues or specific events as directed by the commission or commission staff.

(k) Communication between the CSM and the commission.

(1) The personnel of the CSM may communicate with the commission and commission staff on any matter without restriction consistent with confidentiality requirements.

(2) The CSM must:

(A) immediately report directly to the commission and commission staff any potential cybersecurity concerns;

(B) regularly communicate with the commission and commission staff, and keep the commission and commission staff apprised of its activities, findings, and observations;

(C) coordinate with the commission and commission staff to identify priorities; and

(E) coordinate with the commission and commission staff to assess the resources and methods for cybersecurity monitoring, including consulting needs.

(l) ERCOT's responsibilities and support role. ERCOT must provide to the CSM any access, information, support, or cooperation that the commission determines is necessary for the CSM to perform the functions described by subsection (f) of this section.

(1) ERCOT must conduct an internal cybersecurity risk assessment, vulnerability testing, and employee training to the extent that ERCOT is not otherwise required to do so under applicable state and federal cybersecurity and information security laws.

(2) ERCOT must submit an annual report to the commission on ERCOT's compliance with applicable cybersecurity and information security laws by January 15 of each year or as otherwise determined by the commission.

(m) Participation in the cybersecurity monitor program.

(1) A transmission and distribution utility, a corporation described in PURA §32.053, and a municipally owned utility or electric cooperative that owns or operates equipment or facilities in the ERCOT power region to transmit electricity at 60 or more kilovolts must participate in the cybersecurity monitor program.

(2) An electric utility, municipally owned utility, or electric cooperative that operates solely outside the ERCOT power region may elect to participate in the cybersecurity monitor program. An electric utility, municipally owned utility, or electric cooperative that operates...
solely outside the ERCOT power region that elects to participate in the cybersecurity monitoring program is a monitored utility.

(A) An electric utility, municipally owned utility, or electric cooperative that elects to participate in the cybersecurity monitor program must annually:

(i) file with the commission its intent to participate in the program and to contribute to the costs of the CSM's activities in the project established by commission staff for this purpose; and

(ii) complete and submit to ERCOT the participant agreement form available on the ERCOT website to furnish information necessary to determine and collect the monitored utility's share of the costs of the CSM's activities under subsection (n) of this section.

(B) The cybersecurity monitor program year is the calendar year. An electric utility, municipally owned utility, or electric cooperative that elects to participate in the cybersecurity monitor program must file its intent to participate and complete the participant agreement form under subparagraph (A) of this subsection for each calendar year that it intends to participate in the program.

(i) Notification of intent to participate and a completed participant agreement form may be submitted at any time during the program year, however, an electric utility, municipally owned utility, or electric cooperative that elects to participate in an upcoming program year is encouraged to complete these steps by December 1 prior to the program year in order to obtain the benefit of participation for the entire program year.

(ii) The cost of participation is determined on an annual basis and will not be prorated.

(iii) A monitored utility that elected to participate under subsection (m)(2) may discontinue its participation in the cybersecurity monitor program at any time but is required to pay the annual cost of participation for any calendar year in which the monitored utility submitted a notification of intent to participate.

(n) Funding of the CSM.

(1) ERCOT must use funds from the rate authorized by PURA §39.151(c) to pay for the CSM's activities.

(2) A monitored utility that operates solely outside of the ERCOT power region must contribute to the costs incurred for the CSM's activities.

(A) On an annual basis, ERCOT must calculate the non-refundable, fixed fee that a monitored utility that operates solely outside of the ERCOT power region must pay in order to participate in the cybersecurity monitor program for the upcoming calendar year.

(B) ERCOT must file notice of the fee in the project designated by the commission for this purpose and post notice of the fee on the ERCOT website.

(i) For the 2020 program year, ERCOT must file and post notice of the fee to participate in the program by May 1, 2020.

(ii) Beginning with the 2021 program year, ERCOT must file and post notice of the fee to participate in the program by October 1 of the preceding program year.

(C) Before filing notice of the fee as required by paragraph (2)(B) of this subsection, ERCOT must obtain approval of the fee amount and calculation methodology from the commission's executive director.

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 December 13, 2019.

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Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas

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For further information, please call: (512) 936-7244

TITLE 19. EDUCATION
PART 2. TEXAS EDUCATION AGENCY
CHAPTER 97. PLANNING AND ACCOUNTABILITY
SUBCHAPTER EE. ACCREDITATION
STATUS, STANDARDS, AND SANCTIONS
DIVISION 2. CONTRACTING TO PARTNER TO OPERATE A DISTRICT CAMPUS

19 TAC §97.1075

The Texas Education Agency (TEA) proposes an amendment to §97.1075, concerning contracting to partner to operate a campus under Texas Education Code (TEC), §11.174. The proposed amendment would modify the rule to provide clarifications to existing statutory provisions.

BACKGROUND INFORMATION AND JUSTIFICATION: Section 97.1075 describes the requirements for contracting to partner to operate a campus under TEC, §11.174, including requirements related to conferred authorities, performance contracts, and ongoing monitoring.

The proposed amendment to §97.1075(a) and relettered (j) would reflect the renumbering of TEC, §42.2511, to TEC, §48.252, by House Bill 3, 86th Texas Legislature, 2019.

The proposed amendment to subsection (c) would clarify the authorities over staffing at partner-operated campuses in a district to ensure that the operator has sole authority over staffing and prevent confusion in operation between the district and the operating partner. Subsection (c)(1)(C) would stipulate that the operating partner has sole authority over assignment of district employees to the campus. The amendment would move the requirement for initial and final authority to supervise, manage, and rescind assignment of district employees from the campus from subsection (c)(1)(C) to new subsection (c)(1)(D). The new subsection would also clarify that the authority resides solely with the operating partner and add a provision that district must grant requests to rescind assignments within 15 working days. Subsection (c)(1)(E) would clarify that the operating partner directly manages and has sole responsibility for the evaluation of the campus principal or chief operating officer.

Proposed changes in subsection (c)(2) would further clarify the operating partner's authority over campus decisions to ensure that the operator has sole authority over the decisions as de-
scribed in TEC, §11.174, and prevent confusion in operation between the district and the operating partner. Paragraph (2) would specify that the operator has initial, final, and sole authority over curriculum decisions (subparagraph (A)), educational programs for specific student groups (subparagraph (B)), calendar and daily schedule (subparagraph (C)), use of assessments (subparagraph (D)), and campus budget (subparagraphs (E) and (F)). Subparagraph (E) would further clarify that decisions for budget allocations under the authority of the operator include federal and state grants that the campus receives. New subparagraph (F) would be established to provide clarity regarding the existing requirement for the operator to have sole authority over the implementation of the campus budget.

Proposed changes in subsection (d) would clarify requirements for the performance contract. Subsection (d)(1) would be amended to require the performance contract between the district and the operating partner include a clear and unambiguous description of the enhanced authorities described in subsection (c) to ensure that these authorities are operationalized. Subsection (d)(2) would be amended to clarify the academic expectations and goals to be included in the contract. The provision to include a target for the School Progress Domain and the requirement for annual academic performance expectations would be removed. Since the overall campus rating is an annual goal that is required in subparagraph (B) of subsection (d)(2), this would allow the partner and district the flexibility to establish more frequent academic goals and expectations in the performance contract.

Subsection (d)(3) would be amended to clarify that the annual financial report must be independent.

New subsection (d)(7) would be added to require the performance contract to include a section describing the funding structure for the partnership. This would ensure that the partner has the necessary resources to operate the campus.

Renumbered subsection (d)(8) would be amended to include existing rule language to specify that the performance contract must include which resources the operating partner intends to purchase from the district, including the cost of services. This would ensure that the costs and resources needed to operate the campus are clear to both the operating partner and the district.

Subsection (d)(9) would be amended to require that the performance contract include the operating partners’ academic model description to ensure that this model is already established and that districts are aware of it prior to entering into the partnership.

Subsection (d)(11) would be amended to require that the performance contract include details about the actions the district and/or operating partner will take in the case that the performance contract is breached. The amendment would require the "specific and material" consequences to be described so that both parties are aware of and can take required actions. The provision stating that the contract may not be contingent on any rating issued by TEA would be moved to subsection (d).

New subsection (e) would be added to ensure that the district has done due diligence in ensuring that the operating partner has the capacity to manage the campus successfully.

The amendment to relettered subsection (g) would provide a time limit for notifying TEA of contract amendments to ensure the notification is timely submitted.

New subsection (h) would be established to allow existing language related to performance ratings to be in a separate subsection. The language is currently included in the subsection on monitoring.

Subsection (j) would be amended to make conforming changes to cross references.

FISCAL IMPACT: Joe Siedlecki, associate commissioner for charters and innovation, 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. The budget specifications included in the proposed amendment are costs that are already required by the rule; the amendment clarifies that the district and operating partner must include these costs in the performance contract.

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 an existing regulation. The proposed amendment would require rulemaking by refining some aspects of the rule. The amendment would not increase or decrease the number of individuals subject to the rule, its applicability, or impact.

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 providing school districts with clarifications on the requirements for operating a campus with an operating partner. 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 December 27, 2019, and ends January 27, 2020. A public hearing on the proposal will be held at 8:30 a.m. on January 10, 2020, in Room 1-100, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Anyone wishing to testify at the hearing must sign in between 8:00 a.m. and 8:30 a.m. on the day of the hearing. The hearing will conclude once all who have signed in have been given the opportunity to comment. Questions about the hearing should be directed to Lindsay Denman, Texas Partnerships Manager, at (512) 463-9658. 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), §11.174, which provides benefits to a campus whose district contracts with a TEC, Chapter 12, Subchapter C or D, charter school to operate the campus; and TEC, §48.252, which entities districts to receive increased funding for students at campuses contracting with TEC, Chapter 12, Subchapter C or D, charter operators.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §11.174 and §48.252.

§97.1075. Contracting to Partner to Operate a Campus under Texas Education Code, §11.174.
(a) Applicability. This section applies only to an independent school district that intends to contract to partner to operate a campus and receive benefits under Texas Education Code (TEC), §11.174 and §48.252 [§48.254(b)].

(b) Definitions. For purposes of this division, the following words and terms shall have the following meaning, unless the context clearly indicates otherwise.

1. Operating partner—Either a state-authorized open-enrollment charter school or an eligible entity as defined by TEC, §12.101(a).

2. Open-enrollment charter holder—This term has the meaning assigned in TEC, §12.1012(1).

3. Governing body of a charter holder—This term has the meaning assigned in TEC, §12.1012(2).

4. Governing body of a charter school—This term has the meaning assigned in TEC, §12.1012(3).

5. Contract to partner to operate a campus—This term means the partner must operate the campus in accordance with subsection (c) of this section under a performance contract as outlined in subsection (d) of this section.

6. Campus—This term has the meaning assigned in §97.1051(3) of this title (relating to Definitions).

(c) Conferred authority. In order to qualify as operating a district campus under TEC, §11.174, the district must confer, at a minimum, the following enhanced authorities to the operating partner.

1. Staffing authorities.

(A) The operating partner must have authority to employ and manage the campus chief operating officer, including initial and final non-delegable authority to hire, supervise, manage, assign, evaluate, develop, advance, compensate, continue employment, and establish any other terms of employment.

(B) The operating partner must have authority over the employees of the operating partner, including initial and final non-delegable authority for the operating partner to employ and/or manage all of the operating partner's own administrators, educators, contractors, or other staff. Such authority includes the authority to hire, supervise, manage, assign, evaluate, develop, advance, compensate, continue employment, and establish any other terms of employment.

(C) The operating partner must have sole authority over the assignment of all district employees to the campus, including initial and final authority to approve the assignment of all district employees or contractors to the campus.

(D) The operating partner must have initial, final, and sole authority to supervise, manage, evaluate, and rescind the assignment of any district employee or district contractor from the campus.

(E) The operating partner must directly manage the campus principal or chief operating officer, including the sole responsibility for evaluating the performance of the campus principal or chief operating officer [the instructional staff described in subparagraphs (B) and (C) of this paragraph who provide services to at least a majority of the students].

(F) Other authorities. The operating partner must have:

(a) Initial and final, and sole authority to approve all curriculum decisions beyond the minimum requirements outlined in §74.2 of this title (relating to Description of a Required Elementary Curriculum) or §74.3 of this title (relating to Description of a Required Secondary Curriculum), lesson plans, instructional strategies, and instructional materials, as defined in TEC, §31.002(1), to be used at that campus;

(b) Initial and final, and sole authority over educational programs for specific, identified student groups, such as gifted and talented students, students of limited English proficiency, students at risk of dropping out of school, special education students, and other statutorily defined populations;

(C) Initial and final, and sole authority to set the school calendar and the daily schedule, which may differ from those in other district campuses;

(D) Initial and final, and sole authority to determine the use of any and all assessments to be used on the campus that are not required by the state of Texas; and

(E) Initial and final, and sole authority to determine how the entire budget is used on the campus budget, including any and all federal and state grant funds due the campus, is allocated.

The governing body of the operating partner shall approve the campus budget in a meeting held under the Texas Open Meetings Act, Texas Government Code, Chapter 551. Notwithstanding such budget authority, the operating partner's expenditures must comply with applicable restrictions on the use of state and federal funds; and

(F) Initial, final, and sole authority to implement and adjust the campus budget.
Performance contract. To contract to partner to operate under TEC, §11.174, the independent school district’s board of trustees must grant the operating partner a campus charter under TEC, Chapter 12, Subchapter C. The charter must include performance expectations memorialized in a performance contract, as required by TEC, §12.0531. The contract may not be contingent on any rating issued by the TEA. This performance contract must include, at a minimum, the following provisions:

1. a clear and unambiguous description of enhanced authorities as outlined in subsection (c) of this section;
2. academic performance expectations and goals, which shall include, but are not limited to:
   a. for campuses that are paired for accountability purposes, specific annual targets for improved student academic performance;
   b. for campuses issued an accountability rating under TEC, §39.054, a specific annual target for the overall campus academic rating [and a specific target for student growth based on the School Progress Domain]; and
   c. specific consequences in the event that the operating party does not meet the [annual] academic performance expectations and goals described in the performance contract;
3. annual financial performance expectations and goals, which shall include, but are not limited to:
   a. the completion of an annual independent financial report of the operating partner meeting the expectations outlined in §109.23 of this title (relating to School District Independent Audits and Agreed-Upon Procedures);
   b. receipt of an unqualified audit opinion, in connection with the annual financial report required in subparagraph (A) of this paragraph; and
   c. specific consequences in the event that the operating partner does not meet the annual financial performance expectations and goals described in the performance contract;
4. a description of the campus enrollment and expulsion policies that must comply with TEC, §11.174(i);
5. a contract term of up to 10 [ten] years as required by TEC, §12.0531, with a provision(s) specifying:
   a. a requirement for a public hearing at least 30 days prior to any district action to terminate the contract for an operating partner that successfully met the performance expectations and goals described in the performance contract; and
   b. a requirement for a public hearing at least 30 days prior to any district action to extend the contract for an operating partner that failed to meet the performance expectations and goals described in the performance contract;
6. a contract term stating that the campus is exempt from laws and rules to the fullest extent allowed by TEC, Chapter 12, Subchapter C, and is exempt from all district policies except for laws, rules, and policies that are specifically identified as applicable to the campus in the performance contract;
7. a section that describes the funding structure of the partnership. This section must specify:
   a. a reasonable per pupil amount or percentage of the revenue generated by attendance at the campus from the district to the operating partner of all federal, state, and local funds due the campus, to be paid to the operating partner for managing the campus or campuses each year:
   b. the total budget for the first year of operation; and
   c. the authority of the partner over the entire campus budget;
8. [4a] service-level agreements that list the [describe and allocate shared] resources and services the operating partner intends to purchase from the district and the specific costs of such services by pupil, square foot, campus, or the percentage of the total district budget for the specific resource or service. The resources and services [district provides to the operating partner, which] may include:
   a. facility use and related matters;
   b. transportation;
   c. specific education program services, such as providing special education services; and
   d. access to other resources and services as agreed between the parties;
9. a section that describes [description of] the educational plan or academic model that the operating partner will implement on [for] the campus or campuses;
10. an assurance that the district has consulted with campus personnel regarding the provisions included in the performance contract and that the rights and protections afforded by current employment contracts or agreements shall not be affected by this contract as required by TEC, §11.174(c), unless the district is partnering with an entity described in TEC, §11.174(a)(2); and
11. a description of the specific and material consequence(s) in the instance that either the district or the operating partner breaches the contract. [The contract may not be contingent on any rating issued by the TEA to the campus prior to the operation of the campus by the operating partner.]

(f) [4e] Contract notification to the TEA. In order to qualify as an eligible partnership under TEC, §11.174, the district must demonstrate that the operating partner has the necessary capacity to successfully manage campuses.

(g) [4f] Contract amendments. Eligible partnerships under TEC, §11.174, must notify the TEA of amendments to performance contracts related to TEC, §11.174(a)(1) and (2), within 30 calendar days of the amendment of the contract.

(h) Performance ratings. The commissioner of education shall continue to evaluate and assign overall and domain performance ratings under TEC, §39.054, to the campus.

(i) [4g] Monitoring. [The commissioner of education shall continue to evaluate and assign overall and domain performance ratings under TEC, §39.054, to the campus.] In order to qualify for ongoing benefits, subsequent to initial eligibility validation or approval, the eligible partnership campus must comply with all information requests or monitoring visits deemed necessary by the TEA staff to monitor the ongoing eligibility of the partnership.
Continued eligibility. To receive benefits under TEC, §11.174(f) and (g) and §48.252 (342.2511), the district must continuously meet the requirements in subsections (c)-(i) of this section.

(k) [4(i)] Decision finality. A decision of the commissioner made under this section is a final administrative decision and is not subject to appeal under TEC, §7.057.

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

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

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

19 TAC §97.1079

The Texas Education Agency (TEA) proposes an amendment to §97.1079, concerning determination processes and criteria for eligible entity approval under Texas Education Code (TEC), §11.174. The proposed amendment would modify the rule to provide clarifications to existing statutory provisions.

BACKGROUND INFORMATION AND JUSTIFICATION: Section 97.1079 describes the criteria and determination processes for districts applying for benefits under TEC, §11.174(a)(2).

New §97.1079(e) would be added, using existing rule language, to address application requirements. Throughout the new subsection, the term "eligibility approval request form" would be changed to "application package" to align with what districts actually submit for approval. Subsection (e)(1) would be amended to specify the items that may be included in an application package. The new items would include an application form, the timeline for submission of completed forms, and requirements that must be met in order for the application to be approved, which would include mandatory training sessions. These training sessions would ensure that districts and operating partners are aware of the requirements necessary to submit a successful application package.

New subsection (e)(5) would be added to allow TEA to remove from consideration applications that are not timely submitted, that are from districts that did not attend mandatory trainings or complete a letter of intent, that are plagiarized, or that include an operating partner that did not attend mandatory training sessions or that does not meet basic staffing requirements. This would ensure that districts are prepared to submit successful application packages and that districts have approved operating partners that have the capacity to manage campuses.

Existing rule language relating to the review panel would be moved to new subsection (e)(6). The language would be amended to clarify that the review panel will only review application packages that are completed and satisfy the requirements in subsection (e)(5). The rule would also be amended to allow the commissioner to appoint TEA staff to the review panel in order to allow expeditious review of the application packages.

Subsection (e)(7) would be amended to clarify the agency review process by specifying that the agency may request additional information and/or interviews with districts or operating partners. This would allow staff to have more information before approving an application package.

New subsection (e)(8) would be added using existing rule language that states that no recommendation, ranking, or other type of endorsement by a member or members of the review panel is binding on the commissioner.

Renumbered subsection (e)(9) would be added to outline what a district and/or operating partner must demonstrate with the application package submission. Subparagraph (A) would specify that applicants must submit the financial information for the partnership to ensure that the district and partner have negotiated these terms prior to implementing the partnership and that the necessary financial resources are available. New subparagraph (B) would specify the criteria for application packages relating to TEC, Chapter 12, Subchapters D and E (state-authorized) charter schools. Because these organizations have already been approved by the state, this subparagraph would stipulate that applications need to include the district's authorizing policy and the performance contract between the operator and the district. The new language would specify that TEA will implement an authorizing policy approval process for districts not using the TEA model policy. The approval process will take place prior to the benefits application period starting with the application cycle in the 2020-2021 school year (for benefits beginning in the 2021-2022 school year). New subparagraph (C) would specify the requirements for all entities other than entities that hold a charter granted under TEC, Chapter 12, Subchapters D and E. The following new or amended requirements would apply to those entities.

New subsection (e)(9)(C)(i) would be added to require evidence of the district's capacity to authorize and oversee charter campuses granted under TEC, Chapter 12, Subchapter C, including the employment of a specific person or specific people responsible for overseeing the authorizing and monitoring of in-district charters and evidence that, beginning in the 2021-2022 school year, the district employee has completed a TEA training program within one year of approval of benefits.

Renumbered subsection (e)(9)(C)(ii) would be added to require evidence of the district's high-quality authorizing process to include the adoption of the TEA model policy, model charter application, and scoring rubric or a similar policy, application, and scoring rubric approved by TEA prior to or as part of the application process. New language would specify that TEA will implement an authorizing policy approval process for districts not using the TEA model policy. The approval process will take place prior to the benefits application period starting with the application cycle in the 2020-2021 school year (for benefits beginning in the 2021-2022 school year). Language would also be amended to require evidence that the district required the operating partner to complete the application without the assistance of the district or the district's vendor, that the district employed a review panel to identify the strengths and weaknesses of the application, that the district reviewed any prior operating and academic performance history of the proposed operator, and that the district conducted a capacity interview.

New subsection (e)(9)(C)(iii) would be added to require evidence of the proposed operating partner's capacity to include evidence that the board includes at least three members who served prior
to the submission of the application to the district, that the operating partner has sufficient staff dedicated to the management of the campus or campuses, that the operating partner's staff has experience managing schools or programs, that the operating partner has reasonable funding to manage the campus or campuses, and that the governing board of the operating partner will participate in board governance training within a year of the benefits application approval.

New subsection (e)(9)(C)(iv) would be added to require evidence of a clear and coherent academic model or program to be implemented by the operating partner, including evidence that the operating partner can clearly describe a consistent school vision for the campus or all campuses, including its culture, curriculum, assessment program, instructional strategies, talent recruitment and management strategies, and professional development activities or programs; evidence that the strategies will be effective for the student population to be served; and evidence that the operating partner can clearly describe the management routines and practices that will be implemented.

Renumbered subsection (e)(9)(C)(vi) would be amended to require an assurance that the governing board of the operating partner will participate in board governance training. New subsection (e)(9)(C)(vii) would be added to require the district to provide an assurance that a list of board members and their backgrounds will be provided upon approval and annually thereafter.

Relettered subsection (e)(9)(D) would be amended to ensure that operating partners at campuses that have received unacceptable performance ratings have the capacity to manage a turnaround campus. Specifically, the rule would require that, for partnership benefits that begin in the 2020-2021 school year, operators have staff with three years’ experience managing turn-around campuses and that, for partnership benefits that begin in the 2021-2022 school year, operators have existed for at least three years, have managed multiple campuses, and have a track record of improving student outcomes.

New subsection (e)(9)(E) would be added to address monitoring and clarify that TEA staff will collect information and conduct site visits as needed to ensure that the partnership maintains eligibility for benefits.

New subsection (e)(9)(F) would be added to ensure that districts and operating partners maintain the standards described in subsection (e) to maintain the benefits of the partnership.

FISCAL IMPACT: Joe Siedlecki, associate commissioner for charters and innovation, 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. The budget specifications included in the proposed amendment are costs that are already required by the rule; the amendment clarifies that the district and operating partner must include these costs in the performance contract.

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 an existing regulation. The proposed amendment would revise existing provisions by refining some aspects of the rule and adding new provisions, such as requiring the use of specific forms in applying to TEA for the benefits associated with the program.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not 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. 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 clarifying for school districts the requirements for operating a campus with an operating partner. 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 December 27, 2019, and ends January 27, 2020. A public hearing on the proposal will be held at 8:30 a.m. on January 10, 2020, in Room 1-100, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Anyone wishing to testify at the hearing must sign in between 8:00 a.m. and 8:30 a.m. on the day of the hearing. The hearing will conclude once all who have signed in have been given the opportunity to comment. Questions about the hearing should be directed to Lindsay Denman, Texas Partnerships Manager, at (512) 463-9658. 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), §11.174, which provides benefits to a campus whose district contracts with a TEC, Chapter 12, Subchapter C or D, charter school to operate the campus; and
TEC, §48.252, which entitles districts to receive increased funding for students at campuses contracting with TEC, Chapter 12, Subchapter C or D, charter operators.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §11.174 and §48.252.


(a) Applicability. This section applies only to independent school districts that intend to contract to partner to operate a campus and receive benefits under Texas Education Code (TEC), §11.174(a)(2).

(b) Definitions. For purposes of this division, the following words and terms shall have the following meaning, unless the context clearly indicates otherwise.

(1) Eligible entity—This term has the meaning assigned in TEC, §12.101(a).

(2) Campus—This term has the meaning assigned in §97.1051(3) of this title (relating to Definitions).

(3) Applicant—This term refers to an independent school district seeking approval to receive benefits for an eligible entity to contract to partner to operate a campus.

(4) Proposed operating partner—This term refers to the eligible entity seeking approval in coordination with an independent school district to contract to partner to operate a campus.

(c) Institutions of higher education. This subsection applies to entities meeting the definition of an institution of higher education as described in TEC, §61.003.

(1) For applicants seeking eligibility approval of an institution of higher education, which has been granted a charter in accordance with TEC, Chapter 12, Subchapter E, as the proposed operating partner, the commissioner of education will treat the institution of higher education as an open-enrollment charter school under TEC, §11.174(a)(1).

(2) The commissioner may approve an eligibility approval request under this section if the commissioner determines that the approval of the eligibility approval request will improve student outcomes at the campus.

(d) Private or independent institutions of higher education that are not described in subsection (c) of this section, non-profits, and governmental entities. This subsection applies to entities meeting the definitions described in TEC, §12.101(a)(2), (3), and (4).

(e) Application requirements.

(1) Prior to each eligibility approval cycle, the commissioner shall approve an application package [eligibility approval request form] for submission by applicants seeking eligibility approval as specified in TEC, §11.174. The application package [eligibility approval request form] may contain, but is not limited to, any of the following:

(A) an application form;

(B) [¶A] the timeline for submission of completed forms [eligibility approval] :

(C) requirements, including mandatory training sessions for districts and proposed operating partners, that must be met in order for applications to be approved;

(D) [¶B] scoring criteria and procedures for use by the review panel selected under paragraph (6) [¶4] of this subsection; and

(E) [¶C] eligibility approval criteria, including the minimum score necessary for approval.

(2) The Texas Education Agency (TEA) shall review application packages [eligibility approval request] submitted under this section. If the TEA determines that an application package [eligibility approval request] is not complete and/or the applicant does not meet the eligibility criteria in TEC, §11.174, the TEA shall notify the applicant and allow ten business days for the applicant to submit any missing or explanatory documents.

(A) If, after giving the applicant the opportunity to provide supplementary documents, the TEA determines that the eligibility approval request remains incomplete and/or the eligibility requirements of TEC, §11.174, have not been met, the eligibility approval request will be denied.

(B) If the documents are not timely submitted, the TEA shall remove the eligibility approval request without further processing. The TEA shall establish procedures and schedules for returning eligibility approval requests without further processing.

(C) Failure of the TEA to identify any deficiency or notify an applicant thereof does not constitute a waiver of the requirement and does not bind the commissioner.

(D) A decision made by the TEA to deny, remove, or return an eligibility approval request is a final administrative decision of the TEA and may not be appealed under TEC, §7.057.

(3) Upon written notice to the TEA, an applicant may withdraw an application package [eligibility approval request].

(4) Applicants with complete eligibility approval requests shall be reviewed by an external eligibility approval request review panel selected by the commissioner. The panel shall review eligibility approval requests in accordance with the procedures and criteria established in the eligibility approval request form. Review panel members shall not discuss eligibility approval requests with anyone except TEA staff. Review panel members shall not accept meals, entertainment, gifts, or gratuities in any form from any person or organization with an interest in the results of an eligibility approval request review. Members of the review panel shall disclose to the TEA immediately any conflict of interest. The review panel's recommendation for approval or denial of an application package shall not be disclosed to the applicant until the application package is processed.

(5) No recommendation, ranking, or other type of endorsement by a member of the review panel is binding on the commissioner.

(6) All parts of the district's application package [eligibility approval request] are releasable to the public under the Texas Public Information Act, Texas Government Code, Chapter 552, and will be posted to the TEA website. Therefore, the following must be excluded or redacted from an application package submission [eligibility approval request]:

(A) personal email addresses;

(B) proprietary material;

(C) copyrighted material;

(D) documents that could violate the Family Educational Rights and Privacy Act (FERPA) by identifying potential students of the partnership school, including, but not limited to, sign-in lists at public meetings about the school, photographs of existing students if the school is currently operating or photographs of
prospective students, and/or letters of support from potential charter school parents and/or students; and

(E) any other information or documentation that cannot be released in accordance with Texas Government Code, Chapter 552.

(5) TEA will remove from review any application packages that:

(A) include plagiarisms;

(B) are from districts that did not submit a letter of intent by the TEA published deadline;

(C) are from districts that did not participate in TEA required trainings;

(D) are from districts whose proposed operating partners did not attend TEA required trainings;

(E) are not submitted by the TEA published deadline; or

(F) include an operating partner that does not have a governing board and at least one full-time equivalent dedicated to the management of the campus or campuses.

(6) Applicants with complete application packages satisfying the requirements in paragraph (5) of this subsection will be reviewed by a review panel selected by the commissioner. The panel may include TEA staff or external stakeholders. The panel shall review application packages in accordance with the procedures and criteria established in the application package and guidance form. Review panel members shall not discuss eligibility approval requests with anyone except TEA staff. Review panel members shall not accept meals, entertainment, gifts, or gratuities in any form from any person or organization with an interest in the results of an application package review. Members of the review panel shall disclose to the TEA immediately the discovery of any past or present relationship with an applicant, including any current or prospective employee, agent, officer, or director of the eligible entity, an affiliated entity, or other party with an interest in the approval of the application package.

(7) TEA staff may interview applicants [whose eligibility approval requests received the minimum score established in the eligibility approval request form], may specify individuals from the district and proposed operating partner required to attend the interview, and may require the submission of additional information and documentation prior [or subsequent] to an interview.

(8) No recommendation, ranking, or other type of endorsement by a member or members of the review panel is binding on the commissioner.

(9) [(8)] The commissioner will consider criteria that include the following when determining whether to approve an applicant.

(A) The criteria described in this subparagraph apply to all campuses. Each applicant must submit financial information that demonstrates that the proposed operating partner [demonstrate]:

(i) is provided with a reasonable per pupil amount or percentage of the revenue generated by attendance at the campus from the district to the operating partner of all federal, state, and local funds due the campus, to be paid to the operating partner for managing the campus or campuses each year; and

(ii) has authority over the entire campus budget.

(B) The criteria described in this subparagraph apply to application packages relating to partnerships between a district and an organization authorized under TEC, Chapter 12, Subchapters D and E.

(i) Each applicant must demonstrate evidence of the district's adoption and implementation of the TEA model authorizing policy or a similar policy approved by TEA.

(ii) Each applicant must submit a performance contract that demonstrates that the applicant and proposed operating partner meet the requirements to contract to partner to operate, as outlined in §97.1075 of this title (relating to Contracting to Partner to Operate a Campus under Texas Education Code, §11.174).

(C) The criteria described in this subparagraph apply to application packages relating to partnerships between a district and any other type of partner except for operating partners described in subparagraph (B) of this paragraph. Each applicant must demonstrate:

(i) evidence of district capacity to authorize and oversee district charter campuses authorized under TEC, Chapter 12, Subchapter C, which must include:

(ii) at least one district employee, employed prior to the district evaluation of the partnership, and fully dedicated to overseeing the authorizing and ongoing monitoring of in-district charter schools; and

(ii) for benefits that begin in the 2021-2022 school year, evidence that the district employee has completed a TEA training program on authorizing and partnerships prior to the district evaluation of the partnership within one year of benefits approval;

(ii) evidence of the district's adoption and implementation of a high-quality district charter authorizing process as required by TEC, §12.058, which must [may] include the following:

(I) the district's adoption and implementation of the TEA model[an] authorizing policy or a similar policy approved by TEA prior to or as part of the application review. The following provisions apply. [i]

[a] For application packages submitted for benefits that begin in the 2021-2022 school year, districts not using the TEA model policy must have the local authorizing policy approved prior to the application review.

(b) TEA will release the authorizing policy approval timeline and process annually.

(c) TEA approval of local authorizing policies expires if the district changes the authorizing policy or if related sections of the TAC or TEC change;

(ii) evidence of the district's adoption and implementation of the TEA model [a local] campus charter application or similar application and scoring rubric or a similar application and scoring rubric approved by TEA. The following provisions apply. [, including the evaluation of:]

[a] For application packages submitted for benefits that begin in the 2021-2022 school year, districts not using the TEA model campus application and scoring rubric must have the local campus application approved prior to the application review.

(b) TEA will release the local campus application and scoring rubric approval timeline and process annually.
(c) TEA approval of a local campus application and scoring rubric expires if the district changes the authorizing policy or if related sections of the TAC or TEC change; and

[(a)] the qualifications, backgrounds, and histories of individuals and entities who will be involved in the governance, management, and educational leadership of the proposed operating partner; and

[(b)] any operating and academic performance history of the proposed operator; and

(III) evidence that, at a minimum, the district:

[(a)] required the proposed operating partner to complete the application without assistance from the district or a district assigned vendor;

[(b)] employed a review panel to read the application from the operating partner and that the review panel identified strengths and weaknesses of the application;

[(c)] reviewed any operating and academic performance history of the proposed operator; and

[(d)] conducted a capacity interview with the board and proposed staff of the partner organization;

(iii) evidence of the capacity of the operating partner to manage the campus or campuses, including evidence that:

(I) the board of the operating partner includes at least three people and that their membership on the board pre-dates the submission of their application to the district;

(II) the operating partner has staff that will be fully dedicated to the management of the campus or campuses and that the level of staffing is reasonable given the number of campuses to be managed;

(III) the staff of the operating partner dedicated to the management of the campus or campuses has experience managing schools or academic programs;

(IV) the operating partner is provided with a reasonable per pupil amount or percentage of the revenue generated by attendance at the campus from the district to the operating partner of all federal, state, and local funds due the campus, to be paid to the operating partner for managing the campus or campuses each year; and

(V) the governing board of the operating partner will participate in board governance training provided by TEA or a vendor recommended by TEA within one year of approval of benefits;

(iv) evidence of a clear and coherent academic model or program to be implemented by the partner organization, including evidence that:

(I) the partner can clearly describe a consistent school vision for the campus or all campuses, including its culture, curriculum, assessment program, instructional strategies, talent recruitment and management strategies, and professional development activities or programs;

(II) the partner can clearly provide evidence that the aforementioned strategies and programs can be effective with the student population served in the campus or campuses; and

(III) the partner can clearly describe the management routines and practices to be implemented by the operating partner in managing the staff and academic programs as the campus or campuses;

(ivv) the district's adoption and implementation of codified procedures for monitoring and reviewing in-district charters;

(v) [(iii)] evidence that the applicant and proposed operating partner meet the requirements to contract to partner to operate, as outlined in §97.1075 of this title [(relating to Contracting to Partner to Operate a Campus under Texas Education Code, §111.174)]; [and]

(vi) [(vi)] an assurance that the governing body of the operating partner shall remain independent of the independent school district. This may include the following:

(I) an assurance that the governing body of the operating partner is not and shall not be comprised of any members of the independent school district's board of trustees, the superintendent, or staff responsible for granting the contract to partner to operate or overseeing the performance contract;

(II) an assurance that the majority of the governing body of the operating partner is not and shall not be comprised of district staff;

(III) an assurance that no member of the governing body of the operating partner will be related within the first degree of affinity or consanguinity with any members of the independent school district's board of trustees, the superintendent, or staff responsible for granting the charter or contract to partner to operate or overseeing the performance contract;

(IV) an assurance that all members of the governing body of the operating partner have passed and will continually pass the district's conflict of interest checks; [and]

(V) an assurance that the district has not appointed a majority of the members of the governing board of the operating partner; and

(vii) an assurance that the school district will provide a list of the board members of the governing body and a description of their respective backgrounds upon approval and annually thereafter.

(ivw) an assurance that the operating partner has the staff capacity, including at least one full-time equivalent employee, necessary to oversee the operation of the campus.

(D) [(A)] The criteria described in this subparagraph apply to a campus whose last preliminary or final overall performance rating was unacceptable. In addition to the criteria described in subparagaphs (A)-(C) [subparagraph (A)] of this paragraph, as applicable, each applicant must demonstrate evidence that the operating partner has the capacity necessary to successfully turn around campuses. [the commissioner will consider the following:]

(i) For partnership benefits applied to district charter campuses authorized under TEC, Chapter 12, Subchapter C, that are approved for the 2020-2021 school year, evidence must be provided that the operating partner has staff in leadership positions with at least three years' experience managing campuses to academic success.

(ii) For partnership benefits applied to all campuses approved for the 2021-2022 school year and thereafter, evidence must be provided that the operating partner:

(I) has been in existence for at least three years prior to undertaking the management of the district campus;

(II) has managed multiple campuses for multiple years; and

(III) has a track record of managing campuses to academic success or has significantly improved the academic performance of campuses.
(E) In order to qualify for ongoing benefits, subsequent to initial eligibility validation or approval, the eligible partnership campus must comply with all information requests or monitoring visits deemed necessary by TEA staff to monitor the ongoing eligibility of the partnership.

(F) To receive benefits under TEC, §11.174(f) and (g) and §48.252, the district must continuously meet the requirements in this subsection.

(G) Notwithstanding this subsection, the commissioner will treat a campus granted a charter under TEC, Chapter 12, Subchapter C, as an open-enrollment charter school under TEC, §11.174(a)(1), if the Subchapter C charter was granted by a high-quality district authorizer. A high-quality district authorizer is a district that has successfully completed a state-approved professional development program in high-quality authorizing and has operated at least four Subchapter C campuses that are eligible for benefits under TEC, §11.174, in the prior year with at least 75% of those campuses performing at or above an agency-identified threshold for each campus’s School Progress Domain.

Decision finality. The approval or denial of the eligibility approval request is a final administrative decision by the commissioner and not subject to appeal under TEC, §7.057.

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 December 13, 2019.

TRD-201904783
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 475-1497

TITLE 26. HEALTH AND HUMAN SERVICES
PART 1. HEALTH AND HUMAN SERVICES COMMISSION
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 timeframe, 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; briefing the child after each unauthorized absence; conducting a triggered review for each child who has had three unauthorized absences within a 60-day timeframe, 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-leters 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 references to "title" with "division" and 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 timeframe 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 timeframe, 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 timeframe, 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 timeframe. 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 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 9 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 December 12, 2019.
TRD-201904765
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 438-5559

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 division (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 timeframe.

(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 timeframes:

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 division (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 division; 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 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 operation, an employee, a professional level service provider, contract staff, or a volunteer to the following entities within the specified timeframe:

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 division (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 division (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 operation evaluation for unauthorized absences every six months, as required by §748.463 of this division (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 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 §748.461 of this division (relating to What must a 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.

§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 chapter (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 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.

§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 December 12, 2019.

TRD-201904767
Karen Ray
Chief Counsel
Health and Human Services Commission

Earliest possible date of adoption: January 26, 2020
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 in Title 26, Texas Ad-
ministrative 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, con-
cerning 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 unautho-
rimized 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 ab-
sence). 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 timeframe, 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; de-
briefing the child after each unauthorized absence; conducting a
triggered review for each child who has had three unauthorized
absences within a 60-day timeframe, 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 fos-
ter 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 Subchap-
ter D, Reports and Record Keeping, including the repealed con-
tent 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 "ab-
sent 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) re-
garding how to document a serious incident; adds a new sub-
section (c) that requires a CPA to document an unauthorized ab-
sence that does not meet the reporting time requirements in sub-
section (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 references to
"title" with "division" and the phrase "child absent without per-
mission" in paragraph (3) with "unauthorized absence of a child,"
and adds requirements for agencies to complete certain infor-
mation 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 se-
rious 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 require-
ments described in the remaining rules in proposed new Division 5.

Proposed new §749.591 requires the agency to maintain an an-
nual summary log of each time a child has an unauthorized ab-
sence, document certain information in the log, maintain the an-
nual log for five years, and make the log available to Licensing
upon request.

Proposed new §749.592 describes the requirements for debrief-
ing a child within 24 hours after an unauthorized absence, in-
cluding 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 trig-
gerated review of a child's unauthorized absences no later than 30
days after the child's third unauthorized absence within a 60-day
timeframe 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 trig-
gerated 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 re-
view.

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 over-
all agency evaluation every six months for unauthorized
absences that have occurred during that timeframe, 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 Ser-
vices, 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 rev-
ues 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 ab-
sorbed 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 rules, 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 timeframe, 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):

CPS 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).

CPS 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 in a 60-day timeframe. 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
The rules Texas Department has safety, to authorized takings and determined that 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 CCRules@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 OCCURRENCE

26 TAC §749.501

STATUTORY AUTHORITY

The amendments and 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 amendments and new sections affect 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 December 12, 2019.

TRD-201904768

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: January 26, 2020

For further information, please call: (512) 438-5559

26 TAC §§749.501, 749.503, 749.513

STATUTORY AUTHORITY

The amendments and 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 amendments and new sections 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 division (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 timeframe.

(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 timeframes:

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 division (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 division; 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) 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) 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 timeframe:

Figure: 26 TAC §749.503(c)

[Figure: 40 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: 40 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.

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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 division (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 division (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 division (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 the child's unauthorized absences, if the regularly scheduled review:

(1) Meets the requirements in §749.595 of this division (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 December 12, 2019.

TRD-201904770
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 438-5559

* * *

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER JJ. CIGARETTE, E-CIGARETTE, AND TOBACCO PRODUCTS REGULATION

34 TAC §3.1206

The Comptroller of Public Accounts proposes amendments to §3.1206, concerning delivery sales of e-cigarettes (Health and Safety Code, Chapter 161, Subchapter R). The amendments implement Senate Bill 21, 86th Legislature, 2019, which is effective September 1, 2019. The bill amends provisions of the Health and Safety Code to raise the minimum legal age for the sale, distribution, possession, purchase, consumption, or receipt of cigarettes, e-cigarettes, or tobacco products from 18 to 21 years of age.

The comptroller amends subsection (a)(4) by deleting the definition of the term "shipping document" pursuant to the SB 21 amendment that repealed Health and Safety Code, §161.455 (Shipping Requirements) and by adding the definition of the term "minor." "Minor" means a person under 21 years of age and includes the exceptions to the age restrictions reflected in Health and Safety Code, §161.082(f) and §161.252(c-1) but not included in the statutory definition. Throughout the section, the comptroller replaces the phrases "person younger than 18 years of age" or "individual younger than 18 years of age" with the defined term "minor." The subsequent paragraph is re-lettered.

The comptroller amends subsection (b)(1) to update the title of referenced §3.286.
The comptroller deletes subsection (e) concerning shipping requirements, since SB 21 repealed Health and Safety Code, §161.455 concerning the shipping requirements. The subsequent subsections are re-lettered.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amendment is in effect, the amendment: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules’ applicability; and will not positively or adversely affect this state’s economy. This proposal amends a current rule.

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

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

The comptroller proposes the amendments under Tax Code, §111.002 (Comptroller’s Rules; Compliance; Forfeiture) and §111.0022 (Application to Other Laws Administered by Comptroller), which provide the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2, and taxes, fees, or other charges that the comptroller administers under other law.

The amendments implement Health and Safety Code, §§161.081 (Definitions), 161.082 (Sale of Cigarettes, E-Cigarettes, or Tobacco Products to Persons Younger Than 21 Years of Age Prohibited; Proof of Age Required), 161.083 (Sale of Cigarettes, E-Cigarettes, or Tobacco Products to Persons Younger Than 30 Years of Age), 161.084 (Warning Notice), 161.085 (Notification of Employees and Agents), 161.251 (Definitions), and 161.252 (Possession, Purchase, Consumption, or Receipt of Cigarettes, E-Cigarettes, or Tobacco Products by Minors Prohibited); and Health and Safety Code, Subchapter R (Delivery Sales of Cigarettes and E-Cigarettes).

§3.1206. Delivery Sales of E-Cigarettes (Health and Safety Code, Chapter 161, Subchapter R).

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

(1) Delivery sale--A sale of e-cigarettes to a consumer in Texas regardless of whether the seller is located outside or within Texas:

(A) in which the purchaser submits the order for the sale:

(i) by telephone or any other method of voice transmission;

(ii) by mail or any other delivery service; or

(iii) through the Internet or other on-line service; or

(B) in which the e-cigarettes are delivered by mail or other delivery service;

(C) the term does not include a sale of e-cigarettes for resale to a person who is a wholesale dealer or a retail dealer.

(2) Delivery service--A person, including the United States Postal Service, who is engaged in the commercial delivery of letters, packages, or other containers.

(3) E-cigarette--An electronic cigarette or any other device that simulates smoking by using a mechanical heating element, battery, or electronic circuit to deliver nicotine or other substances to the individual inhaling from the device. The term includes a prescription medical device related to the cessation of smoking. The term also includes:

(A) a device described in paragraph (3) regardless of whether the device is manufactured, distributed, or sold as an e-cigarette, e-cigar, or e-pipe or under another product name or description; and

(B) a component, part, or accessory for the device, regardless of whether the component, part, or accessory is sold separately from the device.

(4) Minor--A person under 21 years of age. The term “minor” does not include a person who is at least 18 years of age and is in the United States military forces or the state military forces. The term “minor” does not include a person who was born on or before August 31, 2001. [Shipping document--A bill of lading, airbill, United States Postal Service form, or any other document used to document a shipment of a delivery sale.]

(5) Seller--A person, located outside or within Texas, who takes or accepts delivery sale orders or who mails or ships e-cigarettes in connection with a delivery sale.

(b) Seller responsibilities.

(1) Sales and use tax permit. A seller who is engaged in business in Texas, or who intends to engage in business in Texas, must obtain a sales and use tax permit from the comptroller's office as described in §3.286 of this title (relating to Seller’s and Purchaser’s Responsibilities [including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules]).

(2) Delivery sale registration.

(A) Before making a delivery sale of e-cigarettes in Texas, a seller must file a statement with the comptroller that includes:

(i) seller’s name and trade name;

(ii) the address of the seller’s principal place of business and any other place of business;

(iii) the seller’s telephone number; and

(iv) the seller’s e-mail address.

(B) The registration requirement described in this paragraph applies to all sellers, whether they are within or outside of Texas and regardless of whether they are engaged in business in Texas.

(3) Collection and payment of taxes. As provided in Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax), a seller engaged in business in Texas is required to collect and remit to the comptroller’s office sales and use tax on all e-cigarette sales made in Texas.
For more information on sales and use tax collection responsibilities, refer to §3.286 of this title.

(c) Notice to purchasers. A delivery sale of an e-cigarette must include a prominent and clearly legible statement that:

1. Texas law prohibits e-cigarette sales to minors [individuals younger than 18 years of age]; and
2. sales of e-cigarettes are restricted to individuals who can provide verifiable proof of age.

(d) Age verification. A seller taking a delivery sale order must verify that the purchaser is not a minor [at least 18 years of age].

(1) Unless the seller is eligible to use the age verification methods described in paragraph (2), each seller who makes a delivery sale must:

(A) verify the age of the prospective purchaser through a commercially available database or an aggregate of databases that is regularly used for the purpose of age and identity verification before accepting a delivery sale order; and
(B) use a method of mailing or shipping the e-cigarettes that requires an adult signature.

(2) A seller located in Texas who primarily makes retail sales of e-cigarettes, and complies with applicable laws relating to such retail sales, may verify the age of a purchaser placing a delivery sale order by:

(A) verifying the age of the prospective purchaser with a commercially available database or a photocopy or other image of a government-issued identification bearing a photograph of the prospective purchaser and stating the date of birth or age of the prospective purchaser;
(B) obtaining a written statement signed by the prospective purchaser, under penalty of law, certifying the prospective purchaser's address and date of birth; and
(C) receiving payment for the delivery sale from the prospective purchaser by a credit card or debit card that has been issued in the prospective purchaser's name or by a check that is associated with a bank account in the prospective purchaser's name.

(e) Seller shipping requirements. A seller who mails, ships, or delivers e-cigarettes in connection with a delivery sale order must include as part of the shipping documents a clear and conspicuous statement: "E-CIGARETTES: TEXAS LAW PROHIBITS SHIPPI NG TO INDIVIDUALS YOUNGER THAN 18 YEARS OF AGE AND REQUIRES PAYMENT OF ALL APPLICABLE TAXES.""

(f) Reporting requirements.

(1) Except as provided by paragraph (2) of this subsection, each seller who has made a delivery sale, and each person who has delivered e-cigarettes in connection with a delivery sale, is required to file a delivery sales report with the comptroller's office.

(A) For each delivery sale, a person must file a memorandum, or a copy of the invoice, that provides:

(i) the name, address, telephone number, and e-mail address of the individual to whom the delivery sale was made;
(ii) the brand or brands of the e-cigarettes that were sold; and
(iii) the quantity of e-cigarettes that were sold.

(B) A person may comply with the reporting requirement described in this paragraph by filing a Texas Cigarette/E-Cigarette Delivery Sales Report. The report is available on the comptroller's website.

(C) This filing is due on or before the 10th day of each month based on delivery sales made in the previous month. The first report is due November 10, 2015.

(2) A person is exempt from the filing requirements in this subsection, if in the preceding two years from the date the report is due, the person is not in violation of the requirements under Health and Safety Code, Chapter 161, Subchapter R (Delivery Sales of Cigarettes and E-Cigarettes), and has not been reported under §161.090 (Reports of Violations) to the comptroller for violating Health and Safety Code, Chapter 161, Subchapter H (Distribution of Cigarettes, E-Cigarettes, or Tobacco Products). A person may be exempt from the delivery sale filing requirements even if the person does not have a two-year history of delivery sales, provided that during the time the person has been in business, the person has not committed a violation and has not been reported to the comptroller under Health and Safety Code, §161.090.

(3) If a person violates the requirements under Health and Safety Code Chapter 161, Subchapter R, or is reported to the comptroller under §161.090 for violating Health and Safety Code, Chapter 161, Subchapter H, the person must comply with the monthly filing requirements described in this subsection for the previous two years for each delivery sale in this state. A person who does not have two years of prior delivery sales will file the information from its first day of business, but no earlier than October 1, 2015, unless the report has already been filed.

(f) Violations and Penalties.

(1) Criminal Penalties.

(A) Knowing violation. A person who knowingly violates the requirements for delivery sales of e-cigarettes in Health and Safety Code, Chapter 161, Subchapter R, commits a felony of the third degree.

(B) Other violation. Any violation of the requirements for delivery sales of e-cigarettes in Health and Safety Code, Chapter 161, Subchapter R for which a criminal penalty is not otherwise provided is a Class C misdemeanor for a first offense and a Class B misdemeanor for subsequent offenses.

(2) Civil penalty. In addition to any other penalty, a seller who fails to remit the sales and use tax due in connection with a delivery sale must pay to the state a civil penalty in an amount equal to five times the amount of tax due.

(3) Forfeiture of e-cigarettes and property. E-cigarettes that a seller sold or attempted to sell in a delivery sale that does not comply with Health and Safety Code, Chapter 161, Subchapter R, are forfeited to the state and will be destroyed. Any equipment, material, or other personal property on the premises of a seller who, with the intent to defraud the state, fails to comply with the provisions of Health and Safety Code, Chapter 161, Subchapter R, is also forfeited to the state.

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 December 12, 2019.

TRD-201904731
The Government or Board in §2001.024(a)(5)

The proposed amendment to §601.1 (relating to Purpose) changes the agency's reference in the purpose of the rules to update its authorizing statute from the original Vernon's Texas Codes Annotated, to its current governing statute, which is in the Texas Government Code.

FISCAL NOTE ON STATE AND LOCAL GOVERNMENTS

Westley Allen, Accountant, has determined that for each year of the first five-year period the rule changes as proposed would be in effect, there will be no foreseeable implications relating to cost or revenues of state or local governments, under Government Code §2001.024(a)(4), as a result of enforcing or administering these rules.

PUBLIC BENEFIT/COST NOTE

Mr. Allen has determined, under Government Code §2001.024(a)(5) that for each year of the first five-year period the rule changes as proposed are in effect, the public benefit anticipated as a result of enforcing the rule changes as proposed would be updated and clarified rules. Also, the amendment relating to PRS Reporting would enhance efficiency in training reporting by public retirement system administrators.

GOVERNMENT GROWTH IMPACT STATEMENT

The Board has determined that during the first five years that the rule changes as proposed will be in effect:

(1) the rule changes as proposed will not create or eliminate a government program;
(2) implementation of the rule changes as proposed will not affect the number of PRB employee positions;
(3) implementation of the rule changes as proposed will result in no assumed change in future legislative appropriations;
(4) the rule changes as proposed will not affect fees paid to PRB;
(5) the rule changes as proposed will not create a new regulation;
(6) the rule changes as proposed will not expand, limit or repeal existing regulations.

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

(8) the rule changes as proposed will not positively or adversely affect the state's economy.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.

Mr. Allen has also determined that there will be no impact on rural communities, small businesses, or microbusinesses as a result of implementing these rule changes as proposed because the rules do not involve those entities and, instead, concern administrative reporting requirements applicable only to public pension systems. Therefore, no regulatory flexibility analysis, as specified in Texas Government Code §2006.002 is required.

IMPACT ON LOCAL EMPLOYMENT OR ECONOMY

Mr. Allen has further determined there is no effect on local economy for the first five years that the rule changes as proposed are in effect because the rules do not involve factors of local economy. Therefore, no economic impact statement, local employment impact statement, nor regulatory flexibility analysis is required under Texas Government Code §§2001.022 or 2001.024(a)(6).

COST TO REGULATED PERSONS (COST-IN/COST-OUT)

This rule proposal is not subject to Texas Government Code §2001.0045, concerning increasing costs to regulated persons, because, as described above in the public benefit and cost note, the proposed amendments do not impose a cost on regulated persons under Government Code §2001.024, including another state agency, a special district, or a local government.

TAKINGS IMPACT ASSESSMENT

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

ENVIRONMENTAL RULE ANALYSIS

The rule changes as proposed are not "major environmental rules" as defined by Government Code §2001.0225. The rule changes as proposed are not specifically intended to protect the environment or to reduce risks to human health from environmental exposure. Therefore, a regulatory environmental analysis is not required.

PUBLIC COMMENT

Written comments on the rule changes as proposed may be submitted to Anumeha Kumar, Executive Director, State Pension Review Board, P.O. Box 13498, Austin, Texas 78711-3498 or by electronic mail to prb@prb.texas.gov. Commenters are encouraged to include “rule comments” in the subject line of the electronic mail. Comments will be accepted until 5:00 p.m. on January 27, 2020, which is 31 days after publication in the Texas Register.

STATUTORY AUTHORITY

The rule changes as proposed are authorized by the Texas Government Code, §802.201(a), which grants specific authority to the Board to adopt rules for the conduct of its business; and
§801.211(e), which allows the Board to adopt rules to administer and provide educational training programs under §801.211.

CROSS REFERENCE TO STATUTES AND CODES AFFECTED

The rule changes as proposed affect Texas Government Code, Chapters 801 and 802, specifically §801.201(c), §801.211(b), §801.202(1) and (2).

§801.1 Purpose.

The rules and regulations of the State Pension Review Board are set forth for the purpose of interpreting and implementing Texas [Vernon's Texas Codes Annotated] Government Code, Title 8, Subtitle A, Chapters 801 and 802 [Chapter 801], and to establish general policies.

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 December 12, 2019.
TRD-201904773
Anumeha Kumar
Executive Director
State Pension Review Board
Earliest possible date of adoption: January 26, 2020
For further information, please call: (512) 463-1736

CHAPTER 604 HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

40 TAC §604.1

The State Pension Review Board (PRB) proposes amendments to §604.1 (relating to Historically Underutilized Businesses).

BACKGROUND AND PURPOSE

The rule changes are proposed as a result of the PRB's rule review, which was conducted pursuant to Texas Government Code §2001.039.

The proposed amendment to §604.1 (relating to Historically Underutilized Businesses) changes the reference to the Comptroller of Public Accounts' updated rules relating to Historically Underutilized Business.

FISCAL NOTE ON STATE AND LOCAL GOVERNMENTS

Westley Allen, Accountant, has determined that for each year of the first five-year period the rule changes as proposed would be in effect, there will be no foreseeable implications relating to cost or revenues of state or local governments, under Government Code §2001.024(a)(4), as a result of enforcing or administering these rules.

PUBLIC BENEFIT/COST NOTE

Mr. Allen has determined, under Government Code §2001.024(a)(5) that for each year of the first five-year period the rule changes as proposed are in effect, the public benefit anticipated as a result of enforcing the rule changes as proposed would be updated and clarified rules. Also, the amendment relating to PRS Reporting would enhance efficiency in training reporting by public retirement system administrators.

GOVERNMENT GROWTH IMPACT STATEMENT

The Board has determined that during the first five years that the rule changes as proposed will be in effect:

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

(2) implementation of the rule changes as proposed will not affect the number of PRB employee positions;

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

(4) the rule changes as proposed will not affect fees paid to PRB;

(5) the rule changes as proposed will not create a new regulation;

(6) the rule changes as proposed will not expand, limit or repeal existing regulations.

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

(8) the rule changes as proposed will not positively or adversely affect the state's economy.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES

Mr. Allen has also determined that there will be no impact on rural communities, small businesses, or microbusinesses as a result of implementing these rule changes as proposed because the rules do not involve those entities and, instead, concern administrative reporting requirements applicable only to public pension systems. Therefore, no regulatory flexibility analysis, as specified in Texas Government Code §2006.002 is required.

IMPACT ON LOCAL EMPLOYMENT OR ECONOMY

Mr. Allen has further determined there is no effect on local economy for the first five years that the rule changes as proposed are in effect because the rules do not involve factors of local economy. Therefore, no economic impact statement, local employment impact statement, nor regulatory flexibility analysis is required under Texas Government Code §§2001.022 or 2001.024(a)(6).

COST TO REGULATED PERSONS (COST-IN/COST-OUT)

This rule proposal is not subject to Texas Government Code §2001.0045, concerning increasing costs to regulated persons, because, as described above in the public benefit and cost note, the proposed amendments do not impose a cost on regulated persons under Government Code §2001.024, including another state agency, a special district, or a local government.

TAKINGS IMPACT ASSESSMENT

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

ENVIRONMENTAL RULE ANALYSIS

The rule changes as proposed are not "major environmental rules" as defined by Government Code §2001.0225. The rule changes as proposed are not specifically intended to protect the environment or to reduce risks to human health from environmental exposure. Therefore, a regulatory environmental analysis is not required.
PUBLIC COMMENT

Written comments on the rule changes as proposed may be submitted to Anumeha Kumar, Executive Director, State Pension Review Board, P.O. Box 13498, Austin, Texas 78711-3498 or by electronic mail to prb@prb.texas.gov. Commenters are encouraged to include “rule comments” in the subject line of the electronic mail. Comments will be accepted until 5:00 p.m. on January 27, 2020, which is 31 days after publication in the Texas Register.

STATUTORY AUTHORITY

The rule changes as proposed are authorized by the Texas Government Code, §802.201(a), which grants specific authority to the Board to adopt rules for the conduct of its business; and §801.211(e), which allows the Board to adopt rules to administer and provide educational training programs under §801.211.

CROSS REFERENCE TO STATUTES AND CODES AFFECTED

The rule changes as proposed affect Texas Government Code, Chapters 801 and 802, specifically §801.201(c), §801.211(b), §801.202(1) and (2).

§604.1. Historically Underutilized Businesses.

In accordance with Texas Government Code §2161.003, the Board adopts by reference the rules of the Comptroller of Public Accounts in TAC 34 Part I, Chapter 20, Subchapter D [B], regarding historically underutilized businesses. A copy of the Comptroller of Public Accounts rules may be obtained by writing to: Executive Director, State Pension Review Board, P.O. Box 13498, Austin, Texas 78711-3498, or by accessing the website [Web site] of the Secretary of State, at www.sos.texas.gov/tac/[www.sos.state.tx.us/tac].

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 December 12, 2019.
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Anumeha Kumar
Executive Director
State Pension Review Board
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For further information, please call: (512) 463-1736

CHAPTER 605. STANDARDIZED FORM

40 TAC §605.3

The State Pension Review Board (PRB) proposes amendments to §605.3 (relating to Submission of Forms).

BACKGROUND AND PURPOSE

The rule changes are proposed as a result of the PRB’s rule review, which was conducted pursuant to Texas Government Code §2001.039.

The proposed amendment to §605.3 (relating to Submission of Forms) makes technical changes to the language of the rule.

FISCAL NOTE ON STATE AND LOCAL GOVERNMENTS

Westley Allen, Accountant, has determined that for each year of the first five-year period the rule changes as proposed would be in effect, there will be no foreseeable implications relating to cost or revenues of state or local governments, under Government Code §2001.024(a)(4), as a result of enforcing or administering these rules.

PUBLIC BENEFIT/COST NOTE

Mr. Allen has determined, under Government Code §2001.024(a)(5) that for each year of the first five-year period the rule changes as proposed are in effect, the public benefit anticipated as a result of enforcing the rule changes as proposed would be updated and clarified rules. Also, the amendment relating to PRS Reporting would enhance efficiency in training reporting by public retirement system administrators.

GOVERNMENT GROWTH IMPACT STATEMENT

The Board has determined that during the first five years that the rule changes as proposed will be in effect:

(1) the rule changes as proposed will not create or eliminate a government program;
(2) implementation of the rule changes as proposed will not affect the number of PRB employee positions;
(3) implementation of the rule changes as proposed will result in no assumed change in future legislative appropriations;
(4) the rule changes as proposed will not affect fees paid to PRB;
(5) the rule changes as proposed will not create a new regulation;
(6) the rule changes as proposed will not expand, limit or repeal existing rules.

(7) the rule changes as proposed will not change the number of individuals subject to the rule; and
(8) the rule changes as proposed will not positively or adversely affect the state’s economy.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.

Mr. Allen has also determined that there will be no impact on rural communities, small businesses, or microbusinesses as a result of implementing these rule changes as proposed because the rules do not involve those entities and, instead, concern administrative reporting requirements applicable only to public pension systems. Therefore, no regulatory flexibility analysis, as specified in Texas Government Code §2006.002 is required.

IMPACT ON LOCAL EMPLOYMENT OR ECONOMY

Mr. Allen has further determined there is no effect on local economy for the first five years that the rule changes as proposed are in effect because the rules do not involve factors of local economy. Therefore, no economic impact statement, local employment impact statement, nor regulatory flexibility analysis is required under Texas Government Code §§2001.022 or 2001.024(a)(6).

COST TO REGULATED PERSONS (COST-IN/COST-OUT)

This rule proposal is not subject to Texas Government Code §2001.0045, concerning increasing costs to regulated persons, because, as described above in the public benefit and cost note, the proposed amendments do not impose a cost on regulated
persons under Government Code §2001.024, including another
state agency, a special district, or a local government.

TAKINGS IMPACT ASSESSMENT

The Board has determined that no private real property inter-
ests are affected by this proposal and the proposal does not re-
strict or limit an owner's right to his or her property that would
otherwise exist in the absence of government action and, there-
fore, does not constitute a taking under Texas Government Code
§2007.043.

ENVIRONMENTAL RULE ANALYSIS

The rule changes as proposed are not "major environmental
rules" as defined by Government Code §2001.0225. The rule
changes as proposed are not specifically intended to protect the
environment or to reduce risks to human health from environ-
mental exposure. Therefore, a regulatory environmental anal-
ysis is not required.

PUBLIC COMMENT

Written comments on the rule changes as proposed may be sub-
mitted to Anumeha Kumar, Executive Director, State Pension
Review Board, P.O. Box 13498, Austin, Texas 78711-3498 or
by electronic mail to prb@prb.texas.gov. Commenters are en-
couraged to include "rule comments" in the subject line of
the electronic mail. Comments will be accepted until 5:00 p.m. on
January 27, 2020, which is 31 days after publication in the Texas
Register.

STATUTORY AUTHORITY

The rule changes as proposed are authorized by the Texas Gov-
ernment Code, §802.201(a), which grants specific authority to
the Board to adopt rules for the conduct of its business; and
§801.211(e), which allows the Board to adopt rules to admin-
ister and provide educational training programs under §801.211.

CROSS REFERENCE TO STATUTES AND CODES AF-
FFECTED

The rule changes as proposed affect Texas Government Code,
Chapters 801 and 802, specifically §801.201(c), §801.211(b),
§801.202(1) and (2).

§605.3. Submission of Forms.

(a) A public retirement system must complete and submit to
the Board the standard forms identified as Form numbers PRB-100,
PRB-200, PRB-300, PRB-400, and PRB-1000 in §605.1 of this chapter
relating to Adoption of Standard Forms.

(b) [ ] A public retirement system must submit the forms
with the information the system submits to the Board as a result of
reviews and studies conducted by the Board regarding the actuarial
soundness and current financial condition of the fund the system
administrators.

(c) Defined contribution plans as defined by Texas Govern-
ment Code, §802.001(1-a) and retirement systems consisting exclu-
sively of volunteers organized under the Texas Local Fire Fighters’ Re-
tirement Act as defined by Texas Government Code, §802.002(d), are
not required to submit to the Board Form PRB-1000.

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

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Anumeha Kumar
Executive Director
State Pension Review Board
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For further information, please call: (512) 463-1736

CHAPTER 607. PUBLIC RETIREMENT
SYSTEM MINIMUM EDUCATIONAL
TRAINING PROGRAM

SUBCHAPTER B. MINIMUM EDUCATIONAL
TRAINING REQUIREMENTS FOR TRUSTEES
AND SYSTEM ADMINISTRATORS

40 TAC §607.111

The State Pension Review Board (PRB) proposes the repeal
of §607.111 (relating to Minimum Educational Training Require-
ments for Current Trustees and System Administrators).

BACKGROUND AND PURPOSE

The rule changes are proposed as a result of the PRB's rule re-
view, which was conducted pursuant to Texas Government Code
§2001.039.

The proposed repeal of §607.111 (relating to Minimum Educa-
tional Training Requirements for Current Trustees and System
Administrators) would remove §607.111(a) - (c), as those sec-
tions expired December 31, 2016. Furthermore, this rule origi-
nally applied to public retirement system trustees and adminis-
trators who were already serving as of January 1, 2015. Since
those trustees and administrators have completed their initial
continuing education cycle, §607.111(d) is no longer necessary.
Subsection §607.111(e) is repealed, as the expiration date is no
longer relevant.

FISCAL NOTE ON STATE AND LOCAL GOVERNMENTS

Westley Allen, Accountant, has determined that for each year of
the first five-year period the rule changes as proposed would be
in effect, there will be no foreseeable implications relating to cost
or revenues of state or local governments, under Government
Code §2001.024(a)(4), as a result of enforcing or administering
these rules.

PUBLIC BENEFIT/COST NOTE

Mr. Allen has determined, under Government Code
§2001.024(a)(5) that for each year of the first five-year period
the rule changes as proposed are in effect, the public benefit
anticipated as a result of enforcing the rule changes as
proposed would be updated and clarified rules. Also, the
amendment relating to PRS Reporting would enhance efficiency
in training reporting by public retirement system administrators.

GOVERNMENT GROWTH IMPACT STATEMENT

The Board has determined that during the first five years that the
rule changes as proposed will be in effect:

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

(2) implementation of the rule changes as proposed will not affect
the number of PRB employee positions;

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2019.
(3) implementation of the rule changes as proposed will result in no assumed change in future legislative appropriations;

(4) the rule changes as proposed rule will not affect fees paid to PRB;

(5) the rule changes as proposed will not create a new regulation;

(6) the rule changes as proposed will not expand or limit existing regulations. The rule change as proposed would repeal §607.111 (relating to Minimum Educational Training Requirements for Current Trustees and System Administrators) to remove expired rules;

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

(8) the rule changes as proposed will not positively or adversely affect the state's economy.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.

Mr. Allen has also determined that there will be no impact on rural communities, small businesses, or micro-businesses as a result of implementing these rule changes as proposed because the rules do not involve those entities and, instead, concern administrative reporting requirements applicable only to public pension systems. Therefore, no regulatory flexibility analysis, as specified in Texas Government Code §2006.002, is required.

IMPACT ON LOCAL EMPLOYMENT OR ECONOMY

Mr. Allen has further determined there is no effect on local economy for the first five years that the rule changes as proposed are in effect because the rules do not involve factors of local economy. Therefore, no economic impact statement, local employment impact statement, nor regulatory flexibility analysis is required under Texas Government Code §§ 2001.022 or 2001.024(a)(6).

COST TO REGULATED PERSONS (COST-IN/COST-OUT)

This rule proposal is not subject to Texas Government Code §2001.0045, concerning increasing costs to regulated persons, because, as described above in the public benefit and cost note, the proposed amendments do not impose a cost on regulated persons under Government Code §2001.024, including another state agency, a special district, or a local government.

TAKINGS IMPACT ASSESSMENT

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

ENVIRONMENTAL RULE ANALYSIS

The rule changes as proposed are not "major environmental rules" as defined by Government Code §2001.0225. The rule changes as proposed are not specifically intended to protect the environment or to reduce risks to human health from environmental exposure. Therefore, a regulatory environmental analysis is not required.

PUBLIC COMMENT

Written comments on the rule changes as proposed may be submitted to Anumeha Kumar, Executive Director, State Pension Review Board, P.O. Box 13498, Austin, Texas 78711-3498 or by electronic mail to prb@prb.texas.gov. Commenters are encouraged to include "rule comments" in the subject line of the electronic mail. Comments will be accepted until 5:00 p.m. on January 27, 2020, which is 31 days after publication in the Texas Register.

STATUTORY AUTHORITY

The repeal is proposed under the authority of Texas Government Code §801.201(a), which grants specific authority to the Board to adopt rules for the conduct of its business, and §801.211(e), which allows the Board to adopt rules to administer and provide educational training programs under §801.211.

STATUTES AND CODES AFFECTED

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

§607.111. Minimum Educational Training Requirements for Current Trustees and System Administrators.

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

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Anumeha Kumar
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SUBCHAPTER D. COMPLIANCE WITH THE MINIMUM TRAINING REQUIREMENTS

40 TAC §607.140

The State Pension Review Board (PRB) proposes amendments to §607.140 (relating to PRS Reporting).

BACKGROUND AND PURPOSE

The rule changes are proposed as a result of the PRB's rule review, which was conducted pursuant to Texas Government Code §2001.039.

The proposed amendment to §607.140 (relating to PRS Reporting) changes the period and frequency for reporting training received by administrators and trustees of public retirement systems. Currently, public retirement systems report training twice a year through the submission of a standard form. The Minimum Educational Training (MET) Program has been established for several years, and at this time, most public retirement system administrators and trustees are in a two-year continuing education cycle for which they must report four hours of training over the two-year cycle. Because of these reasons, and to assist Texas public retirement systems by minimizing required reporting, the agency proposes annual rather than semiannual reporting of training.

The PRB also proposes to update this section to include information currently collected on the standard MET forms concerning trustee and administrator contact and term information. At the time that the rules were originally adopted, the MET Program...
was still in development. The update to the rule would reflect the categories in the standard forms that the public retirement systems are currently reporting to the PRB.

FISCAL NOTE ON STATE AND LOCAL GOVERNMENTS

Westley Allen, Accountant, has determined that for each year of the first five-year period the rule changes as proposed would be in effect, there will be no foreseeable implications relating to cost or revenues of state or local governments, under Government Code §2001.024(a)(4), as a result of enforcing or administering these rules.

PUBLIC BENEFIT/COST NOTE

Mr. Allen has determined, under Government Code §2001.024(a)(5) that for each year of the first five-year period the rule changes as proposed are in effect, the public benefit anticipated as a result of enforcing the rule changes as proposed would be updated and clarified rules. Also, the amendment relating to PRS Reporting would enhance efficiency in training reporting by public retirement system administrators.

GOVERNMENT GROWTH IMPACT STATEMENT

The Board has determined that during the first five years that the rule changes as proposed will be in effect:

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

(b) implementation of the rule changes as proposed will not affect the number of PRB employee positions;

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

(d) the rule changes as proposed will not affect fees paid to PRB;

(e) the rule changes as proposed will not create a new regulation;

(f) the rule changes as proposed will not expand existing regulations. The changes to §607.140 would limit the existing rule, as it would change the required reporting by public retirement systems to the PRB from twice a year to once annually.

(g) the rule changes as proposed will not change the number of individuals subject to the rule; and

(h) the rule changes as proposed will not positively or adversely affect the state’s economy.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.

Mr. Allen has also determined that there will be no impact on rural communities, small businesses, or microbusinesses as a result of implementing these rule changes as proposed because the rules do not involve those entities and, instead, concern administrative reporting requirements applicable only to public pension systems. Therefore, no regulatory flexibility analysis, as specified in Texas Government Code §2006.002 is required.

IMPACT ON LOCAL EMPLOYMENT OR ECONOMY

Mr. Allen has further determined there is no effect on local economy for the first five years that the rule changes as proposed are in effect because the rules do not involve factors of local economy. Therefore, no economic impact statement, local employment impact statement, nor regulatory flexibility analysis is required under Texas Government Code §§ 2001.022 or 2001.024(a)(6).

COST TO REGULATED PERSONS (COST-IN/COST-OUT)

This rule proposal is not subject to Texas Government Code §2001.0045, concerning increasing costs to regulated persons, because, as described above in the public benefit and cost note, the proposed amendments do not impose a cost on regulated persons under Government Code §2001.024, including another state agency, a special district, or a local government.

TAKINGS IMPACT ASSESSMENT

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

ENVIRONMENTAL RULE ANALYSIS

The rule changes as proposed are not "major environmental rules" as defined by Government Code §2001.0225. The rule changes as proposed are not specifically intended to protect the environment or to reduce risks to human health from environmental exposure. Therefore, a regulatory environmental analysis is not required.

PUBLIC COMMENT

Written comments on the rule changes as proposed may be submitted to Anumeha Kumar, Executive Director, State Pension Review Board, P.O. Box 13498, Austin, Texas 78711-3498 or by electronic mail to prb@prb.texas.gov. Commenters are encouraged to include "rule comments" in the subject line of the electronic mail. Comments will be accepted until 5:00 p.m. on January 27, 2020, which is 31 days after publication in the Texas Register.

STATUTORY AUTHORITY

The rule changes as proposed are authorized by the Texas Government Code, §802.201(a), which grants specific authority to the Board to adopt rules for the conduct of its business; and §801.211(e), which allows the Board to adopt rules to administer and provide educational training programs under §801.211.

CROSS REFERENCE TO STATUTES AND CODES AFFECTED

The rule changes as proposed affect Texas Government Code, Chapters 801 and 802, specifically §801.201(c), §801.211(b), §801.202(1) and (2).

§607.140. PRS Reporting.

(a) By September [March 1 and October 1] of each year, a PRS shall accurately report to the Board on behalf of its trustees and system administrator the MET credit hours completed, as required by subchapter B. A PRS shall submit the report [reports] on a form provided by the Board.

(b) In the September [March 1] report, a PRS shall submit the MET credit hours completed between August 1 [September 1] of the previous year and July 31 [January 31] of the current year and any previously unreported training hours. [In the October 1 report, a PRS shall submit the training hours completed between February 1 and August 31 of the current year and any previously unreported training hours.] A PRS shall be responsible for providing the following information to the Board on an ongoing basis. A PRS shall notify the Board of any changes in such information within 30 days after the date of the changes. A PRS shall submit this information on a form provided by the Board.
(1) For each trustee: the name, [occupation] mailing address, phone number, e-mail, position (such as Chair, Vice-Chair, Secretary, etc.), trustee type (such as Active, Retired, Citizen, etc.), term start date, [date of assuming or re-assuming the trustee's position on the governing body] the term length, and the term end date [expected last date of service].

(2) For a system administrator: the name, title, phone number, e-mail, and date of hire. [business contact information, hiring date, and the last date of employment.]

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

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TITLE 43. TRANSPORTATION
PART 1. TEXAS DEPARTMENT OF TRANSPORTATION
CHAPTER 7. RAIL FACILITIES
The Texas Department of Transportation (department) proposes amendments to §§7.30, 7.32 - 7.34, 7.38, and 7.42, concerning Rail Safety, and §7.105, concerning Railroad Grade Crossings.

EXPLANATION OF PROPOSED AMENDMENTS
The department has transferred the Rail Safety program from the Traffic Safety Division, formerly known as Traffic Operations Division, to the Rail Division. The amendments to §§7.30, Definitions, 7.32, Filing Requirements, 7.33, Reports of Accidents/Incidents, 7.34, Hazardous Materials - Telephonic Reports of Incidents, 7.38, Wayside Detector Map, List, or Chart, and 7.42, Administrative Review, are needed to change the responsible division in the rules from the Traffic Safety Division to the Rail Division.

Amendments to §7.33 and §7.34 also delete the telephone number used for giving telephonic notice and refer to the telephone number posted on the department's website. This change allows for greater ease in locating the proper number.

Amendments to §7.105, Spur Tracks Crossing Existing Highways, delete the term "spur" from the phrase "spur tracks" so that the rule applies to all railroad tracks that cross a highway or road. This change is made to conform the text of the rule with actual practice. "Spur" is not a defined term, and §7.105 has been applied to all railroad crossings. A change is also made to §7.105 to state that the person requesting the crossing is responsible for all initial construction costs, but not necessarily all future costs as implied by the current rule. The initial construction costs include active warning devices considered appropriate by the department to assure the crossing meets applicable safety requirements. The regulation does not address future costs, as such costs are handled under applicable state and federal law.

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. The funds at issue are appropriated for a specific purpose and cannot be used for any other purpose. The proposed amendments do not affect how much the department spends, but rather broaden the projects that the department can consider for the funding.

LOCAL EMPLOYMENT IMPACT STATEMENT
Peter D. Espy, Rail 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
Mr. Espy 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 the consolidation of the department's oversight of railroads into one division. The Rail Division is already responsible for statewide rail transportation planning, the oversight of state-owned or state-subsidized rail operations and facilities, and the administration of state and federal funds appropriated for specific rail projects. The state will benefit from the consolidation of this expertise, including rail safety, into one division. The amendments to §7.105 will benefit the public by permitting the department to better address safety concerns by considering a wider range of projects for available rail crossing improvement funding.

COSTS ON REGULATED PERSONS
Mr. Espy 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. Espy has considered the requirements of Government Code, §2001.0221 and expects that the proposed rules will have no effect on government growth. He anticipates that during the first five years that the rule would be in effect:

(1) it would not create or eliminate a government program;

(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;  
(4) it would not require an increase or decrease in fees paid to the agency;  
(5) it would not create a new regulation;  
(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 not positively or adversely affect this state's economy.
TAKINGS IMPACT ASSESSMENT

Mr. Espy has determined that a written takings impact assessment is not required under Government Code §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§7.30, 7.32 - 7.34, 7.38, 7.42, and 7.105 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 "Rail Safety Rules." The deadline for receipt of comments is 5:00 p.m. on January 27, 2020. 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.

SUBCHAPTER D. RAIL SAFETY

43 TAC §§7.30, 7.32 - 7.34, 7.38, 7.42

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, §111.101, which authorizes the commission to adopt rules to implement federal rail safety laws, Transportation Code, §193.001, which relates to the safe packing or transportation of hazardous materials, and Transportation Code, §471.004, which requires the department to adopt rules governing the installation and maintenance of reflecting material at grade crossings.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, Chapters 111, 193, and 471.


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

(1) Department--The Texas Department of Transportation.
(2) Division director--The director of the department's Rail [Traffic Operations] Division.
(3) FRA--The Federal Railroad Administration.
(4) Railroad--Any form of nonhighway ground transportation that runs on rails or electromagnetic guideways.
(A) Railroad includes:

(i) commuter or other short-haul railroad passenger service in a metropolitan or suburban area; and
(ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads.

(B) Railroad does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

§7.32. Filing Requirements.

(a) A railroad shall file with the department:

(1) the name, address, and telephone number of the principal operating officer in Texas;
(2) a primary and secondary telephone number, which are manned 24 hours per day, for the railroad dispatcher or supervisor responsible for train operations in Texas.

(b) When the department makes a written request, a railroad shall file with the department:

(1) its code of operating rules, timetables, and timetable special instructions as follows:

(A) the operating rules, timetables, and timetable special instructions; and
(B) each amendment to the railroad's code of operating rules, each new timetable, and each new timetable special instruction;

(2) a copy of monthly reports of excess service filed with the FRA under 49 C.F.R. §228.19;

(3) a copy of its program for periodic conduct of operational tests and inspections filed with the FRA under 49 C.F.R. §217.9;

(4) a copy of its program for periodic inspection of its employees filed with the FRA under 49 C.F.R. §217.11; and

(5) a copy of its program for engineer certification filed with the FRA under 49 C.F.R. Part 240.

(c) Filings required by subsection (b)(1)-(5) of this section may include only information pertaining to railroad operations conducted in the state of Texas.

(d) It is preferred that filings required by this subsection be made using electronic digital media format.

(e) Filings required by this section shall be submitted to: Rail [Traffic Operations] Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701.

§7.33. Reports of Accidents/Incidents.

(a) Telephonic reports of certain accidents/incidents.

(1) A railroad shall give immediate telephonic notice to the department of accidents/incidents and other events by calling the department's Rail [Traffic Operations] Division at (844) 297-0980 the telephone number posted on the department's website. Except as provided in paragraph (2) of this subsection, a railroad shall give reports to the department in the same manner and following the same requirements as the railroad shall give reports to the National Response Center under 49 C.F.R. §225.9.

(2) In addition to giving the department telephonic notice of the accidents/incidents and other events described in 49 C.F.R. §225.9, a railroad shall give telephonic notice of accidents/incidents which:

(A) result in the death of one or more persons;
A railroad shall give immediate telephonic notice to the department of hazardous materials incidents by calling the department's Rail [Traffic Operations] Division at [817] 292-0980 or the telephone number posted on the department's website. A railroad shall give reports to the department in the same manner and following the same requirements as the railroad shall give reports to the National Response Center under 49 C.F.R. §171.15. A railroad shall give telephonic notice of only those accidents/incidents which involve the operation of railroad on-track equipment (standing or moving).

§7.38. Wayside Detector Map, List, or Chart.
(a) When the department requests in writing, a railroad shall file a map, list, or chart with the department indicating the current locations within the state of Texas of the following wayside detectors:

- (1) hot box indicators;
- (2) dragging equipment detectors;
- (3) high water indicators;
- (4) shifted load detectors; and
- (5) other wayside detectors.

(b) Filings required by this section shall be submitted to: Rail [Traffic Operations] Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701.

§7.42. Administrative Review.
(a) Applicability. This section applies only when another section makes a specific reference to this section.

(b) Application.

(1) A railroad shall submit an application for administrative review to the following address: Director, Rail [Traffic Operations] Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701.

(2) The application shall explain the relief requested, all relevant facts, and the legal basis for the relief sought.

(3) If the application seeks review of a department decision given to the railroad in writing, the railroad shall submit an application for review no later than 30 days after receipt of the written decision.

(c) Decision. The executive director, or his designee not below division director, shall decide whether to grant, grant in part, or deny the application. If an applicant does not provide information sufficient to evaluate the application, the application shall be denied. The applicant is not entitled to a contested case hearing, and there is no right to appeal the decision.

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

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Becky Blewett
Deputy General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8630

SUBCHAPTER F. RAILROAD GRADE CROSSINGS
43 TAC §7.105
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, §111.101, which authorizes the commission to adopt rules to implement federal rail safety laws, Transportation Code, §193.001, which relates to the safe packing or transportation of hazardous materials, and Transportation Code, §471.004, which requires the department to adopt rules governing the installation and maintenance of reflecting material at grade crossings.

CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, Chapters 111, 193, and 471.

§7.105. [Spur] Tracks Crossing Existing Highways.

(a) Grade crossing by [spur] rail line. Grade crossing of any highway or road by a railroad [spur] track is discouraged.

(b) Requirements for major routes. The department will allow a [spur] track crossing on an interstate highway or other major route only with initial separation of grades. The person requesting the crossing shall pay the total cost of constructing and maintaining such a grade separation.

(c) Requirements for other pathways. The department may allow a [spur] track grade crossing on a roadway, other than a roadway to which subsection (b) of this section applies, including a frontage road if technically feasible, if the department determines that the anticipated volumes of train and vehicular traffic and other pertinent factors indicate that the crossing will not be unduly hazardous to the traveling public. If a grade crossing is allowed, the person requesting the crossing shall pay all initial costs of crossing pavement, highway adjustment, and crossing warning protection, including active warning devices that the department considers appropriate for the crossing, to assure that the design and function meets applicable safety requirements. Additionally, the department may specify conditions, such as changes in conditions or volumes of vehicular or train traffic, that will require future separation of grades, at no expense to the state.

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

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Becky Blewett
Deputy General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8630