

# PROPOSED RULES

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

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

## TITLE 13. CULTURAL RESOURCES

### PART 2. TEXAS HISTORICAL COMMISSION

#### CHAPTER 13. ADMINISTRATION OF THE STATE FRANCHISE TAX CREDITS FOR CERTIFIED REHABILITATION OF CERTIFIED HISTORIC STRUCTURES

##### 13 TAC §§13.1, 13.2, 13.6

The Texas Historical Commission proposes amendments to 13 TAC §13.1, relating to Definitions, §13.2, relating to Qualification Requirements, and §13.6, relating to the application review process. These changes are necessary to clarify the circumstances under which lessees may be eligible to apply for the franchise tax credit, to clarify requirements for non-profit entities newly allowed to participate in the program, and to allow certain partial rehabilitations to participate in the program.

Section 13.1 defines the words and terms used in the rules. The proposed amendment to that section specifies which long-term lessees may be considered to be an owner of a property and thus may become eligible to receive a tax credit. The requirement proposed is consistent with the requirements of Internal Revenue Code §47(c)(2). A long-term lessee of a property may be considered an owner if their current lease term is at minimum 27.5 years for residential rental property, or 39 years for nonresidential real property.

The proposed amendment to §13.2 implements changes to the Tax Code made by House Bill 3230, 84th Texas Legislature. This legislation established that entities not subject to the franchise tax under §171.063, Tax Code, are not ineligible to claim eligible costs and expenses as part of the tax credit program. Although this policy change was directly addressed by a previous amendment to §13.1, eligibility for these projects is secondarily constrained by an existing rule in §13.2 that disqualifies applicants if they fail to submit an application prior to project completion. Some otherwise eligible projects could be incidentally disqualified by this provision due to the timing of the legislative change. The proposed amendment to §13.2 will waive this requirement only for the affected projects in the calendar year between the date when this program went into effect, and the date when H.B. 3230 went into effect, thus eliminating this inconsistency and ensuring these projects will remain eligible.

Section 13.6 describes the application review process and further specifies how the scope of the project may be defined for review purposes. The third proposed amendment will, under cer-

tain circumstances, allow portions of a larger scope of work to be considered as an individual project.

Mark Wolfe, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules. There will be no fiscal impact on small or micro businesses.

Mr. Wolfe has also determined that for each year of the first five-year period these amended rules are in effect the public benefit anticipated will be an increased efficiency and effectiveness in the implementation of the Texas Administrative Code. Additionally, Mr. Wolfe has determined that there will be no effect on small businesses.

Comments on the proposal may be submitted to Mark Wolfe, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Government Code §442.005 and Texas Tax Code §171.909, which provide the Commission with authority to promulgate rules that will reasonably effect the purposes of those chapters.

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

##### *§13.1. Definitions.*

The following words and terms when used in these rules shall have the following meanings unless the context clearly indicates otherwise:

(1) Applicant--The entity that has submitted an application for a building or structure it owns or for which it has a contract to purchase.

(2) Application--A fully completed Texas Historic Preservation Tax Credit Certification Application form submitted to the Commission, which includes three parts:

(A) Part A - Evaluation of Significance, to be used by the Commission to make a determination whether the building is a certified historic structure;

(B) Part B - Description of Rehabilitation, to be used by the Commission to review proposed projects for compliance with the Standards for Rehabilitation; and

(C) Part C - Request for Certification of Completed Work, to be used by the Commission to review completed projects for compliance with the work approved under Part B.

(3) Application fee--The fee charged by the Commission and paid by the applicant for the review of Part B and Part C of the application as follows:

Figure: 13 TAC §13.1(3) (No change.)

(4) Audited cost report--Such documentation as defined by the Comptroller in 34 TAC Chapter 3, Tax Administration.

(5) Building--Any edifice enclosing a space within its walls, and usually covered by a roof, the purpose of which is principally to shelter any form of human activity, such as shelter or housing, or to provide working, office, parking, display, or sales space. The term includes among other examples, banks, office buildings, factories, warehouses, barns, railway or bus stations, and stores and may also be used to refer to a historically and functionally related unit, such as a courthouse and jail or a house and barn. Functional constructions made usually for purposes other than creating human shelter or activity such as bridges, windmills, and towers are not considered buildings under this definition and are not eligible to be certified historic structures.

(6) Certificate of eligibility--A document issued by the Commission to the Owner, following review and approval of a Part C application, that confirms the property to which the eligible costs and expenses relate is a certified historic structure and the rehabilitation qualifies as a certified rehabilitation; and specifies the date the certified historic structure was first placed in service after the rehabilitation.

(7) Certified historic structure--A building or buildings located on a property in Texas that is certified by the Commission as:

(A) listed individually in the National Register of Historic Places;

(B) designated as a Recorded Texas Historic Landmark under §442.006, Texas Government Code, or as a State Antiquities Landmark under Chapter 191, Texas Natural Resources Code; §21.6 and §26.3(63) - (64) of this title; or

(C) certified by the Commission as contributing to the historic significance of:

(i) a historic district listed in the National Register of Historic Places; or

(ii) a certified local district as per 36 CFR §67.9.

(8) Certified local district--A local historic district certified by the United States Department of the Interior in accordance with 36 C.F.R. §67.9.

(9) Certified rehabilitation--The rehabilitation of a certified historic structure that the Commission has certified as meeting the Standards for Rehabilitation. If the project is submitted for the federal rehabilitation tax credit it must be reviewed by the National Park Service prior to a determination that it meets the requirements for a certificated rehabilitation under this rule. In the absence of a determination for the federal rehabilitation tax credit, the Commission shall have the sole responsibility for certifying the project.

(10) Commission--The Texas Historical Commission. For the purpose of notifications or filing of any applications or other correspondence, delivery shall be made via postal mail to: Texas Historic Preservation Tax Credit Program, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711-2276; or by overnight delivery at: Texas Historic Preservation Tax Credit Program, Texas Historical Commission, 1700 North Congress Avenue, Suite B-65, Austin, Texas 78701.

(11) Comptroller--The Texas Comptroller of Public Accounts.

(12) Contributing--A building in a historic district considered to be historically, culturally, or architecturally significant according to the criteria established by state or federal government, including those formally promulgated by the National Park Service and the

United States Department of the Interior at 36 C.F.R. Part 60 and applicable National Register bulletins.

(13) Credit--The tax credit for the certified rehabilitation of certified historic structures available pursuant to Chapter 171, Subchapter S of the Texas Tax Code.

(14) District--A geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.

(15) Eligible costs and expenses--The qualified rehabilitation expenditures as defined by §47(c)(2), Internal Revenue Code, including rehabilitation expenses as set out in 26 C.F.R. §1.48-12(c), incurred during the project. The depreciation and tax-exempt use provisions of §47(c)(2) do not apply to the costs and expenses incurred by an entity exempt from the tax imposed by §171.063 of the Tax Code.

(16) Federal rehabilitation tax credit--A federal income tax credit for 20% of qualified rehabilitation expenditures with respect to a certified historic structure, as defined in §47, Internal Revenue Code; 26 C.F.R. §1.48-12; and 36 C.F.R. Part 67.

(17) National Park Service--The agency of the U.S. Department of the Interior that is responsible for certifying projects to receive the federal rehabilitation tax credit.

(18) Owner--A person, partnership, company, corporation, whether for profit or not, governmental body, or other entity holding a legal or equitable interest in a Property or Structure, which can include a full or partial ownership interest. A long-term lessee of a property may be considered an owner if their current lease term is at minimum 27.5 years for residential rental property, or 39 years for nonresidential real property, as referenced by §47(c)(2), Internal Revenue Code.

(19) Phased development--A rehabilitation project which may reasonably be expected to be completed in two or more distinct states of development, as defined by United States Treasury Regulation 26 C.F.R. §1.48-12(b)(2)(v). Each phase of a phased development can independently support an Application for a credit as though it was a stand-alone rehabilitation. If any completed phase of the rehabilitation project does not meet the requirements of a certified rehabilitation, future applications by the same owner for the same certified historic structure will not be considered.

(20) Placed in service--A status obtained upon completion of the rehabilitation project when the building is ready to be reoccupied and any permits and licenses needed to occupy the building have been issued. Evidence of the date a property is placed in service includes a certificate of occupancy issued by the local building official and/or an architect's certificate of substantial completion.

(21) Property--A parcel of real property containing one or more buildings or structures that is the subject of an application for a credit.

(22) Rehabilitation--The process of returning a building or buildings to a state of utility, through repair or alteration, which makes possible an efficient use while retaining those portions and features of the building and its site and environment which are significant.

(23) Rehabilitation plan--Descriptions, drawings, construction plans, and specifications for the proposed rehabilitation of a certified historic structure in sufficient detail to enable the Commission to evaluate compliance with the Standards for Rehabilitation.

(24) Standards for Rehabilitation--The United States Secretary of the Interior's Standards for Rehabilitation as defined in 36 C.F.R. §67.7.

(25) Structure--A building; see also certified historic structure.

§13.2. *Qualification Requirements.*

(a) Qualification for credit.

(1) An Owner is eligible for a credit for eligible costs and expenses incurred in the certified rehabilitation of a certified historic structure if:

(A) the rehabilitated certified historic structure is placed in service on or after September 1, 2013;

(B) the Owner has an ownership interest in the certified historic structure in the year during which the structure is placed in service after the rehabilitation; and

(C) the total amount of the eligible costs and expenses incurred exceeds \$5,000.

(2) A property for which eligible costs and expenses are submitted for the credit must meet Internal Revenue Code §47(c)(2) which includes:

(A) non-residential real property; or

(B) residential rental property.

(b) Eligible costs and expenses. Eligible costs and expenses means those costs and expenses allowed pursuant to Internal Revenue Code §47(c)(2). Such eligible costs and expenses, include, but are not limited to:

(1) expenditures associated with structural components as defined by United States Treasury Regulation §1.48-1(e)(2) including walls, partitions, floors, ceilings, windows and doors, stairs, elevators, escalators, sprinkling systems, fire escapes, components of central air conditioning, heating, plumbing, and electrical systems and other components related to the operation or maintenance of the building;

(2) architectural services;

(3) engineering services;

(4) construction management and labor, materials, and reasonable overhead;

(5) subcontracted services;

(6) development fees;

(7) construction period interest and taxes; and

(8) other items referenced in Internal Revenue Code §47(c)(2).

(c) Ineligible costs and expenses. Eligible costs and expenses as defined in Internal Revenue Code §47(c)(2) do not include the following:

(1) the cost of acquiring any interest in the property;

(2) the personal labor by the applicant;

(3) any cost associated with the enlargement of an existing building;

(4) site work expenditures, including any landscaping, sidewalks, paving, decks, outdoor lighting remote from the building, fencing, retaining walls or similar expenditures; or

(5) any cost associated with the rehabilitation of an out-building or ancillary structure unless it is certified by the Commission to contribute to the historical significance of the property.

(d) Eligibility date for costs and expenses.

(1) If the rehabilitated certified historic structure is placed in service on or after September 1, 2013, but before January 1, 2015, the Application may include eligible costs and expenses for the project incurred up to 60 months prior to the date the property is placed in service.

(2) If the rehabilitated certified historic structure is placed in service on or after January 1, 2015, Part A of the Texas Historic Preservation Tax Credit Certification Application must be submitted prior to the building being placed in service. Projects completed on or after January 1, 2015, but before January 1, 2016, are exempt from this requirement only if their costs and expenses were incurred by an entity exempt from the tax imposed by §171.063 of the Tax Code within a 60 month period prior to the building's placed in service date.

(3) While the credit may be claimed for eligible costs and expenses incurred prior to the filing of an application, potential applicants are urged to file Parts A and B of the application at the earliest possible date. This will allow the Commission to review the application and provide guidance to the applicant that will increase the chances that the application will ultimately be approved and the credit received.

(e) Phased development. Part B applications for rehabilitation of the same certified historic structure may be submitted by the same owner only if they describe clearly defined phases of work that align with a cost report that separates the eligible costs and expenses by phase. Separate Part B and C applications shall be submitted for review by the Commission prior to issuance of a certificate of eligibility for each phase.

(f) Amount of credit. The total amount of credit available is twenty-five percent (25%) of the aggregate eligible costs and expenses incurred in the certified rehabilitation of the certified historic structure.

§13.6. *Application Review Process.*

(a) Application form. The Commission staff will develop the application and may modify it as needed over time. All required forms, including application Parts A, B, C, and amendment forms, are available from the Commission at no cost.

(b) Delivery. Applications will be accepted beginning on January 1, 2015 and continuously thereafter. Applications should be delivered to the Commission by mail, hand delivery, or courier service. Faxed or emailed applications will not be accepted.

(c) Application Part A - Evaluation of Significance. Part A of the application will be used by the Commission to confirm historic designation or to determine if the property is eligible for qualification as a certified historic structure.

(1) If a property is individually listed in the National Register of Historic Places or designated as a Recorded Texas Historic Landmark or State Antiquities Landmark, the property is qualified as a certified historic structure.

(2) The applicant will be responsible for providing sufficient information to the Commission with which the Commission staff may make a determination. If all requested information is not provided to make a determination that a building is eligible for designation as a certified historic structure, the staff may request additional information from the applicant. If the additional information requested is not provided in a timely manner, the application will be considered incomplete and review of the application will be placed on hold until sufficient information is received.

(3) The Commission staff review of Part A of a complete application, unless otherwise provided in §13.8 of this title, and shall notify the applicant in writing of any determination it makes upon completing the review of Part A of the application.

(4) There is no fee to review Part A of the application.

(d) Application Part B - Description of Rehabilitation. Part B of the application will be used by the Commission to review proposed projects for compliance with the Standards for Rehabilitation.

(1) The applicant will be responsible for providing sufficient information, including photographs taken prior to the project, to the Commission with which the Commission staff may make a determination. If all requested information is not provided to make a determination that a project is eligible as a certified rehabilitation, staff may request additional information from the applicant, usually required to be submitted within 30 days. If the additional information requested is not provided in a timely manner, the application will be considered incomplete and review of the application will be placed on hold until sufficient information is received.

(2) The Commission staff will review Part B of a complete application, unless otherwise provided in §13.8 of this title, and shall notify the applicant in writing of any determination it makes upon completing the review of Part B of the application. In reviewing Part B of the application, the Commission shall determine if Part B is approved or not as follows:

(A) Consistent with the Standards for Rehabilitation as determined by the Commission. If all aspects of the Part B of the application meet the standards for rehabilitation, no additional information is required, and no conditions are imposed on the work, Part B is approved.

(B) Consistent with the Standards for Rehabilitation with specific conditions of work required. The Commission may determine that the work described in the plan must be performed in a specific manner or with specific materials in order to fully comply with the Standards for Rehabilitation. In such cases, the Part B may be approved with specific conditions required. For applications found to be consistent with the Standards for Rehabilitation with specific conditions required, the applicant shall provide written acceptance to the Commission of all specific conditions required. Otherwise the application will be determined to be not consistent with the Standards for Rehabilitation; applications found to be consistent with the Standards for Rehabilitation with specific conditions required may proceed with the work but will only be eligible for the credit if the conditions listed are met as part of the rehabilitation work. Failure to follow the conditions may result in a determination by the Commission that the project is not consistent with the Standards for Rehabilitation; or

(C) Not consistent with the Standards for Rehabilitation. Applications found not to be consistent with the Standards for Rehabilitation will be considered to be ineligible applications; the Commission shall make recommendations to the applicant that might bring the project into conformance with the Standards for Rehabilitation, however no warranty is made that the recommendations will bring the project into compliance with the Standards for Rehabilitation; the applicant may reapply and it will be treated as a new application and will be subject to a new application fee.

(3) An application fee is required to be received by the Commission before Commission review of Part B of the application. The fee is based on the estimated amount of eligible costs and expenses listed by the applicant on Part B of the application.

(A) Applicants must submit the fee with their Part B application or the application will be placed on hold until the fee is

received. The fee is calculated according to a fee schedule approved by the Commission and included in the application.

(B) The fee is based on the estimated aggregate eligible costs and expenses indicated in the Part B application and is not refundable. Resubmission of a rejected application or under any other circumstances will require a new fee. Amendments to a pending application or approved project do not require additional fees.

(4) Amendment Sheet. Changes to the project not anticipated in the original application shall be submitted to the Commission on an amendment sheet and must be approved by the Commission as consistent with the Standards for Rehabilitation before they are included in the project. The Commission shall review the amendment sheet and issue a determination in writing regarding whether or not the proposed change in the project is consistent with the Standards for Rehabilitation.

(5) Scope of Review. The review encompasses the building's site and environment as well as any buildings that were functionally related historically. Therefore, any new construction and site improvements occurring on the historic property are considered part of the project. Individual condominiums or commercial spaces within a larger historic building are not considered individual properties apart from the whole. The scope of review for a project is not limited to the work that qualifies as an eligible expense. Likewise, all work completed by the current owner twenty-four (24) months before the submission of the application is considered part of the project, as is the cumulative effect of any work in previously completed or future phases.

(A) An applicant may elect to apply to receive the credit on only the exterior portions of a larger project that includes other work, in which case the scope of review will be limited to the exterior work. For properties that are individually listed on the National Register of Historic Places, are designated as a Recorded Texas Historic Landmark or State Antiquities Landmark, or determined to be eligible for these designations, the scope of review must also include primary interior spaces.

(B) For these projects described above, all work completed by the current owner twenty-four (24) months before the submission of the application, and within the same scope of review (e.g. exterior and/or primary interior) is considered part of the project, as is the cumulative effect of any work in previously completed or future phases within the same scope of review.

(e) Application Part C - Request for Certification of Completed Work. Part C of the application will be used by the Commission to review completed projects for compliance with the work approved under Part B.

(1) The applicant shall file Part C of the application after the building is placed in service.

(2) The applicant will be responsible for providing sufficient information, including photographs before and after the project, to the Commission by which the Commission staff may verify compliance with the approved Part B. If all requested information is not provided to make a determination that a project is eligible as a certified rehabilitation, the application is incomplete and review of the application will be placed on hold until sufficient information is received.

(3) The Commission staff will review Part C of a complete application, unless otherwise provided in §13.8 of this title, and shall notify the applicant in writing of any determination it makes upon completing the review of Part C of the application.

(A) If the completed project is found to be in compliance with the approved Part B and any required conditions and consis-

tent with the Standards for Rehabilitation, and the building is a certified historic structure at the time of the application, the Commission shall approve the project. The Commission then shall issue to the applicant a certificate of eligibility that confirms the property to which the eligible costs and expenses relate is a certified historic structure and the rehabilitation qualifies as a certified rehabilitation and specifies the date the certified historic structure was first placed in service after the rehabilitation.

(B) If the completed project is not consistent with the Standards for Rehabilitation, with the approved Part B, and/or the specific conditions required, and the project cannot, in the opinion of the Commission, be brought into compliance, or if the building is not a certified historic structure at the time of the application, then the Commission shall deny Part C of the application and no certificate of eligibility shall be issued.

(C) If the completed project is not consistent with the Standards for Rehabilitation, with the approved Part B, and/or the specific conditions required, and the project can, in the opinion of the Commission, be brought into compliance, the Commission may issue remedial conditions that will bring the project into compliance. The applicant shall complete the remedial work and file an amended Part C. If the remedial work, in the opinion of the Commission, brings the project into compliance, then the Commission shall issue a certificate of eligibility.

(4) An application fee is charged before Commission review of the Part C of the application based on the amount of eligible costs and expenses listed by applicant on Part C of the application.

(A) Applicants must submit the fee with their Part C application or the application will be placed on hold until the fee is received. The fee is calculated according to a fee schedule approved by the Commission and included in the application.

(B) The fee is based on the eligible costs and expenses as indicated in the audited cost report and is not refundable. Resubmission of a rejected application or under any other circumstances will require a new fee. Amendments do not require additional fees.

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 May 4, 2016.

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Mark Wolfe

Executive Director

Texas Historical Commission

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For further information, please call: (512) 463-6094



## CHAPTER 19. TEXAS MAIN STREET PROGRAM

### 13 TAC §19.1, §19.5

The Texas Historical Commission (THC) proposes amendments to §19.1 and §19.5 of Chapter 19 (Title 13, Part 2 of the Texas Administrative Code) relating to the Texas Main Street Program ("the program").

The Texas Historical Commission's Texas Main Street Program is the agency's responsibility under §442.014, Title 4 Subtitle D of the Texas Government Code. The Texas Main Street Pro-

gram utilizes a national model established by the National Trust for Historic Preservation and the agency has been the state coordinating program for thirty-five years. Administration of the program must comply with the requirements of the national Main Street America program. Local communities in Texas wishing to participate in the program must apply and participate under the auspices of the Texas Historical Commission. Currently, eighty-seven communities with populations from approximately 1,800 to 325,000 actively participate in the program statewide.

The purpose of the Texas Main Street Program is to assist communities in the preservation and revitalization of their historic downtowns and commercial neighborhood districts. The Main Street Approach advocates a return to community self-reliance, local empowerment and the rebuilding of traditional commercial districts based on their unique assets: distinctive architecture, a pedestrian-friendly environment, personal service, local ownership and a sense of community. The Main Street Approach is a comprehensive strategy tailored to meet local needs and opportunities. It encompasses work in four distinct areas combined to address all of the commercial district's needs. The model is based on the premise of a local organization of volunteers led by a local professional manager working in cooperation with the city and business communities. The Texas Historical Commission provides training, technical, and organizational assistance to the local participants.

The amendment of Chapter 19 is proposed to clarify language in the administration of the Texas Main Street Program. The National Trust for Historic Preservation, through its non-profit subsidiary the National Main Street Center has revised nomenclature within their Main Street America model of the program. For consistency, the amended §19.1 and §19.5 will refer to the Main Street Approach rather than the specific points for which nomenclature has changed and may change again in the future.

Mark Wolfe, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering these rules.

Mr. Wolfe has determined for each year of the first five-year period the amendment of the rules are in effect the public benefit anticipated as a result of the amendment of the existing rules will be an increased clarity of the administration of the Texas Main Street Program. Additionally, Mr. Wolfe has determined there will be no effect on small or micro businesses.

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

Amendment of §19.1 and §19.5 of Chapter 19 (Title 13, Part 2 of the Texas Administrative Code) relating to the Texas Main Street Program ("the program") is proposed under §442.005(q), Title 4 Subtitle D of the Texas Government Code, which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

The proposal of these amended rules implements §442.014 of the Texas Government Code.

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

*§19.1. Object.*

(a) The Texas Historical Commission (Commission) is specifically empowered to designate and provide assistance to Texas cities through the Texas Main Street Program.

(b) The mission of the Texas Main Street Program is to assist Texas communities in the preservation and revitalization of historic downtowns and commercial neighborhood districts in accordance with the national [National] Main Street [Four Point] Approach [of organization, economic restructuring, design, and promotion].

§19.5. Assistance Provided.

(a) Training. Each new Texas Main Street City will receive at no charge basic training for its Main Street manager at the beginning of the program. All new Main Street boards will receive at no charge comprehensive board training at the beginning of their city's Main Street Program. Additional training and continuing education is available throughout a city's participation in the Texas Main Street Program. Provisional and affiliate participants may receive training through the program subject to available Commission resources.

(b) Technical assistance. Each Texas Main Street City receives technical assistance and training in the Main Street Approach [areas of design, economic restructuring, promotion and organization]. Provisional and affiliate participants receive technical assistance at the discretion of the program subject to available Commission resources.

(c) Main Street network. Each Texas Main Street City is eligible to receive Texas Main Street publications and participate in Texas Main Street networking opportunities. Provisional and affiliate participants are eligible for the Main Street network.

(d) Fees. Participants in the Texas Main Street Program will pay a fee for participation in the program. The amount of the fee is determined by the Commission. After a city's [cities] acceptance into the program, any subsequent fees based on population shall be based on the most recent decennial census. The Commission may waive the fee for a Texas Main Street Small City in their first three years of participation.

(e) Main Street Status. In order to remain a Texas Main Street City, the community must be certified on an annual basis by the Texas Main Street office to confirm that the community meets all of the requirements for designation.

(f) Reclassification. Participants shall be reclassified as necessary between Texas Main Street Small City and Texas Main Street Urban City based on the most recent decennial census. Changes in fees necessitated by reclassification of a city shall be assessed upon the following year's renewal. The Commission may establish a fee schedule in subsection (d) of this section that graduates fee increases caused by reclassification.

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 May 4, 2016.

TRD-201602169

Mark Wolfe

Executive Director

Texas Historical Commission

Earliest possible date of adoption: June 19, 2016

For further information, please call: (512) 936-2315



## CHAPTER 24. RESTRICTED CULTURAL RESOURCE INFORMATION

### 13 TAC §§24.7, 24.13, 24.15, 24.17, 24.19

The Texas Historical Commission (THC) proposes amendments to 13 TAC Chapter 24, §24.7 concerning Definitions, §24.13 concerning Restricted Information, §24.15 concerning Access to Both Public and Restricted Cultural Resource Information, §24.17 concerning Criteria for Access to Restricted Information, and §24.19 concerning Restricted Information Application Submission and Review Procedures. These changes are needed to further clarify the conditions and procedures related to access to restricted information under the control of the Commission.

Mark Wolfe, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering these rule amendments.

Mr. Wolfe has also determined that for each year of the first five-year period the rule amendments are in effect the public benefit anticipated as a result of these amendments will be improved care of site locational information associated with cultural resources in the State of Texas. Additionally, Mr. Wolfe as determined that there will be no effect on small businesses, and there is no anticipated economic cost to persons who are required to comply with these rule amendments as proposed.

Comments on the proposal may be submitted to Mark Wolfe, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register*.

The amendments are proposed under Title 9, Chapter 191 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules that will reasonably effect the purposes of this chapter.

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

#### §24.7. Definitions.

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

(1) Access account--Confidential transaction record verifying an individual's identity and authority to access the restricted information within the THSA database.

(2) Access agreement--A contract signed or otherwise accepted by all users of RCRI, which states that they agree to comply with the rules governing the use of RCRI, including the restricted data contained within the THSA database.

(3) Access committee--The RCRI Access Committee. A standing committee composed of the Director of the Archeology Division, the Director of the History Programs Division, the State Marine Archeologist, and the Director of the Texas Archeological Research Laboratory of the University of Texas at Austin, or their designees, which has the authority to determine an applicant's qualification for access to restricted information, and the ability to grant or deny such access.

(4) Agency--A department, commission, board, office or other federal or state governmental agency body.

(5) Applicant--An individual who submits an application request for access to RCRI data sources, including the THSA database.

(6) Application [form]--The personal data submitted [completed information packet filed] by an applicant being considered for access privileges to RCRI.

(7) Cultural resource information--Data pertaining to cultural resources, including but not limited to site records, reports, location information, notes, photographs, and maps.

(8) Atlas--The Texas Historic Sites Atlas (THSA).

(9) Cultural resource--A site or place where there is physical evidence of past human activities, such as structures, shipwrecks, artifacts or alterations of the natural environment, and which is fifty or more years old.

(10) Curriculum vitae--Brief account of the applicant's career and qualifications.

(11) Database--Structured information and data contained in a computer file.

(12) Legitimate scientific or legal interest--An interest based on specific research goals associated with professional archeological, historical, or architectural research as defined in Chapter 191 of the Texas Natural Resources Code, or [legal jurisdiction directly related to] ownership and management of sites classified as restricted under this title.

~~[(A) Firms engaged in the business of cultural resource management for profit that do not have a qualified staff archeologist do not have a legitimate scientific or legal interest.]~~

~~[(B) Entities granted access to RCRI solely on the basis of ownership shall be granted access only to information on the sites they actually own, to the extent it is practical to limit such access. They shall not be granted statewide access to the restricted portion of the THSA.]~~

~~[(C) Technical support personnel working with and under the supervision of a currently authorized RCRI user that has a legitimate scientific or legal interest.]~~

~~[(D) College students must submit a letter from a sponsoring professor, verifying their need to access the restricted data of the THSA together with the RCRI application form. If access is approved, students must work under the supervision of a currently authorized RCRI user.]~~

(13) Political subdivision--A political subdivision of the State, as defined in §191.003 [Chapter 191] of the Texas Natural Resources Code.

(14) RCRI--Restricted Cultural Resource Information contained within the THSA database, the libraries, files, documents and maps held by the commission.

(15) RCRI user--An individual who accesses and uses restricted information contained within the THSA database or within the libraries, files, documents, and maps held by the commission.

(16) Site--A cultural resource location containing physical evidence of either a prehistoric and/or historic occupation, or activity, building, or structure, whether standing, in ruin, or vanished, where the location itself maintains historical or archeological integrity regardless of the integrity of any existing structure.

(17) Site location--Information concerning the location, placement, or locality of a cultural resource.

(18) Site records--All data and information relating to the character, condition, and location of any archeological site or other cultural resource, and all data and information pertinent to collections of

material remains. Site records include, but are not limited to, digital and hard copy images, photographs, maps, notes, drawings, site data forms, documents, sound tapes, spatial imagery and other forms of electronic data.

(19) Spatial imagery--Imagery used to illustrate and indicate locations on the surface of the earth, including but not limited to geographic maps; plotting; aerial, satellite and remote sensing imagery; georeferenced images.

(20) Steward--A current member of the Texas Archeological Stewardship Network.

(21) Texas Historic Sites Atlas--The electronic database documenting historical and archeological sites and properties in the state of Texas, survey locational data, as well as the computer database server on which this information resides and the system that provides access to this database through the Internet.

(22) THSA [TSHA] Coordinator--A member of the commission staff appointed [to this position] by the Executive Director to have primary responsibility for operation and maintenance of THSA.

#### *§24.13. Restricted Information.*

The following categories of information are [hereby defined as] Restricted Cultural Resource Information (RCRI).

(1) All archeological survey site location and site record information that contains location descriptions, coordinate data, or [locational data such as longitude and latitude, Universal Transverse Mercator coordinates, and] spatial imagery [or detailed descriptions] that would allow an individual to determine the location of an archeological site.

(2) The address or site location of historic structures or other non-archeological cultural resources nominated for or listed in the National Register of Historic Places or registered as State Archeological Landmarks, if the owner of the property has specifically requested that such information not be distributed to the general public.

(3) The site location of cemeteries determined by the commission to be at risk of harm.

#### *§24.15. Access to Both Public and Restricted Cultural Resource Information.*

All persons desiring to view or use RCRI compiled and maintained by the commission, in its libraries, files, and maps, or within the THSA database must be approved through the commission's application process as defined in §24.17 and §24.19 of this title (relating to Restricted Information Access Criteria and Application Submission and Review Procedures), and agree to abide by the rules of usage established by an RCRI Access Agreement. No access agreement document is needed for persons wishing to access public information in the THSA database or the libraries or files of the commission if restricted information is not contained within those materials. Persons wishing to view or use the RCRI data must submit an [a written] application on a form supplied by the commission, and agree to the terms of the [sign an RCRI Access Agreement if approved for] RCRI access agreement approved for RCRI access. RCRI access is granted for up to a 4-year period and is renewable.

#### *§24.17. Criteria for Access to Restricted Information.*

(a) Qualified applicants meeting one or more of the following criteria may be granted access by the THSA Coordinator:

(1) Meet the Secretary of Interior's Professional Qualifications Standards (36 CFR Part 61) for Archeology.

(2) Meet the definition of professional archeologist, or principal investigator as defined by §26.5 of this title (relating to Definitions).

(3) Be a current member of the Texas Archeological Stewardship Network.

(b) Applications from persons not meeting the criteria set forth in subsection (a) of this section must have a clear and legitimate scientific or legal interest in being granted access to RCRI. Their applications will be reviewed by the access committee, and access will be granted or denied by the committee as specified in §24.19 of this title (relating to Restricted Information Application Submission and Review Procedures).

(c) If an applicant is denied access to RCRI, the applicant may appeal that decision before the commission at one of its regularly scheduled public meetings. Appeals must be submitted in writing to the commission at least 30 days prior to a scheduled meeting of the commission.

(d) Limitations on access to RCRI.

(1) Firms engaged in the business of cultural resource management for profit that do not have a qualified staff archeologist do not have a legitimate scientific or legal interest and may not be granted access to RCRI.

(2) Entities granted access to RCRI solely on the basis of ownership shall be granted access only to information on the sites they actually own, to the extent it is practical to limit such access. They shall not be granted statewide access to the restricted portion of the THSA.

(3) Technical support personnel working with and under the supervision of a currently authorized RCRI user who has a legitimate scientific or legal interest may be granted access.

(4) College students must submit a letter from a sponsoring professor, verifying their need to access the restricted data of the THSA together with the RCRI application form. If access is approved, students must work under the supervision of a currently-authorized RCRI user.

*§24.19. Restricted Information Application Submission and Review Procedures.*

(a) Application forms. All persons requesting access to RCRI must complete and submit the application form provided by the commission. This application [~~form~~] must indicate the type of information to which access is desired, the nature of the proposed research and any special user requirements during access, the name of the person desiring access, when access is needed, and for how long. For student applications, a letter is also required from a sponsoring professor, verifying the applicants' legitimate scientific need for access.

(b) Curriculum vitae. To prove his or her credentials for access, an applicant who is not a member of the Texas Archeological Stewardship Network must also submit a current curriculum vitae to the commission, if such a document is not already on file with the commission.

(c) Access agreement. The applicant must also agree to the terms of the [~~sign an~~] access agreement provided by the commission and submit it. A copy of the access agreement document will be kept on file at the commission.

(d) Initial review by the THSA Coordinator. The THSA Coordinator reviews all applications and vitae for completeness and will notify the applicant of any additional information required.

(e) Consideration of qualified application. When all required application information has been received and reviewed, the THSA

Coordinator will either rule on access relative to criteria set forth in §24.17(a) of this title (relating to Criteria for Access to Restricted Information), or forward the application to the access committee. If the applicant is approved for RCRI access under §24.17(a) of this title, the THSA Coordinator will notify the applicant of this approval within 10 working days. The access committee will review all applications requiring further consideration for qualification within 20 working days of receipt under §24.17(b) of this title, and the THSA Coordinator will notify the applicant of the committee's decision.

(f) Denial of application. If an application is denied, the THSA Coordinator will notify the applicant in writing or through electronic submission of the reasons for denial. Any appeals of these decisions must be made before the commission at one of its regularly scheduled public meetings.

(g) Registration of approved applicant. The THSA Coordinator will register the applicant as an RCRI user, and a [~~written~~] notice documenting registration will be forwarded to the registered RCRI user. The [When appropriate, the] commission will also supply the applicant with a THSA Access Account, which will enable the applicant to access the restricted portion of the THSA database.

(h) The commission may conduct an investigation to verify any information submitted on an application.

(i) False information. If the access committee determines that an applicant provided false information on an application, the committee will take the following actions.

(1) Recommend denial of the application.

(2) Notify the applicant of the information considered to be false and give the applicant a reasonable period of time, not to exceed 30 days, to respond.

(3) If, upon examination of the applicant's response, or failure to respond, the access committee determines that false information was knowingly provided on the application, the access committee may recommend to the commission that the applicant be denied access to RCRI for a period not to exceed two years.

(4) The commission may consider and act on this recommendation[~~, upon due notice to the applicant,~~] at any regular or called meeting of the commission. The applicant will be given notice of at least seven days of the intent to consider the application at the meeting.

(j) Special provision for access to the THC Library or RCRI data. Temporary access to the archeological materials in the THC Library or information in the RCRI may be granted to persons qualified under either §24.17(a) or (b) of this title by a THC staff archeologist. Such authorization must be signed by the THC staff member and a copy kept on file at the commission.

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

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Mark Wolfe

Executive Director

Texas Historical Commission

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For further information, please call: (512) 463-1858



## CHAPTER 28. HISTORIC SHIPWRECKS

### 13 TAC §28.6, §28.9

The Texas Historical Commission (THC) proposes amendments to 13 TAC Chapter 28, §28.6 concerning Conduct of Activities and §28.9 concerning Analysis and Presentation of Data. These changes are needed to further clarify the collection and presentation of marine remote-sensing data as part of permitted underwater archeological investigations.

Mark Wolfe, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering these rule amendments.

Mr. Wolfe has also determined that for each year of the first five-year period the rule amendments are in effect the public benefit anticipated as a result of these amendments will be improved care of site locational information associated with cultural resource in the State of Texas. Additionally, Mr. Wolfe as determined that there will be no effect on small businesses, and there is no anticipated economic cost to persons who are required to comply with these rule amendments as proposed.

Comments on the proposal may be submitted to Mark Wolfe, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register*.

The amendments are proposed under Title 9, Chapter 191 of the Texas Natural Resources Code, which provides the Commission with authority to promulgate rules that will reasonably effect the purposes of this chapter.

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

#### §28.6. *Conduct of Activities.*

(a) All persons shall conduct their activities in Texas' submerged lands in a manner designed to avoid damage to shipwrecks in Texas' submerged lands, and to protect and preserve the cultural resources of Texas. If, during the conduct of activities in submerged state land tracts, a person discovers the existence of a shipwreck, the person shall promptly notify the commission of the existence of the historic property and shall conduct the activities in a manner that will avoid damage to the shipwreck.

(b) When a person submits an application for a permit from the U.S. Army Corps of Engineers, the person shall describe the proposed activity in sufficient detail to enable the commission to review the U.S. Army Corps of Engineers' public notice publication, and determine if the proposed activity may impact a shipwreck.

(c) If the proposed activity is in an area where a shipwreck is known to exist, or where there is a likelihood that a shipwreck exists, the commission may require an archeological survey, the purpose of which is to locate shipwrecks.

(d) Conduct of such a survey may be recommended by the commission to the U.S. Army Corps of Engineers, and may be required as a condition of issuance of the permit from the U.S. Army Corps of Engineers. Such survey must be done under a Texas Antiquities Permit issued by the commission. The Texas Antiquities Permit is issued only to a qualified archeologist and allows the commission to monitor the quality and results of the survey.

(e) The commission has set the following minimum standards for conducting a survey.

- (1) Horizontal positioning.

(A) Texas' submerged lands within bays and rivers and within the 3 nautical mile line in the Gulf of Mexico.

(i) The avoidance margin in this area is fifty (50) meters.

(ii) The maximum survey line spacing in this area is twenty (20) meters.

(B) Texas' submerged lands offshore beyond the 3 nautical mile line in the Gulf of Mexico.

(i) The avoidance margin in this area is one-hundred and fifty (150) meters.

(ii) The maximum survey line spacing in this area is thirty (30) meters.

(C) The geographical extent of an archeological survey must include the construction impacts (e.g. anchor patterns of construction barges) at the margin of the primary activity and the size of the avoidance margin. Survey for a linear project (e.g. pipelines, dredged channels, and utility lines) must include the centerline of the project route and at least one offset line each side of the centerline. A survey for marine seismic activity that employs drilling and detonation of buried explosive charges must, at a minimum, collect data along at least one line of survey crossing each source point and extending at least 20 meters to either side of each source point. The survey area must be adequate to allow movement of the proposed activity such that it is outside of the avoidance margin of any significant magnetic anomaly or sonar target yet fully within the area surveyed.

(D) If avoidance of an anomaly or target determined to be significant by the archeologist holding the survey permit is not feasible, further investigation of the anomaly or target will be required as stated in subsections (g), (i) and (j) of this section. Such further investigation must also be conducted under a permit issued by the commission.

(2) Instrumentation and Survey Procedures. Instrumentation is classified as remote sensing equipment that detects the presence of an object by its inherent physical properties or by signals reflected from the object. The preferred suite of remote sensing equipment includes, but is not limited to, a marine magnetometer, a high-resolution side-scan sonar, and a recording fathometer.

(A) The magnetometer should be set to detect and record the magnetic environment at 1-second intervals or less and the data should be recorded on computer disc or other appropriate computer media. The distance of the magnetometer should not exceed 6 meters from the marine bed.

(B) The side-scan sonar should use a transceiver designated as a 300 kHz transceiver minimum and should be operated in that frequency or a higher frequency if available and the data should be recorded on computer disc or other appropriate computer media.

(C) The fathometer must be capable of recording bathymetric data through digital output to a computer.

(D) The magnetometer, side-scan sonar, and fathometer, to the extent possible, should be interfaced, either directly or through computer files, with the global positioning system receiver to coordinate positions with the remote sensing equipment data.

(E) A differentially corrected global positioning system (GPS) receiver or system of equal or greater accuracy will be used for navigation and positioning.

(F) The positioning system must collect accurate position data at the same time interval as the magnetometer to preclude the

necessity of interpolating positions between more widely spaced position fixes.

(3) Variance from the parameters specified in this section may be requested from the commission. Such variance must be based on quantifiable factors, e.g. the water is too shallow for effective use of side-scan sonar. Likewise, the commission may modify the parameters for a given survey area based on information held by the commission, e.g. survey line spacing may be decreased in the immediate vicinity of a known state archeological landmark beyond the 3 nautical mile line in the Gulf of Mexico.

(f) If a person detects a significant anomaly or sonar target as a result of conducting the survey described in this section, the person shall record a specific UTM, Latitude/Longitude, or state plane coordinate position, along with the geodetic datum in which the coordinates were recorded, and either:

(1) Conduct a thorough and good faith effort to search out the object causing the anomaly or sonar target and identify whether the object might possibly be a state archeological landmark or eligible property in Texas' submerged lands. Excavation in order to make an identification at this stage of investigation is prohibited without a permit issued by the commission. Or, the person may:

(2) Relocate the activity to an area outside of the appropriate avoidance margin in order to avoid disturbance of the object causing the anomaly or sonar target and thereby avoid damage to a shipwreck.

(g) If the person determines, through actions conducted under subsection (e) of this section, that the object causing the significant anomaly or sonar target is definitely not a shipwreck, and if the commission concurs with that determination, the person may perform the activity in a normal, routine manner.

(h) If the person determines, through actions conducted under subsection (e) of this section, that the object causing the significant anomaly or sonar target is a shipwreck or might be a shipwreck, the person shall either:

(1) Notify the commission of the existence of a shipwreck or possible shipwreck, report the coordinate position to the commission and relocate the activity to an area outside of the appropriate avoidance margin in order to avoid disturbance of the object causing the significant anomaly or sonar target and thereby avoid damage to a shipwreck; or

(2) Notify the commission of the existence of a shipwreck or possible shipwreck and report the coordinate position to the commission; whereupon the commission can perform its activities described in Subchapter C, Powers and Duties, and Subchapter E, Prohibitions, of the Antiquities Code of Texas. The commission may require additional archeological investigations of the shipwreck or possible shipwreck, or, if the commission concurs that no damage will occur to the shipwreck from the proposed activity, the commission may authorize the person to proceed with the proposed activity in a normal, routine manner.

(i) Investigation by archeological divers to identify the source of an anomaly or sonar target is appropriate under a survey permit. Such investigations may involve removal of overburden to expose small section of a buried object but shall not involve extensive excavation or artifact recovery. Survey level diving investigations must be approved as part of the survey permit issued to the archeologist or as a separate survey permit.

#### §28.9. *Analysis and Presentation of Data.*

Analysis and presentation of magnetometer and side-scan sonar data upon completion of a survey to locate submerged cultural resources

are subject to the following, in addition to requirements under §26.24 of this title (relating to Reports Relating to Archeological Permits).

(1) If the survey is of sufficient duration, the magnetometer data will be corrected for diurnal variation using either separate data collected concurrently specifically for the purpose of diurnal corrections or through the use of an appropriate algorithm or mathematical formula.

(2) Magnetometer data will be presented on maps, aerial, or satellite imagery in a contour format. In order to facilitate review of this data by the THC, it should be presented at a scale sufficient for examination. Magnetic anomalies recommended for avoidance or investigation shall be illustrated at a scale and showing isolines at appropriate levels to illustrate the complexity and intensity of individual anomalies. Illustrating anomalies at this scale may require separate illustrations from the overall survey map.

(3) Maps illustrating magnetic anomalies will show the actual survey lines followed by the survey vessel and thus the position of each anomaly in relation to the survey lines.

(4) Positive and negative nodes of magnetic anomalies shall be indicated either by different colors of isolines (e.g. red for positive node, blue for negative node) or by variation in line type (e.g. hatched or dashed) for the negative isolines.

(5) Sonar data will be presented as a mosaic on maps, aerial, or satellite imagery. Sonar targets recommended for avoidance shall be presented at a scale suitable to show diagnostic attributes and may require separate illustrations from the overall survey map.

(6) The avoidance margin for significant magnetic anomalies and sonar targets, defined in 13 TAC Chapter 28, Rule §28.2, must be illustrated in the overall contour maps and sonar mosaics.

(7) [(6)] A map of the survey area must be included in the survey report showing both the proposed survey lines and the actual survey lines.

(8) [(7)] A table of anomalies and sonar targets recommended for avoidance or investigation, including the positions of those anomalies, or targets, shall be included in the report.

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 29. MANAGEMENT AND CARE OF ARTIFACTS AND COLLECTIONS

### 13 TAC §§29.4 - 29.6

The Texas Historical Commission (THC) proposes amendments to 13 TAC Chapter 29, §29.4 concerning Definitions, §29.5 concerning Disposition of Archeological Collections, and §29.6 concerning Certification of Curatorial Facilities for State-Associated Held-in-Trust Collections under the jurisdiction of the Antiquities Code of Texas (Title 9, Chapter 191, of the Texas Natural Re-

sources Code). These changes are needed to further clarify the conditions and procedures related to the management and care of artifacts and collections under the control of the Commission.

Mark Wolfe, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be minimal fiscal implications for state or local governments as a result of enforcing or administering the amended rules.

Mr. Wolfe has also determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of the implementation of these rules will be better care of artifacts collected with public funds. There will be minimal effects on small businesses or micro-businesses. There are minimal anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments on the proposal may be submitted to Mark Wolfe, Executive Director, Texas Historical Commission, P.O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register*.

The rule amendments are proposed under both §442.005(q) of the Texas Government Code and §191.052, Title 9, Chapter 191 of the Texas Natural Resources Code, which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

#### §29.4. Definitions.

The following words and terms, when used in this chapter and the Antiquities Code of Texas, shall have the following meanings unless the context clearly indicates otherwise.

(1) Accession--means the formal acceptance of a collection and its recording into the holdings of a curatorial facility and generally includes a transfer of title. For held-in-trust collections, stewardship but not title is transferred to the curatorial facility.

(2) Accessions inventory--means an inventory conducted at the time of accessioning when a collection or historical item is placed at the designated curatorial facility. It is similar to a baseline inventory in that it is comprised of the categories represented in the collection, quantities, and linear feet of documentation as appropriate.

(3) Antiquities--means the tangible aspects of the past, which relate to human life and culture. Some examples include objects, written histories, architecture [architectural significance], cultural traditions and patterns, art forms, and technologies.

(4) Artifact--means an object that has been removed from an archeological site.

(5) Baseline inventory--means the most basic inventory done by summary count within general categories (similar to an entry or accessions inventory).

(6) Cataloging--means assigning an object to an established classification system and having a record containing identification, provenience, accession and catalog numbers, and location of that object in the collection storage area.

(7) Certification--means a process through which a curatorial facility establishes that it has achieved certain standards and follows acceptable practices with respect to its collections.

(8) Certified curatorial facility--means a museum or repository that has been certified by the Commission for the purposes of curating state-associated collections.

(9) Collection--means an associated set of objects, samples, records, or documents or an associated set of documents only.

(10) Commission--means the Texas Historical Commission and its staff.

(11) Conservation--means scientific laboratory process for cleaning, stabilizing, restoring, and preserving artifacts.

(12) Conservation Survey--means inspection and documentation by facility staff, of condition of collection objects on an ongoing basis as part of routine collections management work.

(13) Cultural resource--means any building, site, district, structure, object, historic [pre-twentieth century] shipwreck, data, and locations of historical, archeological, educational, or scientific interest, including, but not limited to, prehistoric and historic Native American or aboriginal campsites, dwellings, and habitation sites, archeological sites of every character, treasure embedded in the earth, sunken or abandoned ships and wrecks of the sea or any part of the contents thereof, maps, records, documents, books, artifacts, and implements of culture in any way related to the inhabitants' prehistory, history, natural history, government, or culture. Examples of cultural resources include Native American mounds and campgrounds, aboriginal lithic resource areas, early industrial and engineering sites, rock art, early cottage, and craft industry sites, bison kill sites, cemeteries, battlegrounds, all manner of historical structures, local historical records, etc.

(14) Curatorial facility--means a museum or repository that professionally manages collections on a long term basis.

(15) Deaccession--means the permanent removal of an object or collection from the holdings of a curatorial facility.

(16) Designated curatorial facility--means any curatorial facility that is holding or seeking to hold any state associated collection on behalf of the Commission.

(17) Destructive analysis--means destroying all or a portion of an object or sample to gain specialized information. For purposes of these rules, it does not include analysis of objects or samples prior to their being accessioned by a curatorial facility.

(18) Disposal--means the discard of an object or sample after being recovered and prior to accession, or after deaccession.

(19) Held-in-trust agreement--means the document signed by the Commission and the designated curatorial facility that provides for the transfer of stewardship to the curatorial facility for the state-associated collection, provides the state-associated collection's accession number and accessions inventory, and notes any conditions or restrictions.

(20) Held-in-trust collection--means those state-associated collections under the authority of the Texas Historical Commission that are placed in a curatorial facility for care and management; stewardship is transferred to that curatorial facility but not ownership.

(21) Inventory--means a physically-checked, itemized list of the objects in a curatorial facility's holdings. Itemized refers to having some sort of categorization, whether it be object-by-object or some type of grouping. Inventory is usually performed by numerical count, but weight may be considered in addition to or instead of a count, where it may be appropriate.

(22) Museum--means a legally organized not-for-profit institution, essentially educational in nature; having a formally stated mission; with a professionally trained staff that uses and interprets objects for the public through regularly scheduled programs and exhibits; with a program of documentation, care, and use of collection or tangi-

ble objects; and having a program of maintenance and presentation of exhibits.

(23) Political subdivision--means a local government entity created and operating under the laws of this state, including a city, county, school district, or special district created under the Texas Constitution, Article III, Section 52(b)(1) or (2), or Article XVI, Section 59.

(24) Preventive conservation--means to maintain the collections in stable condition through preventive maintenance, condition surveys, environmental controls, and pest management.

(25) Public lands--means non-federal public lands that are owned or controlled by the State of Texas or any of its political subdivisions, including the tidelands, submerged land, and the bed of the sea within the jurisdiction of the State of Texas.

(26) Relocation inventory--means a physically-checked, itemized list of a specific subset of objects that have been moved from their permanent location within the holdings of the curatorial facility.

(27) Repository--means a permanent, not-for-profit educational or research-oriented agency or institution, having a professionally trained staff, that provides in-perpetuity legal housing and curation of collections.

(28) Significance--means a trait attributable to sites, buildings, structures and objects of historical, architectural, and archeological (cultural) value which are eligible for designation to State Antiquities [Archeological] Landmark status and protection under the Antiquities Code of Texas. Similarly, a trait attributable to properties included in or determined eligible for inclusion in the National Register of Historic Places.

(29) Site--means any place or location containing physical evidence of human activity. Examples of sites include: the location of prehistoric or historic occupations or activities, a group or district of buildings or structures that share a common historical context or period of significance, and designed landscapes such as parks and gardens.

(30) Spot-check inventory--means an organized location search to produce a physically-checked, itemized list of a predetermined subset of objects for which the curatorial facility is responsible.

(31) State-associated collections--means the collections owned by the State and under the authority of the Texas Historical Commission. This includes the following:

(A) Permitted collections--means collections that are the result of work governed by the Texas Antiquities Code of Texas on land or under waters belonging to the State of Texas or any political subdivision of the State requiring the issuance of a permit by the Commission.

(B) Non-permitted collections--means collections that are the result of work governed by the Antiquities Code on land or under waters belonging to the State of Texas or any political subdivision of the State conducted by Commission personnel without the issuance of a permit.

(C) Purchased collections--means collections that are the result of the acquisition of significant historical items by the Commission through Texas Historical Artifacts Acquisition Program or use of other State funds.

(D) Donated collections--means collections that are the result of a gift, donation, or bequest to the Commission.

(E) Court-action collections--means collections that are awarded to the Commission by a court through confiscation of ille-

gally-obtained archeological artifacts or any other material that may be awarded to the Commission by a court of law.

(32) State Antiquities [Archeological] Landmark--means an archeological site, archeological collection, ruin, building, structure, cultural landscape, site, engineering feature, monument or other object, or district that is eligible to be designated as a landmark or is already officially designated as a landmark. [any cultural resource or site located in, on, or under the surface of any lands belonging to the State of Texas or any county, city, or other political subdivision of the state, or a site officially designated as a landmark at an open public meeting before the Commission.]

§29.5. Disposition of State Associated Collections [Archeological Collections].

(a) Ownership. All specimens, artifacts, materials, and samples plus original field notes, maps, drawings, photographs, and standard state site survey forms, resulting from the investigations remain the property of the State of Texas. Certain exceptions left to the discretion of the Commission are contained in the Texas Natural Resources Code, §191.052(b). The Commission will determine the final disposition of all artifacts, specimens, materials, and data recovered by investigations on State Antiquities [Archeological] Landmarks or potential landmarks, which remain the property of the State. These state-associated collections [Antiquities from State Archeological Landmarks] are of inestimable historical and scientific value and should be preserved and utilized in such a way as to benefit all the citizens of Texas. It is the rule of the Commission that such antiquities shall never be used for commercial exploitation. (see also 13 TAC §26.17 [§26.27] (relating to Principal Investigator's Responsibilities for Disposition of Archeological Artifacts and Data)).

(b) Housing, conserving, and exhibiting state-associated collections [antiquities from State Archeological Landmarks]. (see also 13 TAC §26.17 [§26.27])

(1) After investigations conducted under the jurisdiction of the Antiquities Code of Texas have [investigation of a State Archeological Landmark has] culminated in the reporting of results, these state-associated collections [the antiquities] will be permanently preserved in research collections at a curatorial facility certified by the Commission. Prior to the expiration of a permit, proof that state-associated [archeological] collections [and related field notes] are housed in a curatorial facility is required. Failure to demonstrate proof before the permit expiration date may result in the principal investigator and co-principal investigator falling into default status. (see also 13 TAC §26.17 [§26.27])

(2) Institutions housing state-associated collections [antiquities from State Archeological Landmarks] will also be responsible for adequate security of the collections, continued conservation, periodic inventory, and for making the collections available to qualified institutions, individuals, or corporations for research purposes. (see also 13 TAC §26.17 [§26.27])

(3) Exhibits of state-associated collections [materials recovered from State Archeological Landmarks] will be made in such a way as to provide the maximum amount of historical, scientific, archeological, and educational information to all the citizens of Texas. First preference will be given to traveling exhibits following guidelines provided by the Commission and originating at an adequate facility nearest to the point of recovery. Permanent exhibits of antiquities may be prepared by institutions maintaining such collections following guidelines provided by the Commission. A variety of special, short-term exhibits may also be authorized by the Commission. (see also 13 TAC §26.17 [§26.27])

(c) Access to state-associated collections [antiquities] for research purposes--collections [antiquities] retained under direct supervision of the Commission will be available under the following conditions:

(1) Request for access to collections must be made in writing to the curatorial facility holding the collections indicating to which collection and what part of the collection access is desired; nature of research and special requirements during access; who will have access, when, and for how long; type of report which will result; and expected date of report.

(2) Access will be granted during regular working hours to qualified institutions or individuals for research culminating in non-permit reporting. A copy of the report will be provided to the Commission.

(3) Data such as descriptions or photos when available will be provided to institutions or individuals on a limited basis for research culminating in nonprofit reporting. A copy of the report will be provided to the Commission.

(4) Access will be granted to corporations or individuals preparing articles or books to be published on a profit-making basis only if there will be no interference with conservation activities or regular research projects; photos are made and data collected in the facility housing the collection; arrangements for access are made in writing at least one month in advance; cost of photos and data and a reasonable charge of or supervision by responsible personnel are paid by the corporation or individual desiring access; planned article or publication does not encourage or condone treasure hunting activity on public lands, State Antiquities [Archaeological] Landmarks, or National Register sites, or other activities which damage, alter, or destroy cultural resources; proper credit for photos and data are indicated in the report; a copy of the report will be provided to the Commission.

(5) The Commission may maintain a file of standard photographs and captions available for purchase by the public.

(6) A written agreement containing the appropriate stipulations will be prepared and executed prior to the access.

(7) Curatorial facilities certified by the Commission shall promulgate reasonable procedures governing access to those collections under their stewardship.

(d) Deaccession. The Commission's rules for deaccession recognize the special responsibility associated with the receipt and maintenance of objects of cultural, historical, and scientific significance in the public trust. Although curatorial facilities become stewards of held-in-trust collections, title is retained by the Commission for the State. Thus, the decision to deaccession held-in-trust objects or state-associated collections is the responsibility of the Commission. The Commission recognizes the need for periodic reevaluations and thoughtful selection necessary for the growth and proper care of collections. The practice of deaccessioning under well-defined guidelines provides this opportunity.

(1) Deaccessioning may be through voluntary or involuntary means. The transfer, exchange, or deterioration beyond repair or stabilization or other voluntary removal from a collection in a curatorial facility is subject to the limitations of this rule.

(2) Involuntary removal from collections occurs when objects, samples, or records are lost through theft, disappearance, or natural disaster. If the whereabouts of the object, sample, or record is unknown, it may be removed from the responsibility of the curatorial facility, but the Commission will not relinquish title in case the object, sample, or record subsequently is returned.

(e) Certified curatorial facilities. Authority to deal with deaccessioning of limited categories of objects and samples from held-in-trust collections is delegated to a curatorial facility certified by the Commission to hold state held-in-trust collections through a contractual agreement between the curatorial facility and the Commission. Annual reports will be submitted to the Commission on these deaccessioning actions.

(1) If the Commission determines that a curatorial facility has acted in violation of the contractual agreement and this rule, the contractual agreement will be terminated. From that date forward, the Commission will review and decide on all deaccession actions of that curatorial facility concerning held-in-trust objects and samples. A new contractual agreement may be executed at such time as the Commission determines that the curatorial facility has come into compliance with this rule.

(2) Curatorial facilities not yet certified by the Commission to hold state held-in-trust collections shall submit written deaccession requests of objects and samples from held-in-trust collections to the Commission.

(3) Requests to deaccession a held-in-trust collection in its entirety must be submitted to the Commission.

(4) The reasons for deaccessioning all or part of held-in-trust collections include, but are not limited to, the following:

(A) Objects lacking provenience that are not significant or useful for research, exhibit, or educational purposes in and of themselves;

(B) Objects or collections that do not relate to the stated mission of the curatorial facility. Objects or collections that are relevant to the stated mission of the curatorial facility may not be deaccessioned on the grounds that they are not relevant to the research interests of current staff or faculty;

(C) Objects that have decayed or decomposed beyond reasonable use or repair or that by their condition constitute a hazard in the collections;

(D) Objects that have been noted as missing from a collection beyond the time of the next collections-wide inventory are determined irretrievable and subject to be deaccessioned as lost;

(E) Objects suspected as stolen from the collections must be reported to the Commission in writing immediately for notification to similar curatorial facilities, appropriate organizations, and law enforcement agencies. Objects suspected as stolen and not recovered after a period of three years or until the time of the next collections-wide inventory are determined irretrievable and subject to being deaccessioned as stolen;

(F) Objects that have been stolen and for which an insurance claim has been paid to the curatorial facility;

(G) Objects that may be subject to deaccessioning as required by federal laws; and

(H) Deaccession for reasons not listed above must be approved on a case-by-case basis by the Commission.

(f) Title to Objects or Collections Deaccessioned. If deaccessioning is for the purpose of transfer or exchange, Commission retains title for the State to the object or collection. A new held-in-trust agreement must be executed between the receiving curatorial facility and the THC.

(1) If deaccessioning is due to theft or loss, the Commission will retain title for the State to the object or collection in case it is

ever recovered, but the curatorial facility will no longer be responsible for the object or collection.

(2) If deaccessioning is due to deterioration or damage beyond repair or stabilization, the Commission relinquishes title for the State to the object or collection and the object or collection must be discarded in a suitable manner.

(g) **Destructive Analysis.** The Commission's rules for destructive analysis apply only to samples and objects from held-in-trust collections accessioned into the holdings of a curatorial facility. Destructive analysis of samples or objects prior to placement in a curatorial facility is covered by the research design approved for the Antiquities Permit. Authority to deal with destructive analysis requests of approved categories of objects and samples from state-associated held-in-trust collections is delegated to a curatorial facility certified by the Commission to hold state held-in-trust collections through a contractual agreement between the curatorial facility and the Commission. Annual reports will be submitted to the Commission on these destructive analysis actions.

(1) A written research proposal must be submitted to the curatorial facility stating research goals, specific samples or objects from a held-in-trust collection to be destroyed, and research credentials in order for the curatorial facility to establish whether the destructive analysis is warranted.

(2) If the Commission determines that a curatorial facility has acted in violation of the contractual agreement and this rule, the contractual agreement will be terminated. From that date forward, the Commission will review and decide on all destructive analysis actions of that curatorial facility concerning held-in-trust objects and samples. A new contractual agreement may be executed at such time as the Commission determines that the curatorial facility has come into compliance with these rules.

(3) Curatorial facilities not yet certified by the Commission to hold state held-in-trust collections shall submit destructive analysis requests of objects and samples from held-in-trust collections to the Commission.

(4) Conditions for approval of destructive analysis may include qualifications of the researcher, uniqueness of the project, scientific value of the knowledge sought to be gained, and the importance, size, and condition of the object or sample.

(5) Objects and samples from held-in-trust collections approved for destructive analysis purposes are loaned to the institution where the researcher is affiliated. Objects and samples will not be loaned to individuals for destructive analysis.

(6) If the curatorial facility denies a request for destructive analysis of a sample or object from a held-in-trust collection, appeal of the decision is through the Commission.

(7) Information gained from the analysis must be provided to the curatorial facility as a condition of all loans for destructive analysis purposes. After completion of destructive analysis, the researcher must return the information (usually in the form of a research report) in order for the loan to be closed. Two copies of any publications resulting from the analysis must be sent to the curatorial facility. If the object or sample is not completely destroyed by the destructive analysis, the remainder must be returned to the curatorial facility.

(8) It is the responsibility of the curatorial facility to monitor materials on loan for destructive analysis, to assure their correct use, and to note the returned data in the records.

(9) The Commission does not relinquish title for the State to an object or sample that has undergone destructive analysis and the object or sample is not deaccessioned.

*§29.6. Certification of Curatorial Facilities for State-Associated Held-in-Trust Collections.*

(a) Establishment of certification program.

(1) The Commission shall determine through the program established by this subchapter appropriate facilities to house state-associated held-in-trust collections generated or purchased by the Commission, generated through antiquities permits issued under the authority of the Commission as provided by the Texas Natural Resources Code, Chapter 191, donated to the Commission, or placed with the Commission through the order of a court.

(2) The certification process shall consider the management and care of all state-associated collections at the curatorial facility.

(3) The requirements of this subchapter related to the placement of state-associated collections in certified curatorial facilities shall apply to the following:

(A) All collections placed in curatorial facilities by the Commission after December 31, 2005; and,

(B) All collections generated under antiquities permits on public lands after December 31, 2005.

(4) Except as provided in paragraph (9) of this subsection, no collection or any component of a collection as described under the jurisdiction of this subchapter may be placed in a curatorial facility that is not certified through the process established by this section.

(5) This section does not apply to the placement of collections in curatorial facilities prior to the effective date of this requirement as specified in subsection (a)(3), above. It does apply to any subsequent transfer of collections or a component of a collection taking place after the effective date of this requirement as specified in subsection (a)(3)(A) - (B), above.

(6) This section does not apply to the loan of a collection or a component of a collection to a facility not certified by the Commission.

(7) Certification shall be effective for a period of ten years, after which time, the curatorial facility must apply for renewal [~~through the procedures provided in this subchapter~~]. Renewal will be based upon a review of the standing of the facility in regards to disabling or deficiency factors assigned during the initial certification and the standards for certification in place at the time renewal is requested.

(8) The certification process shall be implemented upon the effective date of these rules, and the staff of the Commission shall develop procedures to begin the review of applicants at the earliest possible date. The requirement that all new collections shall be placed only in certified curatorial facilities shall be effective as specified in subsection (a)(3)(A) - (B), above.

(9) A curatorial facility that has submitted the application for certification provided by subsection (b)(1) of this section by the date provided in subsection (a)(3) of this section may continue to accept held-in-trust collections after that date so long as its application is pending and the application process has not been terminated or its application rejected by the commission.

(b) Procedures for Certification.

(1) Application. A curatorial facility seeking certification from the Commission shall apply to the Commission on a form provided by the Commission.

(A) The form shall require the applicant to provide essential information and documentation to allow the Commission to determine whether the facility is a curatorial facility within the definition of that term.

(B) Staff of the Commission shall evaluate the application and make a recommendation to the executive director on whether the facility should be allowed to proceed with the certification process.

(C) The executive director may determine that the certification review should be terminated at this point in the process. Such termination would be due to a clear failure of the curatorial facility to meet the criteria for certification developed under this subchapter.

(2) Submission of written materials for certification.

(A) The form shall require the applicant to provide essential information and documentation to allow the Commission to determine whether the facility is a curatorial facility within the definition of that term.

(B) The self-evaluation and other materials must be submitted to the Commission within six months after the certification review packet is mailed. A one time extension not to exceed six months may be granted by the Commission staff upon request.

(C) The completed documentation shall be reviewed by the Commission. If clarification or additional information is requested by the Commission, the facility shall have 30 days to furnish the information required.

(D) Failure to provide the requested information or inadequacy of the materials provided may lead to the termination of the review process.

(E) Staff of the Commission shall review the self-evaluation and other written materials provided and make a recommendation to the executive director on whether the facility should be allowed to proceed with the certification process.

(F) The executive director may determine that the review should be terminated at this point in the process.

(3) Field review.

(A) A curatorial facility that has submitted its self-evaluation and other written materials and approved to proceed with the certification process shall be contacted to arrange for a field review.

(B) At a time to be agreed upon by the Commission staff and the facility, an on-site evaluation of the facility shall be conducted by the Commission.

(C) Field review of the curatorial facility will be conducted by qualified staff of the Commission. Confidentiality will be maintained within the limits of the Public Information Act.

(D) An applicant for certification must make their facilities and records freely available to the field reviewers of the Commission in order to be considered for certification.

(E) Upon completion of the on-site evaluation, the persons performing the evaluation shall complete a written report of the on-site evaluation.

(F) The written report and recommendation shall be submitted to the executive director for his review. The executive director may approve, disapprove, or amend the recommendation.

(G) The applicant shall be provided not less than 30 days notice of the Commission meeting when its application will be considered and provided a copy of the executive director's recommendation, the report of the on-site evaluation, and any other relevant documents.

(H) The applicant shall have the opportunity to present written and oral information in support of its application to the staff and the Commission or committees thereof.

(4) Consideration by the Commission.

(A) The Commission may direct that this matter be considered in a committee of the Commission prior to consideration by the full Commission.

(B) The Commission shall consider the recommendations of the staff and/or executive director and all other matters submitted or prepared in connection with the application and shall make a decision on the certification of the curatorial facility. The decision of the Commission shall be provided in writing to the curatorial facility. If certification is denied, the Commission shall provide reasons for the denial to the curatorial facility.

(C) The decision of the Commission shall be based on the matters properly submitted in the certification process, and the decision shall measure the qualifications, stated objectives, and resources of the curatorial facility against the standards for certification established by the Commission.

(i) The Commission shall consider the evaluation of the curatorial facility and determine which, if any, disabling and deficiency factors may be present in the curatorial facility.

(ii) The Commission shall grant certification of the curatorial facility based on the disabling and deficiency factors by the following standards:

(I) Four or more disabling factors, certification denied;

(II) Three or fewer disabling factors and no more than four deficiency factors, certification granted;

(III) Three or fewer disabling factors and five or six deficiency factors, provisional status granted; or

(IV) Three or fewer disabling factors and seven or more deficiency factors, certification denied.

(D) If a curatorial facility is certified with existing disabling factors or deficiencies, these factors must be addressed before subsequent certification can take place. The curatorial facility must submit a plan and schedule for correcting the factors to the Commission within 90 days of the notice of certification. The Commission shall consider the plan and schedule and either approve it or return it to the curatorial facility with suggested revisions. The curatorial facility shall resubmit the plan and schedule until approved by the Commission. If these factors have not been addressed by the end of its certification period, then the curatorial facility will be decertified at the end of the certification period. The curatorial facility must wait two years before reapplying for certification, at which time it will be certified only if it has addressed all prior deficiency and disabling factors.

(E) Provisional status.

(i) If the Commission determines that the curatorial facility does not meet all of the qualifications for certification, but should be granted provisional status, the curatorial facility must submit a plan and schedule for correcting the factors to the Commission within 90 days of the approval of provisional status. The Commission

shall consider the plan and schedule and either approve it or return it to the curatorial facility with suggested revisions. The curatorial facility shall resubmit the plan and schedule until approved by the Commission. If such factors are addressed and appropriate evidence of such measures is presented to the Commission, the Commission may grant certification to the curatorial facility at the next succeeding quarterly meeting of the Commission.

(ii) A curatorial facility that is granted provisional status shall be considered as a certified curatorial facility unless it subsequently fails to address the disabling and deficiency factors within the time allotted, at which time the Commission may vote to deny certification.

(iii) Provisional status shall initially be granted for a period of three years. The period may be extended for up to three one-year increments by the Commission if the curatorial facility is determined to be making progress in remedying the disabling and deficiency factors. Provisional status may not be extended beyond the six-year limit. Each extension will require justification and a vote of the Commission.

(F) Except as provided by this subchapter, a curatorial facility that is denied certification by the Commission may not reapply for certification within one year of the denial of its application.

(c) Appeal.

(1) If the executive director has determined that the review of an application for certification of a curatorial facility should be terminated prior to field review, the curatorial facility may appeal that decision to the Commission by requesting in writing a review of the decision at the next succeeding quarterly Commission meeting, provided that such request must be received not less than 30 days prior to the meeting. The curatorial facility and the executive director may submit arguments in writing to the Commission concerning the appeal.

(2) If the executive director and/or staff recommend against certification of a curatorial facility, the facility may respond in writing to such recommendation. If the curatorial facility determines that it needs additional time to respond to the staff and/or executive director's recommendation, it may request that the consideration of the certification be delayed until the next succeeding quarterly meeting, and shall submit its response not less than 30 days prior to the next succeeding quarterly meeting. Only one such delay in the consideration of certification shall be granted, except on vote of the Commission.

(3) The staff or the executive director may comment on any response of the curatorial facility.

(4) Except as may otherwise be provided by law, the decision of the Commission on certification of a curatorial facility is final.

(d) Criteria for Certification. Each applicant for certification must meet the following criteria to be certified.

(1) The Commission shall develop and adopt objective criteria for the evaluation of curatorial facilities.

(2) The criteria shall be in writing and shall be made available to any person requesting them.

(3) The evaluation shall focus on the care and management of all state-associated held-in-trust collections present at the facility.

(4) The following certification criteria will be used to evaluate curatorial facilities:

(A) Governance.

- (i) specific mission statement;

- (ii) institutional organization document; and

- (iii) evidence of not-for-profit status.

(B) Clear Fiscal Plan.

(C) Policy. Written, integrated collections management policy addressing:

- (i) acquisitions;

- (ii) scope of collections;

- (iii) legal title;

- (iv) held-in-trust agreements;

- (v) contract of gift;

- (vi) accessioning;

collection items;

- (viii) cataloging;

- (ix) loans;

- (x) destructive loans of held-in-trust collections;

- (xi) inventory;

- (xii) adequate and appropriate insurance;

- (xiii) appraisals;

- (xiv) access to collections;

- (xv) record keeping;

- (xvi) collections care;

- (xvii) conservation;

- (xviii) emergency preparedness;

- (xix) integrated pest management; and

- (xx) security.

(D) Procedures. Written, integrated collections management procedures addressing:

- (i) acquisitions;

- (ii) held-in-trust agreement;

- (iii) accessioning;

collection items;

- (v) cataloging;

- (vi) loans;

- (vii) destructive loans of held-in-trust collections;

- (viii) inventory;

- (ix) insurance;

- (x) access to collections;

- (xi) record keeping;

- (xii) collections care;

- (xiii) conservation;

- (xiv) emergency preparedness;

- (xv) integrated pest management; and

(xvi) security.

(E) Physical Facilities.

(i) sound, appropriate structure;

(ii) adequate and appropriate insurance;

(iii) security system;

(iv) fire prevention, detection, and suppression programs; and

(v) environmental controls (temperature, relative humidity, air particulates).

(F) Staff.

(i) written code of ethics;

(ii) written job descriptions;

(iii) minimum one full-time staff member trained in collections care; and

(iv) support for staff training programs in collections care and memberships to museum-related organizations.

(G) Visiting scholars and researchers.

(i) written policy concerning access to collections; and

(ii) written procedures concerning security, access, and handling of collections.

(H) Records management.

(i) functional accession, catalog, inventory, and photo documentation system;

(ii) updated and current list of held-in-trust state-associated collections; and

(iii) baseline inventory of each held-in-trust state-associated collection.

(I) Collections care.

(i) housing;

(I) appropriate housing units with adequate and appropriate space; and

(II) accessible and organized collections.

(ii) packaging;

(I) appropriate materials;

(II) appropriate object spacing; and

(III) appropriate organization of collections.

(e) Application of criteria. In making the determination of certification status, all of the above criteria are considered. In particular, at the Application stage, the curatorial facility must fit the definition; have a mission statement, a statement of purpose, and a scope-of-collections statement; and have a written integrated collections management policy. If the curatorial facility does not meet these three basic criteria, then certification is denied and the process goes no further. At the Commission level, disabling factors could prevent certification. Deficiency factors could result in provisional status or denial. Where appropriate, the criteria for evaluation for curatorial facilities to be developed by the commission will contain objective standards against which disabling and deficiency factors are measured.

(1) Disabling factors are the absence of any of the following:

(A) written procedures and plans;

(B) written held-in-trust agreements for state-associated collections;

(C) list of held-in-trust state-associated collections;

(D) baseline inventory for each held-in-trust state-associated collection;

(E) record keeping system;

(F) accession system;

(G) catalog system;

(H) inventory system;

(I) environmental controls (temperature, relative humidity, air particulates);

(J) fire prevention, detection, and suppression programs;

(K) full-time employee trained in collections care;

(L) appropriate physical facilities; and

(M) appropriate housing or housing conditions.

(2) Deficiency factors are the following:

(A) substandard policies;

(B) substandard procedures and plans;

(C) incomplete held-in-trust agreements for state-associated collections;

(D) incomplete list of held-in-trust state-associated collections;

(E) incomplete baseline inventory for each held-in-trust state-associated collection;

(F) inadequate record keeping system;

(G) inadequate accession system;

(H) inadequate catalog system;

(I) incomplete cataloging of held-in-trust state associated collections;

(J) inadequate inventory system;

(K) substandard environmental controls (temperature, relative humidity, air particulates);

(L) substandard fire prevention, detection, or suppression programs;

(M) substandard physical facilities;

(N) substandard housing or housing conditions; and

(O) substandard packaging.

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 May 6, 2016.

TRD-201602201



## TITLE 19. EDUCATION

### PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

#### CHAPTER 25. OPTIONAL RETIREMENT PROGRAM

##### SUBCHAPTER A. OPTIONAL RETIREMENT PROGRAM

###### 19 TAC §§25.3 - 25.6

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §§25.3, 25.4, 25.5 and 25.6 concerning the Optional Retirement Program (ORP). The intent of these amendments is to incorporate changes in state law and IRS-related interpretations; to make technical corrections; and to add clarifying language.

Amendments to §25.3 (Definitions) incorporate changes in state law made by HB 9 (2015) that eliminated the 90-day waiting period for active membership in the Employees Retirement System of Texas (ERS); improve clarity in the definition of "Full-time" by focusing on the term's meaning for ORP purposes (rather than including part of the Teacher Retirement System of Texas (TRS) definition); clarify that an employee's "Initial ORP Eligibility Date" is the first date that all four eligibility criteria are met; improve clarity in the definition of "Initial ORP Eligibility Period" by referencing the "Initial ORP Eligibility Date" definition; and improve clarity in the definition of "ORP Election Period" by replacing "appropriate" forms with "TRS-28 ORP election" form or, for employees of the Coordinating Board, the ORP election form provided by the Board.

Amendments to §25.4 (Eligibility to Elect ORP) improve clarity in the "100 Percent Effort" eligibility requirement; incorporate changes in state law made by HB 9 (84th Texas Legislature) that eliminated the 90-day waiting period for active membership in ERS; improve clarity by replacing "appropriate" forms with "TRS-28 ORP election" form or, for employees of the Coordinating Board, the ORP election form provided by the Board; clarify that an employee who elects ORP after the first day of the month must earn enough compensation between the election date and the end of that month to cover the amount of the employee's ORP contribution for that month (otherwise, the ORP participation start date must be the first of the following month); clarify that institutional orientation and enrollment procedures must include both new employees and current employees who transfer to an ORP-eligible position; and remove provisions regarding extension of a participant's 90-day ORP election period if the institution fails to notify the participant in a timely manner of his or her eligibility to elect ORP. This change is being made in response to an interpretation by TRS of IRS code and regulations that affect both retirement plans.

Amendments to §25.5 (ORP Vesting and Participation) replace the specific definition of a temporary position with a reference

to the TRS definition; and update language to incorporate IRS changes regarding a participant's transfer of ORP funds from one ORP company to another ("contract exchange").

Amendments to §25.6 (Uniform Administration of ORP) make a technical correction by replacing "plan" year with "tax" year regarding the timeframe for stopping ORP contributions once a participant meets applicable IRS contribution limits (to account for institutions with plan years that don't coincide with the tax year); clarify that withdrawn TRS member contributions cannot be rolled over into a participant's ORP account prior to termination of ORP participation; improve clarity by replacing "appropriate" forms with "TRS-28 ORP election" form; clarify that ORP employers must maintain documentation of a participant's first date of participation in Texas ORP (for determining a participant's grandfather status) whether or not the employer provides an ORP supplement; replace specific proportionality provisions that apply to the funding sources of employer contributions with a reference to applicable state law and the General Appropriations Act; clarify that ORP companies must deposit ORP funds on the same "business" day as received (rather than same day); and update language to incorporate IRS changes regarding a participant's transfer of ORP funds from one ORP company to another ("contract exchange") and to another ORP employer's plan ("plan-to-plan transfer").

Amendments to §25.6 also clarify that prohibited pre-termination "access" to ORP funds includes partial and full withdrawals; clarify that "plan provisions" are governing documents for the program (in addition to applicable laws and regulations); clarify that an ORP company is authorized to release a participant's ORP funds when the institution sends a notice that the participant has retired (not just when a "break in service" has occurred); replace specific provisions for rectifying a prohibited distribution with a reference to applicable IRS procedures; update the normal due date for institutions to submit the annual ORP report (changed from November 1 to October 1 to provide the Legislative Budget Board with earlier access to the data); specify that ORP employers must provide a link to the Coordinating Board's ORP website (rather than providing a specific link to the "Overview of TRS and ORP" or placing the document on the employer's webpage) to ensure that ORP-eligible employees will access the most recent version; and specify that ORP employers must provide a caution against withdrawing all ORP funds not only to terminating participants who may anticipate enrolling in the retiree group insurance program administered by ERS at a future date but also to participants at the time of enrollment (based on ERS interpretation of insurance statute).

Ms. Tonia Scaperlanda, Director of Human Resources, has determined that for the first five years there will be no fiscal implications for state or local governments as a result of the proposed amendments.

Ms. Scaperlanda has also determined that for the first five years the amendments are in effect, the public benefits anticipated as a result of administering the sections will be improved administration of this retirement program for public higher education employees. There are no significant economic costs anticipated to persons and institutions who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposed amendments may be submitted by mail to Tonia Scaperlanda, Director of Human Resources, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or via email at [texorp@theccb.state.tx.us](mailto:texorp@theccb.state.tx.us). Com-

ments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amended sections are proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with general rulemaking authority; Texas Government Code, §830.002(c), which provides the Coordinating Board with authority to develop policies, practices, and procedures to provide greater uniformity in the administration of ORP; §830.101(b), which provides the Coordinating Board with specific rulemaking authority to establish eligibility for participation in ORP; and §830.006(b), which provides that institutions must keep records, make certifications, and furnish to the Coordinating Board information and reports as required by the Coordinating Board to enable it to carry out its ORP-related functions.

The proposed amendments affect the implementation of Texas Government Code, Chapter 830, §§830.001 - 830.205.

### §25.3. Definitions.

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

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

(5) ERS--~~[The] Employees Retirement System of Texas.~~

~~[(6) ERS Waiting Period--A period of 90 calendar days beginning with the first day of employment with the Board in a position that is otherwise eligible for membership in ERS. In accordance with state law, active membership in ERS does not become effective until the 91st calendar day.]~~

~~[(A) The ERS waiting period does not apply to:]~~

~~[(i) new employees of the Board who are already members of ERS based on contributions made during prior employment with the Board or other state agency that have not been withdrawn; or]~~

~~[(ii) new employees of the Board who elected ORP in lieu of ERS in a prior period of employment with the Board and who are eligible to resume ORP participation.]~~

~~[(B) As provided in §25.4(h) of this title (relating to Active Membership in Retirement System Requirement), a new employee of the Board who becomes employed in an ORP-eligible position and who is subject to the ERS waiting period is not permitted to elect ORP in lieu of ERS until satisfying the ERS waiting period because the election of ORP is in lieu of active membership in ERS.]~~

(6) ~~[(7)] Full-time--For purposes of determining initial ORP eligibility, the term "full-time" shall mean employment for the standard full-time workload established by the institution ("100 percent effort") [at a rate comparable to the rate of compensation for other persons in similar positions for a definite period of four and one-half months or a full semester of more than four calendar months].~~

(7) ~~[(8)] Initial ORP Eligibility Date--The first day of an ORP-eligible employee's 90-day ORP election period. An employee's initial ORP eligibility date shall be the first date that the employee meets all four criteria in §25.4(a) of this title (relating to Eligibility Criteria), including employment in an ORP-eligible position that is expected to be full-time (i.e., 100 percent effort) for a period of at least one full semester or four and one-half months. [determined as follows:]~~

~~[(A) Employees of Institutions of Higher Education: For employees of a Texas public institution of higher education, the initial ORP eligibility date shall be the first day of employment in an ORP-eligible position.]~~

~~[(B) Employees of the Board.]~~

~~[(i) Non-ERS Members: For a new employee of the Board who has never been a member of ERS or who is a former member of ERS who canceled membership by withdrawing employee contributions from ERS after termination from a prior period of employment, the initial ORP eligibility date shall be the 91st calendar day of employment in an ERS-eligible position that is also an ORP-eligible position.]~~

~~[(ii) Current ERS Members: For an employee of the Board who is a current member of ERS at the time that he or she becomes employed in an ORP-eligible position, the initial ORP eligibility date shall be the first day of employment in an ORP-eligible position.]~~

(8) ~~[(9)] Initial ORP Eligibility Period--The period of time an ORP participant must be employed on a full-time basis ("100 percent effort") beginning with the initial ORP eligibility date, as defined in paragraph (7) of this section, and ending after [first date of employment in an ORP-eligible position that is expected to be 100 percent effort for a period of at least] one full semester or four and one-half months. [For new employees of the Board who become employed in an ORP-eligible position, the initial ORP eligibility period includes the 90-day ERS waiting period, if applicable.]~~

(9) ~~[(10)] Major Department Requirement--One of the factors used to determine whether a position is ORP-eligible in the "Other Key Administrator" category as defined in §25.4(k) of this title (relating to Eligible Positions). A department or budget entity at a public institution of higher education shall meet this requirement if:~~

(A) the department or budget entity is considered a "major" department by the institution based on the specific organizational size and structure of that institution; and

(B) the department or budget entity has its own budget, policies and programs.

(10) ~~[(11)] ORP--[The] Optional Retirement Program.~~

(11) ~~[(12)] ORP Election Period--The period of time during which ORP-eligible employees have a once-per-lifetime opportunity to elect to participate in ORP in lieu of the applicable retirement system. The ORP election period shall begin on an employee's initial ORP eligibility date, as defined in paragraph (7) of this section, and shall end on the earlier of:~~

(A) the date the employee makes an ORP election by signing the TRS-28 ORP election form or, for employees of the Board, the ORP election form provided by the Board [and submitting the appropriate forms to the ORP employer]; or

(B) the 90th calendar day after the employee's initial ORP eligibility date, not including the initial ORP eligibility date and including the 90th calendar day. If the 90th calendar day after the initial ORP eligibility date falls on a weekend or holiday, the deadline shall be extended until the first business [working] day after the 90th calendar day.

(12) ~~[(13)] ORP Employer--All public institutions of higher education in Texas and the Board.~~

(13) ~~[(14)] ORP Retiree--An individual who participated in ORP while employed with a Texas public institution of higher education or the Board and who established retiree status by meeting the applicable retiree insurance requirements and enrolling in retiree group insurance provided by ERS, The University of Texas System, or The Texas A&M University System, regardless of whether currently enrolled.~~

(14) ~~[(15)] Principal Activity Requirement--One of the factors used to determine whether a position is ORP-eligible based on the~~

percent of effort required by the position to be devoted to ORP-eligible duties. The principal activity requirement shall be met if at least 51 percent of the position's duties are devoted to ORP-eligible duties in one of the ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions), with two exceptions:

(A) During Initial ORP Eligibility Period. During an employee's initial ORP eligibility period (when the position is required to be 100 percent effort to qualify as ORP-eligible), if the ORP-eligible duties associated with an ORP-eligible category are less than 51 percent of the activities for a particular position, the position shall be considered to meet the principal activity requirement if all of the position's other duties are ORP-eligible duties under one of the other ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions), for a total of 100 percent effort devoted to ORP-eligible duties, as would be the case, for example, for a position with required duties that are 50 percent instruction and/or research (faculty position) and 50 percent department chair (faculty administrator position).

(B) After Initial ORP Eligibility Period. For a participant who has completed the initial ORP eligibility period but who has not vested in ORP and who fills a position that is less than 100 percent effort but at least 50 percent effort, then the principal activity requirement shall be considered met if at least 50 percent effort is devoted to applicable ORP-eligible duties in one of the ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions).

~~(15) [(46)] TRS--[(The)] Teacher Retirement System of Texas.~~

~~(16) [(47)] Vesting Requirement--~~The minimum amount of ORP participation required to attain vested status. An ORP participant shall be considered vested on the first day of the second year of active participation in lieu of the applicable retirement system, as provided in §25.5(a) of this title (relating to Vesting Requirement). A vested participant shall have ownership rights to the employer contributions in his or her ORP accounts, meaning that, upon termination of employment with all ORP employers or reaching age 70-1/2, he or she may access both the employee and employer contributions (and any net earnings) in his or her accounts. A vested participant shall remain in ORP even if subsequently employed in a position that is not ORP-eligible, as provided in §25.5(f) of this title (relating to Employment in a non-ORP-Eligible Position).

#### §25.4. Eligibility to Elect ORP.

(a) Eligibility Criteria. An employee shall be eligible to make a once-per-lifetime irrevocable election of ORP in lieu of the applicable retirement system if all of the following criteria are met:

(1) (No change.)

(2) 100 Percent Effort: Employment in an ORP-eligible position ~~that is expected to be [on a] full-time [basis] (i.e., 100 percent effort) for a period of at least one full semester or four and one-half months [(including the 90-day waiting period for active membership in ERS for employees of the Board, if applicable)].~~

(A) - (B) (No change.)

(3) - (4) (No change.)

(b) - (c) (No change.)

(f) 90-Day ORP Election Period. An employee who meets the eligibility criteria in ~~subsection [section] (a) of this section shall be provided an ORP election period, as defined in §25.3 of this title (relating to Definitions), during which an election to participate in ORP may be made by signing the TRS-28 ORP election form or, for employees of the Board, the ORP election form provided by the Board [and submitting the appropriate forms to the ORP employer].~~

~~[(1) After 90-Day ERS Waiting Period. For new employees of the Board, the 90-day ORP election period shall follow the 90-day ERS membership waiting period, if applicable.]~~

~~(2) [(2)] Beginning and Ending Dates. The 90-day ORP election period shall begin on the employee's initial ORP eligibility date, as defined in §25.3 of this title (relating to Definitions), and shall end on the earlier of:~~

~~(A) the date the employee makes an ORP election by signing the TRS-28 ORP election form or, for employees of the Board, the ORP election form provided by the Board [and submitting the appropriate forms to the ORP employer]; or~~

~~(B) the 90th calendar day after the employee's initial ORP eligibility date, not including the initial ORP eligibility date and including the 90th calendar day. If the 90th calendar day after the initial ORP eligibility date falls on a weekend or holiday, the deadline shall be extended until the first business [working] day after the 90th calendar day.~~

~~(2) [(3)] Written Notification. In accordance with §25.6(h)(2) of this title (relating to ORP Election Period Dates), each ORP employer shall, within 15 business days of an ORP-eligible employee's initial ORP eligibility date, provide written notification to the ORP-eligible employee that indicates the beginning and ending dates of his or her ORP election period and the local procedures for submitting the election form and additional required paperwork.~~

~~(3) [(4)] Once-per-Lifetime Irrevocable Election. An employee who is eligible to elect ORP shall have only one opportunity during his or her lifetime, including any future periods of employment in Texas public higher education, to elect ORP in lieu of the applicable retirement system, and the election may never be revoked.~~

~~(A) Default Election. Failure to elect ORP during the 90-day ORP election period shall be a default election to continue membership in the applicable retirement system.~~

~~(i) ORP in Lieu of TRS. An employee of a Texas public institution of higher education who does not elect ORP in lieu of TRS during the 90-day ORP election period shall never again be eligible to elect ORP in lieu of TRS, even if subsequently employed in an ORP-eligible position at the same or another Texas public institution of higher education.~~

~~(ii) ORP in Lieu of ERS. An employee of the Board who does not elect ORP in lieu of ERS during the 90-day ORP election period shall never again be eligible to elect ORP in lieu of ERS, even if subsequently employed in an ORP-eligible position at the Board.~~

~~(B) Irrevocable. An election of ORP shall be irrevocable. An employee who elects ORP shall remain in ORP, except as provided by §25.5(f) and (g) [subsections (f) and (g) of §25.5] of this title (relating to ORP Vesting and Participation). A default election of the applicable retirement system, as described subparagraph [(3)](A) of this paragraph [subsection] shall be irrevocable. An employee who fails to elect ORP during the ORP election period shall remain in the applicable retirement system in accordance with the laws and rules governing eligibility for the retirement system.~~

~~(C) Separate Elections. As provided in subsection (d) of this section, an election of ORP in lieu of TRS at a Texas public institution of higher education shall be considered separate and distinct from an election of ORP in lieu of ERS at the Board; therefore, an election of ORP in lieu of one retirement system shall not preclude an eligible employee's election of ORP in lieu of the other retirement system if subsequently employed in a position that is eligible to elect ORP in lieu of the other retirement system.~~

(4) [(5)] Company Selection Required at Election. An employee who elects to participate in ORP shall select an ORP company from the ORP employer's list of authorized companies in conjunction with the election of ORP. An ORP employer shall establish a policy that failure to select an authorized company may result in disciplinary action up to and including termination of employment because retirement contributions are required by law as a condition of employment.

(5) [(6)] Waiver of Retirement System Benefits. An election of ORP shall be a waiver of the employee's rights to any benefits that may have accrued from prior membership in the applicable retirement system, other than benefits resulting from transfers of service credit between the applicable retirement systems and reinstatement of withdrawn service credit under the ERS/TRS service transfer law, even if the participant has met the applicable system's vesting requirement. Except as provided by §25.5(f) and (g) [subsections (f) and (g) of §25.5] of this title (relating to ORP Vesting and Participation) and the ERS/TRS service transfer law, an ORP participant shall not be eligible to become an active member of the applicable retirement system or receive any benefits from the system other than a return of employee contributions that may have been deposited with the system (and accrued interest, if any).

(g) Participation Start Date. The first day that ORP contributions are made shall be determined as follows.

(1) Election on Initial ORP Eligibility Date.

(A) Employees of Institutions of Higher Education.

(i) New Employees. For new employees who sign the TRS-28 ORP election form [and submit the appropriate ORP election forms] on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment).

(ii) Transfers within Same Institution. For employees who transfer from a non-ORP-eligible position to an ORP-eligible position within the same institution and who sign the TRS-28 ORP election form [and submit the appropriate ORP election forms] on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment), unless the initial ORP eligibility date is not the first day of the month, in which case, to avoid dual contributions to both TRS and ORP during the same month, as provided in §25.6(a)(4) of this title (relating to No Dual Contributions), the participation start date shall be the first day of the month following the month in which the initial ORP eligibility date falls; ~~or the first day of the applicable payroll period, if payroll is not processed on a monthly basis~~.

(B) Employees of the Board. ~~[The participation start date for ORP-eligible Board employees who elect ORP on their initial ORP eligibility date, as defined in §25.3 of this title (relating to Definitions), by signing and submitting the appropriate forms on or before their initial ORP eligibility date shall be based on whether they were subject to the 90-day ERS waiting period.]~~

(i) ~~[Board Employees not subject to 90-Day ERS Waiting Period.]~~

~~[(4)]~~ New Employees. For new Board employees [who are not subject to the 90-day ERS waiting period because they are already members of ERS and] who sign [and submit] the [appropriate] ORP election form provided by the Board [forms] on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment).

~~[(ii)]~~ [(4)] Transfers within the Board. For Board employees [who are not subject to the 90-day ERS waiting period because they are already members of ERS and] who transfer from a non-ORP-eligible position at the Board to an ORP-eligible position at the Board, and who sign [and submit] the [appropriate] ORP election form [forms] provided by the Board on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment), unless the initial ORP eligibility date is not the first day of the month, in which case, to avoid dual contributions to both ERS and ORP during the same month, as provided in §25.6(a)(4) of this title, the participation start date shall be the first day of the month following the month in which the initial ORP eligibility date falls; ~~or the first day of the applicable payroll period, if payroll is not processed on a monthly basis~~.

~~[(ii)]~~ Board Employees subject to 90-Day ERS Waiting Period. To avoid partial month contributions for employees who are subject to the 90-day ERS waiting period and who sign and submit the appropriate ORP election forms on or before their initial ORP eligibility date, the amount of the ORP contribution for the month in which their initial ORP eligibility date falls shall be based on salary earned during that entire month, so the participation start date shall be the first day of the month in which the initial ORP eligibility date falls, or the first day of the applicable payroll period, if payroll is not processed on a monthly basis.]

(2) Election After Initial ORP Eligibility Date. The participation start date for ORP-eligible employees who sign the TRS-28 ORP election form or, for employees of the Board, the ORP election form provided by the Board [and submit the appropriate ORP election forms] after their initial ORP eligibility date, shall be the first day of the month following the date that the form is [forms are] signed [and submitted], with the following exceptions:

(A) During Month of Initial ORP Eligibility Date. ORP employers may establish a policy that employees who elect ORP by signing the TRS-28 ORP election form or, for employees of the Board, the ORP election form provided by the Board [and submitting the appropriate forms] after their initial ORP eligibility date but before the end of [payroll has been processed for] the month in which the initial ORP eligibility date falls may be treated as if they had signed [and submitted] the form [forms] on or before their initial ORP eligibility date as provided by paragraph (1) of this subsection, provided the employee earns enough compensation between the date of the election and the end of the month in which the initial ORP eligibility date falls to cover the employee's ORP contribution for the entire month.

(B) After Month of Initial ORP Eligibility Date: ORP employers may establish a policy that employees who elect ORP by signing the TRS-28 ORP election form or, for employees of the Board, the ORP election form provided by the Board [and submitting the appropriate forms] after the month in which their initial ORP eligibility date falls, but before the end of [payroll has been processed for] the month in which the form is [forms are] signed [and submitted], may start participating in the month in which the form is [forms are] signed [and submitted] rather than the first of the following month, provided the employee earns enough compensation between the date of the election and the end of the month in which the form is signed to cover the employee's ORP contribution for the entire month. To avoid partial month payments, contributions for these participants shall be based on salary earned during the entire month in which the form is [forms are] signed [and submitted, or during the entire pay period in which the forms are signed and submitted, if payroll is not processed on a monthly basis].

(C) (No change.)

(h) Active Membership in Retirement System Requirement. Participation in ORP shall be an alternative to active membership in the applicable retirement system.

[(1) Board Employees Subject to 90-Day ERS Waiting Period. Employees who are not current members of ERS when they become employed in an ORP-eligible position at the Board shall not be eligible to elect ORP in lieu of ERS until the 90-day ERS waiting period has been satisfied.]

[(2) Retirees Not Eligible. Employees who have retired from TRS or ERS are no longer active members of the applicable retirement system; therefore, a]

(1) A TRS retiree shall not be eligible to elect ORP in lieu of TRS at a Texas public institution of higher education. [and an]

(2) An ERS retiree shall not be eligible to elect ORP in lieu of ERS at the Board.

(i) Automatic Retirement System Enrollment. A new employee at a Texas public institution of higher education who is eligible to elect ORP in lieu of TRS shall be automatically enrolled in TRS until an election to participate in ORP is made by signing the TRS-28 ORP election form [and submitting the appropriate forms to the institution] as provided in subsection (g) of this section. A new Board employee who is eligible to elect ORP in lieu of ERS shall be automatically enrolled in ERS [following the 90-day ERS waiting period, if applicable,] until an election to participate in ORP is made by signing the ORP election form provided by the Board [and submitting the appropriate forms to the Board] as provided in subsection (g) of this section.

(j) - (n) (No change.)

(o) Administrative Errors.

(1) Orientation Procedures. Each ORP employer shall develop and implement effective orientation and enrollment procedures to ensure appropriate and timely processing of newly eligible employees' retirement plan choices, including procedures for both new employees and current employees who transfer to an ORP-eligible position.

(2) Rectification. In the event an administrative error occurs which prevents the normal processing of an ORP-eligible employee's election, the ORP employer shall rectify the error as soon as practicable and in a manner that results in a situation that is as close to the originally expected outcome as possible, within applicable federal and state laws and rules.

(A) To ensure compliance with applicable IRS code and regulations, an ORP-eligible employee shall not be eligible to elect ORP after the end of the employee's ORP election period as defined by §25.3 of this title (relating to Definitions).

(B) If an ORP employer fails to provide an opportunity for an ORP-eligible employee to elect ORP on or before the employee's initial ORP eligibility date, the ORP employer shall, immediately upon discovery of the failure, provide notification to the employee that the administrative error occurred.

(i) If the ORP employer's notification is made within the ORP-eligible employee's ORP election period as defined in §25.3 of this title (relating to Definitions), the employee shall only be eligible to elect ORP in lieu of the applicable retirement system within the remainder of the employee's ORP election period. The employee's ORP election period shall not be extended due to an ORP employer's failure to provide an opportunity for the ORP-eligible employee to elect ORP on or before the employee's initial ORP-eligibility date.

(ii) If the ORP employer's notification is not made within the ORP-eligible employee's ORP election period as defined in §25.3 of this title (relating to Definitions), the employee shall not be eligible to elect ORP in lieu of the applicable retirement system.

(C) An ORP-eligible employee's ORP election period shall not be extended due to an ORP employer's failure to timely process an ORP-eligible employee's ORP election form.

(3) (No change.)

[(4) Failure to Notify Error. If an ORP employer fails to notify an ORP-eligible employee of his or her eligible status on or before the employee's initial ORP eligibility date, the ORP employer shall notify the eligible employee as soon as the oversight is discovered. The 90-day ORP election period for the eligible employee shall begin on the date that the employee is notified, and the participation start date shall be determined in accordance with subsection (g) of this section.]

(p) (No change.)

§25.5. ORP Vesting and Participation.

(a) - (f) (No change.)

(g) Employment in a Non-Benefits-Eligible Position.

(1) - (2) (No change.)

(3) Definition. For purposes of this subsection, a non-benefits-eligible position shall be defined as a position that is one or more of the following:

(A) less than 50 percent effort;

(B) temporary, as defined by TRS for employees of Texas public institutions of higher education [expected to last less than a full semester or a period of four and one-half months (i.e., temporary)]; or

(C) requires student status as a condition of employment.

(4) - (7) (No change.)

(h) - (i) (No change.)

(j) Termination of Participation. An employee shall terminate participation in ORP only upon death, retirement (including disability retirement), or termination of employment with all Texas public institutions of higher education (if the election of ORP was in lieu of TRS) or termination of employment with the Board (if the election of ORP was in lieu of ERS).

(1) (No change.)

(2) Transfer of Funds is not a Termination. A transfer of ORP funds between ORP accounts or ORP companies (contract exchange) shall not be considered a termination of employment for ORP purposes.

§25.6. Uniform Administration of ORP.

(a) Contributions.

(1) (No change.)

(2) IRS Limits on Defined Contributions. Contributions to a participant's ORP account shall not exceed the maximum amount allowed under §415(c) of the Internal Revenue Code of 1986, as amended.

(A) (No change.)

(B) Stopping ORP Contributions. In the absence of a 415(m) plan, an ORP employer shall discontinue ORP contributions

for participants who reach the 415(c) limit for the remainder of the applicable tax [plan] year.

(C) (No change.)

(3) No Co-Mingling of ORP and non-ORP Funds.

(A) No Non-Texas ORP Funds. No non-Texas ORP funds, including any withdrawn TRS member contributions, may be rolled over or transferred to an ORP account prior to the participant's termination of ORP participation.

(B) - (C) (No change.)

(4) No Dual Contributions. A contribution to the applicable retirement system and to an ORP company within the same calendar month shall not be permitted, except when a person terminates employment in a position covered by the applicable retirement system and, prior to the end of the calendar month in which the termination occurs, becomes employed in an ORP-eligible position at a different ORP employer and elects to participate in ORP by signing the TRS-28 ORP election form or, for employees of the Board, the ORP election form provided by the Board on a date that results in an [and submitting the appropriate forms to the ORP employer in such manner that the] ORP participation start date that is prior to the end of that same calendar month, as provided in §25.4(g) of this title (relating to Participation Start Date).

(5) Eligible Compensation.

(A) - (B) (No change.)

(C) Stopping ORP Contributions. An ORP employer shall discontinue ORP contributions for participants who reach the 401(a)(17) limit for the remainder of the applicable tax [plan] year.

(6) Contribution Rates. The amount of each participant's ORP contribution shall be a percentage of the participant's eligible compensation as established by the ORP statute and the General Appropriations Act for each biennium. Each contribution shall include an amount based on the employee rate and an amount based on the employer rate.

(A) - (B) (No change.)

(C) Supplemental Employer Rate. Institutions may provide a supplement to the state base rate under the following conditions:

(i) - (v) (No change.)

(vi) All ORP employers shall maintain documentation of a participant's first date to participate in ORP in lieu of the applicable retirement system at any ORP employer and shall provide that information to any future ORP employers of the participant for purposes of determining the participant's grandfather status. This information shall be maintained for as long as the employer's plan exists regardless of whether the ORP employer provides a supplemental employer rate contribution and regardless of the amount of any supplemental employer rate contribution provided.

(7) Proportionality. ORP employers shall pay ORP employer contributions from the appropriate funding source in accordance with applicable proportionality provisions, including provisions in the General Appropriations Act and §830.201 of the Texas Government Code.

~~[(A) ORP employers Other than Community Colleges. Texas public institutions of higher education, not including public community colleges, and the Board shall pay ORP employer contributions on a proportionate basis from the same funding source that a participant's salary is paid from. General Revenue funds may only be used~~

~~for ORP employer contributions for the portion of a participant's salary that is actually paid with General Revenue.]~~

~~[(B) Public Community Colleges. Public community colleges shall pay ORP employer contributions on a proportionate basis from the same funding source that a participant's salary is paid from, except that all participants who are eligible to have all or part of their salary paid from General Revenue shall be eligible for General Revenue funding of their ORP employer contributions for the part of their salaries that is eligible for General Revenue funding, whether or not the salary is actually paid from General Revenue. Eligibility for General Revenue funding shall be based on the Elements of Expenditure.]~~

~~[(C) Not Applicable to Supplemental Employer Contributions. The proportionality provisions in this paragraph do not apply to supplemental employer contributions that an ORP employer may make as provided by subparagraph (6)(C) of this subsection.]~~

(8) - (9) (No change.)

(10) Same-Day Credit. ORP companies shall deposit each participant's ORP contributions into the accounts and/or funds designated by the participant effective on the same business day that the contributions are received by the company if the funds are received before the close of business and on the next business day if the funds are received after the close of business. A company that does not comply with this provision shall not be eligible to be authorized as an ORP company by any ORP employer.

(11) (No change.)

(b) Withdrawal of Retirement System Funds. An employee who elects to participate in ORP may withdraw any member [employee] contributions (plus accrued interest, if any) that he or she may have accumulated in the applicable retirement system prior to the election of ORP. Withdrawn member contributions shall not be rolled over into the participant's ORP account prior to termination of ORP participation.

(c) ORP Companies.

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

(6) Participant's Change of Companies.

(A) - (D) (No change.)

(E) Transfers of Prior Contributions.

(i) Each ORP employer shall include a provision in the employer's ORP plan that permits participants to execute a contract exchange to [Participants may] transfer ORP funds that were contributed during the current or prior periods of employment with the [same or another] ORP employer to another ORP company that is authorized by the employer to receive the funds[; but only if their current ORP employer authorizes it after confirming that the funds are being transferred to a valid ORP contract]. A contract exchange [transfer of prior contributions] shall not be counted against the number of changes required under subparagraph (B) of this paragraph.

(ii) Each ORP employer may include provisions in the employer's ORP plan that permit participants to transfer ORP funds from one ORP employer's plan to another ORP employer's plan provided both employer plans include provisions authorizing such plan-to-plan transfers.

(7) - (16) (No change.)

(d) - (e) (No change.)

(f) Distribution Restrictions.

(1) Restricted Access.

(A) No Pre-Termination Access unless Age 70-1/2. ORP participants shall not access any of their ORP funds by any means (including partial or full withdrawals) until the earlier of the date that they:

(i) terminate all employment with all ORP employers; or

(ii) reach age 70-1/2 years.

(B) No Loans or Hardship Withdrawals.

(i) Loans, financial hardship withdrawals, or any other method that provides a participant with any type of access to ORP funds prior to the earlier of termination of employment or attainment of age 70-1/2 shall not be permitted.

(ii) ORP products may provide for loans or hardship withdrawals after the participant's termination of employment or attainment of age 70-1/2, if permissible under applicable laws, ~~and~~ regulations and plan provisions.

(C) - (D) (No change.)

(E) Transfer of Funds is not a Termination. A transfer of ORP funds between ORP accounts or ORP companies (contract exchange) shall not be considered a termination of employment for ORP purposes.

(F) - (G) (No change.)

(2) Authorization to Release ORP Funds. An ORP company shall not release any ORP funds to a participant until receipt of notification from the participant's ORP employer that a break in service or retirement has occurred, except when the participant has reached age 70-1/2, in which case, the ORP company may release funds upon verification that the participant has reached age 70-1/2. The ORP employer's termination notification may be referred to as a vesting letter because it indicates whether the participant has met the ORP vesting requirement.

(A) (No change.)

(B) Vested Participants. If a participant terminates after meeting the vesting requirement, all funds shall be available in accordance with applicable federal law, plan provisions and contractual provisions, but non-ORP-related early withdrawal penalties, such as additional federal income taxes or contractual surrender fees, may apply depending on factors such as the participant's product selection and age at termination.

(3) Prohibited Distribution by ORP Company. If an ORP company provides a participant with any access to ORP funds prior to the earlier of the participant's termination of employment with all ORP employers or attainment of age 70-1/2, then the ORP employer, as the plan sponsor, and the ORP company, as the trustee of the funds, shall rectify the situation in accordance with applicable IRS procedures. [that company shall be responsible for making a prohibited distribution and the following provisions apply.]

~~{(A) Redeposit. The participant's ORP employer shall require the company to:}~~

~~{(i) redeposit funds to the employee's ORP account as if no withdrawal had been made; and}~~

~~{(ii) provide written verification to the ORP employer that the account has been fully restored with no adverse impact to the employee.}~~

~~{(B) Company Suspension. The ORP employer may suspend a company from doing further business with the ORP em-~~

~~ployer's participants at any time a company fails to comply with these provisions.}~~

~~{(C) Separate Transaction Not Related to ORP. A prohibited distribution, such as a loan that is not authorized under the ORP statute, is not related to ORP and shall be treated as a separate transaction between the company and the individual, for example, as an unsecured loan.}~~

(g) ORP Employer Reports.

(1) (No change.)

(2) Annual Report.

(A) (No change.)

(B) Due Date. The required information shall be reported on a fiscal year basis and shall normally be due on October [November] 1 of each year for the most recent fiscal year ending August 31.

(3) (No change.)

(h) Required Notices to Employees.

(1) Basic Information for Newly Eligible Employees. On or before an ORP-eligible employee's initial ORP eligibility date, which is the first day of his or her 90-day ORP election period, each institution shall provide the ORP-eligible employee with written introductory information on ORP developed by the Board and titled, "An Overview of TRS and ORP for Employees Eligible to Elect ORP."

(A) (No change.)

(B) Electronic Notification. An institution may meet this notification requirement by:

(i) placing ~~[on its website the electronic version of the Overview document that is provided by the Board, and/or placing]~~ a link on its website to ~~[the Overview document that is available on]~~ the Board's ORP website;

(ii) providing the ORP-eligible employee with local internet/intranet access to the ~~[electronic version of the document or]~~ link to the Board's ORP website; and

(iii) within the required timeframe, notifying the ORP-eligible employee in writing of the location of the ~~[electronic version or]~~ link to the Board's ORP website.

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

(4) Possible Retiree Group Insurance Eligibility. ORP employers shall include in their normal out-processing procedures for terminated employees, a notification to ORP participants that includes the following information:

(A) - (B) (No change.)

(C) for ORP employers that are covered under the group insurance program administered by ERS, a caution to the participant to refrain from withdrawing all of his or her ORP funds if the participant enrolls ~~[anticipates enrolling]~~ in the group insurance program administered by ERS as an ORP retiree or anticipates enrolling at a later date.

(D) (No change.)

(5) (No change.)

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

Filed with the Office of the Secretary of State on May 9, 2016.



## PART 2. TEXAS EDUCATION AGENCY

### CHAPTER 97. PLANNING AND ACCOUNTABILITY

#### SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

##### 19 TAC §97.1005

*(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §97.1005(b) is not included in the print version of the Texas Register. The figure is available in the html version of the May 20, 2016, issue of the Texas Register on-line.)*

The Texas Education Agency (TEA) proposes an amendment to §97.1005, concerning accountability and performance monitoring. The section describes the purpose of the Performance-Based Monitoring Analysis System (PBMAS) and manner in which school districts and charter school performance is reported. The section also adopts the most recently published PBMAS Manual. The proposed amendment would adopt the 2016 PBMAS Manual. Earlier versions of the manual will remain in effect with respect to the school years for which they were developed.

House Bill 3459, 78th Texas Legislature, 2003, added the Texas Education Code (TEC), §7.027, limiting and redirecting monitoring done by the TEA to that required to ensure school district and charter school compliance with federal law and regulations; financial accountability, including compliance with grant requirements; and data integrity for purposes of the Public Education Information Management System and accountability under TEC, Chapter 39. Legislation passed in 2005 renumbered TEC, §7.027, to TEC, §7.028. To meet this monitoring requirement, the agency developed the PBMAS, which is used in conjunction with other evaluation systems, to monitor performance and program effectiveness of special programs in school districts and charter schools.

The TEA has adopted its PBMAS Manual in rule since 2005. The PBMAS is a dynamic system that evolves over time, so the specific criteria and calculations for monitoring performance and program effectiveness may differ from year to year. The intent is to update 19 TAC §97.1005 annually to refer to the most recently published PBMAS Manual.

The proposed amendment to 19 TAC §97.1005 would update the current rule by adopting the 2016 PBMAS Manual, which describes the specific criteria and calculations that will be used to assign 2016 PBMAS performance levels.

The 2016 PBMAS includes several key changes from the 2015 system. The ongoing transition to the State of Texas Assessments of Academic Readiness (STAAR®) is reflected in the 2016 PBMAS with the incorporation of STAAR® performance

standards in accordance with 19 TAC §101.3041, Performance Standards. Any STAAR® mathematics data from the 2015 PBMAS used in the 2016 PBMAS for aggregation or required improvement purposes reflect the new Grades 3-8 STAAR® mathematics performance standards. Additionally, the 2016 PBMAS includes STAAR® data based on the Student Success Initiative grade-advancement requirements that were reinstated for mathematics in the 2015-2016 school year. New cut points that reflect the ongoing STAAR® transition were implemented for the STAAR® end-of-course (EOC) indicators, and performance level assignments were added for the STAAR® EOC English language arts (ELA, i.e., English I and English II) indicators.

New cut points were implemented for the annual dropout rate and graduation rate indicators in all four program areas to account for statutory changes in graduation requirements and expectations. The Recommended High School Program and Distinguished Achievement Program indicators in all four program areas were deleted since these indicators no longer correspond with current state graduation requirements and expectations.

In addition to the new cut points for the graduation rate indicators referenced above, the graduation rate in the Bilingual Education/English as a Second Language program area will be determined based on students identified as an English Language Learner (ELL) at any time while attending Grades 9-12 in a Texas public school rather than determined only based on students identified as ELLs in their last year in a Texas public school. This change provides a more comprehensive evaluation of ELL graduation rates and increases the number of students included in the indicator, thereby increasing the number of districts meeting minimum size requirements and evaluated under the indicator.

For the 2015 PBMAS, special performance level (PL) provisions were added to the Career and Technical Education (CTE) EOC indicator that evaluates students served in special education (SPED): Indicator #4(i-iv) (CTE SPED STAAR EOC Passing Rate). These provisions were designed to address the inclusion of STAAR® A and STAAR® Alternate 2 results. For the 2016 PBMAS, the targeted hold harmless component of those provisions will be discontinued, and PL assignments will be based on the new cut points applicable to the other CTE EOC indicators.

For the 2015 PBMAS, special PL provisions were added to SPED Indicator #1(i-v) (SPED STAAR 3-8 Passing Rate) and SPED Indicator #3(i-iv) (SPED STAAR EOC Passing Rate). These provisions were designed to address the inclusion of STAAR® A and STAAR® Alternate 2 results. For the 2016 PBMAS, the targeted hold harmless component of those provisions will be discontinued. However, the PL 4 assignment added in the 2015 PBMAS will continue to be assigned in the 2016 PBMAS. Additionally, the PL 3 and PL 4 assignments for SPED Indicator #1(i-v) will be based on adjusted cut points.

The 6-11 and 12-21 age groups that were used for the SPED Regular Class ≥80% Rate and SPED Regular Class <40% Rate indicators have been combined into one 6-21 age group, resulting in the deletion of two indicators. To meet federal requirements under 20 U.S.C. §1418(d) and 34 Code of Federal Regulations §300.646, the two remaining 6-21 age group indicators will include Report Only designations of significant disproportionality based on race or ethnicity.

Additionally, the 2016 PBMAS marks the beginning of a transition to a new PL structure for SPED Indicator #11 (SPED African American [Not Hispanic/Latino] Representation), SPED Indica-

tor #12 (SPED Hispanic Representation), and SPED Indicator #13 (SPED LEP Representation). This new structure aligns with the transition already made in the 2015 PBMAS for the special education discipline indicators' PL structure and will, beginning with the 2017 PBMAS, replace the current percentage point difference with a disproportionality rate. Changes to the PBMAS indicators for 2016 are marked in the manual as "New!" for easy reference.

The proposal would establish in rule the PBMAS procedures for assigning the 2016 PBMAS performance levels. Applicable procedures will be adopted each year as annual versions of the PBMAS Manual are published.

The proposed amendment would have no locally maintained paperwork requirements.

**FISCAL NOTE.** Criss Cloudt, associate commissioner for assessment and accountability, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment. There is no effect on local economy for the first five years that the proposed amendment is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

**PUBLIC BENEFIT/COST NOTE.** Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to continue to inform the public of the existence of annual manuals specifying PBMAS procedures by including this rule in the Texas Administrative Code. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND MICROBUSINESSES.** There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

**REQUEST FOR PUBLIC COMMENT.** The public comment period on the proposal begins May 20, 2016, and ends June 20, 2016. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. Comments may also be submitted electronically to [rules@tea.texas.gov](mailto:rules@tea.texas.gov). A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on May 20, 2016.

**STATUTORY AUTHORITY.** The amendment is proposed under the Texas Education Code (TEC), §7.028, which authorizes the agency to monitor as necessary to ensure school district and charter school compliance with state and federal law and regulations; TEC, §29.001(5), which authorizes the agency to effectively monitor all local educational agencies (LEAs) to ensure that rules relating to the delivery of services to children with disabilities are applied in a consistent and uniform manner, to ensure that LEAs are complying with those rules, and to ensure that specific reports filed by LEAs are accurate and complete; TEC, §29.010(a), which authorizes the agency to adopt and implement a comprehensive system for monitoring LEA compliance with federal and state laws relating to special education, including ongoing analysis of LEA special education

data; TEC, §29.062, which authorizes the agency to monitor the effectiveness of LEA programs concerning students with limited English proficiency; TEC, §39.051 and §39.052, which authorize the commissioner to determine criteria for accreditation statuses and to determine the accreditation status of each school district and open-enrollment charter school; TEC, §39.054(b-1), which authorizes the agency to consider the effectiveness of district programs for special populations, including career and technical education programs, when determining accreditation statuses; TEC, §§39.056-39.058, which authorize the commissioner to adopt procedures relating to on-site and special accreditation investigations; and TEC, §39.102 and §39.104, which authorize the commissioner to implement procedures to impose interventions and sanctions for school districts and open-enrollment charter schools.

**CROSS REFERENCE TO STATUTE.** The amendment implements the Texas Education Code, §§7.028, 29.001(5), 29.010(a), 29.062, 39.051, 39.052, 39.054(b-1), 39.056-39.058, 39.102, and 39.104.

§97.1005. *Performance-Based Monitoring Analysis System.*

(a) In accordance with Texas Education Code, §7.028(a), the purpose of the Performance-Based Monitoring Analysis System (PBMAS) is to report annually on the performance of school districts and charter schools in selected program areas: bilingual education/English as a Second Language, career and technical education, special education, and certain Title programs under [the] federal law [No Child Left Behind Act]. The performance of a school district or charter school is reported through indicators of student performance and program effectiveness and corresponding performance levels established by the commissioner of education.

(b) The assignment of performance levels for school districts and charter schools in the 2016 [2015] PBMAS is based on specific criteria and calculations, which are described in the 2016 PBMAS [2015] Manual provided in this subsection.

Figure: 19 TAC §97.1005(b)  
[Figure: 19 TAC §97.1005(b)]

(c) The specific criteria and calculations used in the PBMAS are established annually by the commissioner of education and communicated to all school districts and charter schools.

(d) The specific criteria and calculations used in the annual PBMAS manual adopted for prior school years remain in effect for all purposes, including accountability and performance monitoring, data standards, and audits, with respect to those school years.

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

Filed with the Office of the Secretary of State on May 9, 2016.

TRD-201602272

Cristina De La Fuente-Valadez  
Director, Rulemaking  
Texas Education Agency

Earliest possible date of adoption: June 19, 2016

For further information, please call: (512) 475-1497



## TITLE 22. EXAMINING BOARDS

### PART 11. TEXAS BOARD OF NURSING

## CHAPTER 211. GENERAL PROVISIONS

### 22 TAC §211.9

The Texas Board of Nursing (Board) proposes an amendment to §211.9, concerning General Considerations. The amendment is proposed under the authority of the Occupations Code §301.151. Section 301.151 authorizes the Board to adopt rules necessary to perform its statutory duties and conduct its business. The proposed amendment addresses the parliamentary procedures under which Board proceedings will be conducted.

#### Background

The Board's current rule provides that all Board and committee meetings will be conducted under the provisions of Robert's Rules of Order Newly Revised. While Robert's Rules of Order may serve large assemblies and professional parliamentarians well, they are comprehensive, detailed, and overly complex for the majority of situations faced by typical occupational boards. Occupational licensing boards are usually small, and individuals appointed to serve on them are typically private citizens selected for their expertise in the regulated industry. Because of this, the Board desires to simplify the parliamentary processes utilized at its meetings.

At its April 2016 meeting, the Board voted, in open meeting, to adopt a Simplified Parliamentary Policy (policy) to govern its committee and board meetings. The policy is designed to allow flexibility in handling situations that are unique to the Board and to conform to the specific requirements of Texas law. Further, the policy is designed to be applied in a manner that encourages fair and open debate; majority rule; courtesy; good order; common sense; and efficiency.

The newly adopted policy addresses several major issues that the Board routinely encounters during its meetings. First, the policy addresses Board decisions. Under the newly adopted policy, all Board decisions must be decided by a majority of the members present at a meeting in which a quorum of the Board has been convened. The policy also defines a quorum of the Board consistent with the specific requirements of the Texas Government Code §551.001 and Board Rule §211.5.

Second, the policy defines the duties and powers of the Board's presiding officer in simple terms. Under the policy, the Board's chairperson may engage in debate, initiate action, and vote on the Board's agenda items. The policy also simplifies the voting process for the Board, requiring motions and seconds to be utilized by the members when voting on agenda items. The policy also allows for matters to be deemed approved when no objections from Board members are noted.

The policy also regulates the Board's general course of debate. For instance, under the policy, general discussion of a matter may be had prior to a motion determinative of the matter, if permitted by the Board's chairperson. The policy also allows a motion determinative of a matter to be made without the necessity of debate. The policy also encourages the orderly presentation of matters by requiring individuals to be recognized by the chairperson before speaking; for all discussion and debate to be addressed to the chairperson or the body generally; and for all remarks to be civil in content and tone. Further, in order for motions to be easily understood by those voting on them, the policy requires all motions to be cast in affirmative language, when possible, and dilatory, frivolous, rude, or absurd motions are prohibited.

The policy also requires all members to vote on every matter coming before the Board, unless they are disqualified under the Board's conflict of interest and recusal policy. The policy also requires every member to timely disclose any conflicts of interest and/or potential grounds for disqualification from voting on a particular matter in accordance with the Board's conflict of interest and recusal policy. Finally, the policy contains a simplified process for raising points of order, appeals, suspension and/or amendment of the rules, and adjournment of a meeting.

In many ways, the newly adopted policy reflects the processes under which the Board currently operates. However, the newly adopted policy may help clarify some procedural issues that may arise and serves to encourage the resolution of the Board's business in an efficient and easily comprehensible manner.

#### Section by Section Overview

Proposed amended §211.9(a) provides that Board and committee meetings shall be conducted pursuant to the Board's adopted Simplified Parliamentary Policy.

**Fiscal Note.** Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendment will be in effect, there will be no fiscal impact to state or local governments.

**Public Benefit/Cost Note.** Ms. Thomas has also determined that for each year of the first five years the proposed amendment is in effect, the anticipated public benefit will be the adoption of rules that encourage the resolution of the Board's business in an efficient and easily comprehensible manner and encourage fair and open debate; majority rule; courtesy; good order; common sense; and compliance with the requirements of Texas law.

There are no anticipated costs of compliance with the proposal. The proposed amendment affects the processes under which the Board's meetings are conducted; however, the proposal does not impose any direct requirement upon any Board regulated entity. The parliamentary policy adopted by the Board is merely intended to simplify the processes under which the Board's meetings are conducted. As such, the Board does not anticipate that any costs of compliance will result from the proposal.

**Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses.** As required by the Government Code §2006.002(c) and (f), the Board has determined that the proposed amendment will not have an adverse economic effect on any individual, Board regulated entity, or other entity required to comply with the proposed amendment because there are no anticipated costs of compliance with the proposal. As such, the Board is not required to prepare a regulatory flexibility analysis.

**Takings Impact Assessment.** The Board has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

**Request for Public Comment.** To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on June 20 to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to [dusty.johnston@bon.texas.gov](mailto:dusty.johnston@bon.texas.gov), or faxed to (512) 305-8101. If

a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendment is proposed under the authority of the Occupations Code §301.151.

Section 301.151 addresses the Board's rulemaking authority. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders under Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Cross Reference To Statute. The following statutes are affected by this proposal: Occupations Code, §301.151.

§211.9. *General Considerations.*

(a) Parliamentary procedure. Board and committee meetings shall be conducted pursuant to the Board's adopted Simplified Parliamentary Policy [~~provisions of Robert's Rules of Order Newly Revised~~].

(b) - (e) (No change.)

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

Filed with the Office of the Secretary of State on May 9, 2016.

TRD-201602247

Jena Abel

Assistant General Counsel

Texas Board of Nursing

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For further information, please call: (512) 305-6822



## PART 23. TEXAS REAL ESTATE COMMISSION

### CHAPTER 535. GENERAL PROVISIONS SUBCHAPTER E. REQUIREMENTS FOR LICENSURE

#### 22 TAC §535.53

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.53, Requirements for Licensure, in Chapter 535, General Provisions.

The amendments are proposed to clarify that a business entity must be qualified to transact business in Texas at all times to maintain an active license and that the business entity must notify TREC when it is no longer qualified to transact business in Texas. In addition, the amendments more fully set out the scope of required errors and omissions insurance coverage.

Kerri Lewis, General Counsel, 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 as a result of enforcing or administering the section. There is no significant anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the section. There is no anticipated significant eco-

nomical cost to persons who are required to comply with the proposed amendments.

Ms. Lewis also has determined that for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be better clarity in the rule and greater consumer protection.

Comments on the proposal may be submitted to Kerri Lewis, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to [general.counsel@trec.texas.gov](mailto:general.counsel@trec.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

§535.53. *Business Entity; Designated Broker.*

(a) Business Entity.

(1) A business entity must be qualified to transact business in Texas to receive, maintain or renew a broker license.

(2) A Franchise Tax Account Status page from the Texas Comptroller of Public Accounts issued within 21 days prior to the date of its license or renewal application constitutes evidence of being qualified to transact business in Texas.

(3) A business entity must notify the Commission not later than the 10th day after the date it receives notice that it is not qualified to transact business in Texas.

(4) [(3)] A foreign business entity must meet the additional requirements of §535.132 of this chapter to be eligible for a broker's license.

(b) Designated Broker.

(1) For the purposes of qualifying for, maintaining, or renewing a license, a business entity must designate an individual holding an active Texas real estate broker license in good standing with the Commission to act for it.

(2) An individual licensed broker is not in good standing with the Commission if:

(A) the broker's license is revoked or suspended, including probated revocation or suspension;

(B) a business entity licensed by the Commission while the broker was the designated broker for that business entity had its license revoked or suspended, including probated revocation or suspension, in the past two years;

(C) the broker has any unpaid or past due monetary obligations to the Commission, including administrative penalties and recovery fund payments; or

(D) a business entity licensed by the Commission has any unpaid or past due monetary obligations to the Commission, including administrative penalties and recovery fund payments, that were incurred while the broker was the designated broker for the entity;

(3) Regardless of the type of business entity, the designated broker must be a managing officer of the business entity.

(4) The business entity may not act as a broker during any period in which it does not have a designated broker to act for it who meets the requirements of the Act.

(5) To obtain or renew a license, or upon any change in the business entity's designated broker, the entity must provide to the Commission:

(A) proof of the designated broker's current status as an officer, manager or general partner for that entity; and

(B) if the designated broker does not own directly at least 10 percent of the business entity, proof that the business entity maintains [appropriate] errors and omissions insurance; [if the designated broker does not own directly at least 10 percent of the entity]

(i) in at least the minimum coverage limits required by the Act; and

(ii) that provides coverage for losses due to a violation of the Act or this Chapter.

(6) A broker may not act as a designated broker at any time while the broker's license is inactive, expired, suspended, or revoked.

~~[(e) If a licensed corporation or limited liability company is dissolved with the secretary of state then any license held by that corporation or company immediately becomes null and void.]~~

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 May 3, 2016.

TRD-201602104

Kerri Lewis

General Counsel

Texas Real Estate Commission

Earliest possible date of adoption: June 19, 2016

For further information, please call: (512) 936-3092



## 22 TAC §535.55

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.55, Education and Sponsorship Requirements for a Salesperson, in Chapter 535, General Provisions.

The amendments are proposed to align the rule with statutory changes in SB 699, enacted by the 84th Legislature regarding the number of hours required for continuing education and changing term "salesperson" to "sales agent."

Kerri Lewis, General Counsel, 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 as a result of enforcing or administering the section. There is no significant anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the section. There is no anticipated significant economic cost to persons who are required to comply with the proposed amendments.

Ms. Lewis also has determined that for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be greater consistency in the rules.

Comments on the proposal may be submitted to Kerri Lewis, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to [general.counsel@trec.texas.gov](mailto:general.counsel@trec.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

*§535.55. Education and Sponsorship Requirements for a Sales Agent [Salesperson] License.*

(a) Education requirements for an initial sales agent [salesperson] license. An applicant for an initial sales agent [salesperson] license must provide the Commission with satisfactory evidence of completion of 180 hours of qualifying real estate courses as required under the Act as follows:

- (1) 60 hours of Principles of Real Estate;
- (2) 30 hours of Law of Agency;
- (3) 30 hours of Law of Contracts;
- (4) 30 hours of Promulgated Contracts Forms; and
- (5) 30 hours of Real Estate Finance.

(b) Additional education requirements. A sales agent [salesperson] must complete an additional 90 classroom hours in qualifying courses by the expiration date of the sales agent's [salesperson's] initial licensing period and report those hours in accordance with the requirements of §535.91 of this title.

(c) The Commission may waive the education required for a real estate sales agent [salesperson] license if the applicant:

- (1) was licensed either as a Texas real estate broker or as a Texas real estate sales agent [salesperson] within two years before the filing of the application; and
- (2) completed any qualifying real estate courses or real estate related courses that would have been required for a timely renewal of the prior license, or, if the renewal of the prior license was not subject to the completion of qualifying real estate courses or real estate related courses, completed at least the number of [45] hours of continuing education courses required by §535.92(a) of this title within the two-year period before filing an application for an active license.

(d) The Commission will issue an applicant an inactive sales agent [salesperson] license upon satisfaction of subsection (a) of this section. An inactive sales agent [salesperson] may not practice as a licensed sales agent [salesperson] until sponsored by an active Texas licensed broker.

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 May 3, 2016.

TRD-201602105

Kerri Lewis  
General Counsel  
Texas Real Estate Commission  
Earliest possible date of adoption: June 19, 2016  
For further information, please call: (512) 936-3092



## SUBCHAPTER F. REQUIREMENTS FOR EDUCATION PROVIDERS, COURSES AND INSTRUCTORS FOR QUALIFYING EDUCATION

### 22 TAC §535.65

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.65, Responsibilities and Operations of Providers of Qualifying Courses, in Chapter 535, General Provisions.

The amendments are proposed to remove the requirement for education completion certificates to include the registration date since that information not necessary for the Commission to calculate compliance with statutory timeframes for course completion.

Kerri Lewis, General Counsel, 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 as a result of enforcing or administering the section. There is no significant anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the section. There is no anticipated significant economic cost to persons who are required to comply with the proposed amendments.

Ms. Lewis also has determined that for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be reduction of work and duplication on education certificates.

Comments on the proposal may be submitted to Kerri Lewis, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to [general.counsel@trec.texas.gov](mailto:general.counsel@trec.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

§535.65. *Responsibilities and Operations of Providers of Qualifying Courses.*

- (a) - (i) (No change.)
- (j) Course completion certificate.

(1) Upon successful completion of a core course, a provider shall issue a course completion certificate that a student can submit to the Commission. The course completion certificate shall show:

- (A) the provider's name and approval number;
- (B) the instructor's name and instructor license number assigned by the Commission;
- (C) the course title;
- (D) course numbers;
- (E) the number of classroom credit hours;
- (F) the dates the student [~~registered for~~] began and completed the course; and
- (G) printed name and signature of an official of the provider on record with the Commission.

(2) A provider may withhold any official completion documentation required by this subsection from a student until the student has fulfilled all financial obligations to the provider.

(3) A provider shall maintain adequate security against forgery for official completion documentation required by this subsection.

(k) - (m) (No change.)

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

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Kerri Lewis  
General Counsel  
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For further information, please call: (512) 936-3092



## SUBCHAPTER G. REQUIREMENTS FOR CONTINUING EDUCATION PROVIDERS, COURSES AND INSTRUCTORS

### 22 TAC §535.72

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.72, Approval of Non-elective Continuing Education Courses in Chapter 535, General Provisions.

The amendments are proposed to clarify that classroom students must take the promulgated final examination independently prior to the instructor reviewing the correct answers.

Kerri Lewis, General Counsel, 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 as a result of enforcing or administering the section. There is no significant anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the section. There is no anticipated significant economic cost to persons who are required to comply with the proposed amendments.

Ms. Lewis also has determined that for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be greater clarity in the rule.

Comments on the proposal may be submitted to Kerri Lewis, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to [general.counsel@trec.texas.gov](mailto:general.counsel@trec.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

*§535.72. Approval of Non-elective Continuing Education Courses.*

(a) - (h) (No change.)

(i) Course examinations.

(1) A provider must administer a final examination promulgated by the Commission for non-elective CE courses beginning January 1, 2017 as follows:

(A) For classroom delivery, the examination will be given as a part of class instruction time with each student answering the examination questions independently followed by a review of the correct answers [being reviewed] by the instructor. There is no minimum passing grade required to receive credit. [and students will not be graded;]

(B) For distance education delivery, the examination will be given after completion of regular course work and must be:

(i) proctored by a member of the provider faculty or staff, or third party proctor set out in §535.65(i)(5) of this title, who is present at the test site and has positively identified that the student taking the examination is the student registered for and who took the course; or

(ii) administered using a computer under conditions that satisfy the Commission that the student taking the examination is the student registered for and who took the course; and

(iii) graded with a pass rate of 70% in order for a student to receive credit for the course; and

(iv) kept confidential.

(2) A provider may not give credit to a student who fails a final examination and subsequent final examination as provided for in subsection (j) of this section.

(j) - (m) (No change.)

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

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## SUBCHAPTER H. RECOVERY FUND

### 22 TAC §535.83

The Texas Real Estate Commission (TREC) proposes new §535.83, Association of Designated Broker on Claim, in Chapter 535, General Provisions.

The new section is proposed to clarify which designated broker is to be associated with a licensed business entity when a Real Estate Recovery Trust Account claim is filed or paid on behalf of that licensed business entity.

Kerri Lewis, General Counsel, has determined that for the first five-year period the proposed new section is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the section. There is no significant anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the section. There is no anticipated significant economic cost to persons who are required to comply with the proposed new section.

Ms. Lewis also has determined that for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be greater consumer protection.

Comments on the proposal may be submitted to Kerri Lewis, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to [general.counsel@trec.texas.gov](mailto:general.counsel@trec.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The new section is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed new section.

*§535.83. Association of Designated Broker on Claim.*

For purposes of §1101.6011 and §1101.610(e) of the Act, the designated broker associated with the claim against a business entity is the broker who was the designated broker at the time of the act that is the subject of the underlying judgment.

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

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## SUBCHAPTER L. INACTIVE LICENSE STATUS

## 22 TAC §535.123

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.123, Inactive Broker Status, in Chapter 535, General Provisions.

The amendments are proposed to clarify that a licensed business entity becomes inactive when it is no longer qualified to transact business in Texas or its designated broker's license is suspended, including probated suspension.

Kerri Lewis, General Counsel, 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 as a result of enforcing or administering the section. There is no significant anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the section. There is no anticipated significant economic cost to persons who are required to comply with the proposed amendments.

Ms. Lewis also has determined that for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be greater consumer protection.

Comments on the proposal may be submitted to Kerri Lewis, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to [general.counsel@trec.texas.gov](mailto:general.counsel@trec.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

§535.123. *Inactive Broker Status.*

- (a) (No change.)
- (b) The license of a business entity broker immediately becomes inactive when:
  - (1) the Commission receives an application for inactive status from the broker;
  - (2) the entity is not qualified to transact business in Texas [~~forfeits its charter~~];
  - (3) the designated broker's license:
    - (A) expires;
    - (B) is suspended, including a probated suspension; or
    - (C) is [~~is~~] revoked; or
  - (4) the designated broker dies or resigns as designated broker.
- (c) The broker must confirm to the Commission in writing that the broker has given all sales agents [~~salespersons~~] sponsored by the broker written notice of termination of sponsorship at least 30 days before filing the application for inactive status.
- (d) - (e) (No change.)

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

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Kerri Lewis

General Counsel

Texas Real Estate Commission

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## SUBCHAPTER Q. ADMINISTRATIVE PENALTIES

### 22 TAC §535.191

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.191, Schedule of Administrative Penalties, in Chapter 535, General Provisions.

The amendments are proposed to lower the administrative penalty for bad check violations and include a penalty for violations of 22 TAC §535.53.

Kerri Lewis, General Counsel, 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 as a result of enforcing or administering the section. There is no significant anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the section. There is no anticipated significant economic cost to persons who are required to comply with the proposed amendments.

Ms. Lewis also has determined that for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be greater consumer protection.

Comments on the proposal may be submitted to Kerri Lewis, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to [general.counsel@trec.texas.gov](mailto:general.counsel@trec.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statutes affected by this proposal are Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

§535.191. *Schedule of Administrative Penalties.*

- (a) - (b) (No change.)
- (c) An administrative penalty range of \$100-\$1,500 per violation per day may be assessed for violations of the following sections of the Act and Rules:
  - (1) §1101.552;
  - (2) §1101.652(a)(3)

- (3) [(2)] §1101.652(a)(7);
- (4) [(3)] §§1101.652(a-1)(3);
- (5) [(4)] §1101.652(b)(23);
- (6) [(5)] §1101.652(b)(29);
- (7) [(6)] 22 TAC §535.21(a);
- (8) 22 TAC §535.53;
- (9) [(7)] 22 TAC §535.91(d);
- (10) [(8)] 22 TAC §535.154; and
- (11) [(9)] 22 TAC §535.300.

(d) An administrative penalty range of \$500-\$3,000 per violation per day may be assessed for violations of the following sections of the Act and Rules:

- (1) §§1101.652(a)(4)[(3)]-(5);
- (2) §1101.652(a-1)(2);
- (3) §1101.652(b)(1);
- (4) §§1101.652(b)(7)-(8);
- (5) §1101.652(b)(12);
- (6) §1101.652(b)(14);
- (7) §1101.652(b)(22);
- (8) §1101.652(b)(28);
- (9) §§1101.652(b)(30)-(31);
- (10) §1101.654(a);
- (11) 22 TAC §535.2; and
- (12) 22 TAC §535.144.

(e) - (f) (No change.)

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

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Kerri Lewis

General Counsel

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## SUBCHAPTER R. REAL ESTATE INSPECTORS

### 22 TAC §§535.227 - 535.233

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §535.227, Standards of Practice: General Provisions, §535.228, Standards of Practice: Minimum Inspection Requirements for Structural Systems, §535.229 Standards of Practice: Minimum Inspection Requirements for Electrical Systems, §535.230 Standards of Practice: Minimum Inspection Requirements for Heating, Ventilation, and Air Conditioning Systems, §535.231 Standards of Practice: Minimum Inspection Requirements for Plumbing Systems, §535.232 Standards of

Practice: Minimum Inspection Requirements for Appliances, and §535.233 Standards of Practice: Minimum Inspection Requirements for Optional Systems in Subchapter R, Real Estate Inspectors.

The proposed amendments to §535.227, Standards of Practice: General Provisions, provide clarity and consistency by restructuring and renumbering this section, streamlining wording, and removing redundant language. These amendments move §535.227(b) to subsection (a), and renumber the other subsections accordingly. Language was added to subsection (a) clarifying when the SOPs apply, and the definitions for "specialized equipment," "specialized procedures," "substantially completed," and "technically exhaustive" were incorporated into the body of subsection (a) because those definitions are not used elsewhere in the rules.

The proposed amendments to §535.228, Standards of Practice: Minimum Inspection Requirements for Structural Systems, and §535.233, Standards of Practice: Minimum Inspection Requirements for Optional Systems, renumber and restructure those provisions, streamline wording, and remove redundant language to provide clarity and consistency.

The proposed amendments to §535.229, Standards of Practice: Minimum Inspection Requirements for Electrical Systems, §535.230, Standards of Practice: Minimum Inspection Requirements for Heating, Ventilation, and Air Conditioning Systems, §535.231, Standards of Practice: Minimum Inspection Requirements for Plumbing Systems, and §535.232, Standards of Practice: Minimum Inspection Requirements for Appliances, renumber and restructure those provisions for clarity and consistency.

Kristen Worman, Deputy General Counsel, 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 as a result of enforcing or administering the sections. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the sections. There is no anticipated significant economic cost to persons who are required to comply with the proposed amendments.

Ms. Worman also has determined that for each year of the first five years the sections as proposed are in effect the public benefits anticipated as a result of enforcing the sections will be requirements that are consistent with the statute and easier for consumers and license holders to read and understand.

Comments on the proposal may be submitted to Kristen Worman, Deputy General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188 or via email to [general.counsel@trec.texas.gov](mailto:general.counsel@trec.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its license holders to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statute affected by this proposal is Chapter 1102, Texas Occupations Code. No other statute, code or article is affected by the proposed amendments.

§535.227. *Standards of Practice: General Provisions.*

(a) Scope.

(1) These standards of practice apply when a professional inspector or real estate inspector who is licensed under this chapter accepts employment to perform a real estate inspection for a prospective buyer or seller of real property.

(2) These standards of practice define the minimum requirements for a real estate inspection conducted on a one to four family unity that is substantially completed. Substantially completed means the stage of construction when a new building, addition, improvement, or alteration to an existing building can be occupied or used for its intended purpose.

(3) For the purposes of these standards of practice a real estate inspection:

(A) is a limited visual survey and basic performance evaluation of the systems and components of a building using normal controls that provides information regarding the general condition of a residence at the time of inspection.

(B) is not intended to be a comprehensive investigation or exploratory probe to determine the cause of effect of deficiencies noted by the inspector; and

(C) does not require the use of:

(i) specialized equipment, including but not limited

to:

(I) thermal imaging equipment;

(II) moisture meters;

(III) gas or carbon monoxide detection equip-

ment;

(IV) environmental testing equipment and de-

vices;

(V) elevation determination devices; or

(VI) ladders capable of reaching surfaces over

one story above ground surfaces; or

(ii) specialized procedures, including but not limited

to:

(I) environmental testing;

(II) elevation measurement;

(III) calculations; or any method employing destructive testing that damages otherwise sound materials or finishes.

(4) These standards of practice do not prohibit an inspector from providing a higher level of inspection performance than required by these standards of practice or from inspecting components and systems in addition to those listed under the standards of practice.

(b) [(a)] Definitions.

(1) Accessible--In the reasonable judgment of the inspector, capable of being approached, entered, or viewed without:

(A) hazard to the inspector;

(B) having to climb over obstacles, moving furnishings or large, heavy, or fragile objects;

(C) using specialized equipment or procedures;

(D) disassembling items other than covers or panels intended to be removed for inspection;

(E) damaging property, permanent construction or building finish; or

(F) using a ladder for portions of the inspection other than the roof or attic space.

(2) Chapter 1102--Texas Occupations Code, Chapter 1102.

(3) Component--A part of a system.

(4) Cosmetic--Related only to appearance or aesthetics, and not related to performance, operability, or water penetration.

(5) Deficiency--In the reasonable judgment of the inspector, a condition that:

(A) adversely and materially affects the performance of a system, or component; or

(B) constitutes a hazard to life, limb, or property as specified by these standards of practice.

(6) Deficient--Reported as having one or more deficiencies.

(7) Inspect--To operate in normal ranges using ordinary controls at typical settings, look at and examine accessible systems or components and report observed deficiencies as specified by these standards of practice.

(8) Performance--Achievement of an operation, function or configuration relative to accepted industry standard practices with consideration of age and normal wear and tear from ordinary use.

(9) Report--To provide the inspector's opinions and findings on the standard inspection report form as required by §535.222 and §535.223 of this title.

~~[(10) Specialized equipment--Equipment such as thermal imaging equipment, moisture meters, gas or carbon monoxide detection equipment, environmental testing equipment and devices, elevation determination devices, and ladders capable of reaching surfaces over one story above ground surfaces.]~~

~~[(11) Specialized procedures--Procedures such as environmental testing, elevation measurement, calculations and any method employing destructive testing that damages otherwise sound materials or finishes.]~~

~~[(10) [(42)] Standards of practice--§§535.227 - 535.233 of this title.~~

~~[(13) Substantially completed--The stage of construction when a new building, addition, improvement, or alteration to an existing building is sufficiently complete that the building, addition, improvement or alteration can be occupied or used for its intended purpose.]~~

~~[(14) Technically Exhaustive--A comprehensive investigation beyond the scope of a real estate inspection which would involve determining the cause or effect of deficiencies, exploratory probing or discovery, the use of specialized knowledge, equipment or procedures.]~~

~~[(b) Scope.]~~

~~[(1) These standards of practice define the minimum levels of inspection required for substantially completed residential improvements to real property up to four dwelling units. A real estate inspection is a non-technically exhaustive, limited visual survey and basic performance evaluation of the systems and components of a building using normal controls and does not require the use of specialized equipment or procedures. The purpose of the inspection is to provide the client with information regarding the general condition of the residence at the time of inspection. The inspector may provide a higher level of inspection performance than required by these standards of practice and may inspect components and systems in addition to those described by the standards of practice.]~~

(c) [(2)] General Requirements. The inspector shall:

(1) [(A)] operate fixed or installed equipment and appliances listed herein in at least one mode with ordinary controls at typical settings;

(2) [(B)] visually inspect accessible systems or components from near proximity to the systems and components, and from the interior of the attic and crawl spaces; and

(3) [(C)] complete the standard inspection report form as required by §535.222 and §535.223 of this title.

(d) [(3)] General limitations. The inspector is not required to:

(1) [(A)] inspect:

(A) [(+)] items other than those listed within these standards of practice;

(B) [(+)] elevators;

(C) [(+)] detached buildings, decks, docks, fences, or waterfront structures or equipment;

(D) [(+)] anything buried, hidden, latent, or concealed;

(E) [(+)] sub-surface drainage systems;

(F) [(+)] automated or programmable control systems, automatic shut-off, photoelectric sensors, timers, clocks, metering devices, signal lights, lightning arrestor system, remote controls, security or data distribution systems, solar panels or smart home automation components; or

(G) [(+)] concrete flatwork such as driveways, sidewalks, walkways, paving stones or patios;

(2) [(B)] report:

(A) [(+)] past repairs that appear to be effective and workmanlike except as specifically required by these standards;

(B) [(+)] cosmetic or aesthetic conditions; or

(C) [(+)] wear and tear from ordinary use;

(3) [(C)] determine:

[(+)] ~~insurability, warrantability, suitability, adequacy, compatibility, capacity, reliability, marketability, operating costs, recalls, counterfeit products, product lawsuits, life expectancy, age, energy efficiency, vapor barriers, thermostatic performance, compliance with any code, listing, testing or protocol authority, utility sources, or manufacturer or regulatory requirements except as specifically required by these standards;~~

(A) [(+)] the presence or absence of pests, termites, or other wood-destroying insects or organisms;

(B) [(+)] the presence, absence, or risk of: [asbestos, lead-based paint, mold, mildew, corrosive or contaminated drywall "Chinese Drywall" or any other environmental hazard, environmental pathogen, carcinogen, toxin, mycotoxin, pollutant, fungal presence or activity, or poison;]

(i) asbestos;

(ii) lead-based paint;

(iii) mold, mildew;

(iv) corrosive or contaminated drywall "Chinese

Drywall"; or

(v) any other environmental hazard, environmental pathogen, carcinogen, toxin, mycotoxin, pollutant, fungal presence or activity, or poison;

(C) [(+)] types of wood or preservative treatment and fastener compatibility; or

(D) [(+)] the cause or source of a condition;

(E) the cause or effect of deficiencies;

(F) any of the following issues concerning a system or component:

(i) insurability or warrantability;

(ii) suitability, adequacy, compatibility, capacity, reliability, marketability, or operating costs;

(iii) recalls, counterfeit products, or product lawsuits;

(iv) life expectancy or age;

(v) energy efficiency, vapor barriers, or thermostatic performance;

(vi) compliance with any code, listing, testing or protocol authority;

(vii) utility sources; or

(viii) manufacturer or regulatory requirements, except as specifically required by these standards;

(4) [(D)] anticipate future events or conditions, including but not limited to:

(A) [(+)] decay, deterioration, or damage that may occur after the inspection;

(B) [(+)] deficiencies from abuse, misuse or lack of use;

(C) [(+)] changes in performance of any component or system due to changes in use or occupancy;

(D) [(+)] the consequences of the inspection or its effects on current or future buyers and sellers;

(E) [(+)] common household accidents, personal injury, or death;

(F) [(+)] the presence of water penetrations; or

(G) [(+)] future performance of any item;

(5) [(E)] operate shut-off, safety, stop, pressure or pressure-regulating valves or items requiring the use of codes, keys, combinations, or similar devices;

(6) [(F)] designate conditions as safe;

(7) [(G)] recommend or provide engineering, architectural, appraisal, mitigation, physical surveying, realty, or other specialist services;

(8) [(H)] review historical records, installation instructions, repair plans, cost estimates, disclosure documents, or other reports;

(9) [(H)] verify sizing, efficiency, or adequacy of the ground surface drainage system;

(10) [(H)] verify sizing, efficiency, or adequacy of the gutter and downspout system;

(11) [(K)] operate recirculation or sump pumps;

(12) ~~[(L)]~~ remedy conditions preventing inspection of any item;

(13) ~~[(M)]~~ apply open flame or light a pilot to operate any appliance;

(14) ~~[(N)]~~ turn on decommissioned equipment, systems or utility services; or

(15) ~~[(O)]~~ provide repair cost estimates, recommendations, or re-inspection services.

(e) ~~[(4)]~~ In the event of a conflict between the specific provisions and general provisions set out in this section, and the specific provisions specified elsewhere in the standards of practice, specific provisions shall take precedence.

(f) ~~[(5)]~~ Departure provision.

(1) ~~[(A)]~~ An inspector may depart from the inspection of a component or system required by the standards of practice only if:

(A) ~~[(i)]~~ the inspector and client agree the item is not to be inspected;

(B) ~~[(ii)]~~ the inspector is not qualified to inspect the item;

(C) ~~[(iii)]~~ in the reasonable judgment of the inspector, the inspector determines that: ~~[conditions exist that prevent inspection of an item;]~~

(i) conditions exist that prevent inspection of an item;

(ii) conditions or materials are hazardous to the health or safety of the inspector; or

(iii) the actions of the inspector may cause damage to the property;

(D) ~~[(iv)]~~ the item is a common element of a multi-family development and is not in physical contact with the unit being inspected, such as the foundation under another building or a part of the foundation under another unit in the same building.~~;~~

~~[(v) the inspector reasonably determines that conditions or materials are hazardous to the health or safety of the inspector; or]~~

~~[(vi) in the reasonable judgment of the inspector, the actions of the inspector may cause damage to the property.]~~

(2) ~~[(B)]~~ If an inspector departs from the inspection of a component or system required by the standards of practice, the inspector shall:

(A) ~~[(i)]~~ notify the client at the earliest practical opportunity that the component or system will not be inspected; and

(B) ~~[(ii)]~~ make an appropriate notation on the inspection report form, stating the reason the component or system was not inspected.

(3) ~~[(C)]~~ If the inspector routinely departs from inspection of a component or system required by the standards of practice, and the inspector has reason to believe that the property being inspected includes that component or system, the earliest practical opportunity for the notice required by this subsection is the first contact the inspector makes with the prospective client.

(g) ~~[(e)]~~ Enforcement. Failure to comply with the standards of practice is grounds for disciplinary action as prescribed by Chapter 1102.

§535.228. *Standards of Practice: Minimum Inspection Requirements for Structural Systems.*

(a) Foundations. ~~[The inspector shall:]~~

(1) The inspector shall:

(A) ~~[(1)]~~ render a written opinion as to the performance of the foundation; and

(B) ~~[(2)]~~ report:

(i) ~~[(A)]~~ the type of foundations;

(ii) ~~[(B)]~~ the vantage point from which the crawl space was inspected;

(C) ~~[(3)]~~ generally report present and visible indications used to render the opinion of adverse performance, such as:

(i) ~~[(A)]~~ binding, out-of-square, non-latching doors;

(ii) ~~[(B)]~~ framing or frieze board separations;

(iii) ~~[(C)]~~ sloping floors;

(iv) ~~[(D)]~~ window, wall, floor, or ceiling cracks or separations; and

(v) ~~[(E)]~~ rotating, buckling, cracking, or deflecting masonry cladding.

(D) ~~[(4)]~~ report as Deficient:

(i) ~~[(A)]~~ deteriorated materials;

(ii) ~~[(B)]~~ deficiencies in foundation components such as; beams, joists, bridging, blocking, piers, posts, pilings, columns, sills or subfloor;

(iii) ~~[(C)]~~ deficiencies in retaining walls related to foundation performance;

(iv) ~~[(D)]~~ exposed or damaged reinforcement;

(v) ~~[(E)]~~ crawl space ventilation that is not performing; and

(vi) ~~[(F)]~~ crawl space drainage that is not performing.

(2) ~~[(5)]~~ The inspector is not required to:

(A) enter a crawl space or any area where headroom is less than 18 inches or the access opening is less than 24 inches wide and 18 inches high;

(B) provide an exhaustive list of indicators of possible adverse performance; or

(C) inspect retaining walls not related to foundation performance.

(b) Grading and drainage. ~~[The inspector shall:]~~

(1) The inspector shall report as Deficient:

(A) drainage around the foundation that is not performing;

(B) deficiencies in grade levels around the foundation; and

(C) deficiencies in installed gutter and downspout systems.

(2) The inspector is not required to:

(A) inspect flatwork or detention/retention ponds (except as related to slope and drainage);

(B) determine area hydrology or the presence of underground water; or

(C) determine the efficiency or performance of underground or surface drainage systems.

(c) Roof covering materials. [~~The inspector shall:~~]

(1) The inspector shall:

(A) [(+) ] inspect the roof covering materials from the surface of the roof;

(B) [(2) ] report:

(i) [(A) ] type of roof coverings;

(ii) [(B) ] vantage point from where the roof was inspected;

(iii) [(C) ] evidence of water penetration;

(iv) [(D) ] evidence of previous repairs to the roof covering material, flashing details, skylights and other roof penetrations; and

(C) [(3) ] report as Deficient deficiencies in:

(i) [(A) ] fasteners;

(ii) [(B) ] adhesion;

(iii) [(C) ] roof covering materials;

(iv) [(D) ] flashing details;

(v) [(E) ] skylights; and

(vi) [(F) ] other roof penetrations.

(2) [(4) ] The inspector is not required to:

[(A) determine the remaining life expectancy of the roof covering;]

(A) [(B) ] inspect the roof from the roof level if, in the inspector's reasonable judgment; [~~the inspector cannot safely reach or stay on the roof or significant damage to the roof covering materials may result from walking on the roof;~~]

(i) the inspector cannot safely reach or stay on the roof; or

(ii) significant damage to the roof covering materials may result from walking on the roof;

(B) [(C) ] determine:

(i) the remaining life expectancy of the roof covering; or

(ii) the number of layers of roof covering material;

(C) [(D) ] identify latent hail damage;

(D) [(E) ] exhaustively examine all fasteners and adhesion, or

(E) [(F) ] provide an exhaustive list of locations of deficiencies and water penetrations.

(d) Roof structures and attics. [~~The inspector shall:~~]

(1) The inspector shall:

(A) [(+) ] report:

(i) [(A) ] the vantage point from which the attic space was inspected;

(ii) [(B) ] approximate average depth of attic insulation;

(iii) [(C) ] evidence of water penetration;

(B) [(2) ] report as Deficient:

(i) [(A) ] attic space ventilation that is not performing;

(ii) [(B) ] deflections or depressions in the roof surface as related to adverse performance of the framing and decking;

(iii) [(C) ] missing insulation;

(iv) [(D) ] deficiencies in:

(I) [(+) ] installed framing members and decking;

(II) [(+)] attic access ladders and access openings; and

(III) [(+)] attic ventilators.

(2) [(3) ] The inspector is not required to:

(A) enter attics or unfinished spaces where openings are less than 22 inches by 30 inches or headroom is less than 30 inches;

(B) operate powered ventilators; or

(C) provide an exhaustive list of locations of deficiencies and water penetrations.

(e) Interior walls, ceilings, floors, and doors. [~~The inspector shall:~~]

(1) The inspector shall:

(A) [(+) ] report evidence of water penetration;

(B) [(2) ] report as Deficient:

(i) [(A) ] deficiencies in the condition and performance of doors and hardware;

(ii) [(B) ] deficiencies related to structural performance or water penetration; and

(iii) [(C) ] the absence of or deficiencies in fire separation between the garage and the living space and between the garage and its attic.

(2) [(3) ] The inspector is not required to:

(A) report cosmetic damage or the condition of floor, wall, or ceiling coverings; paints, stains, or other surface coatings; cabinets; or countertops, or

(B) provide an exhaustive list of locations of deficiencies and water penetrations.

(f) Exterior walls, doors, and windows. [~~The inspector shall:~~]

(1) The inspector shall:

(A) [(+) ] report evidence of water penetration;

(B) [(2) ] report as Deficient:

(i) [(A) ] the absence of performing emergency escape and rescue openings in all sleeping rooms;

(ii) [(B) ] a solid wood door less than 1-3/8 inches in thickness, a solid or honeycomb core steel door less than 1-3/8 inches thick, or a 20-minute fire-rated door between the residence and an attached garage;

(iii) [(C) ] missing or damaged screens;

(iv) [(D)] deficiencies related to structural performance or water penetration;

(v) [(E)] deficiencies in:

(I) [(H)] weather stripping, gaskets or other air barrier materials;

(II) [(I)] claddings;

(III) [(II)] water resistant materials and coatings;

(IV) [(III)] flashing details and terminations;

(V) [(IV)] the condition and performance of exterior doors, garage doors and hardware; and

(VI) [(V)] the condition and performance of windows and components.

(2) [(3)] The inspector is not required to:

(A) report the condition of awnings, blinds, shutters, security devices, or other non-structural systems;

(B) determine the cosmetic condition of paints, stains, or other surface coatings; or

(C) operate a lock if the key is not available.

(D) provide an exhaustive list of locations of deficiencies and water penetrations.

(g) Exterior and interior glazing. [The inspector shall:]

(1) The inspector shall:

(A) [(+)] report as Deficient:

(i) [(A)] insulated windows that are obviously fogged or display other evidence of broken seals;

(ii) [(B)] deficiencies in glazing, weather stripping and glazing compound in windows and doors; and

(iii) [(C)] the absence of safety glass in hazardous locations.

(2) The inspector is not required to:

(A) exhaustively inspect insulated windows for evidence of broken seals;

(B) exhaustively inspect glazing for identifying labels; or

(C) identify specific locations of damage.

(h) Interior and exterior stairways. [The inspector shall:]

(1) The inspector shall:

(A) [(+)] report as Deficient:

(i) [(A)] spacing between intermediate balusters, spindles, or rails for steps, stairways, guards, and railings that permit passage of an object greater than 4 inches in diameter, except that on the open side of the staircase treads, spheres less than 4-3/8 inches in diameter may pass through the guard rail balusters or spindles; and

(ii) [(B)] deficiencies in steps, stairways, landings, guardrails, and handrails.

(2) The inspector is not required to exhaustively measure every stairway component.

(i) Fireplaces and chimneys. [The inspector shall:]

(1) The inspector shall:

(A) [(+)] report as Deficient:

(i) [(A)] built-up creosote in accessible areas of the firebox and flue;

(ii) [(B)] the presence of combustible materials in near proximity to the firebox opening;

(iii) [(C)] the absence of fireblocking at the attic penetration of the chimney flue, where accessible; and

(iv) [(D)] deficiencies in the:

(I) [(H)] damper;

(II) [(I)] lintel, hearth, hearth extension, and firebox;

(III) [(II)] gas valve and location;

(IV) [(III)] circulating fan;

(V) [(IV)] combustion air vents; and

(VI) [(V)] chimney structure, termination, coping, crown, caps, and spark arrester.

(2) The inspector is not required to:

(A) verify the integrity of the flue;

(B) perform a chimney smoke test; or

(C) determine the adequacy of the draft.

(j) Porches, Balconies, Decks, and Carports. [The inspector shall:]

(1) The inspector shall:

(A) [(+)] inspect:

(i) [(A)] attached balconies, carports, and porches;

(ii) [(B)] abutting porches, decks, and balconies that are used for ingress and egress; and

(B) [(2)] report as Deficient:

(i) [(A)] on decks 30 inches or higher above the adjacent grade, spacings between intermediate balusters, spindles, or rails that permit passage of an object greater than four inches in diameter; and

(ii) [(B)] deficiencies in accessible components.

(2) [(3)] The inspector is not required to:

(A) exhaustively measure every porch, balcony, deck, or attached carport components; or

(B) enter any area where headroom is less than 18 inches or the access opening is less than 24 inches wide and 18 inches high.

§535.229. *Standards of Practice: Minimum Inspection Requirements for Electrical Systems.*

(a) Service entrance and panels. [The inspector shall:]

(1) The inspector shall:

(A) [(+)] report as Deficient:

(i) [(A)] a drop, weatherhead or mast that is not securely fastened to the building;

(ii) [(B)] the absence of or deficiencies in the grounding electrode system;

(iii) [(C)] missing or damaged dead fronts or covers plates;

(iv) [(D)] conductors not protected from the edges of electrical cabinets, gutters, or cutout boxes;

(v) [(E)] electrical cabinets and panel boards not appropriate for their location; such as a clothes closet, bathrooms or where they are exposed to physical damage;

(vi) [(F)] electrical cabinets and panel boards that are not accessible or do not have a minimum of 36-inches of clearance in front of them;

(vii) [(G)] deficiencies in:

(I) [(H)] electrical cabinets, gutters, cutout boxes, and panel boards;

(II) [(I)] the insulation of the service entrance conductors, drip loop, separation of conductors at weatherheads, and clearances;

(III) [(II)] the compatibility of overcurrent devices and conductors;

(IV) [(III)] the overcurrent device and circuit for labeled and listed 240 volt appliances;

(V) [(IV)] bonding and grounding;

(VI) [(V)] conductors;

(VII) [(VI)] the operation of installed ground-fault or arc-fault circuit interrupter devices; and

(viii) [(H)] the absence of:

(I) [(I)] trip ties on 240 volt overcurrent devices or multi-wire branch circuit;

(II) [(II)] appropriate connections;

(III) [(III)] anti-oxidants on aluminum conductor terminations;

(IV) [(IV)] a main disconnecting means.

(2) The inspector is not required to:

(A) determine present or future sufficiency of service capacity amperage, voltage, or the capacity of the electrical system;

(B) test arc-fault circuit interrupter devices when the property is occupied or damage to personal property may result, in the inspector's reasonable judgment;

(C) conduct voltage drop calculations;

(D) determine the accuracy of overcurrent device labeling;

(E) remove covers where hazardous as judged by the inspector;

(F) verify the effectiveness of overcurrent devices; or

(G) operate overcurrent devices.

(b) Branch circuits, connected devices, and fixtures. [The inspector shall:]

(1) The inspector shall:

(A) [(H)] manually test the installed and accessible smoke and carbon monoxide alarms;

(B) [(2)] report the type of branch circuit conductors;

(C) [(3)] report as Deficient:

(i) [(A)] the absence of ground-fault circuit interrupter protection in all:

(I) [(H)] bathroom receptacles;

(II) [(I)] garage receptacles;

(III) [(II)] outdoor receptacles;

(IV) [(III)] crawl space receptacles;

(V) [(IV)] unfinished basement receptacles;

(VI) [(V)] kitchen countertop receptacles; and

(VII) [(VI)] receptacles that are located within six feet of the outside edge of a sink;

(ii) [(B)] the failure of operation of ground-fault circuit interrupter protection devices;

(iii) [(C)] missing or damaged receptacle, switch or junction box covers;

(iv) [(D)] the absence of:

(I) [(H)] equipment disconnects;

(II) [(I)] appropriate connections, such as copper/aluminum approved devices, if branch circuit aluminum conductors are discovered in the main or sub-panel based on a random sampling of accessible receptacles and switches;

(v) [(E)] deficiencies in:

(I) [(H)] receptacles;

(II) [(I)] switches;

(III) [(II)] bonding or grounding;

(IV) [(III)] wiring, wiring terminations, junction boxes, devices, and fixtures, including improper location;

(V) [(IV)] doorbell and chime components;

(VI) [(V)] smoke and carbon monoxide alarms;

(vi) [(F)] improper use of extension cords;

(vii) [(G)] deficiencies in or absences of conduit, where applicable; and

(viii) [(H)] the absence of smoke alarms:

(I) [(H)] in each sleeping room;

(II) [(I)] outside each separate sleeping area in the immediate vicinity of the sleeping rooms; and

(III) [(II)] in the living space of each story of the dwelling.

(2) [(4)] The inspector is not required to:

(A) inspect low voltage wiring;

(B) disassemble mechanical appliances;

(C) verify the effectiveness of smoke alarms;

(D) verify interconnectivity of smoke alarms;

(E) activate smoke or carbon monoxide alarms that are or may be monitored or require the use of codes;

(F) verify that smoke alarms are suitable for the hearing-impaired;

(G) remove the covers of junction, fixture, receptacle or switch boxes unless specifically required by these standards.

§535.230. *Standards of Practice: Minimum Inspection Requirements for Heating, Ventilation, and Air Conditioning Systems.*

(a) Heating equipment. [~~The inspector shall:~~]

(1) General requirements. [~~report:~~]

(A) The inspector shall report:

(i) [~~(A)~~] the type of heating systems;

(ii) [~~(B)~~] the energy sources;

(B) [(2)] report as Deficient:

(i) [~~(A)~~] inoperative units;

(ii) [~~(B)~~] deficiencies in the thermostats;

(iii) [~~(C)~~] inappropriate location;

(iv) [~~(D)~~] the lack of protection from physical damage;

(v) [~~(E)~~] burners, burner ignition devices or heating elements, switches, and thermostats that are not a minimum of 18 inches above the lowest garage floor elevation, unless the unit is listed for garage floor installation;

(vi) [~~(F)~~] the absence of an opening that would allow access to equipment for inspection, service, repair or replacement without removing permanent construction or building finish;

(vii) [~~(G)~~] when applicable; a floored passageway and service platform that would allow access for equipment inspection, service, repair or replacement;

(viii) [~~(H)~~] deficiencies in mounting and performance of window and wall units;

(2) [(4)] in electric units, deficiencies in:

(A) [(4)] performance of heat pumps;

(B) [(4)] performance of heating elements; and

(C) [(4)] condition of conductors; and

(3) [(4)] in gas units:

(A) [(4)] gas leaks;

(B) [(4)] flame impingement, uplifting flame, improper flame color, or excessive scale buildup;

(C) [(4)] the absence of a gas shut-off valve within six feet of the appliance;

(D) [(4)] the absence of a gas appliance connector or one that exceeds six feet in length;

(E) [(4)] gas appliance connectors that are concealed within or extended through walls, floors, partitions, ceilings or appliance housings; and

(F) [(4)] deficiencies in:

(i) [(4)] combustion, and dilution air;

(ii) [(4)] gas shut-off valves;

(iii) [(4)] access to a gas shutoff valves that prohibits full operation;

(iv) [(4)] gas appliance connector materials; and

(v) [(4)] the vent pipe, draft hood, draft, proximity to combustibles, and vent termination point and clearances; and

(b) Cooling equipment. [~~other than evaporative coolers. The inspector shall:~~]

(1) Requirements for cooling units other than evaporative coolers. [~~report the type of systems:~~]

(A) the inspector shall report the type of systems;

(B) [(2)] the inspector shall report as Deficient:

(i) [~~(A)~~] inoperative units;

(ii) [~~(B)~~] inadequate cooling as demonstrated by its performance;

(iii) [~~(C)~~] the absence of an opening that would allow access to equipment for inspection, service, repair or replacement without removing permanent construction or building finish;

(iv) [~~(D)~~] when applicable; a floored passageway and service platform that would allow access for equipment inspection, service, repair or replacement;

(v) [~~(E)~~] noticeable vibration of blowers or fans;

(vi) [~~(F)~~] water in the auxiliary/secondary drain pan;

(vii) [~~(G)~~] a primary drain pipe that discharges in a sewer vent;

(viii) [~~(H)~~] missing or deficient refrigerant pipe insulation;

(ix) [(4)] dirty coils, where accessible;

(x) [(4)] condensing units lacking adequate clearances or air circulation or that has deficiencies in the fins, location, levelness, or elevation above grade surfaces;

(xi) [~~(K)~~] deficiencies in:

(I) [(4)] the condensate drain and auxiliary/secondary pan and drain system;

(II) [(4)] mounting and performance of window or wall units; and

(III) [(4)] thermostats.

(2) [(4)] Requirements for evaporative [~~Evaporative~~] coolers. [~~The inspector shall:~~]

(A) [(4)] The inspector shall report:

(i) [~~(A)~~] type of systems;

(ii) [~~(B)~~] the type of water supply line;

(B) [(2)] The inspector shall report as Deficient:

(i) [~~(A)~~] inoperative units;

(ii) [~~(B)~~] inadequate access and clearances;

(iii) [~~(C)~~] deficiencies in performance or mounting;

(iv) [~~(D)~~] missing or damaged components;

(v) [~~(E)~~] the presence of active water leaks; and

(vi) [~~(F)~~] the absence of backflow prevention.

(c) [(4)] Duct systems, chases, and vents. [~~The inspector shall report as Deficient:~~]

(1) The inspector shall report as Deficient:

(A) ~~[(1)]~~ damaged duct systems or improper material;  
(B) ~~[(2)]~~ damaged or missing duct insulation;  
(C) ~~[(3)]~~ the absence of air flow at accessible supply registers;

(D) ~~[(4)]~~ the presence of gas piping and sewer vents concealed in ducts, plenums and chases;

(E) ~~[(5)]~~ ducts or plenums in contact with earth; and

(2) ~~[(6)]~~ The inspector shall report as Deficient deficiencies in:

(A) filters;

(B) grills or registers; and

(C) the location of return air openings.

(d) ~~[(e)]~~ For heating, ventilation, and air conditioning systems inspected under this section, the [The] inspector is not required to perform the following actions:

(1) program digital thermostats or controls;

(2) inspect:

(A) for pressure of the system refrigerant, type of refrigerant, or refrigerant leaks;

(B) winterized or decommissioned equipment; or

(C) duct fans, humidifiers, dehumidifiers, air purifiers, motorized dampers, electronic air filters, multi-stage controllers, sequencers, heat reclaimers, wood burning stoves, boilers, oil-fired units, supplemental heating appliances, de-icing provisions, or reversing valves;

(3) operate:

(A) setback features on thermostats or controls;

(B) cooling equipment when the outdoor temperature is less than 60 degrees Fahrenheit;

(C) radiant heaters, steam heat systems, or unvented gas-fired heating appliances; or

(D) heat pumps, in the heat pump mode, when the outdoor temperature is above 70 degrees;

(4) verify:

(A) compatibility of components;

(B) tonnage match of indoor coils and outside coils or condensing units;

(C) the accuracy of thermostats; or

(D) the integrity of the heat exchanger; or

(5) determine:

(A) sizing, efficiency, or adequacy of the system;

(B) balanced air flow of the conditioned air to the various parts of the building; or

(C) types of materials contained in insulation.

§535.231. *Standards of Practice: Minimum Inspection Requirements for Plumbing Systems.*

(a) Plumbing systems. ~~[The inspector shall:]~~

(1) The inspector shall: ~~[report:]~~

(A) report: ~~[location of water meter:]~~

~~(i) [(A)]~~ location of water meter;

~~(ii) [(B)]~~ location of homeowners main water supply shutoff valve; and

~~(iii) [(C)]~~ static water pressure;

(B) ~~[(2)]~~ report as Deficient:

~~(i) [(A)]~~ the presence of active leaks;

~~(ii) [(B)]~~ the lack of a pressure reducing valve when the water pressure exceeds 80 PSI;

~~(iii) [(C)]~~ the lack of an expansion tank at the water heater(s) when a pressure reducing valve is in place at the water supply line/system;

~~(iv) [(D)]~~ the absence of:

~~(I) [(+)]~~ fixture shut-off valves;

~~(II) [(+)]~~ dielectric unions, when applicable;

~~(III) [(+)]~~ back-flow devices, anti-siphon devices, or air gaps at the flow end of fixtures; and

~~(v) [(E)]~~ deficiencies in:

~~(I) [(+)]~~ water supply pipes and waste pipes;

~~(II) [(+)]~~ the installation and termination of the vent system;

~~(III) [(+)]~~ the performance of fixtures and faucets not connected to an appliance;

~~(IV) [(+)]~~ water supply, as determined by viewing functional flow in two fixtures operated simultaneously;

~~(V) [(+)]~~ fixture drain performance;

~~(VI) [(+)]~~ orientation of hot and cold faucets;

~~(VII) [(+)]~~ installed mechanical drain stops;

~~(VIII) [(+)]~~ commodes, fixtures, showers, tubs, and enclosures; and

~~(IX) [(+)]~~ the condition of the gas distribution system.

(2) ~~[(3)]~~ The inspector is not required to:

(A) operate any main, branch, or shut-off valves;

(B) operate or inspect sump pumps or waste ejector pumps;

(C) verify the performance of:

~~(i)~~ the bathtub overflow;

~~(ii)~~ clothes washing machine drains or hose bibbs;

or

~~(iii)~~ floor drains;

(D) inspect:

~~(i)~~ any system that has been winterized, shut down or otherwise secured;

~~(ii)~~ circulating pumps, free-standing appliances, solar water heating systems, water-conditioning equipment, filter systems, water mains, private water supply systems, water wells, pressure tanks, sprinkler systems, swimming pools, or fire sprinkler systems;

~~(iii)~~ inaccessible gas supply system components for leaks;

(iv) for sewer clean-outs; or  
(v) for the presence or performance of private sewage disposal systems; or

(E) determine:

(i) quality, potability, or volume of the water supply;  
or

(ii) effectiveness of backflow or anti-siphon devices.

(b) Water heaters. ~~[The inspector shall:]~~

(1) General Requirements. ~~[Report:]~~

(A) The inspector shall:

(i) report:

(I) ~~[(A)]~~ the energy source;

(II) ~~[(B)]~~ the capacity of the units;

(ii) ~~[(2)]~~ report as Deficient:

(I) ~~[(A)]~~ inoperative units;

(II) ~~[(B)]~~ leaking or corroded fittings or tanks;

(III) ~~[(C)]~~ damaged or missing components;

(IV) ~~[(D)]~~ the absence of a cold water shut-off valve;

(V) ~~[(E)]~~ if applicable, the absence of a pan or a pan drain system that does not terminate over a waste receptor or to the exterior of the building above the ground surface;

(VI) ~~[(F)]~~ inappropriate locations;

(VII) ~~[(G)]~~ the lack of protection from physical damage;

(VIII) ~~[(H)]~~ burners, burner ignition devices or heating elements, switches, or thermostats that are not a minimum of 18 inches above the lowest garage floor elevation, unless the unit is listed for garage floor installation;

(IX) ~~[(I)]~~ the absence of an opening that would allow access to equipment for inspection, service, repair or replacement without removing permanent construction or building finish;

(X) ~~[(J)]~~ when applicable; a floored passageway and service platform that would allow access for equipment inspection, service, repair or replacement;

(XI) ~~[(K)]~~ the absence of or deficiencies in the temperature and pressure relief valve and discharge piping;

(XII) ~~[(L)]~~ a temperature and pressure relief valve that failed to operate, when tested manually;

(B) The inspector is not required to:

(i) verify the effectiveness of the temperature and pressure relief valve, discharge piping, or pan drain pipes;

(ii) operate the temperature and pressure relief valve if the operation of the valve may, in the inspector's reasonable judgment, cause damage to persons or property; or

(iii) determine the efficiency or adequacy of the unit.

(2) ~~[(M)]~~ Requirements for [in] electric units. The inspector shall report as Deficient[;] deficiencies in:

(A) ~~[(i)]~~ performance of heating elements; and

~~[(B)] [(ii)]~~ condition of conductors; and

~~[(3)] [(N)]~~ Requirements for [in] gas units. The inspector shall report as Deficient:

~~[(A)] [(i)]~~ gas leaks;

~~[(B)] [(ii)]~~ flame impingement, uplifting flame, improper flame color, or excessive scale build-up;

~~[(C)] [(iii)]~~ the absence of a gas shut-off valve within six feet of the appliance;

~~[(D)] [(iv)]~~ the absence of a gas appliance connector or one that exceeds six feet in length;

~~[(E)] [(v)]~~ gas appliance connectors that are concealed within or extended through walls, floors, partitions, ceilings or appliance housings;

~~[(F)] [(vi)]~~ deficiencies in:

~~(i) [(H)]~~ combustion and dilution air;

~~(ii) [(H)]~~ gas shut-off valves;

~~(iii) [(H)]~~ access to a gas shutoff valves that prohibit full operation;

~~(iv) [(IV)]~~ gas appliance connector materials; and

~~(v) [(V)]~~ vent pipe, draft hood, draft, proximity to combustibles, and vent termination point and clearances.

~~[(3) The inspector is not required to:]~~

~~[(A) verify the effectiveness of the temperature and pressure relief valve, discharge piping, or pan drain pipes:]~~

~~[(B) operate the temperature and pressure relief valve if the operation of the valve may, in the inspector's reasonable judgment, cause damage to persons or property; or]~~

~~[(C) determine the efficiency or adequacy of the unit.]~~

(c) Hydro-massage therapy equipment. [The inspector shall:]

(1) The inspector shall report as Deficient:

(A) report as Deficient:

(i) [(A)] inoperative units;

(ii) [(B)] the presence of active leaks;

(iii) [(C)] deficiencies in components and performance;

(iv) [(D)] missing and damaged components;

(v) [(E)] the absence of an opening that would allow access to equipment for inspection, service, repair or replacement without removing permanent construction or building finish; and

(vi) [(F)] the absence or failure of operation of ground-fault circuit interrupter protection devices; and

(2) The inspector is not required to determine the adequacy of self-draining features of circulation systems.

§535.232. *Standards of Practice: Minimum Inspection Requirements for Appliances.*

(a) General provisions. The inspector is not required to:

(1) operate or determine the condition of other auxiliary components of inspected items;

(2) test for microwave oven radiation leaks;

- (3) inspect self-cleaning functions;
- (4) disassemble appliances;
- (5) determine the adequacy of venting systems; or
- (6) determine proper routing and lengths of duct systems.

(b) [(a)] Dishwashers. The inspector shall report as Deficient:

- (1) inoperative units;
- (2) deficiencies in performance or mounting;
- (3) rusted, missing or damaged components;
- (4) the presence of active water leaks; and
- (5) the absence of backflow prevention.

(c) [(b)] Food waste disposers. The inspector shall report as Deficient:

- (1) inoperative units;
- (2) deficiencies in performance or mounting;
- (3) missing or damaged components; and
- (4) the presence of active water leaks.

(d) [(c)] Range hoods and exhaust systems. The inspector shall report as Deficient:

- (1) inoperative units;
- (2) deficiencies in performance or mounting;
- (3) missing or damaged components;
- (4) ducts that do not terminate outside the building, if the unit is not of a re-circulating type or configuration; and
- (5) improper duct material.

(e) [(d)] Electric or gas ranges, cooktops, and ovens. The inspector shall report as Deficient:

- (1) inoperative units;
- (2) missing or damaged components;
- (3) combustible material within thirty inches above the cook top burners;
- (4) absence of an anti-tip device, if applicable;
- (5) gas leaks;
- (6) the absence of a gas shutoff valve within six feet of the appliance;
- (7) the absence of a gas appliance connector or one that exceeds six feet in length;
- (8) gas appliance connectors that are concealed within or extended through walls, floors, partitions, ceilings or appliance housings;
- (9) deficiencies in:
  - (A) thermostat accuracy (within 25 degrees at a setting of 350° F);
  - (B) mounting and performance;
  - (C) gas shut-off valves;
  - (D) access to a gas shutoff valves that prohibits full operation; and
  - (E) gas appliance connector materials.

(f) [(e)] Microwave ovens. The inspector shall inspect built-in units and report as Deficient:

- (1) inoperative units;
- (2) deficiencies in performance or mounting; and
- (3) missing or damaged components.

(g) [(f)] Mechanical exhaust systems and bathroom heaters. The inspector shall report as Deficient:

- (1) inoperative units;
- (2) deficiencies in performance or mounting;
- (3) missing or damaged components;
- (4) ducts that do not terminate outside the building; and
- (5) a gas heater that is not vented to the exterior of the building unless the unit is listed as an unvented type.

(h) [(g)] Garage door operators. The inspector shall report as Deficient:

- (1) inoperative units;
- (2) deficiencies in performance or mounting;
- (3) missing or damaged components;
- (4) installed photoelectric sensors located more than six inches above the garage floor; and
- (5) door locks or side ropes that have not been removed or disabled.

(i) [(h)] Dryer exhaust systems. The inspector shall report as Deficient:

- (1) missing or damaged components;
- (2) the absence of a dryer exhaust system when provisions are present for a dryer;
- (3) ducts that do not terminate to the outside of the building;
- (4) screened terminations; and
- (5) ducts that are not made of metal with a smooth interior finish.

[(i) The inspector is not required to:]

- [(1) operate or determine the condition of other auxiliary components of inspected items;]
- [(2) test for microwave oven radiation leaks;]
- [(3) inspect self-cleaning functions;]
- [(4) disassemble appliances;]
- [(5) determine the adequacy of venting systems; or]
- [(6) determine proper routing and lengths of duct systems.]

§535.233. *Standards of Practice: Minimum Inspection Requirements for Optional Systems.*

(a) An inspector is not required to inspect the components or systems described under this section.

(b) If an inspector agrees to inspect a component or system described under [in] this section, the general provisions under §535.227 of this title [(relating to Standards of Practice: General Provisions)] and the [applicable] provisions and requirements of this section applicable to that component or system [of this section] apply.

(c) [(1)] Landscape irrigation (sprinkler) systems. [The inspector shall:]

(1) The inspector shall:

(A) manually operate all zones or stations on the system through the controller;

(B) report as Deficient:

(i) the absence of a rain or moisture sensor,

(ii) inoperative zone valves;

(iii) surface water leaks;

(iv) the absence of a backflow prevention device;

(v) the absence of shut-off valves between the water meter and backflow device;

(vi) deficiencies in the performance and mounting of the controller;

(vii) missing or damaged components; and

(viii) deficiencies in the performance of the water emission devices; such as, sprayer heads, rotary sprinkler heads, bubblers or drip lines.

(2) [(C)] The inspector is not required to inspect:

(A) [(i)] for effective coverage of the irrigation system;

(B) [(ii)] the automatic function of the controller;

(C) [(iii)] the effectiveness of the sensors; such as, rain, moisture, wind, flow or freeze sensors; or

(D) [(iv)] sizing and effectiveness of backflow prevention device.

(d) [(2)] Swimming pools, spas, hot tubs, and equipment. [The inspector shall:]

(1) The inspector shall:

(A) report the type of construction;

(B) report as Deficient:

(i) the presence of a single blockable main drain (potential entrapment hazard);

(ii) a pump motor, blower, or other electrical equipment that lacks bonding;

(iii) the absence of or deficiencies in safety barriers;

(iv) water leaks in above-ground pipes and equipment;

(v) the absence or failure in performance of ground-fault circuit interrupter protection devices; and

(vi) deficiencies in:

(I) surfaces;

(II) tiles, coping, and decks;

(III) slides, steps, diving boards, handrails, and other equipment;

(IV) drains, skimmers, and valves;

(V) filters, gauges, pumps, motors, controls, and sweeps;

(VI) lighting fixtures; and

(VII) the pool heater that these standards of practice require to be reported for the heating system.

(2) [(C)] The inspector is not required to:

(A) [(i)] disassemble filters or dismantle or otherwise open any components or lines;

(B) [(ii)] operate valves;

(C) [(iii)] uncover or excavate any lines or concealed components of the system;

(D) [(iv)] fill the pool, spa, or hot tub with water;

(E) [(v)] inspect any system that has been winterized, shut down, or otherwise secured;

(F) [(vi)] determine the presence of sub-surface water tables;

(G) [(vii)] determine the effectiveness of entrapment covers;

(H) [(viii)] determine the presence of pool shell or sub-surface leaks; or

(I) [(ix)] inspect ancillary equipment such as computer controls, covers, chlorinators or other chemical dispensers, or water ionization devices or conditioners other than required by this section.

(e) [(3)] Outbuildings. [The inspector shall report as Deficient:]

(1) [(A)] The inspector shall report as Deficient the absence or failure in performance of ground-fault circuit interrupter protection devices in grade-level portions of unfinished accessory buildings used for storage or work areas, boathouses, and boat hoists; and

(2) [(B)] The inspector shall report as Deficient deficiencies in the structural, electrical, plumbing, heating, ventilation, and cooling systems that these standards of practice require to be reported for the principal building.

(f) [(4)] Private water wells. [The inspector shall:]

(1) The inspector shall:

(A) operate at least two fixtures simultaneously;

(B) recommend or arrange to have performed coliform testing;

(C) report:

(i) the type of pump and storage equipment;

(ii) the proximity of any known septic system;

(D) report as Deficient deficiencies in:

(i) water pressure and flow and performance of pressure switches;

(ii) the condition of accessible equipment and components; and

(iii) the well head, including improper site drainage and clearances.

(2) [(E)] The inspector is not required to:

(A) [(i)] open, uncover, or remove the pump, heads, screens, lines, or other components of the system;

(B) [(ii)] determine the reliability of the water supply or source; or

(C) [(iii)] locate or verify underground water leaks.

(g) [(5)] Private sewage disposal (septic) systems. [The inspector shall:]

(1) The inspector shall:

(A) report:

- (i) the type of system;
- (ii) the location of the drain or distribution field;
- (iii) the proximity of any known water wells, underground cisterns, water supply lines, bodies of water, sharp slopes or breaks, easement lines, property lines, soil absorption systems, swimming pools, or sprinkler systems;

(B) report as Deficient:

- (i) visual or olfactory evidence of effluent seepage or flow at the surface of the ground;
- (ii) inoperative aerators or dosing pumps; and
- (iii) deficiencies in:
  - (I) accessible components;
  - (II) functional flow;
  - (III) site drainage and clearances around or adjacent to the system; and
  - (IV) the aerobic discharge system.

(2) [(6)] The inspector is not required to:

- (A) [(7)] excavate or uncover the system or its components;
- (B) [(8)] determine the size, adequacy, or efficiency of the system; or
- (C) [(9)] determine the type of construction used.

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 May 3, 2016.

TRD-201602112

Kristen Worman

Deputy General Counsel

Texas Real Estate Commission

Earliest possible date of adoption: June 19, 2016

For further information, please call: (512) 936-3093



## TITLE 25. HEALTH SERVICES

### PART 1. DEPARTMENT OF STATE HEALTH SERVICES

#### CHAPTER 1. MISCELLANEOUS PROVISIONS SUBCHAPTER D. STATE EMPLOYEE HEALTH FITNESS AND EDUCATION PROGRAMS

##### 25 TAC §1.61

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §1.61, concerning the Worksite Wellness Advisory Board (board).

#### BACKGROUND AND PURPOSE

The purpose of the repeal is to implement Government Code, Chapter 664, amended by Senate Bill (SB) 277, 84th Legislature, Regular Session, 2015, which abolished the board.

The board was created by the Legislature in 2007 to advise the department, executive commissioner, and statewide wellness coordinator on worksite wellness issues, including funding and resource development for worksite wellness programs; identifying food service vendors that successfully market healthy foods; best practices for worksite wellness used by the private sector; and worksite wellness features and architecture for new state buildings based on features and architecture used by the private sector.

The board was one of several advisory committees recommended for abolishment by the Sunset Advisory Commission in 2014. Subsequent to the repeal of the statutory requirements for this and other committees, the commission conducted a comprehensive analysis and sought stakeholder input on the continuation of the advisory committees abolished in statute to determine if there was a need to recreate any of the committees in rule. No comments were received regarding the discontinuation of the board. The department will continue to obtain input on worksite wellness issues through ongoing interactions with staff of state agencies and stakeholder groups.

#### SECTION-BY-SECTION SUMMARY

Section 1.61 is being repealed because this rule is no longer necessary. SB 277 amended Government Code, Chapter 664, by abolishing the board.

#### FISCAL NOTE

Mr. Brett Spencer, Manager of the Primary Prevention Branch, has determined that for each year of the first five years that the repeal will be in effect, there will be no fiscal implications to the state or local governments as a result of enforcing or administering the repealed section as proposed.

#### SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Spencer has determined that there will be no effect on small businesses or micro-businesses or persons who are required to comply with the section as proposed. This was determined by consideration that the topics addressed by the board applied only to Texas state agencies and imposed no responsibilities or limitations on small or micro-businesses.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

#### PUBLIC BENEFIT

Mr. Spencer has also determined that for each year of the first five years that the section will be repealed, the public will benefit from repeal of the section. The public benefit anticipated from enforcing or administering the repealed section is to remove a rule from the department's rules database that is longer necessary.

## REGULATORY ANALYSIS

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

## TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed repeal 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 Government Code, §2007.043.

## PUBLIC COMMENT

Comments on the proposal may be submitted to Brett Spencer, Primary Prevention Branch, Department of State Health Services, Mail Code 1965, P.O. Box 149347, Austin, Texas 78714-9347, (512) 776-6161, or by email to Brett.Spencer@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

## STATUTORY AUTHORITY

The repeal is authorized by Government Code, Chapter 664, which has been amended to remove reference to rules concerning the Worksite Wellness Advisory Board; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The repeal affects Government Code, Chapters 551 and Chapter 664; and Health and Safety Code, Chapter 1001.

§1.61. *Worksite Wellness Advisory Board.*

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 May 9, 2016.

TRD-201602262

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: June 19, 2016

For further information, please call: (512) 776-6972



## PART 6. STATEWIDE HEALTH COORDINATING COUNCIL

### CHAPTER 571. HEALTH PLANNING AND RESOURCE DEVELOPMENT

The Statewide Health Coordinating Council (council) proposes an amendment to §571.1 and the repeal of §§571.11 - 571.13, concerning general provisions, state health plan and plan implementation, and the Health Information Technology Advisory Committee (advisory committee).

## BACKGROUND AND PURPOSE

The council issues directives for and provides guidance on the development of the state health plan, submits the plan to the Health and Human Services Commission for review and comment, and approves the plan for submission to the governor. The Department of State Health Services (department), in accordance with rules adopted by the council, prepares and reviews a proposed state health plan every six years and revises and updates the plan biennially. The department submits the proposed plan to the council. The rules proposed for amendment, readoption, and repeal implement Health and Safety Code, Chapter 104, Statewide Health Coordinating Council and State Health Plan, and outline the development and implementation of the state health plan.

The council formed the advisory committee in 2006 pursuant to Health and Safety Code, §104.0156 and developed a long-range plan for health care information technology, including the use of electronic medical records, computerized clinical support systems, computerized physician order entry, regional data sharing interchanges for health care information, and other methods of incorporating information technology in pursuit of greater cost-effectiveness and better patient outcomes in health care. The rules proposed for repeal implemented the advisory committee.

Government Code, §2001.039, governs an agency's review of rules, and generally requires that a state agency review a rule no later than the fourth anniversary of the date on which the rule takes effect and every four years after that date. A state agency's review of a rule must include an assessment of whether the reasons for adopting each rule continue to exist.

The amendment to §571.1 and the readoption of §571.2 are necessary to comply with Health and Safety Code, §104.012. Section 571.2 is readopted without changes to the rule.

The repeal of §§571.11 - 571.13 for the advisory committee is necessary as the council's reasons for initially adopting the rules no longer exist, given the completion of the long-range plan mandated by Health and Safety Code, §104.0156.

## SECTION-BY-SECTION SUMMARY

The amendment to §571.1(c) replaces the "Texas Department of Health" with the "Texas Department of State Health Services" to reflect House Bill 2292, 78th Legislature, Regular Session, 2003, which abolished the Texas Department of Health and created the department.

## FISCAL NOTE

Matthew Turner, PhD, MPH, Center for Health Statistics, has determined that for each year of the first five years that the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

## SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Dr. Turner has also determined that there will be no adverse economic costs to small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-busi-

nesses will not be required to alter their business practices in order to comply with the sections.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

#### PUBLIC BENEFIT

In addition, Dr. Turner also has determined that for each year of the first five years the sections are in effect, the public will benefit from their adoption. These updated rules clarify the relationship between the council and the department and remove outdated text.

#### REGULATORY ANALYSIS

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

#### TAKINGS IMPACT ASSESSMENT

The council has determined that the proposed rules do 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, do not constitute a taking under Government Code, §2007.043.

#### PUBLIC COMMENT

Comments on the proposal may be submitted to Matthew Turner, PhD, MPH, Health Professions Resource Center, Center for Health Statistics, Department of State Health Services, Mail Code 1898, P.O. Box 149347, Austin, Texas 78714-9347 or by email to matt.turner@dshs.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

### SUBCHAPTER A. STATEWIDE HEALTH COORDINATING COUNCIL

#### 25 TAC §571.1

##### STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §104.012, which authorizes the council to adopt rules governing the development and implementation of the state health plan. The review of the rules implements Government Code, §2001.039.

The amendment affects Health and Safety Code, Chapter 104.

##### §571.1. *General Provisions.*

(a) - (b) (No change.)

(c) Assistance. The Texas Department of State Health Services (department) shall assist the council in performing the council's duties and functions as described in a memorandum of understanding between the council and the department.

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

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TRD-201602098

Matt Turner

Health Professions Resource Center

Statewide Health Coordinating Council

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For further information, please call: (512) 776-6972



### SUBCHAPTER B. HEALTH INFORMATION TECHNOLOGY ADVISORY COMMITTEE

#### 25 TAC §§571.11 - 571.13

##### STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §104.012, which authorizes the council to adopt rules governing the development and implementation of the state health plan. The review of the rules implements Government Code, §2001.039.

The repeals affect Health and Safety Code, Chapter 104.

##### §571.11. *Definitions.*

##### §571.12. *Objectives.*

##### §571.13. *Committee Constitution.*

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

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TRD-201602099

Matt Turner

Health Professions Resource Center

Statewide Health Coordinating Council

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For further information, please call: (512) 776-6972



### TITLE 34. PUBLIC FINANCE

### PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

#### CHAPTER 3. TAX ADMINISTRATION

##### SUBCHAPTER V. FRANCHISE TAX

#### 34 TAC §3.584

The Comptroller of Public Accounts proposes amendments to §3.584, concerning margin: reports and payments. The amendments implement Senate Bill 1, 82nd Legislature, First Called Session, 2011 (SB 1); House Bill 500, 83rd Legislature, 2013 (HB 500); House Bill 32, 84th Legislature, 2015 (HB 32); House Bill 2891, 84th Legislature, 2015 (HB 2891); Senate Bill 1049, 84th Legislature, 2015 (SB 1049); and Senate Bill 1364, 84th Legislature, 2015 (SB 1364). The amendments also update the section to reflect policy decisions and to improve readability.

Subsection (b) is now titled "definitions" and is amended to include definitions currently located throughout this section and to add definitions for terms not previously defined for use within this section. Information originally in subsection (b) concerning non-taxable entity reporting is now in new subsection (c)(7).

New paragraph (1) is added to include the definition of "beginning date" for franchise tax reporting purposes. This definition was originally under subsection (c)(1)(A) and is amended to add the beginning date for a taxable entity that qualifies as a new veteran-owned business as provided in SB 1049.

New paragraph (2) defines the term "primarily engaged in retail or wholesale trade." The new definition incorporates information that was provided in subsection (d)(3) of the current section, with changes. The subparagraphs have been rearranged. Information for taxable entities that produce some of the products they sell is now located in subparagraph (C). Clauses (i) - (iii) are added to subparagraph (C) to include guidance for determining whether a taxable entity produces the products it sells. The content of subparagraph (C)(i), regarding modifications made to an acquired product, was previously provided in subsection (d)(3). Subparagraph (C)(ii) and (iii) are added to memorialize comp-troller policy from STAR Accession No. 201508350L.

New paragraph (3) adds an updated definition of "retail trade." The meaning of retail trade was originally included in former subsection (d)(3), concerning the rate, but was referenced only as being "under Division...G" of the Standard Industrial Classification (SIC) Manual. Subparagraph (A) defines retail trade as originally provided in House Bill 3, 79th Legislature, Third Called Session, 2006 (HB 3), to mean "the activities described in Division G" of the SIC Manual. Subparagraph (B) expands the definition of retail trade under SB 1, to include apparel rental activities classified as SIC Industry 5999 or 7299. Subparagraph (C) adds to the definition of retail trade, as further expanded by HB 500, to include SIC Industry Group 753, Automotive Repair Shops; rental-purchase agreement activities regulated by Chapter 92, Business & Commerce Code; activities involving the rental or leasing of tools, party and event supplies, and furniture that are classified as SIC Industry 7359; and heavy construction equipment rental or leasing activities classified as SIC Industry 7353.

New paragraph (4) defines and abbreviates the term "Standard Industrial Classification Manual" as SIC Manual to improve readability throughout this section.

New paragraph (5) adds the definition of "wholesale trade" as originally defined in HB 3, to mean "the activities described in Division F" of the SIC Manual. The meaning of wholesale trade was originally included in former subsection (d)(3), referenced only as being "under Division F" of the SIC Manual.

New paragraph (6) defines the term "unrelated party." This term is used in the definition of "primarily engaged in retail or wholesale trade" in subsection (b)(2) and was not previously defined.

Subsection (c) concerning reports and due dates is amended for readability and to eliminate redundant information. The information regarding each type of report was separated and renumbered to be addressed as individual paragraphs that include initial reports, first annual reports, annual reports, and final reports. Subsequent paragraphs include reporting information regarding extensions, transition, nontaxable entities, passive entities, combined reporting, postmark dates, and receivership.

Paragraph (1) now includes only the filing information for initial reports from former subparagraph (B) without change. The infor-

mation in former paragraph (1) on first annual reports and initial reports is removed because the same information was also provided in former subparagraphs (B) and (C). The information in former paragraph (1) on reporting for a taxable entity in receivership is moved to new paragraph (12). The definition of "beginning date" in former subparagraph (A) is moved to new subsection (b) concerning definitions. The information in former subparagraph (C)(i) on first annual reports is moved to paragraph (2), replacing the information in paragraph (2) on the date of filing which is moved to new paragraph (11). The information in former subparagraph (C)(ii) on annual reports is moved to new paragraph (3). The information in former subparagraphs (D)-(H) has been moved to new paragraphs (4), (5), (6), (8), and (9) respectively. New paragraph (5) is amended to add the title to the referenced Tax Code section.

Paragraph (2), now titled "First annual reports," includes information from former paragraph (1)(C)(i) without change.

New paragraph (3) includes the information on annual reports previously provided in former paragraph (1)(C)(ii) without change.

New paragraph (4) includes the reference to §3.592 of this title for information on final reports previously provided in former paragraph (1)(E) but is amended to specify the due date for final reports.

New paragraph (5) amends the information on extensions previously provided in former paragraph (1)(D) by including the information on extensions from Tax Code, §111.057 (Extension for Filing a Report) instead of referencing §3.1 of this title because §3.1 no longer contains information on extensions.

New paragraph (6) includes the transition information previously provided in former paragraph (1)(F) without change.

New paragraph (7) includes the information on nontaxable entities previously provided in subsection (b) without change.

New paragraph (8) includes the information on passive entities previously provided in former paragraph (1)(G) without change.

New paragraph (9) includes the information on combined reporting previously provided in former paragraph (1)(H) but is amended to delete the name of §3.590 of this title as it has already been referenced in new subsection (b)(6).

New paragraph (10) on new veteran-owned businesses is added to reference §3.574 of this title for information concerning the reporting requirements of a qualifying new veteran-owned business.

New paragraph (11), titled "Date of filing," amends former paragraph (2) by replacing the original information with a reference to §3.13 of this title which provides updated information regarding postmarks, timely filing of reports, and timely payments.

New paragraph (12) is added to include information on receivership previously provided in former paragraph (1) without change.

Under subsection (d), the annual election language in paragraph (1) is deleted as it is no longer relevant. A policy change retroactively allows the method of computing margin to be amended to the cost of goods sold or compensation methods regardless of what method was elected on an original report. Paragraphs (2) - (8) are renumbered accordingly.

Renumbered paragraph (1) is retitled "margin computation" to be consistent with Tax Code, §171.101 (Determination of Taxable Margin), and is restructured to implement HB 500, which adds

a fourth method for computing margin. The information in original subparagraphs (A), (B), and (C) providing each of the three computation methods historically allowed for computing margin are renumbered as (i), (ii), and (iii) and are included in new subparagraph (A) which provides the margin computation for reports originally due on or after January 1, 2008, and before January 1, 2014. New subparagraph (B) provides the margin computation for reports due on or after January 1, 2014, which includes a \$1 million deduction from total revenue as a fourth method.

Renumbered paragraph (2), titled "rate," is restructured to implement HB 32; to include the historic tax rates and their effective dates; and to move definitions to subsection (b). The phrase referencing retail and wholesale trade as "under Division F or G of the 1987 Standard Industrial Classification Manual published by the Federal Office of Management and Budget" is removed from this paragraph and replaced with expanded, updated definitions of retail and wholesale trade in subsections (b)(3) and (5) respectively. The definition of "primarily engaged in retail or wholesale trade" in former subparagraphs (A)-(C) is moved to subsection (b)(2).

New subparagraph (A) provides the rates for reports originally due on or after January 1, 2008, and before January 1, 2014. Subparagraph (B) now provides the rates for reports originally due on or after January 1, 2014, and before January 1, 2015, as provided in HB 500. Subparagraph (C) now provides the rates for reports originally due on or after January 1, 2015, and before January 1, 2016, as provided in HB 500. Subparagraph (D) now provides the tax rates for reports originally due on or after January 1, 2016, as provided in HB 32.

Renumbered paragraph (4) is amended to implement the electronic filing requirement for No Tax Due Reports under SB 1364, and to clarify that the tiered partnership exception relates to the filing of No Tax Due Reports. To maintain consistency with report titles, the word "Information" is deleted from the report previously titled "No Tax Due Information Report" throughout the section as the name of the report has been revised for 2016. Clause (iii) of subparagraph (A) is amended to implement HB 500, which repealed the \$600,000 no tax due threshold, making the \$1 million threshold permanent although increased to \$1,030,000 under Tax Code, §171.006 (Adjustment of Eligibility for No Tax Due, Discounts, and Compensation Deduction), which requires the threshold to be adjusted biennially based on the Consumer Price Index (CPI). Clause (iv) is added to include the CPI-adjusted no tax due threshold for reports originally due on or after January 1, 2014, but before January 1, 2016. Clause (v) is added to include the CPI-adjusted no tax due threshold for reports originally due on or after January 1, 2016, but before January 1, 2018. Clause (vi) provides that the threshold amount for reports originally due on or after January 1, 2018, will be determined under Tax Code, §171.006.

Renumbered paragraph (5) is amended to implement the repeal of the discounts from HB 500.

Renumbered paragraph (6) is amended to implement HB 32, which increased the total revenue threshold for qualification to file using the E-Z Computation method and decreased the E-Z Computation tax rate. New subparagraph (A) is added to provide the threshold and rate information originally provided under this paragraph, changed only by the addition of an effective date and an amended reference to renumbered paragraph (5). New subparagraph (B) is added to provide the threshold and rate information for reports originally due on or after January 1, 2016. New subparagraph (C) is added to provide the restrictions on de-

ductions originally provided under this paragraph but is amended to clarify that no deductions to compute margin, credits, or other adjustments are allowed.

Renumbered paragraph (7)(A) is amended to correct the references to renumbered paragraphs (4), (5), and (6).

Subsection (e)(1), (3)(A), (4), and (6) are amended to add titles for the referenced Tax Code sections.

Subsection (f)(1), concerning amended reports, is amended to reflect the policy change that removed the restrictions on changing margin computation methods to cost of goods sold or compensation. Paragraph (5) is amended to add title to referenced Tax Code section.

Subsection (i)(1) and (2) are titled to improve readability. Paragraph (1), now titled "public information report," is amended to include additional entities required to file a public information report under HB 2891. Paragraph (2), now titled "ownership information report," is reworded to make a distinction between taxable entities required to file a public information report and an ownership information report. Paragraphs (1), (2), (3), and (4) are amended to add titles of referenced Tax Code sections. Paragraph (4) is also amended to correct the Tax Code section referenced.

Tom Currah, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by conforming the rule to current legislation and policy. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

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

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

This amendment implements Tax Code, §§111.057 (Extension for Filing a Report), 171.0001 (General Definitions), 171.0022 (Temporary Permissive Alternative Rates for 2014), 171.0023 (Temporary Permissive Alternative Rates for 2015), 171.101 (Determination of Taxable Margin), and 171.1014 (Combined Reporting; Affiliated Group Engaged in Unitary Business).

§3.584. *Margin: Reports and Payments.*

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

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. [Nontaxable entities. See §3.581 of this title (relating to Margin: Taxable and Nontaxable Entities) for information concerning nontaxable entities. Except for passive entities (see

§3.582 (relating to Margin: Passive Entities)), a nontaxable entity that has not notified the comptroller or the secretary of state that it is doing business in Texas, or that has previously notified the comptroller that it is not taxable, must notify the comptroller in writing only when the entity no longer qualifies as a nontaxable entity. If an entity receives notification in writing from the comptroller asking if the entity is taxable, the entity must reply to the comptroller within 30 days of the notice.]

(1) Beginning date--

(A) except as provided by subparagraph (B) of this paragraph:

(i) for a taxable entity chartered or organized in this state, the date on which the taxable entity's charter or organization takes effect; and

(ii) for a foreign taxable entity, the date on which the taxable entity begins doing business in this state; or

(B) for a taxable entity that qualifies as a new veteran-owned business, as defined in §3.574 of this title (relating to Margin: New Veteran-Owned Businesses), the earlier of:

(i) the fifth anniversary of the date on which the taxable entity begins doing business in this state; or

(ii) the date the taxable entity ceases to qualify as a new veteran-owned business.

(2) Primarily engaged in retail or wholesale trade--A taxable entity is primarily engaged in retail or wholesale trade only if:

(A) the taxable entity does not provide retail or wholesale utilities, including telecommunications services, electricity, or gas.

(B) the total revenue from the taxable entity's activities in retail and wholesale trade is greater than the total revenue from its activities in trades other than retail and wholesale trade; and

(C) less than 50% of the total revenue from the taxable entity's activities in retail or wholesale trade comes from the sale of products the taxable entity produces or products produced by an entity that is part of an affiliated group to which the taxable entity also belongs, except for those businesses under Major Group 58 (eating and drinking establishments). For purposes of this subparagraph only:

(i) A taxable entity produces the product that it sells if the taxable entity acquires the product and makes modifications to the product that increase the sales price of the product by more than 10%.

(ii) A taxable entity produces the product that it sells if the taxable entity manufactures, develops, or creates tangible personal property that is incorporated into, installed in, or becomes a component part of the product that it sells. For example:

(I) A taxable entity produces an electronic device that it sells when the taxable entity produces a computer program, such as an application or operating system, that is installed in the device, even if the device is manufactured by an unrelated party.

(II) A taxable entity produces a drug that it sells when the taxable entity produces the active ingredient in the drug, even if the drug is manufactured by an unrelated party.

(iii) A taxable entity does not produce a product that it sells if the product is manufactured by an unrelated party to the taxable entity's specifications.

(3) Retail trade--

(A) for reports originally due on or after January 1, 2008, and before January 1, 2012, the activities described in Division G of the SIC Manual;

(B) for reports originally due on or after January 1, 2012, and before January 1, 2014:

(i) the activities described in Division G of the SIC Manual; and

(ii) apparel rental activities classified as Industry 5999 or 7299 of the SIC Manual; and

(C) for reports originally due on or after January 1, 2014:

(i) the activities described in Division G of the SIC Manual;

(ii) apparel rental activities classified as Industry 5999 or 7299 of the SIC Manual;

(iii) the activities classified as Automotive Repair Shops, Industry Group 753 of the SIC Manual;

(iv) rental-purchase agreement activities regulated by Business & Commerce Code, Chapter 92;

(v) rental or leasing of tools, party and event supplies, and furniture, classified as Industry 7359 of the SIC Manual; and

(vi) heavy construction equipment rental or leasing activities, classified as Industry 7353 of the SIC Manual.

(4) SIC Manual--The 1987 Standard Industrial Classification Manual published by the federal Office of Management and Budget.

(5) Wholesale trade--The activities described in Division F of the SIC Manual.

(6) Unrelated party--With respect to a taxable entity, an entity that is not part of the same affiliated group, as defined in §3.590(b)(1) of this title (relating to Margin: Combined Reporting).

(c) Reports and due dates.

[(1) Each taxable entity subject to the franchise tax levied by Tax Code, §171.001, with a beginning date of October 4, 2009, or later, must file a first annual franchise tax report, and thereafter an annual franchise tax report, and at the same time must pay the franchise tax and any applicable penalties and interest due by the taxable entity. Each taxable entity subject to the franchise tax levied by Tax Code, §171.001, with a beginning date prior to October 4, 2009, must file an initial franchise tax report, and thereafter an annual franchise tax report, and at the same time must pay the franchise tax and any applicable penalties and interest due by the taxable entity. It is the responsibility of a receiver to file franchise tax reports and pay the franchise tax of a taxable entity in receivership. A debtor in possession or the appointed trustee or receiver of a taxable entity in reorganization or arrangement proceedings under the Bankruptcy Act is responsible for filing franchise tax reports and paying the franchise tax pursuant to the plan of reorganization or arrangement.]

[(A) "Beginning date" means:]

[(i) for a taxable entity chartered or organized in this state, the date on which the taxable entity's charter or organization takes effect; and]

[(ii) for a foreign taxable entity, the date on which the taxable entity begins doing business in this state.]

(1) ~~[(B)]~~ Initial report. For taxable entities with a beginning date prior to October 4, 2009, both the initial report and payment of the tax due, if any, are due no later than 89 days after the first anniversary date of the beginning date. The taxable margin computed on the initial report is based on the business done during the period beginning on the beginning date and ending on the last accounting period ending date for federal income tax purposes that is at least 60 days before the original due date of the initial report, or, if there is no such ending date, then ending on the day that is the last day of the calendar month nearest to the end of the taxable entity's first year of business. If the period used to compute business done for purposes of the initial report differs from the taxable entity's last accounting period for federal income tax purposes, then the taxable entity's total revenue for purposes of the initial report shall be computed as if the taxable entity had reported its federal taxable income on an Internal Revenue Service form covering the period used to compute business done for purposes of the initial report. The privilege period for the initial report is from the beginning date through December 31 of the year in which the initial report is originally due.

~~[(C) Annual report.]~~

(2) ~~[(+)]~~ First annual report. For taxable entities with a beginning date of October 4, 2009, or later, both the first annual report and payment of the tax due, if any, are due no later than May 15 of the year following the year the entity became subject to the tax (i.e., the beginning date). The taxable margin computed on the first annual report is based on the business done during the period beginning on the beginning date and ending on the last accounting period ending date for federal income tax purposes that is in the same calendar year as the beginning date. The privilege period for the first annual report is from the beginning date through December 31 of the year in which the first annual report is originally due.

(3) ~~[(+)]~~ Annual report. The annual franchise tax report must be filed and the tax paid no later than May 15 of each year. The taxable margin computed on an annual report is based on the business done during the period beginning with the day after the last date upon which tax was computed under Tax Code, Chapter 171 on a previous report, and ending with the last accounting period ending date for federal income tax purposes ending in the calendar year before the calendar year in which the report is originally due, or, if there is no such ending date, then ending on December 31 of the calendar year before the calendar year in which the report is originally due. A taxable entity that uses a 52 - 53 week accounting year end and has an accounting year ending the first four days of January of the year in which the annual report is originally due may use the preceding December 31 as the date through which taxable margin is computed. If the period used to compute business done for purposes of the annual report differs from the taxable entity's last accounting period for federal income tax purposes, then the taxable entity's total revenue for purposes of the annual report shall be computed as if the taxable entity had reported its federal taxable income on an Internal Revenue Service form covering the period used to compute business done for purposes of the annual report. The privilege period for an annual report is January 1 through December 31 of the year in which the annual report is originally due.

(4) Final report. A final tax report and payment of the additional tax are due within 60 days after the taxable entity no longer has sufficient nexus with Texas to be subject to the franchise tax. See §3.592 of this title (relating to Margin: Additional Tax) for further information concerning the additional tax imposed by Tax Code, §171.0011.

(5) ~~[(D)]~~ Extensions. ~~[See §3.4 of this title (relating to Request for Extension of Time in Which to File Report), for extensions of time to file an initial or final report.]~~

(A) Annual report. See §3.585 of this title (relating to Margin: Annual Report Extensions), for extensions of time to file an annual report, including the first annual report.

(B) Final report. A taxable entity will be granted a 45-day extension of time to file a final report, if the taxable entity:

(i) requests the extension on or before the filing date;

(ii) requests the extension on a form provided by the comptroller; and

(iii) remits 90% or more of the tax reported as due on the final report.

(6) ~~[(F)]~~ Transition. See §3.595 of this title (relating to Margin: Transition) for transitional information concerning tax rates and privilege periods as a result of certain legislative changes.

(7) Nontaxable entities. See §3.581 of this title (relating to Margin: Taxable and Nontaxable Entities) for information concerning nontaxable entities. Except for passive entities (see §3.582 of this title (relating to Margin: Passive Entities)), a nontaxable entity that has not notified the comptroller or the secretary of state that it is doing business in Texas, or that has previously notified the comptroller that it is not taxable, must notify the comptroller in writing only when the entity no longer qualifies as a nontaxable entity. If an entity receives notification in writing from the comptroller asking for information to determine if the entity is a taxable entity, the entity must reply to the comptroller within 30 days of the notice.

(8) ~~[(G)]~~ Passive entities. See §3.582 of this title, for information concerning the reporting requirements for a passive entity.

(9) ~~[(H)]~~ Combined reporting. Taxable entities that are part of an affiliated group engaged in a unitary business must file a combined group report in lieu of individual reports, except that a public information report or ownership information report must be filed for each member of the combined group with nexus. See §3.590 of this title ~~[(relating to Margin: Combined Reporting).]~~ for rules on filing a combined report.

(10) New veteran-owned businesses. See §3.574 of this title for information concerning the reporting requirements for a qualifying new veteran-owned business.

(11) Date of filing. See §3.13 (relating to Postmarks, Timely Filing of Reports, and Timely Payment of Taxes and Fees) for information concerning the requirements for timely filing.

(12) Receivership. It is the responsibility of a receiver to file franchise tax reports and pay the franchise tax of a taxable entity in receivership. A debtor in possession or the appointed trustee or receiver of a taxable entity in reorganization or arrangement proceedings under the Bankruptcy Act is responsible for filing franchise tax reports and paying the franchise tax pursuant to the plan of reorganization or arrangement.

~~[(2) The postmark date (or meter-mark if there is no postmark) on the envelope in which the report or payment is received determines the date of filing.]~~

(d) Calculation of tax.

~~[(1) Annual Election. If eligible, a taxable entity must make an annual election to deduct cost of goods sold or compensation by the due date or at the time the report is filed, whichever is later. The election is made by filing the franchise tax report using one method or the other. (See §3.588 of this title (relating to Margin: Cost of Goods Sold) and §3.589 of this title (relating to Margin: Compensation) for eligibility.). If an election is not made, the taxable entity's margin~~

will be calculated as 70% of total revenue. After the due date of the report, a taxable entity may not amend its report to change its election to cost of goods sold or compensation. However, a taxable entity may amend its report to change its method of computing margin from cost of goods sold or compensation to 70% of total revenue or, if eligible, the E-Z Computation.]

(1) [(2)] Margin computation. [Calculation.] A taxable entity's margin equals the least of the following [three] calculations, if eligible:

(A) For reports originally due on or after January 1, 2008, and before January 1, 2014:

- (i) [(A)] total [Total] revenue minus cost of goods sold;
- (ii) [(B)] total [Total] revenue minus compensation;
- (iii) [(C)] 70% of total revenue.

(B) For reports originally due on or after January 1, 2014:

- (i) total revenue minus cost of goods sold;
- (ii) total revenue minus compensation;
- (iii) 70% of total revenue; or
- (iv) total revenue minus \$1 million.

(2) [(3)] Rate. Except as provided by paragraph (6) of this subsection:

(A) For reports originally due on or after January 1, 2008, but before January 1, 2014:

- (i) a [A] tax rate of 1.0% of taxable margin applies to most taxable entities; and[- A]
- (ii) a tax rate of 0.5% of taxable margin applies to taxable entities primarily engaged in retail or wholesale trade, [under division F or G of the 1987 Standard Industrial Classification Manual published by the Federal Office of Management and Budget. A taxable entity is primarily engaged in retail or wholesale trade only if:]

(B) For reports originally due on or after January 1, 2014, but before January 1, 2015:

- (i) a tax rate of 0.975% of taxable margin applies to most taxable entities; and
- (ii) a tax rate of 0.4875% of taxable margin applies to taxable entities primarily engaged in retail or wholesale trade.

(C) For reports originally due on or after January 1, 2015, but before January 1, 2016:

- (i) a tax rate of 0.95% of taxable margin applies to most taxable entities; and
- (ii) a tax rate of 0.475% of taxable margin applies to taxable entities primarily engaged in retail or wholesale trade.

(D) For reports originally due on or after January 1, 2016:

- (i) a tax rate of 0.75% of taxable margin applies to most taxable entities; and
- (ii) a tax rate of 0.375% of taxable margin applies to taxable entities primarily engaged in retail or wholesale trade.

[(A) the total revenue from its activities in retail and wholesale trade is greater than the total revenue from its activities in trades other than the retail and wholesale trade;]

[(B) less than 50% of the total revenue from activities in retail or wholesale trade comes from the sale of products it produces or products produced by an entity that is part of an affiliated group to which the taxable entity also belongs, except for those businesses under Major Group 58 (eating and drinking establishments). A product is not considered to be produced if modifications made to the acquired product do not increase its sales price by more than 10%; and]

[(C) the taxable entity does not provide retail or wholesale utilities, including telecommunications services, electricity or gas.]

(3) [(4)] Annualized Total Revenue. When the accounting period on which a report is based is more or less than 12 months, a taxable entity must annualize its total revenue to determine its eligibility for the no tax due threshold, discounts, and E-Z Computation. The amount of total revenue used in the actual tax calculations will not change as a result of annualizing revenue. To annualize total revenue, an entity will divide total revenue by the number of days in the period upon which the report is based, and then multiply the result by 365. Examples are as follows:

(A) a taxable entity's 2010 franchise tax report is based on the period September 15, 2009 through December 31, 2009 (108 days), and its total revenue for the period is \$375,000. The taxable entity's annualized total revenue is \$1,267,361 (\$375,000 divided by 108 days multiplied by 365 days). Based on its annualized total revenue, the taxable entity does not qualify for the \$1,000,000 no tax due threshold but is eligible to file using the E-Z computation. The discounts do not apply in years when the no tax due threshold is \$1,000,000;

(B) a taxable entity's 2010 franchise tax report is based on the period March 1, 2008 through December 31, 2009 (671 days), and its total revenue for the period is \$1,375,000. The taxable entity's annualized total revenue is \$747,951 (\$1,375,000 divided by 671 days multiplied by 365 days). Based on its annualized total revenue, the taxable entity qualifies for the \$1,000,000 no tax due threshold and is eligible to file using the No Tax Due Information Report.

(4) [(5)] No tax due. Effective September 1, 2015, No Tax Due Reports are required to be filed electronically. See §3.587(c)(8)(C) of this title (relating to Margin: Total Revenue) for the tiered partnership exception to filing No Tax Due Reports.

(A) A taxable entity owes no tax and may file a No Tax Due [Information] Report if its annualized total revenue is:

- (i) for reports originally due on or after January 1, 2008, but before January 1, 2010, \$300,000 or less;
- (ii) for reports originally due on or after January 1, 2010, but before January 1, 2012, \$1 million or less; [and]
- (iii) for reports originally due on or after January 1, 2012, but before January 1, 2014, \$1,030,000 [(\$600,000) or less]; or the amount determined under Tax Code, §171.006.]
- (iv) for reports originally due on or after January 1, 2014, but before January 1, 2016, \$1,080,000 or less;
- (v) for reports originally due on or after January 1, 2016, but before January 1, 2018, \$1,110,000 or less; and
- (vi) for reports originally due on or after January 1, 2018, the amount determined under Tax Code, §171.006 (Adjustment of Eligibility for No Tax Due, Discounts, and Compensation Deduction).

(B) A taxable entity that has zero Texas receipts owes no tax and may file a No Tax Due [~~Information~~] Report.

(C) A taxable entity that has tax due of less than \$1,000 owes no tax; however, the entity cannot file a No Tax Due [~~Information~~] Report and must file a regular annual report or, if qualified, the E-Z Computation Report.

(5) [(6)] Discount. A taxable entity is entitled to a discount of the tax imposed as follows.

(A) For reports originally due on or after January 1, 2008, but before January 1, 2010, if annualized total revenue is:

(i) greater than \$300,000 and less than \$400,000, the discount is 80% of tax due;

(ii) greater than or equal to \$400,000 and less than \$500,000, the discount is 60% of tax due;

(iii) greater than or equal to \$500,000 and less than \$700,000, the discount is 40% of tax due;

(iv) greater than or equal to \$700,000 and less than \$900,000, the discount is 20% of tax due.

(B) For reports originally due on or after January 1, 2010 [~~but before January 1, 2012,~~] there are no discounts.

~~[(C) For reports originally due on or after January 1, 2012, if annualized total revenue is:]~~

~~[(i) greater than \$600,000 and less than \$700,000, the discount is 40% of tax due;]~~

~~[(ii) greater than or equal to \$700,000 and less than \$900,000, the discount is 20% of tax due.]~~

(6) [(7)] E-Z Computation.

(A) For reports originally due on or after January 1, 2008, and before January 1, 2016, a [A] taxable entity with annualized total revenue of \$10 million or less may choose to pay the franchise tax by using the E-Z Computation method. For this period, under [~~Under~~] the E-Z Computation, a taxable entity's tax liability is computed by applying a tax rate of 0.575% to apportioned total revenue and subtracting any applicable discount as provided by paragraph (5) [(6)] of this subsection.

(B) For reports originally due on or after January 1, 2016, a taxable entity with annualized total revenue of \$20 million or less may choose to pay the franchise tax by using the E-Z Computation method. For this period, under the E-Z Computation, a taxable entity's tax liability is computed by applying a tax rate of 0.331% to apportioned total revenue.

(C) No deductions to compute margin, [~~deduction is allowed for cost of goods sold or compensation if a taxable entity chooses to compute its tax liability under the E-Z Computation. Additionally, no other~~] credits, or other adjustments are allowed if a taxable entity chooses to compute its tax liability under the E-Z Computation.

(7) [(8)] Tiered partnership provision. See §3.587[(b)(14) and (e)(8)] of this title for information concerning the tiered partnership provision.

(A) Eligibility for no tax due, discounts and the E-Z Computation. For eligible entities choosing to file under the tiered partnership provision, paragraphs (4), (5), and (6) [~~and (7)~~] of this subsection do not apply to an upper or lower tier entity if, before the attribution of total revenue by a lower tier entity to upper tier entities, the lower tier entity does not meet the criteria.

(B) Tiered Partnership Report. The lower tier entity must submit a report to the comptroller indicating its total revenue before attribution and the amount of total revenue that each upper tier entity must include with the upper tier entity's own total revenue. Each upper tier entity must submit a report to the comptroller indicating the lower tier entity's total revenue before attribution and the amount of the lower tier entity's total revenue that was passed to the upper tier entity and is included in the total revenue of the upper tier entity.

(e) Penalty and interest on delinquent taxes.

(1) Tax Code, §171.362 (Penalty for Failure to Pay Tax or File Report), imposes a 5.0% penalty on the amount of franchise tax due by a taxable entity that fails to report or pay the tax when due. If any part of the tax is not reported or paid within 30 days after the due date, an additional 5.0% penalty is imposed on the amount of tax unpaid. There is a minimum penalty of \$1.00. Delinquent taxes accrue interest beginning 60 days after the due date. For example, if payment is made on the 61st day after the due date, one day's interest is due. The annual rate of interest on delinquent taxes is the prime rate plus one percent, as published in The Wall Street Journal on the first day of each calendar year that is not a Saturday, Sunday, or legal holiday.

(2) When a taxable entity is issued an audit assessment or other underpayment notice based on a deficiency, penalties under Tax Code, §171.362, and interest are applied as of the date that the underpaid tax was originally due, including any extensions, not from the date of the deficiency determination or date the deficiency determination is final.

(3) A deficiency determination is final 30 days after the date on which the service of the notice of the determination is completed. Service by mail is complete when the notice is deposited with the United States Postal Service.

(A) The amount of a determination is due and payable 10 days after it becomes final. If the amount of the determination is not paid within 10 days after the day it became final, a penalty under Tax Code, §111.0081 (When Payment is Required), of 10% of the tax assessed will be added. For example, if a deficiency determination is made in the amount of \$1,000 tax (plus the initial penalty and interest), but the total amount of the deficiency is not paid until the 41st day after the deficiency notice is served, \$1,200 plus interest would be due (i.e., \$1,000 tax, \$100 initial penalty for not paying when originally due, \$100 penalty for not paying deficiency determination within 10 days after it became final, plus interest accrued to the date of payment at the applicable statutory rate).

(B) A petition for redetermination must be filed within 30 days after the date on which the service of the notice of determination is completed, or the redetermination is barred.

(C) A decision on a petition for redetermination becomes final 20 days after service on the petitioner of the notice of the decision. The amount of a determination is due and payable 20 days after the decision is final. If the amount of the determination is not paid within 20 days after the day the decision becomes final, a penalty under Tax Code, §111.0081, of 10% of the tax assessed will be added. Using the previous example, on the 41st day after service of the decision, \$1,200 plus interest would be due (i.e., \$1,000 tax, \$100 initial penalty, \$100 additional penalty and the applicable accrued interest).

(4) A jeopardy determination is final 20 days after the date on which the service of the notice is completed unless a petition for redetermination is filed before the determination becomes final. Service by mail is complete when the notice is deposited with the United States Postal Service. The amount of the determination is due and payable im-

mediately. If the amount determined is not paid within 20 days from the date of service, a penalty, under Tax Code, §111.022 (Jeopardy Determination), of 10% of the amount of tax and interest assessed will be added.

(5) If the comptroller determines that a taxable entity exercised reasonable diligence to comply with the statutory filing or payment requirements, the comptroller may waive penalties or interest for the late filing of a report or for a late payment. The taxable entity requesting waiver must furnish a detailed description of the circumstances that caused the late filing or late payment and the diligence exercised by the taxable entity in attempting to comply with the statutory requirements. See §3.5 of this title (relating to Waiver of Penalty or Interest) for additional information.

(6) If a taxable entity fails to comply with Tax Code, §171.212 (Report of Changes to Federal Income Tax Return), the taxable entity is liable for a penalty of 10% of the tax that should have been reported and had not previously been reported to the comptroller under Tax Code, §171.212. This penalty is in addition to any other penalty provided by law.

(f) Amended reports. In filing an amended report, the taxable entity must type or print on the top of the report the phrase "Amended Report." The report should be forwarded with a cover letter of explanation, with enclosures necessary to support the amendment. Applicable penalties and interest must be reported and paid along with any additional amount of tax shown to be due on the amended report.

(1) A taxable entity may file an amended report for the purpose of correcting a mathematical or other error in a report, for the purpose of supporting a claim for refund, or to change its method of computing margin [~~to 70% of total revenue~~] or, if qualified, to use the E-Z Computation. [~~After the due date of the report, an amended report may not be filed to change the method of computing margin to a cost of goods sold deduction or to a compensation deduction.~~]

(2) A taxable entity that has been audited by the Internal Revenue Service must file an amended franchise tax report within 120 days after the Revenue Agent's Report (RAR) is final, if the RAR results in changes to taxable margin reported for franchise tax purposes. An RAR is final when all administrative appeals with the Internal Revenue Service have been exhausted or waived. An administrative appeal with the Internal Revenue Service does not include an action or proceeding in the United States Tax Court or any other federal court.

(3) A taxable entity whose taxable margin is changed as a result of an audit or other adjustment by a competent authority other than the Internal Revenue Service must file an amended franchise tax report within 120 days after the adjustment is final. An adjustment is final when all administrative or other appeals have been exhausted or waived. For the purposes of this section, a competent authority includes, but is not limited to, the United States Tax Court, United States District Courts, United States Courts of Appeals, and United States Supreme Court.

(4) A taxable entity must file an amended franchise tax report within 120 days after the taxable entity files an amended federal income tax return that changes the taxable entity's taxable margin. A taxable entity is considered to have filed an amended federal income tax return if the taxable entity is a member of an affiliated group during a period in which an amended consolidated federal income tax return is filed.

(5) A final determination resulting from an Internal Revenue Service administrative proceeding (including an audit), or a judicial proceeding arising from an administrative proceeding, that affects the amount of franchise tax liability must be reported to the comptroller

before the expiration of 120 days after the day on which the determination becomes final. See Tax Code, §111.206 (Exception to Limitation: Determination Resulting from Administrative Proceeding).

(6) Because the 10% penalty provided for in Tax Code, §171.212 only applies to deficiencies, failure to file an amended return in which a refund would result will not cause a 10% penalty to be imposed.

(g) Comptroller audit. During the course of an audit or other examination of a taxable entity's franchise tax account, the comptroller may examine financial statements, working papers, registers, memoranda, contracts, corporate minutes, and any other business papers used in connection with its accounting system. In connection with the examination, the comptroller may also examine any of the taxable entity's officers or employees under oath.

(h) Payment of determination. The payment of a determination issued to a taxable entity for an estimated tax liability shall not satisfy the reporting requirements set forth in Tax Code, Chapter 171, Subchapter E, concerning reports and records.

(i) Information report. Each taxable entity on which the franchise tax is imposed must file an information report.

(1) Public information report. For a taxable entity legally formed as a corporation, limited liability company, limited partnership, professional association, or financial institution, a public information report as described in Tax Code, §171.203 (Public Information Report), is due at the same time each initial and annual, including the first annual, report is due. An authorized person must sign the public information report on behalf of the taxable entity under a certification that:

(A) all information contained in the report is true and correct to the best of the authorized person's knowledge; and

(B) a copy of the report has been mailed to each person named in the report who is an officer, director, or manager and who is not employed by the taxable entity or a related (at least 10% ownership) taxable entity on the date the report is filed.

(C) A report that is filed electronically complies with the signature and certification requirements of this provision.

(2) Ownership information report. Taxable [~~For all other taxable~~] entities not required to file a public information report must file an ownership information report as described in Tax Code, §171.201 (Initial Report) and §171.202 (Annual Report) is due at the same time each initial and annual, including the first annual, report is due.

(3) Failure to file or sign a public information report or ownership information report shall result in the forfeiture of corporate or business privileges as provided by Tax Code, §171.251 (Forfeiture of Corporate Privileges) and §171.2515 (Forfeiture of Right of Taxable Entity to Transact Business in this State). If the corporate or business privileges are forfeited, each officer or director of the taxable entity may be liable for each debt of the taxable entity that is created or incurred in Texas after the date on which the report is due and before the corporate or business privileges are revived, as provided by Tax Code, §171.255 (Liability of Directors and Officers).

(4) The provisions of paragraph (3) of this subsection, concerning forfeiture of corporate privileges do not apply to a banking taxable entity or a savings and loan association, as defined in Tax Code, §171.0001 (General Definitions) [~~§171.004~~].

(5) For purposes of this subsection:

(A) authorized person means, in the case of a corporation, an officer, director or other authorized person of the corporation;

(B) authorized person means, in the case of a limited liability company, a member, manager or other authorized person of the limited liability company;

(C) authorized person means, in the case of a limited partnership, a partner or other authorized person of the partnership;

(D) director includes a manager of a limited liability company, a general partner in a limited partnership and a general partner in a partnership registered as a limited liability partnership;

(E) authorized person also includes a paid preparer authorized to sign the report.

(6) Taxable entities that are members of a combined group and do not have nexus in Texas are not required to file an ownership information report or a public information report.

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 May 9, 2016.

TRD-201602267

Don Neal

Chief Deputy General Counsel

Comptroller of Public Accounts

Earliest possible date of adoption: June 19, 2016

For further information, please call: (512) 475-0387



### 34 TAC §3.588

The Comptroller of Public Accounts proposes amendments to §3.588, concerning margin: cost of goods sold. Subsection (b)(3) is amended to correct the definition of the term "goods" to conform with the statutory language in Tax Code, §171.1012(a)(1) (Determination of Cost of Goods Sold). The amendment specifically deletes the portion of the definition of "goods" that incorrectly includes the husbandry of animals, the growing and harvesting of crops, and the severance of timber from realty. These terms are statutorily defined as "goods" solely for purposes of Tax Code, §171.1012(e)(14), which addresses compensation paid to an undocumented worker. The agency has determined that there is no statutory basis for expanding the definition of "goods" found in Tax Code, §171.1012(a)(1) to incorporate these activities. Subsection (b)(11), defining "undocumented worker," is deleted because this term also applies only for the purposes of Tax Code, §171.1012(e)(14). The language deleted from subsection (b)(3) and (11) is incorporated in subsection (g)(14) to conform with the statutory language in Tax Code, §171.1012(e)(14).

Subsection (g)(14) is amended to incorporate the deleted portion of the definition of "goods" under subsection (b)(3) and the definition of "undocumented worker" deleted from subsection (b)(11) to conform with the statutory language in Tax Code, §171.1012(e)(14).

Tom Currah, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by conforming the rule's provisions to current statutes. This rule is proposed under Tax Code, Title 2,

and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

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

This amendment is proposed under Tax Code, Chapter 171 and Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture) which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under the law.

The amendment implements Tax Code, §171.1012 (Determination of Cost of Goods Sold).

§3.588. *Margin: Cost of Goods Sold.*

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

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

(1) Arm's length--The standard of conduct under which entities that are not related parties and that have substantially equal bargaining power, each acting in its own interest, would negotiate or carry out a particular transaction.

(2) Computer program--A series of instructions that are coded for acceptance or use by a computer system and that are designed to permit the computer system to process data and provide results and information. The series of instructions may be contained in or on magnetic tapes, printed instructions, or other tangible or electronic media.

(3) Goods--Real or tangible personal property sold in the ordinary course of business of a taxable entity. ["Goods" includes:]

~~{(A) the husbandry of animals;}~~

~~{(B) the growing and harvesting of crops;}~~

~~{(C) the severance of timber from realty.}~~

(4) Heavy construction equipment--Self-propelled, self-powered, or pull-type equipment that weighs at least 3,000 pounds and is intended to be used for construction. The term does not include a motor vehicle required to be titled and registered.

(5) Lending institution--An entity that makes loans and:

(A) is regulated by the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, the Office of Thrift Supervision, the Texas Department of Banking, the Office of Consumer Credit Commissioner, the Credit Union Department, or any comparable regulatory body;

(B) is licensed by, registered with, or otherwise regulated by the Department of Savings and Mortgage Lending;

(C) is a "broker" or "dealer" as defined by the Securities Exchange Act of 1934 at 15 U.S.C. §78c; or

(D) provides financing to unrelated parties solely for agricultural production.

(6) Principal business activity--The activity in which a taxable entity derives the largest percentage of its "total revenue".

(7) Production--Construction, manufacture, installation occurring during the manufacturing or construction process, development, mining, extraction, improvement, creation, raising, or growth.

(8) Related party--A person, corporation, or other entity, including an entity that is treated as a pass-through or disregarded entity for purposes of federal taxation, whether the person, corporation, or entity is subject to the tax under this chapter or not, in which one person, corporation, or entity, or set of related persons, corporations, or entities, directly or indirectly owns or controls a controlling interest in another entity.

(9) Service costs--Indirect costs and administrative overhead costs that can be identified specifically with a service department or function, or that directly benefit or are incurred by reason of a service department or function. For purposes of this section, a service department includes personnel (including costs of recruiting, hiring, relocating, assigning, and maintaining personnel records or employees); accounting (including accounts payable, disbursements, and payroll functions); data processing; security; legal; general financial planning and management; and other similar departments or functions.

(10) Tangible personal property--

(A) includes:

(i) personal property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner;

(ii) films, sound recordings, videotapes, live and prerecorded television and radio programs, books, and other similar property embodying words, ideas, concepts, images, or sound, without regard to the means or methods of distribution or the medium in which the property is embodied, for which, as costs are incurred in producing the property, it is intended or is reasonably likely that any medium in which the property is embodied will be mass-distributed by the creator or any one or more third parties in a form that is not substantially altered; and

(iii) a computer program, as defined in paragraph (2) of this subsection.

(B) does not include:

(i) intangible property or

(ii) services.

~~[(11) Undocumented worker--A person who is not lawfully entitled to be present and employed in the United States.]~~

(c) General rules for determining cost of goods sold.

(1) Affiliated entities. Notwithstanding any other provision of this section, a payment made by one member of an affiliated group to another member of that affiliated group not included in the combined group may be subtracted as a cost of goods sold only if it is a transaction made at arm's length.

(2) Capitalization or expensing of certain costs. The election to capitalize or expense allowable costs is made by filing the franchise tax report using one method or the other. The election is for the entire period on which the report is based and may not be changed after the due date or the date the report is filed, whichever is later. A taxable entity that is allowed a subtraction by this section for a cost of goods sold and that is subject to Internal Revenue Code, §§263A, 460, or 471 (including a taxable entity subject to §471 that elects to use LIFO under §472), may elect to:

(A) Capitalize those costs in the same manner and to the same extent that the taxable entity capitalized those costs on its federal income tax return, except for those costs excluded under subsection (g) of this section, or in accordance with subsections (d), (e), and (f) of this section. A taxable entity that elects to capitalize costs on its first report due on or after January 1, 2008, may include, in beginning inventory, costs allowable for franchise tax purposes that would be in beginning inventory for federal income tax purposes.

(i) If the taxable entity elects to capitalize those costs allowed under this section as a cost of goods sold, it must capitalize each cost allowed under this section that it capitalized on its federal income tax return.

(ii) If the taxable entity later elects to begin expensing those costs allowed under this section as a cost of goods sold, the entity may not deduct any cost incurred before the first day of the period on which the report is based, including any ending inventory from a previous report.

(B) Expense those costs, except for those costs excluded under subsection (g) of this section, or in accordance with subsections (d), (e), and (f) of this section.

(i) If the taxable entity elects to expense those costs allowed under this section as a cost of goods sold, costs incurred before the first day of the period on which the report is based may not be subtracted as a cost of goods sold.

(ii) If the taxable entity later elects to begin capitalizing those costs allowed under this section as a cost of goods sold, costs incurred prior to the accounting period on which the report is based may not be capitalized.

(3) Election to subtract cost of goods sold. A taxable entity, if eligible, must make an annual election to subtract cost of goods sold in computing margin by the due date, or at the time the report is filed, whichever is later. The election to subtract cost of goods sold is made by filing the franchise tax report using the cost of goods sold method. An amended report may be filed within the time allowed by Tax Code, §111.107 to change the method of computing margin to the cost of goods sold deduction method or from the cost of goods sold deduction method to the compensation deduction method, 70% of total revenue, or, if otherwise qualified, the E-Z computation method. An election may also be changed as part of an audit. See §3.584 of this title (relating to Margin: Reports and Payments).

(4) Exclusions from total revenue. Any expense excluded from total revenue (see §3.587 of this title (relating to Margin: Total Revenue)) may not be included in the determination of cost of goods sold.

(5) Film and broadcasting. A taxable entity whose principal business activity is film or television production or broadcasting or the sale of broadcast rights or the distribution of tangible personal property described by subsection (b)(10)(A)(ii) of this section, or any combination of these activities, and who elects to use cost of goods sold to determine margin, may include as cost of goods sold:

(A) the costs described in this section in relation to the property;

(B) depreciation, amortization, and other expenses directly related to the acquisition, production, or use of the property, including

(C) expenses for the right to broadcast or use the property.

(6) Lending institutions. Notwithstanding any other provision of this section, if the taxable entity is a lending institution that offers loans to the public and elects to subtract cost of goods sold, the entity may subtract as a cost of goods sold an amount equal to interest expense.

(A) This paragraph does not apply to entities primarily engaged in an activity described by category 5932 of the 1987 Standard Industrial Classification Manual published by the federal Office of Management and Budget.

(B) For purposes of this subsection, an entity engaged in lending to unrelated parties solely for agricultural production offers loans to the public.

(7) Mixed transactions. If a transaction contains elements of both a sale of tangible personal property and a service, a taxable entity may only subtract as cost of goods sold the costs otherwise allowed by this section in relation to the tangible personal property sold.

(8) Owner of goods. A taxable entity may make a subtraction under this section in relation to the cost of goods sold only if that entity owns the goods. The determination of whether a taxable entity is an owner is based on all of the facts and circumstances, including the various benefits and burdens of ownership vested with the taxable entity.

(A) A taxable entity furnishing labor or materials to a project for the construction, improvement, remodeling, repair, or industrial maintenance (as the term "maintenance" is defined in §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance)), of real property is considered to be an owner of the labor or materials and may include the costs, as allowed by this section, in the computation of the cost of goods sold.

(B) Solely for the purposes of this section, a taxable entity shall be treated as the owner of goods being manufactured or produced by the entity under a contract with the federal government, including any subcontracts that support a contract with the federal government, notwithstanding that the Federal Acquisition Regulations may require that title or risk of loss with respect to those goods be transferred to the federal government before the manufacture or production of those goods is complete.

(9) Rentals and leases. Notwithstanding any other provision of this section, the following taxable entities may subtract as cost of goods sold the costs otherwise allowed by this section in relation to tangible personal property that the entity rents or leases in the ordinary course of business of the entity:

(A) a motor vehicle rental company that remits a tax on gross receipts imposed under Tax Code, §152.026 or a motor vehicle leasing company;

(B) a heavy construction equipment rental or leasing company; and

(C) a railcar rolling stock rental or leasing company.

(10) Reporting methods. A taxable entity shall determine its cost of goods sold, except as otherwise provided by this section, in accordance with the methods used on the federal income tax return on which the report under this chapter is based. This subsection does not affect the type or category of cost of goods sold that may be subtracted under this section.

(11) Restaurants and bars. Entities engaged in activities described in Major Group 58 (Eating and Drinking Places) of the Standard Industrial Classification Manual may deduct for cost of goods sold

only those expenses allowed under subsections (d), (e) and (f) of this section, that relate to the acquisition and production of food and beverages. Any costs related to both the production of food and beverages and to other activities must be allocated to production on a reasonable basis.

(d) Direct costs. The cost of goods sold includes all direct costs of acquiring or producing the goods. Direct costs include:

(1) Labor costs. A taxable entity may include in its cost of goods sold calculation labor costs, other than service costs, that are properly allocable to the acquisition or production of goods and are of the type subject to capitalization or allocation under Treasury Regulation Sections 1.263A-1(e) or 1.460-5 as direct labor costs, indirect labor costs, employee benefit expenses, or pension and other related costs, without regard to whether the taxable entity is required to or actually capitalizes such costs for federal income tax purposes.

(A) For purposes of this section, labor costs include W-2 wages, IRS Form 1099 payments for labor, temporary labor expenses, payroll taxes, pension contributions, and employee benefits expenses, including, but not limited to, health insurance and per diem reimbursements for travel expenses, to the extent deductible for federal tax purposes.

(B) Labor costs under this paragraph shall not include any type of costs includable in subsection (f) or excluded in subsection (g) of this section. Costs for labor that do not meet the requirements set forth in this paragraph may still be subtracted as a cost of goods sold if the cost is allowed under another provision of this section. For example, service costs may be included in a taxable entity's cost of goods sold calculation to the extent provided by subsection (f) of this section.

(2) Incorporated materials. A taxable entity may include in its cost of goods sold calculation the cost of materials that are an integral part of specific property produced.

(3) Consumable materials. A taxable entity may include in its cost of goods sold calculation the cost of materials that are consumed in the ordinary course of performing production activities.

(4) Handling costs. A taxable entity may include in its cost of goods sold calculation handling costs, including costs attributable to processing, assembling, repackaging, and inbound transportation.

(5) Storage costs. A taxable entity may include in its cost of goods sold calculation storage costs, including the costs of carrying, storing, or warehousing property, subject to subsection (g) of this section, concerning excluded costs.

(6) Depreciation, depletion, and amortization. A taxable entity may include in its cost of goods sold calculation depreciation, depletion, and amortization reported on the federal income tax return on which the report under this chapter is based, to the extent associated with and necessary for the production of goods, including recovery described by Internal Revenue Code, §197, and property described in Internal Revenue Code, §179.

(7) Rentals and leases. A taxable entity may include in its cost of goods sold calculation the cost of renting or leasing equipment, facilities, or real property directly used for the production of the goods, including pollution control equipment and intangible drilling and dry hole costs.

(8) Repair and maintenance. A taxable entity may include in its cost of goods sold calculation the cost of repairing and maintaining equipment, facilities, or real property directly used for the production of the goods, including pollution control devices.

(9) Research and development. A taxable entity may include in its cost of goods sold calculation the costs attributable to research, experimental, engineering, and design activities directly related to the production of the goods, including all research or experimental expenditures described by Internal Revenue Code, §174.

(10) Mineral production. A taxable entity may include in its cost of goods sold calculation geological and geophysical costs incurred to identify and locate property that has the potential to produce minerals.

(11) Taxes. A taxable entity may include in its cost of goods sold calculation taxes paid in relation to acquiring or producing any material, including property taxes paid on buildings and equipment, and taxes paid in relation to services that are a direct cost of production.

(12) Electricity. A taxable entity may include in its cost of goods sold calculation the cost of producing or acquiring electricity sold.

(13) A taxable entity may include in its cost of goods sold calculation a contribution to a partnership in which the taxable entity owns an interest that is used to fund activities, the costs of which would otherwise be treated as cost of goods sold of the partnership, but only to the extent that those costs are related to goods distributed to the contributing taxable entity as goods-in-kind in the ordinary course of production activities rather than being sold by the partnership.

(e) Additional costs. In addition to the amounts includable under subsection (d) of this section, the cost of goods sold includes the following costs in relation to the taxable entity's goods:

- (1) deterioration of the goods;
- (2) obsolescence of the goods;
- (3) spoilage and abandonment, including the costs of rework, reclamation, and scrap;
- (4) if the property is held for future production, preproduction direct costs allocable to the property, including storage and handling costs, as provided by subsection (d)(4) and (5) of this section;
- (5) postproduction direct costs allocable to the property, including storage and handling costs, as provided by subsection (d)(4) and (5) of this section;
- (6) the cost of insurance on a plant or a facility, machinery, equipment, or materials directly used in the production of the goods;
- (7) the cost of insurance on the produced goods;
- (8) the cost of utilities, including electricity, gas, and water, directly used in the production of the goods;
- (9) the costs of quality control, including replacement of defective components pursuant to standard warranty policies, inspection directly allocable to the production of the goods, and repairs and maintenance of goods; and
- (10) licensing or franchise costs, including fees incurred in securing the contractual right to use a trademark, corporate plan, manufacturing procedure, special recipe, or other similar right directly associated with the goods produced.

(f) Indirect or administrative overhead costs. A taxable entity may subtract as a cost of goods sold service costs, as defined in subsection (b)(9) of this section, that it can demonstrate are reasonably allocable to the acquisition or production of goods. The amount subtracted may not exceed 4.0% of total indirect and administrative overhead costs.

(1) Any costs already subtracted under subsections (d) or (e) of this section may not be subtracted under this subsection.

(2) Any costs excluded under subsection (g) of this section may not be subtracted under this subsection.

(g) Costs not included. The cost of goods sold does not include the following costs in relation to the taxable entity's goods:

- (1) the cost of renting or leasing equipment, facilities, or real property that is not used for the production of the goods;
- (2) selling costs, including employee expenses related to sales;
- (3) distribution costs, including outbound transportation costs;
- (4) advertising costs;
- (5) idle facility expenses;
- (6) rehandling costs;
- (7) bidding costs, which are the costs incurred in the solicitation of contracts ultimately awarded to the taxable entity;
- (8) unsuccessful bidding costs, which are the costs incurred in the solicitation of contracts not awarded to the taxable entity;
- (9) interest, including interest on debt incurred or continued during the production period to finance the production of the goods;
- (10) income taxes, including local, state, federal, and foreign income taxes, and franchise taxes that are assessed on the taxable entity based on income;
- (11) strike expenses, including costs associated with hiring employees to replace striking personnel, but not including the wages of the replacement personnel, costs of security, and legal fees associated with settling strikes;
- (12) officers' compensation;
- (13) costs of operation of a facility that is:
  - (A) located on property owned or leased by the federal government; and
  - (B) managed or operated primarily to house members of the armed forces of the United States;

(14) any compensation paid to an undocumented worker used for the production of goods, provided that, as used in this paragraph only, the following terms shall have the following meanings: [;  
and]

(A) "undocumented worker" means a person who is not lawfully entitled to be present and employed in the United States; and

(B) "goods" includes the husbandry of animals, the growing and harvesting of crops, and the severance of timber from realty; and

(15) costs funded by a partnership contribution, to the extent that the contributing taxable entity made the cost of goods sold deduction under subsection (d)(13) 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 May 5, 2016.  
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Don Neal  
Chief Deputy General Counsel  
Comptroller of Public Accounts  
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For further information, please call: (512) 475-0387



## TITLE 40. SOCIAL SERVICES AND ASSISTANCE

### PART 15. TEXAS VETERANS COMMISSION

#### CHAPTER 460. FUND FOR VETERANS' ASSISTANCE PROGRAM

The Texas Veterans Commission (Commission) proposes amendments to Chapter 460, Subchapter A, §460.10, concerning Limitations on Grant Funds; Subchapter B, §460.21, concerning Monitoring Activities; and Subchapter C, §460.31, concerning Noncompliance.

##### PURPOSE AND BACKGROUND

The proposed amendments are made following a comprehensive review of the chapter under Government Code §2001.039, which requires each state agency to periodically review and consider for re-adoption each of its rules. The Commission has determined that the need for these rules continues to exist but that they should be amended to update or clarify where needed.

The proposed rule amendments update obsolete references to provide current citations to the Code of Federal Regulations which provide a government-wide framework for grants management. Previous federal regulations found in OMB Circulars are now superseded by recent modifications to the Uniform Grant Guidance in the Code of Federal Regulations.

The Executive Office of the President, Office of Management and Budget (OMB) is streamlining the federal government's guidance on Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. The OMB has consolidated the guidance previously contained in multiple OMB Circulars, including A-87 (Cost Principles for State and Local, and Indian Tribal Governments) and A-122 (Cost Principles for Nonprofit Organizations), into a streamlined format that aims to improve both clarity and accessibility. The final guidance is now located in Title 2, Part 200 of the Code of Federal Regulations (2 C.F.R. 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards). This new guidance became effective December 26, 2014.

##### EXPLANATION OF SECTIONS

##### SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE FUND FOR VETERANS' ASSISTANCE GRANT PROGRAM

###### §460.10. Limitations on Grant Funds.

Section 460.10(10) deletes obsolete references to OMB Circulars A-87 and A-122 and replaces them with the updated reference to Title 2, Part 200 of the Code of Federal Regulations.

##### SUBCHAPTER B. MONITORING ACTIVITIES

###### §460.21. Monitoring Activities.

Section 460.21(c) deletes obsolete references to OMB Circulars A-87 and A-122 and replaces them with the updated reference to Title 2, Part 200 of the Code of Federal Regulations.

##### SUBCHAPTER C. CORRECTIVE ACTION

###### §460.31. Noncompliance.

Section 460.31(a)(4) deletes obsolete references to OMB Circulars A-87 and A-122 and replaces them with the updated reference to Title 2, Part 200 of the Code of Federal Regulations.

##### IMPACT STATEMENTS

Michelle Nall, Chief Financial Officer, Texas Veterans Commission, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There will be no increase in expenditures or revenue for state government and no fiscal impact for local government as a result of the proposed amended rules.

There are no anticipated economic costs to persons required to comply with the proposed amended rules.

An Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amended rules will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Tim Shatto, Operations Manager/Interim Director, Veterans Employment Services, Texas Veterans Commission, has determined that there is no significant negative impact upon employment conditions in the state as a result of the proposed amended rules.

Charles Catoe, Director, Fund for Veterans' Assistance, Texas Veterans Commission, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing or administering the amended rules will be the rules will contain the appropriate references to the regulations applicable to the Fund for Veterans' Assistance Grant Program, which are now consolidated and easier to apply and administer.

##### COMMENTS

Comments on the proposed amended rules may be submitted to Texas Veterans Commission, Attention: General Counsel, P.O. Box 12277, Austin, Texas 78711; faxed to (512) 463-3288; or emailed to [rulemaking@tvc.texas.gov](mailto:rulemaking@tvc.texas.gov). For comments submitted electronically, please include "Proposed Rules" in the subject line. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

##### SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE FUND FOR VETERANS' ASSISTANCE PROGRAM

###### 40 TAC §460.10

##### STATUTORY AUTHORITY

The amended rule is proposed under Texas Government Code §434.010, which provides the Texas Veterans Commission with the authority to establish rules that it considers necessary for the effective administration of the agency; and Texas Government Code §434.017, which authorizes the Commission to establish rules governing the award of grants by the Commission.

The amendments implement the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200.

§460.10. *Limitations on Grant Funds.*

Grant funds cannot be used for the following:

(1) - (9) (No change.)

(10) any cost that is not allowable under the Grant Agreement, the Fund for Veterans' Assistance Fiscal Guidelines, State of Texas Uniform Grant Management Standards (UGMS), or 2 C.F.R. 200 - Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [OMB Circular A-87 (Cost Principles for State and Local, and Indian Tribal Governments) or under OMB Circular A-122 (Cost Principles for Nonprofit Organizations)].

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 May 9, 2016.

TRD-201602259

Charles Catoe

Director, Fund for Veterans' Assistance

Texas Veterans Commission

Earliest possible date of adoption: June 19, 2016

For further information, please call: (512) 463-6535



## SUBCHAPTER B. MONITORING ACTIVITIES

### 40 TAC §460.21

#### STATUTORY AUTHORITY

The amended rule is proposed under Texas Government Code §434.010, which provides the Texas Veterans Commission with the authority to establish rules that it considers necessary for the effective administration of the agency; and Texas Government Code §434.017, which authorizes the Commission to establish rules governing the award of grants by the Commission.

The amendments implement the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200.

§460.21. *Monitoring Activities.*

(a) - (b) (No change.)

(c) Monitoring activities shall assess a Grantee's compliance with the Grant Agreement, the Fund for Veterans' Assistance Fiscal Guidelines, the State of Texas Uniform Grant Management Standards (UGMS), and 2 C.F.R. 200 - Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [OMB Circular A-87 (Cost Principles for State and Local, and Indian Tribal Governments) or OMB Circular A-122 (Cost Principles for Nonprofit Organizations)].

(d) - (e) (No change.)

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

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Charles Catoe

Director, Fund for Veterans' Assistance

Texas Veterans Commission

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For further information, please call: (512) 463-6535



## SUBCHAPTER C. CORRECTIVE ACTION

### 40 TAC §460.31

#### STATUTORY AUTHORITY

The amended rule is proposed under Texas Government Code §434.010, which provides the Texas Veterans Commission with the authority to establish rules that it considers necessary for the effective administration of the agency; and Texas Government Code §434.017, which authorizes the Commission to establish rules governing the award of grants by the Commission.

The amendments implement the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200.

§460.31. *Noncompliance.*

(a) The Agency may assess corrective action for failure to ensure, at any time during the grant period, compliance with the following:

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

(4) the Grant Agreement, the Fund for Veterans' Assistance Fiscal Guidelines, the State of Texas Uniform Grant Management Standards (UGMS), and 2 C.F.R. 200 - Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards [OMB Circular A-87 (Cost Principles for State and Local, and Indian Tribal Governments) or OMB Circular A-122 (Cost Principles for Nonprofit Organizations)].

(b) (No change.)

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

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Texas Veterans Commission

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## PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

### CHAPTER 700. CHILD PROTECTIVE SERVICES

#### SUBCHAPTER D. SCHOOL INVESTIGATIONS

### 40 TAC §§700.401 - 700.412

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§700.401 - 700.412, concerning

school investigations, in Chapter 700, Child Protective Services (CPS). The primary purpose of the revisions is to comply with legislative changes from the most recent legislative session. Senate Bill (SB) 206, enacted during the 84th Regular Session of the Texas Legislature, amended Texas Family Code §261.406(b) regarding entities that must be notified when DFPS completes an investigation of alleged abuse or neglect of a child by school personnel or volunteers in a school setting. Prior law mandated that upon completion of a school investigation, DFPS send a copy of the investigation report to the Texas Education Agency (TEA), the State Board for Educator Certification, the local school board or the school's governing body, the superintendent of the school district, and the school principal or director (unless the principal or director is alleged to have committed the abuse and neglect), to allow those officials to take appropriate action. The statute was amended to limit DFPS's duty to only providing notification of the completed report to TEA. The rationale for the change was that the notice requirement was unnecessarily burdensome for CPS caseworkers and that other provisions in the Family Code already contained more appropriate reporting provisions to ensure proper steps are taken to notify any entity within the school hierarchy as necessary to protect a child from potential harm. The entities other than TEA may still receive copies of the completed report upon request.

In addition, minor edits were made to update and "clean-up" the current rules.

The amendment to §700.401: (1) clarifies that CPS investigates abuse and neglect in a school setting as defined in §700.402(a)(2) of this title (relating to What do the terms used in this subchapter mean when Child Protective Services investigates reports of child abuse and neglect in a school?); (2) updates the rule to a question and answer format; and (3) updates the name of the department to the Department of Family and Protective Services.

The amendment to §700.402: (1) clarifies which terms and definitions only apply to school investigations and which terms and definitions apply to school investigations as well as investigations that are not conducted in a school setting; (2) deletes terms and definitions that are already defined in Subchapter E of this chapter (relating to Intake, Investigation, and Assessment Investigations); (3) updates the definition of school personnel and volunteers to persons who have access to children in a school setting and are providing services to or caring for children; (4) clarifies that a school setting for purposes of a Child Protective Services school investigation does not include school settings involving only children in facilities of the Texas Department of Aging and Disability Services and the Texas Department of State Health Services when the facility contracts with the local school district to provide educational services and does not include school settings that are a part of childcare operations regulated by the Child Care Licensing division of the Texas Department of Family and Protective Services (DFPS); (5) updates the definition of a reporter as the person who makes a report of child abuse or neglect to DFPS or a law enforcement agency; (6) adds the definition for alleged victim; (7) updates the rule to a question and answer format; and (8) reorganizes the structure of the rule.

The amendment to §700.403: (1) deletes the definition of "reasonable physical discipline" as it is already defined in Subchapter E of this chapter; (2) rewrites subsection (b) to clarify that any action that school personnel or volunteers take to avoid imminent harm to the child or others should not involve acts of unnecessary force or inappropriate use of restraints or seclusion;

(3) adds a new subsection (c) to clarify that notwithstanding subsection (b), which concerns acts that are not considered abuse and neglect in a school setting, allegations that otherwise meet the definition of abuse or neglect will be investigated by the department; (4) updates the rule to a question and answer format; and (5) updates a citation in subsection (a).

The amendment to §700.404: (1) updates the rule to a question and answer format; (2) updates a citation in subsection (a)(1); and (3) updates the name of the department to the Department of Family and Protective Services in subsection (a)(6).

The amendment to §700.405: (1) updates the rule to a question and answer format; and (2) clarifies that Child Protective Services is not the only division in the Department of Family and Protective Services that provides notice to law enforcement of a report of child abuse or neglect occurring in a school setting.

The amendment to §700.406: (1) updates the rule to a question and answer format; (2) clarifies that in addition to a CPS supervisor, an Investigation Screener may also review intake reports and approve or change the initial priority and action recommended for the report; and (3) changes Child Protective Services (CPS) to the Department of Family and Protective Services (DFPS) to clarify that CPS is not the only division of DFPS that assigns priorities for investigations.

The amendment to §700.407 updates the rule to a question and answer format.

The amendment to §700.408: (1) updates the rule to a question and answer format; (2) clarifies that investigative action and supervisor approval of an investigation must be completed within 30 *calendar* days and 10 *calendar* days respectively; (3) adds a citation from rule §700.507 of this title (relating to Response to Allegations of Abuse or Neglect.) in subsection (d) to clarify when an investigation may be closed administratively; and (4) updates an incorrect citation in subsection (d).

The amendment to §700.409: (1) clarifies that interviews and examinations conducted in a school investigation must follow all applicable standards; (2) clarifies that appropriate school personnel must be notified when the investigator interviews and examines a child on school premises; (3) updates the rule to a question and answer format; and (4) updates the name of the department to the Department of Family and Protective Services in subsection (a).

The amendment to §700.410 are non-substantive and include updating the rule to a question and answer format.

The amendment to §700.411: (1) updates the rule to clarify that DFPS is only mandated to send a copy of the completed report of the investigation to the Texas Education Agency (TEA) and that DFPS will send a copy of the report to State Board for Education Certification, the president of the local school board or local governing body for the school, the superintendent of the school district, and the school principal only upon request; (2) adds new subsection (b) to notify the entities other than TEA that they can find information on obtaining a redacted copy of the report from the DFPS public website; (3) new subsection (c) clarifies that when the overall investigation disposition is "reason-to-believe" in an investigation in a school under the jurisdiction of TEA, the report of the investigation must include information about the designated perpetrator's right to challenge the disposition through the Office of Consumer Affairs review process, in addition to an administrative review of the investigation findings; (4) new subsection (d) clarifies that after the completion

of an investigation of a school that is not under the jurisdiction of TEA, DFPS does not release the results of the investigation to persons having control over the designated perpetrator's access to children, but instead follows the provisions in Subchapter F of this chapter (relating to Release Hearings) prior to releasing the results of the investigation; (5) changes Child Protective Services (CPS) to Department of Family and Protective Services (DFPS) throughout the rule to clarify that CPS is not the only agency in DFPS that provides notification to school officials when a school investigation is closed; (6) updates the department's name to the Department of Family and Protective Services in subsection (e); and (7) updates the rule to a question and answer format.

The amendment to §700.412: (1) updates the rule to a question and answer format; (2) updates a citation within the rule; and (3) changes Child Protective Services to Department of Family and Protective Services (DFPS) to clarify that other divisions in DFPS are involved in notifying school and non-school entities when a school investigation is closed.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed amendments will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Subia also has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be that the public will have a better understanding of what constitutes abuse and neglect in a school setting and how DFPS investigates abuse and neglect in a school setting. In addition, the amendment to §700.411, which requires DFPS to send a copy of the completed investigation report in a school investigation to TEA only, rather than several other entities with the knowledge that the other entities already communicate with each other and still have the option of requesting the report, will allow caseworkers to spend more time on other pertinent issues. There will be no effect on large, small, or micro-businesses because the proposed changes do not impose new requirements on any business and do not require the purchase of any new equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

Ms. Subia has determined that the proposed amendments do 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, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Sophia Karimjee at (512) 438-4358 in DFPS's Legal Division. Electronic comments may be submitted to Sophia Karimjee@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-540, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC

§40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment to §700.409 implements Texas Family Code §261.303. The amendment to §700.411 implements revised Texas Family Code §261.406(b).

*§700.401. What is the purpose of Subchapter D of this chapter? [Purpose of Investigation in School Setting.]*

The purpose of this subchapter is to define abuse and neglect of children by school personnel or volunteers in a school setting as defined by §700.402(a)(2) of this title (relating to What do the terms used in this subchapter mean when Child Protective Services investigates reports of child abuse and neglect in a school?); [public or private schools] and to describe procedures for its report, investigation, and review by the Child Protective Services division of the Texas Department of Family and Protective [and Regulatory] Services pursuant to [Chapter 261, Texas Family Code, Chapter 261; and to describe related procedures.

*§700.402. What do the terms used in this subchapter mean when Child Protective Services investigates reports of child abuse and neglect in a school? [Definitions.]*

(a) The following terms and definitions apply only to school investigations:

(1) School personnel and volunteers--Persons who have access to children in a school setting and are providing services to or caring for the children. School personnel include but are not limited to school employees, contractors, school volunteers, school bus drivers, school cafeteria staff, and school custodians.

(2) School setting--The physical location of a child's school or of an event sponsored or approved by the child's school, or any other location where the child is in the care, custody, or control of school personnel in their official capacity, including transportation services. This does not include:

(A) school settings involving only children in facilities of the Texas Department of Aging and Disability Services, and the Texas Department of State Health Services when the facility contracts with the local school district to provide education services; or

(B) school settings that are a part of childcare operations regulated by the Child Care Licensing division of the Texas Department of Family and Protective Services (DFPS).

(b) The following terms and definitions apply to all Child Protective Services (CPS) investigations: [The terms used in this subchapter shall have the meanings assigned to those terms in Texas Family Code, Chapter 261, and in Subchapter E of this chapter, unless the context clearly indicates otherwise or the term is otherwise defined below:]

(1) Alleged perpetrator--A person who is alleged or suspected of being responsible for the abuse or neglect of a child.

(2) Alleged victim--A child who is alleged to be the victim of abuse or neglect.

(3) [(2)] Child--A person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.

[(3) CPS--Child Protective Services, a program within the Texas Department of Family and Protective Services.]

{(4) Designated perpetrator--A person who has been determined by a preponderance of evidence to have been responsible for abuse or neglect of a child in a school setting.}

{(5) Designated victim--A child who has been determined, based on a preponderance of the evidence, to have been abused or neglected in a school setting.}

(4) [(6)] Preponderance of evidence--Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

{(7) Reason-to-believe--A finding that an allegation of abuse or neglect against school personnel or volunteers in a school setting is supported by a preponderance of the evidence.}

(5) [(8)] Reporter--An individual who makes a, ~~on his own initiative, makes an unsolicited~~ report to DFPS [the Texas Department of Family and Protective Services (DFPS)] or to a duly constituted law enforcement agency[,], alleging the abuse or neglect of a child. If more than one individual makes a [an unsolicited] report alleging abuse or neglect of the same child, all such individuals shall have the designation of reporter.

{(9) Ruled-out--A finding by a preponderance of the evidence that an allegation of abuse or neglect did not occur or was not committed by the alleged perpetrator.}

{(10) School personnel and volunteers--Persons school employees, contractors, school volunteers, school bus drivers, school cafeteria staff, and school custodians.}

{(11) School setting--The physical location of a child's school, or of an event sponsored or approved by the child's school, or any other location where the child is in the care, custody, or control of school personnel in their official capacity, including transportation services, and excluding school settings involving only children in facilities of the Texas Department of Mental Health and Mental Retardation (MHMR) when the facility contracts with the local school district to provide educational services, and excluding school settings involving only children in facilities regulated by the Texas Department of Family and Protective Services.}

{(12) Unable to complete--A finding that CPS was not able to draw a conclusion regarding an investigation of an allegation of abuse or neglect against school personnel or volunteers in a school setting because the alleged victim:}

{(A) could not be located to begin the investigation, or moved and could not be located to finish the investigation; or}

{(B) was unwilling to cooperate with the investigation.}

{(13) Unable to determine--A finding that an allegation of abuse or neglect can neither be supported nor ruled-out by a preponderance of the available evidence.}

(c) Terms used in this subchapter that are not defined in this subchapter shall have the meanings assigned to those terms in Texas Family Code, Chapter 261, and in Subchapter E of this chapter (relating to Intake, Investigation, and Assessment Investigations), unless the context clearly indicates otherwise.

*§700.403. How does the Texas Department of Family and Protective Services define child abuse and neglect for purposes of a school investigation? [Definition of Child Abuse and Neglect in School Investigations.}*

(a) For purposes of an investigation in a school setting, the terms abuse and neglect shall have the meaning assigned to those terms

in the Texas Family Code[,], §261.001(1) and (4), as those terms are further defined in Subchapter E of this chapter (relating to Intake, Investigation, and Assessment Investigations) [§700.501 of this title (relating to Terminology Used in Statutory Definitions of Child Abuse and Neglect and Person Responsible for a Child's Care, Custody, or Welfare)], unless the definition is clearly inapplicable to reports of abuse or neglect in school settings or as otherwise provided in this section.

(b) Abuse and neglect in this context do not include the following:

(1) (No change.)

(2) actions that school personnel or volunteers at the child's school reasonably believe to be immediately necessary to avoid imminent harm to the child [self] or other individuals, if the actions:

(A) are limited only to those actions reasonably believed to be necessary under the existing circumstances; and[. The actions]

(B) do not include acts of unnecessary force or the inappropriate use of restraints or seclusion, such as use of restraints or seclusion as a substitute for lack of staff; [or]

(3) reasonable [physical] discipline. [Reasonable physical discipline is appropriate to the child's age and development and the reason for which the discipline is being administered and is without physical injuries that result in substantial harm or without genuine threat of substantial harm from physical injury to the child.}

(c) Notwithstanding subsection (b) of this section, if there are allegations in the report that otherwise meet the definition of "abuse" or "neglect" by school personnel in a school setting, those allegations will be investigated in accordance with this subchapter.

*§700.404. When does the Texas Department of Family and Protective Services investigate a report of alleged abuse or neglect occurring in a school setting? [Criteria for Accepting Reports and Conducting School Investigations.}*

(a) A report of alleged abuse or neglect occurring in a school setting will be assigned for investigation by Child Protective Services (CPS) if the following criteria are met:

(1) the allegations must meet the definitions of abuse or neglect contained in §700.403 of this title (relating to How does the Texas Department of Family and Protective Services define child abuse and neglect for purposes of a school investigation? [Definition of Child Abuse or Neglect in School Investigations]);

(2) - (5) (No change.)

(6) the same allegations involving the school setting must not have already been investigated by the Texas Department of Family and Protective [and Regulatory] Services.

(b) A report of alleged abuse and neglect which does not meet the criteria for investigation specified in this section shall be referred to an appropriate law enforcement entity or other investigating agency in accordance with Texas Family Code[,], §261.105.

(c) (No change.)

*§700.405. Who must the Texas Department of Family and Protective Services notify when the agency receives a report of child abuse or neglect in a school setting? [Notification to Law Enforcement Agencies of Reports of Abuse or Neglect in School Investigations.}*

The Texas Department of Family and Protective Services (DFPS) [Child Protective Services (CPS)] must provide notification of all school-related reports of child abuse or neglect to the law enforcement

entity with jurisdiction for criminal investigations in the geographical area where the alleged incident occurred, within the time frames set out in §700.506(1) of this title (relating to Notification of Law Enforcement Agencies).

*§700.406. What priorities and time frames for initiating school investigations apply? [Priorities and Time Frames for Initiating School Investigations.]*

The Texas Department of Family and Protective Services [Child Protective Services (CPS)] shall assign a priority to all reports accepted for investigation, and shall initiate an investigation within the corresponding time frame, as specified in §700.505 of this title (relating to Priorities for Investigation and Assessment). Prior to initiating an investigation, a Child Protective Services [CPS] supervisor or an Investigation Screener must review the intake report and either approve or change the initial priority and the action recommended for the report.

*§700.407. Which school personnel must be notified prior to initiating a school investigation? [Notification to School Principal of Impending School Investigation.]*

Prior to conducting an investigation under this subchapter, Child Protective Services (CPS) must notify the school principal (or the principal's supervisor if the school principal is an alleged perpetrator) of the fact that a report has been assigned for investigation, the nature of the allegations contained in the report, and the date and time when the investigator plans to visit the school campus to begin the investigation. The CPS investigator must request that the school principal (or the principal's supervisor) not alert the alleged perpetrator or others regarding the report until the investigator has had an opportunity to interview the alleged perpetrator.

*§700.408. How does Child Protective Services conduct a school investigation? [Conducting the School Investigation.]*

(a) - (b) (No change.)

(c) The CPS investigator must complete the investigation, reach a disposition as to each allegation made in the report, and submit the investigation report and findings to a supervisor for approval within 30 calendar days after initiating the investigation, unless an extension of time is approved by the worker's supervisor due to extenuating circumstances. The CPS supervisor must approve the investigation or return it to the investigator for further action, within 10 calendar [ten] days of receiving the investigative report. If the tenth day falls on a weekend or state holiday, the supervisor has until the next working day to complete the required review.

(d) Notwithstanding any other provision in this section, an investigation may be closed administratively as provided by §700.507 of this title (relating to Response to Allegations of Abuse or Neglect) or at any point during the investigation[;] if it becomes apparent after initiating the investigation that the allegations made in the report do not, in fact, meet one or more of the criteria for investigation specified in §700.404 of this title (relating to When does the Texas Department of Family and Protective Services investigate a report of alleged abuse or neglect occurring in a school setting?) [Criteria for Accepting Reports and Conducting School Investigations]. If a case is closed administratively, all allegations in the case are given the disposition of "administrative closure."

*§700.409. What procedures apply when Child Protective Services conducts an interview or examination during a school investigation? [Conducting Interviews or Examinations.]*

(a) School officials or other persons related to the school setting may not interfere with an investigation of a report of child abuse or neglect conducted by the Texas Department of Family and Protective [and Regulatory] Services, pursuant to Texas Family Code

§261.303, Interference with Investigation[;] Court Order. Interviews and examinations in a school investigation may take place on or off the school premises, as deemed appropriate by the Child Protective Services (CPS) investigator, pursuant to all applicable standards. The CPS [provided the] investigator must notify appropriate school personnel [notifies the school principal (or that individual's supervisor in the event that the principal is the alleged perpetrator)] prior to conducting an interview or examination on school premises. CPS may request that school personnel or volunteers not be present during the interview or examination of an alleged victim, an alleged perpetrator, an adult or child witness, or any other person who may have information relevant to the investigation if the investigator determines that:

(1) - (2) (No change.)

(b) (No change.)

*§700.410. How does Child Protective Services make dispositions and assign roles in a case after completing the investigation? [Dispositions in School Investigations.]*

(a) [Dispositions.] At the conclusion of the investigation, Child Protective Services (CPS) must assign an individual disposition to each allegation of abuse or neglect, as well as an overall disposition to the investigation.

(b) [Assignment of allegation dispositions.] CPS uses the following allegation dispositions for investigations in school settings:

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

(c) [Overall disposition.] The overall investigation disposition is the summary finding about the abuse or neglect that was investigated. The overall disposition is determined in the following manner:

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

(d) [Overall role.] The overall role for the alleged perpetrator and alleged victim at the end of an investigation in the school setting is the summary finding about the person's involvement in the abuse or neglect that was investigated. An individual's overall role is determined as follows:

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

*§700.411. How does the Texas Department of Family and Protective Services provide notice to school officials when a school investigation is closed? [Notification to School Officials of Findings in a School Investigation.]*

(a) After the Texas Department of Family and Protective [and Regulatory] Services (DFPS) has closed an investigation in a [public or private] school under the jurisdiction of the Texas Education Agency (TEA), DFPS [Child Protective Services (CPS)] is statutorily required to provide a report of the investigation, redacted to remove the identity of the reporter, to TEA (Director of Education Investigations). On request, DFPS shall provide a redacted copy of the report to the following:

{(1) TEA (Division of Continuing Education, Services to Children, Youth and Families Unit);}

(1) [(2)] State Board for Educator Certification;

(2) [(3)] president of the local school board or local governing body for the school; [and]

(3) the superintendent of the school district; and

(4) (No change.)

(b) The four entities listed above can find information on obtaining a redacted copy of the report on the DFPS public website at <https://www.dfps.state.tx.us/policies/caserecord.asp>.

(c) [(b)] If the overall investigation disposition is "reason-to-believe[-]" in an investigation in a school under the jurisdiction of TEA, the report must include information about the designated perpetrator's right to challenge the disposition through an administrative review of the investigation findings (ARIF), and through the Office of Consumer Affairs (OCA) review process if the finding is upheld at the ARIF. The report must also state that DFPS [CPS] will notify TEA and any of the above entities that originally requested a copy of the report of the investigation in the event that the dispositions are changed as a result of an ARIF or other challenge.

(d) [(e)] After the completion of an investigation of a school not under the jurisdiction of TEA, DFPS [~~When the overall disposition in an investigation is "reason-to-believe" and the school is a private school not under the jurisdiction of TEA, CPS]~~ does not [~~automatically~~] release the results of the investigation to the entities listed in subsection (a) of this section. DFPS follows[-, but must follow] the provisions in Subchapter F of Chapter 700 of this title (relating to Release Hearings) prior to releasing the results of the investigation to persons having control over the designated perpetrator's access to children. [~~When the overall disposition in an investigation is other than "reason-to-believe," CPS may release the findings to the appropriate school officials when the investigation is complete.-]~~

(e) [(d)] Notwithstanding any other provision in this section, notice need not be provided to a school official if a report of abuse or neglect is closed administratively prior to notification to any school official that a report was received by DFPS [the Texas Department of Protective and Regulatory Services].

*§700.412. How does the Texas Department of Family and Protective Services provide notice to non-school officials when a school investigation is closed? [Notification of Findings to Non-School Officials in a School Investigation.-]*

In addition to the notification of findings required under §700.411 of this title (relating to How does the Texas Department of Family and Protective Services provide notice to school officials when a school investigation is closed?), the Texas Department of Family and Protective Services [Notification to School Officials of Findings in a School Investigation, Child Protective Services (CPS)] must comply with the notification requirements contained in Texas Family Code, Chapter 261, and in §700.513 of this title (relating to Notification about Results).

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 May 9, 2016.

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Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 19, 2016

For further information, please call: (512) 438-4358



## SUBCHAPTER Q. PURCHASED PROTECTIVE SERVICES

### DIVISION 1. RESIDENTIAL CHILD-CARE CONTRACTS

#### 40 TAC §700.1701

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), new §700.1701, in Chapter 700, concerning Child Protective Services. The new section is proposed in Subchapter Q, Purchased Protective Services, in a new Division 1, Residential Child-Care Contracts. All current rules in Subchapter Q are moved to a new Division 2, Post Adoption Services. The purpose of the new section is to comply with the mandates of Senate Bill 830 from the 84th Texas Legislature, Regular Session 2015, which amended Chapter 531 of the Texas Government Code by adding Subchapter Y and also amended §40.0041 of the Human Resources Code by adding Subsections (g) and (h) concerning the Ombudsman For Children and Youth in Foster Care.

Pursuant to the bill, the Health and Human Services Commission was tasked with appointing an ombudsman for children and youth in the conservatorship of DFPS to serve as a neutral party in assisting the children and youth with complaints regarding issues concerning any Health and Human Services (HHSC) agency, including DFPS.

The summary of the changes is as follows:

New §700.1701: (1) specifies in subsection (a) that residential child-care facilities that care for children in the conservatorship of DFPS must prominently display a sign produced by DFPS or the Ombudsman For Children and Youth in Foster Care related to the existence and contact information for the ombudsman office; and (2) specifies in subsection (b) that the residential child care facilities must implement procedures to allow children and youth in the conservatorship of DFPS to make complaints in private or in a space that is separate from facility staff, volunteers, or the foster family.

The Department discussed the rule proposal and collaborated with HHSC's Office of the Ombudsman prior to drafting the rules. Additional stakeholder input will be obtained during the public comment period for the rules.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed new section will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Subia also 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 enforcing the new section will be that children and youth in foster care will have an avenue to make complaints regarding any issues or concerns they have while in foster care to an entity that is independent of DFPS in order to ensure that their rights are protected. There should be no adverse effect on large, small, or micro-businesses as a result of the proposed rule change other than an extremely nominal cost to residential child-care facilities who care for children in the conservatorship of DFPS to print or copy signs that will be developed by DFPS and the Ombudsman For Children and Youth in Foster Care for posting in the facilities, as required by new rule §700.1701. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

Ms. Subia has determined that the proposed new section 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, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Jose A. Martinez at (512) 929-6739 in DFPS's Office of Consumer Affairs Division. Electronic comments may be submitted to Jose.Martinez@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-550, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The new section is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements Texas Human Resources Code §40.0041.

§700.1701. What are the posting requirements for residential child-care facilities who care for children in the conservatorship of the Department of Family and Protective Services related to the Ombudsman For Children and Youth in Foster Care?

(a) Residential child-care facilities who care for children in the conservatorship of the Department of Family and Protective Services must prominently display a sign produced by DFPS or the Ombudsman For Children and Youth in Foster Care related to the existence and contact information for the Ombudsman For Children and Youth in Foster Care.

(b) The residential child care facilities must implement procedures to allow children and youth to make complaints in private or in a space that is separate from facility staff, volunteers, or the foster family.

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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Trevor Woodruff

General Counsel

Department of Family and Protective Services

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For further information, please call: (512) 438-4358



## CHAPTER 702. GENERAL ADMINISTRATION

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§702.801, 702.811, 702.813, 702.841, 702.843, 702.845, 702.847, and 702.849; repeal of §§702.815, 702.817, 702.819, 702.821, 702.823, and 702.825; and new §§702.815, 702.817, 702.819, 702.821, 702.823, 702.825, 702.827, and 702.829, in Chapter 702, concerning General Administration. The purpose of the amendments, repeals, and new sections is to comply with the mandates of Senate Bill 830 from the 84th Texas Legislature, Regular Session 2015, which amended Chapter 531 of the Texas Government Code

by adding Subchapter Y and also amended Section 40.0041 of the Human Resources Code by adding Subsections (g) and (h) concerning the Ombudsman For Children and Youth in Foster Care.

Pursuant to the bill, the Health and Human Services Commission (HHSC) was tasked with appointing an ombudsman for children and youth in the conservatorship of DFPS to serve as a neutral party in assisting the children and youth with complaints regarding issues concerning any HHSC agency, including DFPS. Pursuant to the bill, the following new rules are being proposed:

(1) New rule §702.815 which clarifies that a current foster child or youth may file complaints with the Ombudsman For Children and Youth in Foster Care and explains the types of issues for which the foster children or youth may file a complaint and seek assistance from the office.

(2) New rule §702.817 which explains how DFPS will assist the Ombudsman for Children and Youth in Foster Care in reviewing and investigating complaints.

In addition to the above changes, the purpose of the amendments and repeals to Subchapter I of this chapter is also to update the rules where they are no longer accurate, as the rules were last updated in 2002. The updates seek to conform the rules to the Office of Consumer Affairs' (OCA's) current practice and policy concerning its process for receiving and reviewing complaints regarding case-specific activities of the DFPS program areas as well as reviewing substantiated findings of child abuse or neglect.

The summary of the changes is as follows:

The amendment to §702.801: (1) clarifies that OCA only reviews designated perpetrator findings for child abuse and neglect allegations; and (2) updates the name of the department and OCA.

The amendment to §702.811 updates the names of the department and OCA as well as the link to the DFPS public website.

The amendment to §702.813 clarifies that the following individuals may file complaints with OCA, in addition to the individuals already listed in the rule: (1) consumers, service recipients, and persons or entities regulated by DFPS who have a concern or complaint regarding a specific case; (2) individuals from the public who have a concern or complaint regarding a specific case, including but not limited to extended family, friends of the family, or foster parents; (3) other state agencies when the complaint is regarding a specific case; (4) government officials, including judges; and (5) former foster children or youth, including youth that are 18 years of age or older and are in extended foster care. The rule also updates the names of the department and OCA.

Section 702.815 is being repealed and incorporated into new §702.819.

New §702.815 explains (1) that children and youth under 18 years of age that are currently in the conservatorship of DFPS may file complaints with HHSC's Ombudsman For Children and Youth in Foster Care regarding any issues that are within the authority of any agency under HHSC, including DFPS, and further provides the various methods of contacting the office to file a complaint; (2) that current foster youth and children may also contact the office to seek assistance in reporting allegations of abuse or neglect to DFPS.

Section 702.817 is being repealed and incorporated into new §702.821.

New §702.817 explains that DFPS will assist the Ombudsman For Children and

Youth in Foster Care in reviewing and investigating complaints filed by current foster children and youth by: (1) collaborating with the office to develop and implement an annual outreach plan to promote awareness of the office among the youth and children; (2) providing the office with access to DFPS records relating to complaints, cooperating with the office in responding to questions that the office may have regarding complaints, and providing information requested by the office in order to assist in resolving complaints; and (3) cooperating with the office to create consequences, based on the circumstances of the complaint and the severity of the retaliation, for any person who is found to have retaliated against a child or youth in the conservatorship of DFPS because of a complaint made to the office.

Section 702.819 is being repealed and incorporated into new §702.823.

New §702.819 incorporates the contents of repealed §702.815 except for the following changes: (1) clarifies that the Review of Perpetrator Designation is only available for substantiated child abuse and neglect findings; (2) clarifies that the complaint process is not available for complaints related to civil rights issues and DFPS personnel issues, or when OCA determines that a review of the complaint would interfere with an ongoing litigation, investigation, or prosecution; (3) updates the title of the rule; and (4) updates the names of the department and OCA.

Section 702.821 is being repealed and incorporated into new §702.825.

New §702.821 incorporates the contents of repealed §702.817 except for the following changes: (1) updates OCA's toll-free number, fax number, email, and link to the DFPS public website for purposes of contacting OCA to file a complaint; and (2) updates the names of the department and OCA.

Section 702.823 is being repealed and incorporated into new §702.827.

New §702.823 incorporates the contents of repealed §702.819 except that the names of the department and OCA have been updated.

New §702.825 incorporates the contents of repealed §702.821 except for the following changes: (1) updates the rule to clarify that the Office of Consumer Affairs provides the complainant information by mail or telephone regarding the procedure for investigating and resolving a complaint; and (2) updates the names of the department and OCA.

Section 702.827 is being repealed and incorporated into new §702.823.

New §702.827 incorporates the contents of repealed §702.823 except for the following changes: (1) clarifies that OCA reviews complaints to determine whether applicable rule and statute were violated in addition to DFPS's policies and procedures; (2) clarifies that OCA adheres to confidentiality requirements specified in state and federal law in addition to the Texas Open Records Act; (3) deletes the part of subsection (a) that states that OCA does not investigate issues in ongoing or forthcoming litigation or when the complaint relates to a law enforcement investigation or criminal prosecution if OCA determines it would interfere with the litigation and investigation as it has been incorporated into new rule §702.819; (4) clarifies that OCA provides status information on a quarterly basis to *all* persons

or entities who file a complaint regarding a specific case, if there is a pending complaint, unless the information would jeopardize an undercover investigation; (5) updates the rule to reflect that electronic and paper copies of OCA case files will be purged every two years after the complaint is closed; and (6) updates the names of the department and OCA.

New §702.829 incorporates the contents of repealed §702.825 except for the following changes: (1) clarifies that reports regarding the number, type, and resolution of complaints made against DFPS must be sent to the State Office Program Administrators, and not the executive director; (2) updates the rule to note that OCA also provides monthly reports to the HHSC's Office of the Ombudsman that is included in the written report to HHSC's executive director; and (3) updates the names of department and OCA.

The amendment to §702.841: (1) reflects that a Review of Perpetrator Designation is only available for substantiated findings of child abuse or neglect; (2) clarifies that a review is not available if the request for review is to challenge orders or findings made by the court in which the suit affecting the parent-child relationship has been filed, if there is pending litigation against DFPS that relates to the designation, or if the requestor does not otherwise qualify for a review regardless of if the requestor qualified for an Administrative Review of Investigation Findings (ARIF); and (3) updates the names of the department and OCA.

The amendment to §702.843: (1) updates OCA's toll-free number, fax number, email, and link to the DFPS public website for purposes of contacting OCA to request a Review of Perpetrator Designation; (2) clarifies that a designated perpetrator of child abuse or neglect has 45 days from the date of the ARIF to request a review; and (3) updates the names of the department and OCA.

The amendment to §702.845 updates the name of OCA and deletes the timeframe for acknowledgement of a request for a Review of Perpetrator Designation.

The amendment to §702.847 clarifies that a Review of Perpetrator Designation is conducted as a desk review and updates the names of the department and OCA.

The amendment to §702.849 reflects the current procedure OCA follows once a Review of Perpetrator Designation is complete, including clarifying that: (1) if OCA does not concur with the ARIF, the ARIF documents and OCA review material are forwarded to the CPS assistant commissioner or designee for consideration; (2) if OCA and the program assistant commissioner or designee do not agree on the disposition, the case is forwarded to the DFPS general counsel who reviews the case and makes the final decision as the DFPS commissioner's designee. It also updates the names of the department and OCA.

The Department discussed the rule proposals and collaborated with HHSC's Office of the Ombudsman prior to drafting the rules. Additional stakeholder input will be obtained during the public comment period for the rules.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed amendments, repeals, and new sections will be in effect, there will not be any significant costs or revenues to state or local government as a result of enforcing or administering these sections.

Ms. Subia also has determined that for each year of the first five years the amendments, repeals, and new sections are in effect, the public benefit anticipated as a result of enforcing these rule

changes will be that children and youth in foster care will have an avenue to make complaints regarding any issues or concerns they have while in foster care to an entity that is independent of DFPS in order to ensure that their rights are protected. There is no anticipated economic cost to persons who are required to comply with the proposed amendments, repeals and new sections.

Ms. Subia has determined that the proposed amendments, repeals, and new sections do 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, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Jose A. Martinez at (512) 929-6739 in DFPS's Office of Consumer Affairs Division. Electronic comments may be submitted to [Jose.Martinez@dfps.state.tx.us](mailto:Jose.Martinez@dfps.state.tx.us). Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-550, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

## SUBCHAPTER I. OFFICE OF CONSUMER AFFAIRS SERVICES

### DIVISION 1. OFFICE OF CONSUMER AFFAIRS

#### 40 TAC §702.801

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment generally implements Human Resources Code §40.0041.

*§702.801. What is the Office of Consumer Affairs [Ombudsman Office] fee?*

(a) The Office of Consumer Affairs of the Texas Department of Family and Protective Services (DFPS) [Ombudsman Office PRS] is a neutral party that reviews complaints regarding case-specific activities of the DFPS [PRS] program areas to determine if DFPS's [PRS's] policies and procedures were followed. The complaint process is described in Division 2 of this subchapter (relating to Office of Consumer Affairs [Ombudsman Office] Complaint Process).

(b) The Office of Consumer Affairs [Ombudsman Office] also conducts reviews of case-specific findings that designate an individual as a [an alleged] perpetrator of abuse or[-] neglect[-] or exploitation]. The review process is described in Division 3 of this subchapter (relating to Office of Consumer Affairs [Ombudsman Office] Review of [Alleged] Perpetrator Designation).

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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Trevor Woodruff

General Counsel

Department of Family and Protective Services

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For further information, please call: (512) 929-6739

## DIVISION 2. OFFICE OF CONSUMER AFFAIRS COMPLAINT PROCESS

### 40 TAC §§702.811, 702.813, 702.815, 702.817, 702.819, 702.821, 702.823, 702.825, 702.827, 702.829

The amendments and new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections implement Texas Government Code §§531.992; 531.993; 531.995 and Texas Human Resources Code §40.0041.

*§702.811. How can a member of the public find out about the complaint process?*

The Texas Department of Family and Protective Services (DFPS) [PRS] publicizes the availability of the complaint process and the mailing address and telephone number to which complaints should be sent through:

- (1) signs displayed in DFPS [PRS] offices;
- (2) DFPS [Ombudsman Office] brochures;
- (3) the DFPS [PRS] public web site at <http://www.dfps.state.tx.us>[-]. The address is <http://www.tdprs.state.tx.us>]; and
- (4) other methods determined by DFPS [PRS].

*§702.813. Who may file complaints?*

The Office of Consumer Affairs [Ombudsman Office] complaint process is available to:

- (1) consumers, service recipients, and persons or entities regulated by the Department of Family and Protective Services (DFPS) who have a concern or complaint regarding a specific case [PRS];
- (2) individuals from the public who have a concern or complaint regarding a specific case, including but not limited to extended family, friends of the family, or foster parents;
- (3) [(2)] other state agencies when the complaint is regarding a specific case;
- (4) [(3)] government officials, including judges and state and federal legislative and executive offices; [and]
- (5) [(4)] DFPS [PRS] employees, if the complaint alleges a violation of DFPS [PRS] policy in a case-specific situation; and[-]
- (6) former foster children or youth, including youth that are 18 years of age or older and are in extended foster care. A child

or youth who is currently in the conservatorship of DFPS, may still file a complaint through the process described in §702.815 of this title (relating to May current foster children and youth file complaints?).

*§702.815. May current foster children and youth file complaints?*

(a) Yes. If a child or youth who is under 18 years of age and currently in the conservatorship of the Department of Family and Protective Services (DFPS) seeks to file a complaint, the child or youth should be directed to the Health and Human Services Commission's Ombudsman For Children and Youth in Foster Care. To file the complaint, the current foster child or youth may contact the Ombudsman for Children and Youth in Foster Care through the following methods:

(1) Toll-free phone: 1-844-286-0769;

(2) Toll-free fax: 1-888-780-8099;

(3) Mail: Texas Health and Human Services Commission, Foster Care Ombudsman, MC H-700, P.O. Box 13247, Austin, Texas 78711-3247; or

(4) Email: [fco@hhsc.state.tx.us](mailto:fco@hhsc.state.tx.us)

(b) A current foster child or youth may file a complaint regarding any issues that are within the authority of DFPS or another health and human services agency. This includes individual complaints that allege violations of agency procedures or policies or other violations.

(c) A current foster child or youth may also contact the Ombudsman For Children and Youth in Foster Care to seek assistance in reporting allegations of abuse or neglect to DFPS.

*§702.817. How will the Department of Family and Protective Services (DFPS) assist the Health and Human Services Commission's Ombudsman For Children and Youth in Foster Care office in reviewing and investigating complaints filed by current foster children or youth?*

(a) DFPS will collaborate with the Ombudsman For Children and Youth in Foster Care to develop and implement an annual outreach plan to promote awareness of the office among children and youth in the conservatorship of DFPS.

(b) DFPS will provide the Ombudsman For Children and Youth in Foster Care with access to DFPS records relating to the complaint, cooperate with the office in responding to questions that the Ombudsman may have regarding the complaint, and provide information requested by the office in order to assist in resolving complaints.

(c) DFPS will cooperate with the Ombudsman for Children and Youth in Foster Care to create consequences, based on the circumstances of the complaint and the severity of the retaliation, for any person who is found to have retaliated against a child or youth in the conservatorship of DFPS because of a complaint made to the Ombudsman.

*§702.819. When does the Office of Consumer Affairs not accept complaints for review?*

The complaint process is not available:

(1) to individuals who have been designated as perpetrators of abuse or neglect. Those individuals must use procedures specified in Division 3 of this subchapter (relating to Office of Consumer Affairs Review of Perpetrator Designation), unless the complaint relates to issues other than the case disposition;

(2) for complaints the Office of Consumer Affairs has reviewed multiple times and has made all reasonable efforts within agency policy and procedures to resolve;

(3) for complaints related to civil rights issues;

(4) for complaints regarding or from Department of Family and Protective Services staff relating to personnel issues; or

(5) if the Office of Consumer Affairs discovers that the subject of a complaint is an issue in ongoing or forthcoming litigation against DFPS, except for ongoing Child Protective Services conservatorship cases, or is the subject of a law enforcement investigation or criminal prosecution, and the Office of Consumer Affairs determines that the review would interfere with the litigation, investigation, or prosecution.

*§702.821. How does a complainant file a complaint?*

A complainant may contact the Office of Consumer Affairs for direct case-specific complaints concerning the Department of Family and Protective Services (DFPS) using one of the following methods:

(1) sending a correspondence via mail to the Office of Consumer Affairs, Texas Department of Family and Protective Services, Mail Code Y-946, P.O. Box 149030, Austin, Texas 78714-9030;

(2) calling the toll-free number: 1-800-720-7777;

(3) sending a facsimile to the Office of Consumer Affairs at (512) 339-5892;

(4) using the DFPS public web site at <http://www.dfps.state.tx.us>; or

(5) sending an email to [oca@dfps.state.tx.us](mailto:oca@dfps.state.tx.us).

*§702.823. Must a complainant go through another agency complaint process before contacting the Office of Consumer Affairs?*

No. Although the Department of Family and Protective Services encourages complaint resolution at the local level, a complainant may file a complaint with the Office of Consumer Affairs at any time, without going through another agency process for complaint resolution.

*§702.825. How does a complainant know if the Office of Consumer Affairs received the complaint?*

(a) The Office of Consumer Affairs acknowledges receipt of each complaint, informs the complainant whether the complaint meets the criteria for an Office of Consumer Affairs complaint, and provides the complainant information by mail or telephone regarding the procedures for investigating and resolving a complaint.

(b) A complaint may be accepted initially and later refused if subsequent investigation or developments determine that the complaint is no longer appropriate for the Office of Consumer Affairs.

*§702.827. How does the complaint process work?*

(a) The Office of Consumer Affairs reviews complaints to determine whether applicable rule, statute, or the policies and procedures of the Department of Family and Protective Services (DFPS) were followed.

(b) The Office of Consumer Affairs provides status information at least quarterly to the complainant, if there is a pending complaint, unless the information would jeopardize an undercover investigation.

(c) The Office of Consumer Affairs notifies the complainant of the findings made by the Office of Consumer Affairs, within the limits of confidentiality required by the Texas Open Records Act and state and federal law.

(d) If the Office of Consumer Affairs determines that applicable rule, statute, or DFPS's policies and procedures were not followed, the Office of Consumer Affairs notifies appropriate agency staff so appropriate corrective measures can be taken.

(e) The Office of Consumer Affairs keeps a file for each complaint. The electronic file and paper copies of the records will be purged every two years after the complaint is closed.

§702.829. What are the reporting requirements of the Office of Consumer Affairs?

The Office of Consumer Affairs prepares and delivers a report annually to the Commissioner for the Department of Family and Protective Services (DFPS) and State Office Program Administrators regarding the number, type, and resolution of complaints made against DFPS. The Office of Consumer Affairs also provides a monthly report to the Health and Human Services Commission's Office of the Ombudsman that is included in the written report to the Health and Human Services 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.

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Trevor Woodruff  
General Counsel

Department of Family and Protective Services  
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## DIVISION 2. OMBUDSMAN COMPLAINT PROCESS

### 40 TAC §§702.815, 702.817, 702.819, 702.821, 702.823, 702.825

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals generally implement Human Resources Code §40.0041.

*§702.815. Who may not file complaints with the Ombudsman Office?*

*§702.817. How does a complainant file a complaint?*

*§702.819. Must a complainant go through another agency complaint process before contacting the Ombudsman Office?*

*§702.821. How does a complainant know if the Ombudsman Office received the complaint?*

*§702.823. How does the complaint process work?*

*§702.825. What are the reporting requirements of the Ombudsman Office?*

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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Trevor Woodruff  
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## DIVISION 3. OFFICE OF CONSUMER AFFAIRS REVIEW OF PERPETRATOR DESIGNATION

### 40 TAC §§702.841, 702.843, 702.845, 702.847, 702.849

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment generally implements Human Resources Code §40.0041.

*§702.841. Who can request an Office of Consumer Affairs [Ombudsman Office] Review of [alleged] perpetrator designation?*

(a) Anyone who has been determined to be a perpetrator of abuse or [;] neglect [; or exploitation] as a result of an investigation conducted by the Child Protective Services (CPS) Program of the Department of Family and Protective Services (DFPS) [PRS] can request an Office of Consumer Affairs [Ombudsman Office] Review. The individual must use the Administrative Review of Investigative Findings (ARIF) process offered by the Child Protective Services Program before the individual is eligible for the Office of Consumer Affairs [Ombudsman Office] Review.

(b) An Office of Consumer Affairs [Ombudsman Office] Review is not available in the following situations:

(1) if DFPS [PRS] determines that a court of competent jurisdiction has issued an order that is legally consistent with the DFPS [PRS] finding on the allegation of abuse [;] or neglect [; or exploitation] for which the Review was requested; [-]

(2) if the complaint is to challenge any other orders or findings made by the court in which the suit affecting the parent-child relationship has been filed, including removal orders;

(3) if there is pending litigation against DFPS related to the designation; or

(4) if the requester does not qualify for an Office of Consumer Affairs Review even if the requester qualified for the ARIF.

*§702.843. Are there timeframes for requesting the Office of Consumer Affairs [Ombudsman Office] Review?*

(a) Yes. Except for good cause determined by the Office of Consumer Affairs [Ombudsman Office] director, an individual must request an Office of Consumer Affairs [Ombudsman Office] Review in

writing within 45 calendar [30] days after the date the Administrative Review of Investigative Findings (ARIF) notification letter was sent.

(b) An individual may request the Office of Consumer Affairs Review using one of the following methods:

(1) mailing the [The Review] request [must be sent] to the Office of Consumer Affairs [Ombudsman Office], Texas Department of Family and Protective [and Regulatory] Services, Mail Code Y-946, P.O. Box 149030, Austin, Texas 78714-9030;[- The Review request may also be sent]

(2) sending a [by] facsimile to the Office of Consumer Affairs [Ombudsman Office] at (512) 339-5892; [512-834-3782, or by contacting the Ombudsman Office]

(3) using the Department of Family and Protective Services [PRS] public web site at <http://www.dfps.state.tx.us>; or[- The address is: <http://www.tdprs.state.tx.us>]

(4) sending an email to [oca@dfps.state.tx.us](mailto:oca@dfps.state.tx.us).

§702.845. How does a requester know if the Office of Consumer Affairs [Ombudsman Office] received the request?

The Office of Consumer Affairs [Ombudsman Office] acknowledges receipt of the request in writing [within 30 days from the date the request is received].

§702.847. How does the Office of Consumer Affairs [Ombudsman Office] Review work?

(a) The Office of Consumer Affairs [Ombudsman Office] reviews:

- (1) the program case record;
- (2) the Administrative Review of Investigation Findings documents; and
- (3) additional information that was available during the original investigation and either was considered or should have been considered by staff performing the investigation. Only in extraordinary circumstances, at the discretion of the Office of Consumer Affairs [Ombudsman Office] director, will new information be considered in the Office of Consumer Affairs [Ombudsman Office] Review.

(b) The Ombudsman Office determines whether an interview with the requester is needed to facilitate the Review process.[-]

§702.849. What happens when the Office of Consumer Affairs [Ombudsman Office] completes the Review?

After completing the Review, the Office of Consumer Affairs [Ombudsman Office] prepares written findings and recommendations.

(1) If the Office of Consumer Affairs [Ombudsman Office] findings sustain the Administrative Review of Investigation Findings (ARIF), the Office of Consumer Affairs [Ombudsman Office] director or designee notifies the requester of the final disposition of the case.

(2) If the Office of Consumer Affairs [Ombudsman Office] does not concur with the ARIF, the ARIF documents and Office of Consumer Affairs [Ombudsman Office] Review materials are forwarded to the program assistant commissioner [deputy director] or [his] designee for consideration. [The Ombudsman Office director and staff meet with the program deputy director or the director's designee to examine the evidence to reach concurrence on the case finding.]

(A) If concurrence is reached, the Office of Consumer Affairs [Ombudsman Office] forwards a notification letter to the requester advising the requester of the findings.

(B) If the Office of Consumer Affairs [Ombudsman Office] and the CPS assistant commissioner or designee [program deputy

director] do not agree, the case is forwarded to Department of Family and Protective Services' [PRS's] general counsel, who reviews the case and makes the final decision as the DFPS commissioner's designee [recommendations to PRS's executive director for final disposition]. The Office of Consumer Affairs [executive director or the director's designee] then notifies the requester of the final case disposition.

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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Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 19, 2016

For further information, please call: (512) 929-6739

## CHAPTER 705. ADULT PROTECTIVE SERVICES

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§705.1001, 705.2105, 705.2107, 705.3102, 705.4103, 705.4105, 705.4107, 705.6101, 705.7103, and 705.7105; new §705.2103; and the repeal of §705.2103 in Chapter 705, concerning Adult Protective Services. The purpose of the amendments, new rules and repeal is to implement Senate Bills 760 and 1880 (84th Legislature), the APS Scope and Jurisdiction Bills, which expanded the APS Provider (formally Facility) program's jurisdiction to investigate abuse, neglect, and exploitation. These bills ensured continued State of Texas compliance with the Center for Medicaid and Medicare Services (CMS) requirements for the health and welfare of recipients of home and community-based services (HCBS). The bills (1) expanded the authority of Adult Protective Services (APS) to investigate, inter alia, all home and community-based service providers whether providing services in a traditional or managed care service delivery model, (2) clarified and addressed the gaps and inconsistencies that resulted from evolving service delivery changes and changes in contracting arrangements, and (3) updated statutory language and requirements related to provider and agency responsibilities.

The proposed rules implement APS's expanded jurisdiction and modify existing DFPS rules, as applicable, to the expanded jurisdiction. These rules will take effect on September 1, 2016. The updates in Chapters 705 will implement statutory changes as required by the APS Scope and Jurisdiction Bills.

A summary of the changes are as follows:

The amendment to §705.1001 updates and adds definitions for emergency protective services, home and community support services agencies (HCSSA) agency, paid caretaker, protective services, and purchased client services, and removes definitions of terms not used in this subchapter.

Section 705.2103 is repealed and proposed new to update who is eligible for purchased client services and when purchased client services are available.

The amendment to §705.2105 and §705.2107 updates terms and establishes who is eligible for purchased client services and when purchased client services are available.

The amendment to §705.3102 clarifies when APS can apply for a protective order.

The amendment to §705.4103 clarifies the circumstances in which a designated perpetrator has the right to appeal a validated finding.

The amendment to §705.4105 clarifies to whom APS may release the findings of an investigation when the findings of the investigation are valid.

The amendment to §705.4107 updates language.

The amendment to §705.6101 clarifies when APS uses assessments in an in-home case and when a case worker must consult with a supervisor.

The amendment to §705.7103 deletes outdated language.

The amendment to §705.7105 updates terms to align with APS Scope and Jurisdiction bills. In particular the APS Provider program's expanded authority to investigate providers; make minor edits.

APS coordinated and held stakeholder meetings July 16, 2015, August 4, 2015, October 15, 2015, January 8, 2016, and February 8, 2016. These meetings discussed stakeholder concerns, recommendations, and rule proposals. Stakeholder feedback was incorporated into rule development.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Subia also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that the expanded authority of DFPS to investigate abuse, neglect, and exploitation of individuals receiving services from certain providers. Due to needed additional staffing and technology, the estimated impact on state government and appropriated funding levels is \$1,603,723 for Fiscal Year (FY) 2016, \$1,712,345 FY 2017, \$1,712,345 FY 2018, \$1,712,345 FY 2019, and \$1,712,345 FY 2020. The impact on federal government will be \$333,585 FY 2016, \$370,716 FY 2017, \$370,716 FY 2018, \$370,716 FY 2019, and \$370,716 FY2020. Upon implementation, actual experience has yielded higher caseloads than originally assumed resulting in additional costs to the state. The fiscal impact of these additional costs cannot be estimated at this time. There will be no effect on large, small, or micro-businesses because the proposed change does not impose new requirements on any business and does not require the purchase of any new equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Ms. Subia has determined that the proposed sections do 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, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Lauren Villa at (512) 438-3803 in DFPS's Legal Division. Electronic comments may be submitted to Lau-

ren.Villa@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-552, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

## SUBCHAPTER A. DEFINITIONS

### 40 TAC §705.1001

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §§48.251 - 48.258 and Family Code §261.404.

*§705.1001. How are the terms in this chapter defined?*

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

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

(5) Alleged victim/perpetrator--An adult with a disability or aged 65 or older who has been reported to APS [~~adult protective services~~] to be in a state of or at risk of self-neglect.

(6) - (14) (No change.)

(15) Emergency Protective Services-- Services provided to an alleged victim subject to an investigation conducted under Subchapter F, Chapter 48, Human Resources Code, to alleviate danger of serious harm or death.

(16) [(15)] Emotional harm--A highly unpleasant mental reaction with observable signs of distress, such as anguish, grief, fright, humiliation, or fury.

(17) Home and community support services agency (HCSSA)-- An agency licensed under Chapter 142, Health and Safety Code.

(18) [(16)] Intimidation--Behavior by actions or words creating fear of physical injury, death, or abandonment.

(19) [(17)] Ongoing relationship--A personal relationship that includes:

(A) frequent and regular interaction;

(B) a reasonable assumption that the interaction will continue; and

(C) an establishment of trust, beyond a commercial or contractual agreement.

(20) [(18)] Paid caretaker--

(A) An employee of a home and community support services agency (HCSSA) providing non-Medicare services to an alleged victim; [licensed under Chapter 142, Health and Safety Code, to provide personal care services to an alleged victim,] or

(B) An [~~an~~] individual or family member privately hired and receiving monetary compensation to provide personal care

services, as defined in §142.001(22-a) of the Health and Safety Code, to an alleged victim. ["Personal care" is defined in §142.001(22-a) of the Health and Safety Code.]

(21) [(19)] Person with a disability--An adult with a physical, mental, or developmental disability that substantially impairs the adult's ability to adequately provide for his own care or protection.

(22) [(20)] Physical injury--Physical pain, harm, illness, or any impairment of physical condition.

(23) [(21)] Protective services--The services furnished by DFPS or by a protective services agency to an [a] alleged or designated victim (including a designated victim/perpetrator) or to the alleged or designated victim's relative or caretaker if DFPS determines the services are necessary to prevent the designated victim from being in or returning to a state of abuse, neglect, or financial exploitation. These services may include social casework, case management, and arranging for psychiatric and health evaluation, home care, day care, social services, health care, respite services, and other services consistent with Human Resources Code, Chapter 48. The term does not include the investigation of an allegation of [services of DFPS or another protective services agency in conducting an investigation regarding an allegation of] abuse, neglect, or financial exploitation. (Human Resources Code, §48.002)

(24) Purchased Client Services--A type of protective service provided in accordance with Human Resources Code §48.002(a)(5), including, but not limited to, emergency shelter, medical, and psychiatric assessments, in-home care, residential care, heavy housecleaning, minor home repairs, money management, transportation, emergency food, medication, and other supplies.

(22) Provider agency or entity (contractor)--An agency or entity that has contracted with DFPS to provide authorized protective services to clients.

(25) [(23)] Reporter--A person who makes a report to DFPS about a situation of alleged abuse, neglect, or financial exploitation of an alleged victim.

(26) [(24)] Serious harm--In danger of sustaining significant physical injury or death; or danger of imminent impoverishment or deprivation of basic needs.

(27) [(25)] Substantially impairs--When a disability grossly and chronically diminishes an adult's physical or mental ability to live independently or provide self-care as determined through observation, diagnosis, evaluation, or assessment.

(28) [(26)] Sustained perpetrator--A designated perpetrator whose validated finding of abuse, neglect, or financial exploitation of a designated victim has been sustained by an administrative law judge in a due process hearing, including a release hearing or Employee Misconduct Registry (EMR) hearing, or the designated perpetrator has waived the right to a hearing.

(29) [(27)] Unreasonable confinement--An act that results in a forced isolation from the people one would normally associate with, including friends, family, neighbors, and professionals; an inappropriate restriction of movement; or the use of any inappropriate restraint.

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

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General Counsel

Department of Family and Protective Services

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## SUBCHAPTER D. ELIGIBILITY

### 40 TAC §705.2103

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §§48.251 - 48.258 and Family Code §261.404.

§705.2103. *What are emergency client services?*

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

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### 40 TAC §§705.2103, 705.2105, 705.2107

The new section and amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section and amendments implement HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §§48.251 - 48.258 and Family Code §261.404.

§705.2103. *Who is eligible for emergency protective services?*

Emergency protective services may be offered to:

(1) An individual receiving services from a provider as defined by Human Resources Code §48.251(a)(9); or

(2) An adult who lives in a residence that is owned, operated, or controlled by a provider of home and community-based

services under the home and community-based services waiver program described by §534.001(11)(B), Government Code, regardless of whether the adult is receiving services under that waiver program from the provider.

§705.2105. *Who is eligible for purchased [emergency] client services?*

To be eligible for purchased [emergency] client services, an alleged victim must be receiving [adult] protective services in accordance with Human Resources Code, §48.002(a)(5) and §48.205. The alleged victim must have a service plan developed by DFPS under these sections indicating that [emergency] client services are needed to remedy abuse, neglect, or financial exploitation.

§705.2107. *When are purchased [emergency] client services available?*

(a) State and local resources must be used before purchased [emergency] client services are expended.

(b) Not all purchased [emergency] client services are available in all geographic areas of the state. DFPS may limit the units of service or length of time that clients can receive purchased [emergency] client services, based upon service plans, availability of funds, and availability of service providers.

(c) If the region does not have sufficient funds to provide purchased [emergency] client services to all eligible clients, the client will not be able to receive purchased [emergency] client services at the time the client is determined eligible. Clients who are still in need of purchased [emergency] client services when services are available will be given priority based upon the date of the service plan indicating the need for purchased [emergency] client services.

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

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## SUBCHAPTER G. FAMILY VIOLENCE

### 40 TAC §705.3102

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §§48.251 - 48.258 and Family Code §261.404.

§705.3102. *Can DFPS apply for protective orders?*

When APS staff validate an allegation that an alleged victim is a victim of family violence as specified in the Texas Family Code, §71.004, DFPS may apply for a protective order to protect the victim. Before filing the protective order, the APS caseworker contacts the victim and a non-abusive [~~nonabusive~~] adult member of the household, if available:

(1) (No change.)

(2) to request assistance in developing a safety plan for the protection of the victim and any non-abusive [~~nonabusive~~] household members.

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

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## SUBCHAPTER J. RELEASE HEARINGS

### 40 TAC §§705.4103, 705.4105, 705.4107

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §§48.251 - 48.258 and Family Code §261.404.

§705.4103. *Does the designated perpetrator have the right to appeal?*

(a) When APS staff validates an allegation of abuse, neglect, or financial exploitation against a designated perpetrator and an entity or employer (such as a contracting agency or senior center) allows such designated perpetrator [of a designated victim and an entity such as a provider agency, home and community support services agency (HCSSA); senior center, or other employer allows the designated perpetrator] to have access to adults with disabilities, adults aged 65 or older, or children, then the APS caseworker may notify the entity of the findings by complying with this subchapter. If the findings are to be released to any [the] entity or employer, the designated perpetrator must be given prior written notification, except in emergencies, and an opportunity to request an Administrative Review of Investigative Findings and a hearing before the State Office of Administrative Hearings.

(b) - (d) (No change.)

§705.4105. *How is the designated perpetrator notified of the intent to release?*

(a) The caseworker must give written notification to each designated perpetrator if:

- (1) (No change.)
- (2) the findings are to be released outside of DFPS to an entity or employer which allows the designated perpetrator access to adults with disabilities, adults aged 65 or older, or children; and
- (3) (No change.)
- (b) Written notification must include:
  - (1) (No change.)
  - (2) the entity or employer to which the findings will be released;
  - (3) - (8) (No change.)

§705.4107. *What is the designated perpetrator's role during an administrative review?*

- (a) (No change.)
- (b) The designated perpetrator is responsible for:
  - (1) any costs incurred ~~[he incurs]~~ for the review, except for interpreter services provided by DFPS.
  - (2) (No change.)

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

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## SUBCHAPTER L. RISK ASSESSMENT

### 40 TAC §705.6101

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services DFPS Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §§48.251 - 48.258 and Family Code §261.404.

§705.6101. *What assessments does APS use in an in-home case?*

- (a) APS uses assessments to determine whether an elderly person or individual with a disability is in [at] imminent danger ~~[risk]~~ of abuse, neglect, or financial exploitation ~~[and needs protective services]~~ or is in a state of abuse, neglect, or financial exploitation and needs protective services.
- (b) - (d) (No change.)

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

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## SUBCHAPTER M. CONFIDENTIALITY AND RELEASE OF RECORDS

### 40 TAC §705.7103, §705.7105

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §§48.251 - 48.258 and Family Code §261.404.

§705.7103. *To which ~~[Which]~~ investigations does ~~[do]~~ this subchapter apply ~~[to]~~?*

These rules apply to investigations conducted by the Department of Family and Protective Services Adult Protective Services staff under Chapter 48 of the Human Resources Code and §261.404 of the Texas Family Code ~~[(investigations of abuse, neglect, or exploitation of persons under age 18 years receiving services for mental health or mental retardation)].~~

§705.7105. *Which ~~[What]~~ definitions apply to this subchapter?*

The following words and terms have the following meanings unless the context clearly indicates otherwise:

- (1) Adult Protective Services (APS) client--An elderly person or ~~[disabled]~~ person with a disability as defined in Human Resources Code, §48.002(1) and (8), or a person under age 18 years receiving services from certain providers as described ~~[for mental health or mental retardation as described]~~ in §261.404 of the Texas Family Code.
- (2) Case records--All records described in §48.101 or §48.102 of the Human Resources Code, which were collected, developed, or used in an abuse, neglect, or exploitation investigation, or in providing services as a result of an investigation, and which are under the custody and control of DFPS. ~~[Case records include investigation records, as well as service records.]~~
- (3) - (4) (No change.)
- (5) Report--An allegation of abuse, neglect, or exploitation, as described in §48.002 of the Human Resources Code, this Chap-

ter, and [or] Chapter 711 of this title (relating to Investigations of Individuals Receiving Services from Certain Providers [in TDMHMR Facilities and Related Programs]) made to DFPS.

(6) (No change.)

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

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## CHAPTER 711. INVESTIGATIONS IN DADS AND DSHS FACILITIES AND RELATED PROGRAMS

### SUBCHAPTER O. EMPLOYEE MISCONDUCT REGISTRY

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendment to §§711.1402, 711.1404, 711.1408, 711.1413 - 711.1415, 711.1417, 711.1427, 711.1429, 711.1431, 711.1432, and 711.1434; the repeal of §711.1406 and §711.1411; and new §711.1406 in Chapter 711, concerning Investigations in Department of Aging and Disability Services (DADS) and Department of State Health Services (DSHS) Facilities and Related Programs. The purpose of the amendments and repeals is to update the terminology and process requirements regarding the due process rights of an employee prior to placement on the Emergency Misconduct Registry (EMR).

The EMR is a publicly available, searchable database maintained by the Department of Aging and Disability Services pursuant to Chapter 253 of the Texas Health and Safety Code. The EMR is a list of persons who are not permitted to work in certain settings because they have been found to have committed reportable conduct. A finding of reportable conduct is a finding that an employee has been found to have committed certain, more serious abuse, neglect, or exploitation of a person who is elderly or a person with a disability.

Under authority in Chapter 48 of the Texas Human Resources Code, Subchapter I, DFPS is required to submit the names of certain employees whom Adult Protective Services (APS) has determined committed reportable conduct to DADS for placement on the EMR. If APS determines an employee has committed reportable conduct, the employee is offered a due process hearing prior to placement on the EMR, and if the finding is upheld, the employee is given an opportunity to file for judicial review of the finding.

The changes make APS' requirements consistent with governing Texas law, the Administrative Procedures Act, found in Chapter 2001 of the Texas Government Code. In addition, they standardize terminology so that the employee's administrative remedies are more clearly explained. They also make modest updates to reflect changes enacted in the 84th Regular Session of the

Texas legislature that expanded APS' investigative scope and jurisdiction in certain settings, including some settings in which employees are eligible for potential placement on the EMR. Finally, the changes streamline unnecessary provisions out of the subchapter so that it is easier to follow.

A summary of the changes follows:

Amendment to §711.1402 removes definitions of terms not used in the subchapter and updates definitions for changes made in 84th Regular Session, including changes in Senate Bill (SB) 1880 and SB 760: (1) makes definition of "agency" consistent with law; (2) updates terminology from "facility investigation" to "provider investigation" and clarifies meaning; (3) adds definition of "individual receiving services"; and (4) renumbers and makes minor edits.

Amendments to §711.1404: (1) updates section title so that it is comprehensive; and (2) modifies sections defining physical abuse, sexual abuse, emotional or verbal abuse, neglect, exploitation and financial exploitation for in-home and provider investigations by referring to the identical definitions already in rule. Specifically, for in-home investigations the operative terms are defined in 40 TAC Chapter 705, Subchapter A. For provider investigations the operative terms are defined in Subchapter A of Chapter 711. Rather than repeat the definitions in full, rules were modified to refer back to the definitions in other provisions of the rules.

The repeal of §711.1406 modifies definitions for provider investigations as described above and combines the remaining subsection into §711.1404 of this chapter.

New §711.1406 adds clarity regarding the meaning of the term "agency", the employees of which are potentially subject to the EMR.

Amendment to §711.1408 has minor rewording for clarity and consistency.

The repeal of §711.1411 deletes unnecessary provision as the substance of the rule is also covered in §711.1432 of this chapter.

Amendment to §711.1413: (1) clarifies terminology regarding the "appeal" of a finding of reportable conduct. Terminology was used inconsistently to refer both to the EMR hearing as well as a subsequent request for judicial review; and (2) adds a provision to the notice of finding letter for an employee who is found to have committed reportable conduct, requiring the employee to keep DFPS informed of the employee's current employment and residential contact information.

Amendment to §711.1414: (1) updates terminology; shortens and clarifies provision; and (2) adds requirement that the employee is responsible for providing DFPS with current telephone numbers in addition to the physical address the employee is already required to provide to DFPS.

Amendment to §711.1415 updates terminology regarding EMR hearings for consistency.

Amendment to §711.1417 updates terminology regarding EMR hearings for consistency.

Amendment to §711.1427 adds requirement that the costs of transcribing testimony from an EMR hearing be paid by the employee seeking judicial review unless the employee establishes indigence.

Amendment to §711.1429 updates terminology and cross-reference.

Amendment to §711.1431 makes timelines and requirements for requesting judicial review of a finding of reportable conduct consistent with the Texas Administrative Procedures Act. Specifically: (1) makes the filing of a timely motion for rehearing in accordance with Subchapters F and G of Government Code Chapter 2001 a prerequisite to judicial review; (2) updates the guidance regarding seeking judicial review by referring to the operative law on point, Subchapters F and G of Government Code Chapter 2001; and (3) clarifies the time frame for reporting a finding to the EMR after an order becomes final.

Amendment to §711.1432 provides clarity regarding the exhaustion of an employee's administrative remedies and DFPS' actions once those rights have been exhausted.

Amendment to §711.1434 updates terminology.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed amendments and repeals will be in effect there will not be costs or revenues to state or local government as a result of enforcing or administering the amendments and repeals.

Ms. Subia also has determined that for each of the first five years that the amendments and repeals will be in effect, the public benefit anticipated as a result of the rule change will be that employees who are potentially subject to the EMR will have a better understanding of the process for disputing a finding made against them that is eligible for the EMR. In addition, employers will have a greater understanding of the process that may lead to an employee's placement on the EMR. There is a very small economic cost anticipated to persons who are required to comply with the proposed sections. The amendment to §711.1427 conforms the rules to general civil practice by requiring a petitioner who is seeking judicial review to pay the costs of transcribing the hearing and preparing the record, unless the petitioner is indigent. However for the small number of EMR cases filed in district court each year (with 7 annually being a high number), the petitioner will bear the expense of the transcript of the hearing. Given the wide variety in transcription costs based on variations in hearing length and testimony, specific costs were not estimated at this time. There is no anticipated adverse impact on small or micro businesses as a result of the proposed rule change because the proposed rule change should not affect the cost of doing business; does not impose new requirements on any business; and does not require the purchase of any new equipment or any increased staff time in order to comply.

Ms. Subia has determined that the proposed amendments and repeals do 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, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Audrey Carmical at (512) 438-3854 in DFPS's Legal Services Division. Electronic comments may be submitted to [Audrey.Carmical@dfps.state.tx.us](mailto:Audrey.Carmical@dfps.state.tx.us). Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-549, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

**40 TAC §§711.1402, 711.1404, 711.1406, 711.1408, 711.1413 - 711.1415, 711.1417, 711.1427, 711.1429, 711.1431, 711.1432, 711.1434**

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement Human Resources Code §§48.401 - 48.408.

*§711.1402. How are the terms in this subchapter defined?*

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

- (1) (No change.)
- (2) Agency--An entity, person, [or] facility, or provider, as defined in §711.1406 of this chapter;
- (3) - (6) (No change.)
- (7) Employee--A person who:
  - (A) (No change.)
  - (B) provides personal care services, active treatment, or any other [personal] services to an individual receiving agency services, an individual who is a child for whom an investigation is authorized under Family Code §261.404, or an individual receiving services through the consumer-directed service option, as defined by Government Code §531.051; and
  - (C) (No change.)
- (8) - (9) (No change.)
- (10) Individual Receiving Services: an individual receiving services as provided in §711.3 of this title (relating to How are the terms in this chapter defined?); [~~Facility investigation--An investigation conducted by APS under Chapter 48, Subchapters F and H, Human Resources Code, that involves an employee of one of the following agency types:~~]
  - [(A) a home and community-based services (HCS) provider;]
  - [(B) a community center as defined in §531.002, Health and Safety Code;]
  - [(C) a licensed intermediate care facility for persons with intellectual disabilities and related conditions (ICF-IID);]
  - [(D) a local authority as defined in this chapter;]
  - [(E) the Rio Grande State Center;]
  - [(F) a state-supported living center; or]
  - [(G) a state hospital;]
  - [(11) HCSSA--A home and community support services agency, sometimes referred to as a home health agency, licensed under Chapter 142, Health and Safety Code;]
  - [(12) HCS--A person or an agency exempt from licensure under §142.003(a)(19), Health and Safety Code, that provides home and community-based services to persons with intellectual disabilities and related conditions;]

[(13) ICF-IID--An intermediate care facility for individuals with an intellectual disability or related condition. A licensed ICF-IID is a privately owned and operated facility licensed by the Department of Aging and Disability Services under Chapter 252, Health and Safety Code. A state supported living center operated by DADS or DSHS is also an ICF-IID. A local authority may also operate an ICF-IID;]

[(11) [(14)] In-home investigation--An investigation conducted by APS under Chapter 705 of this title (relating to Adult Protective Services);]

[(12) Provider investigation--An investigation conducted by APS under Chapter 48, Subchapter F, Human Resources Code, or §261.404, Texas Family Code, as applicable;]

[(15) Person served--An adult or child receiving services from an agency as defined in this subchapter;]

[(13) [(16)] Reportable conduct--A confirmed or validated finding of abuse, neglect or exploitation that meets the definition in §48.401(5), Human Resources Code, and as further defined in §711.1408 of this title (relating to What is reportable conduct?);]

[(17) Rio Grande State Center--A facility operated by the Department of State Health Services that provides in-patient mental health services and services through an ICF-IID;]

[(18) State hospital--A hospital operated by the Department of State Health Services that provides in-patient mental health services; and]

[(19) State supported living center--An ICF-IID operated by the Department of Aging and Disability Services;]

§711.1404. *How are the terms physical abuse, sexual abuse, emotional or verbal abuse, neglect, exploitation, and financial exploitation defined for the purpose of this subchapter [In-home investigations]?*

(a) For In-home investigations, the definitions of physical abuse, sexual abuse, emotional or verbal abuse, neglect, and financial exploitation are adopted pursuant to §48.002(c), Human Resources Code, and are found [defined] in Subchapter A of Chapter 705 of this title (relating to Definitions) [(relating to Adult Protective Services)] in the rules adopted pursuant to §48.002(c) of the Human Resources Code. [Additional guidance for some of the terms used in these definitions can be found at §705.1001 of this title (relating to How are the terms in this chapter defined?). The following definitions apply:]

[(1) "Physical abuse."]

[(A) When an alleged perpetrator is a caretaker, family member, or other individual who has an ongoing relationship with the alleged victim, physical abuse is defined as any knowing, reckless, or intentional act or failure to act, including unreasonable confinement, corporal punishment, inappropriate or excessive force, or intimidation, which caused physical injury, death, or emotional harm;]

[(B) When an alleged perpetrator is a paid caretaker, physical abuse is defined as any knowing, reckless, or intentional act or failure to act, including unreasonable confinement, corporal punishment, inappropriate or excessive force, or intimidation, which caused or may have caused physical injury, death, or emotional harm;]

[(2) "Sexual abuse."]

[(A) When an alleged perpetrator is a caretaker or paid caretaker, family member, or other individual who has an ongoing relationship with the alleged victim, sexual abuse is defined as nonconsensual sexual activity, which may include, but is not limited to, any activity that would be a sexually-oriented offense per Texas Penal Code, Chapters 21, 22, or 43;]

[(B) There is no consent when:]

[(i) the alleged perpetrator knows or should know that the alleged victim is incapable of consenting because of impairment in judgment due to mental or emotional disease or defect;]

[(ii) consent is induced by force or threat against any person;]

[(iii) the alleged victim is unconscious or physically unable to resist;]

[(iv) the alleged perpetrator has intentionally impaired the alleged victim by administering any substance without the person's knowledge; or]

[(v) consent is coerced due to fear of retribution or hardship, or by exploiting the emotional dependency of the alleged victim on the alleged perpetrator;]

[(3) "Emotional or verbal abuse."]

[(A) When an alleged perpetrator is a caretaker, family member, or other individual who has an ongoing relationship with the alleged victim, emotional or verbal abuse is defined as any act or use of verbal or other communication to threaten violence that makes a reasonable person fearful of imminent physical injury;]

[(B) When an alleged perpetrator is a paid caretaker, emotional or verbal abuse is defined as any act or communication that is:]

[(i) used to curse, vilify, humiliate, degrade, or threaten and that results in emotional harm; or]

[(ii) of such a serious nature that a reasonable person would consider it emotionally harmful;]

[(4) "Neglect."]

[(A) When the alleged perpetrator is an alleged victim/perpetrator, neglect is defined as the failure of one's self to provide the protection, food, shelter, or care necessary to avoid emotional harm or physical injury;]

[(B) When an alleged perpetrator is a caretaker or paid caretaker, neglect is defined as:]

[(i) the failure to provide the protection, food, shelter, or care necessary to avoid emotional harm or physical injury; or]

[(ii) a negligent act or omission that caused or may have caused emotional harm, physical injury, or death;]

[(5) "Financial exploitation."]

[(A) When an alleged perpetrator is a caretaker or paid caretaker, family member, or other individual who has an ongoing relationship with the alleged victim, financial exploitation is defined as the illegal or improper act or process of an alleged perpetrator using, or attempting to use, the resources of the alleged victim, including the alleged victim's social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the alleged victim. There is no informed consent when it is:]

[(i) not voluntary;]

[(ii) induced by deception or coercion; or]

[(iii) given by an alleged victim who the actor knows or should have known to be unable to make informed and rational decisions because of diminished capacity or mental disease or defect;]

{(B) When an alleged perpetrator is a caretaker, family member, or other individual who has an ongoing relationship with the alleged victim; financial exploitation excludes Theft in Chapter 31 of the Texas Penal Code.}

{(C) When an alleged perpetrator is a paid caretaker, financial exploitation includes; but is not limited to; Theft in Chapter 31 of the Texas Penal Code.}

(b) For provider investigations--the definitions of physical abuse, sexual abuse, verbal/emotional abuse, neglect, and exploitation are adopted pursuant to §48.002(b), Human Resources Code, and are found in Subchapter A of this chapter (relating to Introduction).

§711.1406. How is the term agency defined for the purpose of this subchapter?

(a) For the purpose of this chapter, the term "agency" has the meaning given by §48.401, Human Resources Code, as further clarified in this rule. Any terms used within the definition of "agency" have the meaning given by statute or elaborated upon by this chapter or chapter 705 of this title. The purpose of this rule is to provide a non-exhaustive list of agencies, the employees of which are subject to being listed on the EMR if they are found to have committed reportable conduct. The list is illustrative and not exclusionary. Employees of agencies not specifically enumerated that are within the meaning of §48.401 continue to be eligible for the EMR without regard to whether the agency is specifically enumerated below.

(b) The term "agency" means:

(1) a home and community support services agency licensed under Chapter 142, Health and Safety Code;

(2) a person exempt from licensure who provides home health, hospice, habilitation, or personal assistance services only to persons receiving benefits under:

(A) the home and community-based services (HCS) waiver program;

(B) the Texas home living (TxHmL) waiver program;

(C) the STAR + PLUS or other Medicaid managed care program under the program's HCS or TxHmL certification; or

(D) Section 534.152, Government Code;

(3) an intermediate care facility for individuals with an intellectual disability or related conditions (ICF-IID) licensed under Chapter 252, Health and Safety Code; or

(4) a provider investigated by DFPS under Subchapter F, Human Resources Code or §261.404, Family Code. Such providers include:

(A) a facility as defined in §711.3 of this chapter;

(B) a community center, local mental health authority, and local intellectual and developmental disability authority, as defined in §711.3 of this chapter;

(C) a person who contracts with a health and human services agency or managed care organization to provide home and community-based services (HCBS) as that term is defined in §48.251, Human Resources Code and which is the umbrella term for various long-term services and supports within the Medicaid program, whether delivered in a fee-for-service, managed care, or other service delivery model, and which includes but is not limited to:

(i) Waiver programs including:

(I) community living assistance and support services (CLASS);

(II) Deaf Blind Multiple Disabilities;

(III) HCS;

(IV) TxHmL;

(V) Medically Dependent Child Program

(MDCP); and

(VI) Youth Empowerment Services (YES);

(ii) Community First Choice;

(iii) Texas Dual Eligible Integrated Care Project;

(iv) State plan services including:

(I) Community attendant services; and

(II) Personal attendant services;

(v) Managed Care Programs including:

(I) HCBS - Adult Mental Health;

(II) STAR + PLUS Managed Care program; and

(III) STAR Kid Managed Care program; and

(vi) any other program, project, waiver demonstration, or service providing long-term services and supports through the Medicaid program;

(D) a person who contracts with a Medicaid managed care organization to provide behavioral health services as that term is defined in §48.251 and which include but are not limited to:

(i) Targeted Case Management; and

(ii) Psychiatric Rehabilitation services;

(E) a managed care organization;

(F) an officer, employee, agent, contractor, or subcontractor of a person or entity listed in subsections (A) - (E) above; and

(G) an employee, fiscal agent, case manager, or service coordinator of an individual employer participating in the consumer directed service option, as defined by §531.051, Government Code.

§711.1408. What is reportable conduct?

(a) (No change.)

(b) For purposes of subsection (a) of this section, the terms abuse, neglect, sexual abuse, and financial exploitation have the meanings provided in Subchapter A of Chapter 705 (relating to Definitions) or Subchapter A of this Chapter and incorporated by reference in §711.1404 of this title (relating to How are the terms physical abuse, sexual abuse, emotional or verbal abuse, neglect, exploitation, and financial exploitation defined for the purpose of this subchapter?). [In-home investigations?] and §711.1406 of this title (relating to How are the terms abuse, neglect, and financial exploitation defined for Facility investigations?), depending upon the type of agency for which the employee worked.]

(c) - (d) (No change.)

§711.1413. What notice must DFPS give to an employee before the employee's name is submitted to the Employee Misconduct Registry?

When DFPS determines that an employee committed reportable conduct, DFPS must provide a written "Notice of Finding" to the employee. The notice must include:

(1) (No change.)

(2) a statement of the employee's right to dispute [appeal] the finding by filing a "Request for EMR Hearing" and the instructions for doing so;

(3) - (6) (No change.)

(7) a statement that DFPS reserves the right to make an emergency release of the findings to any subsequent employer of the employee if the employee has access to similar clients or persons served [while the appeal is pending];

(8) a statement that the employee is responsible for keeping DFPS timely informed of the employee's current employment and residential contact information, including addresses and phone numbers, [address] pending the outcome of any appeal filed by the employee; and

(9) a statement that if the employee fails, without good cause, to file a timely request for an EMR hearing [appeal of the Notice of Finding], the employee will be deemed to have waived the employee's rights to dispute the finding [appeal] and the employee's name will be submitted to the EMR.

§711.1414. *How will the Notice of Finding be provided to an employee and who is responsible for ensuring that the department has a valid mailing address for an employee?*

(a) - (b) (No change.)

(c) It is the responsibility of the employee [who is investigated for alleged abuse, neglect, or exploitation of a client or person served by an agency subject to this subchapter] to provide the department with a valid address where notice can be mailed or, if no address is available, with valid contact information, including telephone numbers. It is also the responsibility of the employee to immediately notify DFPS of any change of address or contact information throughout the investigation and any period of time during which a dispute of the finding [an appeal] is pending.

§711.1415. *How does an employee dispute [appeal] a finding of reportable conduct and what happens if the "Request for EMR Hearing" [appeal] is not filed or not filed properly?*

(a) An employee may dispute [appeal] a finding of reportable conduct by submitting a Request for EMR Hearing. The Notice of Finding will contain instructions for filing the Request for EMR Hearing.

(b) The employee will be deemed to have accepted the finding of reportable conduct and DFPS will submit the employee's name for inclusion in the Employee Misconduct Registry if the employee:

(1) - (2) (No change.)

(3) files a Request for EMR Hearing, but fails to follow the filing instructions and, as a result, DFPS does not receive the Request for EMR Hearing in a timely manner or cannot determine the matter being disputed [appealed].

§711.1417. *What is the deadline for filing the Request for EMR Hearing?*

(a) - (c) (No change.)

(d) If an employee files the Request for EMR Hearing after the deadline, DFPS will notify the employee that the request was not filed by the deadline, no EMR [appeal] hearing will be granted, and the employee's name will be submitted for inclusion in the Employee Misconduct Registry.

(e) (No change.)

§711.1427. *How is the EMR hearing conducted?*

(a) - (j) (No change.)

(k) The hearing will be recorded by audio or video tape in order to preserve a record of the hearing. A transcription of the hearing tape will not be made or provided unless an employee seeks judicial review, as provided in this subchapter. The costs of transcribing the testimony and preparing the record for judicial review shall be paid by the party who files for judicial review, unless the party establishes indigence as provided in Rule 20 of the Texas Rules of Appellate Procedure.

(l) (No change.)

§711.1429. *How and when is the decision made after the EMR hearing?*

(a) The administrative law judge will prepare a "Hearing Order" which will be mailed to the employee at the employee's last known mailing address. The Hearing Order must contain the following:

(1) separate statements of the findings of fact and conclusions of law that uphold, reverse, or modify the findings as to whether:

(A) the employee committed abuse, neglect, or financial exploitation [of a client or person served]; and

(B) (No change.)

(2) if reportable conduct is found to have occurred:

(A) (No change.)

(B) a statement that the finding of reportable conduct will be forwarded to the Department of Aging and Disability Services to be recorded in the Employee Misconduct Registry unless the employee [makes a] timely files a petition [request] for judicial review as provided in §711.1431 of this title (relating to How is judicial review requested?) [and the court reverses the finding of reportable conduct].

(b) (No change.)

§711.1431. *How is judicial review requested and what is the deadline?*

(a) A timely motion for rehearing is a prerequisite to judicial review and must be filed in accordance with Subchapters F and G, Chapter 2001, Government Code. The motion for rehearing must be served on the administrative law judge and on DFPS's attorney of record. [To request judicial review of a Hearing Order, the employee must file a petition for judicial review in a Travis County district court, as provided by Government Code, Chapter 2001, Subchapter G.]

(b) To seek judicial review of a Hearing Order, a party must file a petition for judicial review in a Travis County district court, in accordance with Subchapters F and G, Chapter 2001, Government Code. [The petition must be filed with the court no later than the 30th day after the date the Hearing Order becomes final, which is the date that the Hearing Order is received by the employee.]

(c) (No change.)

(d) Unless citation for a petition for judicial review is served on DFPS within 90 [45] days after the date on which the order under review becomes final [Hearing Order is mailed to the employee], DFPS will submit the employee's name for inclusion in the Employee Misconduct Registry. If valid service of citation is received after the employee's name has been recorded in the registry, DFPS will [determine whether the lawsuit was timely filed and, if so, immediately] request that the employee's name be removed from the registry pending the outcome of the judicial review in district court.

§711.1432. *What action does DFPS take when an employee has exhausted the employee's administrative remedies [all appeal rights have been exhausted]?*

(a) An employee has exhausted the employee's administrative remedies if the employee has been found to have committed reportable conduct and the employee has received or is no longer eligible for:

- (1) an EMR hearing;
- (2) a rehearing of the employee's case following an EMR hearing; or
- (3) judicial review.

(b) DFPS takes the following actions once an employee has exhausted the employee's administrative remedies [In any case in which an employee filed a timely appeal, DFPS will take the following actions once the appeal has been finally resolved]:

- (1) modifies [modify] DFPS's internal records to reflect the final outcome in the case [of the appeal];
- (2) provides [provide] notice of the final outcome in the case [of the appeal] to any person or entity that was previously notified of DFPS's findings, if the finding is modified; and
- (3) sends [send] the employee's name and required information to the Employee Misconduct Registry if the finding of reportable conduct was sustained [upheld].

*§711.1434. What special considerations apply to employees of state-operated facilities?*

(a) The sole way to dispute [appeal] a finding of reportable conduct and submission of the employee's name to the Employee Misconduct Registry is provided by the procedures in this subchapter. A Request for EMR hearing [An appeal] filed under this subchapter is not a request for a grievance on disciplinary action from an employer.

(b) (No change.)

(c) When an employee files both a Request of EMR hearing [an appeal of reportable conduct] under this subchapter and a grievance on disciplinary action based on DFPS's finding of reportable conduct, the EMR [appeal] hearing will take place prior to the grievance hearing.

(d) (No change.)

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

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Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 19, 2016

For further information, please call: (512) 438-3854



#### **40 TAC §711.1406, §711.1411**

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement Human Resources Code §§48.401 - 48.408.

*§711.1406. How are the terms abuse, neglect, and financial exploitation defined for Facility investigations?*

*§711.1411. Under what circumstances does DFPS submit an employee's name to the Employee Misconduct Registry?*

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 744. MINIMUM STANDARDS FOR SCHOOL-AGE AND BEFORE OR AFTER-SCHOOL PROGRAMS**

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§744.401, 744.403, 744.605, 744.901, 744.1303, 744.1305, 744.1307, 744.1309, 744.1311, 744.2301, 744.2401, 744.2507, 744.2523, 744.3551, 744.3553, 744.3559, 744.3561; new §744.2667 and §744.2669; and repeal of §744.3555, in Chapter 744, concerning Minimum Standards for School-Age and Before or After-School Programs. The purpose of the amendments, new rules and repeal are to implement needed changes to comply with the Child Care and Development Block Grant Act of 2014.

The Child Care and Development Block Grant (CCDBG) Act of 2014 (the "Act") is the first comprehensive revision of the Child Care and Development Fund (CCDF) program since 1998. (The CCDF is codified in 42 USC §9857 et seq.) The Texas Workforce Commission (TWC) administers the CCDF, which is the primary federal funding source devoted to providing low-income families with access to child care. The Act makes significant reforms to the CCDF programs to raise the health, safety, and quality of child care. The Act does this by mandating that states comply with a multitude of additional requirements in order to continue receiving CCDF funding. Although TWC is the lead agency for determining eligibility and distributing the subsidy monies, DFPS is the agency responsible for licensing child care operations, establishing health and safety regulations, and monitoring eligible operations for compliance. Many of the Act's additional requirements relate to the responsibilities of DFPS. The provisions of the Act that have a significant impact on Child Care Licensing (CCL) and this chapter relate to the following topics: health and safety requirements and training on those requirements.

The changes related to training will impact Before-School and After-School Programs (BAPs and SAPs). The new health and safety training requirements mandated by the Act include the following topics for pre-service training and annual training: (1) food allergies; (2) handling, storing, and disposing of hazardous materials; (3) more robust emergency preparedness plans; (4) administering medication; and (5) building and physical premises safety.

There is also one topic required by the Act that is already required in annual training, but is not currently required in the pre-service training for BABs and SAPs. The additional health and safety training requirement that has been added to the pre-service training is training on precautions in transporting children if the operation transports a child whose chronological or developmental age is younger than nine years old.

In addition to the training requirements the Act increases health and safety requirements for BAPs and SAPs. The health and safety requirements correlate to some of the training topics, including requiring operations to (1) obtain food allergy emergency plans for children with known food allergies, post a list of food allergies at the operation, and carry the child's emergency plan on field trips; and (2) use, store, and dispose of hazardous materials as recommended by the manufacturer.

The summary of the changes are:

The amendments to §744.401: (1) adds a list of each child's food allergies (with a parent's permission) to the school-age and before and after-school program's posting requirements; (2) updates the name of the *Parent Notification Poster*, and (3) makes other wording changes for consistency.

The amendments to §744.403: (1) clarifies that the list of each child's food allergies must be posted (with a parent's permission) where food is prepared and in each room where the child may spend time; and (2) deletes the posting information about an emergency evacuation and relocation plan because it is duplicative.

The amendment to §744.605 adds a requirement for programs to obtain a completed food allergy emergency plan before admitting a child into care, if applicable; and if a parent wants the information posted, permission from the parent to post the information.

The amendment to §744.901 updates a cite and makes the language consistent.

The amendments to §744.1303: (1) clarifies the wording to be consistent with the current wording of the operational policies rule; (2) adds components that must be addressed in the overview of prevention, recognition, and reporting of child abuse and neglect; and (3) requires programs to share the emergency preparedness plan with all employees.

The amendment to §744.1305 adds six topics that must be covered in the pre-service training of caregivers hired after September 1, 2016; and updates the existing language for a current training topic.

The amendment to §744.1307 clarifies when a caregiver is exempt from pre-service training.

The amendments to §744.1309: (1) adds six topics that must be covered in the annual training of caregivers and site directors; (2) deletes a redundant paragraph about transportation safety training; and (3) increases from 50% to 80% the amount of annual training hours that may be obtained through self-instructional training.

The amendments to §744.1311: (1) adds six topics that must be covered in the annual training of operation directors and program directors; (2) deletes a redundant paragraph about transportation safety training; and (3) increases from 50% to 80% the amount of annual training hours that may be obtained through self-instructional training.

The amendment to §744.2301: adds the requirement that caregivers must have a copy of a child's food allergy emergency plan and medications, if applicable, when going on field trips.

The amendments to §744.2401: (1) adds that children must not be served foods identified on their food allergy emergency plan; and (2) deletes the requirement "you must not use food as . . . punishment", because this requirement is already noted in §744.2105.

The amendment to §744.2507 requires a program to use, store, and dispose of hazardous materials as recommended by the manufacturer to ensure a healthy environment for children.

The amendment to §744.2523 clarifies in more detail what the universal precautions as outlined by the Centers for Disease Control (CDC) entail, including placing gloves contaminated with blood in a sealed plastic bag and discarding them immediately.

New §744.2667 defines a food allergy emergency plan, including a list of foods a child is allergic too, possible symptoms, and what steps to take if there is an allergic reaction.

New §744.2669 requires: (1) a food allergy emergency plan for each child with a known food allergy; and (2) the plan to be signed by the child's health care professional and a parent, posted if the parent consents, and taken on field trips.

The amendment to §744.3551 clarifies in more detail what an emergency preparedness plan is by distinguishing between an evacuation, relocation, and sheltering.

The amendments to §744.3553 adds to the requirements for an emergency preparedness plan to also include: (1) the staff responsibility in a sheltering emergency for the orderly movement of children to a designated location within the operation where children should gather; (2) how staff will continue to care for children until each child has been released; and (3) how children will be reunified with their parents at evacuation, relocation, or when sheltering is lifted.

The repeal of §744.3555 is because all of the information is already included in §744.1303(4) and §744.507.

The amendment to §744.3559 adds the "sheltering" language for clarification.

The amendment to §744.3561 clarifies the wording of an emergency evacuation and relocation diagram and where the diagram should be posted.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Subia also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be that: (1) DFPS will be in compliance with the Child Care and Development Block Grant Act of 2014; (2) there will be clarification regarding health and safety requirements and training on those requirements; and (3) there will be a reduced risk to children.

There is an anticipated economic cost for persons required to comply with some of the proposed rule changes. The proposed changes are anticipated to have an adverse impact on businesses, including small and micro-businesses. The proposed changes will impact School Age Programs and Before and After School Programs. According to the Fiscal Year (FY) 2015 DFPS Annual Report and Data Book as of August 31, 2015, there were,

1,551 School Age Programs and Before and After School Programs.

Chapter 2006 of the Government Code defines a small business as one that is for-profit, independently owned, and has fewer than 100 employees or less than six million dollars in annual gross receipts. A small business that has no more than 20 employees is also defined as a micro-business. A 2010 survey conducted by CCL indicated that approximately 55% of Licensed Child Care Centers, including School Age Programs and Before and After School Programs, are for profit businesses, 70% are independently owned, 98% have fewer than 100 employees, and 68% have fewer than 20 employees.

The fiscal impact to these operations primarily results from additional staff time to develop or modify curriculum.

Licensing staff developed the methodologies used to calculate the fiscal impact of these rules. The impacts were calculated using cost research conducted by staff and assumptions regarding child-care practices. The key assumptions and methodologies are described in detail below, as these underlie the individual impact calculations for each rule that are projected to have a fiscal impact on at least some programs.

For School Age Programs and Before and After School Programs, the staff time required to comply with the standards will impact Directors and caregivers. For use in this impact analysis, DFPS will use the following mean wages that were obtained from the Texas Workforce Commission's website for Occupational Wages based on 2014 estimates: (1) for all Directors and Primary Caregivers, DFPS is using a \$24.27 per hour mean wage from the Occupational Title of Education Administrator, Preschool and Childcare Center; and (2) for all caregivers (other than a Primary Caregiver) DFPS is using a \$9.49 per hour mean wage from the Occupational Title of Childcare Workers.

Fiscal Impact for Proposed §744.1305(b). This section adds six additional topics that must be covered in the pre-service training for caregivers hired on or after September 1, 2016. One of the six topics is precautions in transporting children and is only required for operations that transport children whose chronological or developmental age is younger than nine years old. There is no increase in the number of pre-service training hours required; there is only a change in the content of the required training. Any costs associated with this rule change depends upon whether a program pays for outside training, utilizes free training in the community, or provides in-house training to the caregivers. For programs that:

(1) Pay for outside training to obtain pre-service training for caregivers, there are no additional costs associated with this change in training content;

(2) Utilize free training in the community (for example AgriLife training modules) to obtain pre-service training for caregivers, the only additional costs with this change in training content relates to the new topic regarding precautions in transporting children. For example, the relevant AgriLife training modules that could be used to comply with five of the six additional topics are free. However, the AgriLife training module relating to transporting children has a \$14.00 cost. Therefore, it is anticipated that each program that transports children whose chronological or developmental age is younger than nine year old will need to pay the \$14.00 costs for the transportation module for each caregiver.

(3) Provide in-house pre-service training to caregivers, there are costs associated with modifying their current pre-service curriculum for these six topics. However, the time to modify the curriculum is not anticipated to be extensive, because the program will have already developed new curriculum for annual training on these six topics, see "Fiscal Impact for Proposed §744.1309(d)". It is anticipated that a director, or curriculum developer that is similarly paid, will spend approximately 20 hours to modify the pre-service training curriculum. Therefore, the approximate one-time cost to modify the pre-service training curriculum is \$485.40 (20 X \$24.27).

Fiscal Impact for Proposed §744.1309(d). This section adds six additional topics that must be covered in the annual training for caregivers and site directors. There is no increase in the number of annual training hours required; there is only a change in the content of the required training. Any costs associated with this rule change depends on whether a program pays for outside training, utilizes free training in the community, or provides in-house training to the caregivers and site directors. For programs that:

(1) Pay for outside training or utilize free training in the community to obtain annual training for caregivers and site directors, there are possible costs with employees that may take more than the mandated 15 hours of annual training to comply with the six additional topics. For example, the training modules with AgriLife are two hours each. It is anticipated that five AgriLife modules will be needed to comply with the six additional topics. These ten hours of AgriLife training plus the already mandated six hours of annual training (§744.1309(c)) would mean that a caregiver or site director would be taking 16 hours of annual training instead of the 15 hours of mandated annual training. It is anticipated that each program would need to pay each caregiver \$9.49 per hour and site director \$24.27 per hour for each additional training hour that is taken. It is anticipated that over time more training modules will be created that will have a shorter time frame for training on these six topics. When that happens, these costs would no longer be associated with this rule change; and

(2) Provide annual in-house training to caregivers and site directors, there are costs associated with developing new curriculum for these six topics. This section does not mandate a time frame for training on these six topics. However, for purposes of estimating a cost for developing training on these topics, it is assumed that training on these six topics will be two to three hours. A common industry standard is 40 hours to develop one hour of curriculum for face-to-face training. It is anticipated that a director, or curriculum developer that is similarly paid, will spend an average of 80 to 120 hours to develop the two to three hour curriculum on these six topics. Therefore, the approximate one-time cost for the development of the annual curriculum is between \$1,941.60 (80 X \$24.27) and \$2,912.40 (120 X \$24.27).

Fiscal Impact for Proposed §744.1311(d). This section adds six additional topics that must be covered in the annual training for an operation or program director. There is no increase in the number of annual training hours required; there is only a change in the content of the required training. For programs that pay for outside training or utilize free training in the community to obtain annual training for operation and program directors, there are no additional costs associated with this change in training content. For programs that actually provide annual in-house training to operation and program directors, there are costs associated with developing new curriculum for these six topics. However, the program will have already developed the same curriculum

for caregivers in response to §744.1309, see "Fiscal Impact for Proposed §744.1309(d)". Therefore, CCL assumes there will be no costs associated with this rule change.

Regulatory Flexibility Analysis: A regulatory flexibility analysis is not required for the proposed rules with fiscal implications because the proposed rules are specifically required by federal law (The Child Care and Development Block Grant of 2014). Therefore, the proposed rules are consistent with the health and safety of children, whom the law was intended to protect.

Ms. Subia has determined that the proposed sections do 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, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Gerry Williams at (512) 438-5559 in DFPS's Child Care Licensing Division. Electronic comments may be submitted to [CCLRules@dfps.state.tx.us](mailto:CCLRules@dfps.state.tx.us). Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-551, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

## SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

### DIVISION 3. REQUIRED POSTINGS

#### 40 TAC §744.401, §744.403

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§744.401. *What items must I post at my operation at all times?*

You must post the following items:

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

(4) Your emergency [Emergency and] evacuation and relocation diagram as specified in §744.3561 of this title (relating to Must I have an emergency evacuation and relocation diagram?) [plans];

(5) (No change.)

(6) The Licensing *Parent Notification Poster*; [Notice of Availability for Review of:]

~~[(A) The most recent fire inspection report, if applicable;]~~

~~[(B) The most recent sanitation inspection report, if applicable;]~~

~~[(C) The most recent gas inspection report, if applicable; and]~~

~~[(D) The applicable Licensing minimum standards;]~~

~~(7) Telephone numbers specified in §744.405 of this title (relating to What telephone numbers must I post and where must I post them?); [and]~~

~~(8) A list of each child's food allergies, with a parent's permission as specified in §744.605(16) of this title (relating to What admission information must I obtain for each child?); and~~

~~(9) [(8)] Any other Licensing notices with specific instructions to post the notice.~~

§744.403. *When and where must these items be posted?*

(a) (No change.)

~~(b) With the permission of the child's parent, you must post a list of each child's food allergies where you prepare or serve food and in each room where the child may spend time. The posting must be in a place where employees may easily view it. [Emergency and evacuation relocation plans must be posted in each room used by children.]~~

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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Trevor Woodruff

General Counsel

Department of Family and Protective Services

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For further information, please call: (512) 438-5559



## SUBCHAPTER C. RECORD KEEPING

### DIVISION 1. RECORDS OF CHILDREN

#### 40 TAC §744.605

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§744.605. *What admission information must I obtain for each child?*

You must obtain at least the following information before admitting a child to the operation:

(1) - (13) (No change.)

(14) The name and telephone number of the school that a school-age child attends, unless the operation is located at the child's school; [and]

(15) Permission for a school-age child to ride a bus, [or] walk to or from school or home, or to be released to the care of a sibling under 18 years old, if applicable; and[-]

(16) A completed food allergy emergency plan for the child, if applicable, and if a parent wants the information posted, permission from a parent to post the child's allergy information.

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

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## DIVISION 4. PERSONNEL RECORDS

### 40 TAC §744.901

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§744.901. What information must I maintain in my personnel records?*

You must have the following records at the operation and available for review during your hours of operation for each employee, caregiver, substitute, and volunteer as specified in this chapter:

(1) - (9) (No change.)

(10) A statement signed and dated by the employee verifying the date the employee attended training during orientation that includes an overview regarding the prevention, recognition, and reporting [of symptoms] of child abuse and[.] neglect, [and sexual abuse and the responsibility for reporting these] as outlined in §744.1303 of this title (relating to *What must [should] orientation for employees at [to] my operation include?*).

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

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## SUBCHAPTER D. PERSONNEL

### DIVISION 4. PROFESSIONAL DEVELOPMENT

#### 40 TAC §§744.1303, 744.1305, 744.1307, 744.1309, 744.1311

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§744.1303. What must [should] orientation for employees at [to] my operation include?*

Your orientation for employees must include at least the following:

(1) (No change.)

(2) An overview of operational [Your operation's] policies, including discipline and[.] guidance practices[.] and procedures for the release of children;

(3) An overview regarding the prevention, recognition, and reporting [of symptoms] of child abuse and[.] neglect including[.] and sexual abuse and the responsibility for reporting these[.]

(A) Factors indicating a child is at risk of abuse or neglect;

(B) Warning signs indicating a child may be a victim of abuse or neglect;

(C) Internal procedures for reporting child abuse or neglect; and

(D) Community organizations that have training programs available to child-care center staff members, children, and parents;

(4) An overview of the [The] procedures to follow in handling emergencies, which includes sharing the emergency preparedness plan with all employees. Emergencies may include, but are not limited to, fire, explosion, tornado, toxic fumes, volatile persons, and severe injury or illness of a child or adult; and

(5) The [use and] location and use of fire extinguishers and first-aid equipment.

*§744.1305. What must be covered in the eight clock hours of pre-service training for caregivers?*

(a) Before a caregiver can be counted in the child/caregiver ratio, the caregiver must complete eight clock hours of pre-service training that covers the following areas:

(1) Developmental stages of children;

(2) Age-appropriate activities for children;

(3) Positive guidance and discipline of children;

(4) Fostering children's self-esteem;

(5) Supervision and safety practices in the care of children;

(6) Positive interaction with children; and

(7) Preventing and controlling the spread of communicable diseases, including immunizations.

(b) Pre-service training for caregivers you hire on or after 9/1/2016 must also cover the following areas:

(1) The emergency preparedness plan for your operation;

(2) Administering medication, if applicable, including compliance with §744.2653 of this title (relating to What authorization must I obtain before administering a medication to a child in my care?);

(3) Preventing and responding to emergencies due to food or an allergic reaction;

(4) Understanding building and physical premises safety, including identification and protection from hazards, bodies of water, and vehicular traffic;

(5) Handling, storing, and disposing of hazardous materials; and

(6) Precautions in transporting children, if your operation transports a child whose chronological or developmental age is younger than nine years old.

§744.1307. Are any caregivers exempt from the pre-service training? Yes. A caregiver is exempt from the pre-service training requirements if the caregiver has:

(1) At [Caregivers with at] least six months prior experience in a regulated operation; or

(2) Documentation of at least eight clock hours of training in the areas specified in §744.1305 of this title (relating to What must be covered in the eight clock hours of pre-service training for caregivers?) at another regulated operation [with documentation of equivalent child-care training are exempt from the pre-service training requirements].

§744.1309. How many clock hours of annual training must be obtained by caregivers and site directors?

(a) Each caregiver and site director must obtain at least 15 clock hours of training each year relevant to the age of the children for whom the person provides care.

(b) The 15 clock hours of annual training are exclusive of requirements for orientation, pre-service training [requirements], CPR and first aid training, transportation safety training, and high school child-care work-study classes.

(c) [(b)] At least six clock hours of the annual training hours must be in one or more of the following topics:

(1) Child growth and development;

(2) Guidance and discipline;

(3) Age-appropriate curriculum; and

(4) Teacher-child interaction.

(d) While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:

(1) Emergency preparedness;

(2) Preventing and controlling the spread of communicable diseases, including immunizations;

(3) Administering medication, if applicable, including compliance with §744.2653 of this title (relating to What authorization

must I obtain before administering a medication to a child in my care?);

(4) Preventing and responding to emergencies due to food or an allergic reaction;

(5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electric hazards, bodies of water, and vehicular traffic; and

(6) Handling, storing, and disposing of hazardous materials including compliance with §744.2523 of this title (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).

(e) [(e)] The remaining [eleek hours of] annual training hours must be in one or more of the following topics:

(1) Care of children with special needs;

(2) Child health (for example, nutrition or physical activity);

(3) Safety;

(4) Risk management;

(5) Identification and care of ill children;

(6) Cultural diversity for children and families;

(7) Professional development (for example, effective communication with families and[.] time and stress management);

[(8) Preventing the spread of communicable diseases;]

(8) [(9)] Topics relevant to the particular age group the caregiver is assigned;

(9) [(10)] Planning developmentally appropriate learning activities; and

(10) [(11)] Minimum standards and how they apply to the caregiver.

[(d) A caregiver who transports a child whose chronological or developmental age is younger than nine years old must meet additional training requirements as outlined in §744.1317 of this title (relating to What additional training must a person have in order to transport a child in care?).]

(f) [(e)] No [A caregiver or site director may obtain no] more than 80% [50%] of the annual training hours may be obtained through self-instructional training.

§744.1311. How many clock hours of training must an operation director or a program director obtain each year?

(a) An operation director and/or a program director must obtain at least 20 clock hours of training each year relevant to the age of the children for whom the operation provides care.

(b) The 20 clock hours of annual training are exclusive of any requirements for [CPR and first aid,] orientation, pre-service training, CPR and first aid training, and transportation safety training [requirements].

(c) [(b)] At least six clock hours of the annual training hours must be in one or more of the following topics:

(1) Child growth and development;

(2) Guidance and discipline;

(3) Age-appropriate curriculum;

- (4) Teacher-child interaction; and
- (5) Serving children with special care needs.

(d) While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:

- (1) Emergency preparedness;
- (2) Preventing and controlling the spread of communicable diseases, including immunizations;
- (3) Administering medication, if applicable, including compliance with §744.2653 of this title (relating to What authorization must I obtain before administering a medication to a child in my care?);
- (4) Preventing and responding to emergencies due to food or an allergic reaction;
- (5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electric hazards, bodies of water, and vehicular traffic; and
- (6) Handling, storing, and disposing of hazardous materials including compliance with §744.2523 of this title (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).

(e) [(e)] An operation director or program director with:

(1) Five [five] or fewer years of experience as a designated director of an operation or as a program director must [also] complete at least six clock hours of the annual training hours in management techniques, leadership, or staff supervision; or[-]

(2) [(d)] More [A director with more] than five years of experience as a designated director of an operation or as a program director must complete at least three clock hours of the annual training hours in management techniques, leadership, or staff supervision.

(f) [(e)] The remainder of the 20 clock hours of annual training must be selected from the training topics specified in §744.1309(e) [§744.1309(e)] of this title (relating to How many clock hours of annual training must be obtained by caregivers and site directors?).

[(f) If the operation transports a child whose chronological or developmental age is younger than nine years old, the director must complete two hours of annual training on transportation safety, as outlined in §744.1317 of this title (relating to What additional training must a person have in order to transport a child in care?).]

(g) An operation [The] director or program director may obtain clock hours or CEUs from the same sources as caregivers.

(h) Training hours may not be earned for presenting training to others[-; with the exception of up to two hours of training on transportation safety].

(i) No more than 80% [50%] of the annual training hours may be obtained through self-instructional training.

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

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## SUBCHAPTER I. FIELD TRIPS

### 40 TAC §744.2301

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§744.2301. May I take children away from my operation for field trips?*

Yes. You must ensure the safety of all children on field trips or excursions and during any transportation provided by the operation. Anytime you take a child on [away from the operation for] a field trip, you must comply with each of the following requirements:

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

(5) Caregivers must have a copy of a child's food allergy emergency plan and allergy medications, if applicable;

(6) [(5)] Each child must wear a shirt, nametag, or other identification listing the name of the operation and the operation's telephone number;

(7) [(6)] Each caregiver must be easily identifiable by all children on the field trip by wearing a hat, operation tee-shirt, brightly-colored clothes, or other easily spotted identification;

(8) [(7)] Each caregiver supervising a field trip must have transportation available, [or] a communication device such as a cellular phone, message pager, or two-way radio available, or an alternate plan for transportation at the field-trip location in case of emergency; and

(9) [(8)] Caregivers with training in CPR and first aid with rescue breathing and choking must be present on the field trip.

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

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## SUBCHAPTER J. NUTRITION AND FOOD SERVICE

### 40 TAC §744.2401

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§744.2401. *What are the basic requirements for snack and meal-times?*

(a) You must serve all children regular meals and morning and afternoon snacks as specified in this subchapter.

(b) ~~[(4)]~~ If breakfast is served, a morning snack is not required.

(c) ~~[(2)]~~ A child must not go more than three hours without a meal or snack being offered, unless the child is sleeping.

(d) ~~[(3)]~~ If your operation is participating in the Child and Adult Care Food Program (CACFP) administered by the Texas Department of Agriculture, you may elect to meet those requirements rather than those specified in this section ~~[subsection]~~.

(e) ~~[(b)]~~ You must ensure a supply of drinking water is readily available to each child and is served at every snack, mealtime, and after active play in a safe and sanitary manner.

(f) ~~[(e)]~~ You must not serve beverages with added sugars, such as carbonated beverages, fruit punch, or sweetened milk.

(g) ~~[(d)]~~ You must not use food as a reward ~~[or punishment]~~.

(h) You must not serve a child a food identified on the child's food allergy emergency plan as specified in §744.2667 of this title (relating to What is a food allergy emergency plan?).

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

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## SUBCHAPTER K. HEALTH PRACTICES DIVISION 1. ENVIRONMENTAL HEALTH

### 40 TAC §744.2507, §744.2523

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which

provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§744.2507. *What steps must I take to ensure a healthy environment for children at my operation?*

You must clean, repair, and maintain the building, grounds, and equipment to protect the health of the children. This includes, but is not limited to:

(1) - (8) (No change.)

(9) Sanitizing table tops, furniture, and other similar equipment used by children when soiled or contaminated with matter such as food or bodily ~~[body]~~ secretions; ~~[and]~~

(10) Clearly marking cleaning supplies and other toxic materials and keeping them separate from food and inaccessible to children; and[-]

(11) Using, storing, and disposing of hazardous materials as recommended by the manufacturer.

§744.2523. *Must caregivers wear gloves when handling blood or bodily fluids containing blood?*

Yes. Caregivers must follow universal precautions outlined by the Centers for Disease Control (CDC) when handling blood, vomit, or other bodily fluids that may contain blood including:

(1) Using ~~[Use of]~~ disposable, nonporous gloves;

(2) Placing gloves contaminated with blood in a sealed plastic bag and discarding them immediately;

(3) ~~[(2)]~~ Discarding all other ~~[the]~~ gloves immediately after one use; and

(4) ~~[(3)]~~ Washing hands after using and disposing of the gloves.

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

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## SUBCHAPTER L. SAFETY PRACTICES DIVISION 2. MEDICATION AND MEDICAL ASSISTANCE

### 40 TAC §744.2667, §744.2669

The new sections proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§744.2667. What is a food allergy emergency plan?

A food allergy emergency plan is an individualized plan prepared by the child's health care professional that includes:

- (1) a list of each food the child is allergic to;
- (2) possible symptoms if exposed to a food on the list; and
- (3) the steps to take if the child has an allergic reaction.

§744.2669. When must I have a food allergy emergency plan for a child?

You must have a food allergy emergency plan for each child with a known food allergy. The child's health care professional and parent must sign and date the plan. You must keep a copy of the plan in the child's file, post it as specified in §744.403(b) of this title (relating to When and where must these items be posted?), and take it on any field trip that the child is on.

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## SUBCHAPTER P. FIRE SAFETY AND EMERGENCY PRACTICES

### DIVISION 2. EMERGENCY PREPAREDNESS

#### 40 TAC §§744.3551, 744.3553, 744.3559, 744.3561

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§744.3551. What is an emergency preparedness plan?

An emergency preparedness plan is designed to ensure the safety of children during an emergency by addressing staff responsibility and facility readiness with respect to emergency evacuation, ~~and~~ relocation, and sheltering. The plan addresses the types of responses to emergencies most likely to occur in your area including: ~~[but not limited to natural events such as tornadoes, floods or hurricanes, health events such as medical emergencies, communicable disease outbreak, and human-caused events such as intruder with weapon, explosion, or chemical spill.]~~

(1) An evacuation of the children and caregivers to a designated safe area in an emergency such as a fire or gas leak;

(2) A relocation of the children and caregivers to a designated, alternate shelter in an emergency such as a flood, a hurricane, medical emergency, or communicable disease outbreak; and

(3) The sheltering of children and caregivers within the operation to temporarily shelter them from situations such as a tornado, volatile person on the premises, or an endangering person in the area.

§744.3553. What must my emergency preparedness plan include?

Your emergency preparedness plan must include written procedures for:

(1) Evacuation, relocation, and sheltering of children including:

(A) The [That in an emergency, the] first responsibility of staff in an emergency evacuation or relocation is to move the children to a designated safe area or alternate shelter known to all employees, caregivers, parents, and volunteers;

(B) How children will be evacuated or relocated to the designated safe area or alternate shelter, including but not limited to specific procedures for evacuating and relocating children with limited mobility or who otherwise may need assistance in an emergency, such as children who have mental, visual, or hearing impairments;

(C) (No change.)

(D) The staff responsibility in a sheltering emergency for the orderly movement of children to a designated location within the operation where children should gather;

(E) [(D)] Name and address of the alternate shelter away from the operation you will use as needed; and

(F) [(E)] How children in attendance at the time of the emergency will be accounted for at the designated safe area or alternate shelter;[-]

(2) Communication, including:

(A) The emergency telephone number that is on file with us; and

(B) How you will communicate with local authorities (such as fire, law enforcement, emergency medical services, health department), parents, and us; and

(3) How your staff will evacuate and relocate with the essential documentation including:

(A) Parent and emergency contact telephone numbers for each child in care;

(B) Authorization for emergency care for each child in care; and

(C) The child tracking system information for children in care;[-]

(4) How your staff will continue to care for children until each child has been released; and

(5) How you will reunify the children with their parents at evacuation, relocation, or when sheltering is lifted.

§744.3559. *Must I practice my emergency preparedness plan [plans]?*

The following components of your operation's emergency preparedness plan [plans] must be practiced as specified below:

(1) (No change.)

(2) You must practice a severe weather or sheltering drill at least once every three months; and

(3) You must document these drills, including the date of the drill, time of the drill, and length of time for the evacuation, [or] relocation, or sheltering to take place.

§744.3561. *Must I have an emergency evacuation and relocation diagram?*

(a) (No change.)

(b) You must post an emergency evacuation and relocation diagram [plan] in each room the children use. You must post the plan [in a prominent place] near the entrance and/or exit of the room and where children and employees may easily view the diagram.

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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#### 40 TAC §744.3555

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§744.3555. *With whom must I share this plan?*

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

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#### CHAPTER 745. LICENSING

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), an amendment to §745.505 and §745.615 and new §745.616 in Chapter 745, concerning Licensing. The purpose of the amendments and new section is to implement needed changes to comply with the Child Care and Development Block Grant Act of 2014 and Senate Bill (S.B.) 1496, 84th Regular Legislative Session.

The Child Care and Development Block Grant (CCDBG) Act of 2014 (the "Act") is the first comprehensive revision of the Child Care and Development Fund (CCDF) program since 1998. (The CCDF is codified in 42 USC §9857 et seq.) The Texas Workforce Commission (TWC) administers the CCDF, which is the primary federal funding source devoted to providing low-income families with access to child care. The Act makes significant reforms to the CCDF programs to raise the health, safety, and quality of child care. The Act does this by mandating that states comply with a multitude of additional requirements in order to continue receiving CCDF funding. Although TWC is the lead agency for determining eligibility and distributing the subsidy monies, DFPS is the agency responsible for licensing child care operations, establishing health and safety regulations, and monitoring eligible operations for compliance. Many of the Act's additional requirements relate to the responsibilities of DFPS. The provisions of the Act that have a significant impact on Child Care Licensing (CCL) and this chapter relate to background checks. Finally, there will be additional requirements of the Act addressed in future rulemaking.

In regards to background checks, Senate Bill (S.B.) 1496, 84th Regular Legislative Session, amended HRC §42.0523 and §42.056 in order to comply with the Act's requirements. A summary of the background check changes in response to the Act and S.B. 1496 include: (1) requiring Listed Family Homes that provide care to unrelated children to pay biennial background check fees of \$2.00 per person; and (2) requiring Licensed Child-Care Homes, Registered Child-Care Homes, and Listed Family Homes that provide care to unrelated children to obtain fingerprint-based criminal history checks (these homes were previously only required to have name-based criminal history checks). There is also a transitional rule which clarifies which persons are required to have a fingerprint-based criminal history check and when the checks are due.

The summary of the changes are:

The amendment to §745.505 requires Listed Family Homes that provide care to unrelated children to pay biennial background check fees of \$2.00 per person.

The amendment to §745.615 requires Licensed Child-Care Homes, Registered Child-Care Homes, and Listed Family Homes that provide care to unrelated children, to request fingerprint-based criminal history checks.

New §745.616 clarifies which persons in these homes are required to have a fingerprint-based criminal history check and when the request for checks are due.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections. According to the DFPS Centralized Background Check Unit (CBCU), implementation of the legislation requiring fingerprint-based criminal history checks for additional persons will increase the CBCU's workload; however, the Legislature provided an FTE to cover the increase in the workload.

Ms. Subia also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that: (1) DFPS will be in compliance with the Child Care and Development Block Grant Act of 2014; (2) DFPS will be in compliance with HRC §42.056 (S.B. 1496); (3) there will be clarification regarding background checks; and (4) there will be a reduced risk to children.

There is an anticipated economic cost for persons required to comply with some of the proposed rule changes. The proposed changes are anticipated to have an adverse impact on businesses, including small and micro-businesses. The proposed changes will impact Licensed Child-Care Homes, Registered Child-Care Homes, and Listed Family Homes. According to the FY 2015 DFPS Annual Report and Data Book as of August 31, 2015 there were: (1) 1,720 Licensed Child-Care Homes; (2) 4,678 Registered Child-Care Homes; and (3) 5,026 Listed Family Homes.

Chapter 2006 of the Government Code defines a small business as one that is for-profit, independently owned, and has fewer than 100 employees or less than six million dollars in annual gross receipts. A small business that has no more than 20 employees is also defined as a micro-business. CCL is assuming virtually all Homes (Licensed Child-Care Homes, Registered Child-Care Homes, and Listed Family Homes) meet the definitions of a small and micro-business.

The fiscal impact to these operations results from (1) background check fees for Listed Family Homes; and (2) costs for fingerprint-based criminal history checks for all three types of Homes.

The size of Licensed Child-Care Homes and Registered Child-Care Homes and the number of their employees vary. Also, for all Homes, the number of household members varies. Given these variations, it is not possible to project the fiscal impact to each home; however, it is possible to project an average "unit cost" for background checks that are newly required by the rules proposed.

Licensing staff developed the methodologies used to calculate the fiscal impact of these rules. The impacts were calculated using cost research conducted by staff and assumptions regarding child care practices. The key assumptions and methodologies are described in detail below, as these underlie the individual impact calculations for each rule that is projected to have a fiscal impact on at least some operations.

Fiscal Impact for Proposed §745.505. This section requires a listed family home that provides care to unrelated children to pay a background check fee of \$2.00 per person biennially. The total impact will depend upon how many household members a listed family home has that are required to receive a background check.

Fiscal Impact for Proposed §745.615. This section requires licensed child-care homes, registered child-care homes, and listed family homes to request fingerprint-based criminal history checks on certain persons at a cost of \$41.25 per person. This is generally a one-time cost. Once a person has undergone an initial fingerprint-based criminal history check, the person is not required to re-request fingerprints in the future provided the person does not move out-of-state after the initial check and the person undergoes name-based background checks at least every two years. The total impact will depend upon how many employees a Licensed Child-Care Home or Registered Child-Care Home has and how many household members each home (Licensed Child-Care Home, Registered Child-Care Home, or Listed Family Home) has that are required to have a fingerprint-based criminal history check.

Regulatory Flexibility Analysis: A regulatory flexibility analysis is not required for the proposed rules with fiscal implications because the proposed rules are specifically required by state law (S.B. 1496) and federal law (The Child Care and Development Block Grant of 2014). Therefore, the proposed rules are consistent with the health and safety of children, whom the laws were intended to protect.

Ms. Subia has determined that the proposed sections do 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, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Gerry Williams at (512) 438-5559 in DFPS's Child Care Licensing Division. Electronic comments may be submitted to [CCRules@dfps.state.tx.us](mailto:CCRules@dfps.state.tx.us). Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-551, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

## SUBCHAPTER E. FEES

### 40 TAC §745.505

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §§42.042, 42.0421, 42.0523, and 42.056 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§745.505. What fees must I pay to list my family home and maintain the listing?*

(a) The following chart contains the fees required for listed family homes, when the fees are due, and the consequences for failure to pay the fees on time: [- Note that for listed family homes the fees for background checks are included in the \$20 application and annual fees.]

Figure: 40 TAC §745.505(a)

[Figure: 40 TAC §745.505(a)]

(b) The fees listed in subsection (a) of this section are waived for a person with a listing who only provides child care to a related child in the child's own home as approved by the Texas Workforce Commission's Listed Family Home Fee Waiver Authorization form. [A listed family home in which a relative child-care provider cares for the child(ren) in the child(ren)'s own home is exempt from paying fees.]

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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Trevor Woodruff

General Counsel

Department of Family and Protective Services

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For further information, please call: (512) 438-5559



## SUBCHAPTER F. BACKGROUND CHECKS DIVISION 2. REQUESTING BACKGROUND CHECKS

### 40 TAC §745.615, §745.616

The amendment and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment and new section implement HRC §§42.042, 42.0421, 42.0523, and 42.056 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§745.615. *On whom must I request background checks?*

(a) (No change.)

(b) In addition to any other background check required by this section, you must request fingerprint-based criminal history checks on the following:

(1) If you are a permit holder, or applicant for a permit, for a child-placing agency, general residential operation, independent foster home, child-care center, before or after-school program, [ø] school-age program, licensed child-care home, registered child-care home, or listed family home providing care to unrelated children, then you must request a fingerprint-based criminal history check for each person who is required to have a name-based background check under subsection (a)(1) - (6) of this section; and

(2) (No change.)

(c) - (d) (No change.)

§745.616. *Transitional rule for requesting fingerprint-based criminal history checks for listed family homes, registered child-care homes, and licensed child-care homes as required by the 84th Texas Legislature.*

(a) The 84th Texas Legislature enacted changes to Human Resources Code (HRC) §42.056, imposing new fingerprint-based criminal history check (fingerprint-based check) requirements on certain persons affiliated with listed family homes that provide care to unrelated children, registered child-care homes, and licensed child-care homes who had not previously been required to undergo these checks. See S.B. 1496, 84th Regular Legislative Session. The purpose of this transitional rule is to provide guidance on when a fingerprint-based check should be requested and when Licensing will begin to cite a home for a violation of minimum standards for failing to request a required fingerprint-based check. This rule applies only to listed family homes, registered child-care homes, or licensed child-care homes, and only with respect to persons who were not previously required to undergo a fingerprint-based check under HRC §42.056, as that statute existed before the changes from S.B. 1496 became effective on September 1, 2016.

(b) Beginning September 1, 2016, before we issue you a permit to operate a listed family home, registered child-care home, or licensed child-care home you must:

(1) Request fingerprint-based checks for all persons listed in §745.615(a)(1) - (6) of this title (relating to On whom must I request background checks?); and

(2) Request these fingerprint-based checks when you request the initial background checks that you must request according to §745.625(a) of this title (relating to When must I submit a request for an initial or renewal background check?).

(c) For listed family homes, registered child-care homes, or licensed child-care homes that have been issued a permit to operate a home before September 1, 2016, you must request fingerprint-based checks for all persons listed in §745.615(a)(1) - (6) who do not already have a valid fingerprint-based check on file, in accordance with the timeframes listed below:

Figure: 40 TAC §745.616(c)

(d) For persons described in subsection (b) of this section, Licensing will begin citing new homes for violation of minimum standards for any deficiencies relating to fingerprint-based checks after September 1, 2016.

(e) For persons described in subsection (c) of this section, Licensing will provide technical assistance to listed family homes, registered child-care homes, or licensed child-care homes until September 1, 2017, and will begin citing operations for violation of minimum standards for any deficiencies relating to fingerprint-based checks after September 1, 2017.

(f) This rule expires on December 31, 2017.

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 746. MINIMUM STANDARDS FOR CHILD-CARE CENTERS

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§746.401, 746.403, 746.605, 746.901, 746.1303, 746.1305, 746.1307, 746.1309, 746.1311, 746.3001, 746.3301, 746.3407, 746.3425, 746.3505, 746.5201, 746.5202, 746.5205, and 746.5207; new §746.3817 and §746.3819; and repeal of §746.5203, in Chapter 746, concerning Minimum Standards for Child-Care Centers. The purpose of the amendments, new and repeal is to implement needed changes to comply with the Child Care and Development Block Grant Act of 2014.

The Child Care and Development Block Grant (CCDBG) Act of 2014 (the "Act") is the first comprehensive revision of the Child Care and Development Fund (CCDF) program since 1998. (The CCDF is codified in 42 USC §9857 et seq.) The Texas Workforce Commission (TWC) administers the CCDF, which is the primary federal funding source devoted to providing low-income families with access to child care. The Act makes significant reforms to the CCDF programs to raise the health, safety, and quality of child care. The Act does this by mandating that states comply with a multitude of additional requirements in order to continue receiving CCDF funding. Although TWC is the lead agency for determining eligibility and distributing the subsidy monies, DFPS is the agency responsible for licensing child care operations, establishing health and safety regulations, and monitoring eligible operations for compliance. Many of the Act's additional requirements relate to the responsibilities of DFPS. The provisions of the Act that have a significant impact on Child Care Licensing (CCL) and this chapter relate to the following topics: health and safety requirements and training on those requirements.

The changes related to training will impact Licensed Child Care Centers. The new health and safety training requirements mandated by the Act include the following topics for pre-service training and annual training: (1) food allergies; (2) handling, storing, and disposing of hazardous materials; (3) more robust emergency preparedness plans; (4) administering medication; and (5) building and physical premises safety.

There is also one topic required by the Act that is already required in annual training, but is not currently required in the pre-service training for Licensed Child-Care Centers. The additional health and safety training requirement that has been added to the pre-service training is training on precautions in transporting children if the operation transports a child whose chronological or developmental age is younger than nine years old.

In addition to the training requirements the Act increases health and safety requirements for Licensed Child-Care Centers. The health and safety requirements correlate to some of the training topics. The changes to the minimum standards support the health and safety requirements, including requiring operations to (1) obtain food allergy emergency plans for children with known food allergies, post a list of food allergies at the operation, and carry the child's emergency plan on field trips; and (2) use, store, and dispose of hazardous materials as recommended by the manufacturer.

The summary of the changes are:

The amendments to §746.401: (1) adds a list of each child's food allergies (with a parent's permission) to a licensed child-care center's posting requirements; (2) updates the name of the

*Parent Notification Poster*, and (3) makes other wording changes for consistency.

The amendment to §746.403: (1) clarifies that the list of each child's food allergies must be posted (with a parent's permission) where food is prepared and in each room where the child may spend time; and (2) deletes the posting information about an emergency evacuation and relocation plan because it is duplicative.

The amendment to §746.605 adds a requirement for centers to obtain a completed food allergy emergency plan before admitting a child into care, if applicable; and if a parent wants the information posted, permission from the parent to post the information.

The amendment to §746.901 updates a cite and makes the language consistent.

The amendments to §746.1303: (1) clarifies the wording to be consistent with the current wording of the operational policies rule; (2) adds components that must be addressed in the overview of prevention, recognition, and reporting of child abuse and neglect; and (3) requires centers to share the emergency preparedness plan with all employees.

The amendment to §746.1305 adds six topics that must be covered in the pre-service training of caregivers hired after September 1, 2016; and updates the existing language for a current training topic.

The amendment to §746.1307 clarifies when a caregiver is exempt from pre-service training.

The amendments to §746.1309: (1) adds six topics that must be covered in the annual training of caregivers; (2) deletes a redundant paragraph about transportation safety training; and (3) increases from 50% to 80% the amount of annual training hours that may be obtained through self-instructional training.

The amendments to §746.1311: (1) adds six topics that must be covered in the annual training for child-care center directors; (2) deletes a redundant paragraph about transportation safety training; and (3) increases from 50% to 80% the amount of annual training hours that may be obtained through self-instructional training.

The amendment to §746.3001 adds the requirement that caregivers must have a copy of a child's food allergy emergency plan and medications, if applicable, when going on field trips.

The amendments to §746.3301: (1) adds that children must not be served foods identified on their food allergy emergency plan; and (2) deletes the requirement "you must not use food as . . . punishment", because this requirement is already noted in §746.2805.

The amendment to §746.3407 requires a child-care center to use, store, and dispose of hazardous materials as recommended by the manufacturer.

The amendment to §746.3425 clarifies that caregivers must follow universal precautions as outlined by the CDC when handling bodily fluids that may contain blood, including placing gloves contaminated with blood in a sealed plastic bag and discarding them immediately.

The amendment to §746.3505 clarifies that a child's soiled clothing must be placed in a sealed plastic bag and be sent home with the child.

New §746.3817 defines a food allergy emergency plan, including a list of foods a child is allergic to, possible symptoms, and what steps to take if there is an allergic reaction.

New §746.3819 requires: (1) a food allergy emergency plan for each child with a known food allergy; and (2) the plan to be signed by the child's health care professional and a parent, posted if the parent consents, and taken on field trips.

The amendment to §746.5201 clarifies in more detail what an emergency preparedness plan is by distinguishing between an evacuation, relocation, and sheltering.

The amendments to §746.5202 adds to the requirements for an emergency preparedness plan to also include: (1) the staff responsibility in a sheltering emergency for the orderly movement of children to a designated location within the center where children should gather; (2) how staff will continue to care for children until each child has been released; and (3) how children will be reunified with their parents at evacuation, relocation, or when sheltering is lifted.

The repeal of §746.5203 is because all of the information is already included in §746.1303(4) and §746.507.

The amendment to §746.5205 adds the "sheltering" language for clarification.

The amendment to §746.5207 clarifies the wording of an emergency evacuation and relocation diagram and where the diagram should be posted.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Subia also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that: (1) DFPS will be in compliance with the Child Care and Development Block Grant Act of 2014; (2) there will be clarification regarding the health and safety requirements and training on those requirements; and (3) there will be a reduced risk to children.

There is an anticipated economic cost for persons required to comply with some of the proposed rule changes. The proposed changes are anticipated to have an adverse impact on businesses, including small and micro-businesses. The proposed changes will impact Licensed Child-Care Centers. According to the FY 2015 DFPS Annual Report and Data Book as of August 31, 2015 there were 7,888 Licensed Child-Care Centers.

Chapter 2006 of the Government Code defines a small business as one that is for-profit, independently owned, and has fewer than 100 employees or less than six million dollars in annual gross receipts. A small business that has no more than 20 employees is also defined as a micro-business. A 2010 survey conducted by CCL indicated that approximately 55% of Licensed Child Care Centers are for profit businesses, 70% are independently owned, 98% have fewer than 100 employees, and 68% have fewer than 20 employees.

The fiscal impact to these centers primarily results from additional staff time to develop or modify curriculum.

Licensing staff developed the methodologies used to calculate the fiscal impact of these rules. The impacts were calculated using cost research conducted by staff and assumptions regarding child-care practices. The key assumptions and methodologies

are described in detail below, as these underlie the individual impact calculations for each rule that are projected to have a fiscal impact on at least some centers.

For Licensed Child-Care Centers, the staff time required to comply with the standards will impact Directors. For use in this impact analysis, DFPS will use the following mean wages that were obtained from the Texas Workforce Commission's website for Occupational Wages based on 2014 estimates: For all Directors, DFPS is using a \$24.27 per hour mean wage from the Occupational Title of Education Administrator, Preschool and Childcare Center.

Fiscal Impact for Proposed §746.1305(c). This section adds six additional topics that must be covered in the pre-service training for caregivers hired on or after September 1, 2016. One of the six topics is precautions in transporting children and is only required for centers that transport children whose chronological or developmental age is younger than nine years old. There is no increase in the number of pre-service training hours required; there is only a change in the content of the required training. Any costs associated with the rule change depends on whether a center pays for outside training, utilizes free training in the community, or provides in-house training to the caregivers. For centers that:

(1) Pay for outside training to obtain pre-service training for caregivers, there are no additional costs associated with this change in training content;

(2) Utilize free training in the community (for example AgriLife training modules) to obtain pre-service training for caregivers, the only additional costs with this change in training content relates to the new topic regarding precautions in transporting children. For example, the relevant AgriLife training modules that could be used to comply with five of the six additional topics are free. However, the AgriLife training module relating to transporting children has a \$14.00 cost. Therefore, it is anticipated that each center that transports children whose chronological or developmental age is younger than nine years old will need to pay the \$14.00 costs for the transportation module for each caregiver; and

(3) Provide in-house pre-service training to caregivers, there are costs associated with modifying their current pre-service curriculum for these six topics. However, the time to modify the curriculum is not anticipated to be extensive, because the center will have already developed new curriculum for annual training on these six topics, see "Fiscal Impact for Proposed §746.1309(f)". It is anticipated that a director, or curriculum developer that is similarly paid, will spend approximately 20 hours to modify the pre-service training curriculum. Therefore, the approximate one-time cost to modify the pre-service training curriculum is \$485.40 (20 X \$24.27).

Fiscal Impact for Proposed §746.1309(f). This section adds six additional topics that must be covered in the annual training for caregivers. There is no increase in the number of annual training hours required; there is only a change in the content of the required training. Any costs associated with the rule change depends on whether a center pays for outside training, utilizes free training in the community, or provides in-house training to the caregivers. For centers that:

(1) Pay for outside training or utilize free training in the community to obtain annual training for caregivers, there are no additional costs associated with this change in training content; and

(2) Provide annual in-house training to caregivers, there are costs associated with centers developing new curriculum for these six topics. This section does not mandate a time frame for training on these six topics. However, for purposes of estimating a cost for developing training on these topics, it is assumed that training on these six topics will be two to three hours. A common industry standard is 40 hours to develop one hour of curriculum for face-to-face training. It is anticipated that a director, or curriculum developer that is similarly paid, will spend an average of 80 to 120 hours to develop the two to three hour curriculum on these six topics. Therefore, the approximate one-time cost for the development of the annual curriculum is between \$1,941.60 (80 X \$24.27) and \$2,912.40 (120 X \$24.27).

Fiscal Impact for Proposed §746.1311(f). This section adds six additional topics that must be covered in the annual training for a child-care center director. There is no increase in the number of annual training hours required; there is only a change in the content of the required training. For centers that pay for outside training or utilize free training in the community to obtain annual training for a director, there are no additional costs associated with this change in training content. For centers that provide annual in-house training to directors, there are costs associated with centers developing new curriculum for these six topics. However, the center will have already developed the same curriculum for caregivers in response to §746.1309, see "Fiscal Impact for Proposed §746.1309(f)". Therefore, CCL assumes there will be no additional costs associated with this rule change.

Regulatory Flexibility Analysis: A regulatory flexibility analysis is not required for the proposed rules with fiscal implications because the proposed rules are specifically required by federal law (The Child Care and Development Block Grant of 2014). Therefore, the proposed rules are consistent with the health and safety of children, whom the law was intended to protect.

Ms. Subia has determined that the proposed sections do 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, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Gerry Williams at (512) 438-5559 in DFPS's Child Care Licensing Division. Electronic comments may be submitted to CCLRules@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-551, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

## SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

### DIVISION 3. REQUIRED POSTINGS

#### 40 TAC §746.401, §746.403

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§746.401. *What items must I post at my child-care center at all times?*

You must post the following items:

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

(4) Your emergency [Emergency and] evacuation and relocation diagram as specified in §746.5207 of this title (relating to Must I have an emergency evacuation and relocation diagram?) [plans];

(5) - (6) (No change.)

(7) The Licensing Parent Notification Poster; [Notice of Availability for Review of]:

~~[(A) The most recent fire inspection report;]~~

~~[(B) The most recent sanitation inspection report;]~~

~~[(C) The most recent gas inspection report, if applicable; and]~~

~~[(D) The Licensing minimum standards applicable for child-care centers;]~~

(8) (No change.)

(9) A list entitled "Current Employees." The list must be at least 8 1/2 inches by 11 inches in size, printed legibly, and must include each employee's first and last name; ~~[and]~~

(10) A list of each child's food allergies, with a parent's permission as specified in §746.605(16) of this title (relating to What admission information must I obtain for each child?); and

(11) ~~[(+0)]~~ Any other Licensing notices with specific instructions to post the notice.

§746.403. *When and where must these items be posted?*

(a) (No change.)

(b) With the permission of the child's parent, you must post a list of each child's food allergies where you prepare or serve food and in each room where the child may spend time. The posting must be in a place where employees may easily view it. [Emergency and evacuation relocation plans must be posted in each room used by children.]

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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Trevor Woodruff

General Counsel

Department of Family and Protective Services

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For further information, please call: (512) 438-5559



## SUBCHAPTER C. RECORD KEEPING

### DIVISION 1. RECORDS OF CHILDREN

#### 40 TAC §746.605

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§746.605. *What admission information must I obtain for each child?*

You must obtain at least the following information before admitting a child to care:

(1) - (13) (No change.)

(14) The name and telephone number of the school that a school-age child attends, unless the operation is located at the child's school; ~~and~~

(15) Permission for a school-age child to ride a bus, ~~or~~ walk to or from school or home, or to be released to the care of a sibling under 18 years old, if applicable; ~~and~~[-]

(16) A completed food allergy emergency plan for the child, if applicable, and if a parent wants the information posted, permission from a parent to post the child's allergy information.

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

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## DIVISION 4. PERSONNEL RECORDS

### 40 TAC §746.901

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§746.901. *What information must I maintain in my personnel records?*

You must have the following records at the child-care center and available for review during hours of operation for each employee, caregiver, substitute, and volunteer as specified in this chapter:

(1) - (9) (No change.)

(10) A statement signed and dated by the employee verifying the date the employee attended training during orientation that includes an overview of your policy on the prevention, recognition, and reporting of child ~~preventing and responding to~~ abuse and neglect ~~of children as~~ outlined in §746.1303 of this title (relating to What must ~~should~~ orientation for employees at ~~to~~ my child-care center include?).

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

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## SUBCHAPTER D. PERSONNEL

### DIVISION 4 PROFESSIONAL DEVELOPMENT

#### 40 TAC §§746.1303, 746.1305, 746.1307, 746.1309, 746.1311

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§746.1303. *What must ~~should~~ orientation for employees at ~~to~~ my child-care center include?*

Your orientation for employees must include at least the following:

(1) (No change.)

(2) An overview of your ~~Your center's~~ operational policies, including discipline[-] and guidance practices[-] and procedures for the release of children;

(3) An overview of your policy on the prevention, recognition, and reporting of child ~~preventing and responding to~~ abuse and neglect, including: ~~of children;~~

(A) Factors indicating a child is at risk of abuse or neglect;

(B) Warning signs indicating a child may be a victim of abuse or neglect;

(C) Internal procedures for reporting child abuse or neglect; and

(D) Community organizations that have training programs available to child-care center staff members, children, and parents;

(4) An overview of the [The] procedures to follow in handling emergencies, which includes sharing the emergency preparedness plan with all employees. Emergencies may include, but are not limited to, fire, explosion, tornado, toxic fumes, volatile persons, and severe injury or illness of a child or adult; and

(5) The [use and] location and use of fire extinguishers and first-aid equipment.

*§746.1305. What must be covered in pre-service training for caregivers?*

(a) Pre-service training for caregivers must cover the following areas:

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

(7) Preventing and controlling the spread of communicable diseases, including immunizations.

(b) If a caregiver provides care for children younger than 24 months of age, one hour of that caregiver's pre-service training must cover the following topics:

(1) Recognizing and preventing shaken baby syndrome and abusive head trauma;

(2) Understanding and using safe sleep practices and preventing [Preventing] sudden infant death syndrome (SIDS); and

(3) (No change.)

(c) Pre-service training for caregivers you hire on or after September 1, 2016, must also cover the following areas:

(1) The emergency preparedness plan for your center;

(2) Administering medication, if applicable, including compliance with §746.3803 of this title (relating to What authorization must I obtain before administering a medication to a child in my care?);

(3) Preventing and responding to emergencies due to food or an allergic reaction;

(4) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electric hazards, bodies of water, and vehicular traffic;

(5) Handling, storing, and disposing of hazardous materials including compliance with §746.3425 of this title (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?); and

(6) Precautions in transporting children if your center transports a child whose chronological or developmental age is younger than nine years old.

*§746.1307. Are any caregivers exempt from the pre-service training? Yes. A caregiver is exempt from the pre-service training requirements if the caregiver [he] has:*

(1) (No change.)

(2) Documentation of at least 24 clock hours of training in the areas specified in §746.1305 of this title (relating to What must be

covered in pre-service training for caregivers?) at another regulated child-care center.

*§746.1309. How many clock hours of annual training must be obtained by caregivers?*

(a) Each caregiver must obtain at least 24 clock hours of training each year relevant to the age of the children for whom the caregiver provides care.

(b) The 24 clock hours of annual training are exclusive of any requirements for orientation, pre-service training [requirements], CPR and first aid training, transportation safety training, and high school child-care work-study classes.

(c) [(b)] At least six clock hours of the annual training hours must be in one or more of the following topics:

(1) Child growth and development;

(2) Guidance and discipline;

(3) Age-appropriate curriculum; and

(4) Teacher-child interaction.

(d) [(e)] At least one clock hour of the annual training hours must focus on prevention, recognition, and reporting of child abuse and neglect, including:

(1) Factors indicating a child is at risk for abuse or neglect;

(2) Warning signs indicating a child may be a victim of abuse or neglect;

(3) Internal procedures for reporting child abuse or neglect; and

(4) Community organizations that have training programs available to child-care center staff members, children, and parents.

(e) If a caregiver provides care for children younger than 24 months of age, one clock hour of the annual training hours must cover the following topics:

(1) Recognizing and preventing shaken baby syndrome and abusive head trauma;

(2) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS); and

(3) Understanding early childhood brain development.

(f) While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:

(1) Emergency preparedness;

(2) Preventing the spread of communicable diseases, including immunizations;

(3) Administering medication, if applicable, including compliance with §746.3803 of this title (relating to What authorization must I obtain before administering a medication to a child in my care?);

(4) Preventing and controlling and responding to emergencies due to food or an allergic reaction;

(5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electric hazards, bodies of water, and vehicular traffic; and

(6) Handling, storing, and disposing of hazardous materials including compliance with §746.3425 of this title (relating to Must

Caregivers wear gloves when handling blood or bodily fluids containing blood?.

(g) [(d)] The remaining [clock hours of] annual training hours must be in one or more of the following topics:

- (1) Care of children with special needs;
- (2) Child health (for example, nutrition and activity);
- (3) Safety;
- (4) Risk management;
- (5) Identification and care of ill children;
- (6) Cultural diversity for children and families;
- (7) Professional development (for example, effective communication with families and[.] time and stress management);

[(8) Preventing the spread of communicable diseases;]

(8) [(9)] Topics relevant to the particular age group the caregiver is assigned (for example, caregivers assigned to an infant or toddler group should receive training on biting and toilet training);

(9) [(10)] Planning developmentally appropriate learning activities;

(10) [(11)] Observation and assessment;

(11) [(12)] Attachment and responsive care giving; and

(12) [(13)] Minimum standards and how they apply to the caregiver.

[(e) If a caregiver provides care for children younger than 24 months of age, one hour of that caregiver's annual training must cover the following topics:]

[(1) Recognizing and preventing shaken baby syndrome;]

[(2) Preventing sudden infant death syndrome; and]

[(3) Understanding early childhood brain development.]

[(f) A caregiver who transports a child whose chronological or developmental age is younger than nine years old must meet additional training requirements, as outlined in §746.1316 of this title (relating to What additional training must a person have in order to transport a child in care?)]

(h) [(g)] No [A caregiver may obtain no] more than 80% [50%] of the annual training hours may be obtained through self-instructional training.

§746.1311. *How many clock hours of training must my child-care center director obtain each year?*

(a) The child-care center director must obtain at least 30 clock hours of training each year relevant to the age of the children for whom the child-care center provides care.

(b) The 30 clock hours of annual training are exclusive of any requirements for [CPR and first aid,] orientation, pre-service training, CPR and first aid training [requirements], and transportation safety training.

(c) [(b)] At least six clock hours of the annual training hours must be in one or more of the following topics:

- (1) Child growth and development;
- (2) Guidance and discipline;
- (3) Age-appropriate curriculum;
- (4) Teacher-child interaction; and

(5) Serving children with special care needs.

(d) [(e)] At least one clock hour of the annual training hours must focus on prevention, recognition, and reporting of child abuse and neglect, including:

- (1) Factors indicating a child is at risk for abuse or neglect;
- (2) Warning signs indicating a child may be a victim of abuse or neglect;

(3) Internal procedures for reporting child abuse or neglect; and

(4) Community organizations that have training programs available to child-care center staff members, children, and parents.

(e) If the center provides care for children younger than 24 months of age, one hour of the annual training hours must cover the following topics:

(1) Recognizing and preventing shaken baby syndrome and abusive head trauma;

(2) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS); and

(3) Understanding early childhood brain development.

(f) While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:

(1) Emergency preparedness;

(2) Preventing and controlling the spread of communicable diseases, including immunizations;

(3) Administering medication, if applicable, including compliance with §746.3803 of this title (relating to What authorization must I obtain before administering a medication to a child in my care?);

(4) Preventing and responding to emergencies due to food or an allergic reaction;

(5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electric hazards, bodies of water, and vehicular traffic; and

(6) Handling, storing, and disposing of hazardous materials including compliance with §746.3425 of this title (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).

(g) [(d)] A director with:

(1) Five [five] or fewer years of experience as a designated director of a child-care center must [also] complete at least six clock hours of the annual training hours in management techniques, leadership, or staff supervision; or[.]

(2) [(e)] More [A director with more] than five years of experience as a designated director of a child-care center must complete at least three clock hours of the annual training hours in management techniques, leadership, or staff supervision.

[(f) If the center provides care for children younger than 24 months of age, one hour of the annual training must cover the following topics:]

[(1) Recognizing and preventing shaken baby syndrome;]

[(2) Preventing sudden infant death syndrome; and]

~~[(3) Understanding early childhood brain development.]~~

~~(h) [(g)] The remainder of the 30 clock hours of annual training must be selected from the training topics specified in §746.1309(g) [§746.1309(d)] of this title (relating to How many clock hours of annual training must be obtained by caregivers?).~~

~~[(h) If the center transports a child younger than nine years old, the director must complete two hours of annual training on transportation safety in addition to the other training requirements.]~~

(i) The director may obtain clock hours or CEUs from the same sources as caregivers.

(j) Training hours may not be earned for presenting training to others[, with the exception of up to two hours of training on transportation safety].

(k) No more than 80% [50%] of the annual training hours may be obtained through self-instructional training.

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 N. FIELD TRIPS

### 40 TAC §746.3001

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§746.3001. May I take children away from my child-care center for field trips?*

Yes. You must ensure the safety of all children on field trips or excursions and during any transportation provided by the child-care center. Anytime you take a child on [away from the child-care center for] a field trip, you must comply with each of the following requirements:

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

(5) Caregivers must have a copy of a child's food allergy emergency plan and allergy medications, if applicable;

(6) [(5)] Each child must wear a shirt, nametag, or other identification listing the name of the child-care center and the child-care center's telephone number;

(7) [(6)] Each caregiver must be easily identifiable by all children on the field trip by wearing a hat, child-care center tee-shirt, brightly-colored clothes, or other easily spotted identification;

(8) [(7)] Each caregiver supervising a field trip must have transportation available, [or] a communication device such as a cellular phone, message pager, or two-way radio available, or an alternate plan for transportation at the field-trip location in case of emergency; and

(9) [(8)] Caregivers with training in CPR and first aid with rescue breathing and choking must be present on the field trip.

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 Q. NUTRITION AND FOOD SERVICE

### 40 TAC §746.3301

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§746.3301. What are the basic requirements for snack and meal-times?*

(a) You must serve all children ready for table food regular meals and morning and afternoon snacks as specified in this subchapter.

(b) [(4)] If breakfast is served, a morning snack is not required.

(c) [(2)] A child must not go more than three hours without a meal or snack being offered, unless the child is sleeping.

(d) [(3)] If your child-care center is participating in the Child and Adult Care Food Program (CACFP) administered by the Texas Department of Agriculture, you may elect to meet those requirements rather than those specified in this section [subsection].

(e) [(b)] You must ensure a supply of drinking water is always available to each child and is served at every snack, mealtime, and after active play in a safe and sanitary manner.

(f) [(e)] You must not serve beverages with added sugars, such as carbonated beverages, fruit punch, or sweetened milk except for a special occasion such as a holiday or birthday celebration.

(g) [(d)] You must not use food as a reward [or punishment].

(h) You must not serve a child a food identified on the child's food allergy emergency plan as specified in §746.3817 of this title (relating to What is a food allergy emergency plan?).

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

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## SUBCHAPTER R. HEALTH PRACTICES DIVISION 1. ENVIRONMENTAL HEALTH

### 40 TAC §746.3407, §746.3425

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§746.3407. *What steps must I take to ensure a healthy environment for children at my child-care center?*

You must clean, repair, and maintain the building, grounds, and equipment to protect the health of the children. This includes, but is not limited to:

(1) - (10) (No change.)

(11) Sanitizing table tops, furniture, and other similar equipment used by children when soiled or contaminated with matter such as food, body secretions, or excrement; [and]

(12) Clearly marking cleaning supplies and other toxic materials and keeping them separate from food and inaccessible to children; and[-]

(13) Using, storing, and disposing of hazardous materials as recommended by the manufacturer.

§746.3425. *Must caregivers wear gloves when handling blood or bodily fluids containing blood?*

Yes. Caregivers must follow universal precautions outlined by the Centers for Disease Control (CDC) when handling blood, vomit, or other bodily fluids that may contain blood including:

(1) Using [Use] disposable, nonporous gloves [when handling blood, vomit, or other bodily fluids that may contain blood];

(2) Placing gloves contaminated with blood in a sealed plastic bag and discarding them immediately;

(3) [(2)] Discarding all other [Discard the] gloves immediately after one use; and

(4) [(3)] Washing [Wash] hands after using and disposing of the gloves.

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## DIVISION 2. DIAPER CHANGING

### 40 TAC §746.3505

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§746.3505. *What must I do to prevent the spread of germs when diapering children?*

(a) You must wash your hands as specified in[-: Refer to] §746.3419 of this title (relating to How must children and employees wash their hands?).

(b) You must wash the infant's hands or see that the child's hands are washed after each diaper change as specified in[-: See] §746.3421 of this title (relating to How must I wash an infant's hands?).

(c) - (f) (No change.)

(g) You must place soiled clothing in a sealed plastic bag to be sent home with the child.

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SUBCHAPTER S. SAFETY PRACTICES  
DIVISION 2. MEDICATIONS AND MEDICAL ASSISTANCE

40 TAC §746.3817, §746.3819

The new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§746.3817. What is a food allergy emergency plan?*

A food allergy emergency plan is an individualized plan prepared by the child's health care professional that includes:

- (1) a list of each food the child is allergic to;
- (2) possible symptoms if exposed to a food on the list; and
- (3) the steps to take if the child has an allergic reaction.

*§746.3819. When must I have a food allergy emergency plan for a child?*

You must have a food allergy emergency plan for each child with a known food allergy. The child's health care professional and parent must sign and date the plan. You must keep a copy of the plan in the child's file, post it as specified in §746.403(b) of this title (relating to When and where must these items be posted?), and take it on any field trip that the child is on.

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SUBCHAPTER W. FIRE SAFETY AND EMERGENCY PRACTICES  
DIVISION 2. EMERGENCY PREPAREDNESS

40 TAC §§746.5201, 746.5202, 746.5205, 746.5207

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§746.5201. What is an emergency preparedness plan?*

An emergency preparedness plan is designed to ensure the safety of children during an emergency by addressing staff responsibility and facility readiness with respect to emergency evacuation, relocation, and sheltering. The plan addresses the types of responses to emergencies most likely to occur in your area, including: [and relocation. The plan addresses the types of emergencies most likely to occur in your area including but not limited to natural events such as tornadoes, floods or hurricanes; health events such as medical emergencies, communicable disease outbreak; and human-caused events such as intruder with weapon, explosion, or chemical spill.]

(1) An evacuation of the children and caregivers to a designated safe area in an emergency such as a fire or gas leak;

(2) A relocation of the children and caregivers to a designated, alternate shelter in an emergency such as a flood, a hurricane, medical emergency, or communicable disease outbreak; and

(3) The sheltering of children and caregivers within the center to temporarily shelter them from situations such as a tornado, volatile person on the premises, or an endangering person in the area.

*§746.5202. What must my emergency preparedness plan include?*

Your emergency preparedness plan must include written procedures for:

(1) Evacuation, relocation, and sheltering of children including:

(A) The [That in an emergency, the] first responsibility of staff in an emergency evacuation or relocation is to move the children to a designated safe area or alternate shelter known to all employees, caregivers, parents, and volunteers;

(B) How children will be evacuated or relocated to the designated safe area or alternate shelter, including specific procedures for evacuating and relocating children who are under 24 months of age, who have limited mobility, or who otherwise may need assistance in an emergency, such as children who have mental, visual, or hearing impairments;

(C) The staff responsibility in a sheltering emergency for the orderly movement of children to a designated location within the center where children should gather;

(D) [(C)] An emergency evacuation and relocation diagram as outlined in §746.5207 of this title (relating to Must I have an emergency evacuation and relocation diagram?);

(E) [(D)] Name and address of the alternate shelter away from the center you will use as needed; and

(F) [(E)] How children in attendance at the time of the emergency will be accounted for at the designated safe area or alternate shelter.

(2) Communication, including:

(A) The emergency telephone number that is on file with us; and

(B) (No change.)

(3) How your staff will evacuate and relocate with the essential documentation including:

(A) - (B) (No change.)

(C) The child tracking system information for children in care;[-]

(4) How your staff will continue to care for the children until each child has been released; and

(5) How you will reunify the children with their parents at evacuation, relocation, or when sheltering is lifted.

§746.5205. Must I practice my emergency preparedness plan [plans]?

Yes, the following components of your center's emergency preparedness plan [plans] must be practiced as specified below:

(1) (No change.)

(2) You must practice a severe weather or sheltering drill at least once every three months; and

(3) You must document these drills, including the date of the drill, time of the drill, and length of the time for the evacuation, [or] relocation, or sheltering to take place.

§746.5207. Must I have an emergency evacuation and relocation diagram?

(a) (No change.)

(b) You must post an emergency evacuation and relocation diagram [plan] in each room the children use. You must post the diagram [plan in a prominent place] near the entrance and/or exit of the room and where children and employees may easily view the diagram.

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**40 TAC §746.5203**

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and

the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§746.5203. With whom must I share this plan?

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

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**CHAPTER 747. MINIMUM STANDARDS FOR CHILD-CARE HOMES**

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§747.401, 747.605, 747.901, 747.1007, 747.1107, 747.1119, 747.1309, 747.1401, 747.1403, 747.2901, 747.3101, 747.3203, 747.3221, 747.3307, 747.5001, 747.5003, and 747.5005; new §§747.1301, 747.1303, 747.1305, 747.1307, 747.3617, and 747.3619; and repeal of §§747.1109, 747.1301, 747.1303, 747.1305, 747.1307, and 747.2713 in Chapter 747, concerning Minimum Standards for Child-Care Homes. The purpose of the amendments, new sections and repeals is to implement needed changes to comply with the Child Care and Development Block Grant Act of 2014.

The Child Care and Development Block Grant (CCDBG) Act of 2014 (the "Act") is the first comprehensive revision of the Child Care and Development Fund (CCDF) program since 1998. (The CCDF is codified in 42 USC §9857 et seq.) The Texas Workforce Commission (TWC) administers the CCDF, which is the primary federal funding source devoted to providing low-income families with access to child care. The Act makes significant reforms to the CCDF programs to raise the health, safety, and quality of child care. The Act does this by mandating that states comply with a multitude of additional requirements in order to continue receiving CCDF funding. Although TWC is the lead agency for determining eligibility and distributing the subsidy monies, DFPS is the agency responsible for licensing child care operations, establishing health and safety regulations, and monitoring eligible operations for compliance. Many of the Act's additional requirements relate to the responsibilities of DFPS. The provisions of the Act that have a significant impact on Child Care Licensing (CCL) and this chapter relate to the following topics: health and safety requirements and training on those requirements.

The changes related to training will impact Licensed Child-Care Homes (LCCHs) and Registered Child-Care Homes (RCCHs). The new health and safety training requirements mandated by the Act include the following topics for pre-service training and annual training: (1) food allergies; (2) handling, storing, and disposing of hazardous materials; (3) more robust emergency preparedness plans; (4) administering medication; and (5) building and physical premises safety.

There are also some topics required by the Act that are already required in annual training, but are not currently required in the orientation for LCCHs and RCCHs. These additional health and safety training requirements that have been added for orientation are as follows: (1) recognizing and preventing shaken baby syndrome; (2) understanding safe sleep practices; (3) understanding early childhood brain development; and (4) precautions in transporting children if the home transports a child whose chronological or developmental age is younger than nine years old.

In addition to the training requirements the Act increases health and safety requirements for LCCHs and RCCHs. The health and safety requirements correlate to some of the training topics. The changes to the minimum standards support the health and safety requirements, including requiring homes to: (1) obtain food allergy emergency plans for children with known food allergies, post a list of food allergies at the home, and carry the child's emergency plan on field trips; and (2) use, store, and dispose of hazardous materials as recommended by the manufacturer.

The summary of the changes are:

The amendment to §747.401 adds a list of each child's food allergies (with a parent's permission) to a home's posting requirements, and requires it to be posted where food is prepared and served and in a prominent place where caregivers may easily view it.

The amendment to §747.605 adds a requirement for homes to obtain a completed food allergy emergency plan before admitting a child into care, if applicable, and if a parent wants the information posted, permission from a parent to post the information.

The amendment to §747.901 updates a cite and makes the language consistent.

The amendment to §747.1007 requires an additional qualification for a primary caregiver of a RCCH to include proof of training on ten new topics.

The amendment to §747.1107 requires an additional qualification for a primary caregiver of a LCCH to include proof of training on ten new topics.

The repeal of §747.1109 deletes an outdated grandfather rule.

The amendment to §747.1119 corrects a cite.

The repeal of §747.1301 moves the content of this rule to new §747.1303.

New §747.1301: (1) includes the content of previous §747.1305; (2) clarifies the wording to be consistent with the current wording of the operational policies rule; (3) adds components that must be addressed in the overview of prevention, recognition, and reporting of child abuse and neglect; and (4) adds nine new orientation topics for caregivers.

The repeal of §747.1303 moves the content of this rule to new §747.1307.

New §747.1303 includes the content of previous §747.1301.

The repeal of §747.1305 moves the content of this rule to new §747.1301.

New §747.1305: (1) includes the content of previous §747.1307; (2) adds six topics that must be covered in the annual training of caregivers; and (3) deletes a redundant paragraph about transportation safety training.

The repeal of §747.1307 moves the content of this rule to new §747.1305, with one minor modification.

New §747.1307: (1) includes most of the content of previous §747.1303 with one minor modification; (2) deletes the pre-application course content from previous §747.1303 because it is already required at §747.1007; and (3) adds a reference to the transportation safety training requirement.

The amendment to §747.1309: (1) adds six topics that must be covered in the annual training of primary caregivers; and (2) deletes a redundant paragraph about transportation safety training.

The amendment to §747.1401 updates some cites and clarifies the language in the rule.

The amendment to §747.1403 deletes a reference to a rule and spells out all but one of the requirements of the deleted reference to include: (1) an overview of the home's policies; (2) an overview of child abuse and neglect, including reporting; (3) the procedures to follow in an emergency; and (4) the location and use of fire extinguishers and first-aid equipment. The deleted requirement for an overview of the minimum standards is no longer needed, because this new rule only applies to household members.

The repeal of §747.2713 because the information is already included in §747.503, §747.1301(2), and §747.1403(1).

The amendment to §747.2901: (1) adds the requirement that caregivers must have a copy of a child's food allergy emergency plan and medications, if applicable, when going on field trips; and (2) makes the language consistent.

The amendment to §747.3101: (1) adds that children must not be served foods identified on their food allergy emergency plan; and (2) deletes the requirement "you must not use food as . . . punishment", because this requirement is already noted in §747.2705.

The amendment to §747.3203 clarifies that a child-care home must use, store, and dispose of hazardous materials as recommended by the manufacturer.

The amendment to §747.3221 clarifies that caregivers must follow universal precautions as outlined by the CDC when handling bodily fluids that may contain blood, including placing gloves contaminated with blood in a sealed plastic bag and discarding them immediately.

The amendment to §747.3307 clarifies that a child's soiled clothing must be placed in a sealed plastic bag and be sent home with the child.

New §747.3617 defines a food allergy emergency plan, including a list of foods a child is allergic too, possible symptoms, and what steps to take if there is an allergic reaction.

New §747.3619 requires: (1) a food allergy emergency plan for each child with a known food allergy; and (2) the plan to be signed by the child's health care professional and a parent, posted if the parent consents, and taken on field trips.

The amendment to §747.5001 clarifies in more detail what an emergency preparedness plan is by distinguishing between an evacuation, relocation, and sheltering.

The amendment to §747.5003 adds to the requirements for the emergency prepared plan to also include: (1) staff's responsibility in a sheltering emergency for the orderly movement of chil-

dren to a designated location within the home where children should gather; (2) how staff will continue to care for children until each child has been released; and (3) how children will be reunified with their parents at evacuation, relocation, or when sheltering is lifted.

The amendment to §747.5005 adds the "sheltering" language for clarification.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Subia also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that: (1) DFPS will be in compliance with the Child Care and Development Block Grant Act of 2014; (2) there will be clarification of the health and safety requirements and training on those requirements; and (3) there will be a reduced risk to children.

There is an anticipated economic cost for persons required to comply with some of the proposed rule changes. The proposed changes are anticipated to have an adverse impact on businesses, including small and micro-businesses. The proposed changes will impact LCCHs and RCCHs. According to the FY 2015 DFPS Annual Report and Data Book as of August 31, 2015 there were 1,720 LCCHs and 4,678 RCCHs.

Chapter 2006 of the Government Code defines a small business as one that is for-profit, independently owned, and has fewer than 100 employees or less than six million dollars in annual gross receipts. A small business that has no more than 20 employees is also defined as a micro-business. CCL is assuming virtually all of the homes (both LLCHs and RCCHs) meet the definition of a small and micro-business.

The fiscal impact to these homes primarily results from (1) additional staff time to attend trainings; and (2) additional Primary Caregiver time to develop or modify curriculum.

Licensing staff developed the methodologies used to calculate the fiscal impact of these rules. The impacts were calculated using cost research conducted by staff and assumptions regarding child-care practices. The key assumptions and methodologies are described in detail below, as these underlie the individual impact calculations for each rule that are projected to have a fiscal impact on at least some homes.

For LCCHs and RCCHs, the staff time required to comply with the standards will impact Primary Caregivers and other caregivers. For use in this impact analysis, DFPS will use the following mean wages that were obtained from the Texas Workforce Commission's website for Occupational Wages based on 2014 estimates: (1) for Primary Caregivers DFPS is using a \$24.27 per hour mean wage from the Occupational Title of Education Administrator, Preschool and Childcare Center; and (2) for all caregivers (other than a Primary Caregiver) DFPS is using a \$9.49 mean wage from the Occupational Title of Childcare Workers.

Fiscal Impact for Proposed §747.1007. This section adds to the qualification requirements for primary caregivers in a RCCH (the primary caregiver is also the person that obtains the registration for the home) to include proof of training in ten different topics. One of the ten topics is precautions in transporting children and is only required for homes that transport children whose chronological or developmental age is younger than nine years old. These

qualifications will be needed before the primary caregiver will be able to obtain the registration. There are two possible costs associated with the trainings: the costs for the time it takes a primary caregiver to participate in the trainings, and the costs for the actual training. While attending or participating in these trainings will take some time, it is not assumed that the primary caregiver as the applicant will pay oneself for this time. These costs associated with paying for the trainings are minimal, as well. There are free training modules available from AgriLife to cover all of the trainings except for the topic related to precautions in transporting children. This particular topic will cost the primary caregiver \$14.00 to enroll in the training.

Fiscal Impact for Proposed §747.1107. This section adds to the qualification requirements for primary caregivers in a LCCH (the primary caregiver is also the person that obtains the license for the home) to include proof of training in ten different topics. One of the ten topics is precautions in transporting children and is only required for homes that transport children whose chronological or developmental age is younger than nine years old. These qualifications will be needed before the primary caregiver will be able to obtain the license. There are two possible costs associated with the trainings: the costs for the time it takes a primary caregiver to participate in the trainings, and the costs for the actual training. While attending or participating in these trainings will take some time, it is not assumed that the primary caregiver as the applicant will pay oneself for this time. These cost associated with paying for the trainings are minimal, as well. There are free training modules available from AgriLife to cover all of the trainings except for the topic related to precautions in transporting children. This particular topic will cost the primary caregiver \$14.00 to enroll in the training.

Fiscal Impact for Proposed §747.1301. This section adds nine topics that must be covered in the orientation for caregivers of homes. There are costs associated with modifying the current orientation to include these nine additional topics. This section does not mandate a time frame for training on these nine topics. However, for purposes of estimating a cost for developing orientation on these topics, it is assumed that orientation on these six topics will be for three to four hours. A common industry standard is 40 hours to develop one hour of curriculum for face-to-face training. This same standard is being used to modify the orientation. It is anticipated that a primary caregiver, or curriculum developer that is similarly paid, will spend an average of 120 to 160 hours to develop the three to four hour orientation on these nine topics. Therefore, the approximate one-time cost for the development of the orientation is between \$2,912.40 (120 X \$24.27) and \$3,883.20 (160 X \$24.27). (Note: It was not assumed that homes had already developed annual trainings on any of these topics, because in most homes it is assumed that annual trainings are obtained from outside sources.)

Fiscal Impact for Proposed §747.1305(e). This section adds six additional topics that must be covered in the annual training for caregivers. There is no increase in the number of annual training hours required; there is only a change in the content of the required training. Any costs associated with this rule change depends on the type of home (licensed or registered) and whether a home pays for outside training, utilizes free training in the community, or provides in-house training to the caregivers.

(1) For LCCHs that pay for outside training or utilize free training in the community to obtain the mandated 24 hours of annual training for caregivers, there are no additional costs associated with this change in training content.

(2) For RCCHs that pay for outside training or utilize free training in the community to obtain the mandated 15 hours of annual training for caregivers, there are possible costs with employees that may take more than the mandated 15 hours to comply with the six additional topics. For example, the training modules with AgriLife are two hours each. It is anticipated that five AgriLife modules will be needed to comply with the six additional topics. These ten hours (five modules X two hours each) of AgriLife training plus the already mandated six hours of annual training at §744.1309(c) and mandated one hour of training for caregivers of homes that provide care to children younger than 24 months at §744.1309(d), would mean that a caregiver would be taking 16 or 17 hours of annual training instead of the 15 hours of mandated annual training. It is anticipated that each program would need to pay each caregiver \$9.49 per hour for each additional training hour that is taken. It is anticipated that over time more training modules will be created that will have a shorter time frame for training on these six topics. When that happens, these costs would no longer be associated with this rule change; and

(3) It is not assumed that many LCCHs and RCCHs provide direct training to caregivers. However, if they do, there are costs associated with developing new curriculum for these six topics. This section does not mandate a time frame for training on these six topics. However, for purposes of estimating a cost for developing training on these topics, it is assumed that training on these six topics will be for two to three hours. A common industry standard is 40 hours to develop one hour of curriculum for face-to-face training. It is anticipated that a primary caregiver, or curriculum developer that is similarly paid, will spend an average of 80 to 120 hours to develop the two to three hour curriculum on these six topics. Therefore, the approximate one-time cost for the development of the annual curriculum is between \$1,941.60 (80 X \$24.27) and \$2,912.40 (120 X \$24.27).

Fiscal Impact for Proposed §747.1309(e). This section adds six additional topics that must be covered in the annual training hours for a primary caregiver. There is no increase in the number of annual training hours required; there is only a change in the content of the required training. For homes that pay for outside training or utilize free training in the community to obtain annual training for a primary caregiver, there are no additional costs associated with this change in training content. It is not assumed that many LCCHs and RCCHs provide direct training to caregivers. However, for homes that provide annual in-house training to primary caregivers, there are costs associated with developing new curriculum for these six topics. However, the home will have already developed the same curriculum for caregivers in response to §747.1305, see "Fiscal Impact for Proposed §747.1305(e)". Therefore, CCL assumes there will be no additional costs associated with this rule change.

Regulatory Flexibility Analysis: A regulatory flexibility analysis is not required for the proposed rules with fiscal implications because the proposed rules are specifically required by state law (S.B. 1496) and federal law (The Child Care and Development Block Grant of 2014). Therefore, the proposed rules are consistent with the health and safety of children, whom the laws were intended to protect.

The proposed change does not impose new requirements on any business and does not require the purchase of any new equipment or any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the sections.

Ms. Subia has determined that the proposed sections 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, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Gerry Williams at (512) 438-5559 in DFPS's Child Care Licensing Division. Electronic comments may be submitted to CCLRules@dfps.state.tx.us. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-551, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

## SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

### DIVISION 3. REQUIRED POSTINGS

#### 40 TAC §747.401

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§747.401. What items must I post at my child-care home during hours of operation?*

(a) You must post the following in a prominent and publicly accessible place where parents and others may easily view them during all hours of operation:

- (1) The child-care home's license or registration certificate;
- (2) The letter or form from the most recent Licensing inspection or investigation;
- (3) The Licensing notice *Keeping Children Safe*;
- (4) Telephone numbers specified in this division;
- (5) A list of your employees, as defined in §745.21[(46)] of this title (relating to What do the following word and terms mean when used in this chapter?). The list must be printed on paper at least 8 1/2 inches by 11 inches in size and must include each employee's first and last name; and
- (6) Any other Licensing notices requiring posting.

(b) You must post a list of each child's food allergies, with a parent's permission as specified in §747.605(16) of this title (relating to What admission information must I obtain for each child?), where you prepare and serve food and in a prominent place where caregivers may easily view the list.

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

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Trevor Woodruff

General Counsel

Department of Family and Protective Services

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For further information, please call: (512) 438-5559



## SUBCHAPTER C. RECORD KEEPING DIVISION 1. RECORDS OF CHILDREN

### 40 TAC §747.605

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§747.605. *What admission information must I obtain for [øñ] each child?*

You must obtain at least the following information before admitting a child to care:

(1) - (13) (No change.)

(14) The name and telephone number of the school a school-age child attends; [and]

(15) Permission for a school-age child to ride a bus, [ø] walk to or from school or home, or to be released to the care of a sibling under 18 years old, if applicable; and[-]

(16) A completed food allergy emergency plan for the child, if applicable, and if a parent wants the information posted, permission from a parent to post the child's allergy information.

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

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## DIVISION 4. RECORDS ON CAREGIVERS AND HOUSEHOLD MEMBERS

### 40 TAC §747.901

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§747.901. *What information must I maintain in my personnel records?*

You must keep at least the following at the child-care home for each assistant caregiver and substitute caregiver, as specified in this chapter:

(1) - (8) (No change.)

(9) A statement signed and dated by the caregiver in a licensed child-care home verifying the date the caregiver attended training during orientation that includes an overview regarding the prevention, recognition, and reporting [øf symptoms] of child abuse[-] and neglect, as specified in §747.1301 of this title (relating to What must orientation for caregivers at my child-care home include? [and sexual abuse and the responsibility of reporting these as outlined in §747.1305 of this title (relating to What should orientation to my child-care home include?)].

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

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## SUBCHAPTER D. PERSONNEL DIVISION 1. PRIMARY CAREGIVER OF A REGISTERED CHILD-CARE HOME

### 40 TAC §747.1007

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§747.1007. *What qualifications must I meet to be the primary caregiver of a registered child-care home?*

Except as otherwise provided in this division, you must:

- (1) (No change.)
- (2) Have a~~[-]~~
  - ~~[(A)]~~ high [High] school diploma[;] or equivalent;
  - ~~[(B)]~~ High school equivalent;
- (3) Have a certificate of completion of the Licensing pre-application course [orientation] within one year prior to your application date;
- (4) Have current certification in CPR and first aid with rescue breathing and choking; ~~[and]~~
- (5) Be free of active tuberculosis, if required by the regional Texas Department of State Health Services [FB program] or local health authority; ~~and[-]~~
- (6) Have proof of training in the following:
  - (A) Recognizing and preventing shaken baby syndrome and abusive head trauma;
  - (B) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS);
  - (C) Understanding early childhood brain development;
  - (D) Emergency preparedness;
  - (E) Preventing and controlling the spread of communicable diseases, including immunizations;
  - (F) Administering medication, if applicable, including compliance with §747.3603 of this title (relating to What authorization must I obtain before administering a medication to a child in my care?);
  - (G) Preventing and responding to emergencies due to food and allergic reaction;
  - (H) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electric hazards, bodies of water, and vehicular traffic;
  - (I) Handling, storing, and disposing of hazardous materials including compliance with §747.3221 of this title (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?); and
  - (J) Precautions in transporting children if your child-care home plans to transport a child whose chronological or developmental age is younger than nine years old.

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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Trevor Woodruff

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## DIVISION 2. PRIMARY CAREGIVER OF A LICENSED CHILD-CARE HOME

### 40 TAC §747.1107, §747.1119

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§747.1107. *What qualifications must I meet to be the primary caregiver of a licensed child-care home?*

(a) Except as otherwise provided in this division, a primary caregiver for a licensed child-care home must:

- (1) - (2) (No change.)
- (3) Have a certificate of completion of the Licensing pre-application course [orientation] within one year prior to your application date;
- (4) Have current certification in CPR and first aid with rescue breathing and choking; ~~[and]~~
- (5) Have proof of training in the following:
  - (A) Recognizing and preventing shaken baby syndrome and abusive head trauma;
  - (B) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS);
  - (C) Understanding early childhood brain development;
  - (D) Emergency preparedness;
  - (E) Preventing the spread of communicable diseases, including immunizations;
  - (F) Administering medication, if applicable, including compliance with §747.3603 of this title (relating to What authorization must I obtain before administering a medication to a child in my care?);
  - (G) Preventing and responding to emergencies due to food and allergic reaction;
  - (H) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electric hazards, bodies of water, and vehicular traffic;
  - (I) Handling, storing, and disposing of hazardous materials including compliance with §747.3221 of this title (relating to Must

caregivers wear gloves when handling blood or bodily fluids containing blood?); and

(J) Precautions in transporting children if your child-care home plans to transport a child whose chronological or developmental age is younger than nine years old; and

(6) [(5)] Have one of the following combinations of education and experience in a licensed child-care center, or in a licensed or registered child-care home, as defined in §747.1113 of this title (relating to What constitutes experience in a licensed child-care center, or in a licensed or registered child-care home?):

Figure: 40 TAC §747.1107(a)(6)  
[Figure: 40 TAC §747.1107(a)(5)]

(b) Options (D) and (F) of subsection (a)(6) of this section require periodic renewal.

§747.1119. *What credit courses does Licensing recognize as child development?*

Due to a large variation in credit course titles and content, it is impossible to list all courses that may be counted toward the child development requirement. Courses in early childhood education, child growth and development, psychology, sociology, classroom management, child psychology, health and safety of children, elementary education related to pre-kindergarten through third grade, youth development and other similar courses may be counted if they are related to child development or the topics specified in §747.1305 [~~§747.1307~~] of this title (relating to What topics must the [~~15 clock hours of~~] annual training for caregivers include?). Abnormal psychology and secondary education courses are not recognized as child development.

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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#### 40 TAC §747.1109

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§747.1109. *Are there exemptions from the qualifications listed in this division?*

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 4. PROFESSIONAL DEVELOPMENT

#### 40 TAC §§747.1301, 747.1303, 747.1305, 747.1307

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§747.1301. *What training must I ensure that my caregivers have?*

§747.1303. *What training must I have?*

§747.1305. *What should orientation to my child-care home include?*

§747.1307. *What topics must the annual training for caregivers include?*

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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#### 40 TAC §§747.1301, 747.1303, 747.1305, 747.1307, 747.1309

The new sections and amendment are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections and amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development

Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§747.1301. What must orientation for caregivers at my child-care home include?

Orientation for caregivers at your child-care home must include at least the following:

(1) An overview of the minimum standards found in this chapter;

(2) An overview of your operational policies, including discipline and guidance practices and procedures for the release of children, and the provision of copies of these practices and procedures;

(3) An overview regarding the prevention, recognition, and reporting of child abuse and neglect, including:

(A) Factors indicating a child is at risk of abuse or neglect;

(B) Warning signs indicating a child may be a victim of abuse or neglect;

(C) Internal procedures for reporting child abuse or neglect; and

(D) Community organizations that have training programs available to child-care staff, children, and parents;

(4) An overview of your home's Emergency Preparedness Plan;

(5) Locating and using fire extinguishers and first-aid equipment;

(6) Recognizing and preventing shaken baby syndrome and abusive head trauma;

(7) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS);

(8) Understanding early childhood brain development;

(9) Preventing and controlling the spread of communicable diseases, including immunizations;

(10) Administering medication, if applicable, including compliance with §747.3603 of this title (relating to What authorization must I obtain before administering a medication to a child in my care?);

(11) Preventing and responding to emergencies due to food or an allergic reaction;

(12) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electric hazards, bodies of water, and vehicular traffic;

(13) Handling, storing, and disposing of hazardous materials including compliance with §747.3221 of this title (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?); and

(14) Precautions in transporting children if your child-care home transports a child whose chronological or developmental age is younger than nine years old.

§747.1303. What training must I ensure that my caregivers have?

You must make sure that each caregiver has the following training:

(1) Orientation to your child-care home as specified in §747.1301 of this title (relating to What must orientation for caregivers at my child-care home include?) within seven days of employment;

(2) 15 clock hours of annual training for a caregiver in a registered child-care home as specified in §747.1305 of this title (relating to What topics must the annual training for caregivers include?);

(3) 24 clock hours of annual training for a caregiver in a licensed child-care home as specified in §747.1305 of this title;

(4) Current first-aid and CPR training as specified in §747.1313 of this title (relating to Who must have first-aid and CPR training?); and

(5) If a caregiver transports children whose chronological or developmental age is younger than nine years old, transportation safety training as specified in §747.1314 of this title (relating to What additional training must a person have in order to transport a child in care?);

§747.1305. What topics must the annual training for caregivers include?

(a) Each caregiver counted in the child/caregiver ratio on more than ten separate occasions in one training year, as specified in §747.1311 of this title (relating to When must the annual training be obtained?) must obtain annual training relevant to the age of the children for whom the caregiver provides care.

(b) Annual training is exclusive of any requirements for orientation, first aid and CPR training, transportation safety training, and any training received through a high school child-care work-study program.

(c) At least six clock hours of the annual training hours must be in one or more of the following topics:

(1) Child growth and development;

(2) Guidance and discipline;

(3) Age-appropriate curriculum; and

(4) Teacher-child interaction.

(d) If your home provides care for a child younger than 24 months, one hour of the annual training hours must cover the following topics:

(1) Recognizing and preventing shaken baby syndrome and abusive head trauma;

(2) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS); and

(3) Understanding early childhood brain development.

(e) While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:

(1) Emergency preparedness;

(2) Preventing and controlling the spread of communicable diseases, including immunizations;

(3) Administering medication, if applicable, including compliance with §747.3603 of this title (relating to What authorization must I obtain before administering a medication to a child in my care?);

(4) Preventing and responding to emergencies due to food or an allergic reaction;

(5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electric hazards, bodies of water, and vehicular traffic; and

(6) Handling, storing, and disposing of hazardous materials including compliance with §747.3221 of this title (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).

(f) The remaining annual training hours must be in one or more of the following topics:

- (1) Care of children with special needs;
- (2) Child health (for example, nutrition and physical activity);
- (3) Safety;
- (4) Risk management;
- (5) Identification and care of ill children;
- (6) Cultural diversity of children and families;
- (7) Professional development (for example, effective communication with families and time and stress management);
- (8) Topics relevant to the particular ages of children in care (for example, caregivers working with infants or toddlers should receive training on biting and toilet training);
- (9) Planning developmentally appropriate learning activities;
- (10) Observation and assessment;
- (11) Attachment and responsive care giving; and
- (12) Minimum standards and how they apply to the caregiver.

(g) No more than 80% of the annual training hours may be obtained from self-instructional training.

§747.1307. What training must I have?

You must have the following training:

- (1) 30 clock hours of annual training as specified in §747.1309 of this title (relating to (What topics must my annual training include?);
- (2) Current first-aid and CPR training as specified in §747.1313 of this title (relating to Who must have first-aid and CPR training; and
- (3) If you transport children whose chronological or developmental age is younger than nine years old, transportation safety training as specified in §747.1314 of this title (relating to What additional training must a person have in order to transport a child in care?).

§747.1309. What [training] topics must [be included in] my annual training include [as the primary caregiver]?

(a) You must obtain at least 30 clock hours of training [annually that is:]

[(+) each year relevant [Relevant] to the age of the children for whom you provide care.[:]]

(b) [(2)] The 30 clock hours of annual training are exclusive of any requirements for [Exclusive of] the Licensing pre-application course, [interview, CPR and] first-aid and CPR training, and transportation safety training.[: and]

[(3) Not earned for presenting training to others.]

(c) [(b)] At least six clock hours of the annual training hours must be in one or more of the following topics:

- (1) Child growth and development;

- (2) Guidance and discipline;
- (3) Age-appropriate curriculum; and
- (4) Teacher-child interaction.

(d) If your home provides care for children younger than 24 months, one hour of the annual training hours must cover the following topics:

- (1) Recognizing and preventing shaken baby syndrome;
- (2) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS); and
- (3) Understanding early childhood brain development.

(e) While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:

- (1) Emergency preparedness;
- (2) Preventing and controlling the spread of communicable diseases, including immunizations;
- (3) Administering medication, if applicable, including compliance with §747.3603 of this title (relating to What authorization must I obtain before administering a medication to a child in my care?);
- (4) Preventing and responding to emergencies due to food or an allergic reaction;

(5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electric hazards, bodies of water, and vehicular traffic; and

(6) Handling, storing, and disposing of hazardous materials including compliance with §747.3221 of this title (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).

(f) If you have:

(1) [(e)] Five [A primary caregiver with five] or fewer years of experience as a primary caregiver in a licensed or registered child-care home, you must complete at least six of the annual training [30 clock] hours in management techniques, leadership, or staff supervision; or[-]

(2) [(d)] More [A primary caregiver with more] than five years of experience as a primary caregiver in a licensed or registered child-care home, you must complete at least three of the annual training [30 clock] hours in management techniques, leadership, or staff supervision.

[(e) If the home provides care for children younger than 24 months, one hour of annual training must cover the following topics:]

- [(1) Recognizing and preventing shaken baby syndrome;]
- [(2) Preventing sudden infant death syndrome; and]
- [(3) Understanding early childhood brain development.]

(g) [(f)] The remainder of annual training hours must be selected from the training topics specified in §747.1305(f) [§747.1307(d)] of this title (relating to What topics must the annual training for caregivers include?).

(h) You may obtain clock hours or CEUs from the same sources as other caregivers.

(i) Training hours may not be earned for presenting training to other caregivers.

~~[(g) If the home transports children whose chronological or developmental age is younger than nine years old, the primary caregiver must complete two hours of annual training on transportation safety in addition to the other training hours.]~~

(j) ~~[(h) No [A primary caregiver may obtain no] more than 80% of annual training may be obtained from self-instructional training [materials].~~

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## DIVISION 5. HOUSEHOLD MEMBERS, VOLUNTEERS, AND PEOPLE WHO OFFER CONTRACTED SERVICES

### 40 TAC §747.1401, §747.1403

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§747.1401. Must members of my household meet specific qualifications?*

(a) For each household member that you are required to request a background check on, as specified in, Subchapter F of Chapter 745 of this title (relating to Background Checks), the member must:

(1) Provide a copy of a health card or physician's statement verifying they are free of active tuberculosis if required by the regional Texas Department of State Health Services [TB program] or local health authority; and

(2) Complete orientation to your child-care home as specified in §747.1403 of this title (relating to What must orientation for household members at my child-care home include?).

(b) Any household member who is counted in the child/caregiver ratio on more than ten separate occasions in one training year, whether paid or unpaid, must meet the minimum qualifications for assistant caregivers and training requirements for [assistant] caregivers as specified in this subchapter.

(c) Any household member who is left in charge of the child-care home in the absence of the primary caregiver, whether paid or unpaid, must meet the minimum qualifications for a substitute caregiver and training requirements for [substitute] caregivers specified in this subchapter.

(d) (No change.)

*§747.1403. What must orientation [to my child-care home] for household members at my child-care home include?*

The orientation for household members at your child-care home must include at least the following: [topics specified in §747.1305 of this title (relating to What should orientation to my child-care home include?).]

(1) An overview of your home's child-care policies, including discipline and guidance practices and the procedures for the release of children, and the provision of copies of these practices and procedures;

(2) An overview of symptoms of child abuse and neglect and the responsibility for reporting these;

(3) The procedures to follow in handling emergencies. Emergencies include fire, explosion, tornado, toxic fumes, volatile individuals, and severe injury or illness of a child or adult; and

(4) The location and use of fire extinguishers and first-aid equipment.

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## SUBCHAPTER L. DISCIPLINE

### 40 TAC §747.2713

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§747.2713. Must I give a copy of my written discipline and guidance policy to parents, my caregivers, and household members?*

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 N. FIELD TRIPS

### 40 TAC §747.2901

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§747.2901. *May I take children away from my child-care home for field trips?*

(a) Yes. You must ensure the children's safety on field trips and excursions and during any transportation provided by the child-care home. Anytime you take a child on ~~away from the child-care home for~~ a field trip you must comply with each of the following requirements:

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

(5) You must have a copy of a child's food allergy emergency plan and allergy medications, if applicable;

(6) ~~[(5)]~~ Each child must wear a shirt, name tag, or other identification listing the name and telephone number of the child-care home;

(7) ~~[(6)]~~ Each caregiver must be easily identifiable by all children on the field trip, by wearing a hat, specialized tee-shirt, brightly colored clothes, or other easily spotted identification;

(8) ~~[(7)]~~ Each caregiver supervising a field trip must have transportation available, ~~or~~ a communication device such as a cellular phone, message pager, or two-way radio available, or an alternate plan for transportation at the field trip location in case of emergency; and

(9) ~~[(8)]~~ You must ensure that a caregiver trained in CPR and first aid with rescue breathing and choking is present on the field trip.

(b) A walk around the caregiver's neighborhood must comply only with paragraphs (2), (5) and (9) ~~[(8)]~~ of subsection (a) of this section.

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## SUBCHAPTER Q. NUTRITION AND FOOD SERVICE

### 40 TAC §747.3101

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

§747.3101. *What are the basic requirements for snack and meal-times?*

(a) You must serve all children ready for table food regular meals and morning and afternoon snacks as specified in this subchapter.

(b) ~~[(+)]~~ If breakfast is served, a morning snack is not required.

(c) ~~[(2)]~~ A child must not go more than three hours without a meal or snack being offered, unless the child is sleeping.

(d) ~~[(3)]~~ If your child-care home is participating in the Child and Adult Care Food Program (CACFP) administered by the Texas Department of Agriculture, you may elect to meet those requirements rather than those specified in this section ~~[subsection]~~.

(e) ~~[(b)]~~ You must ensure a supply of drinking water is always available to each child and is served at every snack, mealtime, and after active play in a safe and sanitary manner.

(f) ~~[(e)]~~ You must not serve beverages with added sugars, such as carbonated beverages, fruit punch, or sweetened milk except for a special occasion such as a holiday or birthday celebration.

(g) ~~[(4)]~~ You must not use food as a reward ~~or punishment~~.

(h) You must not serve a child a food identified on the child's food allergy emergency plan as specified in §747.3617 of this title (relating to What is a food allergy emergency plan?).

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

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SUBCHAPTER R. HEALTH PRACTICES  
DIVISION 1. ENVIRONMENTAL HEALTH

**40 TAC §747.3203, §747.3221**

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§747.3203. What steps must I take to ensure a healthy environment for children at my child-care home?*

You must clean, repair, and maintain your child-care home, grounds, and equipment to protect the health of the children. This includes, but is not limited to:

(1) - (10) (No change.)

(11) Sanitizing table tops, furniture, and other similar equipment used by children when soiled or contaminated with matter such as food, body secretions, or excrement; ~~and~~

(12) Clearly marking cleaning supplies and other toxic materials and keeping them separate from food and inaccessible to children; ~~and~~[-]

(13) Using, storing and disposing of hazardous materials as recommended by the manufacturer.

*§747.3221. Must caregivers [~~I~~] wear gloves when handling blood or bodily [~~body~~] fluids containing blood?*

Yes, caregivers must follow universal precautions outlined by the Centers for Disease Control (CDC) when handling blood, vomit, or other bodily fluids that may contain blood including:

(1) Using [~~Use~~] disposable, nonporous gloves [~~when handling blood or blood-containing body fluids or discharge from injured tissue~~];

(2) Placing gloves contaminated with blood in a sealed plastic bag and discarding them immediately;

(3) [~~(2)~~] Discarding all other [~~Discard the~~] gloves immediately after one use; and

(4) [~~(3)~~] Washing [~~Wash~~] your hands with soap and running water after using and disposing of the gloves.

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DIVISION 2. DIAPER CHANGING

**40 TAC §747.3307**

The amendment is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§747.3307. What must I do to prevent the spread of germs when diapering children?*

(a) - (e) (No change.)

(f) You must place soiled clothing in a sealed plastic bag to be sent home with the child.

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SUBCHAPTER S. SAFETY PRACTICES  
DIVISION 2. MEDICATION AND MEDICAL ASSISTANCE

**40 TAC §747.3617, §747.3619**

The new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§747.3617. What is a food allergy emergency plan?*

A food allergy emergency plan is an individualized plan prepared by the child's health care professional that includes:

- (1) a list of each food the child is allergic to;
- (2) possible symptoms if exposed to a food on the list; and
- (3) the steps to take if the child has an allergic reaction.

*§747.3619. When is this plan required?*

A food allergy emergency plan is required for each child with a known food allergy. The child's health care professional and parent must sign and date the plan. You must keep a copy of the plan in the child's file, post it as specified in §747.401 of this title (relating to What items must I post at my child-care home during hours of operation?), and take it on any field trip that the child is on.

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## SUBCHAPTER W. FIRE SAFETY AND EMERGENCY PRACTICES

### DIVISION 2. EMERGENCY PREPAREDNESS

#### 40 TAC §§747.5001, 747.5003, 747.5005

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042 and §42.0421 and portions of the Child Care and Development Block Grant Act of 2014, which is codified in 42 USC §9857 et seq.

*§747.5001. What is an emergency preparedness plan?*

An emergency preparedness plan is designed to ensure the safety of children during an emergency by addressing staff responsibility and your home's [facility] readiness with respect to emergency evacuation, [and] relocation, and sheltering. The plan addresses the types of responses to emergencies most likely to occur in your area including: [; but not limited to, natural events such as tornadoes, floods or hurricanes; health events such as medical emergencies; communicable disease outbreak; and human-caused events such as intruder with weapon, explosion; or chemical spill.]

(1) An evacuation of your home to a designated safe area in an emergency such as a fire or gas leak;

(2) A relocation of the children and caregivers to a designated, alternate shelter in an emergency such as a flood, a hurricane, medical emergency, or communicable disease outbreak; and

(3) The sheltering of children and caregivers within your home to temporarily shelter them from situations such as a tornado, volatile person on the premises, or an endangering person in the area.

*§747.5003. What must my emergency preparedness plan include?*

Your emergency preparedness plan must include written procedures for:

(1) Evacuation, relocation, and sheltering of children, including:

(A) Your [That in an emergency; your] first responsibility in an emergency evacuation or relocation is to move the children to a designated safe area or alternate shelter known to all household members, caregivers, parents, and volunteers;

(B) How children will be evacuated or relocated to the designated safe area or alternate shelter, including specific procedures for evacuating or relocating children who are under 24 months of age, who have limited mobility, or who otherwise may need assistance in an emergency, such as children who have mental, visual, or hearing impairments;

(C) (No change.)

(D) The caregivers' responsibility in a sheltering emergency for the orderly movement of children to a designated location in your home where children should gather;

(E) [(D)] Name and address of the alternate shelter away from your home you will use as needed; and

(F) [(E)] How children in attendance at the time of the emergency will be accounted for at the designated safe area or alternate shelter;[-]

(2) Communication, including:

(A) The emergency telephone number that is on file with us; and

(B) How you will communicate with local authorities (such as fire, law enforcement, emergency medical services, health department), parents, and us; [and]

(3) How you will evacuate and relocate with the essential documentation including:

(A) - (B) (No change.)

(C) The attendance record information for children in care at the time of the emergency;[-]

(4) How you will continue to care for the children until each child has been released; and

(5) How you will reunify the children with their parents at evacuation, relocation, or when sheltering is lifted.

*§747.5005. Must I practice my emergency preparedness plan [plans]?*

Yes, the following components of your home's emergency preparedness plan [plans] must be practiced as follows:

(1) (No change.)

(2) You must practice a severe weather or sheltering drill at least once every three months.

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