

# PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to

submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

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

## TITLE 1. ADMINISTRATION

### PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

#### CHAPTER 355. REIMBURSEMENT RATES SUBCHAPTER H. REIMBURSEMENT METHODOLOGY FOR 24-HOUR CHILD CARE FACILITIES

##### 1 TAC §355.7103

The Texas Health and Human Services Commission (HHSC) proposes amendments to §355.7103, concerning Rate-Setting Methodology for 24-Hour Residential Child-Care Reimbursements, to correct and clarify the reimbursement methodology for payment rates for Child Placing Agencies (CPAs) retainage.

##### Background and Justification

HHSC, under its authority and responsibility to administer and implement rates, is proposing to amend this rule to reflect the correct reimbursement methodology for CPA retainage. The 2016-17 General Appropriations Act (DFPS Rider 42, Article II, H.B. 1, 84th Legislature, Regular Session, 2015) provides appropriations for a 5.1 percent rate increase for CPA retainage. Retainage is the portion of the rate that includes the CPA's costs for administering the service, including recruiting and training foster families, matching children with foster families, monitoring foster families and foster homes, and the associated overhead costs. The rate increase was to be 5.1 percent when weighted across all service levels, meaning that the rates for different service levels could increase by different amounts, as long as the weighted average increase for all CPA retainage rates equaled 5.1 percent. However the previous amendment (published in the August 21, 2015, issue of the *Texas Register* as adopted) applied the 5.1 percent rate increase equally to all levels of service.

This amendment corrects the reimbursement methodology to apply specific CPA retainage percentage rate increases to each service level to bring the rule into compliance with the Appropriations Act. The percentage rate increases as laid out in this amendment were determined in concert with the Department of Family and Protective Services, the administrative agency for the 24-Hour Residential Child-Care (24 RCC) program based upon access-to-care needs, cost report data and stakeholder input. Additionally, the amendment clarifies that a CPA may pay a foster home no more than the CPA rate, which is the minimum daily rate paid for foster homes plus the CPA retainage.

##### Section-by-Section Summary

Proposed §355.7103(q)(2)(A) describes the reimbursement methodology for the CPA retainage. For the basic level of service, the rate will be equal to the rate in effect on August 31, 2015, plus a 9.39 percent increase. For the moderate level of service, the rate will be equal to the rate in effect on August 31, 2015, plus a 1.14 percent increase. For the specialized level of service, the rate will be equal to the rate in effect on August 31, 2015, plus a 0.42 percent increase. For the intense level of service, the rate will be equal to the rate in effect on August 31, 2015, plus a 0.01 percent increase. Additionally, the CPA rate is clarified to be equal to the minimum daily rate for foster homes plus the CPA retainage. The amount paid to a foster home from a CPA may never exceed the CPA rate.

##### Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services for HHSC, has determined that, for each year of the first five years the proposed rule will be in effect, there will be no fiscal impact to the state government. This rule corrects the reimbursement methodology from a single percent increase to a weighted average percent increase, resulting in no additional expenditures or cost savings. There are no fiscal implications for local governments as a result of enforcing or administering the amendment.

Ms. Rymal does not anticipate that there will be any economic costs to persons who are required to comply with the proposed amendment during the first five years the rule will be in effect. The amendment will not affect local employment.

##### Small Business and Micro-Business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of the proposed amendment does not require any change in practice or any additional cost to the contracted provider.

##### Public Benefit

Pam McDonald, Director of Rate Analysis, has determined that, for each year of the first five years the amendment will be in effect, the public benefits expected as a result of this amendment will be to ensure the adopted reimbursement methodology is in compliance with the 2016-17 General Appropriations Act.

##### Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "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

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

#### Public Comment

Written comments on the proposal may be submitted to Sarah Hambrick, Senior Rate Analyst, Rate Analysis Department, Texas Health and Human Services Commission, Mail Code H-400, P.O. Box 85200, Austin, Texas 78705-5200, by fax to (512) 730-7475, or by e-mail to [RAD-LTSS@hhsc.state.tx.us](mailto:RAD-LTSS@hhsc.state.tx.us) within 30 days after publication of this proposal in the *Texas Register*.

#### Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority. The proposal implements Texas Government Code, Chapter 531.

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

#### §355.7103. *Rate-Setting Methodology for 24-Hour Residential Child-Care Reimbursements.*

(a) The following is the authority and process for determining payment rates:

(1) For payment rates established prior to September 1, 2005, the Department of Family and Protective Services (DFPS; formerly the Department of Protective and Regulatory Services) reviewed payment rates for providers of 24-hour residential child care services every other year in an open meeting, after considering financial and statistical information, DFPS rate recommendations developed according to the provisions of this subchapter, legislative direction, staff recommendations, agency service demands, public testimony, and the availability of appropriated revenue. Before the open meeting in which rates were presented for adoption, DFPS sent rate packets containing the proposed rates and average inflation factor amounts to provider association groups. DFPS also sent rate packets to any other interested party, by written request. Providers who wished to comment on the proposed rates could attend the open meeting and give public testimony. Notice of the open meeting was published on the Secretary of State's web site at <http://www.sos.state.tx.us/open>. DFPS notified all foster care providers of the adopted rates by letter.

(2) For payment rates established September 1, 2005 and thereafter, the Health and Human Services Commission (HHSC) approves rates that are statewide and uniform. In approving rate amounts HHSC takes into consideration staff recommendations based on the application of formulas and procedures described in this chapter. However, HHSC may adjust staff recommendations when HHSC deems such adjustments are warranted by particular circumstances likely to affect achievement of program objectives, including economic conditions and budgetary considerations. Reimbursement amounts will be determined coincident with the state's biennium. HHSC will hold a public hearing on proposed reimbursements before HHSC approves reimbursements. The purpose of the hearing is to give interested parties an opportunity to comment on the proposed reimbursements. Notice of the hearing will be provided to the public. The notice of the public hearing will identify the name, address, and telephone number to

contact for the materials pertinent to the proposed reimbursements. At least ten working days before the public hearing takes place, material pertinent to the proposed statewide uniform reimbursements will be made available to the public. This material will be furnished to anyone who requests it.

(b) For payment rates in effect for state fiscal year (SFY) 2002 and 2003, DFPS develops rate recommendations for Board consideration for foster homes serving Levels of Care 1 through 4 children as follows:

(1) For all Level of Care 1 rates, DFPS analyzes the most recent statistical data available on expenditures for a child published by the United States Department of Agriculture (USDA) from middle income, dual parent households for the "Urban South." USDA data includes costs for age groupings from 0 to 17 years of age. An age differential is included with one rate for children ages 0-11 years, and another rate for children 12 years and older. Foster homes providing services to Level of Care 1 children receive the rate that corresponds to the age of the child in care.

(A) DFPS excludes health care costs, as specified in the USDA data, from its calculations since Medicaid covers these costs. USDA specified child-care and education costs are also excluded since these services are available in other DFPS day-care programs.

(B) DFPS includes the following cost categories for both age groups as specified in the USDA data: housing, food, transportation, clothing, and miscellaneous.

(C) The total cost per day is projected using the Implicit Price Deflator-Personal Consumption Expenditures (IPD-PCE) Index from the period covered in the USDA statistics to September 1 of the second year of the biennium, which is the middle of the biennium that the rate period covers. Information on inflation factors is specified in subsection (h) of this section.

(2) For Levels of Care 2 through 4 rates, DFPS analyzes the information submitted in audited foster home cost surveys and related documentation in the following ways:

(A) A statistically valid sample of specialized (therapeutic, habilitative, and primary medical) foster homes complete a cost survey covering one month of service if they meet the following criteria:

(i) the foster home currently has a DFPS foster child(ren) residing in the home; and

(ii) the number of children in the home, including the children of the foster parents, is 12 or fewer.

(B) For rates covering the fiscal year 2002-2003 biennium, child-placing agency homes are the only foster homes that complete a cost survey because the children they serve are currently assigned levels of care verified by an independent contractor. By September 1, 2001, children served in DFPS specialized foster homes will also be assigned levels of care verified by an independent contractor. All future sample populations completing a one-month foster home cost survey will include both child-placing agency and DFPS specialized foster homes. As referenced in subsection (j) of this section, during the 2004-2005 biennium, when the rate methodology is fully implemented, DFPS specialized foster homes and child-placing agency foster homes will be required to receive at a minimum the same foster home rate as derived by this subsection.

(C) Cost categories included in the one-month foster home cost survey include:

(i) shared costs, which are costs incurred by the entire family unit living in the home, such as mortgage or rent expense and utilities;

(ii) direct foster care costs, which are costs incurred for DFPS foster children only, such as clothing and personal care items. These costs are tracked and reported for the month according to the level of care of the child; and

(iii) administrative costs that directly provide for DFPS foster children, such as child-care books, and dues and fees for associations primarily devoted to child care.

(D) A cost per day is calculated for each cost category and these costs are combined for a total cost per day for each level of care served.

(E) A separate sample population is established for each type of specialized foster home (therapeutic, habilitative, and primary medical). Each level of care maintenance rate is established by the sample population's central tendency, which is defined as the mean, or average, of the population after applying two standard deviations above and below the mean of the total population.

(F) The rates calculated for each type of specialized foster home are averaged to derive one foster care maintenance rate for each of the Levels of Care 2 through 4.

(G) The total cost per day is projected using the IPD-PCE Index from the period covered in the cost report to September 1 of the second year of the biennium, which is the middle of the biennium that the rate period covers. Information on inflation factors is specified in subsection (h) of this section.

(c) For payment rates in effect for state fiscal year (SFY) 2002 and 2003, DFPS develops rate recommendations for Board consideration for child-placing agencies serving Levels of Care 1 through 4 children as follows:

(1) The rate-setting model defined in subsection (g) of this section is applied to child-placing agencies' cost reports to calculate a daily rate.

(2) At a minimum, child-placing agencies are required to pass through the applicable foster home rate derived from subsection (b) of this section to their foster homes. The remaining portion of the rate is provided for costs associated with case management, treatment coordination, administration, and overhead.

(3) For rate-setting purposes, the following facility types are included as child-placing agencies and will receive the child-placing agency rate:

- (A) child-placing agency;
- (B) independent foster family/group home;
- (C) independent therapeutic foster family/group home;
- (D) independent habilitative foster family/group home;

and

(E) independent primary medical needs foster family/group home.

(d) For payment rates in effect for state fiscal year (SFY) 2002 and 2003, DFPS develops rate recommendations for Board consideration for residential care facilities serving Levels of Care 1 through 6 as follows:

(1) For Levels of Care 1 and 2, DFPS applies the same rate paid to child-placing agencies as recommended in subsection (c) of this section.

(2) For Levels of Care 3 through 6, the rate-setting model defined in subsection (g) of this section is applied to residential care facilities' cost reports to calculate a daily rate.

(3) For rate-setting purposes, the following facility types are included as residential care facilities and will receive the residential care facility rate:

- (A) residential treatment center;
- (B) therapeutic camp;
- (C) institution for mentally retarded;
- (D) basic care facility;
- (E) halfway house; and
- (F) maternity home.

(e) For payment rates in effect for state fiscal year (SFY) 2002 and 2003, DFPS develops rate recommendations for Board consideration for emergency shelters as follows:

(1) DFPS analyzes emergency shelter cost report information included within the rate-setting population defined in subsection (f) of this section. Emergency shelter costs are not allocated across levels of care since, for rate-setting purposes, all children in emergency shelters are considered to be at the same level of care.

(2) For each cost report in the rate-setting population, the total costs are divided by the total number of days of care to calculate a daily rate.

(3) The total cost per day is projected using the IPD-PCE Index from the period covered in the cost report to September 1 of the second year of the biennium, which is the middle of the biennium that the rate period covers. Information on inflation factors is specified in subsection (h) of this section.

(4) The emergency shelter rate is established by the population's central point or central tendency. The measure of central tendency is defined as the mean, or average, of the population after applying two standard deviations above and below the mean of the total population.

(f) For payment rates in effect for state fiscal year (SFY) 2002 and 2003, level of care rates for contracted providers including child-placing agencies, residential care facilities, and emergency shelters are dependent upon provider cost report information. The following criteria applies to this cost report information:

(1) DFPS excludes the expenses specified in §700.1805 and §700.1806 of this title (relating to Unallowable Costs and Costs Not Included in Recommended Payment Rates). Exclusions and adjustments are made during audit desk reviews and on-site audits.

(2) DFPS includes therapy costs in its recommended payment rates for emergency shelters and for Levels of Care 3 through 6, and these costs will be considered as allowable costs for inclusion on the provider's annual cost report, only if one of the following conditions applies. The provider must access Medicaid for therapy for children in their care unless:

(A) the child is not eligible for Medicaid or is transitioning from Medicaid Managed Care to fee-for-service Medicaid;

(B) the necessary therapy is not a service allowable under Medicaid;

(C) service limits have been exhausted and the provider has been denied an extension;

(D) there are no Medicaid providers available within 45 miles that meet the needs identified in the service plan to provide the therapy; or

(E) it is essential and in the child's best interest for a non-Medicaid provider to provide therapy to the child and arrange for a smooth coordination of services for a transition period not to exceed 90 days or 14 sessions, whichever is less. Any exception beyond the 90 days or 14 sessions must be approved by DFPS before provision of services.

(3) DFPS may exclude from the database any cost report that is not completed according to the published methodology and the specific instructions for completion of the cost report. Reasons for exclusion of a cost report from the database include, but are not limited to:

(A) receiving the cost report too late to be included in the database;

(B) low occupancy;

(C) auditor recommended exclusions;

(D) days of service errors;

(E) providers that do not participate in the level of care system;

(F) providers with no public placements;

(G) not reporting costs for a full year;

(H) using cost estimates instead of actual costs;

(I) not using the accrual method of accounting for reporting information on the cost report;

(J) not reconciling between the cost report and the provider's general ledger; and

(K) not maintaining records that support the data reported on the cost report.

(4) DFPS requires all contracted providers to submit a cost report unless they meet one or more of the conditions in §355.105(b)(4)(D) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(g) For payment rates in effect for state fiscal year (SFY) 2002 and 2003, a rate-setting model is applied to child-placing agencies' and residential care facilities' cost report information included within the rate-setting population defined in subsection (f) of this section. Three allocation methodologies are used in the rate-setting model to allocate allowable costs among the levels of care of children that are served. The methodologies are explained below and are applied as follows:

(1) The first methodology is a staffing model, validated by a statistically valid foster care time study, driven by the number of direct care and treatment coordination staff assigned to a child-placing agency or residential care facility to care for the children at different levels of care. The staffing model produces a staffing complement that is applied to direct care costs to allocate the costs among the levels of care.

(A) Staff positions reported on the direct care labor area of the cost report are grouped into the following categories to more clearly define the staffing complement required at each level of care:

(i) case management;

(ii) treatment coordination;

(iii) direct care;

(iv) direct care administration; and

(v) medical.

(B) A categorized staffing complement for each Level of Care 1 through 6 is derived as follows:

(i) A 14-day foster care time study is applied to a representative sample of residential care facilities and child-placing agencies that completed a cost report.

(ii) Contracted staff, or employees, within the sampled facilities complete a foster care time study daily activity log that assigns half-hour units of each employee's time to the individual child(ren) with whom the employee is engaged during the time period. By correlating the distribution of the employee's time with the level of care assigned to each child, the employee's time is distributed across the Levels of Care 1 through 6.

(iii) The foster care time study daily activity log also captures the type of activity performed. The total amount of time spent in each of these activities is a component in determining the number of staff needed in each of the categories included in the staffing complement. The activities performed include:

(I) care and supervision;

(II) treatment planning and coordination;

(III) medical treatment and dental care; and

(IV) other (administrative, managerial, training functions, or personal time).

(iv) An analysis of the cumulative frequency distribution of these time units by level of care of all children served in the sample population, by category of staff performing the activity, and by type of activity, establishes appropriate staffing complements for each level of care in child-placing agencies and in residential care facilities. These time units by level of care are reported as values that represent the equivalent of a full-time employee. The results are reported in the following chart for incorporation into the rate-setting model: Figure: 1 TAC §355.7103(g)(1)(B)(iv) (No change.)

(v) The foster care time study should be conducted every other biennium, or as needed, if service levels substantially change.

(C) Staff position salaries and contracted fees are reported as direct care labor costs on the cost reports. Each staff position is categorized according to the staffing complement outlined for the time study. The salaries and contracted fees for these positions are grouped into the staffing complement categories and are averaged for child-placing agencies and residential care facilities included in the rate-setting population. This results in an average salary for each staffing complement category (case management, treatment coordination, direct care, direct care administration, and medical).

(D) The staffing complement values, as outlined in the chart at paragraph (1)(B)(iv) of this subsection, are multiplied by the appropriate average salary for each staffing complement category. The products for all of the staffing complement categories are summed for a total for each level of care for both child-placing agencies and residential care facilities. The total by level of care is multiplied by the number of days of service in each level of care, and this product is used as the primary allocation statistic for assigning each provider's direct care costs to the various levels of care.

(E) Direct care costs include the following areas from the cost reports:

(i) direct care labor;

(ii) total payroll taxes/workers compensation; and

(iii) direct care non-labor for supervision/recreation, direct services, and other direct care (not CPAs).

(2) The second methodology allocates the following costs by dividing the total costs by the total number of days of care for an even distribution by day regardless of level of care. This amount is multiplied by the number of days served in each level:

- (A) direct care non-labor for dietary/kitchen;
- (B) building and equipment;
- (C) transportation;
- (D) tax expense; and
- (E) net educational and vocational service costs.

(3) The third methodology allocates the following administrative costs among the levels of care by totaling the results of the previous two allocation methods, determining a percent of total among the levels of care, and applying those percentages:

- (A) administrative wages/benefits;
- (B) administration (non-salary);
- (C) central office overhead; and
- (D) foster family development.

(4) The allocation methods described in paragraphs (1) - (3) of this subsection are applied to each child-placing agency and residential care facility in the rate-setting population, and separate rates are calculated for each level of care served. Rate information is included in the population to set the level of care rate if the following criteria are met:

(A) Providers must have at least 30% of their service days within Levels of Care 3 through 6 for residential settings. For example, for the provider's cost report data to be included for calculating the Level of Care 3 rate, a provider must provide Level of Care 3 services for at least 30% of their service days.

(B) For Levels of Care 5 and 6, a contracted provider could provide up to 60% of "private days" services to be included in the rate-setting population. They must provide at least 40% state-placed services.

(5) Considering the criteria in paragraph (4) of this subsection, the rate-setting population is fully defined for each level of care. Based on this universe, each level of care rate will be established by the group's central point or central tendency. The measure of central tendency is defined as the mean, or average, of the population after applying two standard deviations above and below the mean of the total population.

(6) The total cost per day for each child-placing agency and residential care facility is projected using the IPD-PCE Index from the period covered in the cost report to September 1 of the second year of the biennium, which is the middle of the biennium that the rate period covers. Information on inflation factors is specified in subsection (h) of this section.

(h) For payment rates in effect for state fiscal year (SFY) 2002 and 2003, DFPS uses the Implicit Price Deflator - Personal Consumption Expenditures (IPD-PCE) Index, which is a general cost inflation index, to calculate projected allowable expenses. The IPD-PCE Index is a nationally recognized measure of inflation published by the Bureau of Economic Analysis of the United States Department of Commerce. DFPS uses the lowest feasible IPD-PCE Index forecast consistent with the forecasts of nationally recognized sources available to DFPS when

the rates are prepared. Upon written request, DFPS will provide inflation factor amounts used to determine rates.

(i) All reimbursement rates will be equitably adjusted to the level of appropriations authorized by the Legislature.

(j) There will be a transition period for the fiscal year 2002-2003 biennium. During this period current rates will not be reduced, and any increased funding will be applied to those levels of care that are less adequately reimbursed according to the methodology. Since increased funding was appropriated at a different percentage for each year of the 2002-2003 biennium, the rates will be set separately for each year instead of setting a biennial rate, and inflation factors will be applied to the middle of each year of the biennium.

(k) For the SFY 2004 through 2005, DFPS determines payment rates using the rates determined for SFY 2002 and 2003 from subsections (a) - (h) of this section, with adjustments for the transition from a six level of care system to a four service level system of payment rates.

(l) For the state fiscal year 2006 through 2007 biennium, the 2005 payment rates in effect on August 31, 2005 will be adjusted by equal percentages based on a prorata distribution of additional appropriated funds.

(m) For the state fiscal year 2008 through 2009 biennium, rates are paid for each level of service identified by the DFPS. For foster homes, the payments effective September 1, 2007 through August 31, 2009 for each level of service will be equal to the minimum rate paid to foster homes for that level of service in effect August 31, 2007 plus 4.3 percent. For Child Placing Agencies (CPAs), the rates effective September 1, 2007, through August 31, 2009 for each level of service will be equal to the rate paid to CPAs for that level of service in effect August 31, 2007, plus 4.3 percent. Additional appropriated funds remaining after the rate increase for foster homes and CPAs shall be distributed proportionally across general residential operations and residential treatment centers based on each of these provider type's ratio of costs as reported on the most recently audited cost report to existing payment rates.

(n) HHSC may adjust payment rates, if determined appropriate, when federal or state laws, rules, standards, regulations, policies, or guidelines are changed or adopted. These adjustments may result in increases or decreases in payment rates. Providers must be informed of the specific law, rule, standard, regulation, policy or guideline change and be given the opportunity to comment on any rate adjustment resulting from the change prior to the actual payment rate adjustment.

(o) To implement Chapter 1022 of the Acts of the 75th Texas Legislature, §103, the executive director may develop and implement one or more pilot competitive procurement processes to purchase substitute care services, including foster family care services and specialized substitute care services. The pilot programs must be designed to produce a substitute care system that is outcome-based and that uses outcome measures. Rates for the pilot(s) will be the result of the competitive procurement process, but must be found to be reasonable by the executive director. Rates are subject to adjustment as allowed in subsections (a) and (m) of this section.

(p) Payment rates for psychiatric step-down services are determined on a pro forma basis in accordance with §355.105(h) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures). Payment rates for psychiatric step-down services effective September 1, 2015, will be equal to the rates in effect on August 31, 2015.

(q) Rates effective September 1, 2015.

(1) Definitions.

(A) Child-placing agency (CPA)--Child-placing agencies as defined in 40 Texas Administrative Code (TAC) §745.21.

(B) CPA retainage--The portion of the rate that includes the CPA's costs for administering the service, including, but not limited to recruiting and training foster families, matching children with foster families, monitoring foster families and foster homes, and the associated overhead costs.

(C) Emergency Care Services--Emergency care services as defined in 40 TAC §748.61.

(D) Foster home--Foster home as defined in 40 TAC §749.43 and §750.43.

(E) General Residential Operation (GRO)--General residential operations as defined in 40 TAC §748.43.

(F) Levels of service--Levels of service as described in 40 TAC Chapter 700, Subchapter W.

(G) Residential Treatment Center (RTC)--Residential treatment center as defined in 40 TAC §748.43.

(2) Rates are paid for each level of service identified by DFPS.

~~[(A) For foster homes, the minimum daily rate to be paid to a foster home effective September 1, 2015, for each level of service will be equal to the rate for that level of service in effect August 31, 2015.]~~

~~(A) [(B)] For CPAs, the rate consists of a foster home payment described in subparagraph (B) of this paragraph and a CPA retainage. Effective [the rates effective] September 1, 2015, [for] the CPA retainage for each level of service will be equal [to the rate paid to CPAs for the] CPA retainage for that level of service in effect August 31, 2015; [plus 5.1 percent.]~~

~~(i) plus 9.39 percent for the basic level of service;~~

~~(ii) plus 1.14 percent for the moderate level of service;~~

~~(iii) plus 0.42 percent for the specialized level of service; and~~

~~(iv) plus 0.01 percent for the intense level of service.~~

~~(B) For foster homes, the minimum daily rate to be paid to a foster home effective September 1, 2015, for each level of service will be equal to the rate for that level of service in effect August 31, 2015.~~

(C) For GROs and RTCs, the rates effective September 1, 2015, will be equal to the rates paid to GROs and RTCs in effect August 31, 2015:

(i) plus 9.58 percent for the specialized level of service;

(ii) plus 0.3 percent for the intense level of service; and

(iii) unchanged for other levels of service.

(D) For emergency care services the rates effective September 1, 2015, will be equal to the rates in effect August 31, 2015, plus 6.0 percent.

(r) Payment rates for Single Source Continuum Contractors under Foster Care Redesign are determined on a pro forma basis in accordance with §355.105(h) of this title.

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

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602382

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 424-6900



## TITLE 16. ECONOMIC REGULATION

### PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

#### CHAPTER 59. CONTINUING EDUCATION REQUIREMENTS

##### 16 TAC §§59.3, 59.10, 59.20, 59.21, 59.30, 59.51, 59.80, 59.90

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 59, §§59.3, 59.10, 59.20, 59.21, 59.30, 59.51, 59.80, and 59.90, regarding Continuing Education Requirements.

The proposed amendments update the continuing education requirements for the different professions regulated by the Department and provide general language clean up. The proposed amendments are necessary to allow the Department to streamline continuing education requirements across several professions. The proposed amendments provide the Department with better enforcement tools to hold the continuing education providers accountable to the consumers they serve.

The proposed amendments to §59.3 add "booting operators", "elevator contractor responsible party and registered elevator inspector", and "property tax professionals" to the occupations which are required to take continuing education. Also, "licensed court interpreters" was removed from the listed professions since the Department no longer has regulatory authority over the profession.

The proposed amendments to §59.10 add "current on the payment" to the definitions and clarifies the definition of "continuing education provider". Editorial changes are made to renumber the section.

The proposed amendments to §59.20 remove the requirement for a separate provider registration per occupation and add the requirement for the provider to be current on all fees.

The proposed amendments to §59.21 add the requirement for providers seeking renewal to be current on all fees.

The proposed amendments to §59.30 allow the Department to approve courses in increments of less than one hour and prevent the Department from approving a continuing education course from a provider that is not current on required fees.

The proposed amendments §59.51 require the course completion report to include the total amount of continuing education record fees owed to the Department, if any. The proposed

amendments also require the provider to pay all required fees and prohibit the provider from enrolling a participant into a continuing education course without Department approval if fees are owed.

The proposed amendments to §59.80 add a record fee and clean up expired language.

The proposed amendments to §59.90 allow the Department to seek an administrative sanction against a person for failing to pay the Department all required fees, including record fees, or administrative penalties and allow the Executive Director to probate a license.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no direct cost to state or local government as a result of enforcing or administering the proposed rules. There is no estimated decrease or increase in revenue to the state or local government as a result of enforcing or administering the proposed rules.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments are in effect, the public will benefit by having better skilled and informed professionals in the designated occupations.

There will be no anticipated economic effect on small and micro-businesses that are required to comply with the rules as proposed.

Since the agency has determined that the proposed amendments will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Pauline Easley, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; or by facsimile to (512) 475-3032; or electronically to [erule.comments@tdlr.texas.gov](mailto:erule.comments@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapter 51, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the proposal.

### §59.3. Purpose and Applicability.

These rules are promulgated to establish continuing education provider and course requirements for the following occupations regulated by the Department of Licensing and Regulation:

(1) Air conditioning and refrigeration contractors, as provided by Texas Occupations Code, Chapter 1302. Additional continuing education requirements relating to air conditioning and refrigeration contractors may be found in Chapter 75 of this title.

(2) Auctioneers, as provided by Texas Occupations Code, Chapter 1802. Additional continuing education requirements relating to auctioneers may be found in Chapter 67 of this title.

(3) Booting operators, as provided by Texas Occupations Code, Chapter 2308. Additional continuing education requirement relating to booting may be found in Chapter 89 of this title.

(4) ~~[(3)]~~ Cosmetologists, as provided by Texas Occupations Code, Chapters 1602 and 1603. Additional continuing education requirements relating to cosmetologists may be found in Chapter 83 of this title.

(5) ~~[(4)]~~ Electricians, as provided by Texas Occupations Code, Chapter 1305. Additional continuing education requirements relating to electricians may be found in Chapter 73 of this title.

(6) Elevator contractor responsible party and registered elevator inspector, as provided by Texas Health and Safety Code, Chapter 754, Subchapter B. Additional continuing education requirements relating to responsible parties may be found in Chapter 74 of this title.

~~[(5)] Licensed court interpreters, as provided by Texas Government Code, Chapter 57, Subchapter C. Additional continuing education requirements relating to licensed court interpreters may be found in Chapter 80 of this title.~~

(7) ~~[(6)]~~ Polygraph examiners, as provided by Texas Occupations Code, Chapter 1703. Additional continuing education requirements relating to polygraph examiners may be found in Chapter 88 of this title.

(8) ~~[(7)]~~ Property tax consultants, as provided by Texas Occupations Code, Chapter 1152. Additional continuing education requirements relating to property tax consultants may be found in Chapter 66 of this title.

(9) Property tax professionals, as provided by Texas Occupations Code, Chapter 1151, Subchapter D. Additional continuing education requirements relating to property tax professionals may be found in Chapter 94 of this title.

(10) ~~[(8)]~~ Registered accessibility specialists, as provided by Texas Government Code, Chapter 469. Additional continuing education requirements relating to registered accessibility specialists may be found in Chapter 68 of this title.

(11) ~~[(9)]~~ Towing operators, as provided by Texas Occupations Code, Chapter 2308. Additional continuing education requirements relating to towing operators may be found in Chapter 86 of this title.

(12) ~~[(10)]~~ Water well drillers and pump installers, as provided by Texas Occupations Code, Chapters 1901 and 1902. Additional continuing education requirements relating to water well drillers and pump installers may be found in Chapter 76 of this title.

### §59.10. Definitions.

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

~~[(1)] Department--The Texas Department of Licensing and Regulation.~~

(1) ~~[(2)]~~ Commission--The Texas Commission of Licensing and Regulation.

(2) ~~[(3)]~~ Continuing Education Courses or Courses--Department-approved courses that may be completed to satisfy continuing education requirements.

(3) ~~[(4)]~~ Continuing Education Provider or Provider--A person registered by the department to offer continuing education courses, in any occupation that offers continuing education.

(4) Current on the Payment--A provider applicant or provider is considered current on the payment of any required fees or administrative penalties if the provider applicant or provider is making payments as provided by an agreed payment schedule with the department.

(5) Day--A calendar day.

(6) Department--The Texas Department of Licensing and Regulation.

§59.20. *Provider Registration.*

(a) (No change.)

~~[(b) A separate provider registration is required for each occupation (electrician, auctioneer, etc-) for which an applicant wishes to provide continuing education courses.]~~

(b) ~~[(e)]~~ To register, an applicant shall:

(1) file a completed application on the appropriate department-approved form; ~~[and]~~

(2) pay all applicable fees;~~[-]~~

(3) be current on the payment of any unpaid required fees, including record fees, or administrative penalties; and

(4) demonstrate the capability to meet the requirements of this chapter and other applicable department requirements.

~~[(d) To be registered as a provider, an applicant must demonstrate the capability to meet the requirements of this chapter and other applicable department requirements.]~~

§59.21. *Provider Registration Renewals.*

(a) (No change.)

(b) To renew a registration, a provider shall:

(1) file a completed application for renewal on the appropriate department-approved form; ~~[and]~~

(2) pay all applicable fees; ~~and[-]~~

(3) be current on the payment of any unpaid required fees, including record fees, or administrative penalties.

(c) (No change.)

§59.30. *Continuing Education Courses.*

(a) - (k) (No change.)

(l) The department may ~~[not]~~ approve courses in increments of less than one hour of continuing education credit.

(m) - (n) (No change.)

(o) The department may not approve a continuing education course from a provider that is past due or not current on the payment of any unpaid required fees, including record fees, or administrative penalties.

§59.51. *Responsibilities of Providers.*

(a) - (d) (No change.)

(e) A provider must submit to the department, on the appropriate department-approved form, a course completion report no later than seven days after the course completion date. The report shall include the following information:

(1) name and number of course;

(2) course completion date;

(3) provider name and number;

(4) the location where the course was taught;

(5) the number of participants to whom a certificate was issued; ~~[and]~~

(6) the name, license type and license number of each participant to whom a certificate of completion was issued; ~~and[-]~~

(7) the total amount of continuing education record fees owed to the department, if any.

(f) - (l) (No change.)

(m) A provider must pay all required fees, including record fees, or administrative penalties, in a manner prescribed by the department.

(n) Upon notification by the department that a provider is past due or not current on the payment of any unpaid required fees, including record fees, or administrative penalties, a provider may not enroll a participant in a continuing education course without department approval.

§59.80. *Fees.*

(a) (No change.)

(b) Provider renewal application fee--~~[\$250 per occupation for registrations expiring before April 1, 2014;] \$200 [for registrations expiring on or after April 1, 2014].~~

(c) - (d) (No change.)

(e) Record fee, if required--\$5 per licensee.

(f) ~~[(e)]~~ All fees paid to the department are non-refundable.

§59.90. *Sanctions--Administrative Sanctions and Penalties.*

(a) (No change.)

(b) Any of the following actions by a person is a violation of this chapter and may result in the assessment of administrative penalties or administrative sanctions against the person:

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

(5) Fraud or misrepresentation regarding maintenance of records, teaching method, program content, or issuance of certificates; ~~[or]~~

(6) Failing to cooperate with the department in an investigation or audit; ~~or[-]~~

(7) Failing to pay the department all required fees, including record fees, or administrative penalties.

(c) An order of suspension issued under this section may be probated upon reasonable terms and conditions as determined by the commission or executive director.

(d) (No change.)

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

Filed with the Office of the Secretary of State on May 10, 2016.

TRD-201602292

William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 463-8179



## TITLE 19. EDUCATION

### PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO  
ALL PUBLIC INSTITUTIONS OF HIGHER  
EDUCATION IN TEXAS  
SUBCHAPTER C. TEXAS SUCCESS  
INITIATIVE

**19 TAC §4.54**

The Texas Higher Education Coordinating Board (Coordinating Board or THECB) proposes amendments to §4.54, concerning the Texas Success Initiative (TSI), to incorporate into existing rules changes that address the college readiness benchmarks for the new College Board SAT examinations administered on or after March 5, 2016. Specifically, the amendment to §4.54(a)(1)(B), the TSI exemption for the SAT examinations, would add the college readiness benchmarks set by The College Board and would provide additional clarification of rule application.

R. Jerel Booker, J.D., Assistant Commissioner for College Readiness and Success, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Booker has also determined that for each of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be consistent and clear application for TSI purposes of the college readiness benchmark for the new SAT examinations administered on or after March 5, 2016.

Comments on the proposal may be submitted to Jerel Booker, J.D., THECB, P.O. Box 12788, Austin, Texas 78711 or via email in care of Suzanne Morales-Vale, who may be reached at [suzanne.morales-vale@theccb.state.tx.us](mailto:suzanne.morales-vale@theccb.state.tx.us). Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under Texas Education Code (TEC), §51.3062, which provides the THECB with the authority to establish policies and procedures relating to the TSI and §51.307, which provides the THECB with the authority to adopt and publish rules and regulations to effectuate the provisions of Chapter 51, Subchapter F of the TEC.

The amendments affect TEC, §51.3062.

*§4.54. Exemptions, Exceptions, and Waivers.*

(a) The following students shall be exempt from the requirements of this title, whereby exempt students shall not be required to provide any additional demonstration of college readiness and shall be allowed to enroll in any entry-level freshman course as defined in §4.53(12) of this title (relating to Definitions):

(1) For a period of five (5) years from the date of testing, a student who is tested and performs at or above the following standards that cannot be raised by institutions:

(A) ACT: composite score of 23 with a minimum of 19 on the English test shall be exempt for both the reading and writing sections of the TSI Assessment, and/or 19 on the mathematics test shall be exempt for the mathematics section of the TSI Assessment;

(B) SAT:

*(i)* SAT administered prior to March 5, 2016: a combined critical reading (formerly "verbal") and mathematics score of

1070 with a minimum of 500 on the critical reading test shall be exempt for both reading and writing sections of the TSI Assessment; a combined critical reading (formerly "verbal") and mathematics score of 1070 with a minimum of [; and/or] 500 on the mathematics test shall be exempt for the mathematics section of the TSI Assessment. [; or]

*(ii)* SAT administered on or after March 5, 2016: a minimum score of 480 on the Evidenced-Based Reading and Writing (EBRW) test shall be exempt for both reading and writing sections of the TSI Assessment; a minimum score of 530 on the mathematics test shall be exempt for the mathematics section of the TSI Assessment. There is no combined score.

*(iii)* Mixing or combining scores from the SAT administered prior to March 5, 2016 and the SAT administered on or after March 5, 2016 is not allowable.

(2) - (10) (No change.)

(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.

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602357

Bill Franz

General Counsel

Texas Higher Education Coordinating Board

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 427-6114

◆ ◆ ◆  
**PART 2. TEXAS EDUCATION AGENCY**

**CHAPTER 97. PLANNING AND  
ACCOUNTABILITY**

**SUBCHAPTER AA. ACCOUNTABILITY AND  
PERFORMANCE MONITORING**

**19 TAC §97.1001**

*(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 §97.1001(b) is not included in the print version of the Texas Register. The figure is available in the html version of the May 27, 2016, issue of the Texas Register on-line.)*

The Texas Education Agency (TEA) proposes an amendment to §97.1001, concerning accountability. The section describes the state accountability rating system and annually adopts the most current accountability manual. The proposed amendment would adopt applicable excerpts of the *2016 Accountability Manual*. Earlier versions of the manual will remain in effect with respect to the school years for which they were developed.

The TEA has adopted its academic accountability manual in rule since 2000. The accountability system evolves from year to year, so the criteria and standards for rating and acknowledging schools in the most current year differ to some degree over those applied in the prior year. The intention is to update 19 TAC §97.1001 annually to refer to the most recently published accountability manual.

The proposed amendment to 19 TAC §97.1001 would adopt excerpts of the *2016 Accountability Manual* into rule as a figure. The excerpts, Chapters 2-9 of the *2016 Accountability Manual*, specify the indicators, standards, and procedures used by the commissioner of education to determine accountability ratings for districts, campuses, and charter schools. These chapters also specify indicators, standards, and procedures used to determine distinction designations on additional indicators for Texas public school campuses and districts. The TEA will issue accountability ratings and distinction designations under the procedures specified in the *2016 Accountability Manual* by August 15, 2016. Ratings and distinction designations may be revised as a result of investigative activities by the commissioner as authorized under TEC, §39.056 and §39.057.

In 2016, campuses and districts will be evaluated using a performance index framework. The framework includes four indices. These indices include performance on the State of Texas Assessments of Academic Readiness (STAAR®) assessments for Grades 3-8 and end-of-course, longitudinal graduation rates, four-year Recommended High School Program/Distinguished Achievement Program (RHSP/DAP) graduation rate, four-year Foundation High School Program (FHSP) with endorsement/distinguished level of achievement graduation rate, and annual dropout rates. These indices incorporate the various criteria mandated by statute as set out in the statutory authority section. In 2016, the distinction designations system will award seven distinctions to eligible campuses that receive a *Met Standard* rating: Academic Achievement in English Language Arts/Reading, Academic Achievement in Mathematics, Academic Achievement in Science, Academic Achievement in Social Studies, Top 25 Percent Student Progress, Top 25 Percent Closing Performance Gaps, and Postsecondary Readiness. Districts will be eligible for a distinction designation for Postsecondary Readiness.

There are four substantive changes to the accountability system for 2016. First, results of STAAR® assessments for mathematics, Grades 3-8, are included. These assessments were excluded from the 2015 accountability ratings due to the implementation of the new mathematics Texas Essential Knowledge and Skills (TEKS) at Grades 3-8 in 2014-2015. Second, the results of STAAR A are included in all four indices and STAAR Alternate 2 results are included in Index 1, Index 2, and Index 3. These assessments were excluded from the 2015 accountability ratings because they were administered for the first time in 2014-2015. Third, the calculation for the graduation plan component of Index 4 now includes students who graduate under the FHSP. This year, two percentages are calculated: the percentage of students graduating under the RHSP/DAP, and the percentage of students graduating under either the RHSP/DAP or the FHSP with an endorsement (FHSP-E) or the distinguished level of achievement (DLA).

The percentage that contributes the most points to the Index 4 score will be used.

This change was made so that districts with students graduating under the FHSP sooner than required would not be disadvantaged.

Fourth, and finally, the Texas Success Initiative (TSI) assessment is replacing the exit-level Texas Assessment of Knowledge and Skills (TAKS) in the postsecondary component of Index 4. This change is being made because the results of the exit-level TAKS are no longer available.

The proposed amendment to 19 TAC §97.1001 would also include minor technical changes such as date changes and new language in Chapter 2 that explains the special processing rules that will be applied to tests affected by the spring 2016 testing issues.

The proposed rule action would place the specific procedures contained in Chapters 2-9 of the *2016 Accountability Manual* for annually rating school districts and campuses in the *Texas Administrative Code*. Applicable procedures would be adopted each year as annual versions of the accountability 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 are 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 amendments are 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 rating procedures for the public schools 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 27, 2016, and ends June 27, 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 27, 2016.

**STATUTORY AUTHORITY.** The amendment is proposed under the Texas Education Code (TEC), §39.052(a) and (b)(1)(A), which require the commissioner to evaluate and consider the performance on achievement indicators described in TEC, §39.053(c), when determining the accreditation status of each school district and open-enrollment charter school; TEC, §39.053, which requires the commissioner to adopt a set of performance indicators related to the quality of learning and achievement in order to measure and evaluate school districts and campuses; TEC, §39.0535, which provides a temporary provision that the commissioner shall assign each district and campus a performance rating not later than August 15 of each year; TEC, §39.054, which requires the commissioner to adopt rules to evaluate school district and campus performance and to assign a performance rating; TEC, §12.104(b)(2)(L),

which subjects open-enrollment charter schools to the rules adopted under public school accountability in Chapter 39; TEC, §39.0545, which requires each school district to evaluate and report to the agency its own performance and the performance of each of its campuses in community and student engagement; TEC, §29.081(e), which defines criteria for alternative education programs for students at risk of dropping out of school and subjects those campuses to the performance indicators and accountability standards adopted for alternative education programs; TEC, §39.0548, which requires the commissioner to designate campuses that meet specific criteria as dropout recovery schools and to use specific indicators to evaluate them; TEC, §39.055, which prohibits the use of assessment results and other performance indicators of students in a residential facility in state accountability; TEC, §39.151, which provides a process for a school district or an open-enrollment charter school to challenge an academic or financial accountability rating; TEC, §39.201, which requires the commissioner to award distinction designations to a campus or district for outstanding performance; TEC, §39.2011, which makes charter districts and campuses that earn a *Met Standard* rating eligible for distinction designations; and TEC, §39.202 and §39.203, which authorize the commissioner to establish criteria for distinction designations for campuses and districts.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §§39.052(a) and (b)(1)(A), 39.053, 39.0535, 39.054, 39.0545, 39.0548, 39.055, 39.151, 39.201, 39.2011, 39.202, 39.203, 29.081(e), and 12.104(b)(2)(L).

§97.1001. *Accountability Rating System.*

(a) The rating standards established by the commissioner of education under Texas Education Code (TEC), §§39.052(a) and (b)(1)(A); 39.053, 39.0535, [and] 39.054, [as those sections existed on January 1, 2015;] 39.0545, 39.0548, [as added by Senate Bill 1538, 83rd Texas Legislature, Regular Session, 2013; and as that section existed on January 1, 2015;] 39.0545, as added by House Bill 5, 83rd Texas Legislature, Regular Session, 2013;] 39.055, [;] 39.151, [;] 39.201, 39.2011, [;] 39.202, [;] 39.203, [;] 29.081(e), [;] and 12.104(b)(2)(L), shall be used to evaluate the performance of districts, campuses, and charter schools. The indicators, standards, and procedures used to determine ratings will be annually published in official Texas Education Agency publications. These publications will be widely disseminated and cover the following:

- (1) indicators, standards, and procedures used to determine district ratings;
- (2) indicators, standards, and procedures used to determine campus ratings;
- (3) indicators, standards, and procedures used to determine distinction designations; and
- (4) procedures for submitting a rating appeal.

(b) The procedures by which districts, campuses, and charter schools are rated and acknowledged for 2016 [2015] are based upon specific criteria and calculations, which are described in excerpted sections of the 2016 [2015] *Accountability Manual* provided in this subsection.

Figure: 19 TAC §97.1001(b)  
[Figure: 19 TAC §97.1001(b)]

(c) Ratings may be revised as a result of investigative activities by the commissioner as authorized under TEC, §39.056 and §39.057.

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

(e) The specific criteria and calculations used in the annual accountability manual adopted for prior school years remain in effect for all purposes, including accountability, 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 16, 2016.

TRD-201602369

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: June 26, 2016

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



## TITLE 22. EXAMINING BOARDS

### PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

#### CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

##### 22 TAC §153.5

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §153.5, Fees. The proposed amendments add a reference to the fee for voluntary appraiser trainee experience reviews previously adopted by the Board in 22 TAC §153.22 at its meeting on February 19, 2016. The amendments also propose a new fee for fingerprint-based criminal history checks or other related services as recommended by the Working Group for AQB Criminal History Check Criteria.

The Legislature delegated authority to the Board to adopt rules requiring applicants and license holders to provide fingerprints for the purpose of obtaining criminal history record information. The Board appointed the Working Group in November 2015 to consider whether to implement fingerprint-based criminal history checks to comply with criteria adopted by the Appraiser Qualifications Board (AQB). The Working Group recommends implementing national fingerprint-based criminal history checks for applicants and current license holders. The fee for fingerprint-based criminal history checks or other related services allow the Board to recoup the costs of these checks and services from license holders.

Kristen Worman, 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 proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments.

There is no significant anticipated 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 section as proposed is in effect the public benefit anticipated as a result of enforcing the section as proposed will be recovery of direct costs from applicants for implementation of rule requirements consistent with state and federal law.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to [general.counsel@talcb.texas.gov](mailto:general.counsel@talcb.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §§1103.151, 1103.152, and 1103.2031, which authorize TALCB to: adopt rules relating to certificates and licenses; prescribe qualifications for appraisers that are consistent with the qualifications established by the AQB; and require applicants and current license holders to submit fingerprints for the purpose of obtaining criminal history record information.

The statute affected by these amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

#### §153.5. Fees.

(a) The Board shall charge and the Commissioner shall collect the following fees:

- (1) a fee of \$400 for an application for a certified general appraiser license;
- (2) a fee of \$350 for an application for a certified residential appraiser license;
- (3) a fee of \$325 for an application for a licensed residential appraiser license;
- (4) a fee of \$300 for an application for an appraiser trainee license;
- (5) a fee of \$360 for a timely renewal of a certified general appraiser license;
- (6) a fee of \$310 for a timely renewal of a certified residential appraiser license;
- (7) a fee of \$290 for a timely renewal of a licensed residential appraiser license;
- (8) a fee of \$250 for a timely renewal of an appraiser trainee license;
- (9) a fee equal to 1-1/2 times the timely renewal fee for the late renewal of a license within 90 days of expiration;
- (10) a fee equal to two times the timely renewal fee for the late renewal of a license more than 90 days but less than six months after expiration;
- (11) a fee of \$250 for nonresident license;
- (12) the national registry fee in the amount charged by the Appraisal Subcommittee;
- (13) an application fee for licensure by reciprocity in the same amount as the fee charged for a similar license issued to a Texas resident;
- (14) a fee of \$40 for preparing a certificate of licensure history, active licensure, or supervision;

(15) a fee of \$20 for an addition or termination of sponsorship of an appraiser trainee;

(16) a fee of \$20 for replacing a lost or destroyed license;

(17) a fee for a returned check equal to that charged for a returned check by the Texas Real Estate Commission;

(18) a fee of \$200 for an extension of time to complete required continuing education;

(19) a fee of \$25 to request a license be placed on inactive status;

(20) a fee of \$50 to request a return to active status;

(21) a fee of \$50 for evaluation of an applicant's criminal history;

(22) an examination fee as provided in the Board's current examination administration agreement;

(23) a fee of \$20 per certification when providing certified copies of documents;

(24) a fee of \$75 to request a voluntary appraiser trainee experience review;

(25) the fee charged by the Federal Bureau of Investigation, the Texas Department of Public Safety or other authorized entity for fingerprinting or other service for a national or state criminal history check in connection with a license application or renewal;

(26) [(24)] a fee of \$20 for filing any application, renewal, change request, or other record on paper when the person may otherwise file electronically by accessing the Board's website and entering the required information online; and

(27) [(25)] any fee required by the Department of Information Resources for establishing and maintaining online applications.

(b) Fees must be submitted in U.S. funds payable to the order of the Texas Appraiser Licensing and Certification Board. Fees are not refundable once an application has been accepted for filing. Persons who have submitted a check which has been returned, and who have not made good on that check within thirty days, for whatever reason, shall submit all future fees in the form of a cashier's check or money order.

(c) Licensing fees are waived for members of the Board staff who must maintain a license for employment with the Board only and are not also using the license for outside employment.

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

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602359

Kristen Worman

General Counsel

Texas Appraiser Licensing and Certification Board

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 936-3652



## 22 TAC §153.9

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §153.9, Applications. The proposed amendments implement fingerprint-based criminal

history checks for license applicants as recommended by the Working Group for AQB Criminal History Check Criteria and clarify when the Board may terminate an application.

The Legislature delegated authority to the Board to adopt rules requiring fingerprint-based criminal history checks. The Board appointed the Working Group in November 2015 to consider whether to implement fingerprint-based criminal history checks for appraisers to comply with criteria adopted by the Appraiser Qualifications Board (AQB). The Working Group recommends implementing fingerprint-based criminal history checks for applicants and current license holders. The proposed amendments add this requirement to the rule and clarify that the Board may terminate an application if an applicant fails to provide fingerprints or satisfy other licensing requirements within one year from the date an application is filed.

Kristen Worman, 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 proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments. There is no significant anticipated 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 section as proposed is in effect the public benefits anticipated as a result of enforcing the section as proposed will be increased consumer protection, clarity for license holders and a requirement that is consistent with state and federal law.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to [general.counsel@talcb.texas.gov](mailto:general.counsel@talcb.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §§1103.151, 1103.152, and 1103.2031, which authorize TALCB to: adopt rules relating to certificates and licenses; prescribe qualifications for appraisers that are consistent with the qualifications established by the AQB; and require applicants and current license holders to submit fingerprints for the purpose of obtaining criminal history record information.

The statute affected by these amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

#### §153.9. Applications.

(a) A person desiring to be licensed as an appraiser or appraiser trainee; ~~or temporary out-of-state appraiser~~ shall file an application using forms prescribed by the Board or the Board's online application system, if available. The Board may decline to accept for filing an application that is materially incomplete or that is not accompanied by the appropriate fee. Except as provided by the Act, the Board may not grant a license to an applicant who has not:

- (1) paid the required fees;
- (2) submitted a complete and legible set of fingerprints as required in §153.12 of this title;
- (3) ~~(2)~~ satisfied any experience and education requirements established by the Act, Board rules, or the AQB;
- (4) ~~(3)~~ successfully completed any qualifying examination prescribed by the Board;

(5) ~~(4)~~ provided all supporting documentation or information requested by the Board in connection with the application;

(6) ~~(5)~~ satisfied all unresolved enforcement matters and requirements with the Board; and

(7) ~~(6)~~ met any additional or superseding requirements established by the Appraisal Qualifications Board.

(b) Termination of application. An application ~~is~~ may be considered void and subject to no further evaluation or processing if:

(1) an applicant fails to provide information or documentation within 60 days after the Board makes a written request for the information or documentation; or

(2) within one year from the date an application is filed, an applicant fails to satisfy:

(A) a current education, experience or exam requirement; or

(B) the fingerprint and criminal history check requirements in §153.12 of this title.

(c) A license is valid for the term for which it is issued by the Board unless suspended or revoked for cause and unless revoked, may be renewed in accordance with the requirements of §153.17 of this title (relating to Renewal or Extension of Certification and License or Renewal of Trainee Approval).

(d) The Board may deny a license to an applicant who fails to satisfy the Board as to the applicant's honesty, trustworthiness, and integrity.

(e) The Board may deny a license to an applicant who submits incomplete, false, or misleading information on the application or supporting documentation.

(f) When an application is denied by the Board, no subsequent application will be accepted within two years after the date of the Board's notice of denial as required in §157.7 of this title.

(g) This subsection applies to an applicant who is a military service member, a military veteran, or the spouse of a person serving on active duty as a member of the armed forces of the United States.

(1) The Board shall waive the license application and examination fees for an applicant who is:

(A) a military service member or military veteran whose military service, training, or education substantially meets all of the requirements for the license; or

(B) a military service member, military veteran, or military spouse who holds a current license issued by another jurisdiction that has licensing requirements that are substantially equivalent to the requirements for the license in this state.

(2) The Board shall issue on an expedited basis a license to an applicant who holds a current license issued by another state or jurisdiction that has licensing requirements that are substantially equivalent to the requirements for the license issued in this state.

(3) The Board may issue a license to an applicant who within the five years preceding the application date, held the license in this state.

(4) The Board may allow an applicant to demonstrate competency by alternative methods in order to meet the requirements for obtaining a particular license issued by the Board. For purposes of this subsection, the standard method of demonstrating competency is the

specific examination, education, and/or experience required to obtain a particular license.

(5) In lieu of the standard method(s) of demonstrating competency for a particular license and based on the applicant's circumstances, the alternative methods for demonstrating competency may include any combination of the following as determined by the Board:

- (A) education;
- (B) continuing education;
- (C) examinations (written and/or practical);
- (D) letters of good standing;
- (E) letters of recommendation;
- (F) work experience; or
- (G) other methods required by the commissioner.

(h) This subsection applies to an applicant who is serving on active duty or is a veteran of the armed forces of the United States.

(1) The Board will credit any verifiable military service, training or education obtained by an applicant that is relevant to a license toward the requirements of a license.

(2) This subsection does not apply to an applicant who holds a restricted license issued by another jurisdiction.

(3) The applicant must pass the qualifying examination, if any, for the type of license sought.

(4) The Board will evaluate applications filed by an applicant who is serving on active duty or is a veteran of the armed forces of the United States consistent with the criteria adopted by the AQB and any exceptions to those criteria as authorized by the AQB.

(i) A person applying for license under subsection (g) or (h) of this section must also:

- (1) submit the Board's approved application form for the type of license sought;
- (2) submit the appropriate fee for that application; and
- (3) submit the supplemental form approved by the Board applicable to subsection (g) or (h) of this section.

(j) The commissioner may waive any prerequisite to obtaining a license for an applicant as allowed by the AQB.

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 16, 2016.

TRD-201602360

Kristen Worman

General Counsel

Texas Appraiser Licensing and Certification Board

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 936-3652



## 22 TAC §153.12

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes new §153.12, Criminal History Checks. As recommended by the Working Group for AQB Criminal History

Check Criteria, the proposed rule implements fingerprint-based criminal history checks to comply with criteria adopted by the Appraiser Qualifications Board (AQB).

The Legislature delegated authority to the Board to adopt rules requiring applicants and license holders to provide fingerprints for the purpose of obtaining criminal history record information. The Board appointed the Working Group in November 2015 to consider whether to implement fingerprint-based criminal history checks to comply with criteria adopted by the Appraiser Qualifications Board (AQB). The Working Group recommends implementing fingerprint-based criminal history checks for applicants and current license holders. The proposed new section would require applicants to undergo fingerprint-based criminal history checks as part of the application process. The proposed new section would require current license holders to undergo fingerprint-based criminal history checks when renewing their license.

Kristen Worman, General Counsel, has determined that for the first five-year period the proposed new rules 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 proposed new rule. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed new rule. There is no significant anticipated economic cost to persons who are required to comply with the proposed rule.

Ms. Worman also has determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the section as proposed will be increased consumer protection and a requirement that is consistent with state and federal law.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to [general.counsel@talcb.texas.gov](mailto:general.counsel@talcb.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The new rule is proposed under Texas Occupations Code §§1103.151, 1103.152, and 1103.2031, which authorize TALCB to: adopt rules relating to certificates and licenses; prescribe qualifications for appraisers that are consistent with the qualifications established by the AQB; and require applicants and current license holders to submit fingerprints for the purpose of obtaining criminal history record information.

The statute affected by the new rule is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed new rule.

### §153.12. Criminal History Checks.

(a) An applicant or license holder applying for or renewing a license issued by the Board must submit a complete and legible set of fingerprints, in a manner approved by the Board, to the Board, the Texas Real Estate Commission, the Texas Department of Public Safety, or other authorized entity for the purpose of obtaining criminal history record information from the Texas Department of Public Safety and the Federal Bureau of Investigation.

(b) The Board will conduct a criminal history check of each applicant for a license or renewal of a license.

(c) If an applicant or license holder has previously submitted fingerprints on behalf of the Board or Commission as provided in (a), no additional fingerprints are required.

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

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602361

Kristen Worman

General Counsel

Texas Appraiser Licensing and Certification Board

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 936-3652



## 22 TAC §153.15

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §153.15, Experience Required for Licensing. The proposed amendments clarify the criteria required for awarding experience credit for applicants and license holders. The proposed amendments also remove redundant language and reorganize this section to improve readability.

Kristen Worman, 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 proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments. There is no significant anticipated 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 section as proposed is in effect the public benefits anticipated as a result of enforcing the section as proposed will be clarity for applicants and license holders and a requirement that is easier to understand and consistent with state and federal law.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to [general.counsel@talcb.texas.gov](mailto:general.counsel@talcb.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §§1103.151 - 1103.152, which authorize TALCB to: adopt rules relating to certificates and licenses and prescribe qualifications for appraisers that are consistent with the qualifications established by the AQB.

The statute affected by these amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

### §153.15. *Experience Required for Licensing.*

(a) An applicant for a certified general real estate appraiser license must provide evidence satisfactory to the Board that the applicant possesses the equivalent of 3,000 hours of real estate appraisal experience over a minimum of 30 months. At least 1,500 hours of experience must be in non-residential real estate appraisal work. ~~[Hours may be treated as cumulative in order to achieve the necessary hours of appraisal experience.]~~

(b) An applicant for a certified residential real estate appraiser license must provide evidence satisfactory to the Board that the applicant possesses the equivalent of 2,500 hours of real estate appraisal

experience over a minimum of 24 months. ~~[Hours may be treated as cumulative in order to achieve the necessary hours of appraisal experience.]~~

(c) An applicant for a state real estate appraiser license must provide evidence satisfactory to the Board that the applicant possesses at least 2,000 hours of real estate appraisal experience over a minimum of twelve months.

(d) Experience by endorsement: An applicant who is currently licensed and in good standing in a state that has not been disapproved by the ASC is deemed to satisfy the experience requirements for the same level of license in Texas. The applicant must provide appropriate documentation as required by the Board.

(e) The Board awards experience credit in accordance with current criteria established by the AQB and in accordance with the provisions of the Act specifically relating to experience requirements. An hour of experience means 60 minutes expended in one or more of the acceptable appraisal experience areas. Calculation of the hours of experience is based solely on actual hours of experience. Hours may be treated as cumulative in order to achieve the necessary hours of appraisal experience. Any one or any combination of the following categories may be acceptable for satisfying the applicable experience requirement. Experience credit may be awarded for:

(1) An [Fee or staff] appraisal or appraisal analysis when ~~[it is]~~ performed in accordance with Standards 1 and 2 and other provisions of the USPAP edition in effect at the time of the appraisal or appraisal analysis.

(2) Mass appraisal, including ad [Ae] valorem tax appraisal that:

(A) conforms to USPAP Standard 6; and

(B) demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1.

~~[(3) Condemnation appraisal.]~~

(3) ~~[(4) Appraisal [Technical] review [appraisal to the extent] that: [it]~~

(A) conforms to USPAP Standard 3; and

(B) demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1.

~~[(5) Appraisal analysis: A market analysis typically performed by a real estate broker or salesperson may be awarded experience credit when the analysis is prepared in conformity with USPAP Standards 4 and 2.]~~

(4) ~~[(6) Appraisal [Real property appraisal] consulting services, including market analysis, cash flow and/or investment analysis, highest and best use analysis, and feasibility analysis when it demonstrates proficiency in appraisal principles, techniques, or skills used by appraisers practicing under USPAP Standard 1 and performed in accordance with USPAP Standards 4 and 5.~~

(f) Experience credit may not be awarded for teaching appraisal courses.

(g) Each applicant must submit a Board-approved Appraisal Experience Log and Appraisal Experience Affidavit listing each appraisal assignment or other work for which the applicant is seeking experience credit.

(1) The Board may grant experience credit for those real property appraisals listed on an applicant's Appraisal Experience Log that:

(A) comply with the USPAP edition in effect at the time of the appraisal;

(B) are verifiable and supported by:

(i) work files in which the applicant is identified as participating in the appraisal process; or

(ii) appraisal reports that:

(I) name the applicant in the certification as providing significant real property appraisal assistance; or

(II) the applicant has signed;

(C) were performed when the applicant had legal authority to do so; and

(D) comply with the acceptable categories of experience established by the AQB and stated in subsection (e) of this section.

(2) The Board, at its sole discretion, may accept evidence other than an applicant's Appraisal Experience Log and Appraisal Experience Affidavit to demonstrate any experience claimed by an applicant.

[(g) Experience claimed by an applicant must be submitted on an Appraisal Experience Log with an accompanying Appraisal Experience Affidavit.]

[(1) In exceptional situations, the Board, at its discretion, may accept other evidence of experience claimed by the applicant.]

[(2) If the Board determines just cause exists for requiring further information, the Board may obtain additional information by:]

[(A) requiring the applicant to complete a form, approved by the Board, that includes detailed listings of appraisal experience showing, for each appraisal claimed by the applicant, the city or county where the appraisal was performed, the type and description of the building or property appraised, the approaches to value utilized in the appraisal, the actual number of hours expended on the appraisal, name of client, and other information determined to be appropriate by the Board; or]

[(B) engaging in other investigative research determined to be appropriate by the Board.]

(h) [(3)] The Board must verify the experience claimed by each applicant. [will require verification of acceptable experience of all applicants. Applicants have 60 days to provide all documentation requested by the Board. The]

(1) Verification [verification] may be obtained by:

(A) requesting copies of appraisals and all supporting documentation, including the work files; and [requiring the applicant to complete a form, approved by the Board, that includes detailed listings of appraisal experience showing, for each appraisal claimed by the applicant, the city or county where the appraisal was performed, the type and description of the building or property appraised, the approaches to value utilized in the appraisal, the actual number of hours expended on the appraisal, name of client, and other information determined to be appropriate by the Board;]

[(B) requesting copies of appraisals and all supporting documentation, including the workfiles; and]

(B) [(C)] engaging in other investigative research determined to be appropriate by the Board.

(2) If the Board requests documentation from an applicant to verify experience claimed by an applicant, the applicant has 60 days to provide the requested documentation to the Board.

(3) [(4)] Failure to comply with a request for documentation to verify experience [verification of experience], or submission of experience that is found not to comply with the requirements for experience credit, is a violation of these rules and may result in denial of a license application, and any disciplinary action up to and including revocation.

[(h) An applicant may be granted experience credit only for real property appraisals that:]

[(1) comply with the USPAP edition in effect at the time of the appraisal;]

[(2) are verifiable and supported by workfiles in which the applicant is identified as participating in the appraisal process;]

[(3) were performed when the applicant had legal authority; and]

[(4) comply with the acceptable categories of experience as per the AQB experience criteria and stated in subsection (e) 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 16, 2016.

TRD-201602363

Kristen Worman

General Counsel

Texas Appraiser Licensing and Certification Board

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 936-3652



## 22 TAC §153.16

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §153.16, License Reinstatement. As recommended by the Working Group for AQB Criminal History Check Criteria, the proposed amendments implement fingerprint-based criminal history checks for applicants who apply for license reinstatement.

The Legislature delegated authority to the Board to adopt rules requiring fingerprint-based criminal history checks. The Board appointed the Working Group in November 2015 to consider whether to implement fingerprint-based criminal history checks for appraisers to comply with criteria adopted by the Appraiser Qualifications Board (AQB). The Working Group recommends implementing fingerprint-based criminal history checks for applicants and current license holders. The proposed amendments implement this requirement for persons who apply to reinstate their license.

Kristen Worman, 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 proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments.

There is no significant anticipated 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 section as proposed is in effect the public benefits anticipated as a result of enforcing the section as proposed will be increased consumer protection and a requirement that is consistent with state and federal law.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to [general.counsel@talcb.texas.gov](mailto:general.counsel@talcb.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §§1103.151, 1103.152, and 1103.2031, which authorize TALCB to: adopt rules relating to certificates and licenses; prescribe qualifications for appraisers that are consistent with the qualifications established by the AQB; and require applicants and current license holders to submit fingerprints for the purpose of obtaining criminal history record information.

The statute affected by these amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

*§153.16. License Reinstatement.*

(a) This section applies only to a person who:

(1) previously held an appraiser license issued by the Board that has expired; and

(2) seeks to obtain the same level of appraiser license previously held by the person before its expiration.

(b) A person described in subsection (a) may apply to reinstate the person's former license by:

(1) submitting an application for reinstatement on a form approved by the Board;

(2) paying the applicable fee;

(3) satisfying the Board as to the person's honesty, trustworthiness and integrity; ~~and~~

(4) satisfying the experience requirements in this section; ~~and~~[-]

(5) satisfying the fingerprint and criminal history check requirements in §153.12 of this title.

(c) Applicants for reinstatement under this section must demonstrate completion of 14 hours of appraiser continuing education for each year since the last renewal of the person's previous license.

(d) Applicants for reinstatement must demonstrate that their appraisal experience complies with USPAP as follows:

(1) Persons who have work files/license expired less than 5 years. A person described in subsection (a) who has appraisal work files and whose previous license has been expired less than five years may apply to reinstate the person's previous license by submitting an experience log as follows:

(A) For reinstatement as a licensed residential appraiser, a minimum of 10 residential appraisal reports representing at least 200 hours of residential real estate appraisal experience.

(B) For reinstatement as a certified residential real estate appraiser, a minimum of 10 residential appraisal reports representing at least 250 hours of residential real estate appraisal experience.

(C) For reinstatement as a certified general appraiser, a minimum of 10 non-residential appraisal reports representing at least 300 hours of non-residential real estate appraisal experience.

(2) Persons who do not have work files/license expired more than 5 years.

(A) A person described in subsection (a) who does not have appraisal work files or whose previous license has been expired for more than five years may apply for a license as an appraiser trainee for the purpose of acquiring the appraisal experience required under this subsection.

(B) An appraiser trainee licensed under this section may apply for reinstatement at the same level of appraiser license that the applicant previously held, after the applicant completes the required number of appraisal reports or hours of real estate appraisal experience as follows:

(i) For reinstatement as a licensed residential appraiser, the applicant must complete a minimum of 10 residential appraisal reports or 200 hours of residential real estate appraisal experience, whichever is more.

(ii) For reinstatement as a certified residential appraiser, the applicant must complete a minimum of 10 residential appraisal reports or 250 hours of residential real estate appraisal experience, whichever is more.

(iii) For reinstatement as a certified general appraiser, the applicant must complete a minimum of 10 non-residential appraisal reports or 300 hours of non-residential real estate appraisal experience, whichever is more.

(C) Upon completion of the required number of appraisal reports or hours of real estate appraisal experience, the applicant must submit an experience log.

(e) Consistent with §153.15, the Board will evaluate each applicant's real estate appraisal experience for compliance with USPAP based on the submitted experience log.

(f) For those persons described in subsection (a) the Board may waive the following requirements:

(1) Proof of qualifying education;

(2) College education or degree requirement; and

(3) Examination.

(g) Consistent with this chapter, upon review of the applicant's real estate appraisal experience, the Board may:

(1) Reinstatement the applicant's previous appraiser license;

(2) Reinstatement the applicant's previous appraiser license, contingent upon completion of additional education, experience or mentorship; or

(3) Deny the application.

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

Filed with the Office of the Secretary of State on May 16, 2016.  
TRD-201602364



## 22 TAC §153.17

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §153.17, Renewal or Extension of License. As recommended by the Working Group for AQB Criminal History Check Criteria, the proposed amendments implement fingerprint-based criminal history checks for license holders when renewing their license.

The Legislature delegated authority to the Board to adopt rules requiring fingerprint-based criminal history checks. The Board appointed the Working Group in November 2015 to consider whether to implement fingerprint-based criminal history checks for appraisers to comply with criteria adopted by the Appraiser Qualifications Board (AQB). The Working Group recommends implementing fingerprint-based criminal history checks for applicants and current license holders. The proposed amendments implement this requirement for current license holders who renew their license.

Kristen Worman, 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 proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments. There is no significant anticipated 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 section as proposed is in effect the public benefits anticipated as a result of enforcing the section as proposed will be increased consumer protection and a requirement that is consistent with state and federal law.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to [general.counsel@talcb.texas.gov](mailto:general.counsel@talcb.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §§1103.151, 1103.152, and 1103.2031, which authorize TALCB to: adopt rules relating to certificates and licenses; prescribe qualifications for appraisers that are consistent with the qualifications established by the AQB; and require applicants and current license holders to submit fingerprints for the purpose of obtaining criminal history record information.

The statute affected by these amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

### §153.17. *Renewal or Extension of License.*

#### (a) General Provisions.

(1) The Board will send a renewal notice to the license holder at least 90 days prior to the expiration of the license. It is the responsibility of the license holder to apply for renewal in accordance with this chapter, and failure to receive a renewal notice from the Board

does not relieve the license holder of the responsibility to timely apply for renewal.

(2) A license holder renews the license by timely filing an application for renewal, paying the appropriate fees to the Board, and satisfying all applicable education, experience, fingerprint and criminal history check [and experience] requirements.

(3) An application for renewal or extension received by the Board is timely and acceptable for processing if it is:

- (A) complete;
- (B) accompanied with payment of proper fees; and

(C) postmarked by the U.S. Postal Service, accepted by an overnight delivery service, or accepted by the Board's online processing system on or before the date of expiration.

(b) Certified General, Certified Residential and Licensed Residential Appraisers.

~~[(1) A license holder may renew the license by timely filing an application for renewal, paying the appropriate fees to the Board and, unless renewing on inactive status, satisfying ACE requirements.]~~

(1) ~~[(2)]~~ In order to renew on active status, the license holder must complete the ACE report form approved by the Board and, within 20 days of filing the renewal, submit course completion certificates for each course that was not already submitted by the provider and reflected in the license holder's electronic license record.

(A) The Board may request additional verification of ACE submitted in connection with a renewal. If requested, such documentation must be provided within 20 days after the date of request.

(B) Knowingly or intentionally furnishing false or misleading ACE information in connection with a renewal is grounds for disciplinary action up to and including license revocation.

(2) ~~[(3)]~~ The Board may grant, at the time it issues a license renewal, an extension of time of up to 60 days after the expiration date of the previous license to complete ACE required to renew a license, subject to the following:

(A) The license holder must:

- (i) timely submit the completed renewal form with the appropriate renewal fees;
- (ii) complete an extension request form; and
- (iii) pay an extension fee of \$200.

(B) ACE courses completed during the 60-day extension period apply only to the current renewal and may not be applied to any subsequent renewal of the license.

(C) A person whose license was renewed with a 60-day ACE extension:

(i) will not perform appraisals in a federally related transaction until verification is received by the Board that the ACE requirements have been met;

(ii) may continue to perform appraisals in non-federally related transactions under the renewed license;

(iii) must, within 60 days after the date of expiration of the previous license, complete the approved ACE report form and submit course completion certificates for each course that was not already submitted by the provider and reflected in the applicant's electronic license record; and

(iv) will have the renewed license placed in inactive status if, within 60 days of the previous expiration date, ACE is not completed and reported in the manner indicated in paragraph (2) of this subsection. The renewed license will remain on inactive status until satisfactory evidence of meeting the ACE requirements has been received by the Board and the fee to return to active status required by §153.5 of this title (relating to Fees) has been paid.

(c) Appraiser Trainees.

(1) Appraiser trainees must maintain an appraisal log and appraisal experience affidavits on forms approved by the Board, for the license period being renewed. It is the responsibility of both the appraiser trainee and the supervisory appraiser to ensure the appraisal log is accurate, complete and signed by both parties at least quarterly or upon change in supervisory appraiser. The appraiser trainee will promptly provide copies of the experience logs and affidavits to the Board upon request.

(2) Appraiser trainees may not obtain an extension of time to complete required continuing education.

(d) Renewal of Licenses for Persons on Active Duty. A person who is on active duty in the United States armed forces may renew an expired license without being subject to any increase in fee imposed in his or her absence, or any additional education or experience requirements if the person:

(1) did not provide appraisal services while on active duty;

(2) provides a copy of official orders or other documentation acceptable to the Board showing the person was on active duty during the last renewal period;

(3) applies for the renewal within two years after the person's active duty ends;

(4) pays the renewal application fees in effect when the previous license expired; and

(5) completes ACE requirements that would have been imposed for a timely renewal.

(e) Late Renewal. If an application is filed within six months of the expiration of a previous license, the applicant shall also provide satisfactory evidence of completion of any continuing education that would have been required for a timely renewal of the previous license.

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

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602365

Kristen Worman

General Counsel

Texas Appraiser Licensing and Certification Board

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 936-3652



## 22 TAC §153.23

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §153.23, Inactive Status. As recommended by the Working Group for AQB Criminal History Check Criteria, the proposed amendments implement fingerprint-based criminal history checks for license holders with

an inactive license and license holders who seek to renew an expired license on inactive status.

The Legislature delegated authority to the Board to adopt rules requiring fingerprint-based criminal history checks. The Board appointed the Working Group in November 2015 to consider whether to implement fingerprint-based criminal history checks for appraisers to comply with criteria adopted by the Appraiser Qualifications Board (AQB). The Working Group recommends implementing fingerprint-based criminal history checks for applicants and current license holders. The proposed amendments implement this requirement for license holders whose license is already on inactive status and for license holders who seek to renew an expired license on inactive status.

Kristen Worman, 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 proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments. There is no significant anticipated 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 section as proposed is in effect the public benefits anticipated as a result of enforcing the section as proposed will be increased consumer protection and a requirement that is consistent with state and federal law.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to [general.counsel@talcb.texas.gov](mailto:general.counsel@talcb.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §§1103.151, 1103.152, and 1103.2031, which authorize TALCB to: adopt rules relating to certificates and licenses; prescribe qualifications for appraisers that are consistent with the qualifications established by the AQB; and require applicants and current license holders to submit fingerprints for the purpose of obtaining criminal history record information.

The statute affected by these amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

### §153.23. Inactive Status.

(a) A license holder may request to be placed on inactive status by filing a request for inactive status on a form approved by the Board and paying the required fee.

(b) A license holder whose license has expired may renew on inactive status within six months after the license expiration date by:

(1) filing an application for renewal on a form approved by the Board;

(2) indicating on the application that the license holder wishes to renew on inactive status; ~~and~~

(3) paying the required late renewal fees; ~~and~~[-]

(4) satisfying the fingerprint and criminal history check requirements in §153.12 of this title.

(c) A license holder on inactive status:

(1) shall not appraise real property, engage in appraisal practice, or perform any activity for which a license is required; and

(2) must file the proper renewal application and pay all required fees, except for the national registry fee, in order to renew the license.

(d) To return to active status, a license holder who has been placed on inactive status must:

(1) request to return to active status on a form approved by the Board;

(2) pay the required fee;

(3) satisfy all ACE requirements that were not completed while on inactive status, except that the license holder is not required to complete the most current USPAP update course more than once in order to return to active status and shall substitute other approved courses to meet the required number of ACE hours; and[-]

(4) satisfy the fingerprint and criminal history check requirements in §153.12 of this title.

(e) A license holder who has been on inactive status may not resume practice until the Board issues an active license.

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

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602366

Kristen Worman

General Counsel

Texas Appraiser Licensing and Certification Board

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 936-3652



## 22 TAC §153.25

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §153.25, Temporary Out-of-State Appraiser License. The proposed amendments clarify the requirements an applicant must satisfy when applying for a temporary out-of-state license.

The Legislature delegated authority to the Board to adopt rules requiring fingerprint-based criminal history checks. The Board appointed the Working Group in November 2015 to consider whether to implement fingerprint-based criminal history checks for appraisers to comply with criteria adopted by the Appraiser Qualifications Board (AQB).

The Working Group recognizes that applicants who apply for a temporary out-of-state license are appraisers who are already licensed in another jurisdiction with a regulatory program that is approved by the Appraisal Subcommittee (ASC). Because those regulatory programs are also subject to the same criminal history check criteria adopted by the Appraiser Qualifications Board (AQB), those jurisdictions also require applicants to undergo criminal history checks. The Working Group also recognizes that federal law prohibits the Board from imposing burdensome requirements for temporary practice and requires the Board to issue a temporary out-of-state license within five business days of receipt of a completed application. Accordingly, because applicants for a temporary out-of-state license are subject to criminal history checks in their original licensing jurisdiction

and because subjecting applicants for a temporary out-of-state license would impose an unreasonable and burdensome delay in the Board's ability to process such applications, the Working Group does not recommend implementing fingerprint-based criminal history checks for these applicants.

The proposed amendments make clear that applicants for a temporary out-of-state registration must submit the Board-approved application form, pay the appropriate fee, and provide all supporting documentation or information requested by the Board; however, these applicants are not subject to the fingerprint requirements in §153.12.

Kristen Worman, 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 proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments. There is no significant anticipated 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 section as proposed is in effect the public benefits anticipated as a result of enforcing the section as proposed will be clarity for applicants who apply for a temporary out-of-state license and a requirement that is consistent with state and federal law.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to [general.counsel@talcb.texas.gov](mailto:general.counsel@talcb.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §§1103.151, 1103.152, and 1103.2031, which authorize TALCB to: adopt rules relating to certificates and licenses; prescribe qualifications for appraisers that are consistent with the qualifications established by the AQB; and require applicants and current license holders to submit fingerprints for the purpose of obtaining criminal history record information.

The statute affected by these amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

### §153.25. *Temporary Out-of-State Appraiser License*

(a) A person licensed as an appraiser by another state, commonwealth, or territory may register with the Board so as to qualify to appraise real property in this state without holding a license issued under the Act if:

(1) the state, commonwealth or territory licensing program under which the person holds a license has not been disapproved by the ASC; and

(2) the appraiser's business in this state is of a temporary nature not to exceed six months.

(b) A person wishing to be registered under this section must:

(1) submit an [a completed] application for registration on a form approved by the Board;[-]

(2) pay the required fees; and

(3) provide all supporting documentation or information requested by the Board in connection with the application for registration.

(c) A person registered under this section must submit an irrevocable consent to service of process in this state on a form approved by the Board.

(d) A person registered under this section may apply for a 90 day extension to the original expiration date of the temporary registration, provided the person:

(1) is continuing the same appraisal assignment listed on the original application for temporary out-of-state appraiser registration; and

(2) requests an extension on a form approved by the Board, received by the Board or postmarked prior to the expiration of the current temporary registration.

(e) A person who registers under this section is not required to comply with the fingerprint requirements in §153.12 of this title.

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

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602367

Kristen Worman

General Counsel

Texas Appraiser Licensing and Certification Board

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 936-3652



## 22 TAC §153.27

The Texas Appraiser Licensing and Certification Board (TALCB or Board) proposes amendments to §153.27, License by Reciprocity. As recommended by the Working Group for AQB Criminal History Check Criteria, the proposed amendments implement fingerprint-based criminal history checks for applicants who apply for or renew a license by reciprocity.

The Legislature delegated authority to the Board to adopt rules requiring fingerprint-based criminal history checks. The Board appointed the Working Group in November 2015 to consider whether to implement fingerprint-based criminal history checks for appraisers to comply with criteria adopted by the Appraiser Qualifications Board (AQB). The Working Group recommends implementing fingerprint-based criminal history checks for applicants and current license holders. The proposed amendments implement this requirement for persons who apply for or renew a license by reciprocity. A person applying for or renewing a license by reciprocity is subject to the same requirements for other applicants who apply for or renew a license under §153.9 and §153.17, including the requirement for fingerprint-based criminal history checks.

Kristen Worman, 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 proposed amendments. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the proposed amendments. There is no significant anticipated 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 section as proposed is in effect the public bene-

fits anticipated as a result of enforcing the section as proposed will be increased consumer protection and a requirement that is consistent with state and federal law.

Comments on the proposal may be submitted to Kristen Worman, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or emailed to [general.counsel@talcb.texas.gov](mailto:general.counsel@talcb.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code §§1103.151, 1103.152, and 1103.2031, which authorize TALCB to: adopt rules relating to certificates and licenses; prescribe qualifications for appraisers that are consistent with the qualifications established by the AQB; and require applicants and current license holders to submit fingerprints for the purpose of obtaining criminal history record information.

The statute affected by these amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

*§153.27. License by Reciprocity.*

(a) A person who is licensed as an appraiser under the laws of a state whose appraiser program has not been disapproved by the ASC may apply for a Texas license at that same level by completing and submitting to the Board the application for [e] license by reciprocity and paying the appropriate fee to the Board.

(b) The Board shall verify that the applicant's license is valid and in good standing by checking the National Appraiser Registry. A reciprocal license may not be issued without the verification required by this subsection.

(c) Renewal of a license granted through reciprocity shall be in the same manner, and with the same requirements, term, and fees, as for the same classification of license as provided in §153.17 of this title [~~relating to Renewal or Extension of License~~].

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

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602368

Kristen Worman

General Counsel

Texas Appraiser Licensing and Certification Board

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 936-3652



## PART 11. TEXAS BOARD OF NURSING

### CHAPTER 211. GENERAL PROVISIONS

#### 22 TAC §211.10

Introduction. The Texas Board of Nursing (Board) proposes new §211.10, relating to Training and Education Reimbursement. The section is proposed under the Occupations Code §301.151 and is necessary to comply with Texas Government Code, Chapter 656. The proposed rule prescribes requirements for the reimbursement of training or education expenses for Board employees, including: eligibility requirements, employee responsibility, the obligations assumed by employees upon

receiving those funds, and the requirement that the Executive Director approve education and training reimbursement.

**Background.** Texas Government Code §656.047 authorizes a state agency to spend public funds as appropriate to pay the salary, tuition and other fees, travel and living expenses, training stipend, expense of training materials, and other necessary expenses of an instructor, student, or other participant in a training or education program. Pursuant to Texas Government Code §656.048, a state agency is required to adopt rules relating to the eligibility of the agency's employees for training and education supported by the agency, as well as the obligations assumed by employees upon receiving those funds.

House Bill (HB) 3337, passed by the 84th Texas Legislature, Regular Session (2015), amended Texas Government Code, Chapter 656, by establishing additional requirements for the reimbursement of training or education expenses, including a request that the agency executive director authorize tuition reimbursement before any payments may be made.

At the Board's April 2016 regular Board meeting, the Board approved a proposed rule to address these statutory requirements.

**Overview.** For an agency employee to be reimbursed for the expenses associated with training or education, the proposed rule requires that the training or education be related to the duties, or prospective duties of the employee. The proposed rule permits for reimbursement for training or education that is undertaken by an employee at the request of the agency. If the training or education is not undertaken at the request of the agency, then the employee must meet the all of the requirements in the rule in order to be eligible for reimbursement. First, the employee must have been employed full-time at the Board for a period of six (6) months. Second, the employee must be currently employed full-time at the Board. Third, the employee must have a performance evaluation of 3.0 or above, and must have no current employment disciplinary record. Further, there are minimum performance expectations for the training or education. If the course is completed at an accredited institution of higher education, there are minimum grade requirements that apply. If the course is completed at an accredited institution of higher education, the employee must achieve a grade of "C" or above for undergraduate work or a grade of "B" or above for graduate work to be eligible for reimbursement. If the course is a pass/fail activity, then the employee must pass the course. If the employee does not meet these expectations, then the employee will not be reimbursed for the training or education.

The proposed rule also addresses obligations that are undertaken by an employee who chooses to participate in an education or training program. The employee must remain employed with the agency for a period of one (1) year following the education or training. If the employee does not meet this obligation, the employee will be required to refund the expenses incurred by the agency.

The proposed rule also limits the maximum reimbursement amount to one thousand (\$1,000) per fiscal year, which is contingent upon the availability of agency resources.

Finally, the proposed rule requires that the Executive Director authorize under the rule, which meets the requirements of Texas Government Code §656.048(b).

**Fiscal Note.** Katherine Thomas, Executive Director, has determined that for each year of the first five (5) years the proposed section is in effect, there will be no additional fiscal implications

for state or local government as a result of implementing the proposal.

**Public Benefit/Cost Note.** Ms. Thomas has also determined that for each year of the first five years the proposed section is in effect, the anticipated public benefit will be the adoption of clear, concise requirements that meet the requirements of Texas Government Code, Chapter 656, and benefit the Board and its participating employees by: (1) preparing for technological, nursing, and legal developments; (2) increasing work capabilities; (3) increasing the number of qualified employees in areas for which the Board has difficulty in recruiting and retaining employees; and (4) increasing the competence of agency employees. The Board is charged with protecting the health, safety, and welfare of the people of Texas. The Board seeks to fulfill this obligation, in part, by promoting the competency of the Staff of the Board of Nursing. The competence of the staff of the Board of Nursing is improved by encouraging employees to pursue education and training which assists them in performing their duties.

There are no anticipated costs of compliance with the proposal. The proposal does not impose any direct requirement upon any Board regulated entity.

**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 section will not have an adverse economic effect on any individual, Board regulated entity, or other entity required to comply with the proposed section 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 27, 2016, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

**Statutory Authority.** This section is proposed under Texas Occupations Code §301.151 and Texas Government Code §656.048.

Section 301.151 of the Texas Occupations Code 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.

Section 656.048 of the Texas Government Code requires a state agency to adopt rules relating to training and education. The rule must address the eligibility of the agency's administrators and employees for training and education supported by the agency and the obligations assumed by the administrators and employees on receiving the training and education. The rule also must

include a requirement that before an administrator or employee of the agency may be reimbursed, the executive head of the agency must authorize the tuition reimbursement payment.

Cross Reference to Statute. The following statutes are affected by this proposal: Texas Occupations Code §301.151 and Texas Government Code §656.048.

§211.10. Training and Education Reimbursement.

(a) The Board may use public funds to reimburse for the training and education for its employees. The training or education must be related to the duties or the prospective duties of the employee.

(b) An employee may be eligible for education and training reimbursement if the employee is taking the course at the request of the agency or:

(1) has been employed full-time at the Board for a period in excess of six (6) months;

(2) is currently employed full-time;

(3) has a performance evaluation of 3.0 or above; and

(4) does not have a current employment disciplinary record.

(c) If the course is completed at an accredited institution of higher education, the employee must achieve a grade of "C" or above for undergraduate work or a grade of "B" or above for graduate work to be eligible for reimbursement.

(d) If the education or training is a pass/fail activity, the employee must pass the course to be eligible for reimbursement.

(e) Permission to participate in any education or training program must be approved by the Executive Director and may be withdrawn if the Executive Director determines that participation would negatively impact the employee's job duties or performance or that participation is no longer in the agency's best interest.

(f) If the employee does not remain employed at the agency for one (1) year following completion of the course or training, the employee will be required to refund all expenses reimbursed by the Board.

(g) Before an employee of the agency may be reimbursed, the Executive Director must authorize the reimbursement.

(h) For purposes of this rule, reimbursement only includes tuition, building fees, lab fees and student service fees. Tuition will be reimbursed up to half of the cost with a maximum of \$1,000 per fiscal year contingent upon availability of agency resources.

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 16, 2016.

TRD-201602356

James W. Johnston

General Counsel

Texas Board of Nursing

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-6821



**PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY**

**CHAPTER 501. RULES OF PROFESSIONAL CONDUCT**

**SUBCHAPTER A. GENERAL PROVISIONS**

**22 TAC §501.51**

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.51, concerning Preamble and General Principles.

**Background, Justification and Summary**

The amendment to §501.51 deletes the word "insure" and replaces it with "ensure" and moves the word "adequately" to precede the word "serving" in section (c).

**Fiscal Note**

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

**Public Benefit Cost Note**

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be a grammatically correct rule.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

**Small Business and Micro-Business Impact Analysis**

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

**Public Comment**

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

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

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151, which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.51. *Preamble and General Principles.*

(a) These rules of professional conduct were promulgated under the Public Accountancy Act, which directs the Texas State Board of Public Accountancy to promulgate rules of professional conduct "in order to establish and maintain high standards of competence and integrity in the practice of public accountancy and to ensure [~~insure~~] that the conduct and competitive practices of licensees serve the purposes of the Act and the best interest of the public."

(b) The services usually and customarily performed by those in the public, industry, or government practice of accountancy involve a high degree of skill, education, trust, and experience which are professional in scope and nature. The use of professional designations carries an implication of possession of the competence associated with a profession. The public, in general, and the business community, in particular, rely on this professional competence by placing confidence in reports and other services of accountants. The public's reliance, in turn, imposes obligations on persons utilizing professional designations to their clients, employers and to the public in general. These obligations include maintaining independence in fact and in appearance, while in the client practice of public accountancy, continuously improving professional skills, observing GAAP and GAAS, when required, promoting sound and informative financial reporting, holding the affairs of clients and employers in confidence, upholding the standards of the public accountancy profession, and maintaining high standards of personal and professional conduct in all matters.

(c) The board has an underlying duty to the public to ensure [~~insure~~] that these obligations are met in order to achieve and maintain a vigorous profession capable of attracting the bright minds essential to adequately serving [~~adequately~~] the public interest.

(d) These rules recognize the First Amendment rights of the general public as well as licensees and do not restrict the availability of accounting services. However, public accountancy, like other professional services, cannot be commercially exploited without the public being harmed. While information as to the availability of accounting services and qualifications of licensees is desirable, such information should not be transmitted to the public in a misleading fashion.

(e) The rules are intended to have application to all kinds of professional services performed in the practice of public accountancy, including services relating to:

- (1) accounting, auditing and other assurance services,
- (2) taxation,
- (3) financial advisory services,
- (4) litigation support,
- (5) internal auditing,
- (6) forensic accounting, and
- (7) management advice and consultation.

(f) Finally, these rules also recognize the duty of certified public accountants to refrain from committing acts discreditable to the profession. These acts, whether or not related to the accountant's practice, impact negatively upon the public's trust in the profession.

(g) In the interpretation and enforcement of these rules, the board may consider relevant interpretations, rulings, and opinions issued by the boards of other jurisdictions and appropriate committees of professional organizations, but will not be bound thereby.

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 13, 2016.

TRD-201602330

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842



## 22 TAC §501.52

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.52, concerning Definitions.

### Background, Justification and Summary

The amendment to §501.52 revises a paragraph reference, in paragraph (17) and revises the definition of Good Standing in paragraph (13) to include compliance with Peer Review.

### Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

### Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to put everyone on notice that compliance with peer review is an element of good "standing" and to have the correct rule referenced.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

### Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

### Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have

an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

#### Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

#### §501.52. Definitions.

The following words and terms, when used in title 22, part 22 of the Texas Administrative Code relating to the Texas State Board of Public Accountancy, shall have the following meanings, unless the context clearly indicates otherwise. The masculine shall be construed to include the feminine or neuter and vice versa, and the singular shall be construed to include the plural and vice versa.

(1) "Act" means the Public Accountancy Act, Chapter 901, Occupations Code;

(2) "Advertisement" means a message which is transmitted to persons by, or at the direction of, a person and which has reference to the availability of the person to perform Professional Accounting Services;

(3) "Affiliated entity" means an entity controlling or being controlled by or under common control with another entity, directly or indirectly, through one or more intermediaries;

(4) "Attest Service" means:

(A) an audit or other engagement required by the board to be performed in accordance with the auditing standards adopted by the AICPA, PCAOB, or another national or international accountancy organization recognized by the board;

(B) a review or compilation required by the board to be performed in accordance with standards for accounting and review services adopted by the AICPA or another national or international accountancy organization recognized by the board;

(C) an engagement required by the board to be performed in accordance with standards for attestation engagements adopted by the AICPA or another national or international accountancy organization recognized by the board; or

(D) any other assurance service required by the board to be performed in accordance with professional standards adopted by the AICPA or another national or international accountancy organization recognized by the board;

(5) "Board" means the Texas State Board of Public Accountancy;

(6) "Charitable Organization" means an organization which has been granted tax-exempt status under the Internal Revenue Code of 1986, §501(c), as amended;

(7) "Client" means a party who enters into an agreement with a license holder or a license holder's employer to receive a professional accounting service or professional accounting work;

(8) "Client Practice of Public Accountancy" is the offer to perform or the performance by a person for a client or a potential client of professional accounting services or professional accounting work, and also includes:

(A) the advice or recommendations in connection with the sale or offer for sale of products (including the design and implementation of computer software), when the advice or recommendations routinely require or imply the possession of accounting or auditing skills or expert knowledge in auditing or accounting; and

(B) the performance of litigation support services;

(9) "Commission" means compensation for recommending or referring any product or service to be supplied by another party;

(10) "Contingent fee" means a fee for any service where no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. However, a person's non-Contingent fees may vary depending, for example, on the complexity of the services rendered. Fees are not contingent if they are fixed by courts or governmental entities acting in a judicial or regulatory capacity, or in tax matters if determined based on the results of judicial proceedings or the findings of governmental agencies acting in a judicial or regulatory capacity, or if there is a reasonable expectation of substantive review by a taxing authority;

(11) "Financial Statements" means a presentation of financial data, including accompanying notes, derived from accounting records and intended to communicate an entity's economic resources or obligations at a point in time, or the changes therein for a period of time, in accordance with generally accepted accounting principles or other comprehensive basis of accounting. Incidental financial data to support recommendations to a client or in documents for which the reporting is governed by Statements or Standards for Attestation Engagements and tax returns and supporting schedules do not constitute financial statements for the purposes of this definition;

(12) "Firm" means a sole proprietorship, partnership, limited liability partnership, limited liability company, corporation or other legally recognized business entity engaged in the practice of public accountancy;

(13) "Good standing" means compliance by a licensee with the board's licensing rules, including the mandatory continuing education requirements, Peer Review, and payment of the annual license fee, and any penalties and other costs attached thereto. In the case of board-imposed disciplinary or administrative sanctions, the person must be in compliance with all the provisions of the board order to be considered in good standing;

(14) "Licensee" means the holder of a license issued by the board to a person pursuant to the Act, or pursuant to provisions of a prior Act;

(15) "Out of state practitioner and out of state firm" means a person licensed in another jurisdiction practicing in Texas pursuant to a practice privilege as provided for in §901.461 and §901.462 of the Act (relating to Practice by Certain Out-of-State Firms and Practice by Out-of-State Practitioner with Substantially Equivalent Qualifications);

(16) "Peer review", "Quality Review" or "Compliance Assurance" means the study, appraisal, or review of the professional accounting work of a public accountancy firm that performs attest services by a certificate holder who is not affiliated with the firm;

(17) "Person" means an individual, sole proprietorship, partnership, limited liability partnership, limited liability company, corporation or other legally recognized business entity that provides or offers to provide professional accounting services or professional accounting work as defined in paragraph (22) [(21)] of this section;

(18) "Principal office" means the location specified by the client as the address to which a service described in §517.1(a)(2) of this title (relating to Practice by Certain Out of State Firms) is directed and is synonymous with Home Office where it appears in the Act;

(19) "Practice unit" means an office of a firm required to be licensed with the board for the purpose of the client practice of public accountancy;

(20) "Practice privilege" means the privilege for an out-of-state person to provide certain Professional Accounting Services or Professional Accounting Work in Texas to the extent permitted under Chapter 517 of this title (relating to Practice by Certain Out of State Firms and Individuals);

(21) "Preparation engagement" means the preparation of financial statements that do not include an audit, review or a compilation report on those financial statements in accordance with Standards for Accounting and Review Services adopted by the AICPA;

(22) "Professional Accounting Services" or "professional accounting work" means services or work that requires the specialized knowledge or skills associated with certified public accountants, including but not limited to:

- (A) issuing reports on financial statement(s);
- (B) preparation engagements pursuant to SSARS;
- (C) providing management or financial advisory or consulting services;
- (D) preparing tax returns;
- (E) providing advice in tax matters;
- (F) providing forensic accounting services; and
- (G) providing internal auditing services.

(23) "Report" means an opinion, report, or other document, prepared in connection with an attest service that states or implies assurance as to the reliability of financial statement(s); and includes or is accompanied by a statement or implication that the person issuing the opinion, report, or other document has special knowledge or competence in accounting or auditing. A statement or implication of assurance as to the reliability of a financial statement or as to the special knowledge or competence of the person issuing the opinion, report, or other document includes any form of language that is conventionally understood to constitute such a statement or implication. A statement or implication of special knowledge or competence in accounting or auditing may arise from the use by the issuer of the opinion, report, or other document of a name or title indicating that the person is an accountant or auditor; or the language of the opinion, report, or other document itself.

(24) Interpretive Comment: The practice of public accountancy is defined in §901.003 of the Act (relating to the Practice of Public Accountancy).

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 13, 2016.

TRD-201602331

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842



## SUBCHAPTER B. PROFESSIONAL STANDARDS

### 22 TAC §501.60

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.60, concerning Auditing Standards.

#### Background, Justification and Summary

The amendment to §501.60 reformats the rule to recognize several of the sources of GAAS.

#### Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

#### Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be a more easily understood rule.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

#### Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

#### Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health,

safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

#### Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

#### §501.60. Auditing Standards.

A person shall not permit his name to be associated with financial statements in such a manner as to imply that he is acting as an auditor with respect to such financial statements, unless he has complied with GAAS. Each of the following are considered to be sources of GAAS: [SAS issued by the AICPA, auditing standards included in Standards for Audit of Government Organizations, Programs, Activities and Functions issued by the U.S. GAO, auditing and related professional practice standards to be used by registered public accounting firms issued by the PCAOB, and other pronouncements having similar generally recognized authority, are considered to be interpretations of GAAS.]

(1) SAS issued by the AICPA;

(2) auditing standards included in Standards for Audit of Government Organizations, Programs, Activities and Functions issued by the U.S. GAO;

(3) auditing and related professional practice standards to be used by registered public accounting firms issued by the PCAOB; as well as,

(4) other pronouncements having similar generally recognized authority.

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 13, 2016.

TRD-201602332

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842



## 22 TAC §501.62

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.62, concerning Other Professional Standards.

#### Background, Justification and Summary

The amendment to §501.62 adds additional professional standards which must be following in the performance of accounting services.

#### Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no

estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

#### Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be notice that CPAs may be required to follow the International Financial Reporting Standards.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

#### Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

#### Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

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

#### Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151, which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

#### §501.62. Other Professional Standards.

A person in the performance of consulting services, accounting and review services, any other attest service, financial advisory services, or tax services shall conform to the professional standards applicable to such services. For purposes of this section, such professional standards are considered to be interpreted by:

(1) AICPA issued standards, including but not limited to:

(A) Statements on Standards on Consulting Services (SSCS);

(B) Statements on Standards for Accounting and Review Services (SSARS);

(C) Statements on Standards for Attestation Engagements (SSAE);

(D) Statements on Standards for Tax Services (SSTS);

(E) Statements on Standards for Financial Planning Services (SSFPS); or

(F) Statements on Standards for Valuation Services (SSVS).

(2) pronouncements by other professional entities having similar national or international authority recognized by the board including but not limited to the International Financial Reporting Standards (IFRS) promulgated by the International Accounting Standards Board (IASB).

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 13, 2016.

TRD-201602333

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842



## SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

### 22 TAC §501.75

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.75, concerning Confidential Client Communications.

#### Background, Justification and Summary

The amendment to §501.75 recognizes Peer Review communications and the review of the financials related to the prospective purchase, sale or merger of a CPA firm will not be subject to confidentiality.

#### Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

#### Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be the ability to review the financials of a CPA firm prior to its purchase or merger.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

## Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

## Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

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

## Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

### §501.75. Confidential Client Communications.

(a) Except by permission of the client or the authorized representatives of the client, a person or any partner, member, officer, shareholder, or employee of a person shall not voluntarily disclose information communicated to him by the client relating to, and in connection with, professional accounting services or professional accounting work rendered to the client by the person. Such information shall be deemed confidential. The following includes, but is not limited to, examples of authorized representatives:

(1) the authorized representative of a successor entity becomes the authorized representative of the predecessor entity when the predecessor entity ceases to exist and no one exists to give permission on behalf of the predecessor entity; and

(2) an executor/administrator of the estate of a deceased client possessing an order signed by a judge is an authorized representative of the estate.

(b) The provisions contained in subsection (a) of this section do not prohibit the disclosure of information required to be disclosed by:

(1) the professional standards for reporting on the examination of a financial statement and identified in Chapter 501, Subchapter B of this title (relating to Professional Standards);

(2) applicable federal laws, federal government regulations, including requirements of the PCAOB;

(3) a summons under the provisions of the Internal Revenue Code of 1986 and its subsequent amendments, a summons under the provisions of the Securities Act of 1933 (15 U.S.C. Section 77a et seq.) and its subsequent amendments, a summons under the provisions of the Securities Exchange Act of 1934 (15 U.S.C. Section 78a et seq.) and its subsequent amendments, or under a court order signed by a judge if the summons or the court order:

- (A) is addressed to the license holder;
- (B) mentions the client by name; and
- (C) requests specific information concerning the client.

(4) the public accounting profession in reporting on the examination of financial statements;

- (5) a congressional or grand jury subpoena;
- (6) investigations or proceedings conducted by the Board;
- (7) ethical investigations conducted by a private professional organization of certified public accountants; [ø]

(8) a peer review; or [in the course of peer reviews.]

(9) a review in conjunction with a prospective purchase, sale, or merger of all or part of a member's practice if both firms enter into a written nondisclosure agreement with regard to all client information shared between the firms.

(c) The provisions contained in subsection (a) of this section do not prohibit the disclosure of information already made public, including information disclosed to others not having a confidential communications relationship with the client or authorized representative of the client.

(d) Interpretive comment. The definition of a successor entity does not include the purchaser of all assets of an entity.

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

Filed with the Office of the Secretary of State on May 13, 2016.

TRD-201602334

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842



## 22 TAC §501.76

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.76, concerning Records and Work Papers.

### Background, Justification and Summary

The amendment to §501.76 clarifies what constitutes Records and Work Papers and other minor revisions.

### Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

### Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to clarify what records must be returned to a client.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

### Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

### Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

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

### Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.76. *Records and Work Papers.*

#### (a) Records.

(1) A person shall return original client records to a client or former client within a reasonable time (promptly, not to exceed 10 business days) after the client or former client has made a request for those records. Original client [Client] records are those records provided to the person by the client or former client in order for the person to provide professional accounting services to the client or former client. Original client [Client] records also include those documents obtained by the person on behalf of the client or former client in order for the person to provide professional accounting services to the client or former client[- Client records include only the original client documents] and do not include the electronic and hard copies of internal work papers [that the firm produces]. The person shall provide these records to the client or former client, regardless of the status of

the client's or former client's account and cannot charge a fee to provide such records. Such records shall be returned to the client or former client in the same format, to the extent possible, that they were provided to the person by the client or former client. The person may make copies of such records and retain those copies.

(2) A person's work papers, to the extent that such work papers include records which would ordinarily constitute part of the client's or former client's books and records and are not otherwise available to the client or former client, shall also be furnished to the client within a reasonable time (promptly, not to exceed 20 business days) after the client has made a request for those records. The person can charge a reasonable fee for providing such work papers. Such work papers shall be in a format that the client or former client can reasonably expect to use for the purpose of accessing such work papers. Work papers which constitute client records include, but are not limited to:

(A) documents in lieu of books of original entry such as listings and distributions of cash receipts or cash disbursements;

(B) documents in lieu of general ledger or subsidiary ledgers, such as accounts receivable, job cost and equipment ledgers, or similar depreciation records;

(C) all adjusting and closing journal entries and supporting details when the supporting details are not fully set forth in the explanation of the journal entry; and

(D) consolidating or combining journal entries and documents and supporting detail in arriving at final figures incorporated in an end product such as financial statements or tax returns.

(b) Work papers. Work papers, regardless of format, are those documents developed by the person incident to the performance of his engagement which do not constitute records that must be returned to the client in accordance with subsection (a) of this section. Work papers developed by a person during the course of a professional engagement as a basis for, and in support of, an accounting, audit, consulting, tax, or other professional report prepared by the person for a client, shall be and remain the property of the person who developed the work papers.

(c) For a reasonable charge, a person shall furnish to his client or former client, upon request from his client made within a reasonable time after original issuance of the document in question:

(1) a copy of the client's tax return; or

(2) a copy of any report or other document previously issued by the person to or for such client or former client provided that furnishing such reports to or for a client or former client would not cause the person to be in violation of the portions of §501.60 of this chapter (relating to Auditing Standards) concerning subsequent events.

(d) This rule imposes no obligation on the person who provides services to a business entity to provide documents to anyone involved with the entity except the authorized representative of the entity.

(e) Documentation or work documents required by professional standards for attest services shall be maintained in paper or electronic format by a person for a period of not less than five years from the date of any report issued in connection with the attest service, unless otherwise required by another regulatory body. Failure to maintain such documentation or work papers constitutes a violation of this section and may be deemed an admission that they do not comply with professional standards.

(f) Interpretive Comment: It is recommended that a person obtain a receipt or other written documentation of the delivery of records to a client.

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 13, 2016.

TRD-201602335

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842



## SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

### 22 TAC §501.94

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.94, concerning Mandatory Continuing Professional Education.

#### Background, Justification and Summary

The amendment to §501.94 corrects a rule reference.

#### Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

#### Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to have a correct rule reference so that the public can understand the applicable rule.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

#### Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

#### Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small busi-

nesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

#### Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

#### §501.94. *Mandatory Continuing Professional Education.*

Each certificate or registration holder shall comply with the mandatory CPE reporting and the mandatory CPE attendance requirements of Chapter 523 of this title (relating to Continuing Professional Education). Once an individual's license has been suspended for three consecutive years by the board for failing to complete the 120 hours of CPE required by §523.112 of this title (relating to Required [Mandatory] CPE Participation [Attendance]), the individual's certificate shall be subject to revocation and may not be reinstated for at least 12 months from the date of the revocation.

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 13, 2016.

TRD-201602336

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842



## CHAPTER 518. UNAUTHORIZED PRACTICE OF PUBLIC ACCOUNTANCY

### 22 TAC §518.3

The Texas State Board of Public Accountancy (Board) proposes an amendment to §518.3, concerning Violation of a Cease and Desist Order.

#### Background, Justification and Summary

The amendment to §518.3 corrects a rule reference.

#### Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

#### Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be a correct rule reference so the public can understand the applicable rule.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

#### Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

#### Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

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

#### Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

#### §518.3. *Violation of a Cease and Desist Order.*

(a) Whenever the board, through its executive director, determines that a person subject to a cease and desist order issued by the board has violated that order, the board, through its executive director, after notice and an opportunity for a hearing, may assess an administrative penalty, after consulting with the board's presiding officer, against the person in violation in accordance with the guidelines contained in §518.6 of this chapter (relating to Administrative Penalty Guidelines for the Unauthorized Practice of Public Accountancy) [~~§518.4 of this chapter (relating to Administrative Penalty Guidelines for Violations of Cease and Desist Orders)~~] and Subchapter L of the Act, as amended.

(b) The board staff acting through the executive director will offer the person found in violation of a cease and desist order an agreed consent order.

(1) The agreed consent order will act as the preliminary report as required by §901.553 of the Act (relating to Report and Notice

of Violation and Penalty), including findings of fact to support the administrative penalty as well as the amount of the penalty to be imposed.

(2) Board staff will advise the person found in violation of a cease and desist order that he has 20 days to either sign the agreed consent order or to request a hearing in writing, as required by §901.554 of the Act (relating to Penalty to be Paid or Hearing Requested).

(3) If the person found to be in violation of a cease and desist order signs the agreed consent order, then the agreed consent order will be presented to the board for its consideration. If the board ratifies the agreed consent order, then it will issue a board order.

(c) If the board, through its executive director, determines that a person subject to a cease and desist order issued by the board has violated that order, the board, through its executive director and after consulting with the board's presiding officer, may seek to enjoin the person in violation in state district court.

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 13, 2016.

TRD-201602337

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842



## 22 TAC §518.4

The Texas State Board of Public Accountancy (Board) proposes the repeal of §518.4, concerning Administrative Penalty Guidelines for Violations of Cease and Desist Orders.

### Background, Justification and Summary

The repeal of §518.4 will allow a new rule regarding Injunctive Relief to be placed more appropriately within the Chapter 518 rules.

### Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed repeal is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the repeal.

### Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the repeal is in effect the public benefits expected as a result of adoption of the proposed repeal will be a new rule place more appropriately within Chapter 518.

There will be no probable economic cost to persons required to comply with the repeal and a Local Employment Impact Statement is not required because the proposed repeal will not affect a local economy.

### Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed repeal will not have an adverse economic effect on small businesses or micro-businesses because the repeal does not impose any duties or obliga-

tions upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

### Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

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

### Statutory Authority

The repeal is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed repeal.

*§518.4. Administrative Penalty Guidelines for Violations of Cease and Desist Orders.*

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 13, 2016.

TRD-201602338

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842



## 22 TAC §518.4

The Texas State Board of Public Accountancy (Board) proposes new rule §518.4, concerning Injunctive Relief and Penalties.

### Background, Justification and Summary

New rule §518.4 establishes the process for seeking injunctive relief.

### Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments,

and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the new rule.

#### Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be an enforceable process that protects the public from persons misleading the public as to their qualifications.

There will be no probable economic cost to persons required to comply with the new rule and a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

#### Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses or micro-businesses because the new rule does not impose any duties or obligations upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

#### Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

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

#### Statutory Authority

The new rule is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed new rule.

#### §518.4. Injunctive Relief and Penalties.

(a) Whenever the executive director has determined that evidence supports a person(s) has or is engaging in an act(s) that violates §§901.451, 901.452, 901.453 901.454 or 901.456 of the Act (relating to Use of Title or Abbreviation for "Certified Public Accountant"; Use of Title or Abbreviation for "Public Accountant"; Use of Other Titles or Abbreviations; Title Used by Certain Out-of-State or Foreign Accountants; and Reports on Financial Statements; Use of Name or Signature on Certain Documents) or any combination of these sections of the Act, the executive director may, pursuant to §901.604 of the Act (relating to Single Act as Evidence of Practice), seek the issuance of an injunction

and the assessment of penalties against that person(s) in state district court on behalf of the board.

(b) Penalties will be determined in accordance with the guidelines in §518.6 of this chapter (relating to Administrative Penalty Guidelines for the Unauthorized Practice of Public Accountancy).

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 13, 2016.

TRD-201602339

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842



## 22 TAC §518.6

The Texas State Board of Public Accountancy (Board) proposes new rule §518.6, concerning Administrative Penalty Guidelines for the Unauthorized Practice of Public Accountancy.

#### Background, Justification and Summary

New rule §518.6 is former §518.4, which is being repealed, and includes proposed revisions to the administrative penalty guidelines to address repeat offenders.

#### Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the new rule.

#### Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be to permit appropriate penalties for repeat offenders.

There will be no probable economic cost to persons required to comply with the new rule and a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

#### Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses or micro-businesses because the new rule does not impose any duties or obligations upon small businesses or micro-businesses, therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

#### Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on June 27, 2016.

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

#### Statutory Authority

The new rule is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed new rule.

#### §518.6. Administrative Penalty Guidelines for the Unauthorized Practice of Public Accountancy.

(a) Any administrative penalty assessed under this chapter will be in accordance with the following guidelines:

(1) an unlicensed individual who uses terms restricted for use by CPAs in violation of §§901.451, 901.452, 901.453 or 901.454 of the Act (relating to Use of Title or Abbreviation for "Certified Public Accountant"; Use of Title or Abbreviation for "Public Accountant"; Use of Other Titles or Abbreviations; and Title Used by Certain Out-of-State or Foreign Accountants) shall pay a penalty of no less than \$1,000.00 and no more than \$5,000.00 for a first offense; and no less than \$5,000.00 and no more than \$25,000.00 for two or more offenses;

(2) an unlicensed entity that uses terms restricted for use by licensed firms in violation of §901.351(a) of the Act (relating to Firm License Required) shall pay a penalty of no less than \$5,000.00 and no more than \$10,000.00 for a first offense; and no more than \$25,000.00 for two or more offenses;

(3) an unlicensed individual who asserts an expertise in accounting through use of the term "accounting service" or any variation of that term shall pay a penalty of no less than \$1,000.00 and no more than \$5,000.00 for a first offense; and no more than \$25,000.00 for two or more offenses;

(4) an unlicensed entity that asserts an expertise in accounting through use of the term "accounting service" or any variation of that term shall pay a penalty of no less than \$5,000.00 and no more than \$10,000.00 for a first offense; and no more than \$25,000.00 for two or more offenses;

(5) an unlicensed individual who claims to provide attest services shall pay a penalty of no less than \$5,000.00 and no more than \$25,000.00;

(6) an unlicensed entity that claims to provide attest services shall pay a penalty of no less than \$5,000.00 and no more than \$25,000.00;

(7) an unlicensed individual who claims to be a CPA shall pay a penalty of no less than \$5,000.00 and no more than \$25,000.00; and

(8) an unlicensed entity that claims to be a CPA firm shall pay a penalty of no less than \$5,000.00 and no more than \$25,000.00.

(b) An offense is counted as a second or more offense when the person has been notified in writing by the board that the person's actions violate the Public Accountancy Act and the person fails to correct the violation(s) within the time required in the written notification.

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 13, 2016.

TRD-201602340

J. Randel (Jerry) Hill

General Counsel

Texas State Board of Public Accountancy

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 305-7842

## TITLE 28. INSURANCE

### PART 1. TEXAS DEPARTMENT OF INSURANCE

#### CHAPTER 3. LIFE, ACCIDENT, AND HEALTH INSURANCE AND ANNUITIES

##### SUBCHAPTER X. PREFERRED AND EXCLUSIVE PROVIDER PLANS

#### DIVISION 1. GENERAL REQUIREMENTS

##### 28 TAC §3.3705, §3.3708

The Texas Department of Insurance proposes amendments to 28 TAC Chapter 3, Subchapter X, Division 1, §3.3705, relating to Nature of Communications with Insureds; Readability, Mandatory Disclosure Requirements, and Plan Designations, and §3.3708, relating to Payment of Certain Basic Benefit Claims and Related Disclosures. The amendments are necessary because of amendments made to Texas Insurance Code Chapter 1467.

EXPLANATION. SB 481, 84th Legislature, Regular Session (2015) amended Insurance Code Chapter 1467 (Out-of-Network Claim Dispute Resolution). As a result, TDI must make conforming changes to 28 TAC Chapter 3, Subchapter X.

Parts of both §3.3705 and §3.3708 relate to the mediation process mandated by Chapter 1467. SB 481 lowered the threshold for mediation to amounts greater than \$500, for services provided on or after September 1, 2015. The rules at §3.3705 and §3.3708 need to be updated to include these provisions and make nonsubstantive changes to conform to agency style and usage guidelines.

A description of changes to specific sections follows.

Section 3.3705. The proposal adds assistant surgeons to the list of covered hospital-based physicians and lowers the threshold amount for teleconferences and mediation to amounts greater than \$500. The proposal also deletes redundant material and makes nonsubstantive changes to conform to agency style and usage guidelines.

Section 3.3708. The proposal lowers the threshold amount for teleconferences and mediation to amounts greater than \$500.

**FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Patricia Brewer, team lead for the Life and Health Regulatory Initiatives Team, has determined that during each year of the first five years that the proposed amendments are in effect, there will be no fiscal impact on state or local governments as a result of enforcing or administering the sections, other than that imposed by the statute. There will not be any measurable effect on local employment or the local economy as a result of the proposal.

**PUBLIC BENEFIT AND COST NOTE.** Ms. Brewer has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of administration and enforcement of the amended sections will be: (i) assurance that TDI's rules comply with Insurance Code Chapter 1467 as amended by SB 481, and (ii) a possible reduction in balance billing of patients for some out-of-network services. There is no anticipated economic cost to persons who are required to comply with the proposed amendments beyond that imposed by the statute.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.** As required by Government Code §2006.002(c), TDI has determined that these proposed amendments will not have an adverse economic effect on small or micro businesses because, to the extent they contain requirements, they simply implement statutory requirements or contain minor revisions to existing forms. Therefore, in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

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

**REQUEST FOR PUBLIC COMMENT.** TDI invites the public and affected persons to comment on this proposal. Submit your written comments on the proposal no later than 5 p.m., Central time, on June 27, 2016. Send written comments by mail to the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or by email to [chiefclerk@tdi.texas.gov](mailto:chiefclerk@tdi.texas.gov). You must simultaneously submit an additional copy of the comments by mail to Patricia Brewer, Team Lead, Life and Health Regulatory Initiatives Team, Regulatory Policy Division, MC 106-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or by email to [LHLComments@tdi.texas.gov](mailto:LHLComments@tdi.texas.gov). You must submit any request for a public hearing separately to the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or by email to [chiefclerk@tdi.texas.gov](mailto:chiefclerk@tdi.texas.gov) before the close of the public comment period. If a hearing is held, written comments and public testimony presented at the hearing will be considered.

**STATUTORY AUTHORITY.** These amendments are proposed under Insurance Code §§1467.001, 1467.003, 1467.051, 1301.007, 1301.0042, and 36.001, and amendments made by Section 5 of SB 481, 84th Legislature, Regular Session (2015) to Insurance Code §1467.051(a)(1).

Section 1467.001 contains definitions, including a definition for the facility-based physicians to whose billings Chapter 1467 applies.

Section 1467.003 requires the commissioner to adopt rules as necessary to implement the commissioner's powers and duties under Chapter 1467. Section 1467.051 sets out the availability of mandatory mediation under Chapter 1467.

Section 1301.007 authorizes the commissioner to adopt rules to implement Insurance Code Chapter 1301 and ensure reasonable accessibility and availability of preferred provider services to residents of Texas.

Section 1301.0042 provides that a provision of the Insurance Code or another insurance law of Texas that applies to a preferred provider benefit plan applies to an exclusive provider benefit plan except to the extent that the commissioner determines the provision to be inconsistent with the function and purpose of an exclusive provider benefit plan.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement TDI's powers and duties under the Insurance Code and other laws of this state.

**CROSS REFERENCE TO STATUTE.** The proposed amendments implement Insurance Code Chapter 1467 and Section 5 of SB 481, 84th Legislature, Regular Session (2015), which amends Insurance Code §1467.001(4) and §1467.051(a)(1). Specifically, the amendments to 28 TAC §3.3705 implement §1467.001(4) and §1467.051(a)(1), and the amendment to §3.3708 implements §1467.051(a)(1).

*§3.3705. Nature of Communications with Insureds; Readability, Mandatory Disclosure Requirements, and Plan Designations.*

(a) - (e) (No change.)

(f) Notice of rights under a network plan required. An insurer must include the notice specified in Figure: 28 TAC §3.3705(f)(1)[~~;~~] for a preferred provider benefit plan that is not an exclusive provider benefit plan[~~;~~] or Figure: 28 TAC §3.3705(f)(2)[~~;~~] for an exclusive provider benefit plan[~~;~~] in all policies, certificates, disclosures of policy terms and conditions provided to comply with [~~pursuant to~~] subsection (b) of this section, and outlines of coverage in at least 12-point [~~12 point~~] font:

(1) Preferred provider benefit plan notice.

Figure: 28 TAC §3.3705(f)(1)  
[~~Figure: 28 TAC §3.3705(f)(1)~~]

(2) (No change.)

(g) - (q) (No change.)

*§3.3708. Payment of Certain Basic Benefit Claims and Related Disclosures.*

(a) - (d) (No change.)

(e) When services are rendered to an insured by a nonpreferred facility-based physician and the difference between the allowed amount and the billed charge is at least \$500 [~~\$1,000~~], the insurer must include a notice on the applicable explanation of benefits that the insured may have the right to request mediation of the claim of an uncontracted facility-based provider under Insurance Code Chapter 1467 and may obtain more information at [www.tdi.texas.gov/consumer/cp-mmediation.html](http://www.tdi.texas.gov/consumer/cp-mmediation.html). An insurer is not in violation of this subsection if it provides the required notice in connection with claims that are not eligible for mediation.

(f) (No change.)

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

Filed with the Office of the Secretary of State on May 12, 2016.

TRD-201602321

Norma Garcia

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 676-6584



## CHAPTER 21. TRADE PRACTICES

### SUBCHAPTER PP. OUT-OF-NETWORK CLAIM DISPUTE RESOLUTION

The Texas Department of Insurance proposes amendments to 28 TAC Chapter 21, Subchapter PP, §§21.5001 - 21.5003, 21.5010 - 21.5013, 21.5020, 21.5030, and 21.5031, relating to Out-of-Network Claim Dispute Resolution. The amendments are necessary because of amendments made to Texas Insurance Code Chapter 1467.

**EXPLANATION.** SB 481, 84th Legislature, Regular Session (2015) amended Insurance Code Chapter 1467 (Out-of-Network Claim Dispute Resolution). As a result, TDI must make conforming changes to 28 TAC Chapter 21, Subchapter PP.

Both Chapter 1467 and Subchapter PP provide for mediation of certain claims by certain facility-based physicians for services provided to enrollees of preferred provider benefit plans issued under Insurance Code Chapter 1301 and to enrollees of health benefit plans, other than health maintenance organization plans, provided under Insurance Code Chapter 1551 (the Texas Employees Group Benefits Act).

SB 481 added assistant surgeons to the list of covered physicians and lowered the threshold amount for mediation to amounts greater than \$500 for services provided on or after September 1, 2015. The rules at 28 TAC Chapter 21, Subchapter PP, need to be updated to include these changes and adopt a new mediation request form. The proposal also makes it clear that the statute does not allow claims to be unilaterally reduced to an amount below the mediation threshold to avoid mediation of a qualified claim and allow balance billing, and makes nonsubstantive changes to conform to agency style and usage guidelines.

A description of changes to specific sections follows.

Section 21.5001. The proposal makes nonsubstantive changes to conform to agency style and usage guidelines.

Section 21.5002. The proposal removes the phrase "provided the claim is filed on or after November 1, 2010," because the time limitation is no longer required, since there should be no claims still pending that were filed before that date. The proposal also makes nonsubstantive changes to conform to agency style and usage guidelines.

Section 21.5003. The proposal adds assistant surgeons to the list of covered hospital-based physicians effective September 1, 2015, to conform to SB 481. The proposal also makes nonsubstantive changes to conform to agency style and usage guidelines.

Section 21.5010. The proposal changes the threshold amount for mediation to an amount greater than \$500, effective September 1, 2015, to conform to SB 481. The proposal recognizes that a claim qualified for mandatory mediation under Insurance Code §1467.051 does not lose that status by being reduced without the consent of the enrollee so that the provider can balance bill without mediation, and there is no procedure to remove the claim from mediation under §1467.054. The proposal also makes nonsubstantive changes to conform to agency style and usage guidelines.

Section 21.5011. The proposal changes a reference to the Health Insurance Mediation Request Form to correct nomenclature and the form's location. The proposal adds an authorization to allow disclosure of protected health or other confidential information to simplify the mediation process by ensuring that the authorization is obtained at the start of the process. The proposal also corrects addresses and telephone numbers, and makes nonsubstantive changes to conform to agency style and usage guidelines.

Sections 21.5012 - 21.5013. The proposal makes nonsubstantive changes to conform to agency style and usage guidelines.

Section 21.5020. The proposal removes the phrase "on or after November 1, 2010," because the time limitation is no longer required, since there should be no claims still pending that were filed before that date. The proposal also makes nonsubstantive changes to conform to agency style and usage guidelines.

Section 21.5030. The proposal corrects addresses and telephone numbers, and makes nonsubstantive changes to conform to agency style and usage guidelines.

Section 21.5031. The proposal makes nonsubstantive changes to conform to agency style and usage guidelines.

**FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Patricia Brewer, team lead for the Life and Health Regulatory Initiatives Team, has determined that during each year of the first five years that the proposed amendments are in effect, there will be no fiscal impact on state or local governments as a result of enforcing or administering the sections, other than that imposed by the statute. There will not be any measurable effect on local employment or the local economy as a result of the proposal.

**PUBLIC BENEFIT AND COST NOTE.** Ms. Brewer has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of administration and enforcement of the amended sections will be: (i) adoption of a revised mediation request form that incorporates an authorization to disclose protected health information; (ii) clarification that once a claim is qualified for mediation, it does not lose that status by virtue of billing being reduced without the enrollee's consent; (iii) assurance that TDI's rules comply with Insurance Code Chapter 1467 as amended by SB 481; and (iv) a possible reduction in balance billing of patients for some out-of-network services. There is no anticipated economic cost to persons who are required to comply with the proposed amendments beyond that imposed by the statute.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.** As required by Government Code §2006.002(c), TDI has determined that these proposed amendments will not have an adverse economic effect on small or micro businesses because, to the extent they contain requirements, they simply

implement statutory requirements or contain minor revisions to existing forms. Therefore, in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

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

**REQUEST FOR PUBLIC COMMENT.** TDI invites the public and affected persons to comment on this proposal. Submit your written comments on the proposal no later than 5 p.m., Central time, on June 27, 2016. Send written comments by mail to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or by email to [chiefclerk@tdi.texas.gov](mailto:chiefclerk@tdi.texas.gov). You must simultaneously submit an additional copy of the comments by mail to Patricia Brewer, Team Lead, Life and Health Regulatory Initiatives Team, Regulatory Policy Division, MC 106-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or by email to [LHLComments@tdi.texas.gov](mailto:LHLComments@tdi.texas.gov). You must submit any request for a public hearing separately to the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or by email to [chiefclerk@tdi.texas.gov](mailto:chiefclerk@tdi.texas.gov) before the close of the public comment period. If a hearing is held, written comments and public testimony presented at the hearing will be considered.

## DIVISION 1. GENERAL PROVISIONS

### 28 TAC §§21.5001 - 21.5003

**STATUTORY AUTHORITY.** These amendments are proposed under Insurance Code §§1467.001, 1467.003, 1467.051, 1467.054, and 36.001, and amendments made by Sections 4 - 6 of SB 481, 84th Legislature, Regular Session (2015) to Insurance Code §1467.001(4) and §1467.051(a)(1).

Section 1467.001 contains definitions, including a definition for the facility-based physicians to whose billings Chapter 1467 applies.

Section 1467.003 requires the commissioner to adopt rules as necessary to implement the commissioner's powers and duties under Chapter 1467.

Section 1467.051 sets out the availability of mandatory mediation under Chapter 1467.

Section 1467.054 sets out the procedure for requesting mediation and preliminary procedures for that mediation, and provides that a request for mandatory mediation must be provided to the department on a form prescribed by the commissioner.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement TDI's powers and duties under the Insurance Code and other laws of this state.

**CROSS REFERENCE TO STATUTE.** The proposed amendments implement Insurance Code Chapter 1467 and Sections 4 - 6 of SB 481, 84th Legislature, Regular Session (2015), which amend Insurance Code §1467.001(4) and §1467.051(a)(1). Specifically, the amendment to 28 TAC §21.5003(6) implements §1467.001(4), the amendment to 28 TAC §21.5010(a)(3) implements §1467.051(a)(1), the amendment to 28 TAC §21.5010(d)

implements §1467.051(a) and §1467.054, and the amendment to 28 TAC §21.5011(a)(7) implements §1467.054.

#### §21.5001. Purpose.

As authorized by ~~under the~~ Insurance Code §1467.003, concerning Rules, the purpose of this subchapter is to:

(1) prescribe the process for requesting and initiating mandatory mediation of claims as authorized in ~~the~~ Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution; and

(2) facilitate the process for the investigation and review of a complaint filed with the department that relates to the settlement of an out-of-network claim under ~~the~~ Insurance Code Chapter 1467.

#### §21.5002. Scope.

(a) This subchapter applies to a qualified claim filed under health benefit plan coverage:

(1) issued by an insurer as a preferred provider benefit plan under ~~the~~ Insurance Code Chapter 1301, concerning Preferred Provider Benefit Plans ~~[provided the claim is filed on or after November 1, 2010]~~; or

(2) administered by an administrator of a health benefit plan, other than a health maintenance organization (HMO) plan, under ~~the~~ Insurance Code Chapter 1551, concerning Texas Employees Group Benefits Act ~~[provided the claim is filed on or after November 1, 2010]~~.

(b) This subchapter does not apply to a claim for health benefits, including medical and health care services ~~and~~ or supplies, that is not a covered claim under the terms of the health benefit plan coverage.

#### §21.5003. Definitions.

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

(1) Administrator--An administering firm or a claims administrator for a health benefit plan, other than a health maintenance organization (HMO) ~~an HMO~~ plan, providing coverage under ~~the~~ Insurance Code Chapter 1551, concerning Texas Employees Group Benefits Act.

(2) Chief administrative law judge--The chief administrative law judge of the State Office of Administrative Hearings.

(3) Claim--A request to a health benefit plan for payment for health benefits under the terms of the health benefit plan's coverage, including medical and health care services and ~~or~~ supplies, provided that the ~~such~~ services and ~~or~~ supplies:

(A) are furnished for ~~pursuant to~~ a single date of service; or

(B) if furnished for ~~pursuant to~~ more than one date of service, are provided as a continuing ~~and~~ or related course of treatment over a period of time for a specific medical problem or condition, or in response to the same initial patient complaint.

(4) Enrollee--An individual who is eligible to receive benefits through a health benefit plan.

(5) Health benefit plan--A plan that provides coverage under:

(A) a preferred provider benefit plan offered by an insurer under ~~the~~ Insurance Code Chapter 1301, concerning Preferred Provider Benefit Plans; or

(B) a plan, other than an HMO [a health maintenance organization] plan, under [the] Insurance Code Chapter 1551.

(6) Hospital-based physician--A radiologist, an anesthesiologist, a pathologist, an emergency department physician, [or] a neonatologist, or an assistant surgeon if the assistant surgeon's services are provided on or after September 1, 2015:

(A) to whom the hospital has granted clinical privileges; and

(B) who provides services to patients of the hospital under those clinical privileges.

(7) Insurer--A life, health, and accident insurance company, health insurance company, or other company operating under [the] Insurance Code Chapters 841, concerning Life, Health, or Accident Insurance Companies; 842, concerning Group Hospital Service Corporations; 884, concerning Stipulated Premium Insurance Companies; 885, concerning Fraternal Benefit Societies; 982, concerning Foreign and Alien Insurance Companies; or 1501, concerning Health Insurance Portability and Availability Act, that is authorized to issue, deliver, or issue for delivery in this state a preferred provider benefit plan under [the] Insurance Code Chapter 1301.

(8) Mediation--A process in which an impartial mediator facilitates and promotes agreement between the insurer offering a preferred provider benefit plan or the administrator and a hospital-based physician or the physician's representative to settle a qualified claim of an enrollee.

(9) Mediator--An impartial person who is appointed to conduct mediation under [the ] Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution.

(10) Out-of-network claim--A claim for payment for medical or health care services [and/or] supplies [that are] furnished by a hospital-based physician that is not contracted as a preferred provider with a preferred provider benefit plan or [contracted with an] administrator.

(11) Preferred provider--A hospital or hospital-based physician that contracts on a preferred-benefit basis with an insurer issuing a preferred provider benefit plan under [the] Insurance Code Chapter 1301 to provide medical care or health care to enrollees covered by a health insurance policy.

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 12, 2016.

TRD-201602322

Norma Garcia

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 676-6584



## DIVISION 2. MEDIATION PROCESS

### 28 TAC §§21.5010 - 21.5013

STATUTORY AUTHORITY. These amendments are proposed under Insurance Code §§1467.001, 1467.003, 1467.051, 1467.054, and 36.001, and amendments made by Sections

4 - 6 of SB 481, 84th Legislature, Regular Session (2015) to Insurance Code §1467.001(4) and §1467.051(a)(1).

Section 1467.001 contains definitions, including a definition for the facility-based physicians to whose billings Chapter 1467 applies.

Section 1467.003 requires the commissioner to adopt rules as necessary to implement the commissioner's powers and duties under Chapter 1467.

Section 1467.051 sets out the availability of mandatory mediation under Chapter 1467.

Section 1467.054 sets out the procedure for requesting mediation and preliminary procedures for that mediation, and provides that a request for mandatory mediation must be provided to the department on a form prescribed by the commissioner.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement TDI's powers and duties under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed amendments implement Insurance Code Chapter 1467 and Sections 4 - 6 of SB 481, 84th Legislature, Regular Session (2015), which amend Insurance Code §1467.001(4) and §1467.051(a)(1). Specifically, the amendment to 28 TAC §21.5003(6) implements §1467.001(4), the amendment to 28 TAC §21.5010(a)(3) implements §1467.051(a)(1), the amendment to 28 TAC §21.5010(d) implements §1467.051(a) and §1467.054, and the amendment to 28 TAC §21.5011(a)(7) implements §1467.054.

*§21.5010. Qualified Claim Criteria.*

(a) Required criteria [~~Criteria~~]. An enrollee may request mandatory mediation of an out-of-network claim under §21.5011 of this title [~~division~~] (relating to Mediation Request Form and Procedure) if the claim complies with the criteria specified in [~~paragraphs (1) and (2) of~~] this subsection. An out-of-network claim that complies with those [~~such~~] criteria is referred to as a "qualified claim" in this subchapter.

(1) The out-of-network claim must be for medical services [~~and/or~~] supplies provided by a hospital-based physician in a hospital that is a preferred provider with the insurer or that has a contract with the administrator.

(2) For services provided before September 1, 2015, the [~~The~~] aggregate amount for which the enrollee is responsible to the hospital-based physician for the out-of-network claim, not including copayments, deductibles, coinsurance, or amounts paid by an insurer or administrator directly to the enrollee, must be greater than \$1,000.

(3) For services provided on or after September 1, 2015, the aggregate amount for which the enrollee is responsible to the hospital-based physician for the out-of-network claim, not including copayments, deductibles, coinsurance, or amounts paid by an insurer or administrator directly to the enrollee, must be greater than \$500.

(b) Submission of multiple claim forms [~~Multiple Claim Forms~~]. The use of more than one form in the submission of a claim, as defined in §21.5003(3) of this title [~~subchapter~~] (relating to Definitions), does not prevent [~~preclude~~] eligibility of a claim for mandatory mediation under this subchapter if the claim otherwise meets the requirements of this section.

(c) Ineligible claims [~~Claims~~].

(1) An out-of-network claim is not eligible for mandatory mediation under this subchapter if:

(A) the hospital-based physician has provided a complete disclosure to an enrollee under [the] Insurance Code §1467.051, concerning Availability of Mandatory Mediation; Exception, and this subsection before providing the medical service [and/]or supply and has obtained the enrollee's written acknowledgment of that disclosure; and

(B) the amount billed by the hospital-based physician is less than or equal to the maximum amount specified in the disclosure.

(2) A complete disclosure under paragraph (1) of this subsection must:

(A) explain that the hospital-based physician does not have, as applicable, either a contract with the enrollee's health benefit plan as a preferred provider or a contract with the administrator of the plan, other than an HMO plan, provided under [the] Insurance Code Chapter 1551, concerning Texas Employees Group Benefits Act;

(B) disclose projected amounts for which the enrollee may be responsible; and

(C) disclose the circumstances under which the enrollee would be responsible for those amounts.

(d) Qualification continues. A qualified claim does not lose that status by virtue of the aggregate amount for which the enrollee is responsible being reduced below the thresholds set out in this section without the consent of the enrollee.

§21.5011. *Mediation Request Form and Procedure.*

(a) Mediation request form [Request Form]. The commissioner adopts by reference Form No. CP029 [LHL619] (Health Insurance Mediation Request Form), which is available at [www.tdi.state.tx.us/consumer/cpmmediation.html](http://www.tdi.state.tx.us/consumer/cpmmediation.html) [http://www.tdi.state.tx.us/consumer/cpmmediation.html]. Form No. CP029 [LHL619] (Health Insurance Mediation Request Form) requires information necessary for the department to properly identify the qualified claim, including:

(1) the name and contact information, including a telephone number, of the enrollee requesting mediation;

(2) a brief description of the qualified claim to be mediated;

(3) the name and contact information, including a telephone number, of the requesting enrollee's counsel, if the enrollee retains counsel;

(4) the name of the hospital-based physician;

(5) the name of the insurer or administrator; [and]

(6) the name and address of the hospital where services were rendered; and[-]

(7) an authorization allowing TDI to disclose the enrollee's protected health information or other confidential information to the enrollee's health benefit plan's insurer or administrator, the appointed mediator, and the State Office of Administrative Hearings.

(b) Submission of request [Request]. An enrollee may submit a request for mediation by completing and submitting Form No. CP029 [LHL619] (Health Insurance Mediation Request Form) as provided in paragraphs (1) - (4) of this subsection.

[(+)] The request may be submitted:

(1) by [via] mail[-] to the Texas Department of Insurance, Consumer Protection Section, MC [Division, Mail Code] 111-1A, P.O. Box 149091, Austin, Texas 78714-9091;[-]

(2) by [The request may be submitted via] fax[-] to (512) 490-1007; [(512) 475-1771-]

(3) by email [The request may be submitted via e-mail,] to [ConsumerProtection@tdi.texas.gov](mailto:ConsumerProtection@tdi.texas.gov); or [ConsumerProtection@tdi.state.tx.us.]

(4) online, when the department makes [Upon the department's making] Form No. CP029 [LHL619] (Health Insurance Mediation Request Form) available to be completed and submitted online[-] an enrollee may submit the request in this manner].

(c) Assistance. Assistance with submitting a request for mediation is available at the department's toll-free telephone number, 1-800-252-3439.

§21.5012. *Informal Settlement Teleconference.*

An insurer or administrator [that is] subject to mandatory mediation requested by an enrollee under §21.5011 of this title [division] (relating to Mediation Request Form and Procedure) must [shall] use best efforts to coordinate the informal settlement teleconference required by [the] Insurance Code §1467.054, concerning Request and Preliminary Procedures for Mandatory Mediation, [§1467.054(d)] by:

(1) arranging a date and time when the insurer or administrator, the enrollee or the enrollee's representative if the enrollee or the enrollee's representative chooses to participate, and the hospital-based physician or the hospital-based physician's representative can participate in the informal settlement teleconference, which must [shall] occur not later than the 30th day after the date on which the enrollee submitted a request for mediation; and

(2) providing a toll-free telephone number for participation in the informal settlement teleconference.

§21.5013. *Mediation Participation.*

(a) An insurer or administrator subject to mediation under this subchapter must [shall] participate in mediation in good faith and is subject to any rules adopted by the chief administrative law judge in accordance with [pursuant to the] Insurance Code §1467.003, concerning Rules.

(b) Under [the] Insurance Code §1467.101, concerning Bad Faith, conduct that constitutes bad faith mediation includes failing to:

(1) [failing to] participate in the mediation;

(2) [failing to] provide information that the mediator believes is necessary to facilitate an agreement; or

(3) [failing to] designate a representative participating in the mediation with full authority to enter into any mediated agreement.

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

Filed with the Office of the Secretary of State on May 12, 2016.

TRD-201602323

Norma Garcia

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 676-6584



### DIVISION 3. PLAN ADMINISTRATOR'S REQUIRED NOTICE OF CLAIMS DISPUTE RESOLUTION

#### 28 TAC §21.5020

STATUTORY AUTHORITY. These amendments are proposed under Insurance Code §§1467.001, 1467.003, 1467.051, 1467.054, and 36.001, and amendments made by Sections 4 - 6 of SB 481, 84th Legislature, Regular Session (2015) to Insurance Code §1467.001(4) and §1467.051(a)(1).

Section 1467.001 contains definitions, including a definition for the facility-based physicians to whose billings Chapter 1467 applies.

Section 1467.003 requires the commissioner to adopt rules as necessary to implement the commissioner's powers and duties under Chapter 1467.

Section 1467.051 sets out the availability of mandatory mediation under Chapter 1467.

Section 1467.054 sets out the procedure for requesting mediation and preliminary procedures for that mediation, and provides that a request for mandatory mediation must be provided to the department on a form prescribed by the commissioner.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement TDI's powers and duties under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed amendments implement Insurance Code Chapter 1467 and Sections 4 - 6 of SB 481, 84th Legislature, Regular Session (2015), which amend Insurance Code §1467.001(4) and §1467.051(a)(1). Specifically, the amendment to 28 TAC §21.5003(6) implements §1467.001(4), the amendment to 28 TAC §21.5010(a)(3) implements §1467.051(a)(1), the amendment to 28 TAC §21.5010(d) implements §1467.051(a) and §1467.054, and the amendment to 28 TAC §21.5011(a)(7) implements §1467.054.

#### §21.5020. *Required Notice of Claims Dispute Resolution.*

An administrator of a plan under [the] Insurance Code Chapter 1551, concerning Texas Employees Group Benefits Act, must [shall] include a notice [notification] of the availability of mandatory mediation under this subchapter with each explanation of benefits sent to an enrollee for an out-of-network claim [filed on or after November 1, 2010,] for services [and/]or supplies furnished in a hospital that has a contract with the administrator.

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 12, 2016.

TRD-201602324

Norma Garcia

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 676-6584



### DIVISION 4. COMPLAINT RESOLUTION AND OUTREACH

#### 28 TAC §21.5030, §21.5031

STATUTORY AUTHORITY. These amendments are proposed under Insurance Code §§1467.001, 1467.003, 1467.051, 1467.054, and 36.001, and amendments made by Sections 4 - 6 of SB 481, 84th Legislature, Regular Session (2015) to Insurance Code §1467.001(4) and §1467.051(a)(1).

Section 1467.001 contains definitions, including a definition for the facility-based physicians to whose billings Chapter 1467 applies.

Section 1467.003 requires the commissioner to adopt rules as necessary to implement the commissioner's powers and duties under Chapter 1467.

Section 1467.051 sets out the availability of mandatory mediation under Chapter 1467.

Section 1467.054 sets out the procedure for requesting mediation and preliminary procedures for that mediation, and provides that a request for mandatory mediation must be provided to the department on a form prescribed by the commissioner.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement TDI's powers and duties under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed amendments implement Insurance Code Chapter 1467 and Sections 4 - 6 of SB 481, 84th Legislature, Regular Session (2015), which amend Insurance Code §1467.001(4) and §1467.051(a)(1). Specifically, the amendment to 28 TAC §21.5003(6) implements §1467.001(4), the amendment to 28 TAC §21.5010(a)(3) implements §1467.051(a)(1), the amendment to 28 TAC §21.5010(d) implements §1467.051(a) and §1467.054, and the amendment to 28 TAC §21.5011(a)(7) implements §1467.054.

#### §21.5030. *Complaint Resolution.*

##### (a) Written complaint [~~Complaint~~].

(1) An individual may submit [to the department] a written complaint to the department regarding a qualified claim or a mediation that has been requested under §21.5010 of this title [subchapter] (relating to Qualified Claim Criteria). A recommended form for filing a complaint under this subsection is available online at [www.tdi.texas.gov/consumer/cpmmediation.html](http://www.tdi.texas.gov/consumer/cpmmediation.html) [<http://www.tdi.state.tx.us/consumer/epportal.html>]. The complaint may be submitted by:

(A) mail[<sub>s</sub>] to the Texas Department of Insurance, Consumer Protection Section, MC [Division, Mail Code] 111-1A, P.O. Box 149091, Austin, Texas 78714-9091;

(B) fax to (512) 490-1007 [(512) 475-1771];

(C) email [e-mail,] to [ConsumerProtection@tdi.texas.gov](mailto:ConsumerProtection@tdi.texas.gov) [[ConsumerProtection@tdi.state.tx.us](mailto:ConsumerProtection@tdi.state.tx.us)]; or

(D) online submission.

(2) Assistance with filing a complaint is available at the department's toll-free telephone number, 1-800-252-3439.

(b) Complaint form [~~Form~~]. The recommended form for filing a complaint under subsection (a) of this section requests [that certain] information concerning the complaint [be provided], including:

(1) whether the complaint is within the scope of [the] Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution;

(2) whether medical care has been delayed or has not been given;

(3) whether the medical service [and/]or supply that is the subject of the complaint was for emergency care; and

(4) specific information about the qualified claim, including:

(A) the type and specialty of the hospital-based physician;

(B) the type of service performed or supplies provided;

(C) the city and county where service was performed; and

(D) the dollar amount of the disputed claim.

(c) Department Processing. The department will [shall] maintain procedures to ensure that a written complaint made under this section is not dismissed without appropriate consideration, including:

(1) review of all of the information submitted in the written complaint;

(2) contact with the parties that are the subject of the complaint;

(3) review of the responses received from the subjects of the complaint to determine if and what further action is required, as appropriate; and

(4) notification to the enrollee of the mediation process, as described in [the] Insurance Code Chapter 1467, Subchapter B, concerning Mandatory Mediation.

*§21.5031. Department Outreach.*

In addition to the notice provided to consumers regarding the availability of mandatory mediation [as] described in §21.5030(c) of this title [division] (relating to Complaint Resolution), the department will provide outreach as required by [the] Insurance Code §1467.151(a)(2), concerning Consumer Protection Rules, by making information concerning the availability of this mandatory mediation process available:

(1) on the department's website; and

(2) in [via] consumer publications.

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 12, 2016.

TRD-201602325

Norma Garcia

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 676-6584



## TITLE 30. ENVIRONMENTAL QUALITY

### PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

## CHAPTER 39. PUBLIC NOTICE

### SUBCHAPTER O. PUBLIC NOTICE FOR MARINE SEAWATER DESALINATION PROJECTS

#### 30 TAC §§39.901 - 39.903

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§39.901 - 39.903.

Background and Summary of the Factual Basis for the Proposed Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB 2031 was to "...streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509, Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and, TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1)

the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires that the Texas Parks & Wildlife Department (TPWD) and the Texas General Land Office (GLO) conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and for the discharge of waste resulting from the desalination of marine seawater and for the commission to adopt rules designating diversion zones by September 1, 2020. Under TWC, §18.003(j) and §18.005(g), an applicant for a permit to divert marine seawater must consult with the TPWD and the GLO regarding the point(s) of diversion or discharge until such time as the commission adopts rules designating diversion or discharge zones.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

In addition, TWC, §26.0272(b), indicates that TCEQ may issue a permit for the discharge of water treatment residuals from the desalination of seawater into the portion of the Gulf of Mexico inside the territorial limits of the state. TWC, §26.0272(c), specifies that prior to issuing a permit, TCEQ must evaluate the discharge of water treatment residuals from the desalination of seawater into the Gulf of Mexico for compliance with the state wa-

ter quality standards, requirements of the Texas Pollutant Discharge Elimination System program, and applicable federal law. TWC, §26.0272(d), indicates that permits may be individual or general. TWC, §26.0272(d), also specifies that for individual permits, an application review procedure, at a minimum, must comply with the requirements of TWC, Chapter 5, Subchapter M; and the commission must comply with the requirements of TWC, §26.040, for a general permit.

TWC, §27.021, allows TCEQ to issue an individual Class I injection well permit authorizing the disposal of water treatment residuals produced by the desalination of seawater. TWC, §27.025, allows TCEQ to authorize a Class I injection well under a general permit for the disposal of concentrate produced by the desalination of seawater. TWC, §27.025, specifies that the general permit must include any requirements necessary to maintain delimitation of the federal underground injection control program administered by TCEQ.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these proposed rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also proposes new sections in 30 TAC Chapter 295, Water Rights, Procedural; 30 TAC Chapter 297, Water Rights, Substantive; and, 30 TAC Chapter 318, Marine Seawater Desalination Discharges to implement HB 2031 and HB 4097.

## Section by Section Discussion

### *Subchapter O: Public Notice for Marine Seawater Desalination Projects*

#### *§39.901, Applicability*

Proposed new §39.901 identifies the types of applications subject to Chapter 39, Subchapter O, which establishes the public notice process for treated marine seawater and off-shore discharge permits from marine seawater desalination projects under TWC, Chapter 18. This section clarifies that the terms "Treated marine seawater," "Off-shore discharges," and "Marine seawater desalination project" have the same meanings as the terms are defined in 30 TAC §318.2.

#### *§39.902, Public Notice and Comment for Treated Marine Seawater Discharges*

Proposed new §39.902 identifies the public notice and comment process. Proposed §39.902(a) specifies that the executive director will file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk. Proposed §39.902(b) describes the contents of the notice. Proposed §39.902(c) specifies that the notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and the technical summary will be published on the TCEQ website for public review and comment. Additionally, these documents will be emailed to the state senator and representative who represent the area where the facility is or will be located and to the TPWD and the GLO. Proposed §39.902(d) requires a new notice if major amendments or transfers are made after notice is published. Proposed §39.902(e) specifies that the public comment period ends 10 days after notice is published unless the comment period is extended by the executive director for good cause. This section also specifies that the comment period is extended to the

close of any public meeting. Proposed §39.902(f) describes the public meeting notice content. Proposed §39.902(g) specifies that notice of a public meeting will be mailed or emailed to any person who submitted comments or requested a public meeting; emailed to the state senator and representative who represent the area where the facility is or will be located, the TPWD and the GLO; and published on the TCEQ website.

#### *§39.903, Public Notice and Comment for Off-Shore Discharges*

Proposed new §39.903 identifies the public notice and comment process for off-shore discharges. Proposed §39.903(a) specifies that the executive director will file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk. Proposed §39.903(b) describes the contents of the notice. Proposed §39.903(c) specifies that the notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and technical summary will be published on the TCEQ website for public review and comment. Additionally, these documents will be emailed to the state senator and representative who represent the area where the facility is or will be located and to the TPWD and the GLO. Proposed §39.903(d) requires new notice if major amendments or transfers are made after notice is published. Proposed §39.903(e) specifies that the public comment period ends 10 days after the notice is published unless the comment period is extended by the executive director for good cause. Late comments will be added to the application file but will not be processed. Proposed §39.903(f) specifies that after the close of the comment period, the executive director will evaluate timely and relevant public comments and develop a final technical summary. The final technical summary will include a summary of all timely and relevant public comments, a response to the issues raised in public comments, and the executive director's final decision on the application. This response to issues raised is not intended to be a detailed discussion and response to each comment, but rather a high level discussion and response to the issues raised in public comment. This high level discussion is to demonstrate that the executive director reviewed and considered the issues raised in public comment.

#### *Fiscal Note: Costs to State and Local Government*

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are expected for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The rules are proposed in order to implement HB 2031 which created an expedited permitting process for marine seawater desalination projects. HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process.

These proposed rules in Chapter 39 establish the public notice and comment process for treated marine seawater and off-shore discharge permit applications from marine seawater desalination projects. Although the permitting process is expedited, the agency does not expect significant costs or cost savings due to the implementation of the proposed rules. Agency staff does not expect a need for additional resources to issue any permits under the proposed rules as they do not expect a significant number of permit applications. Under the current permitting process, permittees must publish two legal notices in the largest news-

paper in the county where the facility is or will be located. The expedited permitting process in the proposed rulemaking allows for a single web-based public notice rather than two newspaper public notices. This change is not expected to significantly impact agency operations.

Desalination plants are not expected to be owned or operated by other units of state or local government. No significant revenue or costs are expected for the agency due to the administration of the proposed rules.

#### *Public Benefits and Costs*

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and a streamlined regulatory process for marine seawater desalination that would assist the state to develop new water supplies to meet the ever-increasing demand for water.

No significant fiscal implications are anticipated for businesses or for individuals as a result of the administration and enforcement of the proposed rules.

Under the current permitting process, permittees must publish two legal notices in the largest newspaper in the county where the facility is or will be located. The expedited permitting process in the proposed rulemaking allows for a single web-based public notice rather than two newspaper public notices. Legal notices in newspapers can range from approximately \$500 for small newspapers and up to \$4,000 for large newspapers. So the cost savings from using web-based notices rather than two newspaper publications can be \$1,000 - \$8,000 depending on the location of the facility.

According to agency staff, there are currently no marine seawater desalination plants in Texas nor are there a significant number expected to be constructed in the first five years after the proposed rules would come into effect. Any marine seawater desalination plants that would be constructed would be owned by large businesses capable of funding large financial capital expenditures. Even though individuals would pay for water from a desalination plant, they would also benefit from having a new water supply.

#### *Small Business and Micro-Business Assessment*

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. The proposed rules do not affect the regulatory burden on small or micro-businesses unless they intend to own or operate a marine seawater desalination plant. Under the proposed rules, if a business does apply for a permit associated with a marine seawater desalination plant, there would be some cost savings from using web-based notices rather than two newspaper publications.

#### *Small Business Regulatory Flexibility Analysis*

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary in order to comply with state law and does not adversely affect small or micro-businesses in a material way for the first five years that the proposed rules are in effect.

#### *Local Employment Impact Statement*

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

#### Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225(a) because it does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.

Texas Government Code, §2001.0225 applies to a "major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination. HB 2031 states that the purpose of the new law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. More specifically, the legislature stated the purpose of HB 2031 was to "...streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination." Therefore, the specific intent of the proposed rulemaking is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rules in Chapter 39 are for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the processes for obtaining a permit to discharge treated marine seawater and waste resulting from the desalination of marine seawater under TWC, Chapter 18. The proposed new rules will protect the health and safety of aquatic and wildlife resources, as well as water quality, however, the proposed rules will not adversely affect the economy, a sector of the economy, productivity, competition, or jobs within the state or a sector of the state. Accordingly, the commission concludes that the proposed rulemaking does not meet the definition of a "major environmental rule."

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather creates an expedited process under state law to ensure efficient regulatory oversight, while comprehensively protecting the state's natural resources. Third, the proposed rulemaking does not come under a delegation agreement or contract with a federal program, and finally, it is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being

proposed under specific state statutes enacted in HB 2031. Therefore, the commission does not proposed the rules solely under the commission's general powers.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that analysis. The specific purpose of the proposed rulemaking is to modify the TAC to implement the changes to the TWC, from HB 2031, which creates procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rulemaking will substantially advance this stated purpose by proposing rules in Chapter 39, that are intended to articulate and expedite the permitting process for marine seawater desalination discharges in accordance with HB 2031 and TWC, Chapter 18.

Promulgation and enforcement of the proposed rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property. In HB 2031, the legislature expressed that "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. For marine seawater, there are no real property rights that have been granted for use of the water in the Gulf of Mexico. These actions will not affect or burden private real property rights because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico.

#### Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and, 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the proposed rules include: discharges must comply with water quality-based effluent limits; discharges that increase pollutant loadings to coastal waters must not impair designated uses of coastal waters and must not significantly degrade coastal

water quality, unless necessary for important economic or social development; and to the greatest extent practicable, new wastewater outfalls must be located where they will not adversely affect critical areas.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies. The proposed rules are consistent with these CMP goals and policies because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because the proposed rules do not allow a discharge from marine seawater desalination projects into or adjacent to water in the state, except in accordance with an individual permit issued by the commission. Individual permits issued under these proposed rules will include effluent limitation to ensure compliance with water quality standards. Further, the expedited permitting process in these proposed rules cannot be used to authorize discharges of reject water into bays and estuaries. Reject water must be discharged into the Gulf of Mexico, and applicants must consult with the TPWD and the GLO regarding the outfall location(s).

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on June 21, 2016, at 2:00 p.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

#### Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-029-295-OW. The comment period closes on July 5, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at [http://www.tceq.texas.gov/rules/propose\\_adopt.html](http://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Kathy Ramirez, Water Availability Division, at (512) 239-6757 or Laurie Fleet, Wastewater Permitting Section, at (512) 239-5445.

#### Statutory Authority

The rules are proposed under Texas Water Code (TWC), §5.013 which establishes the general jurisdiction of the commission; TWC §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103 which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state;

TWC, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18.

The proposed rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

#### §39.901. Applicability.

The provisions of this subchapter establish the public notice process for treated marine seawater discharge permits and off-shore discharge permits from marine seawater desalination projects under Texas Water Code, Chapter 18. For the purposes of this subchapter, the terms "Treated marine seawater," "Off-shore discharges," and "Marine seawater desalination project" have the same meaning as the definitions of these terms found in §318.2 of this title (relating to Definitions).

#### §39.902. Public Notice and Comment for Treated Marine Seawater Discharges.

(a) Filing the administrative record. After the technical review is completed, the executive director shall file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk.

(b) Notice text. The notice of application and preliminary decision must contain the following information:

- (1) the permit number;
- (2) the name, address, and telephone number of the applicant;
- (3) a brief description of the location and nature of the proposed marine seawater desalination project, including the location of each outfall;
- (4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;
- (5) if applicable, a statement that the application is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;
- (6) a brief description of public comment procedures, including:
  - (A) a description of the manner in which comments regarding the executive director's preliminary decision may be submitted;
  - (B) the deadline to file comments; and
  - (C) the deadline to request a public meeting or a contested case hearing;
- (7) a statement that the executive director will respond to comments raising issues that are timely received and are relevant, material or otherwise significant;
- (8) a brief description of procedures by which the public may request a public meeting and a statement that a public meeting

will be held by the executive director if requested by a member of the legislature who represents the general area where the facility will be located or there is substantial public interest in the proposed activity;

(9) a statement that there is an opportunity for a contested case hearing, the procedures by which the public may request a contested case hearing, and that only disputed issues of fact or mixed issues of fact and law that are relevant and material to the commission's decision that are raised during the comment period can be considered if a contested case hearing is granted;

(10) a statement that the executive director may issue final approval of the application unless a timely contested case hearing request is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(11) the name and telephone number of an agency contact that interested persons may contact for further information; and

(12) any additional information required by the executive director.

(c) Publication of the notice. The notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and the technical summary, excluding oversized documents, will be published on the TCEQ website for public review and comment. Additionally, these documents will be emailed to the state senator and representative who represent the general area in which the facility is or will be located, the Texas Parks & Wildlife Department, and the Texas General Land Office at the email address on file for these individuals and agencies.

(d) Amendment after notice. No amendments to an application which would constitute a major amendment under the terms of §318.6 of this title (relating to Amendment of a Permit) can be made by the applicant after the notice of application and preliminary decision has been published, unless new notice is published which includes a description of the proposed amendments to the application. For purposes of this subsection, an attempted transfer of an application shall constitute an amendment requiring additional notice.

(e) Public comment. Public comments must be filed with the chief clerk within the time period specified in the notice. The public notice period shall end 10 calendar days after the date of publication on the TCEQ website unless extended by the executive director for good cause. The public comment period shall be extended to the close of any public meeting.

(f) Public meeting notice. Notice of a public meeting must include the following information:

(1) the information required by subsection (b)(1) - (3) and (11) of this section;

(2) the date, time, and place of the meeting;

(3) a brief description of the nature and purpose of the meeting, including the applicable rules and procedures; and

(4) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

(g) Recipients of public meeting notice. Notice of a public meeting will be mailed or emailed to any person who submitted comments or requested a public meeting; emailed to the state senator and

representative who represent the area where the facility is or will be located, the Texas Parks & Wildlife Department, and the Texas General Land Office; and published on the TCEQ website at least 14 calendar days prior to the meeting date. The chief clerk need not mail or email notice of the public meeting to persons submitting public comment or public meeting requests who have not provided a return mailing address or email address.

§39.903. Public Notice and Comment for Off-Shore Discharges.

(a) Filing the administrative record. After the technical review is completed, the executive director shall file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk.

(b) Notice text. The notice of application and preliminary decision must contain the following information:

(1) the permit number;

(2) the name, address, and telephone number of the applicant;

(3) a brief description of the location and nature of the proposed marine seawater desalination project, including the location of each outfall;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(5) a statement that the application is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(6) a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and the deadline to file comments;

(7) a statement that the executive director will evaluate comments raising issues that are timely received and are relevant, material or otherwise significant and develop a final technical summary;

(8) the name and telephone number of an agency contact that interested persons may contact for further information; and

(9) any additional information required by the executive director.

(c) Publication of the notice. The notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and the technical summary, excluding oversized documents, will be published on the TCEQ website for public review and comment. Additionally, these documents will be emailed to the state senator or representative who represent the area where the facility is or will be located, the Texas Parks & Wildlife Department, and the Texas General Land Office at the email address on file for these individuals and agencies.

(d) Amendment after notice. No amendments to an application which would constitute a major amendment under the terms of §318.6 of this title (relating to Amendment of a Permit) can be made by the applicant after the notice of application and preliminary decision has been published, unless new notice is published which includes a description of the proposed amendments to the application. For purposes of this subsection, an attempted transfer of an application shall constitute an amendment requiring additional notice.

(e) Public comment. Public comment must be filed with the chief clerk within the time period specified in the notice. The public notice period shall end 10 calendar days after the date of publication on the TCEQ website unless extended by the executive director for good cause. A public comment that is not filed with the chief clerk by the

deadline provided in the notice shall be accepted by the chief clerk and placed in the application file but the chief clerk shall not process it.

(f) Response to comments and final decision. After the close of the comment period, the executive director shall:

(1) evaluate all timely received and relevant, material or otherwise significant issues raised in public comments;

(2) develop a final technical summary which includes:

(A) a summary of all timely received and relevant, material or otherwise significant issues raised in public comments;

(B) a response to the issues raised in public comments;  
and

(C) a summary of the executive director's final decision;

(3) revise the draft permit in response to comments, if necessary; and

(4) file the final technical summary and revised draft permit, if applicable, with the chief clerk within the shortest practical time after the comment period ends.

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 13, 2016.

TRD-201602345

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



## CHAPTER 295. WATER RIGHTS, PROCEDURAL SUBCHAPTER G. DESALINATION, PROCEDURAL

### 30 TAC §§295.300 - 295.306

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§295.300 - 295.306.

Background and Summary of the Factual Basis for the Proposed Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB

2031 was to "...streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509, Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and, TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of treated marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires that the Texas Parks & Wildlife Department (TPWD) and the Texas General Land Office (GLO) conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and for the discharge of waste resulting from the desalination of marine seawater and for the commission to adopt rules designating diversion zones by September 1, 2020. Under TWC, §18.003(j) and §18.005(g), an applicant for a permit to divert marine seawater must consult with the TPWD and the GLO regarding the point(s) of diversion

or discharge until such time as the commission adopts rules designating diversion or discharge zones.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these proposed rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also proposes new sections in 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 318, Marine Seawater Desalination Discharges to implement HB 2031 and HB 4097.

#### Section by Section Discussion

##### *Subchapter G: Desalination, Procedural*

The commission proposes new Subchapter G in Chapter 295 to contain all of the requirements for a water right application to divert marine seawater or seawater and a water right application to convey treated marine seawater in the bed and banks of a watercourse. This new subchapter also contains the requirements for notice of a water right application to divert marine seawater or seawater and for notice of a water right application to convey treated marine seawater in the bed and banks of a watercourse. The commission must adopt rules to implement TWC, §11.1405 and Chapter 18. The commission specifically invites commenters to provide any relevant information that may differ from its proposed rules, which in the commenter's opinion would assist the commission in deciding on adopted rules for water right applications to divert marine seawater or seawater and for water right applications to convey treated marine seawater in the bed and banks of a watercourse. The adopted rules may differ from this proposal and may include additional components based on public comment. The commission invites comments on all aspects of the proposed rules.

##### *§295.300, Applicability*

The commission proposes new §295.300 to describe the purpose of Subchapter G and under what circumstances it applies. Subchapter G is intended to provide an alternate procedure for obtaining an authorization to divert and use state water that consists of marine seawater, to divert and desalinate water for industrial purposes from a bay or arm of the Gulf of Mexico, and to convey treated marine seawater in the bed and banks of a watercourse.

##### *§295.301, Definitions*

The commission proposes new §295.301. The proposed section has definitions of terms that only apply to Chapter 295, Subchapter G. 30 TAC Chapter 55 does not apply to applications to divert marine sea water from the Gulf of Mexico or to take seawater from a bay or arm of the Gulf of Mexico for industrial purposes, except for Chapter 55, Subchapter G. In §295.301(1) the commission proposes a definition of "Affected person." In §295.301(2) the commission proposes a definition of "Marine seawater" consistent with TWC, §18.001(2). In §295.301(3) the commission proposes a definition of "Seawater" as water that is derived from a bay or arm of the Gulf of Mexico.

##### *§295.302, Requirements for Diversion of Marine Seawater and Diversion of Seawater.*

The commission proposes new §295.302. The proposed section sets out the application requirements for a water rights application to divert marine seawater or seawater that will apply only to applications under Subchapter G. In §295.302(a) and (b), the commission proposes that an application for diversion of marine seawater or seawater conform to the requirements in §295.2 and §295.14 so that an application to divert marine seawater or seawater will be submitted in the form of a water rights application. In §295.302(c) and (d) the commission proposes that an application for a water right permit to divert marine seawater or seawater should include the location of the diversion point(s), the total amount of marine seawater or seawater to be diverted and the rate of diversion for the marine seawater or seawater to be consistent with the requirements for a water right application for a new diversion. In §295.302(e) the commission proposes that the application shall include a purpose of use, and if the diverted marine seawater is to be used for more than one purpose, the specific amount to be used annually for each purpose. The commission proposes this requirement so that it can determine whether the proposed use is a beneficial use, and whether the proposed treatment of the marine seawater is consistent with the proposed use. The commission further proposes new §295.302(f) requiring the applicant to provide evidence that the marine seawater or seawater will be treated in accordance with commission rules based on the purpose of use for which the marine seawater or seawater will be used in accordance with TWC, §18.002(d). In §295.302(g) and (h) the commission proposes that an application to divert marine seawater or seawater include a Water Conservation Plan and evidence that the application is consistent with the State and Regional Water Plans because under TWC, §18.002(a)(1), TWC, Chapter 11, including the requirement for a conservation plan and consistency with state and regional water plans, applies to a permit to divert marine seawater. In §295.302(i), the commission proposes a requirement that an application include a determination of the TDS concentration of the water source in accordance with TWC, §18.003(c). Proposed §295.302(j) includes a requirement relating to measures to minimize impingement and entrainment associated with the requested diversion as prescribed by

TWC, §18.003(h). Finally, in §295.302(k) the commission proposes that an application to divert marine seawater shall include evidence of consultation with the TPWD and the GLO in accordance with TWC, §18.005(i). The commission proposes that an applicant for diversion of seawater should also provide evidence of consultation because diversion zones have not been identified at the time of this rulemaking.

#### *§295.303, Review Timeframes*

The commission proposes new §295.303 regarding review timeframes for a water right application to divert marine seawater and to divert seawater for industrial use from a bay or arm of the Gulf of Mexico to provide for an expedited review of applications submitted under Subchapter G in accordance with TWC, §18.003(e). In §295.303(a) the commission proposes that an application must be administratively complete when submitted in order for expedited review to apply. In §295.303(b) applications will be reviewed within 10 working days to determine whether the application is administratively complete and contains the information required under §295.302. In §295.303(c) the commission proposes that technical review of a water right application to divert marine seawater be completed within 60 working days in order to provide for expedited review of these applications. In §295.303(d) the commission proposes requirements and timeframes that would apply to a water right application to divert marine seawater or seawater if the information required under §295.302 is not sufficient for a complete review. The commission proposes that an applicant be provided no less than 30 days to submit the necessary information and provides that if the necessary information is not received, the application may be returned. The commission proposes this requirement to expedite processing of water right applications to divert marine seawater and seawater.

#### *§295.304, Notice of Application to Divert Marine Seawater or Seawater*

The commission proposes new §295.304 to provide the notice requirements for an application to divert marine seawater or to divert and desalinate seawater for industrial use. In §295.304(a) the commission proposes that mailed notice of an application be provided to the TPWD and the GLO because water right applications to divert marine seawater and to divert and desalinate seawater for industrial use would not be located in a river basin as set out in TWC, §11.002(11). The notice requirements in this section do not apply to points of diversion which are located in a river basin as set out in TWC, §11.002(11). In §295.304(b)(1) - (8) the commission proposes that the notice include the applicable information required for mailed notice of a water right application, as set out in §295.151. In §295.304(b)(9) the commission proposes that the notice state that an affected person may submit written comments and request a contested case hearing in accordance with TWC, §18.003(e). In §295.304(b)(11) the commission proposes that the notice can also include any additional information the commission considers necessary which provides the commission flexibility to ensure that the notice includes all relevant information on the application. In §295.304(c) the commission proposes that requests for a contested case hearing submitted on applications to divert marine seawater or seawater will be processed in accordance with 30 TAC Chapter 55, Subchapter G.

#### *§295.305, Requirements for an Authorization to Convey Treated Marine Seawater in Bed and Banks*

The commission proposes new §295.305. The proposed section sets out the application requirements for a water rights application to convey treated marine seawater in the bed and banks of a watercourse that will apply only to applications under Subchapter G. In §295.305(a), the commission proposes that an applicant for a water right to convey treated marine seawater in the bed and banks of a watercourse provide evidence that the marine seawater will be treated so as to meet standards that are at least as stringent as the commission's adopted water quality standards for the watercourse in which the treated marine seawater will be conveyed in accordance with TWC, §18.004(a). In §295.305(b) the commission proposes that treated marine seawater conveyed under an authorization granted under this section may only be used by the person to whom the authorization is granted in accordance with TWC, §18.004(d). The commission proposes §295.305(c) to implement TWC, §18.004(f), which states that §295.305 does not prohibit a person from conveying marine seawater in any other manner authorized by law. The commission proposes §295.305(d) to provide the application requirements for a water right permit to convey treated marine seawater in the bed and banks of a watercourse. The requirements in §295.305(d) are substantially the same requirements for an application under §295.113; however, §295.305(d) does not include requirements for information on interbasin transfers because the conveyed treated marine seawater does not originate from a river basin. The commission's proposed application requirement in §295.305(d)(4) implements TWC, §18.004(c), which relates to discharge of the treated marine seawater, and the commission's proposed application requirement in §295.305(d)(5), relating to consistency with environmental flow standards, implements TWC, §11.1405(f) and (g). The commission's proposed application requirement in §295.305(d)(6) ensures that sufficient information is provided in the application to allow the commission to determine whether other water rights could be affected by the application. The commission's proposed application requirement in §295.305(d)(7) facilitates expedited processing of an application because the accounting plan will be required to be submitted with the application.

#### *§295.306, Notice of Application to Convey Treated Marine Seawater in Bed and Banks*

The commission proposes new §295.306 to provide the notice requirements for a water right application to convey treated marine seawater in the bed and banks of a watercourse. In §295.306(a) - (c) the commission proposes that mailed notice of an application be provided to every water right holder of record downstream of the discharge point, that the application not require published notice, and that the applicant shall be responsible for the costs of providing notice. The commission's proposed notice is consistent with the notice requirements in §295.161, which states the notice requirements for an application under TWC, §11.402(c) consistent with TWC, §18.004(e). In §295.306(d)(1) - (7) and (10), the commission proposes that notice include general information on the application and contact information for the agency. Section 295.306(d)(8) and (9) specifically implements TWC, §18.004(b), relating to notice. In §295.306(d)(11) the commission proposes that the notice can also include any additional information the commission considers necessary which provides the commission flexibility to ensure that the notice includes all relevant information on the application. Finally, in §295.306(e) the commission proposes that requests for a contested case hearing submitted on appli-

cations to divert marine seawater or seawater will be processed in accordance with Chapter 55, Subchapter G.

#### Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are expected for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules implement HB 2031 and HB 4097. HB 2031 establishes an expedited permitting process for marine seawater desalination projects. HB 4097 addresses seawater desalination as it is used for industrial purposes. The proposed rules implement a new expedited permitting process that will be applied by TCEQ staff during the administrative and technical reviews of applicable water rights applications associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and use for industrial purposes. The rulemaking does not propose any new fees.

Although the permitting process is expedited, the agency does not expect the need for additional resources to issue any permits under the proposed rules as staff does not expect a significant number of permit applications. The rulemaking will require the applicant to consult with the TPWD and the GLO in accordance with the provisions of HB 2031 prior to submitting an application. The permit application fee for a water rights permit under this expedited permitting process would not change from the current fee for applying for a water rights permit.

Although governmental entities could apply for a water rights permit under the proposed expedited permitting process, no state or local governments are anticipated to do so at this time. Because few marine seawater diversion, conveyance, or industrial use permit applications are expected under the proposed rules, no significant fiscal implications are anticipated for the agency.

#### Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and a streamlined regulatory process for marine seawater desalination that would assist the state to develop new water supplies to meet the ever-increasing demand for water.

No fiscal implications are anticipated for businesses or individuals as a result of the administration and enforcement of the proposed rules. The proposed rules would affect businesses or individuals who apply for water rights permits associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and its use for industrial purposes.

The proposed rules would require any person or business entity that plans to divert and use state water that consists of marine seawater to determine the TDS concentrations of the seawater at the water source by monthly analysis and sampling for a period of one year. The data collected is to be provided to TCEQ in accordance with provisions in HB 2031 and HB 4097. Costs associated with TDS sampling would include monthly sample collection for one year, sampling equipment, laboratory costs, data analysis and submittal to TCEQ. The proposed rules re-

quire reasonable measures to minimize impingement and entrainment and also allow that marine seawater may be diverted for any beneficial purpose (if the seawater is treated before it is used). Personnel costs for the required sample collection and data analysis, as well as laboratory costs and reasonable measures to minimize impingement and entrainment will be specific to each applicant. These specific costs are context dependent and can't be quantified without knowing the specific nature of each application.

#### Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration and enforcement of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. It is not known how many small or micro-businesses would submit water rights applications under the proposed rules. The proposed rules do not increase the regulatory burden on small or micro-businesses unless they intend to obtain water rights permits associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, or the diversion of seawater for desalination and its use for industrial purposes. If a small or micro-business does apply for such a water rights permit, then it is assumed that any costs would be recovered through increased costs passed on to its customers.

#### Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary in order to comply with state law and does not adversely affect small or micro-businesses in a material way for the first five years that the proposed rules are in effect.

#### Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

#### Draft Regulatory Impact Analysis Determination

The commission has reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and has determined that this rulemaking is not a "major environmental rule." The legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination, and HB 4097, creating TWC, §11.1405, relating to seawater desalination projects for industrial purposes. HB 2031 states that the purpose of the new law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. The legislature also stated that in this state, marine seawater is a potential new source of water for drinking and other beneficial uses, and that this state has access to vast quantities of marine seawater from the Gulf of Mexico. The legislature stated that the purpose of HB 2031 was to "...streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

Therefore, the purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way that may "adversely affect in a material way the economy, a sector of the economy, productivity, com-

petition, jobs, the environment, or the public health and safety of the state or a sector of the state" (Texas Government Code, §2001.0225(g)(3)). The purpose of this rulemaking is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The rules proposed in Chapter 295 streamline the processes for obtaining a permit to divert or transport marine seawater under TWC, Chapter 18, and to divert seawater for industrial purposes under TWC, §11.1405.

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under specific state statutes enacted in HB 2031 and HB 4097.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### Takings Impact Assessment

The commission evaluated these proposed rules and performed analysis of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rules would substantially advance this stated purpose by adding provisions to Chapter 295 to streamline the processes for obtaining a permit to divert or transport marine seawater under TWC, Chapter 18, and to divert seawater for industrial purposes under TWC, §11.1405.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property. In HB 2031, the legislature expressed that "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." For marine seawater, there are no permanent water rights, real property rights that have been granted for use of the water in the Gulf of Mexico. For seawater in a bay or arm of the Gulf of Mexico, very few water rights have been granted for this water. There is no potential for harm to other water rights by this rulemaking. The burden on private real property rights will be nonexistent or minimal because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico. Diversions of seawater in a bay or arm of the Gulf of Mexico are also limited to industrial water and water for municipal and domestic needs will not be taken from this part of the Gulf of Mexico.

#### Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and

found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the proposed rules include those contained in 31 TAC §501.33(a). The proposed rules implement HB 2031 and HB 4097, which direct the commission to regulate the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater through expedited permitting and related processes. In HB 2031, the legislature finds "...that it is necessary and appropriate to grant authority and provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water right protections,..." Since one of the purposes of the proposed rules is to protect coastal natural resources, the rules are consistent with the CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because one of the purposes of the proposed rules is to protect coastal and natural resources.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on June 21, 2016, at 2:00 p.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

#### Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-029-295-OW. The comment period closes on July 5, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at [http://www.tceq.texas.gov/rules/propose\\_adopt.html](http://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Kathy Ramirez, Water Avail-

ability Division, at (512) 239-6757 or Kathy Alexander, Water Availability Division, at (512) 239-0778.

#### Statutory Authority

The rules are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the TCEQ's authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; and TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes.

The proposed rules implement TWC, §§5.013, 5.102, 5.103, 5.120, and 18.005; and House Bill (HB) 2031 and HB 4097 (84th Texas Legislature, 2015).

#### §295.300. Applicability.

(a) This subchapter only applies to diversion and use of marine seawater, diversion of seawater from a bay or arm of the Gulf of Mexico, and conveyance of marine seawater through the bed and banks of a flowing stream. The commission may issue a permit under this section to authorize a diversion of state water from the Gulf of Mexico or a bay or arm of the Gulf of Mexico for desalination and use if:

(1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or

(2) the seawater contains a total dissolved solids concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter.

(b) A person may divert and use state water that consists of marine seawater or seawater without obtaining a permit if subsection (a) of this section does not apply.

(c) A person may not begin construction of a facility for the diversion of marine seawater or seawater without obtaining a permit until the person has provided data to the commission based on the analysis of samples taken at the water source over a period of at least one year demonstrating that subsection (a)(2) of this section does not apply.

(d) A person who has begun construction of a facility for the diversion of marine seawater or seawater without obtaining a permit because the person has demonstrated that subsection (a)(2) of this section does not apply is not required to obtain a permit for the facility if the total dissolved solids concentration of the marine seawater or seawater at the water source subsequently changes so that subsection (a)(2) of this section applies.

(e) This section does not apply to a diversion of marine seawater from a point of diversion located in a bay or estuary unless the application is for a diversion of seawater for industrial use under Texas Water Code (TWC), §11.1405.

(f) TWC, Chapter 11, applies to a permit or authorization under this section in the same manner as that chapter applies to a permit or authorization under that chapter.

#### §295.301. Definitions.

The following words or phrases have the following meanings in this subchapter unless the context clearly indicates otherwise:

(1) Affected person--A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. The determination of whether a person is affected shall be governed by §55.256 of this title (relating to Determination of Affected Person).

(2) Marine seawater--Water that is derived from the Gulf of Mexico.

(3) Seawater--Water that is derived from a bay or arm of the Gulf of Mexico.

#### §295.302. Requirements for Diversion of Marine Seawater and Diversion of Seawater.

(a) An application for diversion of marine seawater or diversion of seawater from a bay or arm of the Gulf of Mexico for industrial purposes must be submitted in accordance with §295.2 of this title (relating to Preparation of Application) and include, for each applicant, the full name, post office address, telephone number, and federal identification number. If the applicant is a partnership, it shall be designated by the firm name followed by the words "a partnership." If the applicant is acting as trustee for another, it shall be designated by the trustee's name followed by the word "trustee." If one other than the named applicant executes the application, the name, position, post office address, and telephone number of the person executing the application shall be given.

(b) The application shall include the signature of the applicant in accordance with §295.14 of this title (relating to Signature of Applicant). Each applicant shall subscribe and swear to the application before any person entitled to administer oaths, who shall also sign his or her name and affix his or her seal of office to the application.

(c) The application shall state the location of point(s) of diversion and provide latitude and longitude coordinates in decimal degrees to six decimal places for each point.

(d) The total amount of marine seawater or seawater from a bay or arm of the Gulf of Mexico to be diverted and used shall be stated in definite terms, i.e., a definite number of acre-feet annually and the application shall state the maximum rate of diversion in gallons per minute or cubic feet per second.

(e) The application shall state the purpose or purposes of each use in definite terms. If the marine seawater is to be used for more than one purpose, the specific amount to be used annually for each purpose shall be clearly set forth. If the application requests authorization to use marine seawater for multiple purposes, the application shall expressly state an annual amount of marine seawater to be used for the multiple purposes as well as for each purpose of use.

(f) The applicant shall provide evidence that the marine seawater or seawater diverted from a bay or arm of the Gulf of Mexico will be treated in accordance with applicable commission rules, based on the purpose for which the water is to be used, before it is used.

(g) The application must include a water conservation plan meeting the requirements contained in §297.208 of this title (relating to Consideration of Water Conservation).

(h) An application shall contain information describing how it addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan or, in the alternative, describe conditions that warrant a waiver of this requirement.

(i) The application must include a determination of the total dissolved solids concentration of the marine seawater or seawater at the water source based on monthly sampling and analysis and provide the data collected to the commission.

(j) The application shall provide documentation that the applicant will take reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater or seawater.

(k) The application shall include evidence of consultation with Texas Parks & Wildlife Department and the Texas General Land Office regarding the point or points from which a facility the person proposes to construct may divert marine seawater or seawater before submitting an application for a permit for the facility if §295.300(a)(1) of this title (relating to Applicability) applies or before beginning construction of the facility if §295.300(a)(2) of this title applies.

§295.303. Review Timeframes.

(a) The review timeframes in this section only apply to applications which are determined to be administratively complete when submitted. If the application is not administratively complete, the application will not be considered for expedited processing under this section.

(b) Applications shall be reviewed by the staff for administrative completeness within 10 working days of receipt of the application by the executive director.

(c) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate. For purposes of this subchapter, the technical review period is that period of time beginning with the completion of the initial review period and will continue for a period of time not to exceed 60 working days.

(d) The applicant shall be promptly notified of any additional technical material as may be necessary for a complete review. If the applicant provides the information within the period of time prescribed by subsection (c) of this section, the executive director will complete processing of the application within the technical review period extended by the number of days required for the additional data. If the necessary additional information is not received by the executive director prior to expiration of the technical review period and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 30 days to provide the technical data before an application is returned. Decisions to return material to the applicant during the technical review stage will be made on a case-by-case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision instead of having the application returned.

§295.304. Notice of Application to Divert Marine Seawater or Seawater.

(a) At the time that the technical review of an application for a permit to divert marine seawater or seawater has been completed and the technical memoranda have been filed by the executive director with the chief clerk of the commission, the chief clerk shall give notice by email to the Texas Parks & Wildlife Department and the Texas General Land Office.

(b) The notice must:

- (1) state the name and address of the applicant;
- (2) state the date on which the application was received by the commission;
- (3) state the date the application was filed by the executive director with the chief clerk as required by §281.17(a) or (b) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness);
- (4) state that the executive director has determined that the technical review of the application is complete;
- (5) state the application number;

(6) state the purpose and amount of the proposed diversion of marine seawater or seawater;

(7) identify the location of the diversion point(s);

(8) state the executive director's recommendation regarding the application;

(9) state that an affected person may submit written comments and request a contested case hearing;

(10) include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information; and

(11) give any additional information the commission considers necessary.

(c) Requests for a contested case hearing will be processed in accordance with Chapter 55, Subchapter G of this title (relating to Requests for Contested Case Hearing and Public Comment on Certain Applications).

§295.305. Requirements for an Authorization to Convey Treated Marine Seawater in Bed and Banks.

(a) The application shall include evidence that the marine seawater conveyed under a permit subject to the requirement in this section will be treated so as to meet standards that are at least as stringent as the water quality standards adopted by the commission and applicable to the receiving stream or impoundment.

(b) Treated marine seawater that is conveyed under an authorization granted under this section may be used only by the person to whom the authorization is granted.

(c) This section does not prohibit a person from conveying treated marine seawater in any other manner authorized by law.

(d) A person wishing to place treated marine seawater into a stream or watercourse, convey the treated marine seawater in the watercourse or stream, and subsequently divert such treated marine seawater shall file an application with the commission containing the following information:

(1) the name, mailing address, and telephone number of the applicant;

(2) the name of the stream and the locations of the point of discharge and diversion as identified on a United States Geological Survey 7.5-minute topographical map(s);

(3) the source, amount, and rates of discharge and diversion;

(4) a description of the water quality of the water discharged and the permit number and name of any related discharge permit;

(5) an assessment of the adequacy of the quantity and quality of flows remaining after the proposed diversion to meet instream uses and bay and estuary freshwater inflow needs;

(6) the estimated amount of treated marine seawater that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion, including the method used to calculate the losses;

(7) an accounting plan that demonstrates that the applicant will only divert the amount of treated marine seawater discharged less losses; and

(8) any other information the executive director may need to complete an analysis of the application.

§295.306. Notice of Application to Convey Treated Marine Seawater in Bed and Banks.

(a) Notice of an application to convey treated marine seawater in the bed and banks of a stream or watercourse shall be provided by first class mail, postage prepaid, by the commission to every water right holder of record downstream of the discharge point at least 30 days prior to commission consideration of the application.

(b) No published notice shall be required for an application under this section.

(c) The applicant shall be responsible for the costs of providing notice under this section.

(d) The notice must:

(1) state the name and address of the applicant;

(2) state the date on which the application was received by the commission;

(3) state the date the application was filed by the executive director with the chief clerk as required by §281.17(a) or (b) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness);

(4) state that the executive director has determined that the technical review of the application is complete;

(5) state the application number;

(6) state the purpose of use for the conveyed treated marine seawater;

(7) state the executive director's recommendation regarding the application;

(8) for applications that do not request authorization to convey treated marine seawater through a reservoir or impoundment the notice shall state that an affected person may provide written comments but may not request a contested case hearing;

(9) for applications that request authorization to convey treated marine seawater through a reservoir or impoundment the notice shall state that an affected person may request a contested case hearing;

(10) include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information; and

(11) give any additional information the commission considers necessary.

(e) Requests for a contested case hearing will be processed in accordance with Chapter 55, Subchapter G of this title (relating to Request for Contested Case Hearing and Public Comment on Certain Applications).

(f) Nothing in this section is intended to deny any additional notice to an affected person that may be required under the Texas Administrative Procedure Act.

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

Filed with the Office of the Secretary of State on May 13, 2016.

TRD-201602346

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



CHAPTER 297. WATER RIGHTS,  
SUBSTANTIVE

SUBCHAPTER K. DESALINATION,  
SUBSTANTIVE

**30 TAC §§297.200 - 297.210**

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§297.200 - 297.210.

Background and Summary of the Factual Basis for the Proposed Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509, Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and, TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC,

§18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of treated marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey treated marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires that the Texas Parks & Wildlife Department (TPWD) and the Texas General Land Office (GLO) conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and for the discharge of waste resulting from the desalination of marine seawater and for the commission to adopt rules designating diversion zones by September 1, 2020. Under TWC, §18.003(j) and §18.005(g), an applicant for a permit to divert marine seawater must consult with the TPWD and the GLO regarding the point(s) of diversion or discharge until such time as the commission adopts rules designating diversion or discharge zones.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to ex-

pedite permitting and related processes for the diversion of seawater.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these proposed rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also proposes new sections in 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 318, Marine Seawater Desalination Discharges to implement HB 2031 and HB 4097.

Section by Section Discussion

#### *Subchapter K: Desalination, Substantive*

The commission proposes new Subchapter K in Chapter 297 to contain the approval criteria for a water right application to divert marine seawater and seawater and a water right application to convey treated marine seawater in the bed and banks of a watercourse. The commission must adopt rules to implement TWC, §11.1405 and Chapter 18. The commission specifically invites commenters to provide any relevant information that may differ from its proposed rules, which in the commenter's opinion would assist the commission in deciding on adopted rules for water right applications to divert marine seawater or seawater and for water right applications to convey treated marine seawater in the bed and banks of a watercourse. The adopted rules may differ from this proposed rule and may include additional components based on public comment. The commission invites comments on all aspects of the proposed rules.

#### *§297.200, Applicability*

The commission proposes new §297.200 to describe the purpose of Subchapter K. Subchapter K is intended to provide the approval criteria for an authorization to divert and use state water that consists of marine seawater or seawater and to convey treated marine seawater in the bed and banks of a watercourse.

#### *§297.201, Definitions*

The commission proposes new §297.201. The proposed section has definitions of terms that only apply to Subchapter K. In §297.201(1) the commission proposes a definition of "Marine seawater" consistent with TWC, §18.001(2). In §297.201(2) the commission proposes a definition of "Seawater" as water that is derived from a bay or arm of the Gulf of Mexico.

#### *§297.202, Approval Criteria for Diversion of Marine Seawater and Seawater*

The commission proposes new §297.202. The proposed section sets out the approval criteria for a water rights application to divert marine seawater or seawater that will apply only to applications considered under Subchapter K. In §297.202, the commission proposes that an application for diversion of marine seawater or seawater may only be granted if the application conforms to the requirements in 30 TAC §295.302 to ensure that the commission considers only applications that meet the requirements in its rules and the requirements of TWC, §18.002(a)(1).

#### *§297.203, Water Availability*

The commission proposes new §297.203 stating that a finding of water availability is not required for an application for a water right permit to divert marine seawater or seawater in accordance with TWC, §11.1405(e).

#### *§297.204, Applicability of Environmental Flow Standards*

The commission proposes new §297.204 stating that it will evaluate whether a water right application for diversion of marine seawater or seawater is consistent with the commission's rules in 30 TAC Chapter 298 (Environmental Flow Standards for Surface Water). The new section allows the commission to include provisions in a water rights permit to divert marine seawater or seawater to comply with Chapter 298 rules in accordance with TWC, §11.1405(f) and (g).

#### *§297.205, Determination of Total Dissolved Solids Concentration*

The commission proposes new §297.205 to specifically state that it will review water quality information submitted under §295.302(i) to ensure that any permit issued meets the requirements for an expedited permit under TWC, §11.1405(a)(2) and §18.003(a)(2). The commission proposes §297.205(b) to ensure that if the application is an amendment to an existing water right, the commission's review of the application is in accordance with TWC, §11.122(b).

#### *§297.206, Treatment of Diverted Marine Seawater and Seawater*

The commission proposes new §297.206 to ensure that any permit issued under 30 TAC Chapter 295, Subchapter G, complies with TWC, §18.003(d).

#### *§297.207, Diversion of Marine Seawater and Seawater*

The commission proposes new §297.207 to ensure that the proposed point of diversion for an application submitted under Chapter 295, Subchapter G, is not located in a bay or estuary in accordance with TWC, §18.003(f) unless the diversion is for industrial use under TWC, §11.1405.

#### *§297.208, Consideration of Water Conservation*

The commission proposes new §297.208 to provide that the water conservation requirements for an application to divert marine seawater or seawater are those requirements under Chapter 295, Subchapter G. The commission proposes that the water conservation review would determine whether there are practicable alternatives, whether the amount requested in the application is reasonable and necessary and whether the applicant will use reasonable diligence to avoid waste and achieve water conservation. The commission proposes new §297.208(b) to provide that the contents of the water conservation plan are those required under §295.302. HB 2031, Section 1(a) states the purpose of the act is not to hinder efforts to conserve or develop other surface water supplies. Under TWC, §18.002(a)(1), TWC, Chapter 11 applies to a permit to divert marine seawater.

#### *§297.209, Impingement and Entrainment*

The commission proposes new §297.209 to require that an applicant for a water rights permit to divert marine seawater or seawater take reasonable measures to avoid impingement and entrainment in accordance with TWC, §18.003(h).

#### *§297.210, Approval Criteria for an Application to Convey Treated Marine Seawater in the Bed and Banks*

The commission proposes new §297.210. The proposed section sets out the approval criteria for a water rights application to convey treated marine seawater in the bed and banks that will apply only to applications considered under Subchapter K. In §297.210(1) - (3), the commission proposes that an application for conveyance of treated marine seawater may only be granted if the application conforms to the requirements in §295.305 to

ensure that the commission considers only applications that meet the requirements in its rules and the requirements in TWC, §18.004(a) and (c). In §297.210(4) and (5), the commission proposes that its decision to grant an application to convey treated marine seawater in the bed and banks consider whether losses are reasonable and appropriate and whether the accounting plan has been approved by the executive director. This will ensure that existing water rights are not affected by an application to convey treated marine seawater as the commission proposes in §297.210(6).

#### Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are expected for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules implement HB 2031 and HB 4097. HB 2031 establishes an expedited permitting process for marine seawater desalination projects. HB 4097 addresses seawater desalination as it is used for industrial purposes. The proposed rules implement a new expedited permitting process that will be applied by TCEQ staff during the administrative and technical reviews of applicable water rights applications associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and use for industrial purposes. The rulemaking does not propose any new fees.

Although the permitting process is expedited, the agency does not expect the need for additional resources to issue any permits under the proposed rules as staff does not expect a significant number of permit applications. The rulemaking will require the applicant to consult with the TPWD and the GLO in accordance with the provisions of HB 2031 prior to submitting an application. The permit application fee for a water rights permit under this expedited permitting process would not change from the current fee for applying for a water rights permit.

Although governmental entities could apply for a water rights permit under the proposed expedited permitting process, no state or local governments are anticipated to do so at this time. Because few marine seawater diversion, conveyance, or industrial use permit applications are expected under the proposed rules, no significant fiscal implications are anticipated for the agency.

#### Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and a streamlined regulatory process for marine seawater desalination that would assist the state to develop new water supplies to meet the ever-increasing demand for water.

No fiscal implications are anticipated for businesses or individuals as a result of the administration and enforcement of the proposed rules. The proposed rules would affect businesses or individuals who apply for water rights permits associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and its use for industrial purposes.

The proposed rules would require any person or business entity that plans to divert and use state water that consists of marine seawater to determine the TDS concentrations of the seawater at the water source by monthly analysis and sampling for a period of one year. The data collected is to be provided to TCEQ in accordance with provisions in HB 2031 and HB 4097. Costs associated with TDS sampling would include monthly sample collection for one year, sampling equipment, laboratory costs, data analysis and submittal to TCEQ. The proposed rules require reasonable measures to minimize impingement and entrainment and also allow that marine seawater may be diverted for any beneficial purpose (if the seawater is treated before it is used). Personnel costs for the required sample collection and data analysis, as well as laboratory costs and reasonable measures to minimize impingement and entrainment will be specific to each applicant. These specific costs are context dependent and can't be quantified without knowing the specific nature of each application.

#### Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration and enforcement of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. It is not known how many small or micro-businesses would submit water rights applications under the proposed rules. The proposed rules do not increase the regulatory burden on small or micro-businesses unless they intend to obtain water rights permits associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, or the diversion of seawater for desalination and its use for industrial purposes. If a small or micro-business does apply for such a water rights permit, then it is assumed that any costs would be recovered through increased costs passed on to its customers.

#### Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary in order to comply with state law and does not adversely affect small or micro-businesses in a material way for the first five years that the proposed rules are in effect.

#### Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

#### Draft Regulatory Impact Analysis Determination

The commission has reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and has determined that this rulemaking is not a "major environmental rule." The legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination, and HB 4097, creating TWC, §11.1405, relating to seawater desalination projects for industrial purposes. HB 2031 states that the purpose of the new law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. The legislature also stated that in this state, marine seawater is a potential new source of water for drinking and other

beneficial uses, and that this state has access to vast quantities of marine seawater from the Gulf of Mexico. The legislature stated that the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

Therefore, the purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way that may "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state" (Texas Government Code, §2001.0225(g)(3)). The purpose of this rulemaking is to establish the requirements for obtaining permits for the diversion and transport of marine seawater and the diversion of seawater. The proposed rules in Chapter 297 are for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits.

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under specific state statutes enacted in HB 2031 and HB 4097.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### Takings Impact Assessment

The commission evaluated these proposed rules and performed analysis of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rules would substantially advance this stated purpose by adding requirements for the diversion or transport of marine seawater under TWC, Chapter 18, and the diversion of seawater for industrial purposes under TWC, §11.1405.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these proposed rules because these rules do not impact private real property. In HB 2031, the legislature expressed that "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." For marine seawater, there are no permanent water rights, real property rights that have been granted for use of the water in the Gulf of Mexico. For seawater in a bay or arm of the Gulf of Mexico, very few water rights have been granted for this water. There is no potential for harm to other water rights by this rulemaking. The burden on private real property rights will be nonexistent or minimal because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico. Diversions of seawater in a bay or arm of the Gulf of Mexico are also limited to industrial water. Water for municipal and domestic needs will not be taken from this part of the Gulf of Mexico.

## Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and, 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the proposed rules include those contained in 31 TAC §501.33(a). The proposed rules implement HB 2031 and HB 4097, which direct the TCEQ to regulate the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater through expedited permitting and related processes. In HB 2031, the legislature finds "...that it is necessary and appropriate to grant authority and provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water right protections,..." Since one of the purposes of the proposed rules is to protect coastal natural resources, the rules are consistent with the CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because one of the purposes of the proposed rules is to protect coastal and natural resources.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

## Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on June 21, 2016, at 2:00 p.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

## Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be

submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-029-295-OW. The comment period closes on July 5, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at [http://www.tceq.texas.gov/rules/propose\\_adopt.html](http://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Kathy Ramirez, Water Availability Division, at (512) 239-6757 or Kathy Alexander, Water Availability Division, at (512) 239-0778.

## Statutory Authority

The rules are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the TCEQ's authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; and TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes.

The proposed rules implement House Bill (HB) 2031 and HB 4097 (84th Texas Legislature, 2015).

### §297.200. Applicability.

This subchapter only applies to diversion and use of marine seawater and seawater and conveyance of treated marine seawater in the bed and banks of a watercourse. The requirements for an application to divert marine seawater and seawater and to convey treated marine seawater in the bed and banks of a watercourse are in Chapter 295, Subchapter G of this title (relating to Desalination, Procedural).

### §297.201. Definitions.

The following words or phrases have the following meanings in this subchapter unless the context clearly indicates otherwise:

(1) Marine seawater--Water that is derived from the Gulf of Mexico.

(2) Seawater--Water that is derived from a bay or arm of the Gulf of Mexico.

### §297.202. Approval Criteria for Diversion of Marine Seawater and Seawater.

The commission shall grant an application for a water right to divert marine seawater or seawater only if:

(1) the application conforms to the requirements prescribed by §295.302 of this title (relating to Requirements for Diversion of Marine Seawater and Diversion of Seawater) and is accompanied by the prescribed fee;

(2) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or the marine seawater contains a total dissolved solids concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter;

(3) the diverted marine seawater or seawater is intended for a beneficial use and the marine seawater or seawater will be treated in accordance with applicable commission rules, based on the purpose for which the marine seawater or seawater is to be used, before it is used;

(4) the application is not detrimental to the public welfare;

(5) the applicant has consulted with Texas Parks & Wildlife Department and the Texas General Land Office;

(6) the application addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan unless the commission determines that new, changed, or unaccounted for conditions warrant waiver of this requirement; and

(7) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by §297.1 of this title (relating to Definitions).

§297.203. Water Availability.

The commission is not required to make a finding of water availability for an application under Chapter 295, Subchapter G of this title (relating to Desalination, Procedural).

§297.204. Applicability of Environmental Flow Standards.

(a) The commission shall evaluate whether an application for a diversion of marine seawater or seawater under Chapter 295, Subchapter G of this title (relating to Desalination, Procedural) is consistent with any applicable environmental flow standards established under Chapter 298 of this title (relating to Environmental Flow Standards for Surface Water).

(b) The commission may include any provisions in a permit issued under Chapter 295, Subchapter G of this title that the commission considers necessary to comply with the environmental flow standards established under Chapter 298 of this title.

§297.205. Determination of Total Dissolved Solids Concentration.

(a) In its consideration of an application for a new or amended water right to divert marine seawater or seawater, the commission shall review the information required under §295.302(i) of this title (relating to Requirements for Diversion of Marine Seawater and Diversion of Seawater) and determine whether the application meets the requirements of Texas Water Code (TWC), §11.1405(a)(2) and §18.003(a)(2).

(b) The assessment of any conditions upon a proposed amendment to a water right under this section shall be limited by §297.45(b) of this title (relating to "No Injury" Rule) as provided by TWC, §11.122(b).

§297.206. Treatment of Diverted Marine Seawater and Seawater.

The commission shall review the information submitted under §295.302(f) of this title (relating to Requirements for Diversion of Marine Seawater and Diversion of Seawater) and determine whether the diverted marine seawater or seawater will be treated in accordance with applicable commission rules, based on the purpose for which the marine seawater or seawater is to be used.

§297.207. Diversion of Marine Seawater and Seawater.

The commission shall review the information submitted under §295.302(c) of this title (relating to Requirements for Diversion of Marine Seawater and Diversion of Seawater) to ensure that the point of diversion is not located in a bay or estuary unless the application is for industrial use under Texas Water Code, §11.1405.

§297.208. Consideration of Water Conservation.

(a) Information in the water conservation plan provided by an applicant for a water right permit to divert marine seawater or seawater shall be considered by the commission in determining whether any practicable alternative exists, whether the requested amount is reasonable and necessary for the proposed use, and to ensure that reasonable diligence will be used to avoid waste and achieve water conservation.

(b) A water conservation plan submitted with an application requesting to divert marine seawater or seawater must include data and information which:

(1) supports the applicant's proposed use of marine seawater or seawater with consideration of the water conservation goals of the water conservation plan;

(2) evaluates conservation as an alternative to the proposed diversion of marine seawater or seawater; and

(3) evaluates other feasible alternatives to new water development. It shall be the burden of proof of the applicant to demonstrate that the requested amount is necessary and reasonable for the proposed use.

§297.209. Impingement and Entrainment.

An application to divert marine seawater or seawater under Chapter 295, Subchapter G of this title (relating to Desalination, Procedural) shall include a written statement of facility-specific, reasonable measures to minimize impingement and entrainment that will be implemented at the proposed desalination facility.

§297.210. Approval Criteria for an Application to Convey Treated Marine Seawater in the Bed and Banks.

The commission shall grant an application for a water right to convey treated marine seawater in the bed and banks of a watercourse only if:

(1) the application conforms to the requirements prescribed by §295.305 of this title (relating to Requirements for an Authorization to Convey Treated Marine Seawater in Bed and Banks) and is accompanied by the prescribed fee;

(2) the marine seawater to be conveyed is treated so as to meet standards that are at least as stringent as the water quality standards adopted by the commission and applicable to the receiving stream or impoundment;

(3) the treated marine seawater conveyed will only be used by the person to whom the authorization is granted;

(4) the estimate of the amount of treated marine seawater that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses is reasonable and appropriate for the stream in which the treated marine seawater will be conveyed;

(5) the accounting plan submitted required by §295.305(d)(7) of this title has been approved by the executive director; and

(6) the application does not impair existing water rights or vested riparian rights.

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 13, 2016.

TRD-201602347

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



## CHAPTER 318. MARINE SEAWATER DESALINATION DISCHARGES

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§318.1 - 318.9, 318.21 - 318.30, 318.40 - 318.43, 318.60, and 318.61.

## Background and Summary of the Factual Basis for the Proposed Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB 2031 was to "...streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509, Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and, TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires the Texas Parks & Wildlife Department (TPWD) and the Texas General Land Office (GLO) to conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and the discharge of waste resulting from the desalination process. The commission must adopt rules designating diversion and discharge zones by September 1, 2020. Until such time as the commission adopts rules designating diversion and discharge zones, an applicant for a permit to divert marine seawater or discharge waste resulting from the desalination process must consult with the TPWD and the GLO regarding the point(s) of diversion and discharge.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

In addition, TWC, §26.0272(b), indicates that TCEQ may issue a permit for the discharge of water treatment residuals from the desalination of seawater into the portion of the Gulf of Mexico inside the territorial limits of the state. TWC, §26.0272(c), specifies that prior to issuing a permit, TCEQ must evaluate the discharge of water treatment residuals from the desalination of seawater into the Gulf of Mexico for compliance with the state water quality standards, requirements of the Texas Pollutant Discharge Elimination System program, and applicable federal law. TWC, §26.0272(d), indicates that permits may be individual or general. TWC, §26.0272(d), also specifies that for individual permits, an application review procedure, at a minimum, must comply with the requirements of TWC, Chapter 5, Subchapter M; and the commission must comply with the requirements of TWC, §26.040, for a general permit.

TWC, §27.021, allows TCEQ to issue an individual Class I injection well permit authorizing the disposal of water treatment residuals produced by the desalination of seawater. TWC, §27.025, allows TCEQ to authorize a Class I injection well under a general permit for the disposal of concentrate produced by the desalination of seawater. TWC, §27.025, specifies that the general permit must include any requirements necessary to maintain delegation of the federal underground injection control program administered by TCEQ.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these proposed rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also proposes new sections in 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 295, Water Rights, Procedural; and, 30 TAC Chapter 297, Water Rights, Substantive to implement HB 2031 and HB 4097.

## Section by Section Discussion

### *General Comments*

The major substance of this proposed chapter was developed from existing regulations related to the permitting process such as 30 TAC Chapters 39, 50, 55, 281, and 305. They were then revised to remove requirements that don't apply to wastewater discharges, to expedite the existing permitting process for wastewater discharges, and to incorporate only the required procedural elements in TWC, §18.005(e)(1) - (3).

The chapter is organized into four subchapters: General Requirements for Marine Seawater Desalination Discharges; Treated Marine Seawater Discharges; Off-Shore Discharges; and Near-Shore Discharges. This organizational structure allows for clearly and separately defined permitting procedures for each type of permit.

Some key terms, which are defined in the proposal, will help improve understanding of this preamble: "Off-shore discharges" are the discharge of wastewater from a marine seawater desalination project into the Gulf of Mexico where the point of discharge is located three or more miles from any point located on the coast of Texas; and "Near-shore discharges" are the discharge of wastewater from a marine seawater desalination project into the Gulf of Mexico where the point of discharge is located within three miles from any point located on the coast of Texas.

### *Subchapter A: General Requirements for Marine Seawater Desalination Discharges*

#### *§318.1, Applicability and Purpose*

Proposed new §318.1, identifies the purpose of Chapter 318, which is to establish an expedited permitting process for new, renewal, and amendment applications for treated marine seawater discharges, off-shore discharges, and near-shore discharges that originate from a marine seawater desalination project. These types of discharges may, alternatively, be authorized under the provisions of TWC, Chapter 26 and 30 TAC Chapter 305. Proposed new §318.1 also identifies which portions of the chapter apply to near-shore discharges. These types of discharges are governed by the Texas Pollutant Discharge Elimination System program and as such must be processed in accordance with the Memorandum of Agreement

between TCEQ and the United States Environmental Protection Agency (EPA). Lastly, proposed new §318.1 states that this chapter does not apply to discharges into a bay, estuary, or fresh waterbody. This provision complies with TWC, §18.005(f).

#### *§318.2, Definitions*

Proposed new §318.2, defines words and terms that are used in the chapter. The definitions for "Off-shore discharges" and "Near-shore discharges" are discussed earlier in this Section by Section Discussion and are consistent with TWC, §18.005(e)(2). Other definitions that would benefit from further discussion are "Facility" and "Marine seawater desalination project." The term "Facility" includes all contiguous land and fixtures, structures, or appurtenances used for the collection, transportation, and treatment of marine seawater and the storage, transportation, and discharge of treated marine seawater and wastewater from a marine seawater desalination project. The term "Marine seawater desalination project" is limited to the operation that desalinates marine seawater.

Desalination plants in other areas of the world are often co-located with power plants. The power plants also have wastewater discharges. Power plant discharges would not be authorized under the expedited process in the proposed rules because the power plant does not desalinate marine seawater. Additionally, other operations may be occurring at the site, such as a water bottling operation or an operation that uses the desalinated water in an industrial process. Wastewater generated by the bottling operation or the industrial operation would not be authorized under the expedited process in the proposed rules because the bottling plant and industrial operation do not desalinate marine seawater. Conversely, the operation that desalinates marine seawater may generate multiple types of wastewater, such as brine concentrate which is sometimes called reject water, filter backwash wastewater, and domestic wastewater from restrooms at the desalination operation. These wastewater discharges, if they are near-shore discharges or off-shore discharges, could be authorized under the expedited process in the proposed rules because they are generated by the operation that desalinates marine seawater.

These definitions are crucial for limiting the applicability of the proposed rules to only wastewaters generated by the operation that desalinates marine seawater, not wastewater generated by other operations such as a co-located power plant or water bottling plant.

#### *§318.3, Application Requirements*

Proposed new §318.3, requires the owner and the operator, if the operator is a different entity, to apply for the permit. The original application and three copies must be submitted to the executive director on forms provided by the executive director. The remaining portions of proposed new §318.3 identify the contents of the permit application. It is the intent of the executive director to develop an application form specific to treated marine seawater discharges and off-shore discharges processed under this chapter. Developing an application form specific to these discharges allows the executive director to collect and review information relevant to these discharges. This will assist in reducing the application review time for these permit applications.

#### *§318.4, Application Fees and Water Quality Fees*

Proposed new §318.4, identifies the application fees for each type of permit action and identifies other regulations for the water quality fee. The application fees are consistent with fees in

30 TAC §305.53 (Application Fee) for minor facilities subject to the EPA's categorical standards. The water quality fees are consistent with the fees for marine seawater desalination plants that obtain a permit under existing procedural rules.

#### *§318.5, Permit Conditions*

Proposed new §318.5, identifies other regulations that are applicable to these permits.

#### *§318.6, Amendment of a Permit*

Proposed new §318.6, defines the types of amendments and modifications, who can initiate amendments, specifies the contents of an amendment application, and the effect of an amendment application on the expiration of the existing permit. Proposed new §318.6 also specifically allows an applicant who files a major amendment application to simultaneously request a renewal of the permit. This provision allows the permittee to get a full five-year permit following a major amendment rather than retaining the expiration date of the current permit.

#### *§318.7, Renewal of a Permit*

Proposed new §318.7, specifies the timing for submitting a renewal application, the effect of a renewal application on the expiration of the existing permit, and a requirement that a renewal application must request continuation of the same requirements and conditions of the expiring permit.

#### *§318.8, Other Permit Actions*

Proposed new §318.8, identifies other regulations that are applicable to these permits for the following permit actions: permit transfers; permit denial, suspension, and revocation; permit cancellation; and corrections to permits.

#### *§318.9, Discharge Zones for Near-Shore and Off-Shore Discharges*

Proposed new §318.9, requires an applicant to include documentation of consultation with the TPWD and the GLO regarding the outfall locations in the permit application for near-shore discharges and off-shore discharges. This requirement only applies to new permit applications and amendment applications that propose a new outfall or a new location for an existing outfall.

#### *Subchapter B: Treated Marine Seawater Discharges*

##### *§318.21, Applicability*

Proposed new §318.21, identifies the application types that this subchapter applies to. In addition to applications seeking authorization for treated marine seawater discharges, this subchapter also applies to applications for a single permit to authorize both treated marine seawater and off-shore discharges.

##### *§318.22, Application Review for Treated Marine Seawater Discharges*

Proposed new §318.22, identifies the administrative and technical review process that the executive director will use. The application will be assigned a permit number and reviewed for administrative completeness within five business days of receipt. If an application is not administratively complete, the applicant will be notified by email and must provide a response within five business days of the request for additional information. If the applicant fails to provide the additional information by the deadline, the application will be considered withdrawn unless there are extenuating circumstances. The administrative review process is expedited by reducing the review period and using email for incoming and outgoing correspondence with applicants.

After the application is administratively complete, it will undergo a technical review for a period of time not to exceed 30 business days from the date the application is declared administratively complete. If an application is not technically complete, the applicant will be notified by email and must provide a response within the timeframe established by the technical review staff. The timeframe for submitting additional technical information can vary based on the level of complexity of the data requested. If the applicant fails to provide the additional information by the deadline, the executive director may return the application. The applicant can request that the commission determine the sufficiency of the technical data prior to having the application returned. The technical review process is expedited by reducing the review period and using email for incoming and outgoing correspondence with applicants. Additionally, developing an application form that is specific to marine seawater desalination discharges will assist the executive director in conducting an expedited technical review. After the application is declared technically complete, the executive director will prepare a draft permit and technical summary unless a recommendation is made to not grant the application. The proposed rule describes the contents of the technical summary. The draft permit and technical summary will be emailed to the applicant for a 10-day review period. The public notice and comment procedures are proposed in new 30 TAC §39.902.

##### *§318.23, Public Meeting*

Proposed new §318.23, specifies that public meetings held on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §55.154. Notice of a public meeting must comply with the requirements in proposed new §39.902.

##### *§318.24, Public Comment Processing*

Proposed new §318.24, identifies other regulations that prescribe how the executive director will process timely filed public comments. The executive director will respond to all timely filed public comments. Late comments will be added to the application file but will not be processed.

##### *§318.25, Action by the Executive Director*

Proposed new §318.25, specifies that actions by the executive director on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §§50.133, 50.135, and 50.137.

##### *§318.26, Motion to Overturn Executive Director's Decision*

Proposed new §318.26, specifies that Motions to Overturn the Executive Director's decision on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §50.139.

##### *§318.27, Request for Contested Case Hearing on an Application*

Proposed new §318.27, identifies the application actions that are subject to contested case hearings and specifies that requests for a contested case hearing on those applications under Chapter 318 are subject to the provisions outlined in 30 TAC §§55.201, 55.203, 55.205, and 55.209.

##### *§318.28, Direct Referrals*

Proposed new §318.28, specifies that direct referrals on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §55.210.

##### *§318.29, Action by the Commission*

Proposed new §318.29, specifies that actions by the commission on applications under Chapter 318 are subject to the provi-

sions outlined in 30 TAC §§50.113, 50.115, 50.117, 50.119, and 55.211.

#### *§318.30, Contested Case Hearing Proceedings*

Proposed new §318.30, identifies other regulations that prescribe how contested case hearings are conducted.

#### *Subchapter C: Off-Shore Discharges*

##### *§318.40, Applicability*

Proposed new §318.40, specifies that this subchapter applies to applications seeking authorization for off-shore discharges. However, as noted in proposed new §318.21, if an application is seeking authorization for both off-shore discharges and treated marine seawater discharges, the application is subject to the requirements in proposed new Subchapter B.

##### *§318.41, Application Review for Off-Shore Discharges*

Proposed new §318.41, identifies the administrative and technical review process that the executive director will use. The application will be assigned a permit number and reviewed for administrative completeness within five business days of receipt. If an application is not administratively complete, the applicant will be notified by email and must provide a response within five business days of the request for additional information. If the applicant fails to provide the additional information by the deadline, the application will be considered withdrawn unless there are extenuating circumstances. The administrative review process is expedited by reducing the review period and using email for incoming and outgoing correspondence with applicants.

After the application is administratively complete, it will undergo a technical review for a period of time not to exceed 30 business days from the date the application is declared administratively complete. If an application is not technically complete, the applicant will be notified by email and must provide a response within the timeframe established by the technical review staff. The timeframe for submitting additional technical information can vary based on the level of complexity of the data requested. If the applicant fails to provide the additional information by the deadline, the executive director may return the application. The applicant can request that the commission determine the sufficiency of the technical data prior to having the application returned. The technical review process is expedited by reducing the review period and using email for incoming and outgoing correspondence with applicants. Additionally, developing an application form that is specific to marine seawater desalination discharges will assist the executive director in conducting an expedited technical review.

After the application is declared technically complete, the executive director will prepare a draft permit and technical summary unless a recommendation is made to not grant the application. The proposed rule describes the contents of the technical summary. The draft permit and technical summary will be emailed to the applicant for a 10-day review period. The public notice and comment procedures are proposed in new 30 TAC §39.903.

##### *§318.42, Action by the Executive Director*

Proposed new §318.42, specifies that actions by the executive director on applications under Chapter 318 are subject to the provisions outlined in §§50.133, 50.135, and 50.137.

##### *§318.43, Motion to Overturn Executive Director's Decision*

Proposed new §318.43, specifies that Motions to Overturn the Executive Director's decision on applications under Chapter 318 are subject to the provisions outlined in §50.139.

#### *Subchapter D: Near-Shore Discharges*

##### *§318.60, Applicability*

Proposed new §318.60, identifies the application types that this subchapter applies to.

##### *§318.61, Application Review and Processing for Near-Shore Discharges*

Proposed new §318.61, explains why an expedited permitting process will not be codified in this chapter; identifies other regulations that prescribe how near-shore discharges will be reviewed and processed; and, states that the executive director will make every reasonable effort to expedite the application review within the current framework.

#### *Fiscal Note: Costs to State and Local Government*

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are expected for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules implement HB 2031 which created an expedited permitting process for marine seawater desalination projects. HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated and marine seawater and waste resulting from the desalination process.

HB 2031 also requires that the TPWD and the GLO conduct a study to identify zones in the Gulf of Mexico that are appropriate for the discharge of waste resulting from the marine seawater desalination process. The bill requires the commission to adopt rules designating discharge zones by September 1, 2020. An applicant for a permit to discharge waste resulting from the marine seawater desalination process must consult with the TPWD and the GLO regarding the point(s) of discharge until such time as the commission adopts rules designating discharge zones.

Although the permitting process is expedited, the agency does not expect the need for additional resources to issue any permits under the proposed rules. Agency staff does not expect a significant number of permit applications for desalination plants in Texas.

The proposed rulemaking establishes application fees and annual water quality fees for discharges associated with marine seawater desalination. Under the proposed rules, a new permit application fee would be \$1,250; a major amendment (with or without renewal) of an existing permit would be \$1,250; and a renewal of an existing permit would be \$1,215. An annual water quality fee would be assessed in accordance with 30 TAC Chapter 21. This fee is calculated using several criteria and is capped by statute at \$150,000. No permittee has ever reached the \$150,000 cap (the highest current annual water quality fee is \$116,000 and the cap is not expected to be reached for several years). The minimum fee may not be less than \$1,250 for each active permit or contract. No significant revenue is anticipated and no significant costs are expected for the agency due to the low number of anticipated permit applications. Desalination plants are not expected to be owned or operated by other units of state or local government.

## Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and a streamlined regulatory process for marine seawater desalination that would assist the state to develop new water supplies to meet the ever-increasing demand for water.

No fiscal implications are anticipated for businesses or individuals as a result of the administration and enforcement of the proposed rules. The proposed rulemaking provides an alternative, expedited procedure for obtaining a discharge permit for a marine seawater desalination plant. Discharges associated with marine seawater desalination may also alternatively be authorized under the provisions of TWC, Chapter 26, and 30 TAC Chapter 305.

According to agency staff, there are currently no marine seawater desalination plants in Texas nor are there a significant number expected to be constructed in the first five years after the proposed rules would come into effect. Any marine seawater desalination plants that would be constructed would be owned by large businesses capable of funding large capital projects. Even though individuals may pay a higher cost for water from a desalination plant, they would also benefit from having a new water supply.

Additionally, a facility that applies for a permit for only off-shore discharges (no treated marine seawater discharges or near-shore discharges) would not be subject to a contested case hearing. A contested case hearing can add a significant cost for obtaining a permit. Costs for a contested case hearing would vary depending on the costs for hiring attorneys, technical experts, and travel expenses.

The proposed rulemaking establishes application fees and annual water quality fees for discharges associated with marine seawater desalination. Under the proposed rules, a new permit application fee would be \$1,250; a major amendment (with or without renewal) of an existing permit would be \$1,250; and a renewal of an existing permit would be \$1,215. An annual water quality fee would be assessed against permittees in accordance with Chapter 21. This fee is calculated using several criteria and is capped by statute at \$150,000. No permittee has ever reached the cap (the highest current annual water quality fee is \$116,000 and the \$150,000 cap is not expected to be reached for several years). The minimum fee may not be less than \$1,250 for each active permit or contract. This fiscal note assumes that any operating costs for businesses or individuals that own or operate marine seawater desalination plants would be offset through charges and fees assessed to their customers.

## Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. The proposed rules only would affect those businesses that intend to own or operate a marine seawater desalination plant and would provide an alternative, expedited procedure for obtaining discharge permits which could result in positive fiscal implications. This fiscal note also assumes that any operating costs for businesses or individuals that own or operate marine seawater desalination plants would be offset through charges and fees assessed to their customers.

## Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary in order to comply with state law and does not adversely affect small or micro-businesses in a material way for the first five years that the proposed rules are in effect.

## Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

## Draft Regulatory Impact Analysis Determination

The commission has reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225(a) because it does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.

Texas Government Code, §2001.0225 applies to a "major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector or the state.

The legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination. HB 2031 states that the purpose of the new law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. More specifically, the legislature stated the purpose of HB 2031 was to "...streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination." Therefore, the specific intent of the proposed rulemaking is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rules in Chapter 318 are for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the processes for obtaining a permit to discharge treated marine seawater and waste resulting from the desalination process under TWC, Chapter 18. The proposed new rules will protect the health and safety of aquatic and wildlife resources, as well as water quality, however, the proposed rules will not adversely affect the economy, a sector of the economy, productivity, competition, or jobs within the state or a sector of the state. Accordingly, the commission concludes that the proposed rulemaking does not meet the definition of a "major environmental rule."

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather creates an expedited process under state law to ensure efficient regulatory oversight, while comprehensively protecting the state's natural resources. Third, it does not come under a delegation agreement or contract with a federal program, and finally, it is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under specific state statutes enacted in HB 2031. Therefore, the commission does not adopt the rule solely under the commission's general powers.

Written comments on the Draft Regulatory Impact Analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that analysis. The specific purpose of the proposed rulemaking is to modify the TAC to implement the changes to the TWC, from HB 2031, which creates procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rulemaking will substantially advance this stated purpose by proposing rules in a new Chapter 318 that are intended to articulate and expedite the permitting process for marine seawater desalination discharges in accordance with HB 2031 and TWC, Chapter 18.

Promulgation and enforcement of the proposed rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property. In HB 2031, the legislature expressed that "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. For marine seawater, there are no real property rights that have been granted for use of the water in the Gulf of Mexico. These actions will not affect or burden private real property rights because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico.

#### Consistency with the Coastal Management Program

The commission has reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and

found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and, 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the proposed rules include: discharges must comply with water quality-based effluent limits; discharges that increase pollutant loadings to coastal waters must not impair designated uses of coastal waters and must not significantly degrade coastal water quality, unless necessary for important economic or social development; and to the greatest extent practicable, new wastewater outfalls must be located where they will not adversely affect critical areas.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies. The proposed rules are consistent with these CMP goals and policies because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because the proposed rules do not allow a discharge from marine seawater desalination projects into or adjacent to water in the state, except in accordance with an individual permit issued by the commission. Individual permits issued under these proposed rules will include effluent limitations to ensure compliance with water quality standards. Further, the expedited permitting process in these proposed rules cannot be used to authorize discharges of wastewater into bays and estuaries. Wastewater must be discharged into the Gulf of Mexico, and applicants must consult with the TPWD and the GLO regarding the outfall location(s).

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on June 21, 2016, at 2:00 p.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

#### Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-029-295-OW. The comment period closes on July 5, 2016. Copies of the proposed rulemaking can be obtained from the commission's website

at [http://www.tceq.texas.gov/rules/propose\\_adopt.html](http://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Kathy Ramirez, Water Availability Division, at (512) 239-6757 or Laurie Fleet, Wastewater Permitting Section, at (512) 239-5445.

## SUBCHAPTER A. GENERAL REQUIREMENTS FOR MARINE SEAWATER DESALINATION DISCHARGES

### 30 TAC §§318.1 - 318.9

#### Statutory Authority

The rules are proposed under Texas Water Code (TWC), §5.013 which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103 which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18.

The proposed rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

#### §318.1. Applicability and Purpose.

(a) The provisions of this chapter establish an expedited process for new, renewal, and amendment applications for treated marine seawater discharges, off-shore discharges, and near-shore discharges that originate from a marine seawater desalination project under Texas Water Code (TWC), Chapter 18. Discharges from a marine seawater desalination project may, alternatively, be authorized under the provisions of TWC, Chapter 26 and Chapter 305 of this title (relating to Consolidated Permits).

(b) Near-shore discharges from marine seawater desalination projects are subject to, and must comply with, §318.9 of this title (relating to Discharge Zones for Near-Shore and Off-Shore Discharges) and Subchapter D of this chapter (relating to Near-Shore Discharges).

(c) This chapter does not apply to discharges into a bay, estuary, or fresh waterbodies.

#### §318.2. Definitions.

The definitions contained in Texas Water Code, §26.001 apply to this chapter. The following words and terms, when used in this chapter, have the following meanings.

(1) Affected person--A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

The determination of whether a person is affected shall be governed by §55.203 of this title (relating to Determination of Affected Person).

(2) Application--A formal written request for commission action relative to a permit, together with all materials and documents submitted to complete the application.

(3) Commission--The Texas Commission on Environmental Quality.

(4) Facility--Includes all contiguous land and fixtures, structures, or appurtenances used for the collection, transportation, and treatment of marine seawater and the storage, transportation, and discharge of treated marine seawater and wastewater from a marine seawater desalination project. A facility may consist of several storage, processing, treatment, or disposal units.

(5) Marine seawater--Water that is derived from the Gulf of Mexico.

(6) Marine seawater desalination project--An operation that desalinates marine seawater. Marine seawater desalination project does not include other businesses, entities, or operations that do not desalinate marine seawater regardless of whether or not they are associated with the desalination operation by ownership, location, business structure, or business dependencies.

(7) Near-shore discharges--The discharge of wastewater from a marine seawater desalination project into the Gulf of Mexico where the point of discharge is located within three miles seaward of any point located on the coast of Texas.

(8) Off-shore discharges--The discharge of wastewater from a marine seawater desalination project into the Gulf of Mexico where the point of discharge is located three or more miles seaward from any point located on the coast of Texas.

(9) Operator--The person responsible for the overall operation of a facility.

(10) Outfall--The point or location where treated marine seawater or reject water is discharged from a marine seawater desalination project into or adjacent to water in this state.

(11) Owner--The person who owns a facility or part of a facility.

(12) Permit--A written document issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate, in accordance with stated limitations, a specified facility for treated marine seawater and reject water discharges.

(13) Site--The land or water area where any marine seawater desalination project is physically located or conducted, including adjacent land or water used in connection with the marine seawater desalination project.

(14) Treated marine seawater--Marine seawater that has been treated to reduce salinity. Treated marine seawater is not a pollutant discharge.

#### §318.3. Application Requirements.

(a) Any person who requests a permit or who requests an amendment, modification, or renewal of a permit for treated marine seawater discharges or off-shore discharges shall complete, sign, and submit an application to the executive director according to the requirements of this chapter. A permittee shall keep records of data used to complete the final application and any supplemental information throughout the term of the permit.

(b) It is the duty of the owner of a facility to submit an application for a permit. However, if the facility is owned by one person

and operated by another, it is the duty of the operator and the owner to jointly submit an application for a permit.

(c) Only one application needs to be filed for each geographical location from which treated marine seawater or wastewater is discharged, even though there may be more than one outfall requested in the application.

(d) The original and three copies of the permit application shall be submitted on forms provided by or approved by the executive director, and shall be accompanied by a like number of copies of all technical supplements and attachments.

(e) All applications shall be signed in accordance with §305.44 of this title (relating to Signatories to Applications).

(f) Each application for a permit must include the following:

(1) the name, mailing address, and location of the facility for which the application is submitted;

(2) the ownership status as federal, state, private, public, or other entity;

(3) the applicant's name, mailing address, email address, and telephone number;

(4) a topographic map, ownership map, county highway map, or a map prepared by a Texas licensed professional engineer, Texas licensed professional geoscientist, or a registered surveyor which shows the facility and each of its intake and outfall structures. Maps must be of material suitable for a permanent record, and shall be on sheets 8-1/2 inches by 11 inches or folded to that size, and shall be on a scale of not less than one inch equals one mile. The map shall depict the approximate boundaries of the tract of property owned or to be used by the applicant and shall extend at least one mile beyond the tract boundaries sufficient to show the following:

(A) each well, spring, and surface water body or other water in the state within the map area;

(B) the general character of the areas adjacent to the facility, including public roads, towns and the nature of development of adjacent lands such as residential, commercial, agricultural, recreational, undeveloped, and so forth; and

(C) the location of any waste disposal activities conducted on the tract not included in the application;

(5) a supplementary technical report submitted in connection with an application. The report must be prepared either by a Texas licensed professional engineer, a Texas licensed professional geoscientist, or by a qualified person who is competent and experienced in the field to which the application relates and thoroughly familiar with the proposed marine seawater desalination project. The report must include the following:

(A) a general description of the facilities and systems used for or in connection with the intake, collection, transportation, and treatment of marine seawater and the storage, transportation, and discharge of treated marine seawater and wastewater; and

(B) for each outfall:

(i) the volume and rate of the discharge of treated marine seawater and wastewater, including daily average flow, daily maximum flow, and detailed information regarding patterns of discharge; and

(ii) the chemical, physical, thermal, organic, bacteriological, or radiological properties or characteristics of the wastewater,

as applicable, described in enough detail to allow evaluation of the water and environmental quality considerations involved; and

(6) the applicant shall provide other information as reasonably may be required by the executive director for an adequate understanding of the project, and which is necessary to provide the commission an adequate opportunity to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and federal statutes.

(g) If the applicant is an individual, the application shall contain:

(1) the individual's full legal name and date of birth;

(2) the street address of the individual's place of residence;

(3) the identifying number from the individual's driver's license or personal identification certificate issued by the state or country in which the individual resides;

(4) the individual's sex; and

(5) any assumed business or professional name of the individual filed under Texas Business and Commerce Code, Chapter 36.

#### §318.4. Application Fees and Water Quality Fees.

(a) An applicant shall include with each application a fee. The application fee is due at the time that the application is filed with the commission. Unless the recommendation of the executive director is that the application be denied, the commission will not consider an application for final decision until such time as the application fee is paid.

(b) The permit application fees are as follows:

(1) new - \$1,250;

(2) major amendment (with or without renewal) of an existing permit - \$1,250;

(3) renewal of an existing permit - \$1,215;

(4) minor amendment and minor modification of an existing permit - \$150.

(c) An annual water quality fee will be assessed against permittees authorized under this chapter in accordance with Chapter 21 of this title (relating to Water Quality Fees).

#### §318.5. Permit Conditions.

(a) A permit issued under this chapter is subject to the requirements of:

(1) §305.122 of this title (relating to Characteristics of Permits);

(2) §305.123 of this title (relating to Reservation in Granting Permit);

(3) §305.124 of this title (relating to Acceptance of Permit, Effect);

(4) §305.125 of this title (relating to Standard Permit Conditions); and

(5) §305.127 of this title (relating to Conditions to be Determined for Individual Permits).

(b) All reports required by permits issued under this chapter and other information requested by the executive director shall be signed in accordance with §305.128 of this title (relating to Signatories to Reports).

#### §318.6. Amendment of a Permit.

(a) Amendments generally. A change in a term, condition, or provision of a permit requires an amendment, except corrections to permits under subsection (c)(2)(A) of this section and permit transfers under §318.8 of this title (relating to Other Permit Actions).

(b) Application for amendment. An application for amendment shall include all requested changes to the permit. Information sufficient to review the application shall be submitted in the form and manner and under the procedures specified in §318.3 of this title (relating to Application Requirements). The application shall include a statement describing the reason for the requested changes.

(c) Types of amendments.

(1) A major amendment is an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit.

(2) A minor amendment is an amendment to improve or maintain the permitted quality or method of disposal of treated marine seawater or wastewater if there is neither a significant increase of the quantity of treated marine seawater or wastewater to be discharged nor a material change in the pattern or place of discharge. A minor amendment includes any other change to a permit issued under this chapter that will not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state. A minor amendment may also include, but is not limited to:

(A) correcting typographical errors;

(B) changing an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date;

(C) requiring more frequent monitoring or reporting by the permittee;

(D) changing the construction schedule for a discharger. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation before discharge; and

(E) deleting an outfall when the discharge from that outfall is terminated and does not change the discharge from other outfalls except within permit limits.

(d) Good cause for amendments. If good cause exists, the executive director may initiate and the commission may order a major amendment, minor amendment, or minor modification to a permit and the executive director may request an updated application if necessary. Good cause includes, but is not limited to:

(1) there are material and substantial changes to the permitted facility or activity which justify permit conditions that are different or absent in the existing permit;

(2) information, not available at the time of permit issuance, is received by the executive director, justifying amendment of existing permit conditions;

(3) the standards or regulations on which the permit or a permit condition was based have been changed by statute, through promulgation of new or amended standards or regulations, or by judicial decision after the permit was issued; or

(4) an act of God, strike, flood, material shortage, or other event over which the permittee has no control and for which there is no reasonably available alternative may be determined to constitute good cause for amendment of a compliance schedule.

(e) Amendment initiated by the executive director. If the executive director determines to amend a permit, notice of the determination stating the reason for the amendment and a copy of a proposed amendment draft shall be mailed, by United States Postal Service or electronic mail, to the permittee at the last address of record with the commission.

(f) Amendment initiated permit expiration. The existing permit will remain effective and will not expire until commission action on the application for amendment is final. The commission may extend the term of a permit when taking action on an application for amendment.

(g) Amendment application with renewal. An application for a major amendment to a permit may include a request for a renewal of the permit.

#### §318.7 . Renewal of a Permit.

Any permittee with an effective permit shall submit an application for renewal at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the executive director. The executive director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.

(1) An application for renewal shall be in the same form as that required for the original permit application.

(2) An application for renewal shall request continuation of the same requirements and conditions of the expiring permit.

(3) If an application for renewal in fact requests a modification of requirements and conditions of the existing permit, an application for amendment shall be filed in place of an application for renewal.

(4) If an application for renewal is received by the executive director before the permit expiration date, the existing permit will remain in full force and effect and will not expire until commission action on the application for renewal is final.

(5) The commission may deny an application for renewal for the grounds set forth in §305.66 of this title (relating to Permit Denial, Suspension, and Revocation).

(6) During the renewal process, the executive director may make any changes or additions to permits authorized by §318.6 of this title (relating to Amendment of a Permit).

#### §318.8. Other Permit Actions.

(a) Permit transfer. A permit issued under this chapter is issued to a specific person and may be transferred only upon approval of the commission in accordance with §305.64 of this title (relating to Transfer of Permits).

(b) Permit denial, suspension, and revocation. A permit issued under this chapter does not become a vested right and may be denied, suspended, or revoked in accordance with §305.66 of this title (relating to Permit Denial, Suspension, and Revocation).

(c) Permit cancellation. If a permittee no longer desires to continue the activity authorized under a permit issued under this chapter, or is agreeable to a suspension of authorization for a specified period of time, the permittee should file with the executive director a written request, or a written consent and waiver in accordance with §305.67 of this title (relating to Revocation and Suspension upon Request or Consent). In the absence of a request filed by the permittee or of sufficient consent and waiver, the commission may revoke or suspend a permit in accordance with §305.66 of this title.

(d) Correction to permits. Nonsubstantive changes to a permit issued under this chapter may be made in accordance with §50.145 of this title (relating to Corrections to Permits).

§318.9. Discharge Zones for Near-Shore and Off-Shore Discharges. An application for near-shore discharges or off-shore discharges must contain documentation of consultation with the Texas Parks & Wildlife Department and the Texas General Land Office regarding the outfall location(s) as required by Texas Water Code, §18.005(h). This provision only applies to new applications and amendment applications that propose a new outfall or a new location for an existing outfall.

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 13, 2016.

TRD-201602348

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



## SUBCHAPTER B. TREATED MARINE SEAWATER DISCHARGES

### 30 TAC §§318.21 - 318.30

#### Statutory Authority

The rules are proposed under Texas Water Code (TWC), §5.013 which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103 which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18.

The proposed rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

#### §318.21. Applicability.

This subchapter applies to:

- (1) applications to discharge treated marine seawater from a marine seawater desalination project; and
- (2) applications for a consolidated permit to discharge treated marine seawater and off-shore discharges.

#### §318.22. Application Review for Treated Marine Seawater Discharges.

(a) Upon receipt of an application, the executive director or his designee shall assign the application a number for identification purposes.

(b) Applications for permits shall be reviewed by the staff for administrative completeness within five business days of receipt of the application by the executive director.

(c) If an application is received which is not administratively complete, the executive director shall notify the applicant of the deficiencies by email by the end of the five-day review period.

(1) If the additional information is received within five business days of notice of the deficiency, the executive director will evaluate the information within five business days of receipt of the additional information.

(2) If the additional information is not received within five business days of notice of the deficiency, the application shall be considered withdrawn unless there are extenuating circumstances.

(d) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate for a period of time not to exceed 30 business days from the date the application is declared administratively complete.

(e) If an application is received which is not technically complete, the executive director shall notify the applicant by email and prior to the end of the 30-day review period of any additional technical material as may be necessary for a complete review.

(1) If the additional information is received within the timeframe established by the technical review staff, the staff will review the additional information to determine if the application is technically complete.

(2) If the additional information is not received within the timeframe established by the technical review staff, and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 15 days to provide the technical data before an application is returned. Decisions to return an application during the technical review stage will be made on a case-by-case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision prior to having the application returned.

(f) After an application is determined by the executive director to be technically complete, the executive director shall prepare a draft permit consistent with all applicable commission rules, unless a recommendation is made not to grant an application. The draft permit will be filed with the commission to be included in the consideration of the application for permit and is subject to change during the course of the proceedings on the application. The draft permit shall be available for public review.

(g) The executive director shall prepare a technical summary which sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The summary shall include the following information, where applicable:

(1) a brief description of the marine seawater desalination project which is the subject of the draft permit;

(2) the quantity of treated marine seawater that is proposed to be discharged;

(3) a brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

(4) reasons why any requested variances or alternatives to required standards do or do not appear justified;

(5) a description of the procedures for reaching a final decision on the draft permit, including procedures by which the public may participate in the final decision; and

(6) the name and telephone number of agency personnel to contact for additional information.

(h) After the draft permit and technical summary are prepared and prior to issuance of public notice, the executive director shall email the draft permit and technical summary to the applicant. The applicant shall have 10 business days to review and provide comment on the draft permit.

(i) Public notice and comment must comply with procedures in §39.902 of this title (relating to Public Notice and Comment for Treated Marine Seawater Discharges).

§318.23. Public Meeting.

(a) Applications for a discharge permit for treated marine seawater shall comply with the relevant public meeting provisions in §55.154 of this title (relating to Public Meetings), except as noted in this section.

(b) New, major amendment, and renewal applications have the opportunity for a public meeting. Minor amendment and minor modification applications are not subject to a public meeting.

(c) Notice of a public meeting must follow the procedures in §39.902(f) and (g) of this title (relating to Public Notice and Comment for Treated Marine Seawater Discharges).

§318.24. Public Comment Processing.

(a) If timely comments are received, the following procedures shall apply to applications processed under this subchapter:

(1) §55.156 of this title (relating to Public Comment Processing); and

(2) §39.420(a), (b), and (f) of this title (relating to Transmittal of Executive Director's Response to Comments and Decision).

(b) A public comment that is not filed with the chief clerk by the deadline provided in the notice shall be accepted by the chief clerk and placed in the application file but the chief clerk shall not process it.

§318.25. Action by the Executive Director.

Actions by the executive director under this subchapter are subject to the provisions in §§50.133, 50.135, and 50.137 of this title (relating to Executive Director Action on Application or WQMP Update; Effective Date of Executive Director Action; and Remand for Action by Executive Director, respectively).

§318.26. Motion to Overturn Executive Director's Decision.

A motion to overturn may be filed under this subchapter in accordance with the provisions in §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

§318.27. Request for Contested Case Hearing on an Application.

(a) New, major amendment, and renewal applications have the opportunity for a contested case hearing. Minor amendment and minor modification applications are not subject to a contested case hearing.

(b) Requests for a Contested Case Hearing are subject to the provisions in §§55.201, 55.203, 55.205, and 55.209 of this title (relating to Requests for Reconsideration or Contested Case Hearing; Determination of Affected Person; Request by Group or Association; and Processing Requests for Reconsideration and Contested Case Hearing, respectively).

§318.28. Direct Referrals.

The executive director or the applicant may file a request with the chief clerk that the application be sent directly to the State Office of Administrative Hearings for a hearing on the application, pursuant to the provisions in §55.210 of this title (relating to Direct Referrals).

§318.29. Action by the Commission.

Commission consideration of the following items are subject to the provisions in §§50.113, 50.115, 50.117, 50.119, and 55.211 of this title (relating to Applicability and Action on Application; Scope of Contested Case Hearings; Commission Actions; Notice of Commission Action; Motion for Rehearing; and Commission Action of Requests for Reconsideration and Contested Case Hearing, respectively). The commission may refer an application to the State Office of Administrative Hearings if the commission finds that an applicant's compliance history, as determined under Chapter 60 of this title (relating to Compliance History), raises an issue regarding the applicant's ability to comply with a material term of its permit.

§318.30. Contested Case Hearing Proceedings.

Contested case hearings on applications for discharges of treated marine seawater shall be conducted in accordance with Chapter 80 of this title (relating to Contested Case Hearings).

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

Filed with the Office of the Secretary of State on May 13, 2016.

TRD-201602349

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



## SUBCHAPTER C. OFF-SHORE DISCHARGES

### 30 TAC §§318.40 - 318.43

#### Statutory Authority

The rules are proposed under Texas Water Code (TWC), §5.013 which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103 which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules

or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18.

The proposed rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

§318.40. Applicability.

This subchapter applies to off-shore discharges from a marine seawater desalination project.

§318.41. Application Review for Off-Shore Discharges.

(a) Upon receipt of an application, the executive director or his designee shall assign the application a number for identification purposes.

(b) Applications for permits shall be reviewed by the staff for administrative completeness within five business days of receipt of the application by the executive director.

(c) If an application is received which is not administratively complete, the executive director shall notify the applicant of the deficiencies by email by the end of the five-day review period.

(1) If the additional information is received within five business days of notice of the deficiency, the executive director will evaluate the information within five business days of receipt of the additional information.

(2) If the additional information is not received within five business days of notice of the deficiency, the application shall be considered withdrawn unless there are extenuating circumstances.

(d) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate for a period of time not to exceed 30 business days from the date the application is declared administratively complete.

(e) If an application is received which is not technically complete, the executive director shall notify the applicant by email and prior to the end of the 30-day review period of any additional technical material as may be necessary for a complete review.

(1) If the additional information is received within the timeframe established by the technical review staff, the staff will review the additional information to determine if the application is technically complete.

(2) If the additional information is not received within the timeframe established by the technical review staff, and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 15 days to provide the technical data before an application is returned. Decisions to return the application during the technical review stage will be made on a case-by-case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision prior to having the application returned.

(f) After an application is determined by the executive director to be technically complete, the executive director shall prepare a

draft permit consistent with all applicable commission rules, unless a recommendation is made not to grant an application. The draft permit will be filed with the commission to be included in the consideration of the application for permit and is subject to change during the course of the proceedings on the application. The draft permit shall be available for public review.

(g) The executive director shall prepare a technical summary which sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The summary shall include the following information, where applicable:

(1) a brief description of the marine seawater desalination project which is the subject of the draft permit;

(2) the sources and quantity of wastewater that is proposed to be discharged;

(3) a brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

(4) reasons why any requested variances or alternatives to required standards do or do not appear justified;

(5) a description of the procedures for reaching a final decision on the draft permit, including procedures whereby the public may participate in the final decision; and

(6) the name and telephone number of any persons to contact for additional information.

(h) After the draft permit and technical summary are prepared and prior to issuance of public notice, the executive director shall email the draft permit and technical summary to the applicant. The applicant shall have 10 business days to review and provide comment on the draft permit.

(i) Public notice and comment must comply with the procedures in §39.903 of this title (relating to Public Notice and Comment for Off-Shore Discharges).

§318.42. Action by the Executive Director.

Actions by the Executive Director under this subchapter are subject to the provisions in §§50.133, 50.135, and 50.137 of this title (relating to Executive Director Action on Application or WQMP Update; Effective Date of Executive Director Action; and Remand for Action by Executive Director, respectively).

§318.43. Motion to Overturn Executive Director's Decision.

A motion to overturn may be filed under this subchapter in accordance with the provisions in §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

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

Filed with the Office of the Secretary of State on May 13, 2016.

TRD-201602350

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



## SUBCHAPTER D. NEAR-SHORE DISCHARGES

### 30 TAC §318.60, §318.61

#### Statutory Authority

The rules are proposed under Texas Water Code (TWC), §5.013 which establishes the general jurisdiction of the commission; TWC, §5.102 which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103 which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18.

The proposed rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

#### §318.60. Applicability.

This subchapter applies to near-shore discharges from a marine seawater desalination project.

#### §318.61. Application Review and Processing for Near-Shore Discharges.

Wastewater discharges within three miles of any point on the coast of Texas are governed by the Texas Pollutant Discharge Elimination System program. As such, the permitting process for these discharges must comply with Chapters 39, 50, 55, 80, 281, and 305 of this title (relating to Public Notice; Action on Applications and Other Authorizations; Requests for Reconsideration and Contested Case Hearings; Public Comment; Contested Case Hearings; Applications Processing; and Consolidated Permits). The executive director will make every reasonable effort to expedite the administrative and technical reviews, including the use of email for correspondence.

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 13, 2016.

TRD-201602351

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



## TITLE 34. PUBLIC FINANCE

## PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

### CHAPTER 3. TAX ADMINISTRATION

#### SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

### 34 TAC §3.369

The Comptroller of Public Accounts proposes amendments to §3.369, concerning sales tax holiday--certain energy star products.

This section is being amended to implement Senate Bill 1356, 84th Legislature, 2015, which added Tax Code, §151.3335 to provide a sales tax exemption for certain water-efficient products sold during a limited period. Sales of certain water-conserving products and products that have been designated as a WaterSense certified product under the WaterSense program operated by the United States Environmental Protection Agency are exempt from sales and use tax if sold during the 3-day period each May described by Tax Code, §151.333. Additional non-substantive revisions are made throughout the section for clarity and consistency with other sales tax holiday provisions.

The title of §3.369 is amended to reference the exemption for certain water-conserving and WaterSense products.

The definition of "energy-efficient product" provided in subsection (a)(1) is amended to add subparagraphs (A) - (H) and to specify the definition is limited to the list of items provided in those paragraphs. This list of specific items is currently included under the definition of "qualifying products" provided in subsection (a)(5).

The definition of "layaway" in paragraph (4) is amended by deleting the last sentence to make the definition consistent with the definition of the term in other sections of this title addressing sales tax holiday provisions.

The definition of "qualifying products" provided in paragraph (5) is amended to include water-conserving and WaterSense products. The definition is also amended to delete the list of specific energy-efficient items, as it is now provided in subsection (a)(1).

New paragraph (7) defines the term "water-conserving product" and includes examples of water-conserving products. Subparagraphs (7)(C) and (D) explain when items are used in a business or trade and are not water-conserving products for purposes of this section. New paragraph (8) defines the term "WaterSense product." Both definitions are based on Tax Code, §151.3335.

Subsection (b)(4) is amended for readability and consistency with other sales tax holiday provisions. No substantive change is intended.

Subsection (c)(1) is amended to specify that sales of energy-efficient items other than those specifically included in subsection (a)(1) are taxable and do not qualify for an exemption under this section.

Paragraph (2) is added to specify that sales of products that conserve water but do not fall within the definition of water-conserving products in subsection (a)(7) are taxable and do not qualify for the exemption under this section. Subsequent paragraphs are renumbered accordingly.

Renumbered paragraph (3) is amended to replace the term "Energy Star qualified products" with the defined term "qualifying

products" to make clear that repair and replacement parts for WaterSense and water-conserving products, as well as Energy Star qualified products, do not qualify for the sales tax exemption.

Renumbered paragraphs (4), (5), and (6) are amended to make the paragraphs easier to read. No substantive change is intended.

Subsection (f)(2)(B) is amended to provide that nontaxable charges for energy-efficient or WaterSense products must be separately stated from charges for taxable nonresidential repair and remodeling. Products that may conserve water but are installed on nonresidential property do not meet the definition of a water-conserving product and do not qualify for exemption.

Subsection (g)(1) is amended to specify that an exemption or resale certificate is not required for purchases of energy-efficient or WaterSense products by real estate developers, dealers, service providers, and contractors.

Paragraph (2) is added to require a purchaser to issue a resale certificate in lieu of tax, even during the exemption period, for purchases of water-conserving products that are resold to customers or incorporated into real property under a separated contract.

Paragraph (3) is added to specify an exemption or resale certificate may not be provided for products that will be incorporated into real property under a lump sum contract because such products do not meet the definition of water-conserving products. Subsequent paragraphs are renumbered accordingly.

New paragraph (4) includes language previously under paragraph (1) and corrects a grammatical error.

Renumbered paragraph (5) addresses items held in inventory. Subparagraphs (A) and (B) are amended to add WaterSense products and provides in subparagraph (B) that use tax is due on products purchased tax-free as water-conserving products that no longer meet the definition of water-conserving products because they are incorporated into real property under a lump sum contract.

Subsection (i) is amended to correct a grammatical error and to make the subsection easier to read.

Subsection (j) is amended to include provisions in existing subsection (n) addressing purchases by means other than in person and to address WaterSense and water-conserving products. The subsection is amended for consistency with other sales tax holiday provisions.

Subsection (l) is amended for consistency with other sales tax holiday provisions. Paragraphs (1) and (2) are amended to delete language that for an exchange required the qualifying products be of the same type. Paragraph (3), addressing exchanges for different types of qualifying products, is deleted. Subsequent paragraphs are renumbered accordingly.

Provisions in subsection (m) that provide for a 30-day period during which tax cannot be refunded without documentation are deleted as the requirement is not limited to 30 days.

Provisions of subsection (n) relating to purchases by means other than in person are incorporated into subsection (j). Subsection (n) is deleted. Subsequent subsection (o) is relettered accordingly. The existing provision of relettered subsection (n) is moved to new paragraph (1) and applies to energy-efficient and WaterSense products. Paragraph (2) is added to specify that a

seller is not required to obtain an exemption certificate for items listed as examples of water-conserving products in subsection (a)(7). A seller should obtain an exemption certificate for items that are not listed as examples but may be used in a manner that qualifies as a water-conserving product.

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 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*.

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

The amendment implements Tax Code, §151.3335 (Water-Efficient Products).

§3.369. Sales Tax Holiday--Certain Energy Star Products, Certain Water-Conserving Products, and WaterSense Products.

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

(1) Energy-efficient product--A product that has been designated as an Energy Star qualified product under the Energy Star program jointly operated by the United States Environmental Protection Agency and the United States Department of Energy and that is an: [-]

(A) air conditioner priced at \$6,000 or less (room and central units);

(B) clothes washer;

(C) ceiling fan;

(D) dehumidifier;

(E) dishwasher;

(F) incandescent or fluorescent light bulb;

(G) programmable thermostat; or

(H) refrigerator (including a mini-fridge) priced at \$2,000 or less.

(2) Exchange--The act of giving or taking one thing in return for another.

(3) Exemption period--The period beginning at 12:01 a.m. on the Saturday preceding the last Monday in May (Memorial Day) and ending at 11:59 p.m. on the last Monday in May.

(4) Layaway sales--A transaction in which merchandise is set aside for future delivery to a person who makes a deposit, agrees to pay the balance of the purchase price over a period of time, and, at

the end of the payment period, receives the merchandise. [An order is accepted for layaway by the retailer when the retailer removes the items from normal inventory or clearly identifies the items as sold to the person.]

(5) Qualifying products--Energy-efficient, water-conserving, and WaterSense products eligible for exemption from sales and use tax if purchased, leased, or rented during the exemption period. [described in paragraph (3) of this subsection as established under Tax Code, §151.333. Qualifying products are limited to the following energy-efficient products:]

~~[(A) air conditioners priced at \$6,000 or less (room and central units);]~~

~~[(B) clothes washers;]~~

~~[(C) ceiling fans;]~~

~~[(D) dehumidifiers;]~~

~~[(E) dishwashers;]~~

~~[(F) incandescent or fluorescent light bulbs;]~~

~~[(G) programmable thermostats; and]~~

~~[(H) refrigerators (including mini-fridges) priced at \$2,000 or less.]~~

(6) Rain check--A document assuring that a person can take advantage of a sale or special offer made by a seller at a later time if the item offered is not available.

(7) Water-conserving product--

(A) tangible personal property that is used on residential property and is not used for business or trade, and when used or planted in an outdoor residential property, may result in:

(i) water conservation or groundwater retention;

(ii) water table recharge; or

(iii) a decrease in ambient air temperature that limits water evaporation.

(B) Examples of water-conserving products include:

(i) a soaker or drip-irrigation hose;

(ii) a moisture control for a sprinkler or irrigation system;

(iii) mulch;

(iv) a rain barrel or an alternative rain and moisture collection system;

(v) a permeable ground cover surface that allows water to reach underground basins, aquifers, or water collection points;

(vi) grasses, plants, shrubs, and trees; and

(vii) water-saving surfactants designed to help water penetrate the soil.

(C) Products purchased by a business, including an apartment complex or nursing home, are used for business or trade and are not water-conserving products.

(D) Products that are incorporated into real property under a lump-sum contract are used for business or trade by the person improving the real property and are not water-conserving products.

(8) WaterSense product--A product that has been designated as a WaterSense certified product under the WaterSense program

operated by the United States Environmental Protection Agency, or a similar successor program.

(b) Exempt sales.

(1) Sales or use tax is not due on the sale of a qualifying product if the sale takes place during the exemption period.

(2) There is no limit to the number of qualifying products one can purchase exempt from sales tax during the exemption period.

(3) The exemption applies to each qualifying product sold during the exemption period, regardless of how many qualifying products are sold on the same invoice to a person. For example, if a person purchases two refrigerators for \$1,800 each, then both refrigerators qualify for the exemption, even though the person's total purchase price (\$3,600) exceeds \$2,000.

(4) Qualifying products may be rented or leased tax-free, including under a "rent to own" contract, if the rental or lease contract is executed during the exemption period. [Rentals and leases of qualifying products, including "rent to own" contracts, qualify for exemption when the contract for the rental or lease is entered into during the exemption period.] The exemption applies only to the specified rental or lease period designated by the contract. Extensions or renewals of rental or lease contracts do not qualify for the exemption unless executed [the contract is renewed or extended] during the exemption period.

(c) Taxable sales. The exemption under this section does not apply to:

(1) products designated as Energy Star products under the Energy Star program that are [items] not specifically identified in subsection (a)(1)[(5)] of this section[, including other types of energy-efficient products such as home insulation materials, water heaters, clothes dryers, attic fans, heat pumps, wine refrigerators, kegerators, freezers, or residential beverage chillers];

(2) products that may conserve water but that do not meet the definition of a water-conserving product provided in subsection (a)(7) of this section;

(3) [(2)] repair or replacement parts for qualifying [Energy Star qualified] products that are used to repair or remodel products already owned by a person and that do not otherwise qualify for exemption. For example, an individual may own a central air conditioner with a faulty compressor. The individual cannot obtain the exemption on the purchase of a new Energy Star qualified compressor;

(4) [(3)] [the first \$6,000 of] an Energy Star qualified air conditioner that sells for more than \$6,000. For example, if a person purchases an Energy Star qualified air conditioner that costs \$6,055, then sales tax is due on the entire \$6,055;

(5) [(4)] [the first \$2,000 of] an Energy Star qualified refrigerator that sells for more than \$2,000. For example, if a customer purchases an Energy Star qualified refrigerator that costs \$2,055, then sales tax is due on the entire \$2,055;

(6) [(5)] system components sold individually. Qualifying products must be sold as a unit in order to qualify for the exemption. The components cannot be priced separately and sold as individual items in order to obtain the exemption. For example, central air conditioners must be priced at \$6,000 or less and [must be] sold as a unit in order to qualify for the exemption. If an Energy Star qualified central air conditioner sells for \$7,000, the entire \$7,000 charge is subject to tax and cannot be split into separate charges for a compressor, metering device, evaporator coil and blower in order to qualify for the exemption; and

(7) [(6)] disposal fees charged for the removal of old appliances. Disposal or "haul away" fees charged for the removal of an old appliance are taxable as a waste removal service.

(d) Sales of pre-packaged combinations containing both exempt and taxable items.

(1) When a qualifying product is sold together with taxable merchandise in a pre-packaged combination or single unit, the full price is subject to sales tax unless the price of the qualifying product is separately stated. For example, a clothes washer and clothes dryer sold as a "set" for a single price is taxable if the washer and dryer are separate appliances. A separately stated charge for the Energy Star rated washing machine is eligible for the sales tax exemption during the holiday period. Tax is due on the dryer. An Energy Star rated combination washer and dryer unit that is designed to be sold as a single unit and that cannot be sold separately will, however, qualify for the exemption.

(2) When a qualifying product is sold in a pre-packaged combination that also contains a taxable item as a free gift, and no additional charge is made for the gift, the qualifying product may qualify for the exemption under this section. For example, the sale of a dishwasher may include a free bottle of rinse aid. If the price of the set is the same as the price of the dishwasher sold separately, the product that is being sold is the dishwasher, which is exempt from tax if sold during the exemption period. Note: When a retailer gives a taxable item away free of charge, the retailer owes sales or use tax on the purchase price that the retailer paid for the item. See §3.301 of this title (relating to Promotional Plans, Coupons, Retailer Reimbursement).

(e) Delivery charges.

(1) Air conditioners and refrigerators. Delivery charges that are billed by the seller to the purchaser are included as part of the total sales price of a qualifying product, regardless of whether the charges are separately stated, and as such must be considered when determining whether air conditioners and refrigerators qualify for the exemption. The addition of delivery charges to the retail price of a refrigerator or air conditioner will cause the loss of the exemption if the total price exceeds the applicable cap. For example, assume a person purchases an Energy Star qualified refrigerator priced at \$1,985. The charge to deliver the refrigerator is \$25, causing the total sales price to be \$2,010. Since the total sales price of the refrigerator exceeds \$2,000, the refrigerator does not qualify for the exemption, and tax is due on the total sales price of \$2,010.

(2) Items other than air conditioners and refrigerators. Delivery charges that are billed by the seller to the purchaser are exempt if the product sold is exempt. For example, delivery fees billed in connection with the sale of a qualifying energy-efficient dishwasher during the exemption period are exempt.

(3) "Per item" delivery fees. Delivery charges billed on a "per item" basis must be properly allocated when a delivery to the same person contains both exempt and taxable items. Except as provided in paragraph (4) of this subsection, if multiple items are shipped on a single invoice, the delivery charges must be allocated to each item ordered and separately identified on the invoice. For example, assume that a person purchases a qualifying clothes washer tax-free during the exemption period. The same person also purchases a clothes dryer, which does not qualify for the exemption. The retailer charges the person an additional fee of \$25 per appliance for delivery. The \$25 delivery fee connected to the delivery of the qualifying clothes washer is exempt from sales tax, but the \$25 fee connected to the delivery of the clothes dryer is subject to tax.

(4) "Flat rate" delivery fees. If the delivery charge is a flat rate per delivery address, and the amount charged is the same regardless

of how many items are included in the delivery, for purposes of the exemption, the total charge may be attributed to one of the items in the delivery rather than proportionately allocated between the items. The delivery fee can be allocated to either an exempt qualifying product or a taxable product. The following examples illustrate the way these charges should be handled.

(A) Delivery fee allocated to exempt item. Assume a seller charges a flat fee of \$50 per customer address for delivery regardless of the number of items delivered to that address and during the exemption period, a person purchases an Energy Star qualified refrigerator priced at \$1,900, a taxable stove and a taxable microwave. The seller may attribute the \$50 delivery charge to the sale of the refrigerator bringing the sales price of the refrigerator to \$1,950. The refrigerator sales price does not exceed \$2,000, so it still qualifies for the exemption. The seller does not have to allocate the delivery charge between the refrigerator, stove and microwave. The sales invoice must clearly identify that the delivery charge was attributed to the exempt item and must separately state the tax due on the taxable items.

(B) Delivery fee allocated to taxable item. Assume a seller charges a flat fee of \$50 per customer address for delivery regardless of the number of items delivered to that address and during the exemption period, a person purchases an Energy Star qualified refrigerator priced at \$1,975 and a taxable stove. The seller may attribute the entire \$50 delivery charge to the sale of the stove, thus allowing the total sales price of the refrigerator to remain \$1,975. Since the refrigerator sales price does not exceed \$2,000 it still qualifies for the exemption. The seller does not have to allocate the delivery charge between the refrigerator and stove. The sales invoice must clearly identify that the delivery charge was attributed to the taxable stove and must separately state the tax due on the taxable item.

(f) Installation charges. A charge for the installation of a qualifying product purchased during the exemption period qualifies for exemption only if the item remains tangible personal property after installation. If the product becomes real property after installation, the charge for installation labor may be taxable or nontaxable depending on whether the product is installed in residential or nonresidential property or as part of a new construction contract.

(1) Tangible personal property. Products that are free-standing or mobile, such as clothes washers, dehumidifiers, refrigerators, portable dishwashers and window or room air conditioning units are tangible personal property. If qualifying tangible personal property retains its identity as tangible personal property after installation, the installation charge billed by the seller of the item becomes part of the sales price of the item. As part of the sales price, an installation charge billed by the seller qualifies for the exemption, even if the installation is performed after the exemption period. If however, the charge for installation of an Energy Star qualified refrigerator, which remains tangible personal property after installation, causes the total sales price to exceed \$2,000, the entire charge of the refrigerator, delivery and installation, is taxable.

(2) Improvements to real property. Items such as programmable thermostats, central air conditioning units, ceiling fans and built-in refrigerators and dishwashers that are plumbed, wired or otherwise permanently attached to a building structure are improvements to real property. For items that become improvements to real property, the taxability of the installation labor is determined by the type of jobsite: residential, new construction or nonresidential repair or remodeling.

(A) Residential and new construction. No tax is due on charges for labor to install items such as ceiling fans, programmable thermostats or central air conditioning units in residential property or

during a new construction project. See §3.291 of this title (relating to Contractors).

(B) Nonresidential repair and remodeling. Nonresidential repair and remodeling is a taxable service. Therefore, tax is due on charges for labor to install ceiling fans, built-in appliances, programmable thermostats and central air conditioning units in existing nonresidential real property, regardless of when the installation is performed. Charges for installation labor performed on existing nonresidential real property should be separately stated on the invoice from the sales price of ~~the~~ qualifying energy-efficient or WaterSense products. Separately stated charges for products that may conserve water but that are not water-conserving products because they are installed in nonresidential real property are taxable ~~product~~. A lump sum charge for the purchase of a qualifying product and installation labor is subject to tax as the purchase of nonresidential repair and remodeling. See §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).

(g) Purchases by real estate developers, dealers, service providers and contractors. Real estate developers, dealers, service providers and contractors may purchase qualifying products tax-free during the sales tax holiday as discussed in this subsection.

(1) An exemption or resale certificate is not required for purchases of energy-efficient or WaterSense products.; and there]

(2) A resale certificate must be provided for purchases of water-conserving products that will be subsequently resold to customers or incorporated into customers' real property under a separated contract.

(3) An exemption certificate or resale certificate may not be provided for purchases of products that may conserve water but will be incorporated into real property under a lump-sum contract.

(4) There is no limit to the number of qualifying products a person ~~such persons~~ may purchase tax-free during the exemption period.

(5) ~~[(2)]~~ Held in inventory. Qualifying products purchased tax-free during the exemption period may be held in inventory until ready for use as discussed in this subsection.

(A) No use tax is due if an energy-efficient product or WaterSense [a qualifying] product purchased tax free during the exemption period by a contractor, developer, etc., is subsequently incorporated into the realty of a contractor's customer under a lump sum contract for new construction or residential repair and remodeling. See §3.291 of this title. Use tax is due on products that may conserve water but do not meet the definition of water-conserving products provided in subsection (a)(7) of this section because the products were incorporated into real property under a lump sum contract.

(B) Sales tax is due on sales of energy-efficient or WaterSense [qualifying] products transferred to customers as part of a non-residential repair and remodeling contract performed after the exemption period. Nonresidential repair and remodeling service providers are responsible for collecting sales tax from customers on sales of energy-efficient or WaterSense [qualifying] products under a separated contract or under a lump sum contract for nonresidential repair and remodeling, unless the transaction (the sale of the energy-efficient or WaterSense [qualifying] product) between the customer and service provider, dealer or contractor occurs during the exemption period under a separated contract. See §3.357 of this title.

(h) Discounts and coupons. An Energy Star qualified air conditioner must be priced at \$6,000 or less in order to qualify for the exemption. An Energy Star qualified refrigerator must be priced at \$2,000

or less to qualify for the exemption. A seller may offer a discount or a coupon that reduces the sales price of an Energy Star qualified air conditioner or refrigerator. A discount or a coupon affects the application of the exemption as explained in paragraphs (1) and (2) of this subsection. The total sales price of the product includes delivery and installation charges as explained in subsections (e) and (f) of this section. See §3.301 of this title.

(1) Discounts. If a discount reduces the sales price of an Energy Star qualified air conditioner to \$6,000 or less, or reduces the sales price of an Energy Star qualified refrigerator to \$2,000 or less, the air conditioner or refrigerator qualifies for the exemption under this section. For example, a person buys an Energy Star qualified free-standing refrigerator that has a sales price of \$2,050, including shipping, handling and installation of tangible personal property, from a seller who offers a 10% discount. After application of the 10% discount, the final sales price of the refrigerator is \$1,845. The refrigerator is exempt because its sales price does not exceed \$2,000.

(2) Coupons. When sellers accept a manufacturer's or other coupon as a part of the sales price of any taxable item, the value of the coupon reduces the sales price, the same as a cash discount, regardless of whether the retailer is reimbursed for the amount that the coupon represents. Therefore, a coupon can be used to reduce the sales price of an Energy Star qualified air conditioner to \$6,000 or less, or to reduce the sales price of an Energy Star qualified refrigerator to \$2,000 or less. The item then qualifies for exemption under this section. For example, a person buys an Energy Star qualified free-standing refrigerator that has a sales price of \$2,050, including shipping, handling and installation of tangible personal property, with a coupon worth \$100. After application of the \$100 coupon, the sales price of the refrigerator is \$1,950. The refrigerator is exempt because its sales price does not exceed \$2,000.

(i) Rebates.

(1) Rebates given at the time of sale. ~~[Retailer rebates.]~~ Rebates provided by a seller are cash discounts when given at the time of sale and as such are excludable from the tax base. The ~~rebate~~ ~~[discount]~~, like a discount when taken at the time of the sale, is a reduction in the amount subject to tax.

(2) Rebates that occur after the sale. Rebates that are paid to a purchaser after the exemption period do not affect the sales price of an item purchased for purposes of determining whether an item qualifies for exemption under this section. ~~[Third party and manufacturer rebates. Third party and manufacturer rebates occur after the sale and do not change the sales price of an item and therefore, do not affect whether the exemption provided by this section applies. The full amount of the sales price, before the rebate, is used to determine whether the exemption applies.]~~ The full amount of the sales price, before the rebate, is used to determine whether the exemption applies. For example, if a person purchases an Energy Star qualified air conditioner for \$6,050 and receives a \$300 mail-in rebate from the manufacturer, the seller must collect tax on the \$6,050 sales price of the air conditioner.

(j) Layaway sales and purchases by means other than in person. ~~[The sale of a qualifying product under a layaway plan qualifies for exemption when either:]~~

(1) the sale of an energy-efficient product, WaterSense product, or water-conserving product under a layaway plan or purchased by mail, telephone, email, internet, custom order, or any other means other than in person qualifies for exemption when: ~~[final payment is made by, and the merchandise is transferred to, the purchaser during the exemption period; or]~~

(A) the purchaser places the item on layaway during the exemption period and the seller accepts the order for immediate delivery upon full payment, even if delivery is made after the exemption period;

(B) the purchaser places the order and the seller accepts the order during the exemption period for immediate shipment, even if delivery is made after the exemption period; or

(C) final payment on a layaway order is made by, and the merchandise is given to, the purchaser during the exemption period.

(2) For purposes of this subsection, the seller accepts an order when the seller has taken action to fill the order for immediate shipment. Actions to fill an order include placement of an "in date" stamp on a mail order, or assignment of an "order number" to a telephone order. An order is for immediate shipment notwithstanding that the shipment may be delayed because of a backlog of orders or because stock is currently unavailable to, or on back order by, the seller. [the purchaser selects the qualifying product and the seller accepts the order for the item during the exemption period, for immediate delivery upon full payment, even if delivery is made after the exemption period.]

(k) Rain checks. Qualifying products that are purchased during the exemption period with use of a rain check qualify for the exemption regardless of when the rain check was issued. However, issuance of a rain check during the exemption period will not cause the purchase of a qualifying product to be exempt if the item is actually purchased after the exemption period.

(l) Exchanges.

(1) If a person purchases a qualifying product during the exemption period, and, after the exemption period has ended, exchanges the item for a [the same type of] qualifying product of equal or lesser value, no additional tax is due. For example, a person purchases a \$60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for a \$60 qualifying dehumidifier of a different brand. Tax is not due on the \$60 sales price of the new dehumidifier.

(2) If a person purchases a qualifying product during the exemption period, and after the exemption period has ended, exchanges the product for a [the same type of] qualifying product of greater value, tax is due on the difference between the prices of the two products. For example, assume a person purchases a \$60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for [a] \$70 in qualifying light bulbs [dehumidifier]. Tax is due on the \$10 difference between the two sales prices.

~~[(3) If a person purchases a qualifying product during the exemption period, and after the exemption period has ended, exchanges the product for a different type of qualifying product, tax is due on the original sales price of the qualifying product the person obtained in the exchange. For example, assume a person purchases a \$60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for \$60 in qualifying light bulbs. Tax is due on the \$60 sales price of the qualifying light bulbs.]~~

(3) [(4)] If a person purchases a qualifying product during the exemption period, and after the exemption period has ended, exchanges the products for a nonqualifying item, tax is due on the original sales price of the nonqualifying item. For example, assume a person purchases a \$60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for a \$60 nonqualifying microwave. Tax is due on the \$60 sales price of the nonqualifying microwave.

(4) [(5)] If a person purchases a qualifying product before the exemption period, but, during the exemption period, returns the product and receives credit on the purchase of a different qualifying product, no sales tax is due on the sale of the new product if the new item is purchased during the exemption period. For example, assume a person purchases a \$60 qualifying dehumidifier before the exemption period. During the exemption period, the person returns the dehumidifier and receives credit on the purchase of a \$70 qualifying ceiling fan. No tax is due on the sale of the ceiling fan if it is purchased during the exemption period.

(m) Returned merchandise. When [For a 30-day period after the exemption period, when] a person returns an item that would qualify for the exemption, no credit for or refund of sales tax shall be given unless the person provides a receipt or invoice that shows tax was paid, or the retailer has sufficient documentation to show that tax was paid on the specific item.

~~[(1) This 30-day period begins the Tuesday after the last Monday in May and ends 30 calendar days later with no exclusions for weekend days or holidays.]~~

~~[(2) This 30-day period is set solely for the purpose of designating a time period during which the purchaser must provide documentation that shows that sales tax was paid on returned merchandise. The 30-day period is not intended to change a retailer's policy on the time period during which the retailer will accept returns.]~~

~~[(n) Purchases by means other than in person. A qualifying product purchased by mail, telephone, email, Internet or custom order qualifies for the exemption if:]~~

~~[(1) the item is both transferred to and paid for by the person during the exemption period; or]~~

~~[(2) the person orders and pays for the item and the seller accepts the order during the exemption period for immediate shipment, even if delivery is made after the exemption period. The seller accepts an order when the seller has taken action to fill the order for immediate shipment. Actions to fill an order include placement of an "in date" stamp on a mail order, or assignment of an "order number" to a telephone order. An order is for immediate shipment when the purchaser does not request delayed shipment. An order is for immediate shipment notwithstanding that the shipment may be delayed because of a backlog of orders or because stock is currently unavailable to, or on back order by the seller.]~~

(n) [(o)] Documenting exempt sales.

(1) A seller is not required to obtain an exemption certificate on sales of energy-efficient or WaterSense [qualifying] products during the exemption period; however, the retailer's records should clearly identify the type of item sold, the date on which the item was sold, and the sales price of the item.

(2) A seller is not required to obtain an exemption certificate on sales of items identified as examples of water-conserving products in subsection (a)(7)(B) of this section; however, the retailer's records should clearly identify the type of item sold, the date on which the item was sold, and the sales price of the item. A seller should obtain an exemption certificate on sales of items that do not clearly meet the definition of a water-conserving product.

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 16, 2016.  
TRD-201602383

◆ ◆ ◆  
**TITLE 40. SOCIAL SERVICES AND ASSISTANCE**

**PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES**

**CHAPTER 711. INVESTIGATIONS OF INDIVIDUALS RECEIVING SERVICES FROM CERTAIN PROVIDERS**

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§711.1, 711.5, 711.7, 711.11, 711.13, 711.17, 711.19, 711.21, 711.23, 711.201, 711.403, 711.419, 711.423, 711.603, 711.609, 711.611, 711.613, 711.801, and 711.802; the repeal of §§711.3, 711.9, 711.15, 711.25, 711.401, 711.405, 711.407, 711.409, 711.411, 711.605, 711.607, 711.1001 - 711.1003, 711.1005, 711.1007, 711.1009, 711.1011 - 711.1013, 711.1015, 711.1201, 711.1203, 711.1205, 711.1207, and 711.1209; and new §§711.3, 711.401, 711.405, 711.605, 711.804, 711.806, 711.901, 711.903, 711.905, 711.907, 711.909, 711.911, 711.913, and 711.915 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, new rules, and repeals is to implement Senate Bills (SB) 760 and 1880, 84th Legislature (Adult Protection Services (APS) Scope and Jurisdiction Bills), which expanded the APS Provider (formerly APS Facility) program's jurisdiction to investigate abuse, neglect, and exploitation. These bills ensure 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 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.

These amendments, new rules, and repeals implement APS's expanded jurisdiction and modify existing rules to reflect such expansion, as applicable. These rules will take effect on September 1, 2016. The updates in Chapter 711 will implement statutory changes as required by the APS Scope and Jurisdiction Bills.

A summary of the changes are as follows:

DFPS is changing the chapter title to Investigations of Individuals Receiving Services from Certain Providers: (1) conforms with the name used in the APS Scope and Jurisdiction Bills; and (2) reflects APS's expanded authority to investigate individuals receiving services from certain providers.

Amendment to §711.1: (1) updates the purpose to align the section with APS Scope and Jurisdiction Bills; and (2) describes APS's expanded investigatory authority.

Section 711.3 is being repealed and new §711.3 updates terms and abbreviations to align with APS Scope and Jurisdiction bills and other clarifications made in this rule proposal including: direct provider, facility, home and community-based services, individual receiving services, limited service provider, non-serious physical injury, provider, serious physical injury, and service provider.

Amendment to §711.5: (1) updates and clarifies what APS investigates; (2) deletes provision on sexual exploitation as it is subsumed within the definition of sexual abuse; and (3) deletes the term "person served" and uses statutory term "individual receiving services" instead to define whom can be an alleged victim.

Amendment to §711.7: (1) updates and clarifies what APS does not investigate; (2) deletes confusing examples; (3) expands exclusion of investigating business or operational issues related to managed care or consumer directed services; and (4) expands exclusion of investigating clinical issues to all licensed professionals rather than just specific ones.

The repeal of §711.9 deletes guidance that will be written into policy as it was confusing and rarely applicable.

Amendment to §711.11: (1) updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills; and (2) expands rule citations for restraints for new providers resulting from APS expanded authority.

Amendment to §711.13: (1) updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills; and (2) updates the definition of sexual exploitation as part of sexual abuse definition in subsection (a)(8).

The repeal of §711.15 moves the content of the rule into §711.13(a)(8) as part of the sexual abuse definition.

Amendment to §711.17 updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills.

Amendment to §711.19 updates language to more appropriately align with APS Scope and Jurisdiction Bills, and clarifies confusing examples.

Amendment to §711.21: (1) updates and clarifies who is an alleged perpetrator of exploitation to align with APS Scope and Jurisdiction Bills; and (2) expands definition of exploitation to include attempted exploitation and theft in a home or community setting other than HCS and TxHml waiver programs.

Amendment to §711.23: (1) updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills; (2) clarifies what is not considered abuse, neglect, or exploitation; and (3) expands rule citations for new providers resulting from APS expanded authority.

Section 711.25 is repealed because it expires September 1, 2016.

Amendment to §711.201: (1) clarifies reporting requirements; and (2) maintains one hour notification for facilities, community centers, local authorities, and HCS/TxHmL waiver programs.

Section 711.401 is repealed and new §711.401: (1) updates the notification chart of whom APS notifies following an intake of an allegation of abuse, neglect, or exploitation; and (2) updates the

requirements for APS notification to providers, law enforcement, and the Office of Inspector General (OIG).

Amendment to §711.403 clarifies steps taken when a general complaint is received.

Section 711.405 is repealed and new §711.405 clarifies what action is taken if the alleged perpetrator is a licensed professional.

The repeal of §§711.407, 711.409 and 711.411 consolidates all affected rules into §711.405.

Amendment to §711.419 clarifies who is notified of investigation extensions.

Amendment to §711.423 updates terms related to unknown perpetrator and system issues.

Amendment to §711.603 clarifies what is included in the investigation report.

Section 711.605 is repealed and new §711.605 clarifies and updates who receives the investigation report.

The repeal of §711.607 moves the content of the rule §711.605.

Amendment to §711.609 and §711.611 updates and clarifies how the reporter and alleged victim, guardian, or parent are notified of the finding and how to appeal.

Amendment to §711.613 clarifies when the report can be released by the service provider.

Amendment to §711.801 and §711.802 clarifies: (1) what steps an investigator takes if an individual receiving services from an HCS waiver program provider requires emergency protective services; and (2) what steps an investigator takes if an individual receiving services from an ICF-IID provider requires emergency protective services.

New §711.804 and §711.806 identifies what steps an investigator takes if an individual, adult or child, living in an HCS waiver provider home but not receiving HCS waiver services requires emergency protective services.

New Subchapter J, Appealing the Investigation Finding, provides rules for appealing the investigation finding.

New §711.901 defines and describes an appeal of the investigation finding.

New §711.903 clarifies how an appeal of the investigation finding affects an act of reportable conduct.

New §711.905 clarifies who may request an appeal of the investigation finding.

New §711.907 describes how a qualified party requests an appeal of the investigation finding.

New §711.909 describes the timeline for an appeal of the investigation finding.

New §711.911 describes how and when an appeal of the investigation finding is conducted.

New §711.913 describes the process for the administrator of a state-operated facility to contest a decision of the APS Assistant Commissioner.

New §711.915 describes when a finding may be changed without an appeal of the investigation finding.

The repeal of Subchapter K consists of §§711.1001, 711.1002, 711.1003, 711.1005, 711.1007, 711.1009, 711.1011, 711.1012,

711.1013, and 711.1015: the substance of this subchapter has been maintained but has been updated, consolidated, and clarified for APS's expanded authority in new Subchapter J.

The repeal of Subchapter M consists of §§711.1201, 711.1203, 711.1205, 711.1207, and 711.1209: the substance of this subchapter has been maintained but has been updated, consolidated, and clarified for APS's expanded authority in new Subchapter J.

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 [Lauren.Villa@dfps.state.tx.us](mailto:Lauren.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. INTRODUCTION

**40 TAC §§711.1, 711.3, 711.5, 711.7, 711.11, 711.13, 711.17, 711.19, 711.21, 711.23**

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.

§711.1. *What is the purpose of this chapter?*

The purpose of this chapter is to:

(1) implement [the] Human Resources Code (HRC), Chapter 48, Subchapter F, [§48.255(a) and (e) and §48.355(e),] and Texas Family Code §261.404[; which require the Texas Department of Family and Protective Services (DFPS) to develop joint rules with the Texas Department of Aging and Disability Services (DADS) and the Texas Department of State Health Services (DSHS) to facilitate investigations in DADS and DSHS facilities and related programs];

(2) describe [Adult Protective Services investigations of allegations involving adults and children in the following programs]:

(A) Adult Protective Services (APS) investigations of allegations of abuse, neglect, and exploitation involving:

(i) adults or children receiving services from a provider, as that term is defined in HRC §48.251(9), if the person alleged or suspected to have committed the abuse, neglect, or exploitation is a provider;

(ii) adults or children who live in a residence that is owned, operated, or controlled by a provider in the home and community-based services (HCS) waiver program described by §534.001(11)(B), Government Code, regardless of whether the individual is receiving services under the home and community-based services (HCS) waiver program; and

(iii) children receiving services from a home and community support services agency licensed under Chapter 142, Health and Safety Code, if the person alleged or suspected to have committed the abuse, neglect, or exploitation is an officer, employee, agent, contractor, or subcontractor of the home and community support services agency; and

(B) that APS does not investigate allegations if the provider alleged or suspected to have committed the abuse, neglect, or exploitation is operated, licensed, or certified, or registered by a state agency that has the authority to investigate a report of abuse, neglect, or exploitation of an individual by the provider;

[(A) DADS and DSHS facilities;]

[(B) local authorities;]

[(C) community centers;]

[(D) home and community-based services programs;]

[(E) licensed intermediate care facilities for individuals with intellectual disabilities and related conditions (ICF-IID); and]

[(F) a contractor or agent of one of the programs listed in subparagraphs (A) - (E) of this paragraph;]

(3) define abuse, neglect, and exploitation for investigations conducted under Human Resources Code, Chapter 48, Subchapter F and Texas Family Code §261.404 [of a person served by the programs listed in paragraph (2) of this section];

(4) - (5) (No change.)

§711.3. *How are the terms in this chapter defined?*

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

(1) Adult--An adult is a person:

(A) 18 years of age or older; or

(B) under 18 years of age who:

(i) is or has been married; or

(ii) has had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

(2) Alleged perpetrator--A direct provider alleged to have committed an act of abuse, neglect, or exploitation.

(3) APS--Adult Protective Services, a division of DFPS.

(4) Agent--An individual (e.g., student, volunteer), not employed by but working under the auspices of a service provider.

(5) Allegation--A report by an individual that an individual receiving services has been or is in a state of abuse, neglect, or exploitation as defined by this subchapter.

(6) Child--A person under 18 years of age who:

(A) is not and has not been married; or

(B) has not had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

(7) Clinical practice--Relates to the demonstration of professional competence of a licensed professional as described by the appropriate licensing professional board.

(8) Community center--A community mental health center; community center for individuals with intellectual or developmental disabilities; or community mental health center and community center for individuals with intellectual or developmental disabilities, established under the Health and Safety Code, Title 7, Chapter 534, Subchapter A.

(9) Consumer Directed Services (CDS) employer--A consumer directed services client or their legally authorized representative.

(10) DADS--Department of Aging and Disability Services.

(11) Designated Perpetrator--A direct provider who has committed an act of abuse, neglect, or exploitation.

(12) Direct Provider--A person, employee, agent, contractor, or subcontractor of a service provider responsible for providing services to an individual receiving services.

(13) DFPS--Department of Family and Protective Services.

(14) DSHS--Department of State Health Services.

(15) Emergency order for protective services--A court order for protective services obtained under Human Resources Code, §48.208.

(16) Facility--

(A) DADS and DSHS central offices, state supported living centers, state hospitals, the Rio Grande State Center, the Waco Center for Youth, the El Paso Psychiatric Center, and community services operated by DADS or DSHS;

(B) A person contracting with a health and human services agency to provide inpatient mental health services; and

(C) Intermediate care facilities for individuals with an intellectual disability or related conditions (ICF-IID) licensed under Chapter 252, Health and Safety Code.

(17) HHSC--Texas Health and Human Services Commission.

(18) Home and community-based services--Have the meaning given to them in §48.251(a)(5) as services provided in the home or community in accordance with 42 U.S.C. §1315, 42 U.S.C. §1315a, 42 U.S.C. §1396a, or 42 U.S.C. §1396n.

(19) Home and community-based services (HCS) waiver program--The Medicaid program authorized under §1915(c) of the federal Social Security Act (42 U.S.C. §1396n(c)) for the provision of services to persons with an intellectual or developmental disability described by §534.001(11)(B), Government Code.

(20) Home and community support services agency (HCSSA)--An agency licensed under Chapter 142, Health and Safety Code.

(21) ICF-IID--A licensed intermediate care facility for individuals with an intellectual disability or related conditions as described in Chapter 252, Health and Safety Code.

(22) Incitement--To spur to action or instigate into activity; the term implies responsibility for initiating another's actions.

(23) Individual receiving services--

(A) An adult or child who receives services from a provider as that term is defined in §48.251(a)(9), Human Resources Code.

(B) An adult or child who lives in a residence that is owned, operated, or controlled by an HCS waiver program provider regardless of whether the individual is receiving HCS waiver program services; or

(C) A child receiving services from a HCSSA.

(24) Investigator--An employee of Adult Protective Services who has:

(A) demonstrated competence and expertise in conducting investigations; and

(B) received training on techniques for communicating effectively with individuals with a disability.

(25) Limited Service Provider--An entity that contracts with a service provider to provide services.

(26) Local authority--Either:

(A) a local mental health authority designated by the HHSC executive commissioner in accordance with §533.035, Health and Safety Code, and as defined by §531.002, Health and Safety Code; or

(B) a local intellectual and developmental disability authority designated by the HHSC executive commissioner in accordance with §533A.035, Health and Safety Code, and as defined by §531.002, Health and Safety Code.

(27) Non-serious physical injury--

(A) In state supported living centers and state hospitals only, any injury requiring minor first aid and determined not to be serious by a registered nurse, advanced practice registered nurse (APRN), or physician.

(B) For all other service providers any injury determined not to be serious by the appropriate medical personnel. Examples of non-serious physical injury include:

(i) superficial laceration;

(ii) contusion two and one-half inches in diameter or smaller; or

(iii) abrasion.

(28) Perpetrator--A direct provider who has committed or alleged to have committed an act of abuse, neglect, or exploitation.

(29) 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.

(30) Prevention and management of aggressive behavior (PMAB)--DADS and DSHS' proprietary risk management program that uses the least intrusive, most effective options to reduce the risk of injury for persons served and staff from acts or potential acts of aggression.

(31) Provider--A provider is:

(A) a facility;

(B) a community center, local mental health authority, and local intellectual and developmental disability authority;

(C) a person who contracts with a health and human services agency or managed care organization to provide home and community-based services;

(D) a person who contracts with a Medicaid managed care organization to provide behavioral health services;

(E) a managed care organization;

(F) an officer, employee, agent, contractor, or subcontractor of a person or entity listed in subparagraphs (A) - (E) of this paragraph; 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.

(32) Reporter--The person, who may be anonymous, making an allegation.

(33) Serious physical injury--

(A) In state supported living centers and state hospitals only, any injury requiring medical intervention or hospitalization or any injury determined to be serious by a physician or APRN. Medical intervention is treatment by a licensed medical doctor, osteopath, podiatrist, dentist, physician's assistant, or APRN. For the purposes of this subchapter, medical intervention does not include first aid, an examination, diagnostics (e.g., x-ray, blood test), or the prescribing of oral or topical medication;

(B) For all other service providers, any injury determined to be serious by the appropriate medical personnel. Examples of serious physical injury include:

(i) fracture;

(ii) dislocation of any joint;

(iii) internal injury;

(iv) contusion larger than two and one-half inches in diameter;

(v) concussion;

(vi) second or third degree burn; or

(vii) any laceration requiring sutures or wound closure.

(34) Service Provider--A provider, HCSSA, or HCS waiver program provider responsible for employing, contracting with, or supervising the direct provider.

(35) Texas Home Living (TxHmL) waiver program--The Medicaid program authorized under §1915(c) of the federal Social Security Act (42 U.S.C. §1396n(c)) for the provision of services to persons with an intellectual or developmental disability described by §534.001(11)(D), Government Code.

(36) Sexually transmitted disease--Any infection with or without symptoms or clinical manifestations that can be transmitted from one person to another by sexual contact.

(37) Victim--An individual receiving services who is alleged to have been abused, neglected, or exploited.

§711.5. *What does APS investigate under this chapter?*

(a) When the alleged perpetrator is a direct provider [an employee, contractor, agent,] or is unknown, and the alleged victim is an individual receiving services [a person served], APS investigates allegations of:

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

~~[(3) sexual exploitation;]~~

(3) ~~[(4)]~~ verbal/emotional abuse;

(4) ~~[(5)]~~ neglect; and

(5) ~~[(6)]~~ exploitation.

(b) APS also investigates:

(1) pregnancy of an individual receiving services from [a person served by] a facility or facility contractor if there is:

(A) medical verification that conception could have occurred while the individual receiving services [person served] was a resident of the facility or facility contractor; and

(B) a reasonable expectation that conception occurred while the individual [person] was a resident of the facility or facility contractor;

(2) sexually transmitted disease (STD) of an individual receiving services from [a person served by] a facility or facility contractor, if the individual [person] could have acquired the STD while a resident of the facility or facility contractor; and

(3) injury of unknown origin if [the] appropriate medical personnel, after examining the individual receiving services [person served], suspect the injury is the result of abuse or neglect.

§711.7. *What does APS not investigate under this chapter?*

APS does not investigate:

(1) (No change.)

(2) general complaints[;] such as:

(A) [a] rights violations [violation];

(B) daily administrative operations;

~~[(B) theft of property;]~~

~~[(C) daily administrative operations;]~~

~~[(D) failure to carry out a person served's program or treatment plan; that does not result in a specific incident or allegation involving a person served; or]~~

~~[(E) failure to maintain adequate numbers of appropriately trained staff that does not result in a specific incident or allegation involving a person served;]~~

~~[(F) failure to provide care or services to a person served that does not result in emotional or physical harm to the person and that is determined not to place the person at risk for harm;]~~

~~[(G) situations in which a staff member other than the responsible staff member provided care or supervision to the person served and no harm came to the person served; or]~~

(3) operational issues related to the business of managed care or consumer directed services; or

(4) ~~[(3)]~~ if the allegation involves only the clinical practice of a licensed professional [physician, dentist, registered nurse, licensed vocational nurse, or pharmacist].

§711.11. *How is physical abuse defined?*

In this chapter, when the alleged perpetrator is a direct provider [an employee, agent, or contractor], physical abuse is defined as:

(1) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, which caused or may have caused physical injury or death to an individual receiving services [a person served];

(2) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to an individual receiving services [a person served]; or

(3) the use of chemical or bodily restraints on an individual receiving services [a person served] not in compliance with federal and state laws and regulations, including:

(A) (No change.)

(B) 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services);

~~[(C) [(B)] 40 TAC Chapter 3, Subchapter F (relating to Restraints);~~

~~[(D) 40 TAC Chapter 90, Subchapter C (relating to Standards for Licensure);~~

~~[(E) 40 TAC Chapter 2, Subchapter G (relating to Role and Responsibilities of a Local Authority);~~

~~[(F) [(C)] 40 TAC Chapter 9, Subchapter D (relating to Home and Community-based Services (HCS) Program and Community First Choice (CFC)); [and]~~

~~[(G) 40 TAC Chapter 9, Subchapter N (relating to Texas Home Living (TxHmL) Program and Community First Choice (CFC)); [and]~~

~~[(H) [(D)] 40 TAC Chapter 97 [90], Subchapter H [(C) (relating to Standards Specific to Agencies Licensed to Provide Hospice Services [for Licensure])];[.]~~

(I) 40 TAC Chapter 42, Subchapter D (relating to Additional Program Provider Provisions); and

(J) 1 TAC Chapter 353, Subchapter C (Member Bill of Rights).

§711.13. *How is sexual abuse defined?*

(a) In this chapter, when the alleged perpetrator is a direct provider [an employee, agent, or contractor], sexual abuse is defined as any sexual activity, including but not limited to:

(1) kissing an individual receiving services [a person served] with sexual intent;

(2) hugging an individual receiving services [a person served] with sexual intent;

(3) stroking an individual receiving services [a person served] with sexual intent;

(4) fondling an individual receiving services [a person served] with sexual intent;

(5) engaging in with an individual receiving services [a person served]:

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

(6) requesting, soliciting, or compelling an individual receiving services [a person served] to engage in:

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

(7) in the presence of an individual receiving services [a person served]:

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

(8) committing sexual exploitation. Sexual exploitation is [as] defined as: [in §711.15 of this title (relating to How is sexual exploitation defined?) against a person served;]

(A) a pattern, practice, or scheme of conduct against an individual receiving services, which may include sexual contact, that can reasonably be construed as being for the purposes of sexual arousal or gratification or sexual abuse of any person.

(B) The term does not include obtaining information about a patient's sexual history within standard accepted clinical practice.

(9) committing sexual assault as defined in the Texas Penal Code §22.011, against an individual receiving services [a person served];

(10) committing aggravated sexual assault as defined in the Texas Penal Code, §22.021, against an individual receiving services [a person served]; and

(11) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, videotaping, or depicting of an individual receiving services [a person served] if the direct provider [employee, agent, or contractor] knew or should have known that the resulting photograph, film, videotape, or depiction of the individual receiving services [person served] is obscene as defined in the Texas Penal Code, §43.21, or is pornographic.

(b) Notwithstanding any other provision in this section, consensual sexual activity between a direct provider [an employee, agent, or contractor,] and an adult receiving services [an alleged victim] is not considered sexual abuse if the consensual sexual relationship began prior to the direct provider [employee, agent, or contractor] becoming a paid direct provider [employee, agent, or contractor].

§711.17. *How is verbal/emotional abuse defined?*

(a) In this chapter, when the alleged perpetrator is a direct provider [an employee, agent, or contractor], verbal/emotional abuse is defined as any act or use of verbal or other communication, including gestures, to:

(1) curse, vilify, or degrade an individual receiving services [a person served]; or

(2) threaten an individual receiving services [a person served] with physical or emotional harm.

(b) In order for the definition of verbal/emotional abuse to be met, the act or communication must:

(1) result in observable distress or harm to the individual receiving services [person served]; or

(2) (No change.)

§711.19. *How is neglect defined?*

(a) In this chapter, when the alleged perpetrator is a direct provider [an employee, agent, or contractor], neglect is defined as a negligent act or omission [by any individual responsible for providing services to a person served,] which caused or may have caused physical or emotional injury or death to an individual receiving services [a person served] or which placed an individual receiving services [a person served] at risk of physical or emotional injury or death.

(b) Examples of neglect may include [Neglect includes], but are [is] not limited to, the failure to:

(1) establish or carry out an appropriate individual program plan or treatment plan for a specific individual receiving services [person served], if such failure results in physical or emotional injury or death to an individual receiving services or which placed an individual receiving services at risk of physical or emotional injury or death [a specific incident or allegation involving a person served];

(2) provide adequate nutrition, clothing, or health care to a specific individual receiving services [person served] in a residential or inpatient program if such failure results in physical or emotional injury or death to an individual receiving services or which placed an individual receiving services at risk of physical or emotional injury or death; or

(3) provide a safe environment for a specific individual receiving services [person served], including the failure to maintain adequate numbers of appropriately trained staff, if such failure results in physical or emotional injury or death to an individual receiving services or which placed an individual receiving services at risk of physical or emotional injury or death [a specific incident or allegation involving a person served].

§711.21. *How is exploitation defined?*

(a) In this chapter, when the alleged perpetrator is a direct provider to an individual receiving services in or from a facility, local authority, community center, or HCS waiver program or TxHML waiver program provider, [an employee, agent, or contractor,] exploitation:

(1) is defined as the illegal or improper act or process of using an individual receiving services [a person served] or the resources of an individual receiving services [a person served] for monetary or personal benefit, profit, or gain; and[-]

(2) excludes theft as defined in Chapter 31 of the Texas Penal Code.

(b) In this chapter when the alleged perpetrator is a direct provider to an individual receiving services from any other services provider, exploitation:

(1) is defined as the illegal or improper act or process of using or attempting to use an individual receiving services or the resources of an individual receiving services for monetary or personal benefit, profit, or gain; and

(2) includes theft as defined in Chapter 31 of the Texas Penal Code.

§711.23. *What is not considered abuse, neglect, or exploitation?*

Abuse, neglect, and exploitation do not include the following:

(1) the proper use of restraints and seclusion, including Prevention and Management of Aggressive Behavior (PMAB), and the approved application of behavior modification techniques as described in:

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

(C) 40 TAC Chapter 3, Subchapter F (relating to Restraints); ~~and~~

(D) 40 TAC Chapter 90, Subchapter C (relating to Standards for Licensure);

(E) 40 TAC Chapter 2, Subchapter G (relating to Role and Responsibilities of a Local Authority);

(F) 40 TAC Chapter 9, Subchapter D (relating to Home and Community-based Services (HCS) Program and Community First Choice (CFC));

(G) 40 TAC Chapter 9, Subchapter N (relating to Texas Home Living (TxHmL) Program and Community First Choice (CFC));

(H) 40 TAC Chapter 97, Subchapter H (Standards Specific to Agencies Licensed to Provide Hospice Services);

(I) 40 TAC Chapter 42, Subchapter D (relating to Additional Program Provider Provisions); and

(J) 1 TAC Chapter 353, Subchapter C (Member Bill of Rights).

(2) actions taken in accordance with the rules of DADS, DSHS, or HHSC [the Texas Department of Aging and Disability Services and the Texas Department of State Health Services]; or

(3) actions that a direct provider [an employee, contractor, or agent] may reasonably believe to be immediately necessary to avoid imminent harm to self, individuals receiving services [persons served], or other individuals provided the actions are limited only to those actions reasonably believed to be necessary under the existing circumstances. [Such actions do not include acts of unnecessary force or the inappropriate use of restraints or seclusion, including PMAB.]

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-201602271

Trevor Woodruff  
General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803



### 40 TAC §§711.3, 711.9, 711.15, 711.25

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 DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals 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.

§711.3. How are the terms in this chapter defined?

§711.9. How does APS determine if it has jurisdiction to investigate in situations when a person served by the program is also an employee of the program?

§711.15. How is sexual exploitation defined?

§711.25. What effect do Senate Bill (SB) 1880 and SB 760 (84th Texas Legislature, Regular Session) have on the jurisdiction of Adult Protective Services (APS) to investigate allegations of abuse, neglect, or exploitation of individuals receiving services from certain providers?

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-201602273

Trevor Woodruff  
General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803



## SUBCHAPTER C. DUTY TO REPORT

### 40 TAC §711.201

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.

§711.201. What is your duty to report if you are a direct provider or service provider [are an employee, agent, or contractor of a facility, local authority, community center, or HCS]?

(a) If you know or suspect that any individual receiving services [a person served] is being or has been abused, neglected, or exploited or meets other criteria specified in §711.5 of this title (relating to What does APS investigate under this chapter?), you must:

(1) report such knowledge or suspicion to DFPS immediately, if possible, [but in no case more than one hour after knowledge or suspicion] by calling the DFPS toll-free number at 1-800-647-7418 or using [by use of] the Internet at <http://www.txabusehotline.org>;

(2) preserve and protect any evidence related to the allegation in accordance with instructions from DFPS; and

(3) cooperate with the investigator during the investigation.

(b) For facilities, community centers, local authorities, and HCS waiver program and TxHmL waiver program providers, the report made under subsection (a)(1) of this section must be made no more than one hour after knowledge or suspicion of abuse, neglect, or exploitation of an individual receiving services.

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

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

TRD-201602274

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803



## SUBCHAPTER E. CONDUCTING THE INVESTIGATION

### 40 TAC §§711.401, 711.405, 711.407, 711.409, 711.411

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 DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals 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.

*§711.401. Who and when does the investigator notify of an allegation and when is the identity of the reporter revealed?*

*§711.405. What action does the investigator take if the alleged perpetrator is a physician, dentist, registered nurse, licensed vocational nurse, or pharmacist for a state-operated facility or a licensed ICF-IID that maintains a peer review committee?*

*§711.407. What action does the investigator take if the alleged perpetrator is a licensed professional other than a physician, dentist, registered nurse, licensed vocational nurse, or pharmacist for a facility?*

*§711.409. What action does the investigator take if the alleged perpetrator is a physician, dentist, registered nurse, licensed vocational nurse, or pharmacist for a community center, local authority, licensed ICF-IID without a peer review committee, or HCS?*

*§711.411. What action does the investigator take if the alleged perpetrator is a licensed professional other than a physician, dentist, registered nurse, licensed vocational nurse, or pharmacist for a community center, local authority, licensed ICF-IID, or HCS?*

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-201602275

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803

◆ ◆ ◆  
**40 TAC §§711.401, 711.403, 711.405, 711.419, 711.423**

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 DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections 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.

*§711.401. Who and when does the Investigator notify for allegations of abuse, neglect, or exploitation and when is the identity of the reporter revealed?*

(a) For all allegations of abuse, neglect, or exploitation of an individual receiving services, the investigator makes the following notifications, as appropriate:

Figure: 40 TAC §711.401(a)

(b) For notifications described in subsection (a) of this section, the identity of the reporter is revealed only if the alleged perpetrator is a mental health service provider and the allegation is sexual exploitation in accordance with Chapter 81, Texas Civil Practice and Remedies Code.

(c) The investigator notifies law enforcement within one hour of receipt of the allegation by DFPS and reveals the identity of the reporter for:

(1) any allegation of abuse, neglect, or exploitation involving a child; and

(2) any allegation of abuse, neglect, or exploitation involving an individual receiving services believed to constitute a criminal offense under any law.

(d) The investigator notifies the Office of Inspector General within one hour of receipt of the allegation by DFPS and reveals the identity of the reporter for any allegation of abuse, neglect, or exploitation believed to constitute a criminal offense under any law involving an individual receiving services:

(1) in a state supported living center;

(2) the ICF-IID component of the Rio Grande State Center;

or

(3) in a state hospital.

*§711.403. Who and when does the investigator notify upon receiving an allegation that relates to a general complaint?*

Within 24 hours or the next working day following receipt of an allegation that relates to a general complaint, as described in §711.7(2) of this title (relating to What does APS not investigate under this chapter?), the investigator makes notifications per §711.401(a) of this title (relating to Who and when does the investigator notify for allegations of abuse, neglect, or exploitation and when is the identity of the reporter revealed?) if the service provider is identified at intake [notifies the administrator of the general complaint].

*§711.405. What action does the investigator take if the alleged perpetrator is a licensed professional?*

(a) The investigator determines whether the allegation involves clinical practice by consultation with an appropriate professional, and in state hospitals, in accordance with 25 TAC §417.509 (relating to Peer Review).

(b) If the allegation is determined to involve clinical practice, the investigator refers the allegation to the service provider for peer or professional review. If the service provider does not have a peer or professional review process, the investigator refers the allegation to the service provider as well as the appropriate professional licensing board.

(c) If the allegation is determined to not involve clinical practice, the investigator investigates the allegation.

(d) If there are multiple allegations, the investigator refers any allegation involving clinical practice to the service provider for peer/professional review and investigates any allegation not involving clinical practice.

§711.419. *What if the investigator cannot complete the investigation on time?*

(a) If additional time is required to complete the investigation, the investigator must request an extension by submitting an Extension Request form to the appropriate [regional] APS program administrator.

(b) The [regional] APS program administrator may grant an extension for good cause for one to 14 calendar days depending on the needs of the investigation.

(c) The investigator must notify the service provider [administrator] of all extensions.

§711.423. *Is the investigator required to designate a perpetrator or alleged perpetrator?*

(a) (No change.)

(b) The perpetrator is [investigator indicates] "perpetrator unknown" when a positive identification of the responsible person(s) cannot be made.

(c) The perpetrator is [investigator indicates] "systems issue" when the investigator determines [it is determined] that the lack of established policy or procedure contributed to the abuse, neglect, or exploitation.

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-201602276

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803



## SUBCHAPTER G. RELEASE OF REPORT AND FINDINGS

### 40 TAC §§711.603, 711.605, 711.609, 711.611, 711.613

The amendments 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 amendments and new section 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.

§711.603. *What is included in the investigative report?*

The investigative report includes the following:

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

(5) concerns and recommendations, if any, resulting from the investigation;

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

(8) the physician's exam and treatment of abuse/neglect related injuries documented on the DADS or DSHS Client Injury/Incident Report for state supported living centers or state hospitals [~~state-operated facilities only~~];

(9) - (10) (No change.)

(11) a signed and dated Client Abuse and Neglect Report (AN-1-A) form, as appropriate, reflecting the information contained in paragraphs (4), (6), and (7) of this section.

§711.605. *Who receives the investigative report?*

(a) The investigator sends a copy of the investigative report to:

(1) The notification contact identified in §711.401(a) of this title (relating to Who and When does the investigator notify for allegations of abuse, neglect, or exploitation and when is the identity of the reporter revealed?) with the identity of the reporter revealed in accordance with §711.401(b);

(2) The appropriate health and human service agency including:

(A) HHSC for investigations involving managed care organization members;

(B) DADS State Office, if the investigation involves:

(i) A state supported living center;

(ii) An HCS waiver program or TxHmL waiver program providers; or

(iii) Licensed ICF-IID; and

(C) DSHS State Office, if the investigation involves:

(i) Youth Empowerment Services (YES) waiver program, the waiver authorized under 1915c of the Social Security Act; or

(ii) Home and Community-based Services-Adult Mental Health Program (HCBS-AMH), the program authorized under 1915i of the Social Security Act;

(3) The DADS Assistant Commissioner of state supported living centers (SSLC) or the DSHS Assistant Commissioner for Mental Health and Substance Abuse Services or their designee for an investigation in a facility, as applicable;

(4) Local law enforcement when an individual receiving services has been abused, neglected, or exploited in a manner that constitutes a criminal offense under any law, including Texas Penal Code §22.04;

(5) The Office of the Inspector General when an individual receiving services at a state hospital, SSLC, or ICF-IID component of the Rio Grande State Center has been abused, neglected, or exploited in a manner that constitutes a criminal offense under any law; and

(6) The state office of Adult Protective Services for any confirmed finding against a licensed professional except for investigations involving licensed professionals employed at a state hospital or state supported living center.

(b) The state office of APS forwards a copy of the report received under subsection (a)(6) of this section to the appropriate professional licensing board.

(c) A provider who contracts with a managed care organization must forward any completed investigation report received under subsection (a) of this section to the managed care organization with which the provider contracts for services for the alleged victim.

(d) Law enforcement or a prosecutor may request that DFPS delay the release of the investigative report, or may request that DFPS delay forwarding a copy of the report to the appropriate licensing authority.

§711.609. Is [How and when is] the reporter notified of the finding and the method to appeal, and if so, how?

Yes; the reporter is notified [Within 30 calendar days of completion] of the finding of the investigation and the method to appeal the finding. The[; the] investigator makes the notification within 5 business days of completion of the investigation. [notifies the reporter in writing of the:]

~~{(1) finding of the investigation; and}~~

~~{(2) method of appealing the finding.}~~

§711.611. Is the victim or alleged victim, guardian, or parent notified of the finding and the method to appeal, and if so, how?

Yes; ~~the[; The]~~ victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child) is notified of the finding of the investigation and the method to appeal the finding.[;]

(1) For facilities, community centers, local authorities, and HCS waiver program or TxHmL waiver program providers providing services to an individual enrolled in the HCS or TxHmL waiver programs, the notification is made in accordance with the following rules of DADS and DSHS:

(A) ~~[(1)]~~ for state hospitals and the mental health services of the Rio Grande State Center--25 TAC §417.510 (relating to Completion of the Investigation);

(B) ~~[(2)]~~ for state supported living centers and the ICF-IID component of the Rio Grande State Center--40 TAC §3.305(c) (relating to Completion of an Investigation);

(C) ~~[(3)]~~ for local authorities and community centers--25 TAC §414.555 and 40 TAC §4.555 (relating to Information To Be Provided to Victim or Alleged Victim and Others);

(D) ~~[(4)]~~ for HCS waiver programs--40 TAC Chapter 9, Subchapter D (relating to Home and Community-based Services (HCS) program); [and]

(E) for TxHmL waiver programs--40 TAC Chapter 9, Subchapter N (relating to Texas Home Living (TxHmL) program); or

(F) ~~[(5)]~~ for licensed ICFs-IID--40 TAC Chapter 90, Subchapter G (relating to Abuse, Neglect, and Exploitation; Complaint and Incident Reports and Investigations); and[-]

(2) For all other service providers, the investigator makes the notification within 5 business days following the date the investigation report was signed and dated by the investigator.

§711.613. Can the investigative report be released by a service provider [the State Supported Living Centers, the State Hospitals, licensed ICFs-IID, local authorities, or HCSs]?

Upon request, the investigative report (with any information concealed that would reveal the identities of the reporter and any individual receiving services [person served] who is not the victim or alleged victim) may be released:

(1) by a facility [for facilities and their contractors,] to:

(A) the victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child), in accordance with 25 TAC §417.511(b) (relating to Confidentiality of Investigative Process and Report), and 40 TAC §3.305(k) (relating to Completion of an Investigation); and [-; ør]

(B) the perpetrator in accordance with 25 TAC §417.512(d) (relating to Classifications and Disciplinary Actions) and 40 TAC §3.305(e);

(2) by a [for] local authority or [authorities,] community center [centers, and their respective contractors] to:

(A) (No change.)

(B) the perpetrator or alleged perpetrator; [by the administrator or contractor CEO; and]

(3) for HCS waiver program or TxHmL waiver program providers providing services to an individual enrolled in the HCS waiver program or TxHmL waiver programs [HCSs and their contractors,] to the victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child), in accordance with 40 TAC Chapter 9, Subchapter D (relating to Home and Community-based Services (HCS) Program) and 40 TAC Chapter 9, Subchapter N (relating to Texas Home Living (TxHmL) Program); and[-]

(4) for all other service providers, the investigative report shall not be released except in accordance with §711.605(c) of this chapter (relating to Who receives the investigative 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-201602277

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803

◆ ◆ ◆

#### **40 TAC §711.605, §711.607**

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 DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals 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.

§711.605. *Who receives the investigative report?*

§711.607. *Does the investigator reveal the identity of the reporter in the investigative report released to the administrator, contractor CEO, or Consumer Rights and Services?*

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

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

TRD-201602278

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803



## SUBCHAPTER I. PROVISION OF SERVICES

### 40 TAC §§711.801, 711.802, 711.804, 711.806

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 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.

§711.801. *What action does the investigator take if an individual enrolled in the HCS waiver program receiving services from [a person served by] an HCS waiver program provider needs emergency services?*

(a) If the investigator determines that an individual receiving HCS waiver program services from [a person served by] an HCS waiver program provider is in immediate threat of serious physical harm or death as a result of abuse, neglect, or exploitation, then the investigator requests that the HCS waiver program provider, if appropriate, [tø] take action to remove the threat of physical harm or death. In deciding whether it is appropriate to request that the HCS waiver program provider take action, the investigator considers the following factors at a minimum:

- (1) the ability of the HCS waiver program provider to take action in a timely manner;
- (2) (No change.)

(3) setting/location [location] of the HCS waiver program provider [site]; and

(4) (No change.)

(b) If the investigator determines that it is not appropriate to request that the HCS waiver program provider [tø] take action, or if the HCS waiver program provider does not respond appropriately to a request, then the investigator utilizes the resources of the APS In-home staff to provide emergency services necessary to prevent serious physical harm or death.

(c) The investigator informs DADS Office of Consumer Rights and Services of the investigator's determination that an individual enrolled in the HCS waiver program receiving services from an HCS waiver program provider [a person served by an HCS] was in immediate threat of serious physical harm or death as a result of abuse, neglect, or exploitation, within 24 hours or the next working day of such determination.

§711.802. *What action does the investigator take if an individual receiving services from [a person served by] a licensed ICF-IID needs emergency services?*

(a) If the investigator determines that an individual receiving services from [a person served by] a licensed ICF-IID is in immediate threat of serious physical harm or death as a result of abuse, neglect, or exploitation, then the investigator requests that the licensed ICF-IID, if appropriate, [tø] take action to remove the threat of physical harm or death. In deciding whether it is appropriate to request that the licensed ICF-IID take action, the investigator considers the following factors at a minimum:

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

(b) If the investigator determines that it is not appropriate to request the licensed ICF-IID to take action or if the licensed ICF-IID does not respond appropriately to a request, then the investigator contacts DADS [the Department of Aging and Disability Services (DADS)] Regulatory division and provides DADS with all information that DFPS believes makes it necessary for DADS to file a petition for temporary care and protection of a resident. If DADS determines, based on information from the DFPS investigator, that immediate removal is necessary to protect the resident from further abuse, neglect, or exploitation, DADS will file the petition.

§711.804. *What action does the investigator take if an adult lives in a residence that is owned, operated, or controlled by an HCS waiver program provider but does not receive HCS waiver services and needs emergency services?*

(a) If the investigator determines that an adult who lives in a residence that is owned, operated, or controlled by an HCS waiver program provider but does not receive HCS waiver services is in immediate threat of serious physical harm or death as a result of abuse, neglect, or exploitation, then the investigator requests that the HCS waiver program provider, if appropriate, take action to remove the threat of physical harm or death. In deciding whether it is appropriate to request that the provider take action, the investigator considers the following factors at a minimum:

- (1) ability of the provider to take action in a timely manner;
- (2) identity of the alleged perpetrator;
- (3) setting of the service provision; and
- (4) type of action needed to remove the threat.

(b) If the investigator determines that it is not appropriate to request that the HCS waiver program provider take action or if the HCS waiver program provider does not respond appropriately to a request,

then the investigator utilizes the resources of the APS In-home staff to provide emergency services necessary to prevent serious physical harm or death.

§711.806. What action does the investigator take if a child lives in a residence that is owned, operated, or controlled by an HCS waiver program provider but does not receive HCS waiver services and needs emergency services?

(a) If the investigator determines that a child who lives in a residence that is owned, operated, or controlled by an HCS waiver program provider but does not receive HCS waiver services is in immediate threat of serious physical harm or death as a result of abuse, neglect, or exploitation, then the investigator requests that the HCS waiver program provider, if appropriate, take action to remove the threat of physical harm or death. In deciding whether it is appropriate to request that the HCS waiver program provider take action, the investigator considers the following factors at a minimum the:

- (1) ability of the provider to take action in a timely manner;
- (2) identity of the alleged perpetrator;
- (3) setting/location of the HCS waiver program provider;
- (4) type of action needed to remove the threat.

and

(b) If the investigator determines that it is not appropriate to request that the HCS waiver program provider take action or if the HCS waiver program provider does not respond appropriately to a request, then the investigator contacts the parent, legally authorized representative, or Child Protective Services (CPS) conservator.

(c) If the parent or legally authorized representative does not respond appropriately to a request, the investigator makes a case-related special request for services to CPS.

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-201602279

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803



## SUBCHAPTER J. APPEALING THE INVESTIGATION FINDING

### 40 TAC §§711.901, 711.903, 711.905, 711.907, 711.909, 711.911, 711.913, 711.915

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 DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections 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.

§711.901. What is an appeal of the investigation?

(a) An appeal is a challenge of the findings of the investigation, as described in §711.421 of this chapter (relating to What are the possible findings of an investigation?) by a qualified party, as described by §711.905 of this chapter (relating to Who may request an appeal of the investigation?).

(b) An appeal may not challenge the determination of whether a confirmation rises to the level of reportable conduct for purposes of the Employee Misconduct Registry.

(c) There are two levels of appeal:

(1) The first level of appeal is conducted by the Director of Provider Investigations or their designee, or a reviewer designated by the Assistant Commissioner of APS.

(2) If a qualified party disagrees with the decision of the first appeal, the qualified party may further appeal. This second appeal is conducted by a reviewer designated by the Assistant Commissioner of APS.

(d) The determination resulting from the second appeal is final and cannot be appealed by any qualified party except Disability Rights Texas.

§711.903. How is an appeal affected by a determination that the perpetrator's confirmed act of abuse, neglect, or exploitation may rise to the level of reportable conduct?

An appeal that is described in this subchapter is not affected by a determination that the confirmed act(s) of abuse, neglect, or exploitation may rise to the level of reportable conduct. The designated perpetrator will not receive notice about their right to request an EMR hearing until the timeframe for all appeals described in this subchapter have expired, or until the second appeal is completed and a confirmed finding that rises to the level of reportable conduct is upheld.

§711.905. Who may request an appeal of the investigation?

(a) In order to be a qualified party to request an appeal, you must be:

- (1) the administrator of the service provider or their attorney;
- (2) the CDS employer or their legal representative;
- (3) the reporter;
- (4) the victim or alleged victim, or the legal guardian or parent (if the victim or alleged victim is a child); or

(5) Disability Rights Texas, only if Disability Rights Texas represents the victim or alleged victim or is authorized by law to represent the victim or alleged victim.

(b) An alleged or designated perpetrator may not request an appeal even if they are otherwise a qualified party. An alleged or designated perpetrator may not coerce a CDS employer into requesting an appeal on their behalf.

§711.907. How does a qualified party request an appeal?

(a) To request an appeal, the qualified party must complete either the DFPS' "Request for Appeal of an APS Provider Investigation" form or "Appeal Addendum," as appropriate to the level of appeal, and send the completed form either via email to APS Provider Appeals@dfps.state.tx.us or via mail to APS Provider Appeals, Adult Protective Services Division, Department of Family and Protective Services, P.O. Box 149030, E-561, Austin, Texas, 78714-9030.

(b) The victim, alleged victim, legal guardian, parent (if the victim or alleged victim is a child), and reporter may request an appeal by calling DFPS toll-free at 1-888-778-4766.

§711.909. What is the timeline for requesting an appeal?

(a) To request a first level appeal:

(1) Service providers may request an appeal no later than the 30th calendar day following the date the investigative report was signed and dated by the investigator;

(2) Reporters, alleged victims, and legal guardians may request an appeal no later than the 60th calendar day following the date the investigative report was signed and dated by the investigator;

(3) Disability Rights Texas may request an appeal no later than the 60th calendar day following the date the investigative report was signed and dated by the investigator; and

(4) DFPS may accept a request for appeal after the deadline for good cause as determined by DFPS.

(b) To challenge the decision from the first level appeal, a qualified party has 30 calendar days following the date the appeal decision letter is signed.

§711.911. How and when is the appeal conducted?

(a) A first level appeal is conducted by the Director of Provider Investigations or their designee, or a reviewer designated by the Assistant Commissioner of APS, who:

(1) analyzes the investigative report and the methodology used to conduct the investigation and makes a decision to sustain, alter, or reverse the original finding;

(2) completes the review within 14 calendar days after receipt of the request; and

(3) notifies the appeal requestor of the appeal decision; and

(4) as appropriate, notifies the service provider, victim, and/or reporter if the finding changed.

(b) A secondary appeal is conducted by a reviewer designated by the Assistant Commissioner of APS, who:

(1) analyzes the investigative report and makes a decision to sustain, alter, or reverse the original finding;

(2) completes the review within 14 calendar days after receipt of the request; and

(3) notifies the appeal requestor of the appeal decision; and

(4) as appropriate, notifies the service provider, victim, and/or reporter if the finding changed.

§711.913. What if the administrator of a state-operated facility disagrees with the secondary appeal decision?

If the administrator of a state-operated facility disagrees with the secondary appeal decision, as referenced in §711.911(b) of this chapter (relating to How and when is the appeal conducted?), then they may contest the decision in accordance with 25 TAC §417.510(g)(2) (relating to Completion of the Investigation) and 40 TAC §3.305(b) (relating to Completion of an Investigation).

§711.915. Is a finding ever changed without an appeal?

DFPS, in its sole discretion, may designate a person to conduct a review of the investigation records or reopen an investigation to collect additional evidence. If a review of the records and any additional investigating results in a change of the finding, DFPS will notify the appropriate parties in writing.

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

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

TRD-201602280

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803

◆ ◆ ◆  
SUBCHAPTER K. REQUESTING A  
REVIEW OF FINDING IF YOU ARE THE  
ADMINISTRATOR OR CONTRACTOR CEO

**40 TAC §§711.1001 - 711.1003, 711.1005, 711.1007,  
711.1009, 711.1011 - 711.1013, 711.1015**

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 DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals 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.

*§711.1001. What if the administrator or contractor CEO wants to request a review of the finding or the methodology used to conduct the investigation?*

*§711.1002. How is a request for review affected by a determination that the perpetrator's confirmed act of abuse, neglect, or exploitation may rise to the level of reportable conduct?*

*§711.1003. How is a review as described in §711.1001 of this title (relating to What if the administrator or contractor CEO wants to request a review of the finding or the methodology used to conduct the investigation?) requested?*

*§711.1005. Is there a deadline to request a review?*

*§711.1007. How is the review of a finding conducted?*

*§711.1009. How is the review of the methodology conducted?*

*§711.1011. What if the administrator or contractor CEO wants to challenge the methodological review decision(s) made by the regional APS program administrator?*

*§711.1012. Is there a deadline for the administrator or contractor CEO to challenge the methodological review decision(s) made by the regional APS program administrator?*

*§711.1013. What if the administrator of a state-operated facility disagrees with the finding review decision?*

*§711.1015. Is a finding ever changed without a request for review of finding or methodology?*

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-201602281

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803



## SUBCHAPTER M. REQUESTING AN APPEAL IF YOU ARE THE REPORTER, ALLEGED VICTIM, LEGAL GUARDIAN, OR WITH DISABILITY RIGHTS TEXAS

### 40 TAC §§711.1201, 711.1203, 711.1205, 711.1207, 711.1209

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 DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals 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.

*§711.1201. Who may request an appeal?*

*§711.1203. How does the reporter, victim or alleged victim, legal guardian or parent, or Disability Rights Texas request an appeal?*

*§711.1205. Is there a deadline to request an appeal?*

*§711.1207. How is the appeal conducted?*

*§711.1209. Is a finding ever changed without a request for appeal?*

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-201602282

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3803



## CHAPTER 745. LICENSING

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Family and Protective Services (DFPS), an amendment to §§745.21, 745.243, 745.301, 745.303, 745.321, 745.341, 745.343, 745.345, 745.347, 745.351, 745.385, 745.403, 745.439, and 745.8521 and new §§745.471, 745.473, 745.475, 745.477, 745.479, 745.481, 745.483, and 745.485 in Chapter 745, concerning

Licensing. The recommended changes are needed to: (1) implement recommendations the Sunset Advisory Commission made in the *Department of Family and Protective Services Staff Report with Commission Decisions* published in August 2014, and required by Senate Bill (S.B.) 206, Sections 77, 78, and 79, that was passed by the 84th Texas Legislature in 2015 relating to the renewal of permits; (2) make conforming changes in Subchapters D and K relating to the implementation of a renewal process; and (3) make other clarifying changes and updates to Subchapters A and D of this chapter, as part of Licensing's comprehensive review of all Licensing rules and minimum standards.

S.B. 206 amended §§42.048, 42.050, and 42.052 of the Human Resources Code (HRC). The amended statute requires a renewal process for child care licenses, certifications, and registrations and directs DFPS to develop rules relating to: (1) renewal periods; (2) a process for staggered renewals; (3) a process for resolving a late application for renewal; (4) expiration dates; and (5) conditions for renewal.

A summary of the changes related to permit renewal includes: (1) defining the terms "full license," "full permit," and "initial license;" (2) removing references to a "non-expiring" permit or license; (3) requiring the renewal of a full license, certificate, and registration every two years to avoid expiration; (4) designating a "renewal period" during which the operation is to apply for renewal of its permit; (5) allowing an operation 30 additional days after the renewal period to apply for renewal if the operation is late in applying; (6) staggering the renewals so that all affected operations would not have to renew their permits at the same time; (7) outlining what an operation must submit as part of a renewal application; (8) detailing what happens after Licensing receives a renewal application; (9) explaining under what circumstances a permit expires and how an expired permit affects an operation; (10) adding language to indicate a full license is effective as long as it has not expired; (11) clarifying that a permit is subject to renewal requirements even if an enforcement action is being taken by Licensing; (12) requiring a registered home or licensed operation to apply for renewal if the permit is due for renewal while it is voluntarily suspended; and (13) requiring an operation to post the written notice of the permit's renewal.

DFPS is also requesting HHSC to propose changes to Subchapter D of this chapter (relating to Application Process), that are not related to permit renewal. HRC §42.042(b) requires DFPS to evaluate rules at least every six years. In addition, part of Licensing's business plan is to review, analyze, and update rules to strengthen the protection of children in out-of-home care and improve providers' understanding of the rules. DFPS has revised the proposed rules to clarify and update rules with current laws and practices in the industry. DFPS will request HHSC to propose rule changes to the remaining Subchapters in Chapter 745 at a later date.

A summary of the changes not related to permit renewal that are being proposed in these rules, includes: (1) adding references to "shelter care" to several rules applicable to shelter care operations that lacked those references; (2) clarifying the definition for the term "regulation;" (3) adding items to the lists of required application materials in order to be consistent with other rule changes that have been made or are being proposed in other rule packets; (4) removing the initial license fee as an item required for a completed application for a license because the fee will be required for issuance of an initial permit; (5) clarifying that Licensing's 10-day time frame for reviewing an application

pertains to an application for a compliance certificate; (6) clarifying that an applicant for a compliance certificate has unlimited attempts to submit all of the information and material that is required for Licensing to accept an application; (7) clarifying when Licensing issues an initial license; (8) replacing "initial permit" with "initial license;" (9) removing outdated language that no longer is applicable; and (10) making minor corrections to improve the reader's understanding of the subject matter or to improve sentence flow.

A summary of the changes is as follows:

The amendment to §745.21: (1) adds references to "shelter care operations" to several definitions that lacked those references; (2) defines the terms "full license," "full permit," and "initial license"; and (3) clarifies the definition of "regulation."

The amendment to §745.243: (1) adds items to the lists of required application materials in order to be consistent with other rule changes that have been made or are being proposed in other rule packets; (2) removes the initial license fee as an item required for a completed application for a license (changes to §745.345 of this chapter proposed in this packet require the initial license fee be paid prior to issuance of the initial permit); and (3) makes minor corrections to improve the reader's understanding of the subject matter.

The amendment to §745.301: (1) clarifies that Licensing's 10-day time frame for reviewing an application pertains to both temporary shelter and employer-based child care operations by replacing "employer-based child care" with "compliance certificate;" and (2) makes minor corrections to improve the sentence flow.

The amendment to §745.303 clarifies that an applicant for a compliance certificate has unlimited attempts to submit a completed application. The childcare at these operations is derivative of a broader purpose; for example, a domestic violence shelter may have an on-site daycare so that a mother will be able to search for employment or a home. Moreover, Subchapters F and G, HRC, require a streamlined application process for compliance certificates.

The amendment to §745.321: (1) adds "shelter care" to the same places where employer-based child care is referenced since the requirements are the same for both; and (2) makes minor corrections to improve the sentence flow.

The amendment to §745.341: (1) removes the term "non-expiring permit" and includes the terms "initial license," "full license," and "full permit" that were added to §745.21 of this chapter; and (2) adds a reference to "shelter care operations" to the list of operations that receive a full permit.

The amendment to §745.343: (1) removes the term "non-expiring permit" and includes the terms "initial license" and "full license;" and (2) adds language to indicate a full license is effective as long as it has not expired.

The amendment to §745.345: (1) clarifies when Licensing issues an initial license; (2) replaces "initial permit" with "initial license;" and (3) makes minor corrections to improve the reader's understanding of the subject matter.

The amendment to §745.347: (1) replaces "initial permit" with "initial license;" (2) replaces "non-expiring permit" with "full license;" and (3) makes a minor correction to improve the sentence flow.

The amendment to §745.351: (1) replaces "initial permit" with "initial license;" (2) replaces "non-expiring permit" with "full license;" and (3) makes a minor correction to improve the reader's understanding of the subject matter.

The amendment to §745.385 adds language to indicate a license or certificate expires.

The amendment to §745.403 removes outdated references to timeframes that are no longer applicable.

The amendment to §745.439 adds a reference to a "shelter care operation" to ensure shelter care operations are treated the same as employer-based child care operations since they have the same type of permit.

New §745.471: (1) indicates a full license, certificate, or registration will expire if it is not renewed; and (2) conveys that there are no renewal requirements for a compliance certificate or listing.

New §745.473: (1) requires an operation with a permit that requires renewal to apply for its renewal every two years; (2) designates a time frame for the operation's "renewal period" during which the operation is to apply for renewal of its permit; (3) allows an operation 30 additional days after the renewal period to apply for renewal if the operation is late in applying for renewal; and (4) creates a staggered renewal schedule for existing operations and operations that receive a permit on or after the effective date of these rules.

New §745.475: (1) requires a completed renewal application in order for Licensing to evaluate a permit for renewal; and (2) indicates what the operation must submit to Licensing in order for the application to be complete.

New §745.477: (1) details what happens after Licensing receives a renewal application; (2) indicates Licensing will evaluate whether the criteria for renewal are met; (3) indicates how and when Licensing will notify the operation that Licensing has approved the renewal of the permit or that the renewal application is incomplete; (4) allows the operation unlimited attempts to submit any missing information and to correct the deficiencies during the renewal period; (5) allows the operation 15 days to submit a completed application from the date it was rejected if the application was submitted during the late renewal period; and (6) provides that CCL may exceed the 15-day limit for good cause.

New §745.479 requires the operation to post the notice of the permit's renewal at the operation.

New §745.481 explains when a permit expires.

New §745.483: (1) requires an operation to cease operating immediately if its permit expires; and (2) requires an operation to submit a new application (as required by §745.243 of this chapter) and pay any necessary fees before resuming operation.

New §745.485 clarifies that a permit is subject to renewal requirements even if Licensing is taking an enforcement action.

The amendment to §745.8521: (1) replaces "non-expiring permit" with "registration or full license;" and (2) requires a registered home or licensed operation to apply for renewal if the permit is due for renewal while it is voluntarily suspended.

While developing the proposed rules for this packet, CCL received feedback from two different workgroups: (1) Between June and September 2015, CCL staff from different areas of the program and parts of the state met three times to develop the renewal policy that would later be incorporated into rule for-

mat; and (2) On February 2, 2016, CCL met with a workgroup of providers to discuss what renewal policy was developed and how providers would be affected and Licensing incorporated the workgroup's recommendations into the proposed rules.

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 a fiscal impact to state government of \$1,410,607 in General Revenue and All Funds as a result of enforcing or administering the sections. Implementation of a renewal process for licenses, certifications, and registrations requires automation changes and funding was appropriated during the 84th Legislative Session to support these costs.

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 safety of children in care and the quality of their care will be improved. There is not an anticipated adverse on small, or micro-businesses which must comply with the rule sections. The proposed changes do not add fees or require the purchase of any additional material or resources. There is no anticipated economic cost to persons who are required to comply with the proposed sections. The rules relating to permit renewal add a minimal amount of work to providers' workload.

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 Ryan Malsbary at (512) 438-5836 in DFPS's Licensing Division. Electronic comments may be submitted to [CCLRules@dfps.state.tx.us](mailto:CCLRules@dfps.state.tx.us), Attention: Ryan Malsbary. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-547, 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. PRECEDENCE AND DEFINITIONS

### DIVISION 3. DEFINITIONS FOR LICENSING

#### 40 TAC §745.21

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.

*§745.21. What do the following words and terms mean when used in this chapter?*

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

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

(6) Child-care facility--An establishment subject to regulation by Licensing which provides assessment, care, training, education, custody, treatment, or supervision for a child who is not related by blood, marriage, or adoption to the owner or operator of the facility, for all or part of the 24-hour day, whether or not the establishment operates for profit or charges for its services. A child-care facility includes the people, administration, governing body, activities on or off the premises, operations, buildings, grounds, equipment, furnishings, and materials. A child-care facility does not include child-placing agencies, listed family homes, ~~or~~ employer-based child care operations, or shelter care operations.

(7) - (19) (No change.)

(20) Full license--The type of full permit that is issued to an operation that requires a license.

(21) Full permit--A full permit is valid as long as it does not expire, if applicable, and is not suspended, revoked, or voluntarily surrendered. A full license is a type of full permit. Other types of full permits include listings, registrations, certificates, and compliance certificates. An initial license is not a full permit.

(22) ~~[(20)]~~ Governing body--The entity with ultimate authority and responsibility for the operation.

(23) ~~[(21)]~~ Governing body designee--The person named on the application as the designated representative of a governing body who is officially authorized by the governing body to speak for and act on its behalf in a specified capacity.

(24) ~~[(22)]~~ Household member--An individual, other than the caregiver(s), who resides in an operation.

(25) Initial license--A time-limited license that we issue an operation in lieu of a full license so that we can subsequently determine whether to issue or deny a full license to the operation.

(26) ~~[(23)]~~ Kindergarten age--As defined in §745.101(1) of this title (relating to What words must I know to understand this subchapter?).

(27) ~~[(24)]~~ Licensed administrator--As defined in §745.8905 of this title (relating to What is a licensed administrator?).

(28) ~~[(25)]~~ Minimum standards--The rules contained in Chapter 743 of this title (relating to Minimum Standards for Shelter Care), Chapter 744 of this title (relating to Minimum Standards for School-Age and Before or After-School Programs), Chapter 746 of this title (relating to Minimum Standards for Child-Care Centers), Chapter 747 of this title (relating to Minimum Standards for Child-Care Homes), Chapter 748 of this title (relating to Minimum Standards for General Residential Operations), Chapter 749 of this title (relating to Minimum Standards for Child-Placing Agencies), Chapter 750 of this title (relating to Minimum Standards for Independent Foster Homes), and Subchapter D, Division 11 of this chapter (relating to Employer-Based Child Care), which are minimum requirements for permit holders that are enforced by DFPS to protect the health, safety and well-being of children.

(29) ~~[(26)]~~ Neglect--As defined in the Texas Family Code, §261.401(3) (relating to Agency Investigation) and §745.8559 of this title (relating to What is neglect?).

(30) ~~[(27)]~~ Operation--A person or entity offering a program that may be subject to Licensing's regulation. An operation includes the building and grounds where the program is offered, any person involved in providing the program, and any equipment used in providing the program. An operation includes a child-care facility,

child-placing agency, listed family home, [ØF] employer-based child care operation, or shelter care operation.

(31) [(28)] Parent--A person that has legal responsibility for or legal custody of a child, including the managing conservator or legal guardian.

(32) [(29)] Permit--A license, certification, registration, listing, compliance certificate, or any other written authorization granted by Licensing to operate a child-care facility, child-placing agency, listed family home, [ØF] employer-based child care operation, or shelter care operation. This also includes an administrator's license.

(33) [(30)] Permit holder--The person or entity granted the permit.

(34) [(31)] Pre-kindergarten age--As defined in §745.101(2) of this title (relating to What words must I know to understand this subchapter?).

(35) [(32)] Program--Activities and services provided by an operation.

(36) [(33)] Regulation--Includes the following: [The enforcement of statutes and the development and enforcement of rules, including minimum standards. Regulation includes the licensing, certifying (both state run and employer-based operations), registering, and listing of an operation or the licensing of an administrator.]

(A) The development of rules, including minimum standards, as provided by statutory authority; and

(B) The enforcement of these rules and relevant statutes in relation to anyone providing care or a service that is subject to the regulation, including a permit holder, an applicant for a permit, and anyone doing so illegally without a permit.

(37) [(34)] Report--An expression of dissatisfaction or concern about an operation, made known to DFPS staff, that alleges a possible violation of minimum standards or the law and involves risk to a child/children in care.

(38) [(35)] Residential child care--As defined in §745.35 of this title (relating to What is residential child care?).

(39) [(36)] State Office of Administrative Hearings (SOAH)--See §745.8831 and §745.8833 of this title (relating to What is a due process hearing? and What is the purpose of a due process hearing?).

(40) [(37)] Sustained perpetrator--See §745.731 of this title (relating to What are designated perpetrators and sustained perpetrators of child abuse or neglect?).

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 16, 2016.

TRD-201602370

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-5836



## SUBCHAPTER D. APPLICATION PROCESS

## DIVISION 3. SUBMITTING THE APPLICATION MATERIALS

### 40 TAC §745.243

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.

§745.243. *What does a completed application for a permit include?* Application forms vary according to the type of permit. We will provide you with the required forms. Contact your local Licensing office for additional information. The following table outlines the requirements for a completed application:

Figure: 40 TAC §745.243

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 16, 2016.

TRD-201602371

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-5836



## DIVISION 5. ACCEPTING OR RETURNING THE APPLICATION

### 40 TAC §745.301, §745.303

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.

§745.301. *How long does Licensing have to review my application and let me know my application status?*

(a) If you are applying for a permit [For all types of permits] other than a compliance certificate [employer-based child care], we have 21 days after receiving your application [for a permit] to review the paperwork. After the review, we will notify you in writing that your application is either:

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

(b) If you are applying for a compliance certificate [For an employer-based child-care permit], we have 10 days after receiving your application [for a permit] to review the paperwork. After the review, we will notify you in writing that your application is either:

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

*§745.303. How many chances do I have to submit all of the required information?*

(a) Unless you are applying for a compliance certificate, you [You] have three times to submit all required material. If we return your application as incomplete three times, you may not apply again until one year from the date that we returned your last application as incomplete.

(b) If you are applying for a compliance certificate to operate an employer-based child care operation or shelter care operation, you have an unlimited amount of times to submit the required material.

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 16, 2016.

TRD-201602372

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-5836



## DIVISION 6. REVIEWING THE APPLICATION FOR COMPLIANCE WITH MINIMUM STANDARDS, RULES, AND STATUTES

### 40 TAC §745.321

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.

*§745.321. What will Licensing do after accepting my application?*

After we accept your application, our process of deciding to issue or deny varies depending on the type of permit you requested. For example, we must conduct an on-site inspection before issuing a compliance certificate, registration, or license to determine compliance with licensing minimum standards, rules, and/or statutes. We [However, unless you are applying for an employer-based child-care permit, we] will decide to issue or deny you a [the] permit no later than two months after we accept your application, unless you are applying for an employer-based child care operation or shelter care operation permit. For an employer-based child care operation or shelter care operation [child-care] permit, we will decide to issue or deny you a [the] permit no later than 30 days after we accept your application.

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

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602373

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-5836



## DIVISION 7. THE DECISION TO ISSUE OR DENY A PERMIT

### 40 TAC §§745.341, 745.343, 745.345, 745.347, 745.351

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, 42.048, 42.050, and 42.052.

*§745.341. What type of permit will Licensing issue me if I qualify for a permit after my application is accepted?*

(a) We issue a full [non-expiring] permit for listed family homes, registered child-care homes, employer-based child care operations, shelter care operations, and certified operations.

(b) We issue either an initial license [permit (time-limited)] or a full license [non-expiring permit] to all licensed operations.

*§745.343. What is the difference between an initial license and full license [non-expiring permit]?*

An initial license [permit] is a [time-limited] permit allowing you to operate pending the issuance of a full license [non-expiring permit]. A full license [non-expiring permit] is effective as long as:

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

(4) Your permit is not suspended, expired, revoked, or voluntarily surrendered.

*§745.345. When does Licensing issue an initial license [licenses]?*

We [must] issue you an initial license instead of a full license when we accept your application and determine that you qualify for a license, you pay the initial license fee, [you meet our Licensing minimum standards, rules, and statutes] and one of the following situations exists:

(1) You have not yet operated with children in care or you have been operating without a license; [You are not currently in operation but meet the appropriate minimum standards, except those with which compliance cannot be determined in the absence of children;]

{(2) You are operating but not currently licensed;}

(2) [(3)] Your operation has changed location and [and/or] has made changes in the type of child-care services it offers;

(3) [(4)] We licensed you for one type of child care, and you apply to add another type of child care to your program (an initial license [permit] is issued for the new type of child care); or

(4) [(5)] Change in ownership results in changes in policy and procedure or in the staff who have direct contact with the children. (See §745.437 of this title (relating to What is a change in the ownership of an operation?)).

§745.347. *How long is an initial license [permit] valid?*

An initial license [permit] is valid for six months from the date we issue it. We may renew it up to an additional six months. You may only have an initial license [permit] for a maximum of one year. The initial license [permit] expires when we issue or deny you a full license [non-expiring one], even if the six-month period for the initial license [permit] has not yet expired at the time the full license [non-expiring permit] is issued or denied.

§745.351. *If I have an initial license [permit], when will I be eligible for a full license [non-expiring permit]?*

You will be eligible for a full license [non-expiring permit] when:

(1) Your initial license [permit] has been in effect for at least three months;

(2) - (4) (No change.)

(5) You have paid your full license [non-expiring license] fee in accordance with Subchapter E of this chapter (relating to 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 16, 2016.

TRD-201602375

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-5836



## DIVISION 8. DUAL AND MULTIPLE PERMITS

### 40 TAC §745.385

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, 42.048, 42.050, and 42.052.

§745.385. *Can multiple operations operate under one permit?*

(a) (No change.)

(b) A permit that we issued prior to September 1, 2005, that allows multiple residential child-care operations to operate under that

permit remains valid regarding the addresses listed on the permit until it expires or is revoked or voluntarily relinquished.

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 16, 2016.

TRD-201602376

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-5836



## DIVISION 9. REAPPLYING FOR A PERMIT

### 40 TAC §745.403

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.

§745.403. *Can I apply for another permit after Licensing denies or revokes my permit?*

(a) If we revoke your [child day-care] permit or deny you a permit to operate a child care [day-care] operation [on or after September 1, 2009], you may not apply for another permit before the fifth anniversary of the date on which the denial or revocation takes effect.

[(b) If we revoke your child day-care permit or deny you a permit to operate a child day-care operation prior to September 1, 2009, you may not apply for another permit before the second anniversary of the date on which the denial or revocation takes effect.]

[(c) If we revoke your residential child-care permit or deny you a permit to operate a residential operation on or after September 1, 2005, you may not apply for another permit before the fifth anniversary of the date on which the denial or revocation takes effect.]

(b) [(d)] A revocation or denial takes effect when:

(1) You have waived or exhausted your due process rights regarding the revocation or denial; and

(2) Our revocation or denial of your permit is upheld.

(c) [(e)] This rule does not apply if your permit is revoked solely because you have relocated your operation or changed ownership.

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

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602377

Trevor Woodruff  
General Counsel  
Department of Family and Protective Services  
Earliest possible date of adoption: June 26, 2016  
For further information, please call: (512) 438-5836



## DIVISION 10. RELOCATION OF OPERATION

### 40 TAC §745.439

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.

*§745.439. What must I do if the ownership of my employer-based child care operation or shelter care operation changes?*

(a) - (b) (No change.)

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

Filed with the Office of the Secretary of State on May 16, 2016.

TRD-201602378

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-5836



## DIVISION 12. PERMIT RENEWAL

### 40 TAC §§745.471, 745.473, 745.475, 745.477, 745.479, 745.481, 745.483, 745.485

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, 42.048, 42.050, and 42.052.

*§745.471. What types of permits need to be renewed?*

(a) A full license, certificate, and registration will expire if it is not renewed.

(b) There are no renewal requirements for a compliance certificate or listing.

*§745.473. When do I need to apply to renew my full license, certificate, or registration?*

(a) If your permit is subject to renewal as outlined in §745.471 of this title (relating to What types of permits need to be renewed?), you must do so every two years. During the year that you must renew your permit, your renewal period:

(1) begins 60 calendar days before the anniversary of when we issued your full permit to you; and

(2) ends on the date of the anniversary.

(b) If you are late in applying for the renewal of your permit, you have 30 additional calendar days after your renewal period to apply for renewal.

(c) If we issued your permit on or after December 1, 2017, you must apply to renew it two years from the date we issued it to you and every two years thereafter.

(d) If we issued your permit to you prior to December 1, 2017, your first renewal period as described in subsection (a) of this rule will occur in:

(1) 2018 if we issued your permit to you in an even-numbered year; or

(2) 2019 if we issued your permit to you in an odd-numbered year.

*§745.475. What does a completed renewal application for a permit include?*

(a) A completed renewal application includes the following information:

(1) Verification that the following information is current and accurate:

(A) Your operation's basic information on the DFPS website;

(B) The list of controlling persons at your operation;

(C) The list of your governing body's members, such as officers and owners, if applicable;

(2) Whether your operation continues to need any existing waivers and variances; and

(3) A list of all persons who require a background check because of their affiliation with your operation, as described in §745.615 of this chapter (relating to On Whom Must I Request Background Checks?).

(b) You must submit a completed renewal application in order for us to evaluate your permit for renewal.

*§745.477. What happens after Licensing receives my renewal application?*

(a) After receiving your renewal application, we evaluate whether you:

(1) Submitted all documentation and information required by §745.475 of this title (relating to What does a completed renewal application for a permit include?);

(2) Are currently meeting all background check requirements; and

(3) Have paid:

(A) All fees required by Subchapter E of this chapter (relating to Fees); and

(B) Each administrative penalty that you owe after waiving or exhausting any due process provided under Tex. Hum. Res. Code §42.078

(b) Within 15 days of receiving your renewal application, we will either send you written notice that:

(1) We have renewed your permit; or

(2) Your renewal application is incomplete, you are not meeting all background check requirements, and/or you have not paid a fee or administrative penalty.

(c) If your renewal application is incomplete and you submitted it during the renewal period, you have unlimited attempts to submit the missing information and to correct the deficiencies until the end of the renewal period.

(d) If your renewal application is incomplete and you submitted it during the late renewal period, you have 15 days to submit a completed renewal application from the date it was rejected.

(e) Notwithstanding any of the other provisions of this subchapter, we may determine that we have good cause to exceed the 15-day timeframe for processing your renewal application in circumstances that would allow us to exceed our timeframes for processing an application for a permit. See §745.327 of this chapter (relating to When does Licensing have good cause for exceeding its timeframes for processing my application?).

§745.479. Will I need to post the written notice of my permit's renewal?

Yes. Upon receiving the written notice of your permit's renewal, you must post the notice at your operation.

§745.481. When does my permit expire?

Your permit expires if:

(1) you do not submit your renewal application during your renewal period or the late renewal period;

(2) you submit your renewal application during the renewal period, we reject your application as incomplete, and you do not submit a completed renewal application before the end of the late renewal period; or

(3) you submit your renewal application during the late renewal period, we reject your application as an incomplete application, and you do not submit a completed renewal application within 15 calendar days after rejection.

§745.483. What must I do if my permit expired?

If your permit expires, your operation must cease operating immediately. Before you can operate again, you will have to submit a new application as required by §745.243 of this chapter (relating to What does a completed application for a permit include?) and pay any necessary fees.

§745.485. Do I have to comply with the renewal requirements if Licensing is taking an enforcement action against my permit?

Yes, your permit is subject to renewal requirements even if we are taking an enforcement action against your permit.

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 16, 2016.

TRD-201602379

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-5836



## SUBCHAPTER K. INSPECTIONS AND INVESTIGATIONS

### DIVISION 4. VOLUNTARY ACTIONS

#### 40 TAC §745.8521

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, 42.048, 42.050, and 42.052.

*§745.8521. How long can I voluntarily suspend my permit?*

(a) If you are registered or licensed to provide child day care, then you can request suspension of your registration or full license [non-expiring permit] for a maximum of 90 days.

(b) If you are licensed to provide residential child care, then you can request a suspension of your license for a maximum of two years.

(c) If your permit is due for renewal while it is voluntarily suspended, you must apply to renew the permit so that it does not expire.

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 16, 2016.

TRD-201602380

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-5836



## CHAPTER 745. LICENSING

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), new §§745.8581, 745.8583, 745.8585, 745.8600, 745.8633, 745.8635, 745.8637, 745.8639, 745.8641, 745.8643, 745.8649, 745.8650, 745.8651, 745.8652, and 745.8654; amendments to §§745.8601, 745.8603, 745.8605, 745.8607,

745.8609, 745.8611, 745.8613, 745.8631, 745.8657, 745.8659 and 745.8713; and the repeal of §§745.8633, 745.8635, and 745.8651 in Chapter 745, concerning Licensing. The purpose of the new sections, amendments, and repeals is to implement recommendations the Sunset Advisory Commission made in the *Department of Family and Protective Services Staff Report with Commission Decisions* published in August 2014, and required by Senate Bill (S.B.) 206, Sections 81 and 82, that was passed by the 84th Texas Legislature in 2015. These sections respectively created Human Resources Code (HRC) §42.0704 and amended §42.078(a-2).

HRC §42.0704 requires DFPS to adopt rules that outline a general enforcement policy that describes the department's approach to enforcement, including: (1) A summary of the department's general expectations in enforcing Human Resources Code, Chapter 42; and (2) A methodology for determining appropriate action to take when a permit holder violates Licensing laws or rules that allows the department to consider the circumstances of the particular case, the nature and seriousness of the violation, history of previous violations, and other aggravating and mitigating factors.

HRC §42.0704 also requires the department to develop a plan for strengthening its enforcement efforts and for making objective regulatory decisions. Prior to the effective date of the rules proposed in this rule packet, Licensing will require all Licensing staff to receive training to promote staff's understanding of the policy and their ability to apply it appropriately and clearly explain it to providers. After the initial training, the concepts will be incorporated into Licensing's Basic Skills Development training, which all new Licensing staff receives, moving forward. Licensing's Performance Management Unit (PMU) performs quality assurance activities to ensure Licensing staff are adhering to policy and consistently enforcing licensing laws and regulations and will evaluate the effectiveness of the enforcement policy through a quality assurance review scheduled to be completed in early fiscal year 2018 (one year after implementation of the new enforcement policy). In addition PMU risk analysts conduct neutral assessments of an operation's compliance history when Licensing staff identifies the operation as having a compliance history that is at increased risk for children. As part of this process, PMU provides recommendations for enforcement actions and, six months later, reviews the operation's record to determine what enforcement action was taken and whether risk was reduced. This work enables Licensing to assess the effectiveness of the enforcement policy on an ongoing basis.

The new version of HRC §42.078(a-2) expands the department's authority to impose administrative penalties before taking corrective action to all high risk violations, not just violations related to background checks.

A summary of the changes to create an enforcement framework include: (1) changing the title of Subchapter L from "Remedial Actions" to "Enforcement Actions"; (2) defining "technical assistance" and outlining when and why technical assistance is provided; (3) clarifying that enforcement actions are not progressive in nature, meaning they are not necessarily recommended or imposed from least to most restrictive; (4) clarifying that CCL may end an enforcement action at any time to impose a more serious enforcement action; (5) removing the ability to extend an enforcement action; (6) identifying a voluntary plan of action as a voluntary enforcement action; (7) defining voluntary plan of action as a collaborative effort between CCL and the provider; (8) identifying factors CCL considers when deciding to recommend

a voluntary plan of action; (9) limiting the number of times a plan of action may be recommended if an operation has already been on a plan of action for similar issues within the previous year; (10) providing a more clearly defined delineation between evaluation and probation by restricting the circumstances under which CCL may consider imposing evaluation; (11) decreasing the length of time an operation may remain on evaluation to six months; (12) identifying factors CCL considers when deciding to impose evaluation; (13) identifying factors CCL considers when deciding to impose probation; (14) identifying factors CCL considers when deciding to impose each adverse action; and (15) adding language allowing CCL to impose administrative penalties prior to taking corrective action for violations of high risk standards.

A summary of the changes are as follows:

New Division 6, in Subchapter K, to house rules related to technical assistance.

New §745.8581 defines technical assistance and clarifies that technical assistance is not a deficiency or an enforcement action and is not used in lieu of citing a deficiency.

New §745.8583 identifies when and how Licensing may provide technical assistance.

New §745.8585 clarifies that a permit holder may not request an administrative review of Licensing providing technical assistance.

New §745.8600 outlines the general purpose of enforcement actions.

Amendment to §745.8601 clarifies that Licensing may provide technical assistance in response to a deficiency in addition to recommending or imposing another enforcement action.

Amendment to §745.8603: (1) replaces the term "remedial action" with "enforcement action"; (2) adds voluntary actions to the chart in subsection (a) listing the types of enforcement actions Licensing may take; (3) rewords and clarifies that listed family homes are not subject to voluntary or corrective action; (4) adds subsection (b) to clarify that Licensing recommends or imposes enforcement actions based on risk and that CCL does not have to impose a less restrictive action if it is determined that a more restrictive action is warranted; and (5) adds subsection (c) to clarify that Licensing may take multiple actions at the same time.

Amendment to §745.8605 replaces the term "remedial action" with "enforcement action" and deletes outdated date references in regards to operations that are ineligible to receive for a permit for a period of 5 years.

Amendment to §745.8607 replaces the term "remedial action" with "enforcement action". It also clarifies in paragraph (5) that CCL also considers the permit holder's ability to maintain compliance with standards, rules, and laws, when deciding which type of enforcement action to recommend or impose.

Amendment to §745.8609: (1) replaces the term "remedial action" with "enforcement action"; (2) adds voluntary actions to section (1) of the chart; and (3) clarifies in section (2) that Licensing notifies a permit holder of the intent to impose adverse action in writing.

Amendment to §745.8611: (1) replaces the term "remedial action" with "enforcement action" and removes language referring to extensions; (2) adds new section (1) "Voluntary Action" to the chart in subsection (a) and includes a maximum timeframe of six months for a voluntary plan of action; (3) makes the following

changes to new sections (2) and (3) in the chart in subsection (a): (A) Removes the minimum length of time evaluation and probation may be imposed; (B) Removes language referring to extensions for evaluation and probation; and (C) Reduces the amount of time evaluation may be imposed from a maximum of one year to six months; (4) renumbers existing section (3) to new section (4) and clarifies that the suspension period will be up to 120 days as necessary to resolve the danger or threat of danger; (5) renumbers existing section (4) to new section (5) in the chart in subsection (a); and (6) adds subsection (b) stating that Licensing may end voluntary or corrective action early if compliance is met and maintained, or if compliance is not met and Licensing determines a more restrictive enforcement action is necessary.

Amendment to §745.8613: (1) replaces the term "remedial action" with "enforcement action"; (2) adds new section (1) to the chart in subsection (a) to include voluntary plan of action and clarifies that a permit holder does not have the right to challenge a plan of action, since it is a voluntary action; and (3) renumbers the existing numbers in the chart in subsection (a).

Division 2, in Subchapter L, is being renamed to "Voluntary and Corrective Actions."

Amendment to §745.8631: (1) adds a new section (1) to include a voluntary plan of action and describes a voluntary plan as an action that Licensing recommends and is a collaborative effort between Licensing and the operation to improve compliance with minimum standards; (2) renumbers existing sections (1) and (2) to new sections (2) and (3); and (3) makes changes regarding evaluation and probation, including: removing language outlining the actions Licensing may take if compliance is not met, or if deficiencies worsen since this information is included in the new proposed §745.8641 of this title (relating to What requirements must I meet during the evaluation or probation period?); and clarifying that Licensing will conduct inspections at least monthly during the evaluation and probation period.

Section §745.8633 is repealed and the content is incorporated into new §745.8641.

New §745.8633 outlines when Licensing may recommend a voluntary plan of action, including: (1) outlining the criteria Licensing considers to determine whether to recommend a plan of action in subsection (a); (2) stating that Licensing may take into consideration the compliance history for each operation the permit holder oversees when determining whether a plan of action is appropriate in subsection (b); and (3) outlining when Licensing may consider imposing a more restrictive enforcement action in lieu of a voluntary plan of action in subsection (c).

Section §745.8635 is repealed and is being proposed with changes in §745.8643.

New §745.8635 outlines when Licensing may impose evaluation, including: (1) listing the circumstances under which Licensing may impose evaluation in subsection (a); and (2) stating that Licensing may impose probation or adverse action if Licensing determines the operation is not eligible for evaluation in subsection (b).

New §745.8637 outlines when Licensing may impose probation, including: (1) listing the circumstances under which Licensing may impose probation in subsection (a); and (2) stating that Licensing may impose adverse action if Licensing determines the operation is not eligible for probation in subsection (b).

New §745.8639 lists the requirements a permit holder must meet during a voluntary plan of action.

New §745.8641 contains the same language as repealed §745.8633. The language remains mostly the same as the repealed rule. However, language has been amended in paragraph (3) to clarify what must be posted during evaluation and probation.

New §745.8643 clarifies that CCL may increase inspections or recommend a more serious enforcement action if an operation does not comply with conditions of evaluation or probation. This language is similar to content in repealed rule §745.8635.

New §745.8649 contains the exact language as repealed §745.8651, which describes types of adverse actions.

New §745.8650 outlines the circumstances under which Licensing may deny a permit.

Section §745.8651 is repealed and re-proposed as the new §745.8649.

New §745.8651 outlines the circumstances under which Licensing may impose an adverse amendment on a permit.

New §745.8652 outlines the circumstances under which Licensing may suspend an operation's permit.

New §745.8654 outlines the circumstances under which Licensing may revoke a permit.

Amendment to §745.8657 updates the department's name and a program offered through a different state agency.

Amendment to §745.8659 removes the requirement for the department publish adverse actions in a local newspaper and publish denials when the operation was previously operating. Licensing posts information regarding suspensions and revocations on the department's public website per the requirements in Human Resources Code §42.025 and §42.077.

Amendment to §745.8713: (1) adds that Licensing may impose an administrative penalty for a violation of a high risk standard; and (2) deletes old paragraph (2) since new paragraph (2)(A) and (B) sufficiently address the issue of timely submitting information required to conduct a background and criminal history check.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the amendments, new, 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 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 amendments, new, and repealed rules will be: (1) compliance with HRC §42.0704 and §42.078(a-2); (2) implementation of the Sunset Recommendations; (3) transparency between providers, the public, and CCL staff who will have a common understanding of the decision making process as it relates to enforcement actions; (4) improved consistency in decision-making; and (5) increased use of voluntary plans of action will reduce the number of corrective action imposed or adverse actions taken. There is no anticipated economic cost to persons who are required to comply with the proposed section. There is no anticipated adverse impact on small or micro businesses as a result of the proposed rule changes because the proposed rule changes 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. There is no anticipated impact on technology as a result of the proposed rule change.

Ms. Subia has determined that the proposed amendments, new and repeal 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 submitted via electronically to CCLRules@dfps.state.tx.us, DFPS's Child Care Licensing Division, attention: Jennifer Ritter and Aimee Perry. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-548, 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 K. INSPECTIONS AND INVESTIGATIONS

### DIVISION 6. TECHNICAL ASSISTANCE

#### 40 TAC §§745.8581, 745.8583, 745.8585

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 the HRC §42.042 and §42.0704.

#### §745.8581. What is technical assistance?

Technical assistance is information we provide to help you improve or maintain compliance with minimum standards, rules, and laws. Technical assistance itself is not a deficiency or enforcement action, and we do not use it in lieu of citing a deficiency of a minimum standard.

#### §745.8583. When does Licensing provide technical assistance?

We may provide technical assistance in writing or in person:

- (1) at any time during an inspection or investigation;
- (2) as part of the ongoing regulatory process; or
- (3) at your request.

#### §745.8585. May I request an administrative review for technical assistance offered?

No. We provide technical assistance in order to help you with your compliance with minimum standards and other laws. Technical assistance does not include a decision or action you may challenge through an administrative review. If we offer you technical assistance in addition to citing you for a deficiency in a minimum standard, you would have the right to request an administrative review related to the deficiency, but not the technical assistance.

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-201602283

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3971



## SUBCHAPTER L. ENFORCEMENT ACTIONS

### DIVISION 1. OVERVIEW OF ENFORCEMENT ACTIONS

#### 40 TAC §§745.8600, 745.8601, 745.8603, 745.8605, 745.8607, 745.8609, 745.8611, 745.8613

The amendments 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 amendments and new section implement the HRC §42.042 and §42.0704.

#### §745.8600. What is the general purpose of the rules in this subchapter?

- (a) The rules in this subchapter contain:

- (1) the different types of actions that we use to enforce the requirements in rules, minimum standards, and statute; and
- (2) the criteria that we use to determine what type of enforcement action we will take in specific circumstances.

- (b) Our goal with respect to enforcement is to ensure the safety of children in care that is subject to our regulation. Our use of enforcement actions is tailored toward the objective of safety and not to be punitive in nature.

#### §745.8601. What happens if I am deficient in a minimum standard, rule, law, specific term of my permit, or condition of evaluation, probation, or suspension?

If you are deficient in a minimum standard, rule, law, specific term of your permit, or a condition of evaluation, probation, or suspension, we may offer one or both of the following: [We may make recommendations and/or impose remedial actions for any deficiency:]

- (1) offer technical assistance; or
- (2) recommend or impose an enforcement action against your permit.

#### §745.8603. What enforcement [remedial] actions may Licensing recommend or impose?

- (a) We may recommend a voluntary plan of action or impose a more serious enforcement action as outlined in the following chart [There are four types of remedial actions: corrective, adverse, judicial, and monetary actions. These actions are:]

Figure: 40 TAC §745.8603(a)

- (b) We may impose an action listed in subsection (a) of this rule any time we determine there is a reason for imposing the action. We will choose the action based on its appropriateness in relation to the

situation we are seeking to address. We do not have to recommend or impose a less restrictive action if we determine that a more restrictive action is more appropriate.

(c) In some situations, we may take multiple types of actions against your operation at the same time. For example, if you continue to operate pending the appeal of a denial, we may pursue a judicial action in order to prevent you from operating illegally.

§745.8605. *When can Licensing recommend or impose an enforcement [take remedial] action against my operation [me]?*

We can recommend or impose an enforcement [a remedial] action any time we find one of the following:

(1) - (14) (No change.)

(15) You apply for a permit to operate a child-care operation within five years after [For residential child-care operations on or after September 1, 2005, and all other child-care operations on or after September 1, 2011]:

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

(16) - (26) (No change.)

§745.8607. *How will Licensing decide which type of enforcement [remedial] action to recommend or impose?*

We decide to recommend or impose enforcement [take remedial] actions based upon our [an] assessment of the following:

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

(5) Whether you demonstrate the responsibility and ability to maintain [fɔr] compliance with minimum standards, rules, and laws;

(6) - (8) (No change.)

§745.8609. *How will I know when Licensing is recommending or imposing an enforcement [taking remedial] action against my operation [me]?*

We will notify you in the following manner:

Figure: 40 TAC §745.8609

§745.8611. *How long do enforcement [For remedial] actions that cover a specific period of time [(e. g. evaluation, probation, suspension, etc.), how long do they] last [and can they be extended]?*

(a) The following chart describes [when corrective actions are taken and] the length of time that we may recommend or impose an enforcement action [they can be imposed]:

Figure: 40 TAC 745.8611(a)

(b) We may end a voluntary or corrective action early if we determine:

(1) that you meet minimum standards and/or the imposed conditions and we are able to evaluate for ongoing compliance; or

(2) your compliance does not improve and a more restrictive enforcement action is necessary.

§745.8613. *What rights do I have [if I disagree with the decision of Licensing] to challenge an enforcement action [impose a remedial action]?*

(a) The rights you have vary depending upon the type of action that we recommend or take [imposed] against you. The chart in this subsection describes your rights to challenge [fɔr] each type of enforcement [remedial] action:

Figure: 40 TAC §745.8613(a)

(b) (No change.)

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

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

TRD-201602284

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3971



## DIVISION 2. VOLUNTARY AND CORRECTIVE ACTIONS

**40 TAC §§745.8631, 745.8633, 745.8635, 745.8637, 745.8639, 745.8641, 745.8643**

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 the HRC §42.042 and §42.0704.

§745.8631. *What types of voluntary or corrective actions may Licensing recommend or impose?*

We may recommend or impose the following types of voluntary or corrective actions:

Figure: 40 TAC §745.8631

§745.8633. *When may Licensing recommend a voluntary plan of action ?*

(a) We may recommend a voluntary plan of action for your operation for an issue identified in §745.8605 of this title (relating to When can Licensing recommend or impose an enforcement action against my operation?) if we determine that:

(1) You:

(A) demonstrate the ability to identify risk;

(B) accept responsibility for correcting deficiencies;

and

(C) have the ability to make corrections;

(2) If applicable, your operation has a history of making corrections to maintain compliance;

(3) Your operation will be able to mitigate risk by following the plan in addition to complying with minimum standards; and

(4) Your operation has not participated in a voluntary plan of action during the previous 12 months for similar issues.

(b) If you have multiple operations we may consider the factors listed in subsection (a) of this section for each of your operations when determining your eligibility to participate in a voluntary plan of action.

(c) We will impose a more restrictive enforcement action instead of recommending a voluntary plan of action when appropriate under the criteria for that enforcement action.

§745.8635. When may Licensing place my operation on evaluation?

(a) We may place your operation on evaluation for an issue identified in §745.8605 of this title (relating to When can Licensing recommend or impose an enforcement action against my operation?) if:

(1) you are eligible to participate in a plan of action but refuse to do so;

(2) your operation is unable to resolve its deficiencies and reduce risk through your implementation or failure to implement the plan;

(3) you have not completed a voluntary plan of action or evaluation for similar deficiencies within the previous 12 months; or

(4) a more restrictive enforcement action is necessary to reduce risk.

(b) If we determine that you are not eligible for evaluation, we will consider imposing probation or an adverse action.

§745.8637. When may Licensing place my operation on probation?

(a) We may place your operation on probation for an issue identified in §745.8605 of this title (relating to When can Licensing recommend or impose an enforcement action against my operation?) if we determine that:

(1) your operation does not qualify for a less restrictive enforcement action;

(2) you have not demonstrated the ability to make the necessary changes to address risk, but express a willingness to comply and make corrections;

(3) your operation will be able to mitigate risk by complying with the conditions identified in the plan in addition to minimum standards; and

(4) a more restrictive enforcement action is not necessary to reduce risk.

(b) If we determine that are you not eligible for probation, we will consider imposing an adverse action.

§745.8639. What requirements must I meet during a voluntary plan of action?

You must:

(1) correct your operation's deficiencies with minimum standards and reduce risk; and

(2) maintain compliance with all other Licensing statutes, rules, and minimum standards.

§745.8641. What requirements must I meet during the evaluation or probation period?

You must:

(1) comply with all of the conditions imposed by the corrective action plan;

(2) correct the minimum standards that were deficient;

(3) unless you are an independent or agency foster family home, post the evaluation letter or the probation notice in a prominent place(s) near all public entrances; and

(4) maintain compliance with all other Licensing statutes, rules, and minimum standards.

§745.8643. What may Licensing do if my operation's compliance with standards does not improve as a result of the voluntary or corrective action?

If your operation's compliance with minimum standards does not improve sufficiently to reduce risk at your operation as a result of the voluntary or corrective action, we will reevaluate your plan to determine the appropriateness of its terms and conditions. As a result, we may:

(1) recommend or impose additional conditions and/or increase inspections; or

(2) impose a more serious enforcement action.

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-201602285

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3971



## DIVISION 2. CORRECTIVE ACTIONS

### 40 TAC §745.8633, §745.8635

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 the HRC §42.042 and §42.0704.

§745.8633. What requirements must I meet during the evaluation or probation period?

§745.8635. What happens if I do not comply with the terms and conditions of the evaluation or probation?

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-201602286

Trevor Woodruff

General Counsel

Department of Family and Protective Services

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 438-3971



## DIVISION 3. ADVERSE ACTIONS

### 40 TAC §§745.8649 - 745.8652, 745.8654, 745.8657, 745.8659

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 the HRC §42.042 and §42.0704.

§745.8649. What adverse actions may Licensing impose?

We may impose the following adverse actions:  
Figure: 40 TAC §745.8649

§745.8650. When may Licensing deny me a permit?

We may deny you a permit for an issue identified in §745.8605 of this title (relating to When can Licensing recommend or impose an enforcement action against my operation?) if we determine that:

(1) a background check result makes you ineligible for a permit, because either the result is ineligible for a risk evaluation or the Department of Family and Protective Services Central Background Check Unit informs us that it will not approve a risk evaluation as provided in Subchapter F of this chapter (relating to Background Checks);

(2) your operation does not demonstrate the ability to comply with minimum standards and other applicable laws during your initial permit period, if applicable;

(3) the results of a public hearing make you ineligible for a permit;

(4) your operation presents an immediate threat to the health or safety of children; or

(5) You are otherwise ineligible for a permit because of a criteria identified in §745.8605 of this title.

§745.8651. When may Licensing impose an adverse amendment on my permit?

We may impose an adverse amendment on your permit for an issue identified in §745.8605 of this title (relating to When can Licensing recommend or impose an enforcement action against my operation?) if we determine:

(1) that an amendment on your permit will mitigate any risks;

(2) the amendment would be the most effective enforcement action for addressing risk at your operation; and

(3) you are capable of following the restrictions of the amendment.

§745.8652. When will Licensing suspend my permit?

We may suspend your permit for an issue identified in §745.8605 of this title (relating to When can Licensing recommend or impose an enforcement action against my operation?) if we determine that:

(1) your operation will pose a danger or threat of danger to the health or safety of children in your operation's care until the issue is resolved;

(2) you cannot correct the issue while children are in care, but you can do so during a specific period of time;

(3) you are capable of making the necessary corrections while your permit is suspended; and

(4) there are no additional concerns about your compliance history that would make revocation a more appropriate enforcement action for the health or safety of children.

§745.8654. When may Licensing revoke my permit?

We may revoke your permit for an issue identified in §745.8605 of this title (relating to When can Licensing recommend or impose an enforcement action against my operation?) if we determine that:

(1) your operation is ineligible for corrective action;

(2) we cannot address the risk at your operation by taking corrective action or another type of adverse action;

(3) a background check result or a finding of abuse or neglect makes you ineligible for a permit, either because the result is ineligible for a risk evaluation or the Department of Family and Protective Services (DFPS) Central Background Check Unit informs us that it will not approve a risk evaluation as provided in Subchapter F of this chapter (relating to Background Checks); or

(4) revocation is otherwise necessary to address the issue identified in §745.8605 of this title.

§745.8657. Will Licensing inform anyone that they are attempting to deny, suspend, or revoke my permit?

Yes, the fact that we are attempting to enforce any adverse action against you is available to the public. If you are a child day-care operation participating in the Child Care Services [Management] Program or the Child and Adult Care Food Program, we will inform the staff of those programs of any suspension or revocation that we are attempting to enforce. If a child in your care is in the custody of Department of Family and Protective Services (DFPS) [PRS], then we will also inform the Child Protective Services Division of DFPS [PRS], and, as appropriate, any other state or federal programs. We will tell these programs that we are attempting to suspend or revoke your permit, that you may request an administrative review and a due process hearing concerning this action, and whether you may care for children pending the administrative review and due process hearing.

§745.8659. Will there be any publication of the denial, suspension, or revocation of my permit?

(a) If you waive the administrative review and due process hearing or if the denial, suspension, or revocation is upheld in the process, we will publish a notice of the adverse action taken against you[.].

[(+) on [On] DFPS's Internet website along with other information regarding your child-care services.[; or]

[(2) In the section of a local newspaper of general circulation in the county where your operation is located.]

[(b) For a denial, we will publish the notice only if you were previously operating.]

(b) [(e)] In addition, we will send notification of the outcomes of the administrative review and the due process hearing to those state and federal programs and agencies that we previously informed of the adverse action.

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-201602287  
Trevor Woodruff  
General Counsel  
Department of Family and Protective Services  
Earliest possible date of adoption: June 26, 2016  
For further information, please call: (512) 438-3971



#### 40 TAC §745.8651

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 the HRC §42.042 and §42.0704.

*§745.8651. What adverse actions may Licensing impose?*

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-201602288  
Trevor Woodruff  
General Counsel  
Department of Family and Protective Services  
Earliest possible date of adoption: June 26, 2016  
For further information, please call: (512) 438-3971



### DIVISION 5. MONETARY ACTIONS

#### 40 TAC §745.8713

The amendment 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 the HRC §42.042) and §42.078(a-2).

*§745.8713. When may Licensing impose a monetary penalty before a corrective action?*

We may impose a monetary penalty before imposing a corrective action any time we find [~~one of the following~~]:

(1) a violation of a high risk standard, as identified on the DFPS public website, along with the Licensing enforcement methodology; or

(2) one of the following:

(A) [(1)] a failure to timely submit the information required to conduct a background and criminal history check under Subchapter F of this chapter (relating to Background Checks) on two or more occasions;

[(2) A failure to timely submit the information required to conduct a background and criminal history check under Subchapter F of this chapter before the 30th day after the date we notify you that the information is overdue;]

(B) [(3)] except as provided in §745.626 of this title (relating to How soon after I request a background check on a person can that person provide direct care or have direct access to a child?), you knowingly allow a person to be present in your child-care operation before you have received the results of the person's background and criminal history check;

(C) [(4)] You knowingly allow a person to be present in your child-care operation after you have received the person's background and criminal history check, if the results contain criminal history or central registry findings that preclude the person from being present in the child-care operation; or

(D) [(5)] You violate a condition or restriction we have placed on a person's presence at your child-care operation as part of a pending or approved risk evaluation of the person's background and criminal history or central registry findings.

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-201602289  
Trevor Woodruff  
General Counsel  
Department of Family and Protective Services  
Earliest possible date of adoption: June 26, 2016  
For further information, please call: (512) 438-3971

