

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 252. ADMINISTRATION

1 TAC §252.5

The Commission on State Emergency Communications (CSEC) adopts amendments to §252.5 relating to the eligibility of the agency's employees for training supported by the agency; and the obligations required by Texas Government Code §656.048 that are assumed by employees upon receiving agency supported training and education. The amendments implement House Bill 3337 adopted by the 84th Texas Legislature. The amended section is being adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3388).

No comments were received by CSEC on the proposed amended section.

STATEMENT OF AUTHORITY

The amended section is adopted under Government Code §656.048.

No other statutes, articles or codes are affected by the amended section.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 1, 2016.

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Patrick Tyler

General Counsel

Commission on State Emergency Communications

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For further information, please call: (512) 305-6922



CHAPTER 253. PRACTICE AND PROCEDURE

1 TAC §253.5

The Commission on State Emergency Communications (CSEC) adopts new §253.5 relating to procedures for identifying contracts requiring enhanced contract or performance monitoring in accordance with Texas Government Code §2261.253(c), which requires each state agency by rule to establish a procedure to identify contracts that require enhanced contract or performance

monitoring. The new section is being adopted without changes to the proposed text as published in the February 26, 2016, issue of the *Texas Register* (41 TexReg 1311).

No comments were received by CSEC on the new section.

STATEMENT OF AUTHORITY

The new section is adopted pursuant to Texas Government Code §2261.253 and Texas Health & Safety Code §771.051. No other statute, article, or code is affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §5.2

The Texas Department of Housing and Community Affairs (the "Department") adopts the amendments to 10 TAC Chapter 5, Subchapter A, §5.2, Definitions. The amendments are adopted with changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3391).

REASONED JUSTIFICATION. The purpose of the amendments to 10 TAC §5.2 is to state that: 1) households assisted through the Low Income Home Energy Assistance Program are categorically income eligible if they are recipients of Supplemental Security Income ("SSI") or a means tested veterans program; 2) households assisted through the Homeless Housing and Services Program ("HHSP") are categorically eligible for HHSP rapid re-housing or homelessness prevention if they are recipients of Supplemental Security Income ("SSI") or a means tested veterans program; 3) that while households must be below 30%

of the Emergency Solutions Grants ("ESG") Income Limits at the time of program qualification, the person may be up to, but not exceed, 50% of the ESG limits at recertification of income twelve months after initial intake; and 4) that Income Limits will be defined by the U.S. Department of Housing and Urban Development ("HUD") ESG Program and not HUD's Section 8 Program.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS. The Department accepted public comment from May 16, 2016, through June 15, 2016. The Department's response to all comments received is set out below. The comments and responses include clarifications and corrections to the amendments recommended by staff. Comments and responses are presented in the order they appear in the rules with comments received from:

Stella Rodriguez, Executive Director, Texas Association of Community Action Agencies (TACAA)

10 TAC Chapter 5, Community Affairs Programs, Subchapter A, General Provisions, §5.2(b)(31)(B)

COMMENT SUMMARY: Regarding §5.2(b)(31)(B) - Commenter requested that a definition, clarification and an example of a means tested veterans program be added.

STAFF RESPONSE: Staff concurs and recommends the following definition be added to the proposed language in 10 TAC §5.2. Examples are provided below but are not recommended to be added to the rule.

(33) Means Tested Veterans Program--A program whereby applicants receive payments under Sections 415, 521, 541, or 542 of title 38, United States Code, or under section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978.

Examples:

38 USC 1315 (Previously 38 USC 415) - Payments for parents of a deceased veteran who died in the line of duty or whose death resulted from a service-related injury or disease.

38 USC 1521 (Previously 38 USC 521) - Payments for low-income veterans meeting specified service requirements who are permanently and totally disabled from non-service-connected disability.

38 USC 1541 (Previously 38 USC 541) - Payments for surviving spouses of veterans of a period of war who met specified service requirements or who at the time of death was receiving (or entitled to receive) compensation or retirement pay for a service-connected disability.

38 USC 1542 (Previously 38 USC 542) - Payments for children of veterans of a period of war who met specified service requirements or who at the time of death was receiving (or entitled to receive) compensation or retirement pay for a service-connected disability.

38 USC 1521 note (Section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978) - Allowed individuals eligible for previous versions of 38 USC 521, 541, and 542 as of Dec. 31, 1978, to continue receiving such payments as prescribed by those sections.)

STATUTORY AUTHORITY. The amendments are adopted pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules, and Chapter 2306, Subchapter E, which authorizes the Department to administer its Community Affairs programs.

The adopted amendments affect no other code, article, or statute.

§5.2. *Definitions.*

(a) To ensure a clear understanding of the terminology used in the context of the programs of the Community Affairs Division, a list of terms and definitions has been compiled as a reference.

(b) The words and terms in this chapter shall have the meanings described in this subsection unless the context clearly indicates otherwise.

(1) Affiliate--If, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways the Department may determine control include, but are not limited to:

(A) Interlocking management or ownership;

(B) Identity of interests among family members;

(C) Shared facilities and equipment;

(D) Common use of employees; or

(E) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

(2) Award Date--Date on which the Department's Board commits funds to an awardee.

(3) Awarded Funds--The amount of funds committed by the Department's board to a Subrecipient or service area.

(4) Child--Household dependent not exceeding eighteen (18) years of age.

(5) Code of Federal Regulations (CFR)--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the Federal Register.

(6) Collaborative Application--An application from two or more organizations to provide services to the target population.

(7) Community Action Agencies (CAAs)--Local Private Nonprofit Organizations and Public Organizations that carry out the Community Action Program, which was established by the 1964 Economic Opportunity Act to fight poverty by empowering the poor in the United States.

(8) Community Affairs Division (CAD)--The Division at the Department that administers CEAP, CSBG, ESG, HHSP, Section 8 Housing Choice Voucher Program, and WAP.

(9) Community Services Block Grant (CSBG)--An HHS-funded program which provides funding for CAAs and other Eligible Entities that seek to address poverty at the community level.

(10) Comprehensive Energy Assistance Program (CEAP)--A LIHEAP-funded program to assist low-income Households, particularly those with the lowest incomes, that pay a high proportion of Household income for home energy, primarily in meeting their immediate home energy needs.

(11) Contract--The executed written Agreement between the Department and a Subrecipient performing an Activity related to a CAD program that describes performance requirements and responsibilities assigned by the document; for which the first day of the contract period is the point at which programs funds may be considered by a Subrecipient for expenditure unless otherwise directed in writing by the Department.

(12) Contracted Funds--The amount of funds obligated by the Department to a Subrecipient as reflected in a Contract.

(13) Declaration of Income Statement (DIS)--A Department-approved form for limited use and only when an applicant cannot obtain income documentation requiring the Subrecipient to document income and the circumstances preventing the client from obtaining documentation. The DIS is not complete unless notarized in accordance with §406.014 of the Texas Government Code.

(14) Deobligation--The partial or full removal of Contracted Funds from a Subrecipient. Partial Deobligation is the removal of some portion of the full Contracted Funds from a Subrecipient, leaving some remaining balance of Contracted Funds to be administered by the Subrecipient. Full Deobligation is the removal of the full amount of Contracted Funds from a Subrecipient. This definition does not apply to CSBG.

(15) Department of Energy (DOE)--Federal department that provides funding for the weatherization assistance program.

(16) Department of Health and Human Services (HHS)--Federal department that provides funding for CSBG and LIHEAP energy assistance and weatherization.

(17) Department of Housing and Urban Development (HUD)--Federal department that provides funding for ESG.

(18) Dwelling Unit--A house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied as separate living quarters. This definition does not apply to the ESG or HHSP.

(19) Elderly Person--

(A) for CSBG, a person who is fifty-five (55) years of age or older;

(B) for CEAP, WAP and HHSP, a person who is sixty (60) years of age or older; and

(C) for ESG, a person who is sixty-two (62) years of age or older

(20) Emergency Solutions Grants (ESG)--A HUD-funded program which provides funds for services necessary to help persons that are at risk of homelessness or homeless quickly regain stability in permanent housing.

(21) Equipment--Tangible non-expendable personal property including exempt property, charged directly to the award, having a useful life of more than one year, and an acquisition cost of \$5,000 or more per unit.

(22) Expenditure--Funds having been drawn from the Department through the Contract System. For purposes of this rule, expenditure will include draws requested through the system.

(23) Families with Young Children--A family that includes a Child age five (5) or younger.

(24) High Energy Burden--Households with energy burden which exceeds 11% of annual gross income. Determined by dividing a Household's annual home energy costs by the Household's annual gross income.

(25) High Energy Consumption--Household energy expenditures exceeding the median of low-income home energy expenditures, by way of example, at the time of this rulemaking, that amount is \$1,000, but is subject to change.

(26) Homeless or Homeless Individual--An individual as defined by 42 U.S.C. §§11371 - 11378 and 24 CFR §576.2.

(27) Homeless Housing and Services Program (HHSP)--A state funded program established under §2306.2585 of the Texas Government Code with the purpose of providing funds to local programs to prevent and eliminate homelessness in municipalities with a population of 285,500 or more.

(28) Household--Any individual or group of individuals who are living together as one economic unit. For DOE WAP this includes all persons living in the Dwelling Unit. For energy programs, these persons customarily purchase residential energy in common or make undesignated payments for energy.

(29) Inverse Ratio of Population Density Factor--The number of square miles of a county divided by the number of poverty Households of that county.

(30) Local Unit of Government--City, county, council of governments, and housing authorities.

(31) Low Income--Income in relation to family size and that governs income eligibility for a program:

(A) For DOE WAP, at or below 200% of the DOE Income guidelines;

(B) For CEAP and LIHEAP WAP, at or below 150% of the HHS Poverty Income guidelines or categorically eligible because a Household member receives SSI or benefits from a means tested veterans program;

(C) For CSBG, at or below 125% of the HHS Poverty Income guidelines;

(D) For ESG, below 30% of the Median Family Income (MFI) as defined by HUD's 30% Income Limits for All Areas for persons receiving prevention assistance or as amended by HUD;

(E) For HHSP, there is no procedural requirement to verify income for persons living on the street (or other places not fit for human habitation), living in emergency shelter, or receiving rapid re-housing. For all other persons, below 30% of the MFI as defined by HUD for the ESG Program, although persons may be up to, but not exceed, 50% of ESG income limits, at recertification for rapid re-housing or homelessness prevention. Households in which any member is a recipient of SSI or a means tested veterans program are categorically income eligible.

(32) Low Income Home Energy Assistance Program (LIHEAP)--An HHS-funded program which serves low income Households who seek assistance for their home energy bills and/or weatherization services.

(33) Means Tested Veterans Program--A program whereby applicants receive payments under Sections 415, 521, 541, or 542 of title 38, United States Code, or under section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978.

(34) Migrant Farm Worker--An individual or family that is employed in agricultural labor or related industry and is required to be absent overnight from their permanent place of residence.

(35) Modified Cost Reimbursement--A contract sanction whereby reimbursement of costs incurred by the Subrecipient is made only after the Department has reviewed and approved backup documentation provided by the Subrecipient to support such costs.

(36) Office of Management and Budget (OMB)--Office within the Executive Office of the President of the United States that oversees the performance of federal agencies and administers the federal budget.

(37) OMB Circulars--Instructions and information issued by OMB to Federal agencies that set forth principles and standards for determining costs for federal awards and establish consistency in the management of grants for federal funds. Uniform cost principles and administrative requirements for local governments and for nonprofit organizations, as well as audit standards for governmental organizations and other organizations expending federal funds are set forth in 2 CFR Part 200, unless different provisions are required by statute or approved by OMB.

(38) Outreach--The method that attempts to identify clients who are in need of services, alerts these clients to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential clients.

(39) Performance Statement--A document which identifies the services to be provided by a Subrecipient.

(40) Persons with Disabilities--Any individual who is:

(A) a handicapped individual as defined in §7(9) of the Rehabilitation Act of 1973;

(B) under a disability as defined in §1614(a)(3)(A) or §223(d)(1) of the Social Security Act or in §102(7) of the Developmental Disabilities Services and Facilities Construction Act; or

(C) receiving benefits under 38 U.S.C. Chapter 11 or 15.

(41) Population Density--The number of persons residing within a given geographic area of the state.

(42) Poverty Income Guidelines--The official poverty income guidelines as issued by HHS annually.

(43) Private Nonprofit Organization--An organization described in §501(c) of the Internal Revenue Code (the "Code") of 1986 and which is exempt from taxation under subtitle A of the Code, has an accounting system and a voluntary board, and practices nondiscrimination in the provision of assistance. For ESG, this does not include a governmental organization such as a public housing authority or a housing finance agency.

(44) Production Schedule--A Production schedule signed by the applicable Executive Director/Chief Executive Officer of the Subrecipient, and approved by the Department meeting the requirements of this definition. The Production Schedule shall include the estimated monthly and quarterly performance targets and the estimated monthly and quarterly expenditure targets for all Contracted Funds reflecting achievement of the criteria identified in the specific program sections of this chapter by the end of the contract period.

(45) Public Organization--A unit of government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments.

(46) Referral--The process of providing information to a client Household about an agency, program, or professional person that can provide the service(s) needed by the client.

(47) Reobligation--The reallocation of deobligated funds to other Subrecipients administering those same program's funds.

(48) Seasonal Farm Worker--An individual or family that is employed in seasonal or temporary agricultural labor or related industry and is not required to be absent overnight from their permanent place of residence. In addition, at least 20% of the Household annualized income must be derived from the agricultural labor or related industry.

(49) Single Audit--As defined in the Single Audit Act of 1984 (as amended) or UGMS, a series of audits that cover departments, agencies, and other organizational units which expended or otherwise administered federal or state awards during such fiscal year provided that each such audit shall encompass the financial statements and schedule of expenditures of federal or state awards for each such department, agency, and organizational unit.

(50) State--The State of Texas or the Department, as indicated by context.

(51) Subcontractor--A person or an organization with whom the Subrecipient contracts with to provide services.

(52) Subgrant--An award of financial assistance in the form of money, or property in lieu of money, made under a grant by a Subrecipient to an eligible Subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases.

(53) Subgrantee--The legal entity to which a subgrant is awarded and which is accountable to the Subrecipient for the use of the funds provided.

(54) Subrecipient--Generally, an organization with whom the Department contracts and provides CSBG, CEAP, ESG, HHSP, DOE WAP, or LIHEAP funds. (Refer to Subchapters B, D - G, J, and K of this chapter for program specific definitions.)

(55) Supplies--All tangible personal property excluding equipment, intangible property, and debt instruments, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement (subject inventions), as defined in 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements." A computing device is a supply if the acquisition cost is less than the lesser of the capitalization level established by the Subrecipient for financial statement purposes or \$5,000, regardless of the length of its useful life.

(56) System for Award Management (SAM)--Combined federal database that includes the Excluded Parties List System (EPLS).

(57) Supplemental Security Income ("SSI")--A means tested program run by the Social Security Administration.

(58) Systematic Alien Verification for Entitlements (SAVE)--Automated intergovernmental database that allows authorized users to verify the immigration status of applicants.

(59) Texas Administrative Code (TAC)--A compilation of all state agency rules in Texas.

(60) Treatment as a State or Local Agency--For purposes of 5 U.S.C. Chapter 15, any entity that assumes responsibility for planning, developing, and coordinating activities under the CSBG Act and receives assistance under CSBG Act shall be deemed to be a state or local agency.

(61) Uniform Grant Management Standards (UGMS)--Established to promote the efficient use of public funds by providing awarding agencies and grantees a standardized set of financial management procedures and definitions, by requiring consistency among grantor agencies in their dealings with grantees, and by ensuring accountability for the expenditure of public funds. State agencies are required to adhere to these standards when administering grants and other financial assistance agreements with cities, counties and other political subdivisions of the state. In addition, Chapter 2105, Texas Govern-

ment Code, subjects subrecipients of federal block grants (as defined therein) to the Uniform Grant and Contract Management Standards.

(62) Unit of General Local Government--A unit of government which has, among other responsibilities, the authority to assess and collect local taxes and to provide general governmental services.

(63) United States Code (U.S.C.)--A consolidation and codification by subject matter of the general and permanent laws of the United States.

(64) Vendor Agreement--An agreement between the Subrecipient and energy vendors that contains assurance as to fair billing practices, delivery procedures, and pricing for business transactions involving ESG and LIHEAP beneficiaries.

(65) Weatherization Assistance Program (WAP)--DOE and LIHEAP funded program designed to reduce the energy cost burden of low income households through the installation of energy efficient weatherization materials and education in energy use.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

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10 TAC §5.19

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 5, Subchapter A, §5.19, Income Eligibility. The amendments are adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 Tex Reg 3395) and will not be republished.

REASONED JUSTIFICATION. The purpose of the amendments to 10 TAC §5.19 is to ensure that the rules are consistent with newly released federal changes and to state that: 1) income eligibility must be done at least every 12 months (unless a more frequent period is required by federal regulation); 2) that income must be re-certified after a period of twelve months (which is a new requirement for the HHSP); and 3) that the method of calculation for income for HHSP must match the Emergency Solutions Grants ("ESG") method.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS. The Department accepted public comment from May 16, 2016, through June 15, 2016. The Department's response to all comments received is set out below. The comments and responses include clarifications and corrections to the amendments recommended by staff. Comments and responses are presented in the order they appear in the rules with comments received from:

Stella Rodriguez, Executive Director, Texas Association of Community Action Agencies ("TACAA")

10 TAC Chapter 5, Community Affairs Programs, Subchapter A, General Provisions, §5.19(b)(2), Recommendation #1

COMMENT SUMMARY: Regarding §5.19(b)(2) - Commenter recommends "Excluded Income" be renamed to "Countable Income" and to list a finite number of types of income. The commenter believes it would make more sense to list a finite number of types of income which could be counted as income rather than an infinite number of types of income that could be excluded. The commenter suggests the "countable" list could be derived from the LIHEAP state plan or the Internal Revenue Service.

STAFF RESPONSE: Staff appreciates the input. The Department had previously structured the rule as the commenter proposed, but by limiting the income types that could be included, eligible possible household sources of income were inadvertently excluded by their not being on the list. Having a finite list, as reflected in the rule, of only those items that cannot be counted, allows subrecipients to know that if an item is not on the list, it must be included. Staff recommends no changes based on this comment.

10 TAC Chapter 5, Community Affairs Programs, Subchapter A, General Provisions, §5.19(b)(2), Recommendation #2

COMMENT SUMMARY: Regarding §5.19(b)(2) - Commenter recommends that if "Excluded Income" is not renamed to "Countable Income" as in Recommendation #1 above, then "SSI and benefits from a means tested veterans program" be added to the list of "Excluded Income" to keep §5.19, Income Eligibility, consistent with §5.2(b)(31)(B), Definitions.

STAFF RESPONSE: SSI and benefits received from a means tested veterans program make the household categorically eligible for the CEAP and LIHEAP WAP program. If the household receives income from SSI or from a means tested veterans program, the Subrecipient must include the income when determining the household poverty level, benefit level, energy burden and energy consumption as part of the normal intake process. The incomes are not excluded incomes as suggested by the Commenter. Staff recommends no changes based on this comment.

10 TAC Chapter 5, Community Affairs Programs, Subchapter A, General Provisions, §5.19(c)(4)

COMMENT SUMMARY: Regarding §5.19(c)(4) - The commenter seeks clarification on who is to decide how long a person is expected to work and on what documentation is required for this item for monitoring purposes.

STAFF RESPONSE: The answer to the questions are: 1) that only the client is able to provide the anticipated number of hours or weeks they expect to work; and 2) that a written statement signed by the client is required for monitoring purposes. Staff recommends no changes to the rule based on these questions.

10 TAC Chapter 5, Community Affairs Programs, Subchapter A, General Provisions, §5.19(c)(5)

COMMENT SUMMARY: Regarding §5.19(c)(5) - The commenter seeks clarification asking "Which HHS or DOE program requires a more frequent period?" because the commenter is unclear about how often and at what period a client is required to submit a new application and income certify.

STAFF RESPONSE: No HHS or DOE program requires a more frequent period. Staff recommends no changes to the rule based on this question, but will consider clarifying this requirement in a future rulemaking.

STATUTORY AUTHORITY. The amendments are adopted pursuant to Texas Government Code §2306.053, which authorizes

the Department to adopt rules, and Chapter 2306, Subchapter E, which authorizes the Department to administer its Community Affairs programs.

The adopted amendments affect no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Timothy K. Irvine

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SUBCHAPTER L. COMPLIANCE MONITORING

10 TAC §5.2101

The Texas Department of Housing and Community Affairs (the "Department") adopts an amendment to 10 TAC Chapter 5, Subchapter L, §5.2101, Purpose and Overview. The amendment is adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3397) and will not be republished.

REASONED JUSTIFICATION. The purpose of the amendment to 10 TAC §5.2101 is to remove the reference to the Compliance Committee. The rule will alternatively indicate that when an Administrator, Subrecipient, Developer, etc. has concerns with a compliance finding, they may pursue an appeal with the Executive Director consistent with the process used in 10 TAC Chapter 1 for most other areas of the Department.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS. The public comment period was held May 16, 2016, through June 15, 2016. No comment was received during this period.

STATUTORY AUTHORITY. The amendment is adopted pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules, and Chapter 2306, Subchapter E, which authorizes the Department to administer its Community Affairs programs.

The adopted amendment affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 20. SINGLE FAMILY PROGRAMS UMBRELLA RULE

10 TAC §20.15

The Texas Department of Housing and Community Affairs (the "Department") adopts an amendment to 10 TAC Chapter 20, Single Family Programs Umbrella Rule, §20.15, Compliance and Monitoring. The amendment is adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3399) and will not be republished.

REASONED JUSTIFICATION. The purpose of the amendment to 10 TAC §20.15 is to remove the reference to the Compliance Committee. The rule will alternatively indicate that when an Administrator, Subrecipient, Developer, etc. has concerns with a compliance finding, they may pursue an appeal with the Executive Director consistent with the process used in 10 TAC Chapter 1 for most other areas of the Department.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS. The public comment period was held May 16, 2016, through June 15, 2016. No comment was received during this period.

STATUTORY AUTHORITY. The amendment is adopted pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules, and Chapter 2306, Subchapter E, which authorizes the Department to administer its Community Affairs programs.

The adopted amendment affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 22. EXAMINING BOARDS PART 11. TEXAS BOARD OF NURSING

CHAPTER 211. GENERAL PROVISIONS

22 TAC §211.10

INTRODUCTION. The Texas Board of Nursing (Board) adopts new §211.10, relating to Training and Education Reimburse-

ment. The rule is adopted without changes to the proposed text published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3819) and will not be re-published.

REASONED JUSTIFICATION. New §211.10 is adopted pursuant to Texas Occupations Code §301.151 and Texas Government Code §656.048. This rule is required by Texas Government Code §656.048 and is necessary to prescribe 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.

New §211.10 meets the requirements of Texas Government Code, Chapter 656, and benefits 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.

HOW THE SECTIONS WILL FUNCTION.

For an agency employee to be reimbursed for the expenses associated with training or education, new §211.10 requires that the training or education be related to the duties or prospective duties of the employee. The 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 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. Finally, the employee must not have a current employment disciplinary record. Further, there are minimum performance expectations that apply to 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 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 rule also limits the maximum reimbursement amount to one-thousand dollars (\$1,000) per fiscal year, which is contingent upon the availability of agency resources.

Finally, the rule requires that the Executive Director authorize reimbursement, which is consistent with the Texas Government Code §656.048(b).

SUMMARY OF COMMENTS AND AGENCY RESPONSE. The Board did not receive any comments on the proposal.

STATUTORY AUTHORITY. The new rule is adopted 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 rules 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.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Board of Nursing

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

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

SUBCHAPTER W. MISCELLANEOUS RULES FOR GROUP AND INDIVIDUAL ACCIDENT AND HEALTH INSURANCE

28 TAC §3.3615

The Texas Department of Insurance adopts the repeal of 28 TAC §3.3615, relating to Continuation of Existing Texas Health Insurance Pool Coverage. The repeal is adopted without changes to the proposal published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3425).

EXPLANATION. Section 3.3615 was adopted under Section 7 of SB 1367, 83rd Legislature, Regular Session (2013), to temporarily extend Texas Health Insurance Pool (THIP) insurance coverage until March 31, 2014, because of problems with the federal implementation of the Patient Protection and Affordable Care Act. That function now is complete, and the THIP's enabling act is repealed. Therefore, §3.3615 is no longer needed and should be repealed.

The adoption of the repeal will result in the elimination of unnecessary regulations.

SUMMARY OF COMMENTS. TDI did not receive any comments on the proposed repeal.

STATUTORY AUTHORITY. The repeal of §3.3615 is adopted under SB 1367, 83rd Legislature, Regular Session (2013), and Insurance Code §36.001. SB 1367 abolished the THIP and repealed Insurance Code Chapter 1506. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Norma Garcia

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Texas Department of Insurance

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SUBCHAPTER DD. ASSESSMENTS

28 TAC §3.4401

The Texas Department of Insurance adopts the repeal of 28 TAC Chapter 3, Subchapter DD, §3.4401, relating to Assessment. The repeal is adopted without changes to the proposal published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3426).

EXPLANATION. SB 1367, 83rd Legislature, Regular Session (2013), abolished the Texas Health Insurance Pool (THIP) and eliminated the need for Subchapter DD, which provided for assessments for the purpose of providing the funds necessary to carry out the powers and duties of the THIP. The subchapter is now unnecessary and should be repealed.

The adoption of the repeal will result in the elimination of unnecessary regulations.

SUMMARY OF COMMENTS. TDI did not receive any comments on the proposed repeal.

STATUTORY AUTHORITY. The repeal of §3.4401 is adopted under SB 1367, 83rd Legislature, Regular Session (2013), and Insurance Code §36.001. SB 1367 abolished the THIP and repealed Insurance Code Chapter 1506. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

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CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 7. INSPECTIONS FOR WINDSTORM AND HAIL INSURANCE

28 TAC §5.4605

The Texas Department of Insurance adopts amendments to 28 TAC §5.4605, concerning Items Not Requiring an Inspection for the Purposes of Windstorm and Hail Insurance Coverage through the Texas Windstorm Insurance Association (TWIA). The amendments are adopted with non-substantive changes to the proposal published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3240).

REASONED JUSTIFICATION. The amendments update the list of items not requiring a compliance inspection as a condition of windstorm and hail coverage under a TWIA policy. Insurance Code §2210.251 requires that structures constructed, altered, remodeled, enlarged, or repaired, or to which additions are made on or after January 1, 1988, must comply with TWIA's plan of operation. The commissioner has adopted several windstorm building codes for TWIA's plan of operation. TDI has developed the uniform list of items, found at §5.4605, that do not require the certification inspection required by §2210.251 for purposes of windstorm and hail insurance coverage through TWIA, provided that any repairs, replacements, or procedures are made with like kind and quality materials, fasteners, and craftsmanship of like kind and quality as compared to the structure before the repairs, replacements, or procedures are made. The uniform list of items not requiring an inspection allows for cost-effective repairs or replacement to various items on a structure.

The amendments to §5.4605 add three new items to the current list: new item 11 is "leveling of an existing pier-and-beam foundation or piling foundation, if no repairs are made"; new item 15 is "repairs or replacement of preformed flanges with a collar or sleeve used for mechanical, plumbing, or electrical roof penetrations"; and new item 21 is "repairs or replacement of storm doors or screen doors (a supplemental door installed on the outside of an exterior door)." The amendments modify four items currently listed: item 1, concerning "repairs to roof coverings with a cumulative area of less than 100 square feet, not involving roof decking or framing members;" item 6, concerning "repairs to porch and balcony handrails and guardrails;" former item 17, renumbered as new item 19, concerning the "replacement of glass in

windows or glass doors or replacement of exterior side-hinged doors not involving the frames, provided that the area is less than 10 percent of the surface area of the affected side (elevation) of the structure"; and former item 18, renumbered as new item 20, concerning "repairs or replacement of exterior wall coverings, provided that the area is less than 10 percent of the surface area of the affected side (elevation) of the structure." The amendments also renumber the list because the three new items were added.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. The comment period for the proposed amendments was May 6, 2016, through June 6, 2016. During the comment period, TDI did not receive any comments or requests for a hearing.

STATUTORY AUTHORITY. TDI adopts the amendments under Insurance Code §§2210.251, 2210.008, and 36.001. Section 2210.251 states property inspection requirements for windstorm and hail insurance coverage through TWIA. Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules in the manner prescribed by Insurance Code Chapter 36, Subchapter A. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of the state.

CROSS-REFERENCE TO STATUTE. The amendments affect Insurance Code §2210.251.

§5.4605. Items Not Requiring an Inspection for the Purposes of Windstorm and Hail Insurance Coverage through the Texas Windstorm Insurance Association.

The items listed in this section do not require an inspection for compliance with the windstorm and hail insurance coverage through the Texas Windstorm Insurance Association provided that any repairs, replacements, or procedures are made with like kind and quality materials, fasteners, and craftsmanship as compared to the structure before the repairs, replacements, or procedures are made, and as compared to the parts of the building that are not repaired. In addition, if no structural change is made, the initial installation or replacement of the listed items may be made without requiring an inspection. The items are as follows:

- (1) repairs to roof coverings with a cumulative area of less than 100 square feet (one square), not involving roof decking or framing members;
- (2) repairs or replacement of gutters;
- (3) replacement of decorative shutters;
- (4) repairs to breakaway walls;
- (5) fascia repairs;
- (6) repairs to porch and balcony handrails and guardrails;
- (7) repairs to stairways or steps, and wheelchair ramps;
- (8) protective measures before a storm;
- (9) temporary repairs after a storm;
- (10) leveling and repairs to an existing slab on grade foundation, unless wall and/or foundation anchorage is altered or repaired;
- (11) leveling of an existing pier and beam foundation or piling foundation, if no repairs are made;
- (12) fence repair;
- (13) painting, carpeting, and refinishing;

- (14) plumbing and electrical repairs;
- (15) repairs or replacement of preformed flanges with a collar or sleeve used for mechanical, plumbing, or electrical roof penetrations;
- (16) repairs to slabs poured on the ground for patios (including slabs under homes on pilings);
- (17) repairs or replacement of soffits less than 24 inches in width;
- (18) repairs or replacement of nonstructural interior fixtures, cabinets, partitions (nonloadbearing), surfaces, trims, or equipment;
- (19) replacement of glass in windows or glass doors or replacement of exterior side-hinged doors not involving the frames provided that the area is less than 10 percent of the surface area of the affected side (elevation) of the structure;
- (20) repairs or replacement of exterior wall coverings provided that the area is less than 10 percent of the surface area of the affected side (elevation) of the structure; and
- (21) repairs or replacement of storm doors or screen doors (a supplemental door installed on the outside of an exterior door).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Department of Insurance

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CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER B. INSURANCE HOLDING COMPANY SYSTEMS

28 TAC §7.209

INTRODUCTION. The Texas Department of Insurance adopts amendments to 28 TAC §7.209 concerning the Form A statement, the statement regarding the acquisition or change of control of a domestic insurer. The amendments are adopted without changes to the proposed text as published in the April 29, 2016, issue of the *Texas Register* (41 TexReg 3080).

Under Government Code §2001.033(a)(1), the department's reasoned justification for these amendments is set out in this order, which includes the preamble and the rule.

REASONED JUSTIFICATION. The amendments are necessary to clarify that information submitted to the department as part of the Form A statement that is required by statute is subject to public inspection, while information not required by statute that is requested by the department to evaluate enterprise risk to the domestic insurer is confidential. The department amended the holding company rules in May 2013, to implement statutory

changes to the Holding Company Systems Act, Insurance Code Chapter 823, by SB 1431, 82nd Legislature, Regular Session (2011), and to adopt rules consistent with the updated National Association of Insurance Commissioners (NAIC) model regulations. The intent of the statutory amendments was to strengthen the department's regulatory tools to evaluate enterprise risk that may develop in insurance holding company systems. The statutory amendments improved the department's access to information about the financial condition of insurance holding company systems in response to the nation's recent financial crisis and enhanced the department's ability to protect the interests of the public and the state.

The amendments are meant to make clear that sensitive, proprietary, or confidential supplemental information that is not required by the acquisition statutes, but is, instead, requested by the commissioner under Insurance Code §823.201(e) to evaluate enterprise risk to the insurer, is separate from the Form A statement. This information is confidential under Insurance Code §823.011 and cannot be disclosed to the public except as provided for in Insurance Code §823.011. These changes do not affect information required by the acquisition statutes and filed with the department as part of the Form A statement, which is subject to public inspection under Insurance Code §823.154(c). Headings, certifications, and other information not required by the acquisition statutes that are not sensitive, proprietary, or confidential by nature will remain in the Form A statement.

The amendments to §7.209 will maintain confidentiality of enterprise risk information that is not required by the acquisition statutes as part of the acquisition process. These amendments will give the department the regulatory tools necessary to assess acquisitions and protect insurance consumers without compromising the confidential information of applicants.

The following paragraphs provide a summary and analysis of the reasons for the adopted amendments.

The department adopts subsection (a) to address the separation of information an applicant must submit as part of the Form A statement from supplemental information an applicant must submit for the department to evaluate enterprise risk to the insurer. Only information required under subsections (b) - (p), including information concerning divestiture of control, is required as part of the Form A statement and subject to public inspection. Supplemental information required under proposed new subsections (r) - (z), which is required to evaluate enterprise risk to the insurer, is confidential and separate from the Form A statement. Also, subsection (a) provides notice that an applicant may submit its application and supplemental information on a form made available by the department to simplify the application process.

The department deletes Figure: 28 TAC §7.209(a) and Figure: 28 TAC §7.209(o), which requested basic insurer and applicant information in graphic format, and replaces the content of those figures with text in (b)(1) and (o)(1), respectively, to be consistent with the rest of the narrative.

The department adopts amendments to subsections (c)(2) and (3); (d); (e)(1) and (2); (f)(1); (g); (m)(1), (2), and (4); and (o)(3) and (4), and deletion of subsections (f)(2) and (4) and (m)(3)(B) and (5) to separate requirements regarding submission of sensitive, proprietary, or confidential information not required by the acquisition statutes from the information an applicant must submit as part of the Form A statement. Requirements addressing submission of this information are deleted from these provisions and incorporated into new subsections (r)(1) and (2); (s)(1) and

(2); (t)(1) and (2); (u)(1) - (3); (v); (w)(1) - (5); (y)(1) and (2); and (z), which provide for applicant submission of information to evaluate enterprise risk to the insurer.

The department adopts amendments to subsection (d) and new subsection (s)(1) to clarify that both direct and indirect owners of 10 percent or more of the voting securities of an applicant must furnish information requested under Insurance Code §823.201(b).

The department adopts amendments to subsection (e)(3) to renumber it as (e)(2) and add language to clarify that the applicant must specifically request that the identity of the lender be kept confidential and not include the identity of the lender with the information required by the section.

The department adopts an amendment to delete subsection (f)(3) because this provision addresses determining whether a domestic insurer complies with 28 TAC Chapter 22 (relating to Privacy), but this information is not necessary to assess an acquisition.

The department adopts an amendment to delete language in subsection (i) that requires an applicant to identify persons with whom voting contracts, arrangements, or understandings have been made. The language is redundant because the "full description" in subsection (i) includes the persons with whom the contracts, arrangements, or understandings have been made.

The department adopts an amendment to subsection (m)(2) to allow an applicant to submit statements already filed with the department, NAIC, or another regulatory agency that can be easily accessed by electronic link as an alternative to submission of hard copy or electronic attachments to reduce the use of paper and data storage, and simplify the application process.

The department adopts amendments to delete current subsection (m)(5), which contains language that certain annual reports are for review by the department and are not part of the required material submitted to the department, but are subject to public inspection during the pendency of the application. Under adopted new subsection (w)(5), the reports are requested to evaluate enterprise risk and are confidential.

The department adopts amendments to subsection (o)(1) to delete the request for email addresses, because email addresses for members of the public communicating electronically with a government agency are confidential under Government Code §552.137 and should not be subject to public inspection.

The department adopts an amendment to subsection (o)(4) to add a provision stating that supplemental information concerning divestitures under new subsection (y) is required to evaluate enterprise risk to the insurer and must be submitted separately.

The department adopts an amendment to subsection (p) and language in new subsection (z) to add an exception for alien applicants, who must submit a certification acceptable in their jurisdiction. Figure: 28 TAC §7.209(p) and Figure: 28 TAC §7.209(z) are provided for applicants in the United States.

The department adopts new subsection (q) to reflect that information required to evaluate enterprise risk to the insurer under Insurance Code §823.201(e) in new subsections (r) - (z) is confidential under Insurance Code §823.011 and is separate from the Form A statement.

The department adopts provisions in new subsections (r)(2), (s), and (w)(1) and (2) to add requirements for the submission of the ultimate controlling person's organizational chart, biographical

data and fingerprints, and financial projections and statements, respectively, and to clarify that an affiliate or owner of 10 percent or more of the voting securities includes the ultimate controlling person.

The department adopts provisions in new subsection (s)(2) to add requirements that the applicant and other persons listed in the subsection provide an independent third party background investigation report from a list of vendors furnished by the NAIC or as acceptable to the commissioner. The report gives more data, in addition to fingerprinting, for the department to make an informed decision about the applicant and other persons. A current version of the report is necessary because there is no system in place to verify an event subsequent to the date of the report.

The department adopts new subsection (u)(2) to add a requirement that the applicant must describe its business plans for the insurer and the ultimate controlling person's business plans for the holding company system; increase the length of time from 24 months, as required by subsection (f)(2) of the current rule, to three years or time of debt service to be consistent with the financial statement requirement; allow the applicant to file its business plan on the NAIC Uniform Certificate of Authority Application to simplify the application process; and replace the word "increase" with "change," to clarify any change in capital or surplus.

The department adopts a provision in new subsection (w)(1) to clarify that financial projections are not required for individuals, and the commissioner may provide for a lesser time requirement for publicly traded companies because more unrestricted information is available on publicly traded companies.

The department adopts a provision in new subsection (w)(2) to clarify that financial statements of the ultimate controlling person are only confidential if the person is not a publicly traded company because the statements of a publicly traded company are already available.

The department adopts new subsection (x) to add a requirement that the applicant describe the applicant and ultimate controlling person's cybersecurity plans and the future cybersecurity plans for the insurer, to evaluate enterprise risk to the insurer.

The department adopts new Figure: 28 TAC §7.209(z) to add a separate certification for the supplemental information submitted to the commissioner to evaluate enterprise risk to the insurer.

The department adopts amendments to renumber subsections where appropriate. Finally, the department adopts amendments that are nonsubstantive in nature to conform to the department's writing style guides.

The department accepted written comments on the proposed amendments from April 29, 2016, to May 31, 2016.

SUMMARY OF COMMENTS. The department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The amendments to §7.209 are adopted under Insurance Code §§823.001(c)(2), 823.011(a)(1), 823.012(a), 823.154(a) and (c), 823.201(e), 823.205(b)(9), and 36.001.

Section 823.001(c)(2) provides that the purpose of Insurance Code Chapter 823 is to promote the public interest by requiring disclosure of pertinent information relating to and approval of changes in control of an insurer.

Section 823.011(a)(1) provides that confidentiality of information includes documents and copies of documents that are reported or otherwise provided under Insurance Code Chapter 823, Subchapter B or C; or §823.201(d) or (e).

Section 823.012(a) provides that the commissioner may, after notice and opportunity for all interested persons to be heard, adopt rules and issue orders to implement Insurance Code Chapter 823, including the conducting of business and proceedings under Insurance Code Chapter 823.

Section 823.154(a) provides that before a person who directly or indirectly controls, or after the acquisition would directly or indirectly control, a domestic insurer may in any manner acquire a voting security of a domestic insurer or before a person may otherwise acquire control of a domestic insurer or exercise any control over a domestic insurer, or before a person may initiate a divestiture of control of a domestic insurer, the acquiring person must file with the commissioner a statement that satisfies the requirements of Insurance Code Chapter 823, Subchapter E; the acquisition or divestiture of control must be approved by the commissioner in accordance with Insurance Code Chapter 823, Subchapter D; and if a person is initiating a divestiture of control, the divesting person must file with the commissioner a notice of divestiture on a form adopted by the NAIC or adopted by the commissioner by rule.

Section 823.154(c) provides that a statement or notice filed under the section must be filed not later than the 60th day before the proposed effective date of the acquisition or change of control or divestiture and is subject to public inspection at the office of the commissioner.

Section 823.201(e) provides that the acquiring person and all subsidiaries within the acquiring person's control in the insurance holding company system must provide information to the commissioner on request of the commissioner as the commissioner deems necessary to evaluate enterprise risk to the insurer.

Section 823.205(b)(9) provides that a statement required under Insurance Code §823.154 must contain any additional information the commissioner by rule prescribes as necessary or appropriate to protect policyholders of the insurer whose voting securities are to be acquired, or the public.

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Norma Garcia

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



CHAPTER 21. TRADE PRACTICES

SUBCHAPTER O. NOTICE OF AVAILABILITY OF COVERAGE UNDER THE TEXAS HEALTH INSURANCE RISK POOL

28 TAC §§21.2301 - 21.2306

The Texas Department of Insurance adopts the repeal of 28 TAC Chapter 21, Subchapter O, §§21.2301 - 21.2306, relating to Notice of Availability of Coverage under the Texas Health Insurance Risk Pool. The repeal is adopted without changes to the proposal published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3432).

EXPLANATION. SB 1367, 83rd Legislature, Regular Session (2013), abolished the Texas Health Insurance Pool (THIP) and eliminated the need for Subchapter O, which was "to facilitate public awareness of coverage under and enrollment in" the THIP. The subchapter is now unnecessary and should be repealed.

The adoption of the repeal will result in the elimination of unnecessary regulations.

SUMMARY OF COMMENTS. TDI did not receive any comments on the proposed repeal.

STATUTORY AUTHORITY. The repeal of §§21.2301 - 21.2306 is adopted under SB 1367, 83rd Legislature, Regular Session (2013), and Insurance Code §36.001. SB 1367 abolished the THIP and repealed Insurance Code Chapter 1506. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

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Norma Garcia

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CHAPTER 34. STATE FIRE MARSHAL

The Texas Department of Insurance adopts amendments to 28 TAC Chapter 34, Subchapter C, Standards and Fees for State Fire Marshal Inspections, §34.302; Subchapter E, Fire Extinguisher Rules, §§34.510, 34.514, 34.517, and 34.521; Subchapter F, Fire Alarm Rules, §§34.609, 34.613, 34.615, 34.616, and 34.622 - 34.624; Subchapter G, Fire Sprinkler Rules, §§34.713, 34.716, 34.721, and 34.722; Subchapter H, Storage and Sale of Fireworks, §§34.808, 34.818, 34.823, and 34.832; Subchapter M, Scheduled Administrative Penalties, §34.1302; and new §34.524 in Subchapter E, §34.631 in Subchapter F, §34.726 in Subchapter G, and §34.833 in Subchapter H. These sections are adopted with non-substantive changes for clarity to the proposed text as published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2090). The department changed §34.823 in response to comments, by declining to adopt proposed §34.823(a)(4)(H). The repeal of Subchapter

J, Stovetop Fire Suppression Device Approval §§34.1001 - 34.1004 is adopted without changes.

REASONED JUSTIFICATION. These amendments, repeals, and new sections are necessary to implement statutory changes made by HB 1150 84th Legislature (2015); SB 807, 84th Legislature (2015); and SB 1307, 84th Legislature (2015); to clarify the intent of the regulations; to revise tags, labels, and stamps; to require certain conduct; and to amend penalty schedules.

Amendments to existing sections are also necessary to make nonsubstantive changes for consistency with the agency style guide, consistency between sections, and to improve readability. These changes change "shall" to the more precise "must," "may," or "is." Other nonsubstantive changes include the addition of oxford commas, changes in capitalization, removing unnecessary instances of "the" before code references, the substitution of other punctuation for semicolons, and the removal of "and/or" in favor of simply "or."

SUBCHAPTER C. STANDARDS AND FEES FOR STATE FIRE MARSHAL INSPECTIONS

Section 34.302.

The department adds a definition to §34.302, to clarify the meaning of the term "authority having jurisdiction," with respect to state fire marshal inspections.

The definition clarifies that these are the standards adopted by a nationally recognized standards-making association for fire protection and the standards under which the state fire marshal will inspect, as contemplated in Government Code §417.008. Typically, the entity performing an inspection is also the entity with the authority to adopt a local fire code. But since state fire marshal inspectors conduct examinations of dangerous conditions statewide, including areas with locally adopted fire codes, the authority having jurisdiction may not be the inspecting entity. The adopted definition clarifies this relationship.

SUBCHAPTER E. FIRE EXTINGUISHER RULES

Section 34.510.

The adopted amendment to §34.510, relating to Certificates of Registration, establishes what constitutes an adequately equipped business vehicle to ensure that licensees are properly equipped for the services they provide. The amendment parallels the equipment requirements for certain activities already described in the section. The adopted NFPA standard (NFPA 10) specifically requires that the business vehicle be equipped with the applicable service manual when the licensee or licensed firm is servicing certain equipment. Failure to have these reference materials available in the field harms the licensee's or licensed firm's ability to adequately service life-saving fire extinguishing devices.

Section 34.514.

The adopted amendment to §34.514, relating to Applications, adds a requirement for the applicant to furnish, along with the application for a license, a copy of the applicant's criminal history report. Under the current rules, the department requests the applicant's criminal history report after it receives the application, which causes delays in processing the application. Requiring the applicants to provide their own criminal history report will expedite application processing. Some individuals, primarily those living outside of Texas, may need to have fingerprints taken by the Texas Department of Public Safety's vendor and then processed.

Section 34.517.

The adopted amendment to §34.517, relating to Installation and Service, clarifies the requirements for fixed fire extinguisher systems. The amendment adds language that allows installation and servicing to comply with a standard adopted by the political subdivision in which the system is installed. In general, the state fire marshal adopts National Fire Protection Association (NFPA) standards, or other standards, when those standards are revised. Local governments having jurisdiction over buildings within the political subdivision may lag behind in adopting these standards. This change provides greater flexibility in allowing licensed persons to perform services consistent with the standards adopted by the political subdivision where the system is installed. Another adopted change, in subsection (h), requires that the service tag indicate temperature and quantity for fusible metal alloy fixed-temperature sensing elements. This will help ensure the safe maintenance and service of these systems. New subsection (k) is added to address pre-engineered dry chemical fixed fire extinguishing systems requirements. This provision was previously in the section, but had been inadvertently deleted in an earlier rule adoption.

Section 34.521.

The adopted amendment to §34.521, relating to Red Tags, requires notification to the authority having jurisdiction (AHJ) when a tag is corrected. The rules already require the licensee or licensed firm to notify the AHJ when they identify a problem, but this amendment will help AHJs follow up with building owners or representatives to determine when they have fixed an unsafe condition. The adopted notification requirement is similar to the existing requirement for licensees or licensed firms to notify an AHJ of a tagged device, and it is consistent with NFPA 17A Standard for Wet Chemical Extinguishing Systems.

Section 34.524.

New §34.524, relating to Military Service Members, Military Veterans, or Military Spouses, reflects the statutory protections as provided in Occupations Code Chapter 55 and as amended by SB 807 and SB 1307. The adopted amendment puts all military-related waivers and exemptions in one section so that affected persons are on notice that the provisions may apply to them. Subsection (a) implements SB 807, and provides for waiver of application and examination fees for certain military service members, military veterans, and military spouses. Subsection (b) implements SB 1307, Section 8, and provides specific credit for verified military service, with respect to apprentice requirements. Subsection (c) implements SB 1307, Section 4, and provides for the extension of license renewal deadlines for certain military service members. Subsection (d) implements SB 1307, Section 5, and it provides for waiver of license prerequisites for certain military service members, military veterans, and military spouses. Other benefits, exemptions, or waivers that are due to military service members, military veterans, and military spouses as provided in state or federal law may also apply.

SUBCHAPTER F. FIRE ALARM RULES

Section 34.609.

The adopted amendment to §34.609, relating to Approved Testing Organization, includes the fire marshal's recognition of another approved testing organization, the Electronic Security Association (ESA), as a testing standards organization for testing license applicants. Insurance Code §6002.156 provides that the

state fire marshal may adopt rules as necessary to implement examination requirements. Insurance Code §6002.158 provides that training schools must be approved by the state fire marshal. The state fire marshal has reviewed ESA's application, course, and testing curriculum and has determined that it is an approved organization for purposes of the Fire Alarm Rules. The ESA materials and course for the residential alarm license provides an acceptable level of training.

Section 34.613.

The adopted amendment to §34.613, relating to Applications, adds a requirement for the applicant to furnish, along with the application for a license, a copy of the applicant's criminal history report. Under the current provisions, the department requests the criminal history from the Texas Department of Public Safety after receiving an application, which delays the application approval process. Requiring that applicants provide their criminal history report with their application will expedite the application approval process. The criminal history report process may require some applicants, primarily those living outside of Texas, to have fingerprints taken by the Texas Department of Public Safety's vendor and then processed. Adopted §34.613(b)(1) includes additional language that specifies the general content for the qualifying test as part of a training school for a residential fire alarm technical license. The change clarifies an ambiguity that existed in the content of the residential fire alarm technician training school instruction. Other changes are adopted to accommodate ESA as a testing standards organization, and for consistency with the adopted changes to §34.609.

Section 34.615.

The adopted amendment to §34.615, relating to Test, is in conjunction with the approval of ESA in §34.609, and it adds ESA to the list of organizations that may conduct technical qualifying tests.

Section 34.616.

The adoption order amends §34.616, relating to Sales, Installation, and Service. The amendments to §34.616(b)(1) specify that a licensee who plans fire detection and fire alarm devices or systems must be licensed under the primary registered firm. This amendment is congruent with the structure of the fire alarm licensing requirements in Insurance Code Chapter 6002. The amendments to §34.616(b)(4) add servicing to the list of functions that must be done in accordance with the adopted standards. The amendments also delete the provision related to the Tentative Interim Amendment published by the NFPA and allow for system planning, installation, and servicing if it complies with a more recent standard adopted by the political subdivision in which the system is installed. This change provides greater flexibility in allowing licensed persons to perform services consistent with the standards adopted by the political subdivision. The amendments to §34.616(c) establish a two-year recordkeeping requirement for firms. This requirement is consistent with the adopted NFPA 72 requirements. Additionally, the amendment specifies that the state fire marshal or the state fire marshal's representative can examine the operation records for service, maintenance, testing, and certification. The requirements for storage and access of these records will assist the state fire marshal with fair, thorough, and consistent regulation of licensed firms.

Section 34.622.

The adopted amendment to §34.622, relating to Inspection/Test Labels, creates two new subsections for licensees and licensed

firms to provide notice to AHJs when a new system is installed or a problem is corrected. The change will help AHJs follow up with building owners or representatives. Section 34.622(c) specifies that an inspection/test label may be applied only after an AHJ has approved the new installation. Section 34.622(e) requires notice to the AHJ when a fault or impairment has been corrected.

The department amends §34.622(h) to clarify the size of the adhesive inspection/test label. The amendment to Figure: 28 TAC §34.622(k) provides for indicating the name and address of the business where the inspection occurred. This will assist local AHJs with monitoring the inspections done in their jurisdiction.

Section 34.623.

The adopted amendment to §34.623, relating to Yellow Labels, requires the inspector or service provider to notify the AHJ when a tag is corrected. The rules already require the licensee or registered firm to notify the AHJ when a problem is identified. This change will help AHJs follow up with building owners or representatives to determine whether they have fixed an unsafe condition. This submission of the revised status of a yellow label is similar to the existing requirement to notify an AHJ of a tagged device.

Section 34.624.

The adopted amendment to §34.624(d), relating to Red Labels, requires notification to the AHJ when a tag is corrected. The rules already require the licensee or registered firm to notify the AHJ when a problem is identified. This change will help AHJs follow up with building owners or representatives to determine whether they have fixed an unsafe condition. Submission of the revised status of a red label is similar to the submission of the existing requirement to notify an AHJ of a tagged device.

Section 34.631.

New §34.631 reflects the statutory protections for military service members, military veterans, and military spouses as provided in Occupations Code Chapter 55, and as amended by SB 807 and SB 1307. The adopted section puts all military-related waivers and exemptions in one section so that applicable persons are on notice that the provisions may apply to them. Section 34.631(a) implements SB 807, and it provides for waiver of application and examination fees for certain military service members, military veterans, and military spouses. Section 34.631(b) implements SB 1307, Section 8, and it provides specific credit for verified military service with respect to apprentice requirements. Section 34.631(c) implements SB 1307, Section 4, and it provides for the extension of license renewal deadlines for certain military service members. Section 34.631(d) implements SB 1307, Section 5, and it provides for waiver of license prerequisites for certain military service members, military veterans, and military spouses. Other benefits, exemptions, or waivers that are due to military service members, military veterans, and military spouses as provided in state or federal law may also apply.

SUBCHAPTER G. FIRE SPRINKLER RULES

Section 34.713.

The adopted amendment to §34.713 deletes requirements to submit the examination test score. Proof of National Institute for Certification in Engineering Technologies (NICET) certification at Level II demonstrates sufficient training and knowledge. The adopted change also eliminates a potential redundancy for applicants who already have a Responsible Managing Employee (RME) General license because RME general licensees already

have demonstrated knowledge at a NICET Level III, which means they have demonstrated competency at least equivalent to NICET Level II. The adopted amendment to §34.713 also adds a requirement for the applicant to furnish, along with the application for a license, a copy of the applicant's criminal history report. Under the current provisions, the department requests the criminal history from the Texas Department of Public Safety after receiving the application, which delays the application approval process. Requiring that applicants provide their criminal history report with their application will expedite the application approval process. Some individuals, primarily those living outside of Texas, may need to have fingerprints taken by the Texas Department of Public Safety's vendor and then processed.

Section 34.716.

The adopted amendment to §34.716, relating to Installation, Maintenance, and Service, deletes language to allow for system planning, installation, and servicing to comply with a standard adopted by the political subdivision in which the system is installed; and provides that it is consistent with similar provisions in this chapter. This change provides greater flexibility at the local level by allowing licensees to perform services consistent with the standards adopted by the political subdivision in which the system is installed. The amendments to §34.716(c) establish a recordkeeping requirement for firms. This requirement is consistent with the NFPA 13 requirements.

Section 34.721.

The adopted amendments to §34.721, relating to Yellow Tags, adds that a licensee or licensed firm is required to notify the AHJ when a tag is corrected. The rules already require the licensee or licensed firm notify the AHJ when a problem is identified. This change will help AHJs follow up with building owners or representatives to determine whether they have fixed an unsafe condition. Submitting the notification of a revised status of a tag is similar to the existing requirement to notify an AHJ of a tagged device.

Section 34.722.

The adopted amendment updates Figure 28: TAC §34.722(h) to provide for new exemplar years. The adopted amendment includes a specification that the inspection/test label be approximately three-inches high and three-inches wide.

Section 34.726.

New §34.726, Relating to Military Service Member, Military Veterans, or Military Spouses, reflects the statutory protections for military service members, military veterans, and military spouses as provided in Occupations Code Chapter 55 and as amended by SB 807 and SB 1307. The adopted amendment puts all military-related waivers and exemptions in one section so that applicable persons are on notice that the provisions may apply to them. Section 34.726(a) implements SB 807, and it provides for waiver of application and examination fees for certain military service members, military veterans, and military spouses. Section 34.726(b) implements SB 1307, Section 8, and it provides specific credit for verified military service with respect to apprentice requirements. Section 34.726(c) implements SB 1307, Section 4, and it provides for the extension of license renewal deadlines for certain military service members. Section 34.726(d) implements SB 1307, Section 5, and it provides for waiver of license prerequisites for certain military service members, military veterans, and military spouses. Other benefits, exemptions, or

waivers due to military service members, military veterans, and military spouses as provided in state or federal law may also apply.

SUBCHAPTER H. FIREWORKS RULES (*formerly STORAGE AND SALE OF FIREWORKS*)

The adopted name of the subchapter changes from "Storage and Sale of Fireworks" to the more concise "Fireworks Rules." This nonsubstantive change conforms the title of the subchapter to the similar Fire Extinguisher Rules, Fire Alarm Rules, and Fire Sprinkler Rules elsewhere in the chapter and is intended to improve clarity and organization of the rules.

Section 34.808.

The adopted amendments to §34.808, Definitions, add a definition of "immediate family member" as a family member that specifically includes the spouse, child, sibling, parent, grandparent, grandchild, stepparent, stepchild, and stepsibling; and a relationship established by adoption, as provided in Occupations Code §2154.254, relating to Employment of Minors. Cousins, aunts, uncles, nieces, and nephews are not included in the definition of immediate family member. These individuals could work at an owner's retail sales location, but would not fall under the specific allowance for individuals aged 12 to 15. The department also amends the definition of "retail fireworks site" to include other structures, vehicles, or surrounding area subject to care and control of the retailer, owner, supervisor, or operator of the retail location. A related adopted change is made in §34.832, addressing fire safety hazards near the site. By amending the term to include those areas, retail fireworks site safety is more effectively ensured.

Section 34.818.

The adopted amendment to §34.818, relating to Specific Requirements for Retail Fireworks Stands, adds a requirement for the minimum distance between fireworks and the front of the customer counter and to the back side of the fireworks stand, and it prohibits fireworks from being displayed on the customer counter or in any manner that allows the customer to handle fireworks without the assistance of an employee. This additional requirement ensures that customers cannot endanger themselves or others. Customers may still examine and handle fireworks if an attendant is assisting the customer.

Section 34.823.

The adopted amendment to §34.823, relating to Bulk Storage of Fireworks 1.4G, establishes a requirement for a fire sprinkler system if a fireworks storage facility's floor space exceeds 12,000 square feet, and it allows for additional or more restrictive fire protections that may be adopted by a political subdivision. This adopted requirement will reduce the potential danger inherent in large fireworks storage facilities. Fire sprinklers can slow or stop small fires (reducing the likelihood of detonating the large quantities of explosive materials in fireworks storage facilities), giving the occupants additional time to exit the building and potentially providing emergency responders with additional time to reach the scene. The adopted change is consistent with the NFPA 1 Fire Code paragraph 13.3.2.23.1(2).

Section 34.832.

Section 34.832 relates to Specific Requirements for Retail Fireworks Sites Other Than Stands. The adopted amendment to §34.832(8) modifies the requirement for business owners to provide written notification to the local fire department and

county fire marshal about the location of a building that sells or stores fireworks. HB 1150, 84th Legislature, Regular Session (2015), added additional dates during which fireworks can be sold. Some of these additional sales periods are other than the Fourth of July sales period. So the adopted amendment removes the June 14 notice date and instead requires the licensee or licensed fireworks retailer to notify the AHJ about its intention to store or sell fireworks before the dates or periods during which fireworks will be stored or sold. This amendment will allow local first responders and fire safety officials to continue to receive timely notice about when and where fireworks are sold and stored.

The adopted amendment to §34.832(11) provides that extension cords may not be plugged in to a power strip. Power strips are temporary wiring and are not designed to safely provide power to extension cords. This temporary wiring is not intended to be plugged in to one another, and doing so creates a dangerous fire hazard (NFPA 1, paragraph 11.1.6.2). The adopted amendment to §34.832(20) provides that an indoor fireworks retail site must not display fireworks on the customer counter or in any manner that allows the customer to handle fireworks without an attendant directly assisting the customer.

Section 34.833.

New §34.833, relating to Military Service Members, Military Veterans, or Military Spouses, reflects the statutory protections for military service members, military veterans, and military spouses as provided in Occupations Code Chapter 55 and as amended by SB 807 and SB 1307. The adopted section puts all military-related waivers and exemptions in one section so that applicable persons are on notice that the provisions may apply to them. Section 34.833(a) implements SB 807 and provides for waiver of application and examination fees for certain military service members, military veterans, or military spouses. Section 34.833(b) implements SB 1307, Section 8, and it provides specific credit for verified military service with respect to apprentice requirements. Section 34.833(c) implements SB 1307, Section 4, and it provides for the extension of license renewal deadlines for certain military service members. Section 34.833(d) implements SB 1307, Section 5, and it provides for waiver of license prerequisites for certain military service members, military veterans, and military spouses. Other benefits, exemptions, or waivers that are due to military service members, military veterans, and military spouses as provided in state or federal law may also apply.

SUBCHAPTER J. STOVETOP FIRE SUPPRESSION DEVICE APPROVAL §§34.1001 - 34.1004

Chapter 34, Subchapter J, is repealed. SB 14, 78th Texas Legislature, Regular Session (2003), repealed Insurance Code Articles 5.33A and 5.33C, providing for certificates used for premium credits and discounts on insurance rates, including credits or discounts for certain stovetop fire suppression devices.

SUBCHAPTER M. SCHEDULED ADMINISTRATIVE PENALTIES

Section 34.1302

The adopted amendment to §34.1302 amends the previous penalty schedules and creates a new penalty schedule. The amendment to the penalty schedule for fire sprinkler violations corrects the description for two listed violations. The existing penalty schedules in Figure: 28 TAC §34.1302(a), Figure: 28 TAC §34.1302(b), and Figure: 28 TAC §34.1302(c) are

amended to include additional violations. The current department penalty schedules, in effect since 2013, have promoted efficient and timely resolution of minor administrative violations. The new schedule, Figure: 28 TAC §34.1302(e), provides similar penalties for minor violations of statute and rules related to fireworks distributors.

Changes from proposed rules

As a result of comments, the department does not adopt proposed subparagraph (H) in §34.823(a)(4), relating to Bulk Storage of Fireworks 1.4G.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: The department received written comments in support of the proposal, with changes, from 12 people.

Comment on §34.823, Bulk Storage of Fireworks 1.4G, proposed fire sprinkler requirement.

All twelve comments received on the proposed rule suggested that the department not adopt the addition of a fire sprinkler requirement as proposed in §34.823(a)(4)(H).

Several commenters referred to the cost estimate in the proposal, which estimated costs of compliance to potentially be hundreds of thousands of dollars. Several commenters suggested that all existing stores should be grandfathered. Several commenters suggested that, if the proposed fire sprinkler requirement were to be adopted, the requirement be prospective only, and should not apply to existing retail fireworks sites other than stands.

One commenter stated that many storage facilities are in rural areas, with limited access to the quantities of water required to service a large sprinkler system. The commenter stated that the cost to supply adequate water flow and pressure would be cost prohibitive.

One commenter stated that there has been no rash in fires in fireworks buildings, and that fireworks storage facilities have an excellent track record.

Several commenters stated that the proposed sprinkler requirement does not have a basis in scientific studies related to safety.

Several commenters stated that the additional sprinkler requirement, and its provisions related to local AHJ regulations, were more restrictive fire protection requirements than what the statute allows, and they noted that Occupations Code §2154.052 states that a rule may not be adopted under this chapter that is more restrictive than a rule in effect on September 1, 1998, without specific statutory authority.

Several commenters stated that an AHJ should not be given the authority to make a sprinkler system requirement more restrictive than state code. One commenter suggested that the provisions in proposed §34.823 would subject operators to a patchwork of more restrictive local regulations, depriving operators of the benefits of statewide rules. Another commenter stated that the expansion of municipal jurisdictions is already a problem for licensees.

Agency response to comments on §34.823, Bulk Storage of Fireworks 1.4G.

The department appreciates the comments concerning the proposed amendment requiring fire sprinkler protections for the bulk storage of fireworks. As a result of comments, the department will not adopt proposed subparagraph (H) in §34.823(a)(4). The

department emphasizes that §34.832(19) already requires indoor retail fireworks site to comply with the mercantile occupancy requirements of the standards adopted in 28 TAC §34.303 (relating to Applicability of Rules). This standard, NFPA 101, Life Safety Code, already requires indoor retail fireworks sites to provide fire sprinkler protection for buildings greater than 12,000 square feet in size. This is a requirement specific to mercantile occupancies, and it does not apply to bulk storage warehouses.

Comment on §34.832, Specific Requirements for Retail Fireworks Sites Other Than Stands.

One commenter suggests that the existing requirement in §34.832(5) be amended to delete the second and third sentences, so that it reads, "Fireworks sales display areas shall be sufficiently designed to prevent customers from handling fireworks, unless an attendant is directly assisting the customer." The commenter says that this amendment would remove the specific requirement to include a continuous durable restraint around displayed fireworks separating the customers from all merchandise. The commenter states that this change would improve safety while imposing no significant additional costs. The commenter suggests that removing the barrier requirement would improve customer and employer egress.

Agency response to comment on §34.832.

The department declines to make the requested change to §34.832(5). No change to the existing requirement related to the separation of displayed fireworks from customers was proposed. The adoption of the display area requirement in the December 8, 2002, *Texas Register* (27 TexReg 11562), was the subject a lot of controversy and disagreement, and the department believes any changes to it would need to be included in a proposal so that all those interested in the provision would have the opportunity to consider and comment on them. Revisions may be proposed and considered at a later date if a need to revise the provision becomes apparent.

SUBCHAPTER C. STANDARDS AND FEES FOR STATE FIRE MARSHAL INSPECTIONS DIVISION 1. GENERAL PROVISIONS

28 TAC §34.302

STATUTORY AUTHORITY. The amendment is adopted under Government Code §§417.005, 417.008, and 417.0081; and Insurance Code §36.001.

Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal in the performance of other duties for the commissioner.

Government Code §417.008(e) provides that the commissioner may adopt by rule any appropriate standard related to fire danger developed by a nationally recognized standards-making association.

Government Code §417.0081 provides that the commissioner by rule will adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings and providing for the inspection of each building to which this section applies.

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

§34.302. *Definitions.*

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

(1) Authority having jurisdiction (AHJ)--An organization, office, or individual responsible for enforcing the requirements of a code or standard.

(2) Commissioner--The Commissioner of Insurance.

(3) NFPA--The National Fire Protection Association, a nationally recognized standards making organization.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. FIRE EXTINGUISHER RULES

28 TAC §§34.510, 34.514, 34.517, 34.521, 34.524

STATUTORY AUTHORITY. The amendments are adopted under Government Code §§417.005, 417.008, and 417.0081; Occupations Code Chapter 55; and Insurance Code §§6001.051, 6001.052, and 36.001.

Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal in the performance of other duties for the commissioner.

Government Code §417.008(e) provides that the commissioner may adopt by rule any appropriate standard related to fire danger developed by a nationally recognized standards-making association.

Government Code §417.0081 provides that the commissioner by rule will adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings and providing for the inspection of each building to which this section applies.

Occupations Code Chapter 55, and as amended by SB 807 and SB 1307, provides certain statutory protections for military service members, military veterans, and military spouses.

Insurance Code §6001.051(a) specifies that the department administers Insurance Code Chapter 6001. Insurance Code §6001.051(b) specifies that the commissioner may issue rules the commissioner considers necessary to administer Chapter 6001 through the state fire marshal.

Insurance Code §6001.052(a) specifies that in adopting necessary rules, the commissioner may use recognized standards, including standards published by the National Fire Protection Association, recognized by federal law or regulation, published by any nationally recognized standards-making organization, or

contained in the manufacturer's installation manuals. Insurance Code §6001.052(b) specifies that the commissioner shall adopt and administer rules determined essentially necessary for the protection and preservation of life and property regarding: (i) registration of firms engaged in the business of installing or servicing portable fire extinguishers or planning, certifying, installing, or servicing fixed fire extinguisher systems or hydrostatic testing of fire extinguisher cylinders; (ii) the examination and licensing of individuals to install or service portable fire extinguishers and plan, certify, install, or service fixed fire extinguisher systems; and (iii) requirements for installing or servicing portable fire extinguishers and planning, certifying, installing, or servicing fixed fire extinguisher systems. Insurance Code §6001.052(c) specifies that the commissioner by rule shall prescribe requirements for applications and qualifications for licenses, permits, and certificates issued under this chapter.

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

§34.510. *Certificates of Registration.*

(a) Required. Each firm and each branch office engaged in the business must obtain a certificate of registration from the state fire marshal.

(b) Properly equipped licensed person. Before engaging in the business, each registered firm must have at least one licensed person who must be properly equipped to perform the act or acts authorized by its certificate.

(c) Types of certificates. The business activities authorized by the certificate is limited to the business activities authorized under the license of its employees. A separate Type C registration is required to engage in the business of hydrostatic testing of U.S. Department of Transportation (U.S. DOT) specification fire extinguisher cylinders.

(d) Business location. Each registered firm must maintain a specific business location, and the business location must be indicated on the certificate.

(e) Shop. A registered firm must establish and maintain a shop, whether at a specific business location or in a mobile unit designed so that servicing, repairing, or hydrostatic testing can be performed. The shop must be adequately equipped to service or test all fire extinguishers or systems the registered firm installs and services. At a minimum, a firm must maintain the following:

- (1) a copy of the most recently adopted edition of NFPA 10;
- (2) a copy of the most recently adopted Insurance Code Chapter 6001 and this chapter;
- (3) a list of manufacturers or types of portable extinguishers serviced with their respective manuals or part lists;
- (4) portable scale to accurately measure extinguisher gross weights;
- (5) seals or tamper indicators;
- (6) temporary fire extinguishers replacements;
- (7) if performing annual maintenance on carbon dioxide extinguishers, at a minimum, the following additional items are required:
 - (A) conductivity tester, and
 - (B) conductivity test label.

(8) if performing internal maintenance for portable extinguishers, a written notice must be kept on file indicating the registered firm performing the maintenance or, at a minimum, the following additional items are required:

- (A) appropriate tools to remove and reinstall a valve head;
- (B) charging adapters;
- (C) Teflon tape, silicone grease, solvent, or other lubricant used;
- (D) supply of spare parts for respective manufacturers and type of fire extinguishers serviced;
- (E) appropriate recharge agents;
- (F) agent fill funnels;
- (G) light designed to be used for internal inspections;
- (H) dry chemical closed recovery system or sufficient new dry chemical;
- (I) leak test equipment;
- (J) dry nitrogen cylinders, regulator and calibrated gauges for pressurizing cylinders;
- (K) verification collar rings; and
- (L) six-year maintenance labels.

(9) if performing hydrostatic testing for portable extinguishers, a written notice must be kept on file indicating the registered firm performing the test or, at a minimum, the following additional items are required:

- (A) working hydrostatic test pump with flexible connection, check valves, and fittings;
- (B) protective cage or barrier;
- (C) calibrated gauges;
- (D) drying equipment;
- (E) hydrostatic test log; and
- (F) hydrostatic test labels;

(10) if performing maintenance for U.S. DOT specification portable fire extinguishers, a written notice must be kept on file indicating the registered firm that would perform the hydrostatic test when required or, at a minimum, the following additional items are required:

- (A) a current Type C registration issued by the State Fire Marshal's Office; and
- (B) verification of registration through the U.S. DOT.

(11) if installing or servicing a fixed fire extinguisher system, at a minimum, the following additional items are required:

- (A) a copy of the latest adopted edition of applicable NFPA standards with respect to the type of system installed or serviced;
- (B) applicable manufacturer's service manuals for the type of system; and
- (C) any special tools or parts as required by the manufacturer's manual.

(f) Business vehicles. All vehicles used regularly in installation, service, maintenance, testing, or certification activities must prominently display the company name, telephone number, and certifi-

cate of registration number. The numbers and letters must be at least one inch in height and permanently affixed or magnetically attached to each side of the vehicle in a color contrasting with the background color of the vehicle. The certificate-of-registration number must be designated in the following format: TX ECR-number. A business vehicle must be adequately equipped for the type of service that is being provided.

(g) Branch office initial certificate of registration fees and expiration dates. The initial fee for a branch office certificate of registration is \$100 and is not prorated. Branch office certificates of registration expire and renew on the same date as the certificate of registration for the registered firm's main office.

(h) Change of ownership.

(1) The total change of a firm's ownership invalidates the current certificate. To ensure continuance of the business, the new owners must submit an application for a new certificate to the state fire marshal 14 days prior to the change.

(2) A partial change in a firm's ownership will require a revised certificate if it affects the firm's name, location, or mailing address.

(i) Change of corporate officers. Any change of corporate officers must be reported in writing to the state fire marshal within 14 days. This change does not require an application for a new or revised certificate.

(j) Duplicate certificates. A certificate holder must obtain a duplicate certificate from the state fire marshal to replace a lost or destroyed certificate. The certificate holder must submit written notification of the loss or destruction without delay, accompanied by the required fee.

(k) Revised certificates. The change of a firm's name, location, or mailing address requires a revised certificate. Within 14 days after the change requiring the revision, the registered firm must submit written notification of the necessary change accompanied by the required fee to the State Fire Marshal's Office.

(l) Nontransferable. A certificate is neither temporarily nor permanently transferable from one firm to another.

(m) Initial alignment of the expiration and renewal dates of existing branches. For branch offices in existence as of the effective date of this rule, branch office certificates of registration will expire and renew on the same date as the certificate of registration issued to the main office for that firm. All fees associated with the initial alignment of expiration and renewal dates for the branch office certificate of registration will prorate accordingly.

§34.514. Applications.

(a) Certificates of registration.

(1) Applications for certificates and branch office certificates must be submitted on forms provided by the state fire marshal and accompanied by all other information required by Insurance Code Chapter 6001 and this subchapter. An application will not be deemed complete until all required forms and documents have been received in the State Fire Marshal's Office.

(2) Applications must be signed by the sole proprietor, or by each partner of a partnership, or by an officer of a corporation. For corporations, the application must be accompanied by the corporate charter of a Texas corporation, or, in the case of a foreign corporation, a copy of the Texas certificate of authority to do business. For applicants using an assumed name, the application must be accompanied by evidence of compliance with the Assumed Business or Professional

Name Act, Texas Business and Commerce Code, Chapter 71. The application must also include written authorization by the applicant permitting the state fire marshal or the state fire marshal's representative to enter, examine, and inspect any premises, building, room, or establishment used by the applicant while engaged in the business to determine compliance with the provisions of Insurance Code Chapter 6001 and this subchapter.

(3) For corporations, the application must also include the corporate taxpayer identification number, the charter number, and a copy of the corporation's current franchise tax "Certificate of Good Standing" issued by the state comptroller's office.

(4) Applications for Type C certificates must be accompanied by a copy of the U.S. DOT letter registering the applicant's facility and that issues a registration number to the facility.

(5) The applicant must comply with the following requirements concerning liability insurance.

(A) The state fire marshal will not issue a certificate of registration under this subchapter unless the applicant files a proof of liability insurance with the State Fire Marshal's Office proof of liability insurance. The insurance must include products and completed operations coverage.

(B) Each registered firm must maintain in force and on file in the State Fire Marshal's Office the certificate of insurance as required.

(C) Evidence of public liability insurance, as required by Insurance Code §6001.154, must be in the form of a certificate of insurance executed by an insurer authorized to do business in this state.

(D) If a certificate of registration is to be issued in the name of a corporation, the corporate name must be used on the applicable insurance forms. If the corporation is obtaining a certificate of registration in an assumed name, the insurance must be issued to the corporation doing business as (dba) the assumed name. Example: XYZ Corporation dba XXX Extinguisher Service.

(E) Insurance issued for a partnership must be issued to the name of the partnership or to the names of all the individual partners.

(F) Insurance for a proprietorship must be issued to the individual owner. If an assumed name is used, the insurance must be issued to the individual doing business as (dba) the assumed name. Example: William Jones dba XXX Extinguisher Service.

(b) Fire extinguisher licenses.

(1) Original applications for a license from an employee of a firm engaged in the business must be submitted on forms provided by the state fire marshal and accompanied a criminal history report from the Texas Department of Public Safety, and by all other information required by Insurance Code Chapter 6001 and this subchapter.

(2) Applications for Type A and Type K licenses must be accompanied by a written statement from the certificate holder (employer) certifying that the applicant meets the minimum requirements of §34.511(f)(4) of this title (relating to Fire Extinguisher Licenses) and is competent to install or service fixed systems.

(3) Applications for Type PL licenses must be accompanied by one of the following documents to evidence technical qualifications for a license:

(A) proof of registration in Texas as a professional engineer; or

(B) a copy of NICET's (National Institute for Certification in Engineering Technologies) notification letter regarding the applicant's successful completion of examination requirements for certification at Level III for Special Hazard Systems Layout or Special Hazard Suppression Systems.

(4) All applications must indicate if the individual is an employee or agent of the registered firm.

(A) If the individual is an employee of the registered firm, the State Fire Marshal's Office may request from the registered firm verification of employment of the individual.

(B) If the individual is an agent of the fire extinguisher firm, the State Fire Marshal's Office may request the firm to provide a letter or other document acceptable to the State Fire Marshal's Office issued by the firm's insurance company, verifying the policy number and that the acts of the individual are covered by the same insurance policy required by this subchapter to obtain the firm's registration. If required, the verifying document must be submitted to the State Fire Marshal's Office before a license will be issued or when there is a change in the licensee's registered firm. Unless otherwise required by the State Fire Marshal's Office, renewal of a license does not require insurance verification unless there has been a change in the insurance carrier.

(c) Complete application required for renewal. Renewal applications for certificates of registration and licenses must be submitted on forms provided by the state fire marshal accompanied a criminal history report obtained through the Texas Department of Public Safety and by all other information required by Insurance Code Chapter 6001 and this subchapter. An application will not be deemed complete until all required forms and documents have been received in the State Fire Marshal's Office.

(d) Timely filed. A license or registration will expire at 12:00 midnight on the date printed on the license or registration. A renewal application and fee for license or registration must be postmarked on or before the date of expiration to be accepted as timely. If a renewal application is not complete but there has been no lapse in the required insurance, the applicant will have 30 days from the time the applicant is notified by the State Fire Marshal's Office of the deficiencies in the renewal application to submit any additional requirement. If an applicant fails to respond and correct all deficiencies in a renewal application within the 30-day period, a late fee may be charged.

(e) Requirements for applicants holding licenses from other states. An applicant holding a valid license in another state who desires to obtain a Texas license through reciprocity must submit the following documentation with the application in addition to all other information required by Insurance Code Chapter 6001 and this subchapter:

(1) a letter of certification from the licensing entity of another state certifying the applicant holds a valid license in that state; and

(2) additional information from the state detailing material content of any required examination used to qualify for license, including NFPA or other standards, if applicable.

(f) Apprentice permits. Each person employed as an apprentice by a firm engaged in the business must make application for a permit on a form provided by the state fire marshal and accompanied by the required fee.

(g) Complete applications. The application form for a license or registration must be accompanied by the required fee and must, within 180 days of receipt by the State Fire Marshal's Office of the initial application, be complete and accompanied by all other informa-

tion required by Insurance Code Chapter 6001 and this subchapter, or a new application must be submitted, including all applicable fees.

§34.517. *Installation and Service.*

(a) The following requirements are applicable to all portable extinguishers.

(1) Portable extinguishers must be installed, serviced, and maintained in compliance with the manufacturer's instructions and with the applicable standards adopted in this subchapter except when the installation or servicing complies with a standard that has been adopted by the political subdivision in which the system is installed.

(2) A service tag certifying the work the licensee performed must be securely attached to the portable extinguisher on completion of the work.

(3) When requested in writing by the owner, a portable fire extinguisher of the type described in subparagraphs (A), (B), or (C) of this paragraph may be serviced according to the requirement of this subchapter, regardless of whether it carries the label of approval or listing of a testing laboratory approved according to this subchapter.

(A) All portable fire extinguishers serviced according to the requirements of the United States Coast Guard and installed for use in foreign shipping vessels;

(B) all portable carbon dioxide fire extinguishers serviced according to the requirements of the United States Department of Transportation; or

(C) cartridge-actuated portable fire extinguishers used exclusively by employees of the firm owning the extinguishers.

(4) A licensee who services portable fire extinguishers according to paragraph (3) of this subsection, must comply with the following:

(A) The back of the service tag must be plainly marked with the words "No Listing Mark."

(B) All missing markings, code symbols, instructions, and information required by the applicable performance standard and fire test standard specified in §34.507(1) of this title (relating to Adopted Standards), except for the approving or listing mark of the testing laboratory, must be affixed to each extinguisher in the form of a label designated in the standard.

(b) The following requirements are applicable to all fixed fire extinguisher systems.

(1) Fixed systems must be planned, installed, and serviced in compliance with the manufacturer's installation manuals and specifications or the applicable standards adopted in this subchapter, except when the installation or servicing complies with a standard that has been adopted by the political subdivision in which the system is installed.

(2) On completion of the installation of a pre-engineered fixed fire extinguisher system, a licensee authorized to certify pre-engineered fixed fire extinguishing systems under the provisions of this subchapter must place an installation label on the system to certify that the system was installed in compliance with the manufacturer's installation manuals and specifications or standards adopted by the commissioner in this subchapter. The licensee whose signature appears on the installation label must be present for the final test of the system prior to certification.

(3) On completion of the installation of a fixed fire extinguisher system other than a pre-engineered system, a Type A or Type

PL licensee must place an installation label on the system to certify that the system was installed in compliance with the manufacturer's installation manuals and specifications, plans developed by a Type PL licensee or professional engineer, or standards adopted by the commissioner in this subchapter. The licensee whose signature appears on the installation label must be present for the final test of the system prior to certification.

(4) A service tag certifying the work the licensee performed must be securely attached to the system on completion of the work.

(c) Pre-engineered fixed fire extinguisher systems must be installed and serviced by a licensee authorized to install or service pre-engineered fixed fire extinguishing systems under the provisions of this subchapter.

(d) A pre-engineered fixed fire extinguisher system, except those covered by subsection (f) of this section, which has been previously installed in one location may be reinstalled in another location if:

(1) the system is of the size and type necessary to protect all hazards;

(2) all parts and equipment, when installed, will function as designed by the manufacturer; and

(3) the system complies with all applicable adopted standards.

(e) Fixed fire extinguisher systems other than pre-engineered systems must be planned, installed, or serviced by a Type PL licensee or professional engineer. Installation and servicing of these systems may also be performed by or supervised by a Type A licensee. An employee of the registered firm may install these systems, under the direct supervision of a Type A or PL licensee, without obtaining a license or permit.

(f) All pre-engineered fixed fire extinguishing systems, installed or modified after July 1, 1996, according to NFPA 17 or NFPA 17A or NFPA 96 of the adopted standards for the protection of commercial cooking areas, must meet the minimum requirements of Underwriters Laboratories, Inc., Standard 300, "Fire Testing of Fire Extinguishing Systems for Protection of Restaurant Cooking Area" (UL 300). After January 1, 2008, all existing pre-engineered fixed fire extinguishing systems, installed in accordance with NFPA 17 or NFPA 17A or NFPA 96 of the adopted standards, for the protection of commercial cooking areas, must meet the minimum requirements of UL Standard 300, "Fire Testing of Fire Extinguishing Systems for Protection of Restaurant Cooking Area" (UL 300) or a red tag must be attached following the procedures in §34.521 of this title (relating to Red Tags).

(g) If the installation or servicing of a fixed fire extinguishing system includes the installation or servicing of any part of a fire alarm or detection system or a fire sprinkler system other than the installation and servicing of mechanical or pneumatic detection or actuation devices in connection with the fire extinguishing system, the licensing requirements of the appropriate Insurance Code Chapters 6002 or 6003 must be satisfied.

(h) The fixed-temperature sensing elements of the fusible metal alloy type, replaced while servicing a kitchen hood fire extinguishing system, must bear the manufacturer's date stamp, which must be within one year of the date of the replacement. The year of manufacture, temperature, and quantity for new fusible links must be listed on the service tag under service performed.

(i) The disposable actuation cartridge, replaced while servicing a kitchen hood fire extinguisher system, must bear the date of replacement.

(j) After operating the pull pin or locking device during maintenance of a portable fire extinguisher, the flag of the new tamper seal must bear the year it was attached. The date must be imprinted or embossed on the flag of the new tamper seal. Dates applied with a marker are not allowed.

(k) All pre-engineered dry chemical fixed fire extinguishing systems, installed in new, remodeled, or relocated protected areas after January 1, 2006, must meet the minimum requirements of the second edition (1996) or more recent edition of Underwriters Laboratories, Inc., Standard 1254, Pre-engineered Dry Chemical Extinguishing System Units.

§34.521. Red Tags.

(a) If impairments exist that make a portable extinguisher or fixed system unsafe or inoperable, the owner or the owner's representative must be notified in writing of all impairments. The registered firm must notify the owner or the owner's representative immediately and must also notify the local authority having jurisdiction (AHJ) when available within 24 hours by phone, fax, or email describing the impairments or deficiencies. A copy of the written notice to the owner must be submitted to the AHJ within three business days. A completed red tag must be attached to indicate that corrective action or replacement is necessary. The signature of the licensee on the tag certifies that the impairments listed indicate that the equipment is unsafe or inoperable. A service tag must not be attached until the impairments have been corrected or the portable extinguisher or fixed system is replaced and the extinguisher or fire extinguisher system re-inspected and found to be in good operating condition. The local AHJ must be notified when corrections are made and a red tag is removed or revised. The notification must be postmarked, emailed, faxed, or hand delivered within five business days of the removal of the red tag.

(b) Red tags must be the same size as service tags.

(c) Red tags must bear the following information in the format of the tag shown in subsection (e) of this section:

- (1) "DO NOT REMOVE--EQUIPMENT IMPAIRED" (all capital letters, at least 10-point boldface type);
- (2) firm's name and address;
- (3) firm's certificate-of-registration number;
- (4) licensee's name and license number;
- (5) licensee's signature (a stamped signature is prohibited);
- (6) date;
- (7) list of impairments; and
- (8) name and address of owner or occupant.

(d) A red tag may be removed only by an authorized employee of a registered firm who has corrected the impairments and certified the service, an employee of the State Fire Marshal's Office, or an employee of another governmental agency with regulatory authority.

(e) Red tag:

Figure: 28 TAC §34.521(e)

§34.524. Military Service Members, Military Veterans, or Military Spouses.

(a) Waiver of licensed application and examination fees. The department will waive the license application and examination fees for an applicant who is:

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

(2) 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.

(b) Apprentice requirements. Verified military service, training, or education that is relevant to the occupation will be credited toward the apprenticeship requirements for the license.

(c) Extension of license renewal deadlines. A military service member who holds a license is entitled to two years' additional time to complete any continuing education requirements and any other requirements related to the renewal of the military service member's license.

(d) Alternative licensing. The state fire marshal, after reviewing the applicant's credentials, may waive any prerequisite to obtaining a license for a military service member, military veteran, or military spouse that:

(1) holds a current license issued by another jurisdiction that has licensing requirements substantially equivalent to the requirements for the license in this state; or

(2) within the five years preceding the application date, held the license in this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. FIRE ALARM RULES

28 TAC §§34.609, 34.613, 34.615, 34.616, 34.622 - 34.624, 34.631

STATUTORY AUTHORITY. The amendment is adopted under Government Code §§417.005, 417.008, and 417.0081; Occupations Code Chapter 55; and Insurance Code §§6002.051, 6002.052, and 36.001.

Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal in the performance of other duties for the commissioner.

Government Code §417.008(e) provides that the commissioner may adopt by rule any appropriate standard related to fire danger developed by a nationally recognized standards-making association.

Government Code §417.0081 provides that the commissioner by rule will adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings and providing for the inspection of each building to which this section applies.

Occupations Code Chapter 55, and as amended by SB 807 and SB 1307, provides certain statutory protections for military service members, military veterans, and military spouses.

Insurance Code §6002.051(a) specifies that the department will administer Chapter 6002. Insurance Code §6002.051(b) specifies that the commissioner may adopt rules as necessary to administer Chapter 6002, including rules the commissioner considers necessary to administer Chapter 6002 through the state fire marshal.

Insurance Code §6002.052(a) specifies that in adopting necessary rules, the commissioner may use: (i) recognized standards, such as, but not limited to standards of the National Fire Protection Association, standards recognized by federal law or regulation, or standards published by a nationally recognized standards-making organization; (ii) the National Electrical Code; or (iii) information provided by individual manufacturers. Insurance Code §6002.052(b) specifies that rules adopted under §6002.051 may create specialized licenses or registration certificates for an organization or individual engaged in the business of planning, certifying, leasing, selling, servicing, installing, monitoring, or maintaining fire alarm or fire detection devices or systems, and that the rules must establish appropriate training and qualification standards for each kind of license and certificate.

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

§34.609. Approved Testing Organization.

The commissioner approves the following testing organizations as a testing standards organization for testing license applicants:

- (1) National Institute for Certification in Engineering Technologies (NICET); and
- (2) Electronic Security Association (ESA).

§34.613. Applications.

- (a) Approvals and certificates of registration.

(1) Applications for approvals, certificates, and branch office certificates must be submitted on the forms adopted by reference in §34.630 of this title (relating to Application and Renewal Forms) and be accompanied by all fees, documents, and information required by Insurance Code Chapter 6002 and this subchapter. An application will not be deemed complete until all required forms, fees, and documents have been received in the State Fire Marshal's Office.

(2) Applications must be signed by the sole proprietor, or by each partner of a partnership, or by an officer of a corporation. For applicants using an assumed name, the application must also be accompanied by evidence of compliance with the Assumed Business or Professional Name Act, Texas Business and Commerce Code Chapter 71. The application must also include written authorization by the applicant permitting the state fire marshal or the state fire marshal's representative to enter, examine, and inspect any premises, building, room, or establishment used by the applicant while engaged in the business to determine compliance with the provisions of Insurance Code Chapter 6002 and this subchapter.

(3) For corporations, the application must also include the name of each shareholder owning more than 25 percent of the shares issued by the corporation; the corporate taxpayer identification number; the charter number; a copy of the corporate charter of a Texas corporation or, in the case of a foreign corporation, a copy of the Texas

certificate of authority to do business; and a copy of the corporation's current franchise tax certificate of good standing issued by the comptroller.

(4) A registered firm must employ at least one full-time licensed individual at each location of a main or branch office.

(5) Insurance is required as follows.

(A) The state fire marshal will not issue a certificate of registration under this subchapter unless the applicant files with the State Fire Marshal's Office evidence of an acceptable general liability insurance policy.

(B) Each registered firm must maintain in force and on file in the State Fire Marshal's Office a certificate of insurance identifying the insured and the exact nature of the business insured. In identifying the named insured, the certificate of insurance must include either an assumed name or the name of the corporation; partners, if any; or sole proprietor, if applicable.

(6) A firm billing a customer for monitoring is engaged in the business of monitoring and must comply with the insurance requirements of this subchapter for a monitoring firm.

(7) Applicants for a certificate of registration who engage in monitoring must provide the specific business locations where monitoring will take place and the name and license number of the fire alarm licensees at each business location. A fire alarm licensee may not serve in this capacity for a registered firm other than the firm applying for a certificate of registration. In addition, the applicants must provide evidence of listing or certification as a central station by a testing laboratory approved by the commissioner and a statement that the monitoring service is in compliance with NFPA 72 as adopted in §34.607 of this title (relating to Adopted Standards).

(8) Applicants for a certificate of registration--single station must provide a statement, signed by the sole proprietor, a partner of a partnership, or by an officer of the corporation, indicating that the firm exclusively engages in the business of planning, certifying, leasing, selling, servicing, installing, monitoring, or maintaining single station devices.

(b) Fire alarm licenses.

(1) To be complete, applications for a license from an employee or agent of a registered firm must be submitted on forms provided by the state fire marshal and be accompanied by all fees, documents, a criminal history report from the Texas Department of Public Safety, and information required by Insurance Code Chapter 6002 and this subchapter. Applications must be signed by the applicant and by a person authorized to sign on behalf of the registered firm. All applicants for any type of license must successfully complete a qualifying test regarding Insurance Code Chapter 6002 and the Fire Alarm Rules as designated by the State Fire Marshal's Office. The qualifying test, given as part of the training for residential fire alarm technician license, must include questions regarding Insurance Code Chapter 6002 and the Fire Alarm Rules.

(2) Applicants for fire alarm technician licenses must:

(A) furnish notification from National Institute for Certification in Engineering Technologies (NICET) (National Institute for Certification in Engineering Technologies) or ESA (Electronic Security Association), confirming the applicant's successful completion of the test requirements in work elements pertaining to fire alarm systems, as determined by the state fire marshal; or

(B) successfully complete a technical qualifying test as designated by the State Fire Marshal's Office.

(3) Applicants for a fire alarm monitoring technician license must successfully complete a technical qualifying test as designated by the State Fire Marshal's Office, or provide evidence of current registration in Texas as a registered engineer.

(4) Applicants for a residential fire alarm superintendent (single station) license must successfully complete a technical qualifying test as designated by the State Fire Marshal's Office.

(5) Applicants for a residential fire alarm superintendent license must:

(A) furnish notification from NICET or ESA confirming the applicant's successful completion of the test requirements in work elements pertaining to fire alarm systems, as determined by the state fire marshal; or

(B) successfully complete a technical qualifying test as designated by the State Fire Marshal's Office.

(6) Applications for a fire alarm planning superintendent license must be accompanied by one of the following documents as evidence of technical qualifications for a license:

(A) proof of registration in Texas as a professional engineer; or

(B) a copy of NICET's or ESA's notification letter confirming the applicant's successful completion of the test requirements for NICET or ESA certification at Level III for fire alarm systems.

(7) An applicant for a residential fire alarm technician license must provide evidence of the applicant's successful completion of the required residential fire alarm technician training course from a training school approved by the State Fire Marshal's Office.

(c) Instructor and training school approvals.

(1) Instructor approvals. An applicant for approval as an instructor must:

(A) hold a current fire alarm planning superintendent license, residential fire alarm superintendent license, or fire alarm technician license issued by the State Fire Marshal's Office;

(B) submit a completed Instructor Approval Application, Form No. SF247, signed by the applicant, that is accompanied by all fees; and

(C) furnish written documentation of a minimum of three years of experience in fire alarm installation, service, or monitoring of fire alarm systems unless the applicant has held a fire alarm planning superintendent license, residential fire alarm superintendent license, or fire alarm technician license for three or more years.

(2) Training school approvals.

(A) An applicant for approval of a training school must submit a completed Training School Approval Application, Form No. SF 246, to the State Fire Marshal's Office. To be complete, the application must be:

(i) signed by the applicant, the sole proprietor, by each partner of a partnership, or by an officer of a corporation or organization as applicable;

(ii) accompanied by a detailed outline of the proposed subjects to be taught at the training school and the number and location of all training courses to be held within one year following approval of the application; and

(iii) accompanied by all required fees.

(B) After review of the application for approval for a training school, the state fire marshal will approve or deny the application within 60 days following receipt of the materials. A letter of denial will state the specific reasons for the denial. An applicant that is denied approval may reapply at any time by submitting a completed application that includes the changes necessary to address the specific reasons for denial.

(d) Renewal applications.

(1) In order to be complete, renewal applications for certificates, licenses, instructor approvals, and training school approvals must be submitted on the forms adopted by reference in §34.630 of this title and be accompanied by all fees, documents, a criminal history report from the Texas Department of Public Safety, and information required by the Insurance Code Chapter 6002 and this subchapter. A complete renewal application deposited with the United States Postal Service is deemed to be timely filed, regardless of actual date of delivery, when its envelope bears a postmark date that is before the expiration of the certificate or license being renewed.

(2) A licensee with an unexpired license who is not employed by a registered firm at the time of the licensee's renewal may renew that license; however, the licensee may not engage in any activity for which the license was granted until the licensee is employed and qualified by a registered firm.

(e) Complete applications. The application form for a license, registration, instructor approval, and training school approval must be accompanied by the required fee and must, within 180 days of receipt by the State Fire Marshal's Office of the initial application, be complete and accompanied by all other information required by Insurance Code Chapter 6002 and this subchapter, or a new application must be submitted including all applicable fees.

§34.615. *Test.*

(a) Each applicant for a license must pass the appropriate tests. Tests may be supplemented by practical tests or demonstrations necessary to determine the applicant's knowledge and ability.

(1) The license test will include a section on this subchapter, Insurance Code Chapter 6002, and a technical qualifying test to be conducted by:

(A) the State Fire Marshal's Office;

(B) NICET (National Institute for Certification in Engineering Technologies);

(C) ESA (Electronic Security Association); or

(D) an outsource testing service.

(2) The standards used in tests will be those adopted in §34.607 of this title (relating to Adopted Standards).

(b) Examinees who fail the test must file a retest application accompanied by the required fee in order to be retested on the next scheduled test date.

(c) A person whose license has been expired for two years or longer who makes application for a new license must take and pass another test. No test is required for a licensee whose license is renewed within two years of expiration.

(d) An applicant may only schedule each type of test three times within a 12-month period.

(e) An applicant for a license must complete and submit all application requirements within one year of the successful completion of any test required for a license; otherwise the test is voided and the individual will have to pass the test again.

§34.616. *Sales, Installation, and Service.*

(a) Residential alarm (single station).

(1) Registered firms may employ persons exempt from the licensing provisions of Insurance Code §6002.155(10) to sell, install, and service residential, single station alarms. Exempted persons must be under the supervision of a residential fire alarm superintendent (single station), residential fire alarm superintendent, or fire alarm planning superintendent.

(2) Each registered firm that employs persons exempt from licensing provisions of Insurance Code §6002.155(10) is required to maintain documentation to include lesson plans and annual test results demonstrating competency of those employees regarding the provisions of Insurance Code Chapter 6002, adopted standards, and this subchapter applicable to single station devices.

(b) Fire detection and fire alarm devices or systems other than residential single station.

(1) The installation of all fire detection and fire alarm devices or systems, including monitoring equipment subject to Insurance Code Chapter 6002 must be performed by or under the direct on-site supervision of a licensed fire alarm technician, residential fire alarm technician, residential fire alarm superintendent, or a fire alarm planning superintendent for the work permitted by the license. The licensee responsible for the planning of all fire detection and fire alarm devices or systems, including monitoring equipment subject to Insurance Code Chapter 6002, must be licensed under the ACR number of the primary registered firm. The certifying licensee must be licensed under the ACR number of the primary registered firm and must be present for the final acceptance test prior to certification.

(2) The maintenance or servicing of all fire detection and fire alarm devices or systems must be performed by or under the direct on-site supervision of a licensed fire alarm technician, residential fire alarm technician, residential fire alarm superintendent or a fire alarm planning superintendent, for the work permitted by the license. The licensee attaching a label must be licensed under the ACR number of the primary registered firm.

(3) If the installation or servicing of a fire alarm system also includes installation or servicing of any part of a fire protection sprinkler system or a fire extinguisher system other than inspection and testing of detection or supervisory devices, the licensing requirements of Insurance Code Chapters 6001 and 6003 must be satisfied, as appropriate.

(4) The planning, installation, and servicing of fire detection or fire alarm devices or systems, including monitoring equipment, must be performed according to standards adopted in §34.607 of this title (relating to Adopted Standards) except when the planning and installation complies with a more recent edition of the standard that has been adopted by the political subdivision in which the system is installed.

(5) Fire alarm system equipment replaced in the same location with the same or similar electrical and functional characteristics and listed to be compatible with the existing equipment, as determined by a fire alarm planning superintendent, may be considered repair. The equipment replaced must comply with the current adopted standards but the entire system is not automatically required to be modified to meet the applicable adopted code. The local AHJ must be consulted to determine whether to update the entire system to comply with the current code and if plans or a permit is required prior to making the repair.

(6) On request of the owner of the fire alarm system, a registered firm must provide all passwords, including those for the site-specific software, but the registered firm may refrain from provid-

ing that information until the system owner signs a liability waiver provided by the registered firm.

(c) Monitoring requirements.

(1) A registered firm may not monitor a fire alarm system located in the State of Texas for an unregistered firm.

(2) A registered firm may not connect a fire alarm system to a monitoring service unless:

(A) the monitoring service is registered under Insurance Code Chapter 6002 or is exempt from the licensing requirements of that chapter; and

(B) the monitoring equipment being used is in compliance with Insurance Code §6002.25.

(3) A registered firm must employ at least one technician licensee at each central station location. Each dispatcher at the central station is not required to be a fire alarm technician licensee.

(4) A registered firm subcontracting monitoring services to another registered firm must advise the monitoring services subscriber of the identity and location of the registered firm actually providing the services unless the registered firm's contract with the subscriber contains a clause giving the registered firm the right, at the registered firm's sole discretion, to subcontract any or all of the work or service.

(5) A registered monitoring firm, reporting an alarm or supervisory signal to a municipal or county emergency services center, must provide, at a minimum, the type of alarm, address of alarm, name of subscriber, dispatcher's identification, and call-back phone number. If requested, the firm must also provide the name, registration number, and call-back phone number of the firm contracted with the subscriber to provide monitoring service if other than the monitoring station.

(6) If the monitoring service provided under this subchapter is discontinued before the end of the contract with the subscriber, the monitoring firm, central station, or service provider must notify the owner or owner's representative of the monitored property and the local AHJ a minimum of seven days before terminating the monitoring service. If the monitored property is a one- or two- family dwelling, notification of the local AHJ is not required.

(d) Record keeping. The firm must keep complete records of all service, maintenance, and testing on the system for a minimum of two years. The records must be available for examination by the state fire marshal or the state fire marshal's representative.

§34.622. *Inspection/Test Labels.*

(a) After the inspection and testing of a fire alarm system, a fire alarm inspection/test label must be completed in detail and affixed to either the inside or outside of the control panel cover or, if the system has no panel, in a permanent location. The signature of the licensee on the inspection/test label certifies that the inspection and tests performed comply with requirements of the adopted standards.

(b) If any service or maintenance is performed under the inspection or test, a service label, in addition to the inspection/test label, must be completed and attached according to the procedures in this section.

(c) For new installation, an inspection/test label may only be applied after the system has been accepted by the local AHJ.

(d) If, during any inspection or test, the system does not comply with applicable standards adopted at the time the system was installed, has a fault condition, or is impaired from normal operation, the owner or the owner's representative and the local AHJ must be notified of the condition and the licensee must attach, in addition to the inspec-

tion/test label, the appropriate yellow or red label, in accordance with the procedures in this section.

(e) The local AHJ must be notified when the fault or impairment has been corrected.

(f) Inspection/test labels must remain in place for at least five years, after which they may be removed by a licensed employee or agent of a registered firm. An employee of the State Fire Marshal's Office or an authorized representative of a governmental agency with appropriate regulatory authority may remove excess labels at any time.

(g) The inspection/test label must be blue with printed black lettering.

(h) The inspection/test label must be approximately three inches high and three inches wide, and must have an adhesive on the back that allows for label removal.

(i) Approximately a half-inch of the adhesive on the top back of the label should be used to attach the label over the previous inspection/test label to permit viewing of the previous label and the maintaining of a brief history.

(j) Inspection/test labels must contain the following information in the format of the inspection/test label, as set forth in subsection (k) of this section:

(1) DO NOT REMOVE BY ORDER OF TEXAS STATE FIRE MARSHAL (all capital letters in at least 10-point bold face type);

(2) INSPECTION/TEST RECORD (all capital letters in at least 10-point bold face type);

(3) the registered firm's name, address, telephone number (either main office or branch office) and certificate of registration number of the firm performing the inspection/test;

(4) the date of the inspection performed, the licensee's signature (a stamped signature is prohibited) and license number;

(5) the type of inspection/test performed to be marked, new installation, semi-annual, quarterly or annual;

(6) the last date of sensitivity test, if known; and

(7) the status after the inspection/test if acceptable or if yellow label attached, or if red label attached.

(k) Inspection/test label:

Figure: 28 TAC §34.622(k)

§34.623. Yellow Labels.

(a) If, after any service, inspection, or test, a system does not comply with applicable codes and adopted standards or is not being tested or maintained according to those standards, a completed yellow label must be attached to the outside of the control panel cover or, if the system has no panel, in a permanent location to indicate that corrective action is necessary.

(b) The signature of the licensee on a yellow label certifies that the conditions listed on the label cause the system to be out of compliance with applicable codes and standards.

(c) After attaching a yellow label, the licensee or the registered firm must notify the property owner, occupant or their representative, and the local AHJ in writing indicating the conditions with which the system does not comply with the applicable codes and standards. The notification must be postmarked, emailed, faxed or hand delivered within five business days of the attachment of the yellow label.

(d) Yellow labels must remain in place until the conditions are corrected and a service label is attached certifying that the corrections

were made. The yellow label may be removed by a licensed employee or agent of a registered firm, an employee of the State Fire Marshal's Office, or an authorized representative of a governmental agency with appropriate regulatory authority. The local AHJ must be notified when corrections are made and a yellow label is removed or revised. The notification must be postmarked, emailed, faxed, or hand delivered within five business days of the removal of the yellow label.

(e) Yellow labels must be approximately three inches high and three inches wide and must have an adhesive on the back that allows for label removal.

(f) Labels must be yellow with printed black lettering.

(g) Yellow labels must bear the following information in the format of the label, as set forth in subsection (h) of this section:

(1) "DO NOT REMOVE BY ORDER OF TEXAS STATE FIRE MARSHAL" (all capital letters in at least 10-point bold face type);

(2) "SYSTEM DOES NOT COMPLY WITH APPLICABLE CODES & STANDARDS" (all capital letters in at least 10-point bold face type);

(3) the registered firm's name, address, telephone number (either main office or branch office) and certificate of registration number of the firm attaching the yellow label;

(4) the date the label was attached, the licensee's signature (a stamped signature is prohibited) and license number; and

(5) a list of conditions resulting in the yellow label;

(h) Yellow label:

Figure: 28 TAC §34.623(h) (No change.)

§34.624. Red Labels.

(a) If, after any service, inspection or test, a system or any part thereof is inoperable, has a fault condition, or is impaired from normal operation, excluding the area(s) of a building under construction, a completed red label must be attached to the outside of the control panel cover or, if the system has no panel, in a permanent location, to indicate that corrective action is necessary.

(b) The signature of the licensee on a red label certifies that the conditions listed on the label have caused the system to be inoperable, have a fault condition, or be impaired from normal operation.

(c) If the system is inoperable, immediately after attaching a red label the licensee or the registered firm must orally notify the property owner, occupant or their representative, and the local AHJ, where available, of all impairments and provide a written notification, emailed, faxed or hand delivered within the next business day of the attachment of the red label. If the system has a fault condition or is impaired from normal operation, after attaching a red label, the licensee or the registered firm must notify the property owner, occupant or their representative, and the local AHJ in writing indicating the condition(s). The written notification must be postmarked, emailed, faxed or hand delivered within three business days of the attachment of the red label.

(d) Red labels must remain in place until the conditions are corrected and a service label is attached certifying that the corrections were made. The red label may be removed by a licensed employee or agent of a registered firm, an employee of the State Fire Marshal's Office, or an authorized representative of a governmental agency with appropriate regulatory authority. The local AHJ must be notified when corrections are made and a red label is removed or revised. The notification must be postmarked, emailed, faxed, or hand delivered within five business days of the removal of the red label.

(e) Red labels must be approximately three inches high and three inches wide and must have an adhesive on the back that allows for label removal.

(f) Labels must be red with printed black lettering.

(g) Red labels must bear the following information in the format of the label as shown in subsection (h) of this section:

(1) "DO NOT REMOVE BY ORDER OF TEXAS STATE FIRE MARSHAL" (all in capital letters, at least 10-point bold face type);

(2) status of the system to be marked, inoperable or impaired or fault;

(3) the registered firm's name, address, telephone number (either main office or branch office) and certificate of registration number of the firm attaching the red label;

(4) the date the label was attached, the licensee's signature (a stamped signature is prohibited) and license number; and

(5) a list of conditions resulting in the red label;

(h) Red label:

Figure: 28 TAC §34.624(h) (No change.)

§34.631. *Military Service Members, Military Veterans, or Military Spouses.*

(a) Waiver of licensed application and examination fees. The department will waive the license application and examination fees for an applicant who is:

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

(2) 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.

(b) Apprentice requirements. Verified military service, training, or education that is relevant to the occupation are credited toward the apprenticeship requirements for the license.

(c) Extension of license renewal deadlines. A military service member who holds a license is entitled to two years additional time to complete any continuing education requirements; and any other requirement related to the renewal of the military service member's license.

(d) Alternative licensing. The state fire marshal, after reviewing the applicant's credentials, may waive any prerequisite to obtaining a license for a military service member, military veteran, or military spouse that:

(1) holds a current license issued by another jurisdiction that has licensing requirements substantially equivalent to the requirements for the license in this state; or

(2) within the five years preceding the application date, held the license in this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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General Counsel
Texas Department of Insurance
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SUBCHAPTER G. FIRE SPRINKLER RULES

28 TAC §§34.713, 34.716, 34.721, 34.722, 34.726

STATUTORY AUTHORITY. The amendment is adopted under Government Code §§417.005, 417.008, and 417.0081; Occupations Code Chapter 55, and Insurance Code §§6003.051, 6003.052, and 6003.054, and 36.001.

Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal in the performance of other duties for the commissioner.

Government Code §417.008(e) provides that the commissioner may adopt by rule any appropriate standard related to fire danger developed by a nationally recognized standards-making association.

Government Code §417.0081 provides that the commissioner by rule shall adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings and providing for the inspection of each building to which this section applies.

Occupations Code Chapter 55, and as amended by SB 807 and SB 1307, provides certain statutory protections for military service members, military veterans, or military spouses.

Insurance Code §6003.051(a) specifies that the department administers Chapter 6003. Insurance Code §6003.051(b) specifies that the commissioner may issue rules necessary to administer Chapter 6003 through the state fire marshal.

Insurance Code §6003.052(a) specifies that in adopting necessary rules, the commissioner may use recognized standards, including standards adopted by federal law or regulation, standards published by a nationally recognized standards-making organization, or standards developed by individual manufacturers.

Section 6003.054(a) further specifies that the state fire marshal must implement the rules adopted by the commissioner for the protection and preservation of life and property in controlling: (i) the registration of an individual or an organization engaged in the business of planning, selling, installing, maintaining, or servicing fire protection sprinkler systems; and (ii) the requirements for the plan, sale, installation, maintenance, or servicing of fire protection sprinkler systems by determining the criteria and qualifications for registration certificate and license holders; evaluating the qualifications of an applicant for a registration certificate to engage in the business of planning, selling, installing, maintaining, or servicing fire protection sprinkler systems; conducting examinations and evaluating the qualifications of a license applicant; and issuing registration certificates and licenses to qualified applicants.

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

§34.713. *Applications.*

(a) Certificates of registration.

(1) Applications for certificates must be submitted on forms provided by the state fire marshal and must be accompanied by all other information required by Insurance Code Chapter 6003 and this subchapter. An application will not be deemed complete until all required forms and documents have been received in the State Fire Marshal's Office.

(2) Applications must be signed by the sole proprietor, by each partner of a partnership, or by an officer of a corporation. For corporations, the application must be accompanied by the corporate charter of a Texas corporation or, in the case of a foreign corporation, a copy of the Texas certificate of authority to do business. For applicants using an assumed name, the application must also be accompanied by evidence of compliance with the Assumed Business or Professional Name Act, Business and Commerce Code Chapter 71. The application must also include written authorization by the applicant that permits the state fire marshal or the state fire marshal's representative to enter, examine, and inspect any premises, building, room, or establishment used by the applicant while engaged in the business to determine compliance with the provisions of Insurance Code Chapter 6003 and this subchapter.

(3) For corporations, the application must also include the corporate taxpayer identification number, the charter number, and a copy of the corporation's current franchise tax certificate of good standing issued by the state comptroller.

(4) An applicant must not designate as its full-time responsible managing employee (RME) a person who is the designated full-time RME of another registered firm.

(5) A registered firm must not conduct any business as a fire protection sprinkler contractor until a full-time RME, as applicable to the business conducted, is employed. An individual with an RME-General Inspector's license does not constitute compliance with the requirements of this subsection.

(6) A certificate of registration may not be renewed unless the firm has at least one licensed RME as a full-time employee before the expiration of the certificate of registration to be renewed. If an applicant for renewal does not have an RME as a full-time employee as a result of death or disassociation of an RME within 30 days preceding the expiration of the certificate of registration, the renewal applicant must inform the license section of the State Fire Marshal's Office of the employment of a full-time RME before the certificate of registration will be renewed.

(7) Insurance required.

(A) The state fire marshal must not issue a certificate of registration under this subchapter unless the applicant files with the state fire marshal's office a proof of liability insurance. The insurance must include products and completed operations coverage.

(B) Each registered firm must maintain in force and on file in the State Fire Marshall's Office the certificate of insurance identifying the insured and the exact nature of the business insured. In identifying the named insured, the certificate of insurance must include either an assumed name or the name of the corporation; partners, if any; or sole proprietor, as applicable. Failure to do so will be cause for administrative action.

(C) Evidence of public liability insurance, as required by Insurance Code §6001.152, must be in the form of a certificate of insurance executed by an insurer authorized to do business in this state, or a certificate of insurance for surplus lines coverage, secured in com-

pliance with Insurance Code Chapter 981, as contemplated by Insurance Code §6001.152(c).

(b) Responsible managing employee licenses.

(1) Original and renewal applications for a license from an employee of a firm engaged in the business must be submitted on forms provided by the state fire marshal, along with a criminal history report from the Texas Department of Public Safety, and accompanied by all other information required by Insurance Code Chapter 6003 and this subchapter.

(2) The following documents must accompany the application as evidence of technical qualifications for a license:

(A) RME-General:

(i) proof of current registration in Texas as a professional engineer; or

(ii) a copy of the National Institute for Certification in Engineering Technologies (NICET's) notification letter confirming the applicant's successful completion of the test requirements for certification at Level III for water-based fire protection systems layout.

(B) RME-Dwelling:

(i) proof of current registration in Texas as a professional engineer; or

(ii) a copy of NICET's notification letter confirming the applicant's successful completion of the test requirements for certification at Level II for fire protection automatic sprinkler system layout and evidence of current employment by a registered fire sprinkler contractor.

(C) RME-Underground Fire Main:

(i) proof of current registration in Texas as a professional engineer; or

(ii) a copy of the notification letter confirming at least a 70 percent grade on the test covering underground fire mains for fire protection sprinkler systems, administered by the State Fire Marshal's Office or an outsource testing service.

(D) RME-General Inspector:

(i) a copy of NICET's notification letter confirming the applicant's successful completion of the examination requirements for certification at Level II for Inspection and Testing of Water-Based Systems; and

(ii) evidence of current employment by a registered fire protection sprinkler system contractor.

(c) Complete applications. The application form for a license or registration must be accompanied by the required fee and must, within 180 days of receipt by the department of the initial application, be complete and accompanied by all other information required by Insurance Code Chapter 6003 and this subchapter, or a new application must be submitted including all applicable fees.

§34.716. *Installation, Maintenance, and Service.*

(a) All fire protection sprinkler systems installed under Insurance Code Chapter 6003 must be installed under the supervision of the appropriate licensed responsible managing employee.

(1) An RME-General may supervise the installation of any fire protection sprinkler system including one- and two-family dwellings.

(2) An RME-Dwelling may only supervise the installation of a fire protection sprinkler system in one- and two-family dwellings.

(3) An RME-Underground Fire Main may only supervise the installation of an assembly of underground piping or conduits that conveys water with or without other agents and used as an integral part of any type of fire protection sprinkler system.

(b) On completion of the installation, the licensed RME type G, D, or U (as applicable) must have affixed a contractor's material and test certificate for aboveground or underground piping on or near the system riser. If the adopted installation standard does not require testing, all other sections except the testing portion of the contractor's material and test certificate must still be completed. The contractor's material and test certificate must be obtained from the State Fire Marshal's Office. The certificate must be distributed as follows:

(1) original copy kept at the site after completion of the installation;

(2) second copy retained by the installing company at its place of business in a separate file used exclusively by that firm to retain all Contractor's Material and Test Certificates. The certificates must be available for examination by the state fire marshal or the state fire marshal's representative on request. The certificates must be retained for the life of the system; and

(3) third copy to be sent to the local AHJ within 10 days after completion of the installation.

(c) Service, maintenance, or testing, when conducted by someone other than an owner, must be conducted by a registered firm and in compliance with the appropriate adopted standards. The inspection, test, and maintenance service of a fire protection sprinkler system, except in a one- and two-family dwelling, must be performed by an individual holding a current RME-General Inspector or RME-General license. A visual inspection not accompanied by service, maintenance, testing, or certification does not require a certificate of registration.

(d) The firm must keep complete records of all service, maintenance, testing, and certification operations. The records must be available for examination by the state fire marshal or the state fire marshal's representative.

(e) All vehicles regularly used in service, maintenance, testing, or certification activities must prominently display the company name, telephone number, and certificate of registration number. The numbers and letters must be at least one-inch high and must be permanently affixed or magnetically attached to each side of the vehicle in a color contrasting with the background color of the vehicle. The certificate of registration number must be designated in the following format TX: SCR-number.

(f) Each registered firm must employ at least one full-time RME-General or RME-Dwelling licensee at each business office where fire protection sprinkler system planning is performed, who is appropriately licensed to conduct the business performed by the firm.

(g) The planning of an automatic fire protection sprinkler system must be performed under the direct supervision of the appropriately licensed RME.

(h) The planning, installation, or service of a fire protection sprinkler system must be performed in accordance with the minimum requirements of the applicable adopted standards in §34.707 of this title (relating to Adopted Standards), except when the plan, installation, or service complies with a standard that has been adopted by the political subdivision in which the system is installed.

§34.721. *Yellow Tags.*

(a) If a fire protection sprinkler system is found to be noncompliant with applicable NFPA standards, is not being tested or maintained according to adopted standards, or found to contain equipment

that has been recalled by the manufacturer, but the noncompliance or recalled equipment does not constitute an emergency impairment, a completed yellow tag must be attached to the respective riser of each system to permit convenient inspection, to not hamper the system's actuation or operation, and to indicate that corrective action is necessary.

(b) The signature of the service person or inspector on a yellow tag certifies the conditions that caused the system to be out of compliance with NFPA standards.

(c) After attaching a yellow tag, the service person or inspector must notify the building owner or the building owner's representative and the local AHJ in writing of all noncompliant conditions. The notification must be postmarked, emailed, faxed, or hand delivered within five business days of the attachment of the yellow tag.

(d) A yellow tag may only be removed by an authorized employee of a registered firm or an authorized representative of a governmental agency with appropriate regulatory authority after the employee or representative completes and attaches a service tag that indicates the noncompliant conditions were corrected. The local AHJ must be notified when corrections are made and a yellow tag is removed or revised. The notification must be postmarked, emailed, faxed, or hand delivered within five business days of the date on which the yellow tag is removed.

(e) Yellow tags may be printed for multiple years.

(f) Yellow tags must be the same size as service tags, and must contain the following information in the format of the tag as set forth in subsection (g) of this section:

(1) "DO NOT REMOVE BY ORDER OF TEXAS STATE FIRE MARSHAL" (all capital letters, at least 10-point boldface type);

(2) firm's name, address, and phone number;

(3) firm's certificate of registration number;

(4) license number of RME;

(5) printed name of service person or inspector;

(6) signature of service person or inspector;

(7) day, month, and year (to be punched);

(8) name and address of owner or occupant;

(9) building number, location, or system number; and

(10) list of items not compliant with NFPA standards.

(g) Sample yellow tag:

Figure: 28 TAC §34.721(g) (No change.)

§34.722. *Red Tags.*

(a) If a fire protection sprinkler system has an impairment which constitutes an emergency impairment, as defined in the adopted edition of NFPA 25, the service person or inspector must complete and attach a red tag to the respective riser of each system to indicate corrective action is necessary.

(b) Immediately after attaching a red tag, the inspector or service person must orally notify the building owner or the building owner's representative and, where available, the local AHJ all impairments. The inspector or service person must also provide written notice to the building owner or the building owner's representative and, where available, the local AHJ of all impairments, and the written notice must be postmarked, emailed, faxed, or hand delivered within 24 hours of the attachment of the red tag.

(c) The signature of the service person or inspector on the red tag certifies the impairments listed constitute an emergency impairment.

(d) A red tag may only be removed by an authorized employee of a registered firm or an authorized representative of a governmental agency with appropriate regulatory authority after the employee or representative completes and attaches a service tag that indicates the impaired conditions were corrected. The local AHJ must be notified when corrections are made and a red tag is removed or revised. The notification must be postmarked, emailed, faxed, or hand delivered within five business days of the removal of the red tag.

(e) Red tags may be printed for a multiple period of years.

(f) Red tags must be the same size as service tags.

(g) Red tags must contain the following information in the format of the sample tag as set forth in subsection (h) of this section:

(1) "DO NOT REMOVE BY ORDER OF THE TEXAS STATE FIRE MARSHAL" (all capital letters, at least 10-point boldface type);

(2) firm's name, address, and phone number;

(3) firm's certificate of registration number;

(4) license number of RME;

(5) printed name of service person or inspector;

(6) signature of service person or inspector;

(7) day, month, and year (to be punched);

(8) name and address of owner or occupant;

(9) building number, location, or system number; and

(10) list of emergency impairments.

(h) Sample red tag:

Figure: 28 TAC §34.722(h)

§34.726. *Military Service Members, Military Veterans, or Military Spouses.*

(a) Waiver of licensed application and examination fees. The department will waive the license application and examination fees for an applicant who is:

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

(2) 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.

(b) Apprentice requirements. Verified military service, training, or education that is relevant to the occupation are credited toward the apprenticeship requirements for the license.

(c) Extension of license renewal deadlines. A military service member who holds a license is entitled to two years additional time to complete any continuing education requirements; and any other requirement related to the renewal of the military service member's license.

(d) Alternative licensing. The state fire marshal, after reviewing the applicant's credentials, may waive any prerequisite to obtaining a license for a military service member, military veteran, or military spouse that:

(1) holds a current license issued by another jurisdiction that has licensing requirements substantially equivalent to the requirements for the license in this state; or

(2) within the five years preceding the application date, held the license in this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



SUBCHAPTER H. STORAGE AND SALE OF FIREWORKS

28 TAC §§34.808, 34.818, 34.823, 34.832, 34.833

STATUTORY AUTHORITY. The amendments are adopted under Government Code §§417.005, 417.008, and 417.0081; Occupations Code Chapter 55, §2154.051, and §2154.052; and Insurance Code §36.001.

Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal in the performance of other duties for the commissioner.

Government Code §417.008(e) provides that the commissioner may adopt by rule any appropriate standard related to fire danger developed by a nationally recognized standards-making association. Government Code §417.0081 provides that the commissioner by rule shall adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings and providing for the inspection of each building to which this section applies.

Occupations Code Chapter 55, as amended by SB 807 and SB 1307, provides certain statutory protections for military service members, military veterans, and military spouses.

Occupations Code §2154.051 states the commissioner shall determine reasonable criteria and qualifications for licenses and permits pertaining to the regulation of fireworks and fireworks displays.

Occupations Code §2154.052 states that the commissioner will adopt and the state fire marshal must administer rules the commissioner considers necessary for the protection, safety, and preservation of life and property.

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

§34.808. *Definitions.*

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

(1) Acceptor building--A building that is exposed to embers and debris emitted from a donor building.

(2) Agricultural, industrial, or wildlife control permits--Permits authorizing the holder to use Fireworks 1.3G for specified purposes in these business activities.

(3) Bare wiring--Any electrical cable or cord any part of which has the insulating cover broken or removed, exposing bare wire.

(4) Barricade--A natural or artificial barrier that will effectively screen a magazine, building, railway, or highway from the effects of an explosion in a magazine or building containing explosives. It must be of a height that a straight line from the top of any side wall of a building, or magazine containing explosives to the eave line of any magazine, or building, or to a point 12 feet above the center of a railway or highway, will pass through such natural or artificial barrier.

(5) Barricade, artificial--An artificial mound or revetted wall of earth of a minimum thickness of one foot.

(6) Barricade, natural--Natural features of ground, such as hills, or timber of sufficient density that the surrounding exposures that require protection cannot be seen from the magazine or building containing explosives when the trees are bare of leaves.

(7) Barricade, screen type--Any of several barriers for containing embers and debris from fires and deflagrations in process buildings that could cause fires and explosions in other buildings. Screen type barricades must be constructed of metal roofing, inch or a half-inch mesh screen or equivalent material. A screen-type barricade extends from the floor level of the donor building to a height that a straight line from the top of any side wall of the donor building to the eave line of the acceptor building will go through the screen at a point not less than five feet from the top of the screen. The top five feet of the screen are inclined at an angle of between 30 and 45 degrees, toward the donor building.

(8) Breakaway construction--A general term that applies to the principle of purposely providing a weak wall so that the explosive effects can be directed and minimized. The term "weak wall" as used in these sections refers to a weak wall and roof, or weak roof. The term "weak wall" is used in a relative sense as compared to the construction of the entire building. The design strength of the weak wall will vary as to the building construction, as well as to the type and quantity of explosive or pyrotechnic materials in the building. The materials used for weak wall construction are usually light gauge metal, plywood, hardboard, or equivalent lightweight material, and the material is purposely selected to minimize the danger from flying missiles. The method of attachment of the weak wall must be constructed to aid the relief of blast pressure and fireball.

(9) Bulk storage, Fireworks 1.4G--The storage of 500 or more cases of Fireworks 1.4G.

(10) Business--The manufacturing, importing, distributing, jobbing, or retailing of permissible fireworks; acting as a pyrotechnic operator; conducting multiple public fireworks displays; or using fireworks for agricultural, wildlife, or industrial purposes.

(11) Buyer--Any person or group of persons offering an agreed upon sum of money or other considerations to a seller of fireworks.

(12) CFR--The Code of Federal Regulations, a codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the federal government. The Code is divided into 50 titles. The titles are divided into chapters, which are further subdivided into parts.

(13) Commissioner--The Commissioner of Insurance.

(14) Department--The Texas Department of Insurance.

(15) Donor building--A process building from which embers and burning debris are emitted during a fire.

(16) DOT--The United States Department of Transportation.

(17) Fireworks plant--All lands, and building thereon, used for or in connection with the manufacture processing of fireworks. It includes storage facilities used in connection with plant operation.

(18) Firm--A person, partnership, corporation, or association.

(19) Flame effects operator--An individual who, by experience, training, or examination has demonstrated the skill and ability to safely assemble, conduct, or supervise flame effects in accordance with §2154.253, Occupations Code.

(20) Generator--Any device driven by an engine and powered by gasoline or other fuels to generate electricity for use in a retail fireworks stand.

(21) Highway--The paved surface or, where unpaved, the edge of a graded or maintained public street, public alley, or public road.

(22) Indoor retail fireworks site--A retail fireworks site other than a retail stand that sells Fireworks 1.4G from a building or structure.

(23) Immediate family member--The spouse, child, sibling, parent, grandparent, or grandchild of an individual. The term includes a stepparent, stepchild, and stepsibling and a relationship established by adoption.

(24) License--The license issued by the state fire marshal to a person or a fireworks firm authorizing same to engage in business.

(25) Licensed firm--A person, partnership, corporation, or association holding a current license.

(26) Magazine--Any building or structure, other than a manufacturing building, used for storage of Fireworks 1.3G.

(27) Manufacturing--The preparation of fireworks mixes and the charging and construction of all unfinished fireworks, except pyrotechnic display items made on site by qualified personnel for immediate use when the operation is otherwise lawful.

(28) Master electric switch--Manually operated device designed to interrupt the flow of electricity.

(29) Mixing building--A manufacturer's building used for mixing and blending pyrotechnic composition, excluding wet sparkler mixes.

(30) Multiple public display permit--A permit issued for the purpose of conducting multiple public displays at a single approved location.

(31) Nonprocess building--Office buildings, warehouses, and other fireworks plant buildings where no explosive compositions are processed or stored. A finished firework is not considered an explosive composition.

(32) Open flame--Any flame that is exposed to direct contact.

(33) Outsource testing service--The testing service selected by the state fire marshal to administer certain designated qualifying tests for licenses under this subchapter.

(34) Process building--A manufacturer's mixing building or any building in which pyrotechnic or explosive composition is pressed or otherwise prepared for finishing and assembling.

(35) Public display permit--A permit authorizing the holder to conduct a public fireworks display using Fireworks 1.3G, on a single occasion, at a designated location, and during a designated period.

(36) Retail fireworks site--The structure from which Fireworks 1.4G are sold and in which Fireworks 1.4G are held pending retail sale, and other structures, vehicles, or surrounding areas subject to the care and control of the retailer, owner, supervisor, or operator of the retail location.

(37) Retail stand--A retail site that sells Fireworks 1.4G over the counter to the general public who always remain outside the structure.

(38) Safety container--A container especially designed, tested, and approved for the storage of flammable liquids.

(39) School--Any inhabited building used as a classroom or dormitory for a public or private primary or secondary school or institution of higher education.

(40) Selling opening--An open area, including the counter, through which fireworks are viewed and sold at retail.

(41) Storage facility--Any building, structure, or facility in which finished Fireworks 1.4G are stored, but in which no manufacturing is performed.

(42) Supervisor--A person who is 18 years or older and who is responsible for the retail fireworks site during operating hours.

(43) Walk door--An opening through which retail stand attendants can freely move but which can be secured to keep the public from the interior of the stand.

§34.818. Specific Requirements for Retail Fireworks Stands.

A retail fireworks stand must comply with the following requirements:

(1) The fireworks stand in which Fireworks 1.4G are held for retail sale must be constructed of wood, metal, masonry, or concrete, or combinations thereof.

(2) Each stand of less than 16 feet in length must have at least one walk door that opens outward. Stands measuring 16 feet or longer must have at least two walk doors, one in each end, that open outward.

(3) A minimum of combustible material such as posters, signs, and decorations may be used on interior walls.

(4) A minimum distance of six feet must be maintained from the front of the customer counter to the back side of the stand. Fireworks must not be displayed on the customer counter or in any manner that allows the customer to handle fireworks without an attendant directly assisting the customer.

(5) Electrical service to the stand must be installed at least eight feet above ground or buried underground according to standards acceptable to the local AHJ.

(6) Each stand that uses electricity must have a point of power interruption, either inside or outside the stand, (switch or switches) located near a walk door, that interrupts all electric supply to devices and equipment located inside and on the stand.

(7) All electrical wiring, equipment, and devices, both inside and outside the stand, must be UL approved, be securely mounted to the structure, and be installed and maintained to prevent electrical hazards. Splices in electrical wiring servicing equipment and devices inside the stand must be enclosed in junction boxes. Light fixtures and wiring used for illumination inside and outside of the stand must be installed and maintained to prevent accidental contact by the general public and employees.

(8) Drop cords with lights, extension cords, or bare wiring must not be used in any manner inside a retail stand.

(9) In stands where generator-created power is used, the generator must be located in an area free from grass, trash, and other flammable materials and at least 10 feet from the stand. Reserve fuel for the generator must be stored in an approved safety container and a portable fire extinguisher rated to at least 6 BC must be provided.

(10) Fireworks stands must not be illuminated or heated by any device that requires open flame or exposed heating elements. Electric heaters must be equipped with a switching device to stop the flow of current should the heater be tipped over.

(11) If the fireworks stand is used for the overnight storage of Fireworks 1.4G, it must be equipped with suitable locking devices to prevent unauthorized entry.

§34.823. Bulk Storage of Fireworks 1.4G.

(a) General provisions.

(1) These provisions apply to licensees and retail storage of more than 500 cases of Fireworks 1.4G.

(2) Storage facilities containing Fireworks 1.4G must be of solid construction using sound engineering principles.

(3) Electrical installation, if used, must be in compliance with the National Electric Code, 1984. An outside electrical master switch must be provided at each storage facility location when electrical power is installed.

(4) Storage facilities containing Fireworks 1.4G must comply with the following.

(A) Storage facilities must be separated from inhabited buildings, passenger railways, and from the pavement or main travelled surface of any highway by a minimum distance of 50 feet and be in compliance with Table 1 in §34.824 of this title (relating to Distance Tables). Storage facilities in existence prior to January 1, 1986, and then conforming to existing warehouse distance separation rules for jobbers and distributors are exempt from compliance with Table 1, provided such facilities are not enlarged or expanded beyond their January 1, 1986, capacities. An office used for the operation of a storage facility or a retail/wholesale site established in conjunction with a storage facility is exempt from the distance requirements after notifying the state fire marshal. Subsequent construction by adjacent property owners or public authorities must not subject licensee to a distance regulation violation under this section, provided existing storage facilities are not enlarged or expanded after the subsequent construction.

(B) Storage facilities must not contain windows, and any other openings must be situated so that the rays of the sun do not come in contact with or shine through glass directly on fireworks stored in the facility. Skylights that diffuse sun rays are permitted.

(C) No stoves, exposed flames, or electric heaters may be used in any part of storage facility except in a boiler room, machine shop, office building, pump house, or lavatory. Heating of storage facilities must be by means of steam, indirect hot air radiation, or hot water.

(D) Exit doors other than overhead or sliding doors must open outward, must be unlocked during operating hours, and must be clearly marked. Aisles and exit doors must be kept free of any obstruction.

(E) At least one approved Class A fire extinguisher must be provided for each 1,000 square feet of floor space in a storage facility.

(F) The land surrounding storage facilities must be kept clear of brush, dried grass, leaves, and similar combustibles for a distance of at least 10 feet.

(G) Smoking must not be permitted in storage facilities. There must be signs conspicuously posted with the words "Fireworks-No Smoking" in letters not less than four inches high.

(5) Storage buildings must have fencing in compliance with §34.821(a)(1) of this title (relating to Manufacturing Operations) or one of the following:

(A) personnel on the premises 24 hours per day, and the premises remains lighted at night; or

(B) a security alarm system.

(6) Bulk storage of Class I flammable liquids (such as gasoline) and flammable compressed gases must comply with provisions of §34.821(a)(7) of this title (relating to Manufacturing Operations).

(b) Operation of storage facilities.

(1) Storage facilities must at all time during operating hours be in the charge of a competent person who is at least 18 years of age and who is responsible for the enforcement of all safety precautions.

(2) Doors must be kept locked, except during hours of operation.

§34.832. *Specific Requirements for Retail Fireworks Sites Other Than Stands.*

Indoor retail fireworks sites must comply with the following requirements:

(1) The retail fireworks sales building must be a free standing durable structure with only one story of space accessible to the public. It must not be a tent, boat, or mobile vehicle. The fireworks sales area must not be part of a multi-use or multi-tenant building.

(2) The following distance requirements apply to an indoor retail fireworks site owned or leased by a fireworks licensee, which had a fireworks retail permit or a building permit in effect or was under construction on or before November 18, 2002, and stores or displays over 500 cases of Fireworks 1.4G in the building.

(A) The fireworks sales building must be a minimum distance of 60 feet from any inhabited building;

(B) The fireworks sales building must be a minimum distance of 30 feet from the property line.

(C) The fireworks sales building must meet the distance requirements of §34.824 Table 1 of this title (relating to Distance Tables), or have a minimum one-hour fire rated exterior wall with minimum three-fourths-hour fire rated protected openings.

(D) An office area used for the operation of the site, separated by a one hour fire rated wall from the fireworks sales or storage area, may be exempt from the distance requirements after it is reported to and reviewed by the state fire marshal.

(3) The following distance requirements must apply to an indoor retail fireworks site owned or leased by a fireworks licensee which did not have a fireworks retail permit or a building permit in effect or was not under construction on or before November 18, 2002, and that stores or displays over 500 cases of Fireworks 1.4G in the building.

(A) The fireworks sales building must be a minimum distance of 60 feet from any inhabited building.

(B) The fireworks sales building must be a minimum distance of 30 feet from the property line.

(C) The fireworks sales building must meet the distance requirements of §34.824 Table 1 of this title, or have a complete automatic fire sprinkler system installed in accordance with NFPA 13 Standard for the Installation of Sprinkler Systems.

(4) Subsequent construction by adjacent property owners or public authorities will not subject licensee or permittee to a distance regulation violation under this section, provided existing facilities are not enlarged or expanded after the subsequent construction.

(5) Fireworks sales display areas must be sufficiently designed to prevent customers from handling fireworks, unless an attendant is directly assisting the customer. Sales display areas must include a continuous durable restraint around displayed fireworks separating the customers from all merchandise. The height, weight, and stability of the restraint must be designed to prevent individuals from penetrating the barrier.

(6) Fireworks in the sales area must be limited to the displayed merchandise unless stored in closed cardboard boxes not accessible to the public.

(7) Access to fireworks when stored in a separate and distinct area away from general fireworks sales must be restricted to employees only and "No Smoking" signs must be posted inside.

(8) The local fire department and the county fire marshal, if one is appointed or elected in that county, must be notified in writing annually, before beginning sales operations, of the business location, placement of fireworks in building or structure, maximum amount of fireworks in the building, and time period that fireworks will be stored or sold.

(9) Trash, rubbish, and unused boxes, except for small quantities stored in an orderly manner for reuse, must be removed from the sales, storage, and adjacent areas daily, or as often as necessary to prevent unsafe accumulation.

(10) Fireworks may not be displayed or stored behind glass through which direct sunlight can shine on the fireworks.

(11) Extension cords may not be located where the general public could walk over them. An extension cord may be used to extend power to a single appliance or single power strip. An extension cord providing power to a power strip must be of the same or greater wire gauge. Power strips used for multiple appliances must contain an internal circuit breaker. Extension cords and power strips must be protected from accidental damage. Flexible cords and cables must not be used as a substitute for the fixed wiring of a structure. An extension cord must not be plugged into a power strip.

(12) A supervisor, 18 years of age or older, must be on duty during all phases of operation. All fireworks sales personnel must be 16 years of age or older. The permit holder and the supervisor must ensure that all sales personnel comply with this subchapter.

(13) All trash containers used by the general public must be metal or heavy plastic and be located 10 feet from any displayed or stored fireworks.

(14) An outside electrical master switch must be provided at each retail location.

(15) Portable space heaters must not be permitted in retail or storage areas.

(16) A retail sales permit, for other than a retail stand, is not valid until a plan is on file at the State Fire Marshal's Office showing the following:

(A) the address or location of the site;

(B) the name of the person to whom the permit is issued;

(C) the outline and length of all building exterior walls;

(D) the floor area, location, and dimensions used for fireworks sales;

(E) the floor area, location, and dimensions used for fireworks storage outside the sales area;

(F) the floor area, location, and dimensions used for other than fireworks sales and storage;

(G) the general location, description, and distances from the exterior walls to all buildings, fireworks storage magazines, highways, and equipment for storage or dispensing of flammable liquids or compressed gas;

(H) the location of the master electrical cut-off switch;

(I) the location and width of all building doors and paths of egress; and

(J) the maximum estimated number of cases of fireworks to be stored or displayed for sale in the site.

(17) Cooking equipment must not be used within rooms used for fireworks sales or storage.

(18) All fireworks retail sites with a sales area more than 2500 square feet must have a minimum average ceiling height of 12 feet. The sales area is the total square feet of floor area used to sell or store fireworks in an indoor retail fireworks site. Each sales area may be separated from another sales area by a fire barrier having a resistance rating of not less than one hour, with all openings therein protected by a three-fourths-hour fire protection-rated self-closing fire doors.

(19) An indoor retail fireworks site must comply with the mercantile occupancy requirements of the standards adopted in §34.303 of this title (relating to Applicability of Rules). This standard, NFPA 101, Life Safety Code, is published by and is available from the National Fire Protection Association, Quincy, Massachusetts, 1-800-344-3555.

(20) An indoor fireworks retail site must have a minimum distance of 20 feet around the perimeter of the building that is kept free of high grass, empty cardboard boxes, and trash.

§34.833. *Military Service Members, Military Veterans, or Military Spouses.*

(a) Waiver of licensed application and examination fees. The department will waive the license application and examination fees for an applicant who is:

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

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

(b) Apprentice requirements. Verified military service, training, or education that is relevant to the occupation are credited toward the apprenticeship requirements for the license.

(c) Extension of license renewal deadlines. A military service member who holds a license is entitled to two years additional time to complete any continuing education requirements; and any other requirement related to the renewal of the military service member's license.

(d) Alternative licensing. The state fire marshal, after reviewing the applicant's credentials, may waive any prerequisite to obtaining a license for a military service member, military veteran, or military spouse that:

(1) holds a current license issued by another jurisdiction that has licensing requirements substantially equivalent to the requirements for the license in this state; or

(2) within the five years preceding the application date, held the license in this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER J. STOVETOP FIRE SUPPRESSION DEVICE APPROVAL

28 TAC §§34.1001 - 34.1004

STATUTORY AUTHORITY. The repeals are adopted under SB 14, 78th Legislature, Regular Session (2003); Government Code §417.005; and Insurance Code §36.001.

SB 14 repealed Insurance Code Articles 5.33A and 5.33C, providing for certificates used for premium credits and discounts on insurance rates.

Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal in the performance of other duties for the commissioner.

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

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SUBCHAPTER M. SCHEDULED ADMINISTRATIVE PENALTIES

28 TAC §34.1302

STATUTORY AUTHORITY. The amendment is adopted under Government Code §417.005 and §417.010, and Insurance Code §36.001.

Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal in the performance of other duties for the commissioner.

Government Code §417.010 provides that commissioner by rule must delegate to the state fire marshal the authority to take disciplinary and enforcement actions, including the imposition of administrative penalties. The commissioner must specify which types of disciplinary and enforcement actions are delegated to the state fire marshal. The commissioner must also outline the process through which the state fire marshal may impose administrative penalties or take other disciplinary and enforcement actions.

Government Code §417.010 also provides that the commissioner by rule must adopt a schedule of administrative penalties for violations subject to a penalty under this section to ensure that the amount of an administrative penalty is appropriate to the violation. This section requires the department to provide the schedule of administrative penalties to the public on request. The amount of an administrative penalty imposed must be based on the factors specified in Government Code §417.010(c). Section 417.010 also authorizes the state fire marshal to, instead of canceling, revoking, or suspending a license or certificate of registration, impose on the holder of the license or certificate an order directing the holder to cease and desist from a specified activity, pay an administrative penalty, or make restitution to a person harmed by the holder's violation of an applicable law or rule. Under §417.010, the state fire marshal may impose an administrative penalty in the manner prescribed in Subchapter B, Chapter 84, Insurance Code. The state fire marshal may impose an administrative penalty under the section without referring the violation to the department for commissioner action.

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

§34.1302. *Schedule of Administrative Penalties.*

(a) The Fire Extinguisher Penalty Schedule specified as follows.

Figure: 28 TAC §34.1302(a)

(b) The Fire Alarm Penalty Schedule specified as follows.

Figure: 28 TAC §34.1302(b)

(c) The Fire Protection Sprinkler Penalty Schedule specified as follows.

Figure: 28 TAC §34.1302(c)

(d) The Fireworks Indoor Retail Stand Penalty Schedule specified as follows.

Figure: 28 TAC §34.1302(d)

(e) The Fireworks Retail Site Penalty Schedule specified as follows.

Figure: 28 TAC §34.1302(e)

(f) The Fireworks Distributor Licensing Retailer Permit Penalty specified as follows.

Figure: 28 TAC §34.1302(f)

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT

CHAPTER 221. PROFICIENCY CERTIFICATES

37 TAC §221.25

The Texas Commission on Law Enforcement (Commission) adopts amended §221.25, concerning Civil Process Proficiency, without changes to the proposed text as published in the April 1, 2016, issue of the *Texas Register* (41 Tex Reg 2469).

This amended rule updates the qualifications for eligibility of the Civil Process Proficiency to include clerks in a constable or sheriff's office that work with civil process.

This amendment is necessary to enhance the proficiency and professionalism of those in a constable or sheriff's office that work with civil process.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority and §1701.402, Proficiency Certificates.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement
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For further information, please call: (512) 936-7713



CHAPTER 225. SPECIALIZED LICENSES

37 TAC §225.1

The Texas Commission on Law Enforcement (Commission) adopts amended §225.1, concerning Issuance of Jailer License through a Contract Jail Facility, without changes to the proposed text as published in the April 1, 2016, issue of the *Texas Register* (41 Tex Reg 2470).

This amended rule reflects a correct rule cross-referencing.

This amended rule is necessary to correct rule cross-referencing.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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37 TAC §225.3

The Texas Commission on Law Enforcement (Commission) adopts the amended §225.3, concerning Issuance of Peace Officer License through a Medical Corporation, without changes to the proposed text as published in the April 1, 2016, issue of the *Texas Register* (41 Tex Reg 2471).

This amended rule reflects a correct rule cross-referencing.

This amended rule is necessary to correct rule cross-referencing.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code §1701.151, General Powers of the Commission; Rulemaking Authority.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§19.101, 19.204, 19.1911, and 19.1921 and new §19.1936, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification, with changes to the proposed text as published in the January 15, 2016, issue of the *Texas Register* (41 TexReg 580).

The amendments and new section are adopted to implement Texas Health and Safety Code (THSC), §242.019, as added by House Bill (H.B.) 1337 of the 84th Legislature, Regular Session, 2015, and amendments to THSC, §242.202(d) and §242.040, as made by H.B. 2588 of the 84th Legislature, Regular Session, 2015.

In response to H.B. 1337, the adoption requires a nursing facility (facility) to request a copy of any court order and letters of guardianship appointing a guardian of a resident or a resident's estate from the resident's nearest relative or the person responsible for the resident's support, and requires a facility to maintain in a resident's clinical record a copy of the most recent court order and letters of guardianship received by the facility.

In response to H.B. 2588, the adoption defines the term "Alzheimer's disease and related disorders" and requires a facility that advertises, markets, or otherwise promotes that it provides services to residents with Alzheimer's disease and related disorders to include in the facility's disclosure statement whether the facility is certified under THSC, §242.040 for the provision of specialized care and treatment of residents with Alzheimer's disease and related disorders. A facility must amend its disclosure statement to reflect any changes in the operation of the facility that will affect the information in the statement and provide DADS and a resident, responsible party, or legal guardian with a copy of the amended disclosure statement at least 30 days before the changes are effective.

In §19.204, the agency made minor editorial corrections. In addition, the agency amended subsection (b)(4)(C) to clarify that a facility must amend its disclosure statement regarding Alzheimer's disease and related conditions if changes in the operation of the facility will affect information in the disclosure statement and submit the amended disclosure statement to DADS at least 30 days before the changes are effective.

In §19.1911, the agency made minor editorial corrections. In addition, the agency amended subsection (b)(17) to require a facility to include in the clinical record of a resident a copy of the most recent court order and letters of guardianship received by the facility, regardless of whether they were received in response to a request made in accordance with §19.1936.

In §19.1921, the agency made changes to clarify when and to whom a facility must give a disclosure statement or amended disclosure statement required by §19.204(b)(4).

In §19.1936, the agency made a minor editorial correction in subsection (d) and amended subsection (e)(2) to require a facility to include in the clinical record of a resident a copy of the most recent court order and letters of guardianship received by the facility, regardless of whether it was received in response to a request made in accordance with §19.1936.

DADS received written comments from Coalition for Nurses in Advanced Practice and the State Long-term Care Ombudsman. A summary of the comments and the responses follows.

Comment: One commenter expressed concern regarding the definition of Alzheimer's disease and related disorders in 40 TAC §19.101, requesting that the agency include in the definition a description of dementia and a definition of "related disorders."

Response: Texas Health and Safety Code §242.020 authorizes the HHSC Executive Commissioner to adopt by reference a definition of "Alzheimer's disease and related disorders" that is published in a generally accepted clinical resource for medical professionals. Because the understanding and classification of these conditions may change as research and treatment continue, the agency has referenced the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders and the Centers for Disease Control and Prevention as sources that describe the diseases and disorders included in this term. In response to the comment, the agency changed the definition to reference Alzheimer's disease and any other irreversible dementia instead of cognitive disorders to be more specific about the diseases and disorders included in the term.

Comment: One commenter noted that the Nursing Practice Act, Texas Occupations Code Chapter 301, was amended to use the term "advanced practice registered nurse" rather than "advanced practice nurse." The commenter suggested revising the definitions in §19.101 to delete "nurse practitioner," add "advanced practice registered nurse," and amend "licensed health professional" and "supervising physician" to include advanced practice registered nurse instead of nurse practitioner.

Response: The agency agrees that the term "advanced practice registered nurse" should replace "nurse practitioner" and has made the suggested changes, except the term "nurse practitioner" cannot be deleted from the definitions because the term is used in sections of Chapter 19 that are not being amended. However, the definition of "nurse practitioner" has been amended to mean an advanced practice registered nurse. When all uses of the term "nurse practitioner" in Chapter 19 have been removed, the term can be eliminated from the definitions. In addition, the definition of "practitioner" has been amended to refer to an "advanced practice registered nurse" instead of an "advanced practice nurse."

Comment: One commenter suggested adding "practitioner" as a person who can order a prescription in the definitions of "pharmacist" and "poison."

Response: The agency agrees that using the term "practitioner" in the definitions of "pharmacist" and "poison" is consistent with the definition of "practitioner" as someone authorized to sign a prescription order, so the agency made the suggested changes.

Comment: One commenter suggested revising §19.1911(b)(12), regarding content of the clinical record, to include "practitioner" orders in addition to physician orders.

Response: The suggested revision to §19.1911(b)(12), regarding orders included in the clinical record of a resident, is outside the scope of the proposed changes. The agency will consider the implications of the suggested change and may propose amendments to the rule in the future. In addition, the agency notes that subsection (b)(7) requires the clinical record to include the signed and dated clinical documentation from all health care practitioners involved in the resident's care. The agency did not make any changes in response to this comment.

SUBCHAPTER B. DEFINITIONS

40 TAC §19.101

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

§19.101. Definitions.

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

- (1) Abuse--Negligent or willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical or emotional harm or pain to a resident; or sexual abuse, including involuntary or nonconsensual sexual conduct that would constitute an offense under Penal Code §21.08 (indecent exposure) or Penal Code Chapter 22 (assaultive offenses), sexual harassment, sexual coercion, or sexual assault.
- (2) Act--Chapter 242 of the Texas Health and Safety Code.
- (3) Activities assessment--See Comprehensive Assessment and Comprehensive Care Plan.
- (4) Activities director--The qualified individual appointed by the facility to direct the activities program as described in §19.702 of this chapter (relating to Activities).
- (5) Addition--The addition of floor space to an institution.
- (6) Administrator--Licensed nursing facility administrator.
- (7) Admission MDS assessment--An MDS assessment that determines a recipient's initial determination of eligibility for medical necessity for admission into the Texas Medicaid Nursing Facility Program.
- (8) Advanced practice registered nurse--A person licensed by the Texas Board of Nursing as an advanced practice registered nurse.
- (9) Affiliate--With respect to a:
 - (A) partnership, each partner thereof;

(B) corporation, each officer, director, principal stockholder, and subsidiary; and each person with a disclosable interest;

(C) natural person, which includes each:

(i) person's spouse;

(ii) partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

(iii) corporation in which said person is an officer, director, principal stockholder, or person with a disclosable interest.

(10) Agent--An adult to whom authority to make health care decisions is delegated under a durable power of attorney for health care.

(11) Alzheimer's disease and related disorders--Alzheimer's disease and any other irreversible dementia described by the Centers for Disease Control and Prevention or the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

(12) Applicant--A person or governmental unit, as those terms are defined in the Texas Health and Safety Code, Chapter 242, applying for a license under that chapter.

(13) APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001.

(14) Attending physician--A physician, currently licensed by the Texas Medical Board, who is designated by the resident or responsible party as having primary responsibility for the treatment and care of the resident.

(15) Authorized electronic monitoring--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

(16) Barrier precautions--Precautions including the use of gloves, masks, gowns, resuscitation equipment, eye protectors, aprons, face shields, and protective clothing for purposes of infection control.

(17) Care and treatment--Services required to maximize resident independence, personal choice, participation, health, self-care, psychosocial functioning and reasonable safety, all consistent with the preferences of the resident.

(18) Certification--The determination by DADS that a nursing facility meets all the requirements of the Medicaid or Medicare programs.

(19) CFR--Code of Federal Regulations.

(20) CMS--Centers for Medicare & Medicaid Services, formerly the Health Care Financing Administration (HCFA).

(21) Complaint--Any allegation received by DADS other than an incident reported by the facility. Such allegations include, but are not limited to, abuse, neglect, exploitation, or violation of state or federal standards.

(22) Completion date--The date an RN assessment coordinator signs an MDS assessment as complete.

(23) Comprehensive assessment--An interdisciplinary description of a resident's needs and capabilities including daily life functions and significant impairments of functional capacity, as described in §19.801(2) of this chapter (relating to Resident Assessment).

(24) Comprehensive care plan--A plan of care prepared by an interdisciplinary team that includes measurable short-term and long-term objectives and timetables to meet the resident's needs developed for each resident after admission. The plan addresses at least the fol-

lowing needs: medical, nursing, rehabilitative, psychosocial, dietary, activity, and resident's rights. The plan includes strategies developed by the team, as described in §19.802(b)(2) of this chapter (relating to Comprehensive Care Plans), consistent with the physician's prescribed plan of care, to assist the resident in eliminating, managing, or alleviating health or psychosocial problems identified through assessment. Planning includes:

(A) goal setting;

(B) establishing priorities for management of care;

(C) making decisions about specific measures to be used to resolve the resident's problems; and

(D) assisting in the development of appropriate coping mechanisms.

(25) Controlled substance--A drug, substance, or immediate precursor as defined in the Texas Controlled Substance Act, Texas Health and Safety Code, Chapter 481, or the Federal Controlled Substance Act of 1970, Public Law 91-513.

(26) Controlling person--A person with the ability, acting alone or in concert with others, to directly or indirectly, influence, direct, or cause the direction of the management, expenditure of money, or policies of a nursing facility or other person. A controlling person does not include a person, such as an employee, lender, secured creditor, or landlord, who does not exercise any influence or control, whether formal or actual, over the operation of a facility. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of a nursing facility;

(B) any person who is a controlling person of a management company or other business entity that operates a nursing facility or that contracts with another person for the operation of a nursing facility;

(C) an officer or director of a publicly traded corporation that is, or that controls, a facility, management company, or other business entity described in subparagraph (A) of this paragraph but does not include a shareholder or lender of the publicly traded corporation; and

(D) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of a nursing facility, is in a position of actual control or authority with respect to the nursing facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility.

(27) Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and DADS have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(28) DADS--The Department of Aging and Disability Services.

(29) Dangerous drugs--Any drug as defined in the Texas Health and Safety Code, Chapter 483.

(30) Dentist--A practitioner licensed by the Texas State Board of Dental Examiners.

(31) Department--Department of Aging and Disability Services.

(32) DHS--This term referred to the Texas Department of Human Services; it now refers to DADS, unless the context concerns an administrative hearing. Administrative hearings were formerly the responsibility of DHS; they now are the responsibility of the Texas Health and Human Services Commission (HHSC).

(33) Dietitian--A qualified dietitian is one who is qualified based upon either:

(A) registration by the Commission on Dietetic Registration of the Academy of Nutrition and Dietetics; or

(B) licensure, or provisional licensure, by the Texas State Board of Examiners of Dietitians. These individuals must have one year of supervisory experience in dietetic service of a health care facility.

(34) Direct care by licensed nurses--Direct care consonant with the physician's planned regimen of total resident care includes:

- (A) assessment of the resident's health care status;
- (B) planning for the resident's care;
- (C) assignment of duties to achieve the resident's care;
- (D) nursing intervention; and
- (E) evaluation and change of approaches as necessary.

(35) Distinct part--That portion of a facility certified to participate in the Medicaid Nursing Facility program.

(36) Drug (also referred to as medication)--Any of the following:

(A) any substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

(B) any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man;

(C) any substance (other than food) intended to affect the structure or any function of the body of man; and

(D) any substance intended for use as a component of any substance specified in subparagraphs (A) - (C) of this paragraph. It does not include devices or their components, parts, or accessories.

(37) Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(38) Emergency--A sudden change in a resident's condition requiring immediate medical intervention.

(39) Executive Commissioner--The executive commissioner of the Health and Human Services Commission.

(40) Exploitation--The illegal or improper act or process of a caregiver, family member, or other individual who has an ongoing relationship with a resident using the resources of the resident for monetary or personal benefit, profit, or gain without the informed consent of the resident.

(41) Exposure (infections)--The direct contact of blood or other potentially infectious materials of one person with the skin or mucous membranes of another person. Other potentially infectious materials include the following human body fluids: semen, vaginal secre-

tions, cerebrospinal fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, and body fluid that is visibly contaminated with blood and all body fluids when it is difficult or impossible to differentiate between body fluids.

(42) Facility--Unless otherwise indicated, a facility is an institution that provides organized and structured nursing care and service and is subject to licensure under Texas Health and Safety Code, Chapter 242.

(A) For Medicaid, a facility is a nursing facility which meets the requirements of §1919(a) - (d) of the Social Security Act. A facility may not include any institution that is for the care and treatment of mental diseases except for services furnished to individuals age 65 and over and who are eligible as defined in Chapter 17 of this title (relating to Preadmission Screening and Resident Review (PASRR)).

(B) For Medicare and Medicaid purposes (including eligibility, coverage, certification, and payment), the "facility" is always the entity which participates in the program, whether that entity is comprised of all of, or a distinct part of, a larger institution.

(C) "Facility" is also referred to as a nursing home or nursing facility. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care of the resident; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.

(43) Family council--A group of family members, friends, or legal guardians of residents, who organize and meet privately or openly.

(44) Family representative--An individual appointed by the resident to represent the resident and other family members, by formal or informal arrangement.

(45) Fiduciary agent--An individual who holds in trust another's monies.

(46) Free choice--Unrestricted right to choose a qualified provider of services.

(47) Goals--Long-term: general statements of desired outcomes. Short-term: measurable time-limited, expected results that provide the means to evaluate the resident's progress toward achieving long-term goals.

(48) Governmental unit--A state or a political subdivision of the state, including a county or municipality.

(49) HCFA--Health Care Financing Administration, now the Centers for Medicare & Medicaid Services (CMS).

(50) Health care provider--An individual, including a physician, or facility licensed, certified, or otherwise authorized to administer health care, in the ordinary course of business or professional practice.

(51) Hearing--A contested case hearing held in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) and Chapter 91 of this title (relating to Hearings Under the Administrative Procedure Act).

(52) HIV--Human Immunodeficiency Virus.

(53) Incident--An abnormal event, including accidents or injury to staff or residents, which is documented in facility reports. An occurrence in which a resident may have been subject to abuse, neglect, or exploitation must also be reported to DADS.

(54) Infection control--A program designed to prevent the transmission of disease and infection in order to provide a safe and sanitary environment.

(55) Inspection--Any on-site visit to or survey of an institution by DADS for the purpose of licensing, monitoring, complaint investigation, architectural review, or similar purpose.

(56) Interdisciplinary care plan--See the definition of "comprehensive care plan."

(57) Involuntary seclusion--Separation of a resident from others or from the resident's room or confinement to the resident's room, against the resident's will or the will of a person who is legally authorized to act on behalf of the resident. Monitored separation from other residents is not involuntary seclusion if the separation is a therapeutic intervention that uses the least restrictive approach for the minimum amount of time, not exceed to 24 hours, until professional staff can develop a plan of care to meet the resident's needs.

(58) IV--Intravenous.

(59) Legend drug or prescription drug--Any drug that requires a written or telephonic order of a practitioner before it may be dispensed by a pharmacist, or that may be delivered to a particular resident by a practitioner in the course of the practitioner's practice.

(60) Licensed health professional--A physician; physician assistant; advanced practice registered nurse; physical, speech, or occupational therapist; pharmacist; physical or occupational therapy assistant; registered professional nurse; licensed vocational nurse; licensed dietitian; or licensed social worker.

(61) Licensed nursing home (facility) administrator--A person currently licensed by DADS in accordance with Chapter 18 of this title (relating to Nursing Facility Administrators).

(62) Licensed vocational nurse (LVN)--A nurse who is currently licensed by the Texas Board of Nursing as a licensed vocational nurse.

(63) Life Safety Code (also referred to as the Code or NFPA 101)--The Code for Safety to Life from Fire in Buildings and Structures, Standard 101, of the National Fire Protection Association (NFPA).

(64) Life safety features--Fire safety components required by the Life Safety Code, including, but not limited to, building construction, fire alarm systems, smoke detection systems, interior finishes, sizes and thicknesses of doors, exits, emergency electrical systems, and sprinkler systems.

(65) Life support--Use of any technique, therapy, or device to assist in sustaining life. (See §19.419 of this chapter (relating to Advance Directives)).

(66) Local authorities--Persons, including, but not limited to, local health authority, fire marshal, and building inspector, who may be authorized by state law, county order, or municipal ordinance to perform certain inspections or certifications.

(67) Local health authority--The physician appointed by the governing body of a municipality or the commissioner's court of the county to administer state and local laws relating to public health in the municipality's or county's jurisdiction as defined in Texas Health and Safety Code, §121.021.

(68) Long-term care-regulatory--DADS Regulatory Services Division, which is responsible for surveying nursing facilities to determine compliance with regulations for licensure and certification for Title XIX participation.

(69) Manager--A person, other than a licensed nursing home administrator, having a contractual relationship to provide management services to a facility.

(70) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, or food service.

(71) MDS--Minimum data set. See Resident Assessment Instrument (RAI).

(72) MDS nurse reviewer--A registered nurse employed by HHSC to monitor the accuracy of the MDS assessment submitted by a Medicaid-certified nursing facility.

(73) Medicaid applicant--A person who requests the determination of eligibility to become a Medicaid recipient.

(74) Medicaid nursing facility vendor payment system--Electronic billing and payment system for reimbursement to nursing facilities for services provided to eligible Medicaid recipients.

(75) Medicaid recipient--A person who meets the eligibility requirements of the Title XIX Medicaid program, is eligible for nursing facility services, and resides in a Medicaid-participating facility.

(76) Medical director--A physician licensed by the Texas Medical Board, who is engaged by the nursing home to assist in and advise regarding the provision of nursing and health care.

(77) Medical necessity (MN)--The determination that a recipient requires the services of licensed nurses in an institutional setting to carry out the physician's planned regimen for total care. A recipient's need for custodial care in a 24-hour institutional setting does not constitute a medical need. A group of health care professionals employed or contracted by the state Medicaid claims administrator contracted with HHSC makes individual determinations of medical necessity regarding nursing facility care. These health care professionals consist of physicians and registered nurses.

(78) Medical power of attorney--The legal document that designates an agent to make treatment decisions if the individual designator becomes incapable.

(79) Medical-social care plan--See Interdisciplinary Care Plan.

(80) Medically related condition--An organic, debilitating disease or health disorder that requires services provided in a nursing facility, under the supervision of licensed nurses.

(81) Medication aide--A person who holds a current permit issued under the Medication Aide Training Program as described in Chapter 95 of this title (relating to Medication Aides--Program Requirements) and acts under the authority of a person who holds a current license under state law which authorizes the licensee to administer medication.

(82) Misappropriation of funds--The taking, secretion, misapplication, deprivation, transfer, or attempted transfer to any person not entitled to receive any property, real or personal, or anything of value belonging to or under the legal control of a resident without the effective consent of the resident or other appropriate legal authority, or the taking of any action contrary to any duty imposed by federal or state law prescribing conduct relating to the custody or disposition of property of a resident.

(83) Neglect--The failure to provide goods or services, including medical services that are necessary to avoid physical or emotional harm, pain, or mental illness.

(84) NHIC--This term referred to the National Heritage Insurance Corporation. It now refers to the state Medicaid claims administrator.

(85) Nonnursing personnel--Persons not assigned to give direct personal care to residents; including administrators, secretaries, activities directors, bookkeepers, cooks, janitors, maids, laundry workers, and yard maintenance workers.

(86) Nurse aide--An individual who provides nursing or nursing-related services to residents in a facility under the supervision of a licensed nurse. This definition does not include an individual who is a licensed health professional, a registered dietitian, or someone who volunteers such services without pay. A nurse aide is not authorized to provide nursing or nursing-related services for which a license or registration is required under state law. Nurse aides do not include those individuals who furnish services to residents only as paid feeding assistants.

(87) Nurse aide trainee--An individual who is attending a program teaching nurse aide skills.

(88) Nurse practitioner--An advanced practice registered nurse.

(89) Nursing assessment--See definition of "comprehensive assessment" and "comprehensive care plan."

(90) Nursing care--Services provided by nursing personnel which include, but are not limited to, observation; promotion and maintenance of health; prevention of illness and disability; management of health care during acute and chronic phases of illness; guidance and counseling of individuals and families; and referral to physicians, other health care providers, and community resources when appropriate.

(91) Nursing facility/home--An institution that provides organized and structured nursing care and service, and is subject to licensure under Texas Health and Safety Code, Chapter 242. The nursing facility may also be certified to participate in the Medicaid Title XIX program. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care to the residents; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.

(92) Nursing facility/home administrator--See the definition of "licensed nursing home (facility) administrator."

(93) Nursing personnel--Persons assigned to give direct personal and nursing services to residents, including registered nurses, licensed vocational nurses, nurse aides, and medication aides. Unlicensed personnel function under the authority of licensed personnel.

(94) Objectives--See definition of "goals."

(95) OBRA--Omnibus Budget Reconciliation Act of 1987, which includes provisions relating to nursing home reform, as amended.

(96) Ombudsman--An advocate who is a certified representative, staff member, or volunteer of the DADS Office of the State Long Term Care Ombudsman.

(97) Optometrist--An individual with the profession of examining the eyes for defects of refraction and prescribing lenses for correction who is licensed by the Texas Optometry Board.

(98) Paid feeding assistant--An individual who meets the requirements of §19.1113 of this chapter (relating to Paid Feeding Assistants) and who is paid to feed residents by a facility or who is used under an arrangement with another agency or organization.

(99) PASARR or PASRR--Preadmission Screening and Resident Review.

(100) Palliative Plan of Care--Appropriate medical and nursing care for residents with advanced and progressive diseases for whom the focus of care is controlling pain and symptoms while maintaining optimum quality of life.

(101) Patient care-related electrical appliance--An electrical appliance that is intended to be used for diagnostic, therapeutic, or monitoring purposes in a patient care area, as defined in Standard 99 of the National Fire Protection Association.

(102) Person--An individual, firm, partnership, corporation, association, joint stock company, limited partnership, limited liability company, or any other legal entity, including a legal successor of those entities.

(103) Person with a disclosable interest--A person with a disclosable interest is any person who owns at least a 5.0 percent interest in any corporation, partnership, or other business entity that is required to be licensed under Texas Health and Safety Code, Chapter 242. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company, unless these entities participate in the management of the facility.

(104) Pharmacist--An individual, licensed by the Texas State Board of Pharmacy to practice pharmacy, who prepares and dispenses medications prescribed by a practitioner.

(105) Physical restraint--See Restraints (physical).

(106) Physician--A doctor of medicine or osteopathy currently licensed by the Texas Medical Board.

(107) Physician assistant (PA)--

(A) A graduate of a physician assistant training program who is accredited by the Committee on Allied Health Education and Accreditation of the Council on Medical Education of the American Medical Association;

(B) A person who has passed the examination given by the National Commission on Certification of Physician Assistants. According to federal requirements (42 CFR §491.2) a physician assistant is a person who meets the applicable state requirements governing the qualifications for assistant to primary care physicians, and who meets at least one of the following conditions:

(i) is currently certified by the National Commission on Certification of Physician Assistants to assist primary care physicians; or

(ii) has satisfactorily completed a program for preparing physician assistants that:

(I) was at least one academic year in length;

(II) consisted of supervised clinical practice and at least four months (in the aggregate) of classroom instruction directed toward preparing students to deliver health care; and

(III) was accredited by the American Medical Association's Committee on Allied Health Education and Accreditation; or

(C) A person who has satisfactorily completed a formal educational program for preparing physician assistants who does not meet the requirements of paragraph (d)(2), 42 CFR §491.2, and has been assisting primary care physicians for a total of 12 months during the 18-month period immediately preceding July 14, 1978.

(108) Podiatrist--A practitioner whose profession encompasses the care and treatment of feet who is licensed by the Texas State Board of Podiatric Medical Examiners.

(109) Poison--Any substance that federal or state regulations require the manufacturer to label as a poison and is to be used externally by the consumer from the original manufacturer's container. Drugs to be taken internally that contain the manufacturer's poison label, but are dispensed by a pharmacist only by or on the prescription order of a practitioner, are not considered a poison, unless regulations specifically require poison labeling by the pharmacist.

(110) Practitioner--A physician, podiatrist, dentist, or an advanced practice registered nurse or physician assistant to whom a physician has delegated authority to sign a prescription order, when relating to pharmacy services.

(111) PRN (pro re nata)--As needed.

(112) Provider--The individual or legal business entity that is contractually responsible for providing Medicaid services under an agreement with DADS.

(113) Psychoactive drugs--Drugs prescribed to control mood, mental status, or behavior.

(114) Qualified surveyor--An employee of DADS who has completed state and federal training on the survey process and passed a federal standardized exam.

(115) Quality assessment and assurance committee--A group of health care professionals in a facility who develop and implement appropriate action to identify and rectify substandard care and deficient facility practice.

(116) Quality-of-care monitor--A registered nurse, pharmacist, or dietitian employed by DADS who is trained and experienced in long-term care facility regulation, standards of practice in long-term care, and evaluation of resident care, and functions independently of DADS Regulatory Services Division.

(117) Recipient--Any individual residing in a Medicaid certified facility or a Medicaid certified distinct part of a facility whose daily vendor rate is paid by Medicaid.

(118) Registered nurse (RN)--An individual currently licensed by the Texas Board of Nursing as a Registered Nurse in the State of Texas.

(119) Reimbursement methodology--The method by which HHSC determines nursing facility per diem rates.

(120) Remodeling--The construction, removal, or relocation of walls and partitions, the construction of foundations, floors, or ceiling-roof assemblies, the expanding or altering of safety systems (including, but not limited to, sprinkler, fire alarm, and emergency systems) or the conversion of space in a facility to a different use.

(121) Renovation--The restoration to a former better state by cleaning, repairing, or rebuilding, including, but not limited to, routine maintenance, repairs, equipment replacement, painting.

(122) Representative payee--A person designated by the Social Security Administration to receive and disburse benefits, act in the best interest of the beneficiary, and ensure that benefits will be used according to the beneficiary's needs.

(123) Resident--Any individual residing in a nursing facility.

(124) Resident assessment instrument (RAI)--An assessment tool used to conduct comprehensive, accurate, standardized, and reproducible assessments of each resident's functional capacity as specified by the Secretary of the U.S. Department of Health and Human Services. At a minimum, this instrument must consist of the Minimum Data Set (MDS) core elements as specified by the Centers for Medicare & Medicaid Services (CMS); utilization guidelines; and Care Area Assessment (CAA) process.

(125) Resident group--A group or council of residents who meet regularly to:

(A) discuss and offer suggestions about the facility policies and procedures affecting residents' care, treatment, and quality of life;

(B) plan resident activities;

(C) participate in educational activities; or

(D) for any other purpose.

(126) Responsible party--An individual authorized by the resident to act for him as an official delegate or agent. Responsible party is usually a family member or relative, but may be a legal guardian or other individual. Authorization may be in writing or may be given orally.

(127) Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(128) Restraints (chemical)--Psychoactive drugs administered for the purposes of discipline, or convenience, and not required to treat the resident's medical symptoms.

(129) Restraints (physical)--Any manual method, or physical or mechanical device, material or equipment attached, or adjacent to the resident's body, that the individual cannot remove easily which restricts freedom of movement or normal access to one's body. The term includes a restraint hold.

(130) RN assessment coordinator--A registered nurse who signs and certifies a comprehensive assessment of a resident's needs, using the RAI, including the MDS, as specified by DADS.

(131) RUG--Resource Utilization Group. A categorization method, consisting of 34 categories based on the MDS, that is used to determine a recipient's service and care requirements and to determine the daily rate DADS pays a nursing facility for services provided to the recipient.

(132) Secretary--Secretary of the U.S. Department of Health and Human Services.

(133) Services required on a regular basis--Services which are provided at fixed or recurring intervals and are needed so frequently that it would be impractical to provide the services in a home or family setting. Services required on a regular basis include continuous or

periodic nursing observation, assessment, and intervention in all areas of resident care.

(134) SNF--A skilled nursing facility or distinct part of a facility that participates in the Medicare program. SNF requirements apply when a certified facility is billing Medicare for a resident's per diem rate.

(135) Social Security Administration--Federal agency for administration of social security benefits. Local social security administration offices take applications for Medicare, assist beneficiaries file claims, and provide information about the Medicare program.

(136) Social worker--A qualified social worker is an individual who is licensed, or provisionally licensed, by the Texas State Board of Social Work Examiners as prescribed by the Texas Occupations Code, Chapter 505, and who has at least:

(A) a bachelor's degree in social work; or

(B) similar professional qualifications, which include a minimum educational requirement of a bachelor's degree and one year experience met by employment providing social services in a health care setting.

(137) Standards--The minimum conditions, requirements, and criteria established in this chapter with which an institution must comply to be licensed under this chapter.

(138) State Medicaid claims administrator--The entity under contract with HHSC to process Medicaid claims in Texas.

(139) State plan--A formal plan for the medical assistance program, submitted to CMS, in which the State of Texas agrees to administer the program in accordance with the provisions of the State Plan, the requirements of Titles XVIII and XIX, and all applicable federal regulations and other official issuances of the U.S. Department of Health and Human Services.

(140) State survey agency--DADS is the agency, which through contractual agreement with CMS is responsible for Title XIX (Medicaid) survey and certification of nursing facilities.

(141) Supervising physician--A physician who assumes responsibility and legal liability for services rendered by a physician assistant (PA) and has been approved by the Texas Medical Board to supervise services rendered by specific PAs. A supervising physician may also be a physician who provides general supervision of an advanced practice registered nurse providing services in a nursing facility.

(142) Supervision--General supervision, unless otherwise identified.

(143) Supervision (direct)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence. If the person being supervised does not meet assistant-level qualifications specified in this chapter and in federal regulations, the supervisor must be on the premises and directly supervising.

(144) Supervision (general)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence. The person being supervised must have access to the qualified person providing the supervision.

(145) Supervision (intermittent)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence, with initial direction and periodic inspection of the actual act of accomplishing the function or activity. The person being supervised must have access to the qualified person providing the supervision.

(146) *Texas Register*--A publication of the Texas Register Publications Section of the Office of the Secretary of State that contains emergency, proposed, withdrawn, and adopted rules issued by Texas state agencies. The Texas Register was established by the Administrative Procedure and Texas Register Act of 1975.

(147) Therapeutic diet--A diet ordered by a physician as part of treatment for a disease or clinical condition, in order to eliminate, decrease, or increase certain substances in the diet or to provide food which has been altered to make it easier for the resident to eat.

(148) Therapy week--A seven-day period beginning the first day rehabilitation therapy or restorative nursing care is given. All subsequent therapy weeks for a particular individual will begin on that day of the week.

(149) Threatened violation--A situation that, unless immediate steps are taken to correct, may cause injury or harm to a resident's health and safety.

(150) Title II--Federal Old-Age, Survivors, and Disability Insurance Benefits of the Social Security Act.

(151) Title XVI--Supplemental Security Income (SSI) of the Social Security Act.

(152) Title XVIII--Medicare provisions of the Social Security Act.

(153) Title XIX--Medicaid provisions of the Social Security Act.

(154) Total health status--Includes functional status, medical care, nursing care, nutritional status, rehabilitation and restorative potential, activities potential, cognitive status, oral health status, psychosocial status, and sensory and physical impairments.

(155) UAR--HHSC's Utilization and Assessment Review Section.

(156) Uniform data set--See Resident Assessment Instrument (RAI).

(157) Universal precautions--The use of barrier and other precautions to prevent the spread of blood-borne diseases.

(158) Unreasonable confinement--Involuntary seclusion.

(159) Vaccine preventable diseases--The diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

(160) Vendor payment--Payment made by DADS on a daily-rate basis for services delivered to recipients in Medicaid-certified nursing facilities. Vendor payment is based on the nursing facility's approved-to-pay claim processed by the state Medicaid claims administrator. The Nursing Facility Billing Statement, subject to adjustments and corrections, is prepared from information submitted by the nursing facility, which is currently on file in the computer system as of the billing date. Vendor payment is made at periodic intervals, but not less than once per month for services rendered during the previous billing cycle.

(161) Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 1, 2016.



SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §19.204

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

§19.204. *Application Requirements.*

(a) Applications. All applications must be made on forms prescribed by and available from DADS.

(1) Each application must be completed in accordance with DADS instructions, and it must be signed and notarized.

(2) Changes to information required in the application must be reported to DADS, as required by §19.1918 of this title (relating to Disclosure of Ownership).

(b) General information required. An applicant must file with DADS an application that contains:

(1) for initial applications and change of ownership only, evidence of the right to possession of the facility at the time the application will be granted, which may be satisfied by the submission of applicable portions of a lease agreement, deed or trust, or appropriate legal document. The names and addresses of any persons or organizations listed as owner of record in the real estate, including the buildings and grounds, must be disclosed to DADS;

(2) a certificate of good standing issued by the Comptroller of Public Accounts;

(3) for initial applications and change of ownership only, the certificate of incorporation issued by the secretary of state for a corporation or a copy of the partnership agreement for a partnership; and

(4) for a facility that advertises, markets, or otherwise promotes that it provides services to residents with Alzheimer's disease and related disorders, a disclosure statement, using the departmental form, describing the nature of its care or treatment of residents with Alzheimer's disease and related disorders, as required by the Texas Health and Safety Code, §242.202.

(A) Failure to submit the required disclosure statement will result in an administrative penalty in accordance with §19.2112 of this title (relating to Administrative Penalties).

(B) The disclosure statement must contain the following information:

(i) the facility's philosophy of care for residents with Alzheimer's disease and related disorders;

(ii) whether the facility is certified under Texas Health and Safety Code §242.040 for the provision of specialized care and treatment of residents with Alzheimer's disease and related disorders;

(iii) the preadmission, admission, and discharge process;

(iv) resident assessment, care planning, and implementation of the care plan;

(v) staffing patterns, such as resident to staff ratios, and staff training;

(vi) the physical environment of the facility;

(vii) resident activities;

(viii) program charges;

(ix) systems for evaluation of the facility's program;

(x) family involvement in resident care; and

(xi) the telephone number for DADS toll-free complaint line.

(C) A facility must:

(i) amend its disclosure statement if changes in the operation of the facility will affect the information in the disclosure statement required by subparagraph (B)(i) - (xi) of this paragraph; and

(ii) submit the amended disclosure statement to DADS at least 30 days before the changes are effective.

(c) Requested information. An applicant or license holder must provide any information DADS requests within 30 days after the request.

(d) Exemptions. The provisions of this section do not apply to a bank, trust company, financial institution, title insurer, escrow company, or underwriter title company to which a license is issued in a fiduciary capacity.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-2235



SUBCHAPTER T. ADMINISTRATION

40 TAC §§19.1911, 19.1921, 19.1936

The amendments and new section are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and

provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

§19.1911. *Contents of the Clinical Record.*

(a) A resident's clinical record must meet all documentation requirements in the Texas Health and Human Services Commission rule at 1 TAC §371.214 (relating to Resource Utilization Group Classification System).

(b) The clinical record of each resident must contain:

(1) a face sheet that contains the attending physician's current mailing address and telephone numbers;

(2) sufficient information to identify and care for the resident, to include at a minimum:

- (A) full name of resident;
- (B) full home/ mailing address;
- (C) social security number;
- (D) health insurance claim numbers, if applicable;
- (E) date of birth; and
- (F) clinical record number, if applicable;

(3) a record of the resident's assessments, including 15 months of MDS records;

(4) the comprehensive, interdisciplinary plan of care and services provided (see also §19.802 of this chapter (relating to Comprehensive Care Plans));

(5) a permanency plan, for residents younger than 22 years of age;

(6) the results of any Preadmission Screening and Resident Review;

(7) signed and dated clinical documentation from all health care practitioners involved in the resident's care, with each page identifying the name of the resident for whom the clinical care is intended;

(8) any directives or medical powers of attorney as described in §19.419 of this chapter (relating to Advance Directives);

(9) discharge information in accordance with §19.803 of this chapter (relating to Discharge Summary (Discharge Plan of Care)) and a physician discharge summary, to include, at least, dates of admission and discharge, admitting and discharge diagnoses, condition on discharge, and prognosis, if applicable;

(10) at admission or within 14 days after admission, documentation of an initial medical evaluation, including history, physical examination, diagnoses and an estimate of discharge potential and rehabilitation potential, and documentation of a previous annual medical examination;

(11) authentication of a hospital diagnosis, which may be in the form of a signed hospital discharge summary, a signed report from the resident's hospital or attending physician, or a transfer form signed by the physician;

(12) the physician's signed and dated orders, including medication, treatment, diet, restorative and special medical procedures, and routine care to maintain or improve the resident's functional abilities (required for the safety and well-being of the resident), which must not be changed either on a handwritten or computerized physician's order sheet after the orders have been signed by the physician unless space allows for additional orders below the physician's signature, including space for the physician to sign and date again;

(13) arrangements for the emergency care of the resident in accordance with §19.1204 of this chapter (relating to Availability of Physician for Emergency Care);

(14) observations made by nursing personnel according to the time frames specified in §19.1010 of this chapter (relating to Nursing Practices);

(15) items as specified on the MDS assessment;

(16) current information, including:

- (A) PRN medications and results;
- (B) treatments and any notable results;
- (C) physical complaints, changes in clinical signs and behavior, mental and behavioral status, and all incidents or accidents;
- (D) flow sheets, which may include bathing, restraint observation or release documentation, elimination, fluid intake, vital signs, ambulation status, positioning, continence status and care, and weight;

(E) a record of dietary intake, including deviations from normal diet, rejection of substitutions, and physician's ordered snacks or supplemental feedings;

(F) a record of the date and hour a drug or treatment is administered; and

(G) documentation of a special procedure performed for the safety and well-being of the resident; and

(17) a copy of the most recent court order and letters of guardianship appointing a guardian of the resident or the resident's estate received by the facility.

§19.1921. *General Requirements for a Nursing Facility.*

(a) The facility must admit and retain only residents whose needs can be met through service from the facility staff, or in cooperation with community resources or other providers under contract.

(b) Individuals who have met the requirements of Chapter 17 of this title (relating to Preadmission Screening and Resident Review (PASRR) and have mental or physical diseases, or both, that endanger other residents may be admitted or retained if adequate rooms and care are provided to protect the other residents.

(c) The term "hospital" may not be used as part of the name of a nursing facility unless it has been classified and duly licensed as a hospital by the appropriate state agency.

(d) A facility that ceases operation, temporarily or permanently, voluntarily or involuntarily, must provide notice to the residents and residents' relatives or responsible parties of closure. See §19.2310 of this chapter (relating to Nursing Facility Ceases to Participate) for additional notice requirements that apply to a Medicaid or Medicare certified facility.

(1) If the closure is voluntary, within one week after the date on which the decision to close is made, the facility must send written notice to residents' relatives or responsible parties stating that the closure will occur no earlier than 60 days after receipt of the notice.

(2) If the closure is involuntary, the facility must make the notification, whether orally or in writing, immediately on receiving notice of the closure.

(e) Each licensed facility must conspicuously and prominently post the information listed in paragraphs (1) - (13) of this subsection in an area of the facility that is readily available to residents, employees, and visitors. The posting must be in a manner that each item of information is directly visible at a single time. In the case of a licensed section that is part of a larger building or complex, the posting must be in the licensed section or public way leading to it. Any exceptions must be approved by DADS. The following items must be posted:

- (1) the facility license;
- (2) a complaint sign provided by DADS giving the toll-free telephone number;
- (3) a notice in a form prescribed by DADS that inspection and related reports are available at the facility for public inspection;
- (4) a concise summary prepared by DADS of the most recent inspection report;
- (5) a notice of DADS toll-free telephone number 1-800-458-9858 to request summary reports relating to the quality of care, recent investigations, litigation or other aspects of the operation of the facility that are available to the public;
- (6) a notice that DADS can provide information about the nursing facility administrator at 512-438-2015;
- (7) if a facility has been ordered to suspend admissions, a notice of the suspension, which must be posted also on all doors providing public ingress to and egress from the facility;
- (8) the statement of resident rights provided in §19.401 of this chapter (relating to Introduction) and any additional facility requirements involving resident rights and responsibilities;
- (9) a notice that employees, other staff, residents, volunteers, and family members and guardians of residents are protected from discrimination or retaliation as provided by the Texas Health and Safety Code, §260A.014 and §260A.015; and that the facility has available for public inspection a copy of the Texas Health and Safety Code, Chapter 260A;
- (10) a prominent and conspicuous sign for display in a public area of the facility that is readily available to the residents, employees, and visitors and that includes the statement: **CASES OF SUSPECTED ABUSE, NEGLECT, OR EXPLOITATION SHALL BE REPORTED TO THE DEPARTMENT OF AGING AND DISABILITY SERVICES BY CALLING 1-800-458-9858;**
- (11) for a facility that advertises, markets, or otherwise promotes that it provides services to residents with Alzheimer's disease and related disorders, a disclosure statement describing the nature of its care or treatment of residents with Alzheimer's disease and related disorders in accordance with §19.204(b)(4) of this chapter (relating to Application Requirements);
- (12) at each entrance to the facility, a sign that states that a person may not enter the premises with a concealed handgun and that complies with Government Code §411.204; and
- (13) daily for each shift, the current number of licensed and unlicensed nursing staff directly responsible for resident care in the facility. In addition, the nursing facility must make the information required to be posted available to the public upon request.

(f) A facility that advertises, markets, or otherwise promotes that it provides services to residents with Alzheimer's disease and related disorders must give:

(1) the disclosure statement required by §19.204(b)(4) of this chapter (relating to Application Requirements) to:

(A) an individual with Alzheimer's disease or a related disorder who is seeking to become a resident of the facility;

(B) an individual assisting an individual with Alzheimer's disease or a related disorder who is seeking to become a resident of the facility; and

(C) an individual seeking information about the facility's care and treatment of residents with Alzheimer's disease and related disorders; and

(2) an amended disclosure statement required by §19.204(b)(4)(C) to a resident, responsible party, or legal guardian at least 30 days before the change in the operation of the facility reflected in the amended disclosure statement is effective.

(g) The reports referenced in subsection (e)(3) of this section must be maintained in a well-lighted, accessible location and must include:

(1) a statement of the facility's compliance record that is updated at least bi-monthly and reflects at least one year's compliance record, in a form required by DADS; and

(2) if a facility has been cited for a violation of residents' rights, a copy of the citation, which must remain in the reports until any regulatory action with respect to the violation is complete and DADS has determined that the facility is in full compliance with the applicable requirement.

(h) The facility must inform the resident or responsible party or both upon the resident's admission that the inspection reports referenced in subsection (e)(3) of this section are available for review.

(i) A facility must provide the telephone number for reporting cases of suspected abuse, neglect, or exploitation to an immediate family member of a resident of the facility upon the resident's admission to the facility.

(j) A copy of the Texas Health and Safety Code, Chapters 242 and 260A, must be available for public inspection at the facility.

(k) Within 72 hours after admission, the facility must prepare a written inventory of the personal property a resident brings to the facility, such as furnishings, jewelry, televisions, radios, sewing machines, and medical equipment. The facility does not have to inventory the resident's clothing; however, the operating policies and procedures must provide for the management of resident clothing and other personal property to prevent loss or damage. The facility administrator or his or her designee must sign and retain the written inventory and must give a copy to the resident or the resident's responsible party or both. The facility must revise the written inventory to show if property is lost, destroyed, damaged, replaced, or supplemented. Upon discharge of the resident, the facility must document the disposition of personal effects by a dated receipt bearing the signature of the resident or the resident's responsible party or both. See §19.416 of this chapter (relating to Personal Property).

(l) Each facility must comply with the provisions of the Texas Health and Safety Code, Chapter 250 (relating to Nurse Aide Registry and Criminal History Checks of Employees and Applicants for Employment in Certain Facilities Serving the Elderly or Persons with Disabilities).

(m) Before a facility hires an unlicensed employee, the facility must search the employee misconduct registry (EMR) established under §253.007, Texas Health and Safety Code, and the DADS nurse aide registry (NAR) to determine whether the individual is designated in either registry as unemployable. Both registries can be accessed on the DADS Internet website.

(n) A facility is prohibited from hiring or continuing to employ a person who is listed in the EMR or NAR as unemployable.

(o) A facility must provide notification about the EMR to an employee in accordance with §93.3 of this title (relating to Employment and Registry Information).

(p) In addition to the initial search of the EMR and NAR, a facility must:

(1) conduct a search of the NAR and EMR to determine if an employee of the facility is listed as unemployable in either registry as follows:

(A) for an employee most recently hired before September 1, 2009, by August 31, 2011, and at least every 12 months thereafter; and

(B) for an employee most recently hired on or after September 1, 2009, at least every twelve months; and

(2) keep a copy of the results of the initial and annual searches of the NAR and EMR in the employee's personnel file.

(q) A facility must upload to the DADS website, at <http://fives.dads.state.tx.us/choose.asp>, a statement of all facility requirements involving resident rights and responsibilities that are not described in §19.401(b) of this chapter. The facility must promptly upload a revised statement if the facility changes its requirements.

§19.1936. *Guardianship Orders for a Nursing Facility Resident.*

(a) A facility must request a copy of any current court order appointing a guardian and letters of guardianship for a resident or a resident's estate from the resident's nearest relative or the person responsible for the resident's support.

(b) A facility must request the court order and letters of guardianship:

(1) when a facility admits an individual; and

(2) when the facility becomes aware a guardian is appointed after the facility admits a resident.

(c) A facility must request an updated copy of the court order and letters of guardianship at each annual assessment and retain documentation of any change.

(d) A facility must make at least one follow-up request within 30 days after the facility makes a request in accordance with subsection (b) or (c) of this section if the facility has not received:

(1) a copy of the court order and letters of guardianship; or

(2) a response that there is no court order and letters of guardianship.

(e) A facility must keep in the resident's clinical record:

(1) documentation of the results of the request for the court order and letters of guardianship; and

(2) a copy of the most recent court order appointing a guardian of a resident or a resident's estate and letters of guardianship that the facility received.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Lawrence Hornsby

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Department of Aging and Disability Services

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For further information, please call: (512) 438-2235



CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§92.2, 92.41, 92.51, and 92.53 and new §92.42, in Chapter 92, Licensing Standards for Assisted Living Facilities. The amendments to §§92.2, 92.41, and 92.53 and new §92.42 are adopted with changes to the proposed text published in the January 15, 2016, issue of the *Texas Register* (41 TexReg 592). The amendments to §92.51 are adopted without changes to the proposed text.

The amendments and new section are adopted to implement §247.070, Texas Health and Safety Code (THSC), as added by House Bill (H.B.) 1337 of the 84th Legislature, Regular Session, 2015, and amendments to §247.026 and §247.029, THSC, as made by H.B. 2588 of the 84th Legislature, Regular Session, 2015.

In response to H.B. 1337, the adoption requires an assisted living facility (ALF) to request a copy of any court order and letters of guardianship appointing a guardian of a resident or a resident's estate from the resident's nearest relative or the person responsible for the resident's support, and requires an ALF to maintain in a resident's records a copy of the most recent court order and letters of guardianship received by the ALF.

In response to H.B. 2588, the adoption defines the term "Alzheimer's Assisted Living Disclosure Statement Form" and "Alzheimer's disease and related disorders" and requires an ALF to use the Alzheimer's Assisted Living Disclosure Statement Form and amend the form to reflect any changes in the operation of the ALF that will affect the information in the form.

The adoption also corrects a reference in §92.41 to a rule of the Texas Department of State Health Services regarding food safety.

Minor editorial changes were made to §92.41(h)(2)(F) and §92.42(a), (b), and (d). Changes were made to §92.53(d) and (e) to clarify when an ALF must amend and provide the Alzheimer's Assisted Living Disclosure Statement form. A reference to a section in the Life Safety Code was corrected in §92.53(i)(9).

DADS received written comments from Coalition for Nurses in Advance Practice, Texas Association of Residential Care Communities, and the State Long-term Care Ombudsman. A summary of the comments and the responses follows.

Comment: Two commenters expressed concern regarding the definition of "Alzheimer's disease and related disorders" in §92.2. One commenter questioned the use of clinical references in the definition and recommended the rule provide a comprehensive definition of Alzheimer's disease and related disorders. Another commenter requested that the agency include in the definition a description of dementia and a definition of "related disorders."

Response: Texas Health and Safety Code §247.029 authorizes the HHSC Executive Commissioner to adopt by reference a definition of "Alzheimer's disease and related disorders" that is published in a generally accepted clinical resource for medical professionals. Because the understanding and classification of these conditions may change as research and treatment continue, the agency has referenced the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders and the Centers for Disease Control and Prevention as sources that describe the diseases and disorders included in this term. In response to the comment, the agency changed the definition to reference Alzheimer's disease and any other irreversible dementia instead of cognitive disorders to be more specific about the diseases and disorders included in the term.

Comment: One commenter suggested adding the terms "practitioner" to §92.41(e)(1), (e)(5)(l), (h)(1)(D), (j)(1), (j)(1)(B), (j)(1)(C), (j)(4)(A), (j)(6)(A)(i), (k)(1)(B), (m)(4), (n)(4)(D), (p)(5)(B)(i), and (p)(5)(B)(ii). In addition, the commenter requested that the agency add the terms "advanced practice registered nurse" and "physician assistant" to §92.41(e)(4) and §92.41(h)(1)(F). The commenter stated that these changes would make the rules more accurately reflect which practitioners are authorized to order and provide services to residents of an ALF.

Response: The suggested revisions to §92.41 would substantively affect responsibilities under the chapter and are outside the scope of the proposed changes. The agency will consider the implications of the suggested changes and may propose amendments to the rule in the future. The agency did not make any changes in response to this comment.

SUBCHAPTER A. INTRODUCTION

40 TAC §92.2

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code (THSC), §247.025, which authorizes the licensing of assisted living facilities.

§92.2. Definitions.

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

(1) Abuse--

(A) for a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes, the term has the meaning in Texas Family Code §261.401(1), which is an intentional, knowing, or reckless act or omission by an employee, volunteer, or other individual working under

the auspices of a facility or program that causes or may cause emotional harm or physical injury to, or the death of, a child served by the facility or program as further described by rule or policy; and

(B) for a person other than one described in subparagraph (A) of this paragraph, the term has the meaning in Texas Health and Safety Code §260A.001(1), which is:

(i) the negligent or willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to a resident by the resident's caregiver, family member, or other individual who has an ongoing relationship with the resident; or

(ii) sexual abuse of a resident, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Section 21.08, Penal Code (indecent exposure), or Chapter 22, Penal Code (assaultive offenses), committed by the resident's caregiver, family member, or other individual who has an ongoing relationship with the resident.

(2) Accreditation commission--Has the meaning given in Texas Health and Safety Code, §247.032.

(3) Advance directive--Has the meaning given in Texas Health and Safety Code, §166.002.

(4) Affiliate--With respect to:

(A) a partnership, each partner thereof;

(B) a corporation, each officer, director, principal stockholder, subsidiary, and each person with a disclosable interest, as the term is defined in this section; and

(C) a natural person:

(i) said person's spouse;

(ii) each partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

(iii) each corporation in which said person is an officer, director, principal stockholder, or person with a disclosable interest.

(5) Alzheimer's Assisted Living Disclosure Statement form--The DADS-prescribed form a facility uses to describe the nature of care or treatment of residents with Alzheimer's disease and related disorders.

(6) Alzheimer's disease and related disorders--Alzheimer's disease and any other irreversible dementia described by the Centers for Disease Control and Prevention (CDC) or the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

(7) Alzheimer's facility--A type B assisted living facility that is certified to provide specialized services to residents with Alzheimer's or a related condition.

(8) Applicant--A person applying for a license to operate an assisted living facility under Texas Health and Safety Code, Chapter 247.

(9) Attendant--A facility employee who provides direct care to residents. This employee may serve other functions, including cook, janitor, porter, maid, laundry worker, security personnel, bookkeeper, activity director, and manager.

(10) Authorized electronic monitoring (AEM)--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

(11) Behavioral emergency--Has the meaning given in §92.41(p)(2) of this chapter (relating to Standards for Type A and Type B Assisted Living Facilities).

(12) Change of ownership--A change of ownership is:

(A) a change of sole proprietorship that is licensed to operate a facility;

(B) a change of 50 percent or more in the ownership of the business organization that is licensed to operate the facility;

(C) a change in the federal taxpayer identification number; or

(D) relinquishment by the license holder of the operation of the facility.

(13) Commingles--The laundering of apparel or linens of two or more individuals together.

(14) Controlling person--A person with the ability, acting alone or with others, to directly or indirectly influence, direct, or cause the direction of the management, expenditure of money, or policies of an assisted living facility or other person. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of an assisted living facility;

(B) any person who is a controlling person of a management company or other business entity that operates an assisted living facility or that contracts with another person for the operation of an assisted living facility;

(C) an officer or director of a publicly traded corporation that is, or that controls, a facility, management company, or other business entity described in subparagraph (A) of this paragraph but does not include a shareholder or lender of the publicly traded corporation; and

(D) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of an assisted living facility, is in a position of actual control or authority with respect to the facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility, except an employee, lender, secured creditor, landlord, or other person who does not exercise formal or actual influence or control over the operation of an assisted living facility.

(15) Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and DADS have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(16) DADS--The Department of Aging and Disability Services.

(17) DHS--Formerly, this term referred to the Texas Department of Human Services; it now refers to DADS.

(18) Dietitian--A person who currently holds a license or provisional license issued by the Texas State Board of Examiners of Dietitians.

(19) Disclosure statement--A DADS form for prospective residents or their legally authorized representatives that a facility must complete. The form contains information regarding the preadmission, admission, and discharge process; resident assessment and service

plans; staffing patterns; the physical environment of the facility; resident activities; and facility services.

(20) Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(21) Exploitation--

(A) for a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes, the term has the meaning in Texas Family Code §261.401(2), which is the illegal or improper use of a child or of the resources of a child for monetary or personal benefit, profit, or gain by an employee, volunteer, or other individual working under the auspices of a facility or program as further described by rule or policy; and

(B) for a person other than one described in subparagraph (A) of this paragraph, the term has the meaning in Texas Health and Safety Code §260A.001(4), which is the illegal or improper act or process of a caregiver, family member, or other individual who has an ongoing relationship with the resident using the resources of a resident for monetary or personal benefit, profit, or gain without the informed consent of the resident.

(22) Facility--An entity required to be licensed under the Assisted Living Facility Licensing Act, Texas Health and Safety Code, Chapter 247.

(23) Fire suppression authority--The paid or volunteer fire-fighting organization or tactical unit that is responsible for fire suppression operations and related duties once a fire incident occurs within its jurisdiction.

(24) Flame spread--The rate of fire travel along the surface of a material. This is different than other requirements for time-rated "burn through" resistance ratings, such as one-hour rated. Flame spread ratings are Class A (0-25), Class B (26-75), and Class C (76-200).

(25) Governmental unit--The state or any county, municipality, or other political subdivision, or any department, division, board, or other agency of any of the foregoing.

(26) Health care professional--An individual licensed, certified, or otherwise authorized to administer health care, for profit or otherwise, in the ordinary course of business or professional practice. The term includes a physician, registered nurse, licensed vocational nurse, licensed dietitian, physical therapist, and occupational therapist.

(27) Immediate threat--There is considered to be an immediate threat to the health or safety of a resident, or a situation is considered to put the health or safety of a resident in immediate jeopardy, if there is a situation in which an assisted living facility's noncompliance with one or more requirements of licensure has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

(28) Immediately available--The capacity of facility staff to immediately respond to an emergency after being notified through a communication or alarm system. The staff are to be no more than 600 feet from the farthest resident and in the facility while on duty.

(29) Large facility--A facility licensed for 17 or more residents.

(30) Legally authorized representative--A person authorized by law to act on behalf of a person with regard to a matter

described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(31) Listed--Equipment, materials, or services included in a list published by an organization concerned with evaluation of products or services, that maintains periodic inspection of production of listed equipment or materials or periodic evaluation of services, and whose listing states that either the equipment, material, or service meets appropriate designated standards or has been tested and found suitable for a specified purpose. The listing organization must be acceptable to the authority having jurisdiction, including DADS or any other state, federal or local authority.

(32) Local code--A model building code adopted by the local building authority where the assisted living facility is constructed or located.

(33) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, transportation, or food services.

(34) Manager--The individual in charge of the day-to-day operation of the facility.

(35) Medication--

(A) Medication is any substance:

(i) recognized as a drug in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, Texas Drug Code Index or official National Formulary, or any supplement to any of these official documents;

(ii) intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease;

(iii) other than food intended to affect the structure or any function of the body; and

(iv) intended for use as a component of any substance specified in this definition.

(B) Medication includes both prescription and over-the-counter medication, unless otherwise specified.

(C) Medication does not include devices or their components, parts, or accessories.

(36) Medication administration--The direct application of a medication or drug to the body of a resident by an individual legally allowed to administer medication in the state of Texas.

(37) Medication assistance or supervision--The assistance or supervision of the medication regimen by facility staff. Refer to §92.41(j) of this chapter.

(38) Medication (self-administration)--The capability of a resident to administer the resident's own medication or treatments without assistance from the facility staff.

(39) Neglect--

(A) for a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes, the term has the meaning in Texas Family Code, §261.401(3), which is a negligent act or omission by an employee, volunteer, or other individual working under the auspices of a facility or program, including failure to comply with an individual treatment plan, plan of care, or individualized service plan, that causes or may cause substantial emotional harm or physical injury to, or the

death of, a child served by the facility or program as further described by rule or policy; and

(B) for a person other than one described in subparagraph (A) of this paragraph, the term has the meaning in Texas Health and Safety Code §260A.001(6), which is the failure to provide for one's self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of a caregiver to provide such goods or services.

(40) NFPA 101--The 2000 publication titled "NFPA 101 Life Safety Code" published by the National Fire Protection Association, Inc., 1 Batterymarch Park, Quincy, Massachusetts 02169.

(41) Ombudsman--Has the meaning given in §85.2 of this title (relating to Definitions).

(42) Person--Any individual, firm, partnership, corporation, association, or joint stock association, and the legal successor thereof.

(43) Person with a disclosable interest--Any person who owns 5.0 percent interest in any corporation, partnership, or other business entity that is required to be licensed under Texas Health and Safety Code, Chapter 247. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company unless such entity participates in the management of the facility.

(44) Personal care services--Assistance with feeding, dressing, moving, bathing, or other personal needs or maintenance; or general supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent residence in the facility or who needs assistance to manage his or her personal life, regardless of whether a guardian has been appointed for the person.

(45) Physician--A practitioner licensed by the Texas Medical Board.

(46) Practitioner--An individual who is currently licensed in a state in which the individual practices as a physician, dentist, podiatrist, or a physician assistant; or a registered nurse approved by the Texas Board of Nursing to practice as an advanced practice registered nurse.

(47) Qualified medical personnel--An individual who is licensed, certified, or otherwise authorized to administer health care. The term includes a physician, registered nurse, and licensed vocational nurse.

(48) Resident--An individual accepted for care in a facility.

(49) Respite--The provision by a facility of room, board, and care at the level ordinarily provided for permanent residents of the facility to a person for not more than 60 days for each stay in the facility.

(50) Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(51) Restraints--Chemical restraints are psychoactive drugs administered for the purposes of discipline or convenience and are not required to treat the resident's medical symptoms. Physical restraints are any manual method, or physical or mechanical device, material, or equipment attached or adjacent to the resident that restricts freedom of movement. Physical restraints include restraint holds.

(52) Safety--Protection from injury or loss of life due to such conditions as fire, electrical hazard, unsafe building or site conditions, and the hazardous presence of toxic fumes and materials.

(53) Seclusion--The involuntary separation of a resident from other residents and the placement of the resident alone in an area from which the resident is prevented from leaving.

(54) Service plan--A written description of the medical care, supervision, or nonmedical care needed by a resident.

(55) Short-term acute episode--An illness of less than 30 days duration.

(56) Small facility--A facility licensed for 16 or fewer residents.

(57) Staff--Employees of an assisted living facility.

(58) Standards--The minimum conditions, requirements, and criteria established in this chapter with which a facility must comply to be licensed under this chapter.

(59) Terminal condition--A medical diagnosis, certified by a physician, of an illness that will result in death in six months or less.

(60) Universal precautions--An approach to infection control in which blood, any body fluids visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids are treated as if known to be infectious for HIV, hepatitis B, and other blood-borne pathogens.

(61) Vaccine Preventable Diseases--The diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the CDC.

(62) Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. STANDARDS FOR LICENSURE

40 TAC §§92.41, 91.42, 91.51, 92.53

The amendments and new section are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services

agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code (THSC), §247.025, which authorizes the licensing of assisted living facilities.

§92.41. *Standards for Type A and Type B Assisted Living Facilities.*

(a) Employees.

(1) Manager. Each facility must designate, in writing, a manager to have authority over the operation.

(A) Qualifications. In small facilities, the manager must have proof of graduation from an accredited high school or certification of equivalency of graduation. In large facilities, a manager must have:

(i) an associate's degree in nursing, health care management, or a related field;

(ii) a bachelor's degree; or

(iii) proof of graduation from an accredited high school or certification of equivalency of graduation and at least one year of experience working in management or in health care industry management.

(B) Training in management of assisted living facilities. After August 1, 2000, a manager must have completed at least one educational course on the management of assisted living facilities, which must include information on the assisted living standards; resident characteristics (including dementia), resident assessment and skills working with residents; basic principles of management; food and nutrition services; federal laws, with an emphasis on the Americans with Disability Act's accessibility requirements; community resources; ethics, and financial management.

(i) The course must be at least 24 hours in length.

(I) Eight hours of training on the assisted living standards must be completed within the first three months of employment.

(II) The 24-hour training requirement may not be met through in-services at the facility, but may be met through structured, formalized classes, correspondence courses, training videos, distance learning programs, or off-site training courses. All training must be provided or produced by academic institutions, assisted living corporations, or recognized state or national organizations or associations. Subject matter that deals with the internal affairs of an organization will not qualify for credit.

(III) Evidence of training must be on file at the facility and must contain documentation of content, hours, dates, and provider.

(ii) Managers hired after August 1, 2000, who can show documentation of a previously completed comparable course of study are exempt from the training requirements.

(iii) Managers hired after August 1, 2000, must complete the course by the first anniversary of employment as manager.

(iv) An assisted living manager who was employed by a licensed assisted living facility on August 1, 2000, is exempt from the training requirement. An assisted living manager who was employed by a licensed assisted living facility as the manager before Au-

gust 1, 2000, and changes employment to another licensed assisted living facility as the manager, with a break in employment of no longer than 30 days, is also exempt from the training requirement.

(C) Continuing education. All managers must show evidence of 12 hours of annual continuing education. This requirement will be met during the first year of employment by the 24-hour assisted living management course. The annual continuing education requirement must include at least two of the following areas:

- (i) resident and provider rights and responsibilities, abuse/neglect, and confidentiality;
- (ii) basic principles of management;
- (iii) skills for working with residents, families, and other professional service providers;
- (iv) resident characteristics and needs;
- (v) community resources;
- (vi) accounting and budgeting;
- (vii) basic emergency first aid; or
- (viii) federal laws, such as Americans with Disabilities Act, Civil Rights Act of 1991, the Rehabilitation Act of 1993, Family and Medical Leave Act of 1993, and the Fair Housing Act.

(D) Manager's responsibilities. The manager must be on duty 40 hours per week and may manage only one facility, except for managers of small Type A facilities, who may have responsibility for no more than 16 residents in no more than four facilities. The managers of small Type A facilities must be available by telephone or pager when conducting facility business off-site.

(E) Manager's absence. An employee competent and authorized to act in the absence of the manager must be designated in writing.

(2) Attendants. Full-time facility attendants must be at least 18 years old or a high-school graduate.

(A) An attendant must be in the facility at all times when residents are in the facility.

(B) Attendants are not precluded from performing other functions as required by the assisted living facility.

(3) Staffing.

(A) A facility must develop and implement staffing policies, which require staffing ratios based upon the needs of the residents, as identified in their service plans.

(B) Prior to admission, a facility must disclose, to prospective residents and their families, the facility's normal 24-hour staffing pattern and post it monthly in accordance with §92.127 of this title (relating to Required Postings).

(C) A facility must have sufficient staff to:

- (i) maintain order, safety, and cleanliness;
- (ii) assist with medication regimens;
- (iii) prepare and service meals that meet the daily nutritional and special dietary needs of each resident, in accordance with each resident's service plan;
- (iv) assist with laundry;
- (v) assure that each resident receives the kind and amount of supervision and care required to meet his basic needs; and

(vi) ensure safe evacuation of the facility in the event of an emergency.

(D) A facility must meet the staffing requirements described in this subparagraph.

(i) Type A facility: Night shift staff in a small facility must be immediately available. In a large facility, the staff must be immediately available and awake.

(ii) Type B facility: Night shift staff must be immediately available and awake, regardless of the number of licensed beds.

(4) Staff training. The facility must document that staff members are competent to provide personal care before assuming responsibilities and have received the following training.

(A) All staff members must complete four hours of orientation before assuming any job responsibilities. Training must cover, at a minimum, the following topics:

- (i) reporting of abuse and neglect;
- (ii) confidentiality of resident information;
- (iii) universal precautions;
- (iv) conditions about which they should notify the facility manager;
- (v) residents' rights; and
- (vi) emergency and evacuation procedures.

(B) Attendants must complete 16 hours of on-the-job supervision and training within the first 16 hours of employment following orientation. Training must include:

- (i) in Type A and B facilities, providing assistance with the activities of daily living;
- (ii) resident's health conditions and how they may affect provision of tasks;
- (iii) safety measures to prevent accidents and injuries;
- (iv) emergency first aid procedures, such as the Heimlich maneuver and actions to take when a resident falls, suffers a laceration, or experiences a sudden change in physical and/or mental status;
- (v) managing disruptive behavior;
- (vi) behavior management, for example, prevention of aggressive behavior and de-escalation techniques, practices to decrease the frequency of the use of restraint, and alternatives to restraints; and
- (vii) fall prevention.

(C) Direct care staff must complete six documented hours of education annually, based on each employee's hire date. Staff must complete one hour of annual training in fall prevention and one hour of training in behavior management, for example, prevention of aggressive behavior and de-escalation techniques, practices to decrease the frequency of the use of restraint, and alternatives to restraints. Training for these subjects must be competency-based. Subject matter must address the unique needs of the facility. Suggested topics include:

- (i) promoting resident dignity, independence, individuality, privacy, and choice;

(ii) resident rights and principles of self-determination;

(iii) communication techniques for working with residents with hearing, visual, or cognitive impairment;

(iv) communicating with families and other persons interested in the resident;

(v) common physical, psychological, social, and emotional conditions and how these conditions affect residents' care;

(vi) essential facts about common physical and mental disorders, for example, arthritis, cancer, dementia, depression, heart and lung diseases, sensory problems, or stroke;

(vii) cardiopulmonary resuscitation;

(viii) common medications and side effects, including psychotropic medications, when appropriate;

(ix) understanding mental illness;

(x) conflict resolution and de-escalation techniques; and

(xi) information regarding community resources.

(D) Facilities that employ licensed nurses, certified nurse aides, or certified medication aides must provide annual in-service training, appropriate to their job responsibilities, from one or more of the following areas:

(i) communication techniques and skills useful when providing geriatric care (skills for communicating with the hearing impaired, visually impaired and cognitively impaired; therapeutic touch; recognizing communication that indicates psychological abuse);

(ii) assessment and interventions related to the common physical and psychological changes of aging for each body system;

(iii) geriatric pharmacology, including treatment for pain management, food and drug interactions, and sleep disorders;

(iv) common emergencies of geriatric residents and how to prevent them, for example falls, choking on food or medicines, injuries from restraint use; recognizing sudden changes in physical condition, such as stroke, heart attack, acute abdomen, acute glaucoma; and obtaining emergency treatment;

(v) common mental disorders with related nursing implications; and

(vi) ethical and legal issues regarding advance directives, abuse and neglect, guardianship, and confidentiality.

(b) Social services. The facility must provide an activity and/or social program at least weekly for the residents.

(c) Resident assessment. Within 14 days of admission, a resident comprehensive assessment and an individual service plan for providing care, which is based on the comprehensive assessment, must be completed. The comprehensive assessment must be completed by the appropriate staff and documented on a form developed by the facility. When a facility is unable to obtain information required for the comprehensive assessment, the facility should document its attempts to obtain the information.

(1) The comprehensive assessment must include the following items:

(A) the location from which the resident was admitted;

(B) primary language;

(C) sleep-cycle issues;

(D) behavioral symptoms;

(E) psychosocial issues (i.e., a psychosocial functioning assessment that includes an assessment of mental or psychosocial adjustment difficulty; a screening for signs of depression, such as withdrawal, anger or sad mood; assessment of the resident's level of anxiety; and determining if the resident has a history of psychiatric diagnosis that required in-patient treatment);

(F) Alzheimer's/dementia history;

(G) activities of daily living patterns (i.e., wakened to toilet all or most nights, bathed in morning/night, shower or bath);

(H) involvement patterns and preferred activity pursuits (i.e., daily contact with relatives, friends, usually attended religious services, involved in group activities, preferred activity settings, general activity preferences);

(I) cognitive skills for daily decision-making (independent, modified independence, moderately impaired, severely impaired);

(J) communication (ability to communicate with others, communication devices);

(K) physical functioning (transfer status; ambulation status; toilet use; personal hygiene; ability to dress, feed and groom self);

(L) continence status;

(M) nutritional status (weight changes, nutritional problems or approaches);

(N) oral/dental status;

(O) diagnoses;

(P) medications (administered, supervised, self-administers);

(Q) health conditions and possible medication side effects;

(R) special treatments and procedures;

(S) hospital admissions within the past six months or since last assessment; and

(T) preventive health needs (i.e., blood pressure monitoring, hearing-vision assessment).

(2) The service plan must be approved and signed by the resident or a person responsible for the resident's health care decisions. The facility must provide care according to the service plan. The service plan must be updated annually and upon a significant change in condition, based upon an assessment of the resident.

(3) For respite clients, the facility may keep a service plan for six months from the date on which it is developed. During that period, the facility may admit the individual as frequently as needed.

(4) Emergency admissions must be assessed and a service plan developed for them.

(d) Resident policies.

(1) Before admitting a resident, facility staff must explain and provide a copy of the disclosure statement to the resident, family, or responsible party. An assisted living facility that provides brain injury rehabilitation services must attach to its disclosure statement a

specific statement that licensure as an assisted living facility does not indicate state review, approval, or endorsement of the facility's rehabilitative services. The facility must document receipt of the disclosure statement.

(2) The facility must provide residents with a copy of the Resident Bill of Rights.

(3) When a resident is admitted, the facility must provide to the resident's immediate family, and document the family's receipt of, the DADS telephone hotline number to report suspected abuse, neglect, or exploitation, as referenced in §92.102 of this chapter (relating to Abuse, Neglect, or Exploitation Reportable to DADS).

(4) The facility must have written policies regarding residents accepted, services provided, charges, refunds, responsibilities of facility and residents, privileges of residents, and other rules and regulations.

(5) Each facility must make available copies of the resident policies to staff and to residents or residents' responsible parties at time of admission. Documented notification of any changes to the policies must occur before the effective date of the changes.

(6) Before or upon admission of a resident, a facility must notify the resident and, if applicable, the resident's legally authorized representative, of DADS rules and the facility's policies related to restraint and seclusion.

(e) Admission policies.

(1) A facility must not admit or retain a resident whose needs cannot be met by the facility or who cannot secure the necessary services from an outside resource. As part of the facility's general supervision and oversight of the physical and mental well-being of its residents, the facility remains responsible for all care provided at the facility. If the individual is appropriate for placement in a facility, then the decision that additional services are necessary and can be secured is the responsibility of facility management with written concurrence of the resident, resident's attending physician, or legal representative. Regardless of the possibility of "aging in place" or securing additional services, the facility must meet all Life Safety Code requirements based on each resident's evacuation capabilities, except as provided in subsection (f) of this section.

(2) There must be a written admission agreement between the facility and the resident. The agreement must specify such details as services to be provided and the charges for the services. If the facility provides services and supplies that could be a Medicare benefit, the facility must provide the resident a statement that such services and supplies could be a Medicare benefit.

(3) A facility must share a copy of the facility disclosure statement, rate schedule, and individual resident service plan with outside resources that provide any additional services to a resident. Outside resources must provide facilities with a copy of their resident care plans and must document, at the facility, any services provided, on the day provided.

(4) Each resident must have a health examination by a physician performed within 30 days before admission or 14 days after admission, unless a transferring hospital or facility has a physical examination in the medical record.

(5) The assisted living facility must secure at the time of admission of a resident the following identifying information:

- (A) full name of resident;
- (B) social security number;

(C) usual residence (where resident lived before admission);

(D) sex;

(E) marital status;

(F) date of birth;

(G) place of birth;

(H) usual occupation (during most of working life);

(I) family, other persons named by the resident, and physician for emergency notification;

(J) pharmacy preference; and

(K) Medicaid/Medicare number, if available.

(f) Inappropriate placement in Type A or Type B facilities.

(1) DADS or a facility may determine that a resident is inappropriately placed in the facility if a resident experiences a change of condition but continues to meet the facility evacuation criteria.

(A) If DADS determines the resident is inappropriately placed and the facility is willing to retain the resident, the facility is not required to discharge the resident if, within 10 working days after receiving the Statement of Licensing Violations and Plan of Correction, Form 3724, and the Report of Contact, Form 3614-A, from DADS, the facility submits the following to the DADS regional office:

(i) Physician's Assessment, Form 1126, indicating that the resident is appropriately placed and describing the resident's medical conditions and related nursing needs, ambulatory and transfer abilities, and mental status;

(ii) Resident's Request to Remain in Facility, Form 1125, indicating that:

(I) the resident wants to remain at the facility; or

(II) if the resident lacks capacity to provide a written statement, the resident's family member or legally authorized representative wants the resident to remain at the facility; and

(iii) Facility Request, Form 1124, indicating that the facility agrees that the resident may remain at the facility.

(B) If the facility initiates the request for an inappropriately placed resident to remain in the facility, the facility must complete and date the forms described in subparagraph (A) of this paragraph and submit them to the DADS regional office within 10 working days after the date the facility determines the resident is inappropriately placed, as indicated on the DADS prescribed forms.

(2) DADS or a facility may determine that a resident is inappropriately placed in the facility if the facility does not meet all requirements referenced in §92.3 of this chapter (relating to Types of Assisted Living Facilities) for the evacuation of a designated resident.

(A) If, during a site visit, DADS determines that a resident is inappropriately placed at the facility and the facility is willing to retain the resident, the facility must request an evacuation waiver as described in subparagraph (C) of this paragraph to the DADS regional office within 10 working days after the date the facility receives the Statement of Licensing Violations and Plan of Correction, Form 372, and the Report of Contact, Form 3614-A. If the facility is not willing to retain the resident, the facility must discharge the resident within 30 days after receiving the Statement of Licensing Violations and Plan of Correction and the Report of Contact.

(B) If the facility initiates the request for a resident to remain in the facility, the facility must request an evacuation waiver as described in subparagraph (C) of this paragraph from the DADS regional office within 10 working days after the date the facility determines the resident is inappropriately placed, as indicated on the DADS prescribed forms.

(C) To request an evacuation waiver for an inappropriately placed resident, a facility must submit to the DADS regional office:

(i) Physician's Assessment, Form 1126, indicating that the resident is appropriately placed and describing the resident's medical conditions and related nursing needs, ambulatory and transfer abilities, and mental status;

(ii) Resident's Request to Remain in Facility, Form 1125, indicating that:

(I) the resident wants to remain at the facility; or

(II) if the resident lacks capacity to provide a written statement, the resident's family member or legally authorized representative wants the resident to remain at the facility;

(iii) Facility Request, Form 1124, indicating that the facility agrees that the resident may remain at the facility;

(iv) a detailed emergency plan that explains how the facility will meet the evacuation needs of the resident, including:

(I) the specific staff positions that will be on duty to assist with evacuation and their shift times;

(II) specific staff positions that will be on duty and awake at night; and

(III) specific staff training that relates to resident evacuation;

(v) a copy of an accurate facility floor plan, to scale, that labels all rooms by use and indicates the specific resident's room;

(vi) a copy of the facility's emergency evacuation plan;

(vii) a copy of the facility fire drill records for the last 12 months;

(viii) a copy of a completed Fire Marshal/State Fire Marshal Notification, Form 1127, signed by the fire authority having jurisdiction (either the local Fire Marshal or State Fire Marshal) as an acknowledgement that the fire authority has been notified that the resident's evacuation capability has changed;

(ix) a copy of a completed Fire Suppression Authority Notification, Form 1129, signed by the local fire suppression authority as an acknowledgement that the fire suppression authority has been notified that the resident's evacuation capability has changed;

(x) a copy of the resident's most recent comprehensive assessment that addresses the areas required by subsection (c) of this section and that was completed within 60 days, based on the date stated on the evacuation waiver form submitted to DADS;

(xi) the resident's service plan that addresses all aspects of the resident's care, particularly those areas identified by DADS, including:

(I) the resident's medical condition and related nursing needs;

(II) hospitalizations within 60 days, based on the date stated on the evacuation waiver form submitted to DADS;

(III) any significant change in condition in the last 60 days, based on the date stated on the evacuation waiver form submitted to DADS;

(IV) specific staffing needs; and

(V) services that are provided by an outside provider;

(xii) any other information that relates to the required fire safety features of the facility that will ensure the evacuation capability of any resident; and

(xiii) service plans of other residents, if requested by DADS.

(D) A facility must meet the following criteria to receive a waiver from DADS:

(i) The emergency plan submitted in accordance with subparagraph (C)(iv) of this paragraph must ensure that:

(I) staff is adequately trained;

(II) a sufficient number of staff is on all shifts to move all residents to a place of safety;

(III) residents will be moved to appropriate locations, given health and safety issues;

(IV) all possible locations of fire origin areas and the necessity for full evacuation of the building are addressed;

(V) the fire alarm signal is adequate;

(VI) there is an effective method for warning residents and staff during a malfunction of the building fire alarm system;

(VII) there is a method to effectively communicate the actual location of the fire; and

(VIII) the plan satisfies any other safety concerns that could have an effect on the residents' safety in the event of a fire; and

(ii) the emergency plan will not have an adverse effect on other residents of the facility who have waivers of evacuation or who have special needs that require staff assistance.

(E) DADS reviews the documentation submitted under this subsection and notifies the facility in writing of its determination to grant or deny the waiver within 10 working days after the date the request is received in the DADS regional office.

(F) Upon notification that DADS has granted the evacuation waiver, the facility must immediately initiate all provisions of the proposed emergency plan. If the facility does not follow the emergency plan, and there are health and safety concerns that are not addressed, DADS may determine that there is an immediate threat to the health or safety of a resident.

(G) DADS reviews a waiver of evacuation during the facility's annual renewal licensing inspection.

(3) If a DADS surveyor determines that a resident is inappropriately placed at a facility and the facility either agrees with the determination or fails to obtain the written statements or waiver required in this subsection, the facility must discharge the resident.

(A) The resident is allowed 30 days after the date of notice of discharge to move from the facility.

(B) A discharge required under this subsection must be made notwithstanding:

(i) any other law, including any law relating to the rights of residents and any obligations imposed under the Property Code; and

(ii) the terms of any contract.

(4) If a facility is required to discharge the resident because the facility has not submitted the written statements required by paragraph (1) of this subsection to the DADS regional office, or DADS denies the waiver as described in paragraph (2) of this subsection, DADS may:

(A) assess an administrative penalty if DADS determines the facility has intentionally or repeatedly disregarded the waiver process because the resident is still residing in the facility when DADS conducts a future onsite visit; or

(B) seek other sanctions, including an emergency suspension or closing order, against the facility under Texas Health and Safety Code Chapter 247, Subchapter C (relating to General Enforcement), if DADS determines there is a significant risk and immediate threat to the health and safety of a resident of the facility.

(5) The facility's disclosure statement must notify the resident and resident's legally authorized representative of the waiver process described in this section and the facility's policies and procedures for aging in place.

(6) After the first year of employment and no later than the anniversary date of the facility manager's hire date, the manager must show evidence of annual completion of DADS training on aging in place and retaliation.

(g) Advance directives.

(1) The facility must maintain written policies regarding the implementation of advance directives. The policies must include a clear and precise statement of any procedure the facility is unwilling or unable to provide or withhold in accordance with an advance directive.

(2) The facility must provide written notice of these policies to residents at the time they are admitted to receive services from the facility.

(A) If, at the time notice is to be provided, the resident is incompetent or otherwise incapacitated and unable to receive the notice, the facility must provide the written notice, in the following order of preference, to:

(i) the resident's legal guardian;

(ii) a person responsible for the resident's health care decisions;

(iii) the resident's spouse;

(iv) the resident's adult child;

(v) the resident's parents; or

(vi) the person admitting the resident.

(B) If the facility is unable, after diligent search, to locate an individual listed under subparagraph (A) of this paragraph, the facility is not required to give notice.

(3) If a resident who was incompetent or otherwise incapacitated and unable to receive notice regarding the facility's advance directives policies later becomes able to receive the notice, the facility must provide the written notice at the time the resident becomes able to receive the notice.

(4) Failure to inform the resident of facility policies regarding the implementation of advance directives will result in an administrative penalty of \$500.

(A) Facilities will receive written notice of the recommendation for an administrative penalty.

(B) Within 20 days after the date on which written notice is sent to a facility, the facility must give written consent to the penalty or make written request for a hearing to the Texas Health and Human Services Commission.

(C) Hearings will be held in accordance with the formal hearing procedures at 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedures Act).

(h) Resident records.

(1) Records that pertain to residents must be treated as confidential and properly safeguarded from unauthorized use, loss, or destruction.

(2) Resident records must contain:

(A) information contained in the facility's standard and customary admission form;

(B) a record of the resident's assessments;

(C) the resident's service plan

(D) physician's orders, if any;

(E) any advance directives;

(F) documentation of a health examination by a physician performed within 30 days before admission or 14 days after admission, unless a transferring hospital or facility has a physical examination in the medical record. Christian Scientists are excluded from this requirement;

(G) documentation by health care professionals of any services delivered in accordance with the licensing, certification, or other regulatory standards applicable to the health care professional under law; and

(H) a copy of the most recent court order appointing a guardian of a resident or a resident's estate and letters of guardianship that the facility received in response to the request made in accordance with §92.42 of this subchapter (relating to Guardianship Record Requirements).

(3) Records must be available to residents, their legal representatives, and DADS staff.

(i) Personnel records. An assisted living facility must keep current and complete personnel records on a facility employee for review by DADS staff including:

(1) documentation that the facility performed a criminal history check;

(2) an annual employee misconduct registry check;

(3) an annual nurse aide registry check;

(4) documentation of initial tuberculosis screenings referenced in subsection (n) of this section;

(5) documentation of the employee's compliance with or exemption from the facility vaccination policy referenced in subsection (r) of this section; and

(6) the signed statement from the employee referenced in §92.102 of this chapter acknowledging that the employee may be criminally liable for the failure to report abuse, neglect and exploitation.

(j) Medications.

(1) Administration. Medications must be administered according to physician's orders.

(A) Residents who choose not to or cannot self-administer their medications must have their medications administered by a person who:

(i) holds a current license under state law that authorizes the licensee to administer medication; or

(ii) holds a current medication aide permit and acts under the authority of a person who holds a current nursing license under state law that authorizes the licensee to administer medication. A medication aide must function under the direct supervision of a licensed nurse on duty or on call by the facility.

(iii) is an employee of the facility to whom the administration of medication has been delegated by a registered nurse, who has trained them to administer medications or verified their training. The delegation of the administration of medication is governed by 22 TAC Chapter 225 (concerning RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions), which implements the Nursing Practice Act.

(B) All resident's prescribed medication must be dispensed through a pharmacy or by the resident's treating physician or dentist.

(C) Physician sample medications may be given to a resident by the facility provided the medication has specific dosage instructions for the individual resident.

(D) Each resident's medications must be listed on an individual resident's medication profile record. The recorded information obtained from the prescription label must include, but is not limited to, the medication:

- (i) name;
- (ii) strength;
- (iii) dosage;
- (iv) amount received;
- (v) directions for use;
- (vi) route of administration;
- (vii) prescription number;
- (viii) pharmacy name; and
- (ix) the date each medication was issued by the pharmacy.

(2) Supervision. Supervision of a resident's medication regimen by facility staff may be provided to residents who are incapable of self-administering without assistance to include and limited to:

- (A) reminders to take their medications at the prescribed time;
- (B) opening containers or packages and replacing lids;
- (C) pouring prescribed dosage according to medication profile record;

(D) returning medications to the proper locked areas;

(E) obtaining medications from a pharmacy; and

(F) listing on an individual resident's medication profile record the medication:

- (i) name;
- (ii) strength;
- (iii) dosage;
- (iv) amount received;
- (v) directions for use;
- (vi) route of administration;
- (vii) prescription number;
- (viii) pharmacy name; and
- (ix) the date each medication was issued by the pharmacy.

(3) Self-administration.

(A) Residents who self-administer their own medications and keep them locked in their room must be counseled at least once a month by facility staff to ascertain if the residents continue to be capable of self-administering their medications/treatments and if security of medications can continue to be maintained. The facility must keep a written record of counseling.

(B) Residents who choose to keep their medications locked in the central medication storage area may be permitted entrance or access to the area for the purpose of self-administering their own medication/treatment regimen. A facility staff member must remain in or at the storage area the entire time any resident is present.

(4) General.

(A) Facility staff will immediately report to the resident's physician and responsible party any unusual reactions to medications or treatments.

(B) When the facility supervises or administers the medications, a written record must be kept when the resident does not receive or take his/her medications/treatments as prescribed. The documentation must include the date and time the dose should have been taken, and the name and strength of medication missed; however, the recording of missed doses of medication does not apply when the resident is away from the assisted living facility.

(5) Storage.

(A) The facility must provide a locked area for all medications. Examples of areas include, but are not limited to:

- (i) central storage area;
- (ii) medication cart; and
- (iii) resident room.

(B) Each resident's medication must be stored separately from other resident's medications within the storage area.

(C) A refrigerator must have a designated and locked storage area for medications that require refrigeration, unless it is inside a locked medication room.

(D) Poisonous substances and medications labeled for "external use only" must be stored separately within the locked medication area.

(E) If facilities store controlled drugs, facility policies and procedures must address the prevention of the diversion of the controlled drugs.

(6) Disposal.

(A) Medications no longer being used by the resident for the following reasons are to be kept separate from current medications and are to be disposed of by a registered pharmacist licensed in the State of Texas:

(i) medications discontinued by order of the physician;

(ii) medications that remain after a resident is deceased; or

(iii) medications that have passed the expiration date.

(B) Needles and hypodermic syringes with needles attached must be disposed as required by 25 TAC §§1.131 - 1.137 (relating to Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities).

(C) Medications kept in a central storage area are released to discharged residents when a receipt has been signed by the resident or responsible party.

(k) Accident, injury, or acute illness.

(1) In the event of accident or injury that requires emergency medical, dental or nursing care, or in the event of apparent death, the assisted living facility will:

(A) make arrangements for emergency care and/or transfer to an appropriate place for treatment, such as a physician's office, clinic, or hospital;

(B) immediately notify the resident's physician and next of kin, responsible party, or agency who placed the resident in the facility; and

(C) describe and document the injury, accident, or illness on a separate report. The report must contain a statement of final disposition and be maintained on file.

(2) The facility must stock and maintain in a single location first aid supplies to treat burns, cuts, and poisoning.

(3) Residents who need the services of professional nursing or medical personnel due to a temporary illness or injury may have those services delivered by persons qualified to deliver the necessary service.

(l) Resident finances. The assisted living facility must keep a simple financial record on all charges billed to the resident for care and these records must be available to DADS. If the resident entrusts the handling of any personal finances to the assisted living facility, a simple financial record must be maintained to document accountability for receipts and expenditures, and these records must be available to DADS. Receipts for payments from residents or family members must be issued upon request.

(m) Food and nutrition services.

(1) A person designated by the facility is responsible for the total food service of the facility.

(2) At least three meals or their equivalent must be served daily, at regular times, with no more than a 16-hour span between a substantial evening meal and breakfast the following morning. All exceptions must be specifically approved by DADS.

(3) Menus must be planned one week in advance and must be followed. Variations from the posted menus must be documented. Menus must be prepared to provide a balanced and nutritious diet, such as that recommended by the National Food and Nutrition Board. Food must be palatable and varied. Records of menus as served must be filed and maintained for 30 days after the date of serving.

(4) Therapeutic diets as ordered by the resident's physician must be provided according to the service plan. Therapeutic diets that cannot customarily be prepared by a layperson must be calculated by a qualified dietician. Therapeutic diets that can customarily be prepared by a person in a family setting may be served by the assisted living facility.

(5) Supplies of staple foods for a minimum of a four-day period and perishable foods for a minimum of a one-day period must be maintained on the premises.

(6) Food must be obtained from sources that comply with all laws relating to food and food labeling. If food, subject to spoilage, is removed from its original container, it must be kept sealed, and labeled. Food subject to spoilage must also be dated.

(7) Plastic containers with tight fitting lids are acceptable for storage of staple foods in the pantry.

(8) Potentially hazardous food, such as meat and milk products, must be stored at 45 degrees Fahrenheit or below. Hot food must be kept at 140 degrees Fahrenheit or above during preparation and serving. Food that is reheated must be heated to a minimum of 165 degrees Fahrenheit.

(9) Freezers must be kept at a temperature of 0 degrees Fahrenheit or below and refrigerators must be 41 degrees Fahrenheit or below. Thermometers must be placed in the warmest area of the refrigerator and freezer to assure proper temperature.

(10) Food must be prepared and served with the least possible manual contact, with suitable utensils, and on surfaces that have been cleaned, rinsed, and sanitized before use to prevent cross-contamination.

(11) Facilities must prepare food in accordance with established food preparation practices and safety techniques.

(12) A food service employee, while infected with a communicable disease that can be transmitted by foods, or who is a carrier of organisms that cause such a disease or while afflicted with a boil, an infected wound, or an acute respiratory infection, must not work in the food service area in any capacity in which there is a likelihood of such person contaminating food or food-contact surfaces with pathogenic organisms or transmitting disease to other persons.

(13) Effective hair restraints must be worn to prevent the contamination of food.

(14) Tobacco products must not be used in the food preparation and service areas.

(15) Kitchen employees must wash their hands before returning to work after using the lavatory.

(16) Dishwashing chemicals used in the kitchen may be stored in plastic containers if they are the original containers in which the manufacturer packaged the chemicals.

(17) Sanitary dishwashing procedures and techniques must be followed.

(18) Facilities that house 17 or more residents must comply with 25 TAC Chapter 228, Subchapters A - J (relating to Texas Food Establishment rules) and local health ordinances or requirements must

be observed in the storage, preparation, and distribution of food; in the cleaning of dishes, equipment, and work area; and in the storage and disposal of waste.

(n) Infection control.

(1) Each facility must establish and maintain an infection control policy and procedure designated to provide a safe, sanitary, and comfortable environment and to help prevent the development and transmission of disease and infection.

(2) The facility must comply with departmental rules regarding special waste in 25 TAC §§1.131 - 1.137.

(3) The name of any resident of a facility with a reportable disease as specified in 25 TAC §§97.1 - 97.13 (relating to Control of Communicable Diseases) must be reported immediately to the city health officer, county health officer, or health unit director having jurisdiction, and appropriate infection control procedures must be implemented as directed by the local health authority.

(4) The facility must have written policies for the control of communicable disease in employees and residents, which includes tuberculosis (TB) screening and provision of a safe and sanitary environment for residents and employees.

(A) If employees contract a communicable disease that is transmissible to residents through food handling or direct resident care, the employee must be excluded from providing these services as long as a period of communicability is present.

(B) The facility must maintain evidence of compliance with local and/or state health codes or ordinances regarding employee and resident health status.

(C) The facility must screen all employees for TB within two weeks of employment and annually, according to Centers for Disease Control and Prevention (CDC) screening guidelines. All persons who provide services under an outside resource contract must, upon request of the facility, provide evidence of compliance with this requirement.

(D) All residents should be screened upon admission and after exposure to TB, in accordance with the attending physician's recommendations and CDC guidelines.

(5) Personnel must handle, store, process, and transport linens so as to prevent the spread of infection.

(6) Universal precautions must be used in the care of all residents.

(o) Access to residents. The facility must allow an employee of DADS or an employee of a local authority into the facility as necessary to provide services to a resident.

(p) Restraints. All restraints for purposes of behavioral management, staff convenience, or resident discipline are prohibited. Seclusion is prohibited.

(1) As provided in §92.125(a)(3) of this chapter (relating to Resident's Bill of Rights and Provider Bill of Rights), a facility may use physical or chemical restraints only:

(A) if the use is authorized in writing by a physician and specifies:

(i) the circumstances under which a restraint may be used; and

(ii) the duration for which the restraint may be used;

or

(B) if the use is necessary in an emergency to protect the resident or others from injury.

(2) A behavioral emergency is a situation in which severely aggressive, destructive, violent, or self-injurious behavior exhibited by a resident:

(A) poses a substantial risk of imminent probable death of, or substantial bodily harm to, the resident or others;

(B) has not abated in response to attempted preventive de-escalatory or redirection techniques;

(C) could not reasonably have been anticipated; and

(D) is not addressed in the resident's service plan.

(3) Except in a behavioral emergency, a restraint must be administered only by qualified medical personnel.

(4) A restraint must not be administered under any circumstance if it:

(A) obstructs the resident's airway, including a procedure that places anything in, on, or over the resident's mouth or nose;

(B) impairs the resident's breathing by putting pressure on the resident's torso;

(C) interferes with the resident's ability to communicate; or

(D) places the resident in a prone or supine position.

(5) If a facility uses a restraint hold in a circumstance described in paragraph (2) of this subsection, the facility must use an acceptable restraint hold.

(A) An acceptable restraint hold is a hold in which the individual's limbs are held close to the body to limit or prevent movement and that does not violate the provisions of paragraph (4) of this subsection.

(B) After the use of restraint, the facility must:

(i) with the resident's consent, make an appointment with the resident's physician no later than the end of the first working day after the use of restraint and document in the resident's record that the appointment was made; or

(ii) if the resident refuses to see the physician, document the refusal in the resident's record.

(C) As soon as possible but no later than 24 hours after the use of restraint, the facility must notify one of the following persons, if there is such a person, that the resident has been restrained:

(i) the resident's legally authorized representative;

or

(ii) an individual actively involved in the resident's care, unless the release of this information would violate other law.

(D) If, under the Health Insurance Portability and Accountability Act, the facility is a "covered entity," as defined in 45 Code of Federal Regulations (CFR) §160.103, any notification provided under subparagraph (C)(ii) of this paragraph must be to a person to whom the facility is allowed to release information under 45 CFR §164.510.

(6) In order to decrease the frequency of the use of restraint, facility staff must be aware of and adhere to the findings of the resident assessment required in subsection (c) of this section for each resident.

(7) A facility may adopt policies that allow less use of restraint than allowed by the rules of this chapter.

(8) A facility must not discharge or otherwise retaliate against:

(A) an employee, resident, or other person because the employee, resident, or other person files a complaint, presents a grievance, or otherwise provides in good faith information relating to the misuse of restraint or seclusion at the facility; or

(B) a resident because someone on behalf of the resident files a complaint, presents a grievance, or otherwise provides in good faith information relating to the misuse of restraint or seclusion at the facility.

(q) Accreditation status. If a license holder uses an on-site accreditation survey by an accreditation commission instead of a licensing survey by DADS, as provided in §92.11(c)(2) and §92.15(j) of this chapter (relating to Criteria for Licensing; and Renewal Procedures and Qualifications), the license holder must provide written notification to DADS within five working days after the license holder receives a notice of change in accreditation status from the accreditation commission. The license holder must include a copy of the notice of change with its written notification to DADS.

(r) Vaccine Preventable Diseases.

(1) Effective September 1, 2012, a facility must develop and implement a policy to protect a resident from vaccine preventable diseases in accordance with Texas Health and Safety Code, Chapter 224.

(2) The policy must:

(A) require an employee or a contractor providing direct care to a resident to receive vaccines for the vaccine preventable diseases specified by the facility based on the level of risk the employee or contractor presents to residents by the employee's or contractor's routine and direct exposure to residents;

(B) specify the vaccines an employee or contractor is required to receive in accordance with paragraph (1) of this subsection;

(C) include procedures for the facility to verify that an employee or contractor has complied with the policy;

(D) include procedures for the facility to exempt an employee or contractor from the required vaccines for the medical conditions identified as contraindications or precautions by the Centers for Disease Control and Prevention;

(E) for an employee or contractor who is exempt from the required vaccines, include procedures the employee or contractor must follow to protect residents from exposure to disease, such as the use of protective equipment, such as gloves and masks, based on the level of risk the employee or contractor presents to residents by the employee's or contractor's routine and direct exposure to residents;

(F) prohibit discrimination or retaliatory action against an employee or contractor who is exempt from the required vaccines for the medical conditions identified as contraindications or precautions by the Centers for Disease Control and Prevention, except that required use of protective medical equipment, such as gloves and masks, may not be considered retaliatory action;

(G) require the facility to maintain a written or electronic record of each employee's or contractor's compliance with or exemption from the policy;

(H) include disciplinary actions the facility may take against an employee or contractor who fails to comply with the policy.

(3) The policy may:

(A) include procedures for an employee or contractor to be exempt from the required vaccines based on reasons of conscience, including religious beliefs; and

(B) prohibit an employee or contractor who is exempt from the required vaccines from having contact with residents during a public health disaster, as defined in Texas Health and Safety Code, §81.003 (relating to Communicable Diseases).

(s) A DADS employee must not retaliate against an assisted living facility, an employee of an assisted living facility, or a person in control of an assisted living facility for:

(1) complaining about the conduct of a DADS employee;

(2) disagreeing with a DADS employee about the existence of a violation of this chapter or a rule adopted under this chapter; or

(3) asserting a right under state or federal law.

§92.42. *Guardianship Record Requirements.*

(a) A facility must request, from a resident's legally authorized representative or the person responsible for the resident's support, a copy of:

(1) the current court order appointing a guardian for the resident or the resident's estate; and

(2) current letters of guardianship for the resident.

(b) A facility must request the court order and letters of guardianship:

(1) when the facility admits an individual; and

(2) when the facility becomes aware a guardian is appointed after the facility admits a resident.

(c) A facility must request an updated copy of the court order and letters of guardianship at each annual assessment and retain documentation of any change.

(d) A facility must make at least one follow-up request within 30 days after the facility makes a request in accordance with subsection (b) or (c) of this section if the facility has not received:

(1) a copy of the court order and letters of guardianship; or

(2) a response that there is no court order or letters of guardianship.

(e) A facility must keep in the resident's record:

(1) documentation of the results of the request for the court order and letters of guardianship; and

(2) a copy of the court order and letters of guardianship.

§92.53. *Standards for Certified Alzheimer's Assisted Living Facilities.*

(a) Manager qualifications and training.

(1) The manager of the certified Alzheimer facility or the supervisor of the certified Alzheimer unit must be 21 years of age, and have:

(A) an associate's degree in nursing, health care management;

(B) a bachelor's degree in psychology, gerontology, nursing, or a related field; or

(C) proof of graduation from an accredited high school or certification of equivalency of graduation and at least one year of experience working with persons with dementia.

(2) The manager or supervisor must complete six hours of annual continuing education regarding dementia care.

(b) Staff training.

(1) All staff members must receive four hours of dementia-specific orientation prior to assuming any job responsibilities. Training must cover, at a minimum, the following topics:

(A) basic information about the causes, progression, and management of Alzheimer's disease;

(B) managing dysfunctional behavior; and

(C) identifying and alleviating safety risks to residents with Alzheimer's disease.

(2) Direct care staff must receive 16 hours of on-the-job supervision and training within the first 16 hours of employment following orientation. Training must cover:

(A) providing assistance with the activities of daily living;

(B) emergency and evacuation procedures specific to the dementia population;

(C) managing dysfunctional behavior; and

(D) behavior management, including prevention of aggressive behavior and de-escalation techniques, or fall prevention, or alternatives to restraints.

(3) Direct care staff must annually complete 12 hours of in-service education regarding Alzheimer's disease. One hour of annual training must address behavior management, including prevention of aggressive behavior and de-escalation techniques, or fall prevention, or alternatives to restraints. Training for these subjects must be competency-based. Subject matter must address the unique needs of the facility. Additional suggested topics include:

(A) assessing resident capabilities and developing and implementing service plans;

(B) promoting resident dignity, independence, individuality, privacy and choice;

(C) planning and facilitating activities appropriate for the dementia resident;

(D) communicating with families and other persons interested in the resident;

(E) resident rights and principles of self-determination;

(F) care of elderly persons with physical, cognitive, behavioral and social disabilities;

(G) medical and social needs of the resident;

(H) common psychotropics and side effects; and

(I) local community resources.

(c) Staffing. A facility must employ sufficient staff to provide services for and meet the needs of its Alzheimer's residents. In large facilities or units with 17 or more residents, two staff members must be immediately available when residents are present.

(d) Alzheimer's Assisted Living Disclosure Statement form. A facility must use the Alzheimer's Assisted Living Disclosure Statement form and amend the form if changes in the operation of the facility will affect the information in the form.

(e) Pre-admission. The facility must establish procedures, such as an application process, interviews, and home visits, to ensure that prospective residents are appropriate and their needs can be met.

(1) Prior to admitting a resident, facility staff must discuss and explain the Alzheimer's Assisted Living Disclosure Statement form with the family or responsible party.

(2) The facility must give the Alzheimer's Assisted Living Disclosure Statement form to any individual seeking information about the facility's care or treatment of residents with Alzheimer's disease and related disorders.

(f) Assessment. The facility must make a comprehensive assessment of each resident within 14 days of admission and annually. The assessment must include the items listed in §92.41(c)(1)(A) - (T) of this chapter (relating to Standards for Type A and Type B Assisted Living Facilities).

(g) Service plan. Facility staff, with input from the family, if available, must develop an individualized service plan for each resident, based upon the resident assessment, within 14 days of admission. The service plan must address the individual needs, preferences, and strengths of the resident. The service plan must be designed to help the resident maintain the highest possible level of physical, cognitive, and social functioning. The service plan must be updated annually and upon a significant change in condition, based upon an assessment of the resident.

(h) Activities. A facility must encourage socialization, cognitive awareness, self-expression, and physical activity in a planned and structured activities program. Activities must be individualized, based upon the resident assessment, and appropriate for each resident's abilities.

(1) The activity program must contain a balanced mixture of activities addressing cognitive, recreational, and activity of daily living (ADL) needs.

(A) Cognitive activities include, but are not limited to, arts, crafts, story telling, poetry readings, writing, music, reading, discussion, reminiscences, and reviews of current events.

(B) Recreational activities include all socially interactive activities, such as board games and cards, and physical exercise. Care of pets is encouraged.

(C) Self-care ADLs include grooming, bathing, dressing, oral care, and eating. Occupational ADLs include cleaning, dusting, cooking, gardening, and yard work. Residents must be allowed to perform self-care ADLs as long as they are able to promote independence and self worth.

(2) Residents must be encouraged, but never forced, to participate in activities. Residents who choose not to participate in a large group activity must be offered at least one small group or one-on-one activity per day.

(3) Facilities must have an employee responsible for leading activities.

(A) Facilities with 16 or fewer residents must designate an employee to plan, supply, implement, and record activities.

(B) Facilities with 17 or more residents must employ, at a minimum, an activity director for 20 hours weekly. The activity director must be a qualified professional who:

(i) is a qualified therapeutic recreation specialist or an activities professional who is eligible for certification as a therapeutic recreation specialist, therapeutic recreation assistant, or an ac-

tivities professional by a recognized accrediting body, such as the National Council for Therapeutic Recreation Certification, the National Certification Council for Activity Professionals, or the Consortium for Therapeutic Recreation/Activities Certification, Inc.; or

(ii) has two years of experience in a social or recreational program within the last five years, one year of which was full-time in an activities program in a health care setting; or

(iii) has completed an activity director training course approved by the National Association for Activity Professionals or the National Therapeutic Recreation Society.

(4) The activity director or designee must review each resident's medical and social history, preferences, and dislikes, in determining appropriate activities for the resident. Activities must be tailored to the residents' unique requirements and skills.

(5) The activities program must provide opportunities for group and individual settings. On weekdays, each resident must be offered at least one cognitive activity, two recreational activities and three ADL activities each day. The cognitive and recreational activities (structured activities) must be at least 30 minutes in duration, with a minimum of six and a half hours of structured activity for the entire week. At least an hour and a half of structured activities must be provided during the weekend and must include at least one cognitive activity and one physical activity.

(6) The activity director or designee must create a monthly activities schedule. Structured activities should occur at the same time and place each week to ensure a consistent routine within the facility.

(7) The activity director or designee must annually attend at least six hours of continuing education regarding Alzheimer's disease or related disorders.

(8) Special equipment and supplies necessary to accommodate persons with a physical disability or other persons with special needs must be provided as appropriate.

(i) Physical plant. Alzheimer's units, if segregated from other parts of the Type B facility with approved security devices, must meet the following requirements within the Alzheimer's unit:

(1) Resident living area(s) must be in compliance with §92.62(m)(3) of this chapter (relating to General Requirements).

(2) Resident dining area(s) must be in compliance with §92.62(m)(4) of this chapter.

(3) Resident toilet and bathing facilities must be in compliance with §92.62(m)(2) of this chapter.

(4) A monitoring station must be provided within the Alzheimer's unit with a writing surface such as a desk or counter, chair, task illumination, telephone or intercom, and lockable storage for resident records.

(5) Access to at least two approved exits remote from each other must be provided in order to meet the Life Safety Code requirements.

(6) In large facilities, cross corridor control doors, if used for the security of the residents, must be similar to smoke doors, which are each 34 inches in width and swing in opposite directions. A latch or other fastening device on a door must be provided with a knob, handle, panic bar, or other simple type of releasing device.

(7) An outdoor area of at least 800 square feet must be provided in at least one contiguous space. This area must be connected to, be a part of, be controlled by, and be directly accessible from the facility.

(A) Such areas must have walls or fencing that do not allow climbing or present a hazard and meet the following requirements. These minimum dimensions do not apply to additional fencing erected along property lines or building setback lines for privacy or to meet requirements of local building authorities.

(i) Minimum distance of the enclosure fence from the building is 8 feet if the fence is parallel to the building and there are no window openings;

(ii) Minimum distance of the enclosure fence (parallel with building walls) from bedroom windows is 20 feet if the fencing is solid and 15 feet from bedroom windows if the fencing is open; or

(iii) For unusual or unique site conditions, areas of enclosure may have alternate configurations with DADS approval.

(B) Access to at least two approved exits remote from each other must be provided from the enclosed area in order to meet the Life Safety Code requirements.

(C) If the enclosed area involves a required exit from the building, the following additional requirements must be met:

(i) A minimum of two gates must be remotely located from each other if only one exit is enclosed. If two or more exits are enclosed by the fencing and entry access can be made at each door, a minimum of one gate is required.

(ii) The gate(s) must be located to provide a continuous path of travel from the building exit to a public way, including walkways of concrete, asphalt, or other approved materials.

(iii) If gate(s) are locked, the gate nearest the exit from the building must be locked with an electronic lock that operates the same as electronic locks on control doors and/or exit doors and is in compliance with the National Electrical Code for exterior exposure. Additional gates may also have electronic locks or may have keyed locks provided staff carry the keys. All gates may have keyed locks, provided all staff carry the keys, and the outdoor area has an area of refuge which:

(I) extends beyond a minimum of 30 feet from the building; and

(II) the area of refuge allows at least 15 square feet per person (resident, staff, visitor) potentially present at the time of a fire.

(8) Locking devices may be used on the control doors provided the following criteria are met:

(A) The building must have an approved sprinkler system and an approved fire alarm system to meet the licensing standards.

(B) The locking device must be electronic and must be released when any one of the following occurs:

(i) activation of the fire alarm or sprinkler system;

(ii) power failure to the facility; or

(iii) activation of a switch or button located at the monitoring station and at the main staff station.

(C) A key pad or buttons may be located at the control doors for routine use by staff.

(9) Locking devices may be used on the exit doors provided:

(A) the locking arrangements meet §7.2.1.6 of the Life Safety Code; or

(B) the following criteria are met:

(i) The building must have an approved sprinkler system and an approved fire alarm system to meet the licensing standards.

(ii) The locking device must be electro-magnetic; that is, no type of throw-bolt is to be used.

(iii) The device must release when any one of the following occurs:

(I) activation of the fire alarm or sprinkler system;

(II) power failure to the facility; or

(III) activation of a switch or button located at the monitoring station and at the main staff station.

(iv) A key pad or buttons may be located at the control doors for routine use by staff.

(v) A manual fire alarm pull must be located within five feet of each exit door with a sign stating, "Pull to release door in an emergency."

(vi) Staff must be trained in the methods of releasing the door device.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 1, 2016.

TRD-201603329

Lawrence Hornsby
General Counsel

Department of Aging and Disability Services
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For further information, please call: (512) 438-2235



PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 800. GENERAL ADMINISTRATION SUBCHAPTER B. ALLOCATIONS

40 TAC §800.68

The Texas Workforce Commission (Commission) adopts amendments to the following section of Chapter 800, relating to General Administration, *without changes* to the text as published in the April 22, 2016, issue of the *Texas Register* (41 TexReg 2887):

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted Chapter 800 rule change is to amend Agency rules to clarify that the allocation of Adult Education and Literacy (AEL) funds, pursuant to Texas Labor Code §302.062(d), includes the application of a hold-harmless/stop-gain calculation, as defined in Agency rule §800.52(7).

This adopted amendment also strikes an adjacent clause that is now out of date and unnecessary.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

SUBCHAPTER B. ALLOCATIONS

The Commission adopts the following amendments to Subchapter B:

§800.68. Adult Education and Literacy

Section 800.68(b)(1)(C) is amended by:

--adding the stop-gain option to the hold-harmless procedure; and

--removing "(for any program year after Fiscal Year (FY) 2015)," as it is no longer relevant.

Section 800.68(c)(1)(C) is amended by:

--adding the stop-gain option to the hold-harmless procedure; and

--removing "(for any program year after Fiscal Year (FY) 2015)," as it is no longer relevant.

Section 800.68(d)(3) is amended by:

--adding the stop-gain option to the hold-harmless procedure; and

--removing "(for any program year after Fiscal Year (FY) 2015)," as it is no longer relevant.

Section 800.68(e)(1)(C) is amended by:

--adding the stop-gain option to the hold-harmless procedure; and

--removing "(for any program year after Fiscal Year (FY) 2015)," as it is no longer relevant.

Comment: One commenter requested that the definition found in Texas Labor Code §302.62(d) of "hold-harmless/stop-gain" be added to §800.68.

Response: The Commission retains the definition of "hold-harmless/stop-gain" found in §800.52, Definitions, which meets the commenter's request for a definition.

COMMENTS WERE RECEIVED FROM:

Jon Engel, Community Action, Inc.

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 30, 2016.

TRD-201603302

Patricia Gonzalez
Deputy Director, Workforce Development Division Programs
Texas Workforce Commission
Effective date: July 20, 2016
Proposal publication date: April 22, 2016
For further information, please call: (512) 463-9598



CHAPTER 805. ADULT EDUCATION AND LITERACY

The Texas Workforce Commission (Commission) adopts amendments to the following section of Chapter 805, relating to Adult Education and Literacy, *with changes* to the rule text as published in the April 22, 2016, issue of the *Texas Register* (41 TexReg 2889): Subchapter A, General Provisions, §805.3.

The Commission adopts amendments to the following sections of Chapter 805, relating to Adult Education and Literacy, *without changes* to the rule text as published in the April 22, 2016, issue of the *Texas Register* (41 TexReg 2889): Subchapter A, General Provisions, §805.2; Subchapter B, Staff Qualifications, §805.21.

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the amendment to §805.21 is to address issues based on observations and feedback related to finding and supporting qualified staff across an Adult Education and Literacy (AEL) system built on partnerships.

Current staff qualification requirements set forth in §805.21 were carried over with some modifications from the Texas Education Code (TEC). The TEC rules were developed for an AEL program that largely operated as an independent, nonintegrated program. Transition of the AEL program to TWC, with the implementation of new contracts, has revealed a stronger need for partnerships, including partnerships with community colleges and Local Workforce Development Boards (Boards).

The amendment to §805.3 aligns with new Texas Education Code (TEC) §25.085, which modifies the compulsory attendance age from 18 years to 19 years.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS

The Commission adopts the following amendments to Subchapter A:

§805.2. Definitions

New §805.2(7) defines "assessment services" as the processes, administration, review, and consultation provided to individuals in accordance with the AEL assessment procedure and other agency guidance to direct placement, progress, and achievement in AEL and other instructional services, including the identification of potential academic or support service needs.

New §805.2(8) defines "clock hour," distinguishing a clock hour of 60 minutes from a credit hour, which constitutes 50 minutes of instruction over a 15-week period in a semester system or a 10-week period in a quarter system.

New §805.2(9) defines "college and career transitional support" as support that may include, but is not limited to, recruiting and outreach, intensive individual case management, career and academic counseling, enrollment and financial aid support, self-advocacy skills development, academic and career support

strategies, college and workforce system capacity building, student data records management, and providing access to other support and employment services.

New §805.2(12) defines "literacy," in alignment with the Workforce Innovation and Opportunity Act (WIOA), as an individual's ability to read, write, and speak in English, and to compute and solve problems at levels of proficiency necessary to function on the job, in the family of the individual, and in society.

New §805.2(13) defines "principles of adult learning" as a wide variety of research-based professional development topics that include instructional and advising characteristics specific to adults, and support the range of knowledge, skills, and abilities adults need to understand and use information, express themselves, act independently, effectively manage a changing world, and meet goals and objectives related to career, family, and community participation. Instructional principles include, but are not limited to, engaging adults and customizing instruction on subjects that have immediate relevance to their career and personal goals and objectives, building on their prior knowledge and experience, and supporting them in taking responsibility for their learning.

New §805.2(14) defines "proctoring" as one type of assessment service, the administration of tests or pretests by test proctors working under the guidance or supervision of an individual who oversees program assessment services and/or accountability assessment.

New §805.2(15) defines "professional development" as encompassing all types of facilitated learning activities for instructors and staff of AEL programs and organizations participating in AEL programs and services. Professional development can be face-to-face or virtual and can be a workshop, lecture, presentation, poster session, roundtable discussion, study circle, or demonstration that meets for a minimum of one hour and upwards in increments of one half (.5) hour (i.e., the hours assigned for purposes of tracking AEL staff professional development requirements in TEAMS, the Texas Educating Adults Management System) to accomplish a predetermined educational or learning outcome.

New §805.2(16) defines "program year" for AEL purposes. The AEL program year, which aligns to the U.S. Department of Education's (ED) Adult Education and Family Literacy Act (AEFLA) program year, is July 1 through June 30.

New §805.2(17) defines "substitute," specifying the distinction between a substitute and a full- or part-time instructor. A substitute works on call, does not have a full-time assignment, and does not assume permanent responsibilities for class instruction. An individual is considered a substitute if he or she instructs a particular class for four or fewer consecutive class meetings.

New §805.2(18) defines "support services," to align with the definition in WIOA §2, as services such as transportation, child care, dependent care, housing, and needs-related payments, which are necessary to enable an individual to participate in activities.

New §805.2(19) defines "workforce training" to align with the definition in WIOA §134(c)(3)(D), which states that workforce training services may include the following:

occupational skills training, including training for nontraditional employment;

on-the-job training;

incumbent worker training;

programs that combine workplace training with related instruction, which may include cooperative education programs; training programs operated by the private sector; skill upgrading and retraining; entrepreneurial training; transitional jobs; job readiness training provided in combination with services described in any of subparagraphs (A) through (H) of this paragraph;

AEL activities, including activities of English language acquisition and integrated education and training programs, provided concurrently or in combination with services described in any of subparagraphs (A) through (G) of this paragraph; and

customized training conducted with a commitment by an employer or group of employers to employ an individual upon successful completion of the training.

Comment: One commenter requested a modification of the definition of

"Principles of Adult Learning" by removing "effectively manage a changing world."

Response: The Commission maintains the definition from the proposed rules, recognizing that lifelong learning is a critical element for successful career development and a tenet of established adult learning theory, a core philosophy of adult education.

§805.3. Federal and State AEL Funds

Section 805.3 is amended to replace "18 years of age" with "19 years of age" to align with new TEC §25.085.

Comment: One commenter recommended modifying "19 years of age" to "compulsory age" to better align with other language found in Agency guidance and rules.

Response: The Commission agrees with this recommendation and has modified the language accordingly.

SUBCHAPTER B. STAFF QUALIFICATIONS

The Commission adopts the following amendments to Subchapter B:

§805.21. Staff Qualifications and Training

Current §805.21(1) and (2) are removed.

Current §805.21(3) is renumbered as new §805.21(1), and is amended to apply additionally to administrative, data entry, and proctoring staff, and staff providing support or employment services to students.

Current §805.21(4) is renumbered as new §805.21(2), and is amended to remove teachers and counselors and to apply additionally to staff that oversees program assessment services and/or accountability and instructors in the content areas of reading, writing, mathematics, and English language acquisition, including substitutes, shall possess at least a bachelor's degree.

New §805.21(3) is added to specify requirements for workforce training instructors.

New §805.21(4) is added to set forth the process for submitting staff qualification exemption requests

New §805.21(4)(B) specifies that exemptions must be submitted and approved prior to an individual being placed in the position for which an exemption is requested.

Current §805.21(5) is amended to remove teachers and counselors and add "other staff with program oversight or coordination responsibilities." The required 12 clock hours of professional development annually is modified to 15 clock hours each program year. The provision modifying the amount of required professional development once the described individuals have completed six clock hours of AEL college credit or two years of AEL experience is removed. Additionally, staff described in §805.21(5), hired on or after January 1 of a program year, may have half of the required staff professional development time required in that particular program year.

Current §805.21(6) is renumbered as new §805.21(9) new §805.21(6) is added to specify that all AEL instructional staff, except substitutes, who are paid with AEL grant funds or who acquire student contact hours, including volunteers, shall receive at least 15 clock hours of professional development each program year.

New §805.21(6)(A)(i) - (iii) specify that the 15 hours shall include three clock hours of principles of adult learning as defined in §805.2(13), six clock hours in relevant areas of literacy instruction, with literacy defined in §805.2(12), and six hours at the discretion of the program that consist of content related to the AEL program's purpose, which is to provide adults with specific basic education that enables them to effectively:

--acquire the basic educational skills necessary for literate functioning;

--participate in job training and retraining programs;

--obtain and retain employment; and

--continue their education to at least the level of secondary school completion and postsecondary education preparation.

New §805.21(6)(A)(iv) allows for six clock hours of content area in staff professional development to be waived for individuals who have 18 or more college semester undergraduate or graduate credit hours in relevant areas of literacy instruction.

New §805.21(6)(B) is added to specify that staff meeting the specifications outlined in §805.21(6)(A) and hired on or after January 1 of a program year, may require half of the professional development time required for that program year, and to specify that for instructors in the content areas of reading, writing, mathematics, and English language acquisition, the professional development time completed shall consist of three clock hours of training in principles of adult learning and three clock hours in the relevant areas of literacy instruction.

New §805.21(6)(C) is added to specify that staff described in §805.21(2) must receive at least six clock hours of professional development as described in §805.21(b)(2)(A)(i) - (iii) within 30 calendar days of providing instructional activities if new to AEL or direct student service delivery; the six hours include the required three hours of principles of adult learning and three hours of the relevant areas of literacy instruction. New §805.21(6)(C) also specifies that any waiver of the requirement that staff members who are new to AEL or to direct student service must receive staff development within 30 calendar days of providing instructional services shall be approved before the individual provides any instructional services.

Language referring to exemptions for qualifications, which previously required Commission approval when an entity submitted its application for funding, has been removed from current §805.21(6).

New §805.21(7) is added to specify that staff providing support services or college and career transitional support who are paid through an AEL grant shall receive at least three clock hours of professional development each program year.

New §805.21(8) is added to specify that AEL staff assigned test proctoring or data entry duties shall receive at least three clock hours of professional development related to their primary job duties each program year.

Current §805.21(6) is renumbered as new §805.21(9) and modified to remove the word "in-service" and replace the term "local programs" with "grant recipients." The definition of "exceptional circumstances" is added to include absence from the program or work due to personal health reasons or emergency familial responsibilities, including maternity/paternity. Language is changed to specify that documents justifying these circumstances shall be available for monitoring and as requested by AEL staff. Language requiring exemptions to be submitted to the Commission for approval in cases of exemptions for minimum qualifications is removed.

Current §805.21(7) is renumbered as new §805.21(10), and "fiscal agent" is replaced with "grant recipient."

Current §805.21(8) is removed.

Comment: One commenter commended the removal of six hours of preliminary professional development and reduction from 24 hours of staff development requirements for new hires.

Response: The Commission appreciates the comment.

Comment: One commenter requested that volunteer instructional staff be waived from the current staff development requirements.

Response: The Commission appreciates the comment, but in order to maintain quality of AEL instruction for all participants, retains this requirement for any individual who acquires contact hours with participants. Local programs have the option to not count the contact hours acquired by volunteer staff, which would remove these requirements, or to request a staff exemption if the staff development time creates an undue burden.

Comment: One commenter requested that the requirement for all staff to yearly receive three hours of staff development in principles of adult learning be waived for returning teachers, new staff, or staff with a college degree in the content area.

Response: The Commission appreciates the comment, but retains this requirement. Principles of adult learning is a general concept, not a specific course, and can cover a wide array of topics necessary for individuals providing adult education instruction to implement meaningful andragogy to ensure success for program participants, including new staff orientation, if that orientation focuses on successful instruction to adults. Local programs are encouraged to explore the wide array of topics that fall within this concept area in order to keep material fresh and timely. Agency professional development contractors are aligning training courses to identify courses that address topics in principles of adult learning.

Comment: One commenter requested clarification for the requirements for instructional staff, including the allowability to use

staff development for goal setting as well as staff development provided by local independent school districts (ISDs) to meet staff development requirements.

Response: The Commission clarifies that staff development should be customized to meet local needs and objectives, as well as AEL objectives, and if goal setting, as well as staff development provided by local ISDs, meets those objectives, it can be used to meet staff development requirements for staff members.

Comment: One commenter requested clarification for the requirements for literacy instructional staff to waive content-area professional development if they have earned college-level credit in their instructional content area, and whether there is an expiration for these requirements.

Response: The Commission clarifies that waivers for literacy instructional staff who waive content-area professional development through college-level credit in their literacy instructional content area are permanent; however, the Commission encourages local programs to assess individual instructors' skills and abilities and use local flexibility to require skill refreshers as needed.

COMMENTS WERE RECEIVED FROM:

Angie Kaldro, Education Service Center 6

Jon Engel, Community Action, Inc.

Resa Wingfield, Literacy Council of Tyler

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §805.2, §805.3

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

§805.3. Federal and State AEL Funds.

(a) Federal AEL funds may be used for AEL programs for out-of-school individuals who have attained 16 years of age and who are not enrolled or required to be enrolled in secondary school under state law and:

(1) lack sufficient mastery of basic educational skills to enable the individuals to function effectively in society;

(2) do not have a secondary school diploma or its recognized equivalent, and have not achieved an equivalent level of education; or

(3) are unable to speak, read, or write the English language.

(b) State AEL funds are to be used for AEL programs for out-of-school individuals who are beyond the compulsory age of attendance unless specifically exempted from compulsory school attendance by Texas Education Code §25.086 and:

(1) lack sufficient mastery of basic educational skills to enable the individuals to function effectively in society;

(2) do not have a secondary school diploma or its recognized equivalent, and have not achieved an equivalent level of education; or

(3) are unable to speak, read, or write the English language.

(c) The proportion of students served who meet the requirements of subsection (a) of this section, but do not meet the requirements of subsection (b) of this section, shall not exceed the grant recipient's percentage of federal funds to the total allocation.

(d) The Commission shall establish annual performance benchmarks for the use of AEL funds in serving specific student populations, including the population of students receiving other workforce services or coenrolled in postsecondary education or training.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on June 30, 2016.

TRD-201603303

Patricia Gonzalez

Deputy Director, Workforce Development Division Programs

Texas Workforce Commission

Effective date: July 20, 2016

Proposal publication date: April 22, 2016

For further information, please call: (512) 463-9598



SUBCHAPTER B. STAFF QUALIFICATIONS

40 TAC §805.21

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Workforce Commission

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For further information, please call: (512) 463-9598



TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 2. ENVIRONMENTAL REVIEW OF TRANSPORTATION PROJECTS

The Texas Department of Transportation (department) adopts amendments to §§2.1, 2.3, 2.5, 2.11, 2.14, 2.44, 2.48 - 2.50, 2.81, 2.83 - 2.85, 2.102, 2.104 - 2.108, 2.110, and 2.131, all relating to the environmental review of transportation projects. The amendments to §§2.1, 2.3, 2.5, 2.11, 2.14, 2.44, 2.48 - 2.50,

2.83 - 2.85, 2.104 - 2.106, 2.110, and 2.131 are adopted without changes to the proposed text as published in the April 15, 2016 issue of the *Texas Register* (41 TexReg 2705) and will not be republished. The amendments to §§2.81, 2.102, 2.107, and 2.108 are adopted with changes to the proposed text as published in the April 15, 2016 issue of the *Texas Register* (41 TexReg 2705).

EXPLANATION OF ADOPTED AMENDMENTS

The department has identified the need to make various changes to its environmental review rules to add additional flexibility in certain areas, add clarity, and further streamline and improve the environmental review process. The various changes in this rulemaking are summarized below.

SUBCHAPTER A. GENERAL PROVISIONS

Amendments to §2.1, Purpose of Rules, remove references to Transportation Code, §203.021; Parks and Wildlife Code §26.001 and §26.002; and Natural Resources Code §183.057. As explained below, the department has determined that there is no need for it to have rules implementing these particular statutes.

Transportation Code, §203.021 contains a hearing requirement for a highway project that bypasses or goes through a county or municipality. The statute sets forth specific requirements for holding such a hearing. While it is possible for a hearing held under the department's environmental review rules to be noticed and held to also satisfy the requirements of §203.021, the department considers the hearing requirement in §203.021 to be separate from and not subject to the requirements for hearings held under its environmental review rules. Additionally, §203.021 is a statute that applies by its own force and contains requirements independent of those specified under the department's environmental review rules. The department, therefore, does not believe it is necessary to have its own rules implementing this statute.

Parks and Wildlife Code §26.001 and §26.002 require certain governmental entities to hold a hearing and make certain determinations before approving a program or project that requires the use or taking of public land designated and used prior to the arrangement of the program or project as a park, recreation area, scientific area, wildlife refuge, or historic site. Again, while it is possible for a hearing held on a project under the department's environmental review rules to be noticed to also satisfy the hearing requirement of §26.001 and §26.002, the department considers the hearing requirement in those statutes to be separate from and not subject to the requirements for hearings held under its environmental review rules. Additionally, §26.001 and §26.002 are statutes that apply of their own force and contain requirements independent of those specified under the department's environmental review rules. The department, therefore, does not believe it is necessary to have its own rules implementing these statutes.

In 2015, the Texas Legislature transferred and redesignated Natural Resources Code §183.057 as Parks and Wildlife Code §84.007, and also amended the statute. See Acts 2015, 84th Legislature, Regular Session, Ch. 401 (H.B. No. 1925), Section 1, effective June 10, 2015. This statute requires certain governmental entities to hold a hearing and make certain determinations before approving a program or project that requires the use or taking of private land encumbered by an agricultural conservation easement. Again, while it is possible for a hearing held under the department's environmental review rules to be noticed to also satisfy the hearing requirement of §183.057, the

department considers the hearing requirement in that statute to be separate from and not subject to the requirements for hearings held under its environmental review rules. Additionally, §183.057 is a statute that applies by its own force and contains requirements independent of those specified under the department's environmental review rules. The department, therefore, does not believe it is necessary to have its own rules implementing this statute.

Amendments to §2.3, Applicability; Exceptions, add an exception to the applicability of the department's environmental review rules for certain park road projects undertaken in cooperation with the Texas Parks and Wildlife Department (TPWD). The department is obligated to construct, repair, and maintain roads in and adjacent to state parks and related facilities. See Section 1.02, Chapter 7 (H.B. No. 9), 72nd Legislature, 1st Called Session, 1991, as amended by Chapter 445 (H.B. No. 1359), 74th Legislature, Regular Session, 1995. The department and TPWD have entered into an Interagency Cooperation Contract regarding Design, Construction, and Maintenance of Roads and Parking Within and Adjacent to the Facilities of the Texas Parks and Wildlife Department, effective August 6, 2014. The Interagency Cooperation Contract between the two agencies specifies that TPWD will provide to the department an environmental clearance certification for all projects on park roads owned and operated by TPWD and not listed on the state highway system indicating that all applicable federal and state laws pertaining to environmental procedures have been met. The department believes that the certification provided by TPWD is sufficient, and therefore these projects should be excepted from the environmental review requirements of Chapter 2. Projects on park roads that are owned and operated by the department and listed on the state highway system remain subject to Chapter 2.

Amended §2.3 also excepts from the applicability of Chapter 2 contractor activities outside of the right-of-way which are not directed or directly controlled by the department, including staging areas, disposal sites, equipment storage, and borrow sites selected by a contractor. Compliance with environmental laws in those areas is the respective contractor's responsibility. Contractors may be subject to sanctions under Chapter 9, Subchapter G of the department's rules, relating to Highway Improvement Contract Sanctions, for failure to comply with environmental laws applicable to their activities outside the right-of-way.

Amended §2.3 also clarifies that relocations of individuals, families, businesses, farm operations, nonprofit organizations or utilities to locations outside the right-of-way are not subject to review under Chapter 2. The removal or displacement of any improvement, infrastructure, or activity within the right-of-way is, of course, subject to review under Chapter 2 as part of the respective transportation project. However, while the owners or tenants of certain improvements, infrastructure, and activities may be entitled to compensation or relocation benefits, or both, when displaced by a transportation project in accordance with applicable law, the department does not have jurisdiction or control over the re-establishment of any displaced improvement, infrastructure, or activity by those owners or tenants on property outside the right-of-way. That type of relocation is, therefore, outside the scope of environmental review under Chapter 2.

Amendments to §2.5 remove the definition of "department public hearing officer." As indicated below, amendments to §2.106, Opportunity for Public Hearing, and §2.108, Public Hearing, also remove references to the phrase, "department public hearing officer." This term is confusing because, as provided in subsection

(f) of §2.101, General Requirements, the individuals who preside over a public hearing are not always a department employees. Additionally, amendments to §2.106 and §2.108 remove the requirement of a certification signed by the public hearing officer, as the department believes that there is no need to specify by rule the individual authorized to execute a certification regarding the public participation process.

Amended §2.5 also revises the definition of "environmental review document" to refer to a "documented" reevaluation. This revision corresponds to amendments to §2.85, Reevaluations, which differentiate between "documented reevaluations" and "consultation reevaluations." This distinction is explained further below in the context of the amendments to §2.85.

Amended §2.5 also removes both the definition of "transportation enhancement" and inclusion of that term in the definition of "transportation project." In 2012, the Federal Moving Ahead for Progress in the 21st Century Act, or "MAP-21," replaced the Federal Transportation Enhancement Activities Program with the Transportation Alternatives Program. The Transportation Alternatives Program is a federal funding program for on- and off-road pedestrian and bicycle facilities, infrastructure projects for improving non-driver access to public transportation, community improvement activities, and other types of projects.

The department is required to follow its Chapter 2 rules both for state and Federal Highway Administration (FHWA) transportation projects, at least to the extent they are not inconsistent with applicable federal requirements. However, the primary purpose of the rules is to implement Transportation Code, §201.604, which requires the department to have rules governing the environmental review of the department's projects that are not subject to review under the National Environmental Policy Act (NEPA). Because Transportation Enhancement Program projects are, by definition, federally funded, they are subject to review under NEPA. The department believes it is neither necessary nor appropriate to include them in the definition of "transportation project" in Chapter 2, as they are a federally defined category of actions that are automatically subject to NEPA.

Amendments to §2.11, Employee Certification Process, provide that the certification is required only for a person who is employed by a department district and holds the job title of environmental specialist. The existing rule provides that the certification is required for a person who is employed by a department district and "prepares or reviews environmental reports, environmental review documents or documentation of categorical exclusion." This is too broad however, as there are many different jobs at the department that involve the review of environmental documentation, but that do not necessarily warrant certification under the Environmental Affairs Division's (ENV) process. The revision conforms the rule to the applicable statute, Transportation Code §222.006, which requires the certification only for "department district environmental specialists."

Amendments to §2.14, Project File, provide that a local government project sponsor must provide the project file to the department delegate before approval of the environmental review document or documentation of categorical exclusion. This change will ensure that the department delegate will have access to the full project file prior to rendering an environmental decision on the project.

SUBCHAPTER C. ENVIRONMENTAL REVIEW PROCESS FOR HIGHWAY PROJECTS

Amendments to §2.44, Project Scope, provide that a project scope is required only for a project for which an environmental review document is expected to be prepared, or for any project for which documentation of categorical exclusion (CE) is expected to be prepared and for which the project sponsor is a local government. The purpose of this change is to no longer require project scopes to be prepared for CE projects for which an organizational unit of the department is the project sponsor. CE projects are intended to have the most minimal level of environmental review. The department has determined that the additional administrative burden of requiring project scopes for CE projects undertaken by the department, in addition to the preparation of CE documentation, is not justified by the relatively minor associated benefits. Department personnel have become very familiar with the requirements applicable to most CE projects, and the department is confident that it can properly document that a project qualifies for a CE using the standardized CE documentation required under §2.81, relating to Categorical Exclusions, without the additional procedural step of preparing a project scope. Project scopes will continue to be required for CE projects for which a local government is the project sponsor, as the department believes that it remains a useful exercise for those entities that may not be as familiar as department personnel with requirements applicable to CE projects.

Amendments to §2.48, Administrative Completeness Review, exclude draft environmental impact statements (DEIS), and consultation reevaluations from the requirement to perform an administrative completeness review. The existing rule states that administrative completeness review is required for all environmental review documents, with a clarification that CE projects for which a checklist is prepared are exempt. However, the department does not intend for there to be an administrative completeness review for a DEIS. The primary purpose of administrative completeness review is to ensure that a document is complete, and ready for a timed technical review subject to a review deadline under Transportation Code, §201.759. In other words, if the project sponsor has submitted a document that is, on its face, incomplete, the timed technical review under §201.759 should not begin until the document is re-submitted as a complete document. Under Transportation Code, §201.759, there is a deadline for completing a timed technical review of a final environmental impact statement (FEIS), but there is no such deadline for review of a DEIS. There is, therefore, no compelling reason to have a separate administrative completeness review for a DEIS before it is reviewed for readiness for public review.

Also, the distinction between documented reevaluations and consultation reevaluations in amended §2.85 requires a change to §2.48 to clarify that there is no administrative completeness review for a consultation reevaluation. The amended version of §2.48 provides that administrative completeness review is required only for draft EAs, FEISs, documented reevaluations, and CEs for which a narrative document is prepared rather than a checklist.

Amended §2.48 also clarifies that once a document is declared administratively complete, no further administrative completeness review is required for future revised, amended or final versions of the same document. The department believes this clarification is needed to avoid confusion when an environmental review document is heavily revised or there is a long delay between submittal of different versions of the same document.

Amendments to §2.49, Technical Review, clarify that, while technical review for most types of environmental review documents begins when the document has been determined to be administratively complete, technical review of a DEIS begins when the department delegate receives the document from the project sponsor. This revision corresponds to the above-described amendments to §2.48, indicating that there is no administrative completeness review for a DEIS.

Amendments to §2.50, Deadlines for Completing Certain Types of Technical Reviews; Suspension of Technical Review Deadlines, clarifies the meaning of "the date the public participation process concludes" for purposes of determining the 60-day deadline for rendering an environmental decision on an EA. If no hearing is held and no public comments are received on the draft EA, then "the date the public participation process concludes" is the date on which the project sponsor submits to the department delegate a written confirmation that no further public participation is required and none will be conducted. If a hearing is held or if public comments are received on the draft EA, then "the date the public participation process concludes" is the date that the project sponsor submits to the department delegate the documentation of public hearing required by §2.107 of this chapter (relating to Public Hearing), if applicable, and a revised EA responsive to any public comments received. The department believes this clarification is needed because the existing rule does not account for situations in which only an opportunity for public hearing is held or comments are received outside of a public hearing. Additionally, the public participation process does not "conclude" until the project sponsor has developed responses to any comments received and any corresponding revisions to the draft EA.

Amended §2.50 also provides that the deadline for rendering an environmental decision within 120 days of when the department delegate determines that a reevaluation is administratively complete applies only to a "documented" reevaluation. As described below in the context of amendments to §2.85, Reevaluations, the department is making a distinction between "documented reevaluations" and "consultation reevaluations." While consultation reevaluations should be appropriately noted in the project file, there is no requirement to prepare a document for administrative and technical review if the result of a consultation reevaluation is that no documented reevaluation is required.

SUBCHAPTER D. REQUIREMENTS FOR CLASSES OF PROJECTS

Amendments to §2.81, Categorical Exclusions, provide that certain types of projects meeting specified criteria may be processed as CEs, without preparation of individual environmental issues checklists, by recording verification that the project meets the specified criteria. It has been the department's experience that certain classes of activities, by definition, do not involve any potential for significant environmental impacts or need for coordination with resource agencies, and therefore may be cleared as CEs without the need for preparation of an environmental issues checklist for the individual project.

Amended §2.81 also changes the section heading in the reference to §2.131 to conform to the changes made to that heading by these rules.

Amendments to §2.83, Environmental Assessments, provide that, when a public hearing is held, the department delegate will review "the documentation of public hearing" rather than the "summary and analysis." As explained below in the context of

amendments to §2.107, the department will no longer require preparation of a public hearing "summary and analysis." Instead, the department will require preparation of "documentation of public hearing," which consists of various types of materials specified by guidance, including a comment and response matrix.

Amended §2.83 also removes the requirement to include in an EA "a summary of the contacts with agencies and the comments received." The department believes that the remaining requirement to include in the EA the results of coordination, which would typically include copies of any correspondence with resource agencies, is sufficient.

Amendments to §2.84, Environmental Impact Statements, clarify that an environmental impact statement (EIS) is prepared not only if there are likely to be a significant environmental impacts, but also if the project is of a type for which an EIS is typically prepared. ENV is familiar with the types of projects for which an EIS is typically prepared, such as large scale new highways or added-capacity highways. The department believes amendment of §2.84 is needed to ensure that the default classification of these types of projects is an EIS, even when department personnel is unable to conclude that the project is likely to involve significant environmental impacts.

Amended §2.84 also removes the requirement to include in an EIS "a summary of the contacts with agencies and the comments received." The department believes that the remaining requirement to include in the EIS the results of coordination, which would typically include copies of any correspondence with resource agencies, is sufficient.

Amended §2.84 also reflects that a notice of availability of a DEIS or FEIS is "issued" rather than "published." The department believes that "issue" more appropriately describes the department's dissemination of a notice of availability, which, depending on the type of document, may not actually be "published" in any periodical.

Amended §2.84 also removes the reference to preparation of a "draft" record of decision. While a record of decision, like most written documents, is likely to go through one or more rounds of drafting prior to being finalized, preparation of a "draft" record of decision is not a separate procedural step.

Amended §2.84 also revises the description of a record of decision (ROD) to more closely track that set forth in rules promulgated by the Federal Council on Environmental Quality (CEQ) at 40 C.F.R. §1505.2 and by FHWA at 23 C.F.R. §771.127. The department believes the revised description of a ROD to be more clear and precise.

Amended §2.84 also revises the department's procedure for producing a combined FEIS/ROD. Instead of having two signature lines on the cover of the combined FEIS/ROD, one for the FEIS and the other for the ROD, and then waiting 30 days between signing separately for the FEIS and the ROD as required by the existing rule, the revised rule allows the department delegate to sign just once to indicate approval of the combined FEIS/ROD. This is consistent with how other states appear to be handling combined FEIS/RODs. The 30-day waiting period prior to issuance of a ROD remains in place when the FEIS and ROD are prepared as separate documents.

Amended §2.84 also clarifies the language prohibiting certain project activities until a ROD is issued. The existing rule prohibits "further approvals...except for administrative activities taken to

secure further project funding." This language, patterned after FHWA's rule governing RODs at 23 C.F.R. §771.127(a), is somewhat vague and confusing. The department believes it is more appropriate, and consistent with the overall purpose of the department's environmental review requirements, to prohibit "any action concerning the project that would have an adverse environmental impact or limit the choice of reasonable alternatives" until the ROD is issued. The revised language is patterned after CEQ's rule at 40 C.F.R. §1506.1.

Amendments to §2.85, Reevaluations, make a distinction between documented reevaluations and consultation reevaluations, and provide that documented reevaluations may be in the form of a checklist. Documented reevaluations are required if an FEIS is not submitted to the department delegate within three years after a DEIS is circulated, or if major steps to advance the project have not occurred within three years after the FEIS, an FEIS supplement, or the last major department approval or grant. ENV has developed a checklist for preparing a documented reevaluation. While it may be necessary to develop technical reports or other materials in support of a documented reevaluation, the reevaluation itself should be in the format of the department's prescribed checklist.

A consultation evaluation, as opposed to a documented reevaluation, will be conducted whenever there are changed circumstances that could affect the continued validity of a ROD, finding of no significant impact (FONSI) or CE designation. If either the project sponsor or department delegate believes that changed circumstances are present, the project sponsor and department delegate will consult to determine if the environmental documentation remains valid in light of the changed circumstances. The project sponsor should record this consultation in the project file. For example, a journal entry may be added to the department's Environmental Compliance Oversight System indicating the consultation between project sponsor and department delegate, and any determination or outcome of that consultation. If the project sponsor and department delegate are both confident that the environmental documentation remains valid, then there is no need to prepare a documented reevaluation. However, if either the project sponsor or department delegate has any concerns about the continued validity of the environmental documentation, then a documented reevaluation must be completed. Again, any such documented reevaluation should be prepared using the department's prescribed checklist format.

SUBCHAPTER E. PUBLIC PARTICIPATION

Amendments to §2.102, Notice of Intent, change the department's procedure for issuing a notice of intent (NOI), which signals the department's intent to begin the process for preparing an EIS for a project. Under amended §2.102, the department will publish an NOI either in the *Texas Register* or in the *Federal Register*, depending on whether the project is a state or FHWA transportation project, but not in both the *Texas* and *Federal Registers*. Any benefits of the requirement in the existing rule to publish all NOIs in the *Texas Register*, even for FHWA transportation projects for which the NOI is also published in the *Federal Register*, do not justify the additional administrative burden. Publication of the NOI for an FHWA transportation project in the *Federal Register* should be sufficient to alert those entities with interest in the department's EIS projects. Additionally, federal law requires the department to hold early scoping public meetings following issuance of an NOI for an FHWA transportation project. See 23 U.S.C. §139. The methods used to notify the public of these early scoping meetings are typically tailored

to the type and location of the project in order to maximize public awareness. Notification of these meetings is an effective way to notify the public of an FHWA EIS project, without publishing an NOI in the *Texas Register* that is duplicative of the one published in the *Federal Register*.

Amendments to §2.104, Meeting with Affected Property Owners (MAPO), require one or more MAPOs to be held when a project requires a road or bridge closure. The department considers a road or bridge closure as a form of detour, which is one of the triggers for a MAPO in the existing rule, but believes that this revision is needed to clarify the intent of the existing rule.

Amendments to §2.105, Public Meeting, shorten the explanation of the purpose of a public meeting to the essential functions, and remove superfluous descriptive language regarding the purpose of a public meeting.

Amended §2.105 also removes the limitation in the existing rule that the decision to hold a public meeting be based on the level of public concern "that is based on environmental issues." The decision to hold a public meeting should be based on the level of public concern about the project generally, not just environmental issues.

Amended §2.105 also removes the requirement of a project sponsor to prepare a written summary of a public meeting that includes specific enumerated elements. The department believes that the benefits of a written summary of a public meeting do not justify the additional administrative burden and cost. Instead, project sponsors will be required to assemble documentation of a public meeting in accordance with guidance provided by ENV. ENV will continue to require project sponsors to prepare and include in the documentation a matrix containing the department's responses to comments received from the public.

Amendments to §2.106, Opportunity for Public Hearing, remove the requirement that the project sponsor's certification of the public participation process be "signed by the department public hearing officer." As indicated above, the phrase, "department public hearing officer," is confusing because, as provided in subsection (f) of §2.101, General Requirements, the individuals who preside over public hearings are not always department employees. Additionally, the department believes that there is no need to specify by rule the individual authorized to execute a certification regarding the public participation process.

Amended §2.106 also clarifies that notice of the opportunity to request a public hearing must be published before the 30th day before the deadline for submission of written requests for holding a public hearing. This is not a substantive change, but rather conforms to style used elsewhere in Chapter 2.

Amended §2.106 also clarifies that an opportunity for public hearing is afforded for a project for which an environmental assessment is being prepared, rather than a project for which "the results of environmental studies support a FONSI." This change is needed because the existing language may be interpreted as requiring speculation as to what the ultimate conclusion of the environmental assessment will be when determining whether or not an opportunity for public hearing must be afforded.

Amended §2.106 also removes the requirement to afford an opportunity for public hearing when the project sponsor or department delegate determines it is in the public interest. The department believes that, in situations in which none of the other criteria for affording a public hearing are triggered, but project-specific

facts nevertheless warrant a level of public participation beyond a public meeting, a public hearing, rather than a mere opportunity for one, would be more appropriate. The "public interest" criteria, is therefore moved from §2.106 to §2.107, Public Hearing.

Amendments to §2.107, Public Hearing, remove the requirement to hold a public hearing for "a high-profile project." It has been the department's experience that the phrase, "a high-profile project," is too subjective to be a helpful threshold for determining when a public hearing is required. Additionally, a project that may be considered "high-profile" may not, in fact, be the subject of substantial public interest from an environmental review perspective, in which case it would not be a judicious use of the department's resources to hold a hearing on the project.

Amended §2.107 also revises the requirement to hold a hearing on a project that constructs a new "facility" on a new location to instead require a hearing on a project that constructs a new "highway" on a new location. "Facility" is not defined, and could be construed to mean relatively minor infrastructure improvements, such as construction of a pedestrian or bike path, for which a public hearing would not necessarily be justified. Additionally, revising to "highway" corresponds to the requirement in Transportation Code §203.022 to provide notice and an opportunity to comment to adjoining landowners and local governments for projects that involve "the construction of a highway at a new location."

Amended §2.107 also removes references to Chapter 26 of the Parks and Wildlife Code and Chapter 183 of the Natural Resources Code. As explained above, the department considers the hearing requirements in those statutes to be separate from and not subject to the requirements for hearings held under its environmental review rules.

Amended §2.107 also revises the timeframe for publishing newspaper notice of a public hearing, and for making maps, drawings, environmental reports, and other documents available for public inspection, to at least 15 days before the hearing. Under the existing rule, these items are due 30 days before the hearing. This change will allow additional flexibility in the scheduling and arrangement of facilities for holding a public hearing.

Amended §2.107 also revises the deadline for accepting public comments to 15 days after the date of the public hearing, regardless of whether the hearing was held for an EA or EIS project. Under the existing rule, the comment deadline is 10 days after the hearing for an EA project, and 15 days after the hearing for an EIS project. Changing the comment deadline to 15 days after the hearing for both EA and EIS projects reduces the chances for confusion about the correct deadline. It also provides a full 30 days for public comment after the notice of hearing is published and materials are made available for public review.

Amended §2.107 also removes the requirement of a project sponsor to prepare a written summary of a public hearing that includes specific enumerated elements. The department believes that the benefits of a written summary of a public hearing do not justify the additional administrative burden and cost. Instead, project sponsors will be required to assemble documentation of a public hearing in accordance with guidance provided by ENV. ENV will continue to require project sponsors to prepare and include in the documentation a matrix containing the department's responses to comments received from the public.

Amended §2.107 also adds the requirement to hold a public hearing when the department delegate determines it is in the public interest. As explained earlier, the department believes this trigger is more appropriately included under §2.107, Public Hearing, rather than under §2.106, Opportunity for Public Hearing.

Amended §2.107 also adds requirements that one or more department employees must begin a public hearing by making opening remarks to the audience of attendees, and that one or more department employees must be physically present during any portion of a public hearing. This more closely conforms the department's public hearing rule to FHWA's stated interpretation of its own public involvement rule, which provides that a public hearing shall be "held by the State highway agency." 23 C.F.R. §771.111(h)(2).

Amendments to §2.108, Notice of Availability, reflect that a notice of availability (NOA) of a DEIS or FEIS is "issued" rather than "published." The department believes that "issue" more appropriately describes the department's dissemination of a notice of availability, which, depending on the type of document, may not actually be "published" in any periodical.

Amended §2.108 also clarifies that an NOA is issued only for a draft EA. There is no separate NOA for the final EA, as notice of completion of the environmental review process is provided by issuance of an NOA for the FONSI.

Amended §2.108 specifies that NOAs must be sent to "entities identified as having an interest in or regulatory jurisdiction over an aspect of the project in accordance with §2.12, relating to Project Coordination." This change is needed because the requirement in the existing rule that NOAs be sent to "agencies with an interest in the project" is too vague.

Amended §2.108 requires an NOA of a draft EA to be published on the department's website. The existing rule only requires NOAs of FONSIs, DEISs, FEISs, and RODs to be published on the department's website. In the interest of encouraging public involvement in the environmental assessment process, the department believes that draft EAs should be similarly noticed on the department's website.

Amended §2.108 also requires newspaper publication of an NOA for a draft EA for which no public hearing is held or an FEIS. This conforms the department's rules to FHWA's rules on this point, which require newspaper notice for these types of NOAs. See 23 C.F.R. §771.119(f) regarding EAs and 23 C.F.R. §771.125(g) regarding FEISs.

Newspaper publication of an NOA for a draft EA may be combined with the opportunity for public hearing notice published under §2.106(c), in which case the department recommends that the title of the notice read, "Notice of Availability of Draft Environmental Assessment and Opportunity for Public Hearing." The combined notice should also clearly indicate how copies of the draft EA may be obtained. Combining the NOA and notice of opportunity for public hearing avoids the need for a second newspaper publication of an NOA for the draft EA if no requests are ultimately received in response to the opportunity for public hearing.

Amended §2.108 also provides that the department will publish an NOA for a DEIS, FEIS or ROD either in the *Texas Register* or in the *Federal Register*, depending on whether the project is a state or FHWA transportation project, but not in both the *Texas* and *Federal Registers*. The benefits of the requirement

in the existing rule to publish an NOA for a DEIS or FEIS in the *Texas Register*, even for FHWA transportation projects for which the NOA is also published in the *Federal Register*, do not justify the additional administrative burden. Publication of the NOA for an FHWA DEIS or FEIS in the *Federal Register* should be sufficient to alert those entities with interest in the department's EIS projects.

Amended §2.108 also removes the requirement of a separate NOA for the ROD when a combined FEIS and ROD is issued. As explained above, §2.84, Environmental Impact Statements, is revised to no longer require two signature lines on the cover of the combined FEIS/ROD with a 30-day waiting period between signatures. It is, therefore, no longer necessary to have a separate NOA for the ROD when a combined FEIS/ROD is issued. A single NOA for the combined document will suffice.

Amended §2.108 also requires that an NOA of a DEIS published in the *Texas Register* or *Federal Register* shall establish a period of not fewer than 45 days and no more than 60 days for the return of comments on the DEIS. The purpose of this change is to conform the department's rules to the analogous FHWA rule, 23 C.F.R. §771.124(i).

Amendments to §2.110, Notice of Impending Construction, provides that the department may provide owners of adjoining property and affected local governments and public officials with notice of impending construction by any means approved by ENV, which may include a sign or signs posted in the right-of-way, mailed notice, printed notice distributed by hand, or notice via website when the recipient has previously been informed of the relevant website address. This will allow the department to more efficiently communicate this notice to the intended audience than would be allowed if mailed notice were the only option.

Amended §2.110 also requires that the notice of impending construction must be provided after a CE determination or issuance of a FONSI or ROD for the project, but before earthmoving or other activities requiring the use of heavy equipment commence. The department believes that this is the appropriate time frame for giving notice of impending construction, as commencement of heavy equipment use may have the potential for impacts to local landowners and governments.

SUBCHAPTER F. REQUIREMENTS FOR SPECIFIC TYPES OF PROJECTS AND PROGRAMS

Amendments to §2.131, Special Right-of-Way Acquisition, remove requirements implementing Parks and Wildlife Code, Chapter 26 and Natural Resources Code, Chapter 183. As explained above, those statutes apply by their own force and contain requirements independent of those specified under the department's environmental review rules. The department, therefore, does not believe it is necessary to have its own rules implementing these statutes. The amendments also re-name the section as "Advance Acquisition of Right-of-Way," as this is the only remaining subject covered by the rule after removal of the requirements implementing Parks and Wildlife Code, Chapter 26 and Natural Resources Code, Chapter 183.

Amended §2.131 also eliminates the requirement to prepare a CE analysis when the department acquires real property for corridor preservation, access management, or other purposes prior to completion of the environmental review process for a project. Those types of advance acquisitions by the department must instead be preceded by preparation of a due diligence report, which will assess the presence or likelihood of contamination and any other undesirable conditions on the real property, and

whether the real property consists of any public land that is designated and used as a park, recreation area, scientific area, wildlife refuge, or historic site. The department believes that a due diligence report is more appropriate than a CE analysis as there are generally no environmental impacts associated with the mere acquisition of real estate. Project impacts on a parcel that was the subject of advance acquisition will be identified and evaluated as part of the environmental review of the actual project.

COMMENTS

The department received comments from FHWA and the Texas Press Association (TPA).

SUBCHAPTER D. REQUIREMENTS FOR CLASSES OF PROJECTS

Comment: FHWA commented regarding the department's amendment of §2.81, regarding Categorical Exclusions (CEs). The department proposed to amend this rule to provide that an environmental issues checklist is not required for a project covered under a "programmatic CE" issued by the department's Environmental Affairs Division. FHWA stated that the term, "programmatic CE," is prohibited from use for federal aid projects under Section 1.1.4 of the December 16, 2014 Memorandum of Understanding Between the Federal Highway Administration and the Texas Department of Transportation Concerning State of Texas' Participation in the Project Delivery Program Pursuant to 23 U.S.C. 327 (the NEPA assignment MOU).

Response: The department agrees that "programmatic CE" is not the most appropriate term to describe the department's intent with respect to the proposed amendment of §2.81, as the programmatic agreement between FHWA and the department that allowed for the use of "programmatic CEs" is suspended for the duration of the NEPA assignment MOU.

In response to FHWA's comment, the department is revising its amendment of §2.81 to more specifically describe the department's intent without using the phrase, "programmatic CE." As the department explained in its proposal preamble, it has been the department's experience that certain classes of activities, by definition, do not involve any potential for significant environmental impacts or need for coordination with resource agencies, and therefore do not warrant preparation of an environmental issues checklist for each individual project. Amended §2.81 now allows the department's Environmental Affairs Division to direct that certain types of projects meeting specified criteria may be processed as CEs, without preparation of individual environmental issues checklists, by recording verification that the project meets the specified criteria.

Comment: FHWA commented regarding the department's amendment of §2.85, regarding Reevaluations. The department is amending this rule to specifically allow documented reevaluations to be prepared in a checklist format, as opposed to a narrative document. FHWA expressed concern with this approach, stating its position that the "evaluation" must be explained in enough detail to inform the public. FHWA further stated that it is not convinced that a checklist format would suffice to comply with 23 C.F.R. §771.129(b), which relates to the type of reevaluation required if major steps to advance the action have not occurred within three years of a final environmental impact statement (EIS).

Response: The rule cited by FHWA, 23 C.F.R. §771.129(b), states only that a "written evaluation" be prepared. It does not prescribe any required format or content. Further, unlike FHWA's

rules regarding environmental assessments (EAs) and EISs, the rule does not require any form of public involvement or review with respect to a reevaluation. Because the rule is so broadly written, any format of "evaluation" would suffice so long as it is "written" (i.e., recorded, or expressed in writing as opposed to verbally).

Although there's no requirement that a reevaluation be noticed for public review, the checklist format developed by the department does, in fact, contain information sufficient to allow a member of the public or any other reviewer to understand the analysis conducted. The department's Reevaluation Consultation Checklist form is available on the department's NEPA and Project Development Toolkit webpage. It contains many fields requiring written explanations or descriptions in response to questions or prompts, such as "Have substantial changes occurred to the project design concept and/or scope since the original environmental decision or subsequent reevaluations? (if so, explain)", and "Indicate whether there have been changes in the affected environment since the environmental decision." These and other fields on the form combine to provide an adequate depiction of the analysis conducted that could be easily understood by a member of the public.

SUBCHAPTER E. PUBLIC PARTICIPATION

Comment: FHWA commented regarding the department's amendment of §2.102, regarding Notice of Intent. The department is amending this rule to require publication of a notice of intent (NOI) in either the *Texas Register* or the *Federal Register*, depending on whether the project is a state or FHWA transportation project. FHWA pointed out that this may require re-issuance of an NOI if funding for a project changes from state to federal after initial publication in the *Texas Register*.

Response: The department appreciates FHWA's comment and is aware of this potential consequence, but believes that it is still more efficient to require, as a matter of rule, publication of the NOI only once in the appropriate register, depending on what is known about the source of funding at the outset. Note that nothing in the rule prohibits the department from publishing an NOI in both registers if it believes federal funding is a possibility for a particular project.

Comment: TPA also commented regarding the department's amendment of §2.102. TPA commented that it disagreed with elimination of the requirement to publish an NOI for an EIS in a newspaper of general circulation. It asserted that this change substantially reduces the likelihood that citizens in the affected areas will learn of the project in time to fully participate in the process and that the cost of newspaper publication is negligible compared to overall budgets, among other arguments. TPA also requested a hearing on the department's amendment of §2.102.

Response: The department has determined to not adopt this proposed change regarding newspaper publication. Section 2.102 will continue to require newspaper publication of an NOI for an EIS in a newspaper of general circulation. TPA has withdrawn its request for a hearing on the department's amendment of §2.102.

Comment: FHWA commented regarding the department's amendment of §2.105, relating to Public Meeting, and §2.107, relating to Public Hearing. The department proposed to amend these rules to require the project sponsor to assemble documentation of public meetings and hearings, rather than prepare a written summary with specific enumerated elements. FHWA

stated that it will have to review and approve the department's Public Involvement Handbook to ensure that the contents of public meeting and hearing documentation contain all elements required by federal rules.

Response: The department agrees with FHWA's comment. After completion of this rulemaking, the department intends to revise its existing Public Involvement Handbook to reflect this rulemaking and make other needed revisions. Before finalizing revisions to the handbook, the department will seek FHWA's approval of the procedures set forth in the handbook as required by 23 C.F.R. §771.111(h)(1). While FHWA states that 23 C.F.R. Section 771.123(g)(3) requires enumerated items to document public involvement, that section does not list specific documentation requirements. Note that, in the meantime, the existing handbook already contains the specific elements of public meeting and hearing documentation, which the department believes are consistent with federal rules, specifically §771.111(h)(2)(vi), requiring submission to FHWA of a hearing transcript, written public comments, and certification that a required hearing or hearing opportunity was provided.

Comment: TPA also commented regarding §2.107, and specifically the deletion of references to Chapter 26 of the Texas Parks and Wildlife Code. TPA stated that it had no objection to the deletion of these references.

Response: The department acknowledges TPA's comment.

Comment: FHWA commented that the department's proposed rules use the term, "highway," while the federal regulations use the term, "facility." FHWA asserted that this is problematic for projects other than highways such as rest areas, recreational trails and bicycle and pedestrian projects.

Response: The department believes this comment is made in reference to §2.107, which contains the triggers for holding a public hearing. The department is amending §2.107 to require a hearing for a project that constructs a new "highway," rather than a new "facility," on a new location.

FHWA's rules, at 23 C.F.R. §771.111(h)(2)(iii), require "one or more public hearings or the opportunity for hearing(s)" for a project that "substantially changes the layout or functions of connecting roadways or of the facility being improved". The department's rules mirror this requirement, not in §2.107, regarding public hearings, but in §2.106, regarding opportunities for public hearing. Section 2.106 states that an opportunity for public hearing is required for a project that "substantially changes the layout or function of connecting roadways or of the facility being improved".

Because FHWA's rules require either a public hearing or an opportunity for one in this situation, and because the department's rules require an opportunity for a hearing, the department's rules are consistent with FHWA's rules. The department's additional, separate trigger for holding a hearing on a new "highway" does not conflict with FHWA's rules.

Comment: FHWA commented that its rules, at 23 C.F.R. §771.111(h)(2)(iii), require public involvement events to be led or hosted by a department employee, as opposed to a contractor or local government sponsor. FHWA further pointed out that the public has a right to address the department directly.

Response: In response to FHWA's comment, the department is further amending §2.107 to specifically require one or more department employees to begin a public hearing by making opening remarks to the audience of attendees, and to require one or

more department employees to be physically present during any portion of a public hearing. These requirements do not preclude department staff from turning over any portion of a public hearing to a local government official, consultant, or any other individual approved by the department.

Note that the rule cited by FHWA, 23 C.F.R. §771.111(h)(2), applies only to public hearings. It does not apply to other forms of public participation not specifically identified in FHWA's rules, such as public meetings and meetings with affected property owners. Therefore, these forms of public participation are not affected by FHWA's stated interpretation regarding the meaning of "held by the State highway agency," and could continue to be hosted by other entities, without physical attendance by any department employee, in accordance with §2.101: "Public participation hosted by other entities may satisfy department public participation requirements provided the requirements established in this subchapter are met."

Comment: FHWA commented that its rules, at 23 C.F.R. §771.111(h)(2)(viii), require each State to have procedures to carry out a public involvement/public hearing program that provide for public notice and opportunity to comment on a Section 4(f) *de minimis* impact finding. FHWA asserted that this must be addressed for federal aid projects in the department's public participation rules.

Response: Because the Section 4(f) *de minimis* impact requirements are purely federal in nature, and there is no state equivalent, the department believes that FHWA's comment is best addressed by amending department guidance, rather than the state rules.

In 2014, when the department last revised its environmental review rules, FHWA made a similar comment regarding the lack of sufficient detail regarding federal requirements in the department's Chapter 2 rules. In response, the department explained its belief that a guidance document, rather than state rules, is the more appropriate method for informing staff of how to comply with federal public involvement/public hearing requirements. See the April 11, 2014 issue of the *Texas Register* (39 TexReg 2941, 2947). By the time the department responded to public comments in 2014, FHWA had already approved a separate guidance document as fulfilling the requirement to have public involvement procedures meeting federal requirements.

As stated earlier, the department intends to revise its existing Public Involvement Handbook to reflect this rulemaking and make other needed revisions. The department intends to incorporate into the next version of the handbook a reminder about the public notice and comment requirement for Section 4(f) *de minimis* determinations. Before finalizing revisions to the handbook, the department will seek FHWA's approval of the procedures set forth in the handbook as required by 23 C.F.R. §771.111(h)(1). The department believes that this, rather than amending the state rules to codify a purely federal regulatory requirement, is the most appropriate response to FHWA's comment.

Note also that the department's existing guidance on Section 4(f) *de minimis* determinations specifically requires confirmation that a public notice and opportunity for public review and comments was provided, and explains that this requirement can be satisfied in conjunction with other public involvement procedures, such as those for the NEPA process. See the department's "Checklist for Section 4(f) De Minimis for Public Parks, Recreation Lands,

Wildlife and Waterfowl Refuges, and Historic Properties," available on the department's Section 4(f) Toolkit webpage.

Comment: FHWA commented that the department's rules do not comply with 23 C.F.R. §771.119(h), which applies to projects that are of a type for which an EIS is normally prepared, but for which only an EA and FONSI are prepared. Section 771.119(h) states that, for such projects, the final EA must be made available for public review, by issuance of a notice similar to a public hearing notice, for a minimum of thirty (30) days before issuance of the FONSI.

Response: Because the requirement of a 30-day review period between issuance of an EA and FONSI for certain types of projects is a purely federal requirement, and there is no state equivalent, the department believes that FHWA's comment is best addressed by amending department guidance, rather than the state rules (see above response regarding Section 4(f) de minimis determinations).

Accordingly, the department intends to incorporate into the next version of the Public Involvement Handbook an explanation of the procedure for providing the 30-day review period between issuance of an EA and FONSI for certain types of federal projects. Before finalizing revisions to the handbook, the department will seek FHWA's approval of the procedures set forth in the handbook as required by 23 C.F.R. §771.111(h)(1).

Note that the department's recently issued guidance document, Handbook for Preparing an Environmental Assessment, contains an explicit reference to this federal requirement. The handbook is available on the department's NEPA and Project Development Toolkit webpage.

Comment: FHWA commented regarding §2.108, relating to NOA. FHWA stated that its rules, at 23 C.F.R. §771.111(d) & (e), require "other States and Federal land management entities" that may be significantly affected by an action, or by any of the alternatives, be notified early and their views solicited. FHWA asserted that §2.108 does not comply with this federal requirement because it only requires the NOA to be provided to "agencies that have submitted written comments on the project."

Response: In response to FHWA's comment, the department is revising its amendment of §2.108 to require NOAs to be sent to "entities identified as having an interest in or regulatory jurisdiction over an aspect of the project in accordance with §2.12, relating to Project Coordination." Section 2.12 is the department's rule regarding identification of interested entities with whom coordination on any given project may be required. It requires identification of "any agency, department, or other unit of federal, state, local, or Indian tribal government, including a local flood control authority, that may have an interest in a transportation project, or that is a regulatory agency with jurisdiction over an aspect of a project." The department believes that requiring NOAs to be sent to all entities identified under §2.12, regardless of whether they submitted written comments on the project, should satisfy the concern raised by FHWA.

Comment: TPA also commented regarding §2.108, and specifically the addition of a requirement to publish in the newspaper an NOA of a draft EA for which no public hearing is held or a final EIS. TPA stated that it supports this addition.

Response: The department acknowledges TPA's comment.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §§2.1, 2.3, 2.5, 2.11, 2.14

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.752, which requires the department to promulgate rules to establish standards for processing environmental review documents for highway projects; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 203.022, and 222.006 and Chapter 201, Subchapter I-1.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. ENVIRONMENTAL REVIEW PROCESS FOR HIGHWAY PROJECTS

43 TAC §§2.44, 2.48 - 2.50

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.752, which requires the department to promulgate rules to establish standards for processing environmental review documents for highway projects; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 203.022, and 222.006 and Chapter 201, Subchapter I-1.

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SUBCHAPTER D. REQUIREMENTS FOR CLASSES OF PROJECTS

43 TAC §§2.81, 2.83 - 2.85

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.752, which requires the department to promulgate rules to establish standards for processing environmental review documents for highway projects; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 203.022, and 222.006 and Chapter 201, Subchapter I-1.

§2.81. *Categorical Exclusions.*

(a) Applicability.

(1) This section applies to a transportation project that is classified by the department delegate as a CE. A CE is a category of actions that have been found to have no significant effect on the environment, individually or cumulatively.

(2) This section applies to a transportation project that is a state transportation project or an FHWA transportation project, except that subsection (e) of this section applies only if the project is an FHWA transportation project.

(3) This section does not apply to the purchase of an option to acquire real property, or to the exercise of an option or other early and advance acquisition of land. The required environmental review for those types of transactions is specified in §2.131 of this chapter (relating to Advance Acquisition of Right-of-Way).

(b) Approval for classification as CE.

(1) If the project sponsor satisfies the requirements of this subsection the department delegate may approve the classification of a transportation project as a CE.

(2) Except as provided in subsection (4) below, the project sponsor will submit to the department delegate documentation that is an environmental issues checklist showing compliance with the section. The checklist may be prepared electronically in the department's environmental database. A categorical exclusion determination in the form of a checklist is not an environmental review document. However, if required by the FHWA for an FHWA transportation project, the project sponsor must submit, instead of a checklist, a brief environmental review document discussing and analyzing the potential environmental impacts. If the department delegate determines that a transportation project qualifies as a CE, it will document that determination in the project file.

(3) The environmental issues checklist must show that the project does not violate the restrictions in subsection (c) of this section and that significant environmental impacts will not result based on the results of an evaluation of the project. The project sponsor must indicate if coordination is required, and if so, the portion of coordination that can be completed before final approval of the environmental review document has been completed.

(4) The department's environmental affairs division may direct that certain types of projects meeting specified criteria be processed as CEs, without preparation of individual environmental issues checklists, by recording verification that the project meets the specified criteria.

(c) Restrictions on classification.

(1) A CE project directly, indirectly, or cumulatively, may not:

(A) induce significant impacts to planned growth or land use for the area;

(B) cause any significant environmental impacts to any natural, cultural, recreational, historic, or other resource;

(C) cause any significant impacts to air, noise, or water quality;

(D) relocate significant numbers of people; or

(E) cause significant impacts on travel patterns.

(2) The CE action may not involve unusual circumstances or lead to:

(A) significant environmental impacts;

(B) substantial controversy on environmental grounds;

or

(C) inconsistencies with federal or state law.

(d) Categories of projects. For a state transportation project or an FHWA transportation project, the categories of projects listed at 23 C.F.R. §771.117(c) and (d) normally will qualify as categorical exclusions, unless unusual circumstances make the project ineligible for designation as a categorical exclusion under subsection (c) of this section. The categories of projects listed at 23 C.F.R. §771.117(c) and (d) are not the only types of projects that may qualify as categorical exclusions.

(e) FHWA transportation projects.

(1) For an FHWA transportation project, in addition to subsections (a) - (d) of this section, the department delegate and project sponsor must comply with any federal laws, including FHWA's rules, applicable to the processing of the project as a CE.

(2) If federal law, including FHWA's rules, or a programmatic agreement conflicts with this chapter, the federal law or programmatic agreement provision controls to the extent of the conflict.

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SUBCHAPTER E. PUBLIC PARTICIPATION

43 TAC §§2.102, 2.104 - 2.108, 2.110

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.752, which requires the department to promulgate rules to establish standards for processing environmental review documents for highway projects; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 203.022, and 222.006 and Chapter 201, Subchapter I-1.

§2.102. Notice of Intent (NOI).

(a) Purpose. An NOI formally initiates the process for preparing an EIS or a supplemental EIS.

(b) Notice of Intent Required. The project sponsor will prepare an NOI before the preparation of an EIS or supplemental EIS. An NOI must be prepared according to guidelines and procedures established by the department. The department delegate will review the NOI and submit it for publication in the *Texas Register* if the project is a state transportation project or in the *Federal Register* if the project is an FHWA transportation project.

(c) Notice Requirements. The project sponsor will publish the approved NOI in a local newspaper having general circulation in the area affected by the project. If there is no local newspaper in the area affected by the project, the project sponsor will publish the NOI in any newspaper having general circulation in the area affected by the project.

§2.107. Public Hearing.

(a) Purpose. A public hearing is held to present project alternatives and to encourage and solicit public comment.

(b) When to hold a public hearing. A project sponsor will hold a public hearing if:

(1) a request for hearing is received under §2.106 of this subchapter (relating to Opportunity for Public Hearing);

(2) ten or more individuals submit a written request for a hearing, except that a public hearing is not required under this paragraph if a public hearing has been held concerning the project before the requests are received or if the hearing requests are received after the environmental review document or documentation of categorical exclusion for the project is approved;

(3) the department delegate determines it is in the public interest; or

(4) the project is:

(A) a project with substantial public interest or controversy;

(B) an EIS project; or

(C) a project that constructs a new highway on a new location.

(c) Notice requirements.

(1) At a minimum, the project sponsor will publish, before the 15th day before the day of a public hearing, one notice of the hearing in a local newspaper having general circulation in the area affected by the project. If there is no local newspaper in the area affected by the project, the project sponsor will publish notice in a newspaper having general circulation in the area affected by the project. For a project that constructs a reliever route, notice must also be published in a newspaper of general circulation in the bypassed area.

(2) In addition to the other notice required by this subsection, the project sponsor will select a minimum of one additional outreach method to inform the public of the public hearing.

(3) The project sponsor will mail notice of the public hearing to landowners abutting the roadway within the proposed project limits, as identified by tax rolls or other reliable land ownership records, and to affected local governments and public officials.

(d) Procedural requirements.

(1) The hearing will be held after location and design studies are developed and the environmental review document or documentation of categorical exclusion is approved for public disclosure by the department delegate.

(2) The project sponsor will make the maps, drawings, environmental reports, and documents concerning the project available to the public for not less than the 15 consecutive days before the date of the public hearing.

(3) The project sponsor shall establish a deadline for accepting public comments of not less than 15 days after the date of the public hearing.

(e) Documentation requirements.

(1) After a public hearing, the project sponsor will assemble documentation of the public hearing. The public hearing documentation will be forwarded to the department delegate for review and maintained in the project file.

(2) For a public hearing regarding an EIS, the project sponsor will document the number of positive, negative, and neutral public comments received in accordance with Transportation Code, §201.811(b). This information must be presented to the commission in

an open meeting and reported on the department's website in a timely manner.

(f) Role of department staff. One or more department employees must begin a public hearing by making opening remarks to the audience of attendees. Additionally, one or more department employees must be physically present during any portion of a public hearing.

§2.108. *Notice of Availability.*

(a) Purpose. A notice of availability is issued to inform the public or recipient of when certain important documents are available for review, and how to obtain copies of those documents.

(b) When to issue notice. A notice of availability is required for:

- (1) a draft EA;
- (2) a FONSI;
- (3) a DEIS;
- (4) a FEIS; or
- (5) a ROD.

(c) Notice requirements.

(1) The project sponsor will send copies of all notices of availability to the appropriate metropolitan planning organization and entities identified as having an interest in or regulatory jurisdiction over an aspect of the project in accordance with §2.12, relating to Project Coordination. The copy of a notice with instructions on how to access the document electronically, may be provided by e-mail if the recipient has provided the department with an e-mail address. If the entity will receive a full copy of the document, it is not necessary to also send a notice of availability.

(2) The project sponsor, in collaboration with the department delegate, will publish a notice of availability on the department website regarding a FONSI, DEIS, FEIS, ROD, or draft EA.

(3) The project sponsor, in collaboration with the department delegate, will publish in a local newspaper having general circulation in the area affected by the project a notice of availability regarding a draft EA for which no public hearing is held or an FEIS. If there is no local newspaper in the area affected by the project, the project sponsor will publish notice in a newspaper having general circulation in the area affected by the project.

(4) The department delegate also must submit for publication a notice of availability regarding a DEIS, FEIS or ROD in the *Texas Register* if the project is a state transportation project or in the *Federal Register* if the project is an FHWA transportation project. For an NOA for a DEIS published in the *Texas Register* or *Federal Register*, the NOA shall establish a period of not fewer than 45 days and no more than 60 days for the return of comments on the DEIS.

(5) If the FEIS and ROD will be a single document, the notice of availability regarding the FEIS should indicate that fact.

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**SUBCHAPTER F. REQUIREMENTS FOR
SPECIFIC TYPES OF PROJECTS AND
PROGRAMS**

43 TAC §2.131

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which authorizes the commission to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §91.033, which authorizes the department to adopt rules concerning the environmental processing of a rail project; Transportation Code, §201.604, which requires the department to promulgate rules providing for its review of transportation projects that are not subject to review under the National Environmental Policy Act (42 U.S.C. §4321 et seq.); Transportation Code, §201.752, which requires the department to promulgate rules to establish standards for processing environmental review documents for highway projects; and Transportation Code, §203.022, which requires the department to promulgate rules concerning public participation during the environmental processing of certain projects.

CROSS REFERENCE TO STATUTE

Transportation Code, §§91.033, 91.034, 201.6035, 201.604, 201.606, 201.607, 201.610, 201.611, 201.617, 203.022, and 222.006 and Chapter 201, Subchapter I-1.

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**CHAPTER 6. STATE INFRASTRUCTURE
BANK**

The Texas Department of Transportation (department) adopts the repeal of §6.24, Suspension of Applications, and amendments to §6.31, Department Action, and §6.32, Commission Action, all relating to the State Infrastructure Bank. The repeal and amendments are adopted without changes to the proposed text as published in the April 15, 2015 issue of the *Texas Register* (41 TexReg 2725) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS AND REPEAL

The rulemaking implements new procedures for the commission's consideration of applications so that the department may more effectively manage the available funds in the State Infrastructure Bank (bank) in accordance with the policies of the Texas Transportation Commission (commission). The commission has historically used the bank to provide loans of varying size for highway projects, including relatively small loans for local government participation in department highway projects and relatively large loans for local governments' own highway projects. The commission's rules currently provide for the commission's consideration of loan applications on a first-come, first-served basis. The commission wishes to assure that funds in the bank will continue to be available for financial assistance to applicants as the need arises so it is amending the procedures for providing financial assistance from the bank.

The repeal of §6.24, Suspension of Applications, is necessary in order to adopt different notice requirements in §6.31, Department Action. Section 6.24, which requires the department to publish a notice in the *Texas Register* regarding the suspension of applications, will no longer be needed upon the adoption of the new notice requirements in §6.31(d).

Amendments to §6.31, Department Action, simplify the specified periods during which the executive director must analyze an application and prepare findings and recommendations for and submit those findings and recommendations to the commission by requiring those actions to be completed as soon as practicable. New subsection (d) requires the executive director to develop guidelines and post information on the department's website regarding available funds, limitations on the amount of bank funds available for various applicants and types of projects, application deadlines, and any other information that the executive director considers necessary for the administration of the bank in accordance with the executive director's analysis and recommendations to the commission under this chapter and the commission's direction to assure that funds in the bank will continue to be available for varying amounts of financial assistance to applicants for various types of projects as needs arise.

Amendments to §6.32, Commission Action, change the procedures regarding the commission's consideration of applications for preliminary and final approval to provide for better management of available funds in the bank. The commission wishes to assure that there will be funds available for loans of less than \$10 million for local participation in a department highway project, which typically take the form of local cost participation in a department project or the relocation of utilities necessary for a department project. The commission wishes to address the potential that local governments will apply for large loans for local government projects for which the department does not have primary responsibility, which could monopolize all of the available funds in the bank and leave no funds for a loan of less than \$10 million for local participation in a department highway project. The commission considers it important to have funds available in the bank for these smaller loans when a local government's participation is needed for a department project. Consequently, the rule amendments streamline the commission's consideration of the smaller loans that benefit department projects, while requiring applicants for large loans and loans for local government projects to compete for available funds through a prioritization process.

Currently, §6.32(a) states that the commission will consider all relevant information, including the sufficiency of the information, the probable reliability of the projections, and the anticipated fi-

ancial condition of the applicant and the project. The amendments to §6.32(a) clarify that the commission will consider all relevant information in the application together with the executive director's findings and recommendations.

Currently, §6.32(b)(1) requires that applications for financial assistance of under \$10 million will be considered by the commission for final approval without going through the preliminary approval process. The amendments limit this group of applications to those for loans of under \$10 million that will be used for local government participation in department projects.

Currently, §6.32(b)(2) requires that applications for financial assistance in the amount of more than \$10 million must be submitted to the commission for consideration for preliminary and final approval separately. The amendments to §6.32(b)(2) require that applications for financial assistance that are not subject to §6.32(b)(1) must be submitted to the commission for preliminary and final approval separately. This category of applications will include those for loans of more than \$10 million and loans of any amount for local government projects for which the department does not have primary responsibility.

Amendments to §6.32(c) add the requirements that the executive director prioritize applications that must be considered for preliminary approval and present to the commission analyses and recommendations for all complete applications received by each deadline established by the executive director in accordance with commission policies. The amendments delete the statement that the commission may consider certain factors and replace it with the requirement that the executive director must base the analyses and recommendations on specified considerations. The amendments also add factors that the executive director must consider in developing the analyses and recommendations to the commission. The amendments also clarify that the commission's preliminary approval is of an application for financial assistance from the bank rather than to a project for bank financing. These amendments are needed to implement the new prioritization and preliminary approval process that will provide for better management of available funds in the bank.

COMMENTS

No comments on the proposed repeal and amendments were received.

SUBCHAPTER C. PROCEDURES

43 TAC §6.24

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code §222.077, which authorizes the commission to adopt rules to implement Transportation Code, Chapter 222, Subchapter D relating to the State Infrastructure Bank.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 222, Subchapter D.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. DEPARTMENT AND COMMISSION ACTION

43 TAC §6.31, §6.32

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code §222.077, which authorizes the commission to adopt rules to implement Transportation Code, Chapter 222, Subchapter D relating to the State Infrastructure Bank.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 222, Subchapter D.

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CHAPTER 7. RAIL FACILITIES SUBCHAPTER D. RAIL SAFETY

43 TAC §§7.31, 7.33, 7.34, 7.36

The Texas Department of Transportation (department) adopts amendments to §7.31, Safety Requirements, §7.33, Reports of Accidents/Incidents, §7.34, Hazardous Materials--Telephonic Reports of Incidents, and §7.36, Clearances of Structures Over and Alongside Railway Tracks, concerning Rail Safety. The amendments to §§7.31, 7.33, 7.34 and 7.36 are adopted without changes to the proposed text as published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2728) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The rule amendments correct statutory references, update the toll-free number for railroads to use when reporting on rail safety incidents, and clarify the application and approval process for waivers of railway clearance provisions.

Amendments to §7.31, Safety Requirements, add references to Transportation Code, Chapters 191 and 192 to the list of laws

containing safety requirements with which railroads operating in the state must comply. Both chapters provide requirements for railroad companies that are reviewed and monitored by the department.

Amendments to §7.33, Reports of Accidents/Incidents, and §7.34, Hazardous Materials--Telephonic Reports of Incidents, update the toll-free number listed for railroads to use when reporting on rail safety accidents and incidents. The changes replace the toll-free number of a customer service vendor with the number monitored by the department.

Amendments to §7.36, Clearances of Structures Over and Alongside Railway Tracks, update statutory references within the section and clarify the application and approval process for waivers to requirements related to the clearances of structures over and beside railway tracks. The amendments clarify that the commission decides whether to grant a waiver. Vernon's Texas Civil Statutes, Article 6559f, which was originally passed by the legislature in 1925, authorized the Railroad Commission, under certain conditions, by order to grant a deviation from the requirements of Articles 6559a-6559c. In 2005, the legislature transferred all powers and duties of the Railroad Commission that related primarily to railroads and the regulation of railroads to the state transportation agency. The wording of Article 6559f remained unchanged until it was codified as Transportation Code, §191.005, as a part of the legislature's codification of Texas statutes. Section 191.005 authorizes the department by order to grant a deviation (or waiver). Notwithstanding the legislature's generic use of "department" on the transfer of the Railroad Commission's duties, the authority and duties of the Railroad Commission, itself, were transferred to the Transportation Commission and the authority and duties of the staff of Railroad Commission were transferred to the department. Accordingly, the authority to grant a waiver from the requirements of Articles 6559a-6559c rests with the commission and a waiver may be granted only by commission minute order.

The amendments to §7.36 also remove the reference to 43 TAC §7.42 regarding administrative review because the decision on a waiver is made by the commission and not the executive director but expressly retain, as new subsection (e)(3) and (4), the parts of §7.42(c) providing that insufficient information will result in denial of the waiver and that there is no right of appeal.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 111, 191, 192, and 193.

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CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

SUBCHAPTER C. CONTRACTING FOR ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICES

43 TAC §§9.31, 9.32, 9.34, 9.35, 9.37, 9.41

The Texas Department of Transportation (department) adopts amendments to §9.31, Definitions, §9.32, Selection Processes, Contract Types, Selection Types, and Projected Contracts, §9.34, Comprehensive Process, §9.35, Federal Process, §9.37, Accelerated Process, and §9.41, Contract Administration, concerning Contracting for Architectural, Engineering, and Surveying Services. The amendments are adopted without changes to the proposed text as published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2730) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Effective June 22, 2015, the Federal Highway Administration revised 23 CFR 172, relating to procurement, management, and administration of engineering, architectural, and surveying contracts. States were given 12 months to make corresponding revisions to their policies and procedures. The changes to the rules incorporate the updates required by federal regulations and correct citations and terminology.

Amendments to §9.31 include new definitions for "department project manager," "indefinite deliverable contract," "multiphase contract," "prime provider project manager," "Professional Engineering Procurement Services Division," "Professional Engineering Procurement Services Division Director," "proposal," "request for proposal," and "specific deliverable contract." The amendments also include revisions to the terms "consultant selection team," "non-listed category," and "relative importance factor." These new and revised definitions are necessary to provide clarity. The terms "managing office," "managing officer," and "notice of intent" are no longer used and are will be deleted.

Amendments to §9.32(b) add multiphase contract as a third contract type offered by the department and provide the maximum period of five years for an indefinite deliverable contract. Federal regulations provide the five-year maximum for federally funded contracts. The amendments apply this contract period to all indefinite deliverable contracts, whether federally or state-funded, for consistency among those contracts.

Amendments to §§9.34, 9.35, 9.37, and 9.41 update references to reflect the current names of departmental positions and entities.

Additionally, §9.35 is amended by adding subsection (d) that modifies the short list evaluation for the federal process by adding the evaluation of proposals in addition to interview for the federal process, as directed by federal regulations.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, §223.041, regarding the use by the department of private sector professional services for transportation projects, and Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act), which sets forth requirements for selection and contracting of architectural and engineering services.

CROSS REFERENCE TO STATUTE

Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act) and Transportation Code, §223.041.

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