

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 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD

AND ABUSE PROGRAM INTEGRITY SUBCHAPTER G. ADMINISTRATIVE ACTIONS AND SANCTIONS

DIVISION 3. ADMINISTRATIVE ACTIONS AND SANCTIONS

1 TAC §371.1713

The Texas Health and Human Services Commission (HHSC) adopts the repeal of §371.1713, concerning Restricted Reimbursement, without changes to the proposed text as published in the January 29, 2016, issue of the *Texas Register* (41 TexReg 717) and will not be republished.

BACKGROUND AND JUSTIFICATION

Section 371.1713 is repealed because it contains a process the Office of the Inspector General no longer uses."

COMMENTS

The 30-day comment period ended February 29, 2016. No comments were received regarding the repeal of §371.1713.

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

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 28, 2016.

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Karen Ray
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Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900



TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER H. SECTION 8 HOUSING CHOICE VOUCHER PROGRAM

10 TAC §5.802

The Texas Department of Housing and Community Affairs (the "Department") adopts an amendment to 10 TAC Chapter 5 Community Affairs Programs, Subchapter H, Section 8 Housing Choice Voucher Program, §5.802, Local Operators for the Section 8 Housing Choice Voucher Program without changes to the proposed text as published in the June 10, 2016, issue of the *Texas Register* (41 TexReg 4136). The amended rule will not be republished.

REASONED JUSTIFICATION. The purpose of the amendment to 10 TAC §5.802 is to remove definitions, eligibility criteria, the application process, and requirements relating to procuring new Local Operators because the Department is no longer utilizing new Local Operators, and clarifies the responsibilities and eligibility criteria and performance requirements for Local Operators.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS. The public comment period was held June 6, 2016, through July 6, 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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Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 13. TEXAS HISTORIC PRESERVATION TAX CREDIT PROGRAM

13 TAC §§13.1, 13.2, 13.6

The Texas Historical Commission adopts amendments to 13 Texas Administrative Code §13.1, relating to Definitions, §13.2, relating to Qualification Requirements, and §13.6, relating to the application review process, with changes to the proposed text as published in the May 20, 2016, issue of the *Texas Register* (41 TexReg 3571). These changes are necessary to clarify the circumstances under which lessees may be eligible to apply for the franchise tax credit and to clarify requirements for non-profit entities newly allowed to participate in the program, and to allow certain partial rehabilitations to participate in the program.

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

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

Section 13.6 describes the application review process and further specifies how the scope of the project may be defined for review purposes. The third amendment will, under certain circumstances, allow portions of a larger scope of work to be considered as an individual project.

During the public comment period for the proposed rules, comments were provided by Kennedy Sutherland LLP regarding these proposed amendments. As a result, a reference in the text of the third amendment has been edited for clarity, but no further changes have been made.

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

§13.1. Definitions.

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

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

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

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

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

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

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

Figure: 13 TAC §13.1(3) (No change.)

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

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

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

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

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

(B) designated as a Recorded Texas Historic Landmark under §442.006, Texas Government Code, or as a State Antiquities

Landmark under Chapter 191, Texas Natural Resources Code; §21.6 and §26.3(63) - (64) of this title; or

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

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

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

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

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

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

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

(12) Contributing--A building in a historic district considered to be historically, culturally, or architecturally significant according to the criteria established by state or federal government, including those formally promulgated by the National Park Service and the United States Department of the Interior at 36 C.F.R. Part 60 and applicable National Register bulletins.

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

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

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

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

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

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

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

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

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

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

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

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

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

§13.2. Qualification Requirements.

(a) Qualification for credit.

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

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

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

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

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

(A) non-residential real property; or

(B) residential rental property.

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

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

(2) architectural services;

(3) engineering services;

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

(5) subcontracted services;

(6) development fees;

(7) construction period interest and taxes; and

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

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

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

(2) the personal labor by the applicant;

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

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

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

(d) Eligibility date for costs and expenses.

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

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

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

(e) Phased development. Part B applications for rehabilitation of the same certified historic structure may be submitted by the

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

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

§13.6. Application Review Process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

mission of the application is considered part of the project, as is the cumulative effect of any work in previously completed or future phases.

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

(B) For these projects described in part (5)(A) above, all work completed by the current owner twenty-four (24) months before the submission of the application, and within the same scope of review (e.g. exterior and/or primary interior) is considered part of the project, as is the cumulative effect of any work in previously completed or future phases within the same scope of review.

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

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

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

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

(A) If the completed project is found to be in compliance with the approved Part B and any required conditions and consistent with the Standards for Rehabilitation, and the building is a certified historic structure at the time of the application, the Commission shall approve the project. The Commission then shall issue to the applicant a certificate of eligibility that confirms the property to which the eligible costs and expenses relate is a certified historic structure and the rehabilitation qualifies as a certified rehabilitation and specifies the date the certified historic structure was first placed in service after the rehabilitation.

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

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

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

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

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

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

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Mark Wolfe

Executive Director

Texas Historical Commission

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Proposal publication date: May 20, 2016

For further information, please call: (512) 463-6100



CHAPTER 19. TEXAS MAIN STREET PROGRAM

13 TAC §19.1, §19.5

The Texas Historical Commission (hereinafter referred to as the "commission") adopts amendments to §19.1 and §19.5 of Chapter 19 (Title 13, Part 2 of the Texas Administrative Code) relating to the Texas Main Street Program ("the program") without changes to the proposed text as published in the May 20, 2016, issue of the *Texas Register* (41 TexReg 3575).

The Texas Historical Commission's Texas Main Street Program is the agency's responsibility under §442.014, Title 4 Subtitle D of the Texas Government Code. The Texas Main Street Program utilizes a national model established by the National Trust for Historic Preservation and the agency has been the state coordinating program for thirty-five years. Administration of the program must comply with the requirements of the national Main Street America Program. Local communities in Texas wishing to participate in the program must apply and participate under the auspices of the Texas Historical Commission. Currently, eighty-seven communities with populations from approximately 1,800 to 325,000 actively participate in the program statewide.

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

city and business communities. The Texas Historical Commission provides training, technical, and organizational assistance to the local participants.

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

The commission received no comments on the adoption of the amendments.

Amendment of §19.1 and §19.5 of Chapter 19 is adopted under §442.005(q), Title 4 Subtitle D of the Texas Government Code, which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

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

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 26, 2016.

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Mark Wolfe

Executive Director

Texas Historical Commission

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For further information, please call: (512) 463-6100



CHAPTER 24. RESTRICTED CULTURAL RESOURCE INFORMATION

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

The Texas Historical Commission (THC) adopts amendments to §24.7, related to Definitions, §24.13, related to Restricted Information, §24.15, related to Access to Both Public and Restricted Cultural Resource Information, §24.17, related to Criteria for Access to Restricted Information, and §24.19, related to Restricted Information Application Submission and Review Procedures, without changes to the proposed text as published in the May 20, 2016, issue of the *Texas Register* (41 TexReg 3576). These changes are needed to further clarify the conditions and procedures related to access to restricted information under the control of the Commission.

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

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

is no anticipated economic cost to persons who are required to comply with these rule amendments as adopted.

No comments were received regarding adoption of the amendments.

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

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

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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Mark Wolfe

Executive Director

Texas Historical Commission

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



CHAPTER 28. HISTORIC SHIPWRECKS

13 TAC §28.6, §28.9

The Texas Historical Commission (THC) adopts amendments to Texas Administrative Code, Title 13, Part 2, Chapter 28, §28.6, related to Conduct of Activities, and §28.9, related to Analysis and Presentation of Data, without changes to the proposed text as published in the May 20, 2016, issue of the *Texas Register* (41 TexReg 3578). These changes are needed to further clarify the collection and presentation of marine remote-sensing data as part of permitted underwater archeological investigations.

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

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

No comments were received regarding adoption of the amendments.

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

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

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 27, 2016.

TRD-201603698

Mark Wolfe

Executive Director

Texas Historical Commission

Effective date: August 16, 2016

Proposal publication date: May 20, 2016

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



CHAPTER 29. MANAGEMENT AND CARE OF ARTIFACTS AND COLLECTIONS

13 TAC §§29.4 - 29.6

The Texas Historical Commission (THC) adopts amendments to §29.4, related to Definitions; §29.5, related to Disposition of Archeological Collections; and §29.6, related to Certification of Curatorial Facilities for State-Associated Held-in-Trust Collections without changes to the proposed text as published in the May 20, 2016, issue of the *Texas Register* (41 TexReg 3580). The amendments are adopted under the jurisdiction of the Antiquities Code of Texas (Title 9, Chapter 191, of the Texas Natural Resources Code). These changes are needed to further clarify the conditions and procedures related to the management and care of artifacts and collections under the control of the Commission.

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

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

No comments were received regarding adoption of the amendments.

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

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

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 27, 2016.

TRD-201603699

Mark Wolfe

Executive Director

Texas Historical Commission

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

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TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 31. ADMINISTRATION

16 TAC §31.4

The Texas Alcoholic Beverage Commission adopts amendments to §31.4, relating to Public Information Signs, with changes to the proposal as published in the June 10, 2016, issue of the *Texas Register* (41 TexReg 4139).

Section 31.4 addresses signs that must be posted at a licensed premises informing consumers how to file a complaint with the commission about the sale or service of alcoholic beverages at the establishment, and signs that must be posted at licensed or permitted premises that are authorized to sell alcoholic beverages for consumption on the premises informing consumers of health risks associated with drinking alcohol during pregnancy.

The amendments provide the statutory authorization for each sign requirement. The amendments clarify that the complaint sign requirement applies to businesses that hold permits as well as to those which hold licenses. The amendments also indicate that complaints may be filed by using the commission's website or a commission-authorized mobile application, as well as by mail or telephone.

Section 31.4 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for reoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended.

Although the commission received no comments on the proposed amendments, the commission is making one change to the published proposal. The published amendments did not propose to change the commission's telephone number as it appeared in the version of the rule adopted in 2008. That number is the 512 area code number at the commission's headquarters in Austin. The commission is instead adopting a change that substitutes the toll-free commission number (1-888-THE-TABC). This change does not involve any new subject or affect any new persons, and therefore republication is not required. (*See Board of Insurance v. Deffebach*, 631 SW2d 794 (Tex. App. Austin 1982).

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

§31.4. Public Information Signs.

(a) Complaint Sign. In accordance with Alcoholic Beverage Code §5.53(d), any licensed or permitted business location in the state which sells or serves alcoholic beverages to the ultimate consumer shall display at his place of business in a prominent place easily seen by the public, i.e. near the door or by the cash register, a sign that provides the following information: "If you have a complaint about the sale or service of alcoholic beverages in this establishment, please contact the Texas Alcoholic Beverage Commission by mail at P.O. Box 13127, Austin, Texas 78711-3127, by phone at 1-888-THE-TABC, by internet at www.tabc.texas.gov, or by a TABC-authorized mobile application."

(1) This sign shall be no smaller than 6 inches by 3-1/2 inches and shall be in lettering or type of a size sufficient to render it both conspicuous and readily legible.

(2) The sign shall be made of sturdy material; if made of paper, the weight shall be no less than 65# stock.

(b) Health Risk Warning Sign. In accordance with Alcoholic Beverage Code §§11.042 and 61.111, a holder of a license or permit authorizing the sale of alcoholic beverages for on premises consumption shall display a health risks warning sign. The health risks warning sign must:

(1) be posted at each egress of all public restrooms on the licensed premises;

(2) be placed at a level where the sign can be easily seen by persons exiting the restroom;

(3) be not less than 8 1/2 x 11 inches in size;

(4) the following language shall be printed in English and in Spanish, in bold black type on a white surface, or other clearly legible graphic design, with a font or type set size of not less than 28 point Arial or Helvetica:

Figure: 16 TAC §31.4(b)(4)

(c) The responsibility of furnishing the required signs in this section is the sole responsibility of the licensee or permittee.

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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TRD-201603707

Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489

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CHAPTER 33. LICENSING

SUBCHAPTER A. APPLICATION PROCEDURES

16 TAC §33.7

The Texas Alcoholic Beverage Commission adopts amendments to §33.7, relating to Monitoring Sales Data, without changes to the proposal as published in the June 10, 2016, issue of the *Texas Register* (41 TexReg 4140).

Section 33.7 implements Alcoholic Beverage Code §104.06(b), which requires the commission to adopt rules for making a determination whether 51 percent of the gross receipts of a premises for which the license or permit is issued are from the sale or service of alcoholic beverages for on-premises consumption. If the commission determines that 51 percent of the gross receipts are from such sales or service, Alcoholic Beverage Code §104.06(c) requires the license or permit holder to comply with Government Code §411.204. That section of the Government Code requires certain types of license or permit holders who meet the 51 percent threshold to post a sign that gives notice to persons who are

licensed to carry a handgun that it is unlawful for them to carry a handgun on the premises.

The amendments retitle the section to more precisely reflect the commission's role, which is to monitor sales data and make the 51 percent determination. The amendments more accurately reflect the statutory requirement that the commission make such determination regarding any premises that allows on-premises consumption and not just those premises that are subject to the posting requirements in Government Code §411.204. For the same reason, the exemption for food and beverage certificate holders in subsection (c) of the current rule is deleted in the amendments.

Section 33.7 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for reoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



SUBCHAPTER C. LICENSE AND PERMIT ACTION

16 TAC §33.34

The Texas Alcoholic Beverage Commission adopts new rule §33.34, relating to Reporting Permit or License Changes, without changes to the proposal as published in the June 10, 2016 issue of the *Texas Register* (41 TexReg 4140).

New §33.34 establishes timelines for permittees and licensees to report changes to the information provided in their original applications (or most recent renewal applications) prior to renewal.

Subsection (a) provides the reason for the rule and the statutory authority for it. It also establishes that the rule applies to changes in the information that was provided to the commission in connection with an original application, or changes to the most recent information that has been provided to the commission.

Subsection (b) sets forth the types of changes that must be reported within 30 days following the date the change occurred, including changes to the type of business, contact information, criminal history, property ownership, arrangements with management companies or concession companies, the employer of certain agent permittees or licensees, or (in most circumstances) the organization (as that term is defined by Business Organi-

zations Code §1.002(62), which includes corporations, partnerships, limited liability companies, etc.). Certain organizational changes that fall under subsection (d) have a different timeline.

Subsection (c) provides that changes to the corporate control of a mixed beverage permittee (as described in Alcoholic Beverage Code §28.04) or to the tradename of any permit or license must be reported prior to the date the change will occur.

Subsection (d) provides that a change to a business entity that is described in Alcoholic Beverage Code §11.12 or §61.14 must be reported not later than the 11th day preceding the date the change will occur, as prescribed by those sections of the Code.

Subsection (e) refers to two types of changes (a change of the mailing address or of the licensed or permitted location) that are subject to the timelines established by other commission rules.

Subsection (f) provides that all changes subject to the section must be reported on forms prescribed by the commission.

Subsection (g) clarifies that nothing in the section restricts the commission's authority under Alcoholic Beverage Code §5.32 to get necessary information at any time.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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 29, 2016.

TRD-201603782

Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



CHAPTER 35. ENFORCEMENT SUBCHAPTER A. TRANSPORTATION OF LIQUOR

16 TAC §35.2

The Texas Alcoholic Beverage Commission adopts amendments to §35.2, relating to Transportation of Imported Liquor, without changes to the proposal as published in the June 10, 2016, issue of the *Texas Register* (41 TexReg 4142).

Section 35.2 addresses the transportation by holders of carrier permits or private carrier permits of liquor imported into the state. Although both types of carriers are required by subsection (b) to have invoices covering a shipment of liquor into the state, formerly subsection (c) only applied its obligation regarding the specificity of such an invoice to private carrier permittees. Similarly, subsection (d) formerly only imposed the obligation to use the most direct route practical on private carrier permittees.

The amendments change the title of the section to more precisely reflect that the substance of the rule deals with the transportation, rather than the actual importation, of liquor. The

amendments also apply the obligations imposed by subsections (c) and (d) to any type of carrier.

Section 35.2 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for reoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



SUBCHAPTER D. PLACE OR MANNER

16 TAC §35.32

The Texas Alcoholic Beverage Commission adopts amendments to §35.32, relating to Reporting a Breach of the Peace, without changes to the proposal as published in the June 10, 2016, issue of the *Texas Register* (41 TexReg 4142).

Section 35.32 addresses the procedures to be followed by a permittee or licensee who is reporting to the commission a breach of the peace that has occurred at a licensed or permitted location. Subsection (c) describes the methods by which such reports may be made.

The amendments to subsection (c) update the commission's e-mail address. Also, new paragraph (5) allows reports to be made using a commission-authorized mobile application. The commission anticipates rolling out such an application soon.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



CHAPTER 39 PORT OF ENTRY

16 TAC §39.1

The Texas Alcoholic Beverage Commission adopts amendments to §39.1, relating to Personal Importation, without changes to the proposal as published in the June 10, 2016, issue of the *Texas Register* (41 TexReg 4144). The Texas Alcoholic Beverage Commission proposes amendments to §39.1, relating to Tax Stamps.

Formerly, §39.1 applied to stamps used in connection with the commission's tax collection activities at ports of entry. Subsections (a) and (b) addressed the liability of commission representatives relating to the value of the stamps and the funds collected for their issuance. Subsections (c) and (d) addressed classes of stamps and types of beverages.

The commission has determined that the rule is archaic and proposes amendments to make the section more current and useful, including a change to the title of the section.

The amendments to subsection (a) state the commission's statutory authority regarding the use of stamps to demonstrate the payment of taxes.

The amendments to subsection (b) clarify that alcoholic beverages imported into the state for personal consumption must pay the applicable state tax plus a \$3.00 administrative fee. The amendments also provide that the posted tax rates will include the administrative fee.

The amendments to subsection (c) provide that the payment of the fees and taxes described in subsection (b) must be documented by a tax stamp.

The amendments delete subsection (d) as unnecessarily duplicative of the Alcoholic Beverage Code §1.04(4) definition of "illicit beverage".

Section 39.1 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for reoption each of its rules. The commission has determined that the need for a rule addressing taxation at ports of entry continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



CHAPTER 41. AUDITING

SUBCHAPTER C. RECORDS AND REPORTS BY LICENSEES AND PERMITTEES

16 TAC §41.28

The Texas Alcoholic Beverage Commission adopts amendments to §41.28, relating to Sale and Delivery of Beer to Retail Premises and Private Clubs, with changes to the proposal as published in the June 10, 2016, issue of the *Texas Register* (41 TexReg 4145).

Section 41.28 addresses transporting beer through a dry area and consummating its sale at a retailer's premise or a private club located in a wet area. The amendments clarify the language of the rule and include references to additional authorized sellers who may engage in the activity.

The commission received one comment on the proposed rule. Cheri Huddleston suggested that there might be ambiguity because the term "authorized seller" was not defined. The commission addresses this concern by amending subsection (a) to characterize as "authorized sellers" those specific licensees who are authorized to engage in the activities described in the rule. When reference is made to "authorized sellers" thereafter in the rule, it will be clear that the reference is to these licensees specifically characterized as such. This change does not involve any new subject or affect any new persons, and therefore republication is not required. (See *Board of Insurance v. Deffebach*, 631 SW2d 794 (Tex. App. Austin 1982).

Section 41.28 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

§41.28. Sale and Delivery of Beer to Retail Premises and Private Clubs.

(a) Beer intended to be delivered in sales transactions consummated at a licensed retailer's place of business or at a private club located in a wet area may be transported through dry areas upon vehicles owned or leased and operated by one of these authorized sellers, who are authorized to sell to retailers or private clubs located in wet areas: the holder of a manufacturer's self-distribution license; the holder of any type of distributor license; or the holder of a brewpub license. The person directly in charge of the vehicle used in such transportation must possess a written statement furnished and signed by the authorized seller showing the quantity of beer so delivered to such person, the origin thereof, and the fact that said beer is intended for delivery only upon any sale that may be consummated by such person acting as agent for the authorized seller at the place of business of a licensed retail dealer or a private club located in a wet area.

(b) A person into whose charge beer is delivered as provided in this section and who is delivering and obtaining payment for any such beer at a licensed retailer's place of business or at a private club located in a wet area must at that time provide a sales invoice for such beer that must be signed by the purchaser of the beer. The invoice must show the purchaser, the quantity of each type of container sold, and the price. A copy of such invoice shall be furnished to the purchaser at the time of sale and a copy of the signed sales invoice must be furnished to the authorized seller of such beer within 24 hours from the time of its delivery.

(c) A person into whose charge beer is delivered as provided in this section must possess the signed sales invoices required by subsection (b) for any such beer that is not in the person's possession. The records pertaining to any such shipment must be shown to any representative of the commission or any peace officer on demand.

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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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



16 TAC §41.30

The Texas Alcoholic Beverage Commission adopts amendments to §41.30, relating to Sale and Delivery of Ale to Retail Premises, without changes to the proposal as published in the June 10, 2016, issue of the *Texas Register* (41 TexReg 4146).

Section 41.30 addresses transporting ale through a dry area and consummating its sale at a retailer's premise or a private club located in a wet area. The amendments clarify the language of the rule and include references to additional authorized sellers who may engage in the activity.

Section 41.30 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



16 TAC §41.48

The Texas Alcoholic Beverage Commission adopts amendments to §41.48, relating to Changes Relating to Control, without changes to the proposal as published in the June 10, 2016 issue of the *Texas Register* (41 TexReg 4147).

Section 41.48 applies to mixed beverage permits and private club permits. It defines "effective control" and "managerial control" and addresses how they relate to qualifications for holding a mixed beverage or private club permit. Subsection (d) described certain changes relating to these permits that must be reported to the commission. The commission is separately adopting new §33.34 which sets forth timelines for reporting certain changes relating to permits and licenses. To avoid any conflict in the reporting obligations of mixed beverage or private club permittees, the commission amends §41.48 by deleting subsection (d) simultaneously with its adoption of §33.34. Subsequent subsections in §41.48 are relettered appropriately.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



16 TAC §41.49

The Texas Alcoholic Beverage Commission adopts amendments to §41.49, relating to Private Clubs - Temporary Memberships, without changes to the proposal as published in the June 10, 2016, issue of the *Texas Register* (41 TexReg 4148).

Section 41.49 addresses requirements relating to temporary memberships at private clubs pursuant to Alcoholic Beverage Code §32.09.

The amendments eliminate a reference in subsection (c) to typewriters as a means of filling blanks on temporary membership cards. In its place the amendments impose a requirement that the name of the temporary member, the name of the club, the city and the time period covered be legibly completed on the temporary membership card.

In subsection (d), the amendments substitute the title of executive director for administrator, consistent with Alcoholic Beverage Code §5.11(b).

Section 41.49 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for re-adoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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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Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489



16 TAC §41.51

The Texas Alcoholic Beverage Commission adopts amendments to §41.51, relating to Private Clubs--Purchases--Pool Systems, without changes to the proposal as published in the June 10, 2016 issue of the *Texas Register* (41 TexReg 4149).

Section 41.51 addresses pool systems used by private clubs to purchase alcoholic beverages.

The amendments add the words "pool systems" to the title to accurately reflect the scope of the rule as amended, and add a new subsection (b) describing the authorized operation of pool replacement systems. Subsequent subsections are appropriately renumbered, and subsection (a) is clarified to appropriately describe the authorized operation of pool equal assessment systems.

The amendments make appropriate changes in newly renumbered subsection (c) to clarify that its requirements apply to both types of pool systems, and make a grammatical change in newly renumbered subsection (d) to accurately reflect the intent of the requirement.

Section 41.51 was also reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for re-adoption each of its rules. The commission has determined that the need for the section continues to exist but that it should be amended.

No comments were received.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

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

Assistant General Counsel

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3489

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 33. STATEMENT OF INVESTMENT OBJECTIVES, POLICIES, AND GUIDELINES

OF THE TEXAS PERMANENT SCHOOL FUND

SUBCHAPTER A. STATE BOARD OF EDUCATION RULES

19 TAC §§33.5, 33.15, 33.20, 33.25, 33.30, 33.35, 33.60

The State Board of Education (SBOE) adopts amendments to §§33.5, 33.15, 33.20, 33.25, 33.30, 33.35, and 33.60, concerning the statement of investment objectives, policies, and guidelines of the Texas Permanent School Fund (PSF). The amendments are adopted with changes to the proposed text as published in the May 13, 2016 issue of the *Texas Register* (41 TexReg 3401). The sections address provisions related to the PSF code of ethics, objectives, responsible parties and their duties, permissible and restricted investments and general guidelines for investment managers, standards of performance, guidelines for the custodian and the securities lending agent, and performance and review procedures. The adopted amendments better reflect the PSF asset allocation and consolidate some provisions to avoid repetition.

REASONED JUSTIFICATION. In accordance with statute, the rules in 19 TAC Chapter 33, Subchapter A, establish investment objectives, policies, and guidelines for the investment and management of the Texas Permanent School Fund.

The adopted amendments to 19 TAC Chapter 33, Subchapter A, reflect the changing PSF investment portfolio, including investments of the PSF in investment funds, and changing market conditions.

The adopted amendment to 19 TAC §33.5, Code of Ethics, provides various clarifications to the rule, including how it applies to investments of the PSF in investment funds.

In accordance with the Texas Education Code, §43.0031(c), a copy of the proposed amendment to 19 TAC §33.5 was submitted to the Texas Ethics Commission and the State Auditor's Office for review and comment following SBOE approval of the proposed amendment for first reading and filing authorization at the April 2016 meeting. The SBOE is to consider any comments from the commission or state auditor received prior to final adoption. In a letter dated June 22, 2016, the State Auditor's Office advised that it had no comments on the proposed amendment to §33.5. The Texas Ethics Commission provided comments, which can be found in the Summary of Comments and Responses section of this notice.

At adoption, §33.5(f)(1) was modified to include two additional Texas Government Code references to the list of statutes applicable to State Board of Education Members and Permanent School Fund Service Providers, as requested by the Texas Ethics Commission.

The adopted amendment to 19 TAC §33.15, Objectives, reflects the current objectives for the management of the PSF, including the asset allocation policy, established by the SBOE.

The adopted amendment to 19 TAC §33.20, Responsible Parties and Their Duties, provides various clarifications to the rule to accurately reflect the responsibilities, respectively, of the SBOE, the PSF staff, and other parties retained by the SBOE to assist with aspects of the PSF.

The adopted amendment to 19 TAC §33.25, Permissible and Restricted Investments and General Guidelines for Investment Managers, reflects the SBOE's general management authority over the PSF, including permitted and prohibited transactions as currently established or as may be established from time to time by the SBOE.

The adopted amendment to 19 TAC §33.30, Standards of Performance, reflects the SBOE's general management authority over the PSF, including standards of performance for each asset class as currently established or as may be established from time to time by the SBOE.

The adopted amendment to 19 TAC §33.35, Guidelines for the Custodian and the Securities Lending Agent, provides various clarifications to the rule and reflect the changing PSF investment portfolio and changing market conditions. At adoption, §33.35(2)(H)(i)(II)(-e-) and (VI)(-d-) was amended to clarify that the long-term rating of AA2 and AA by Moody's Investor Service and Standard & Poor's Corporation is required at the time of purchase.

The adopted amendment to 19 TAC §33.60, Performance and Review Procedures, clarifies aspects of the SBOE's oversight role with respect to all asset classes.

The amendments were approved by the SBOE for first reading and filing authorization at its April 8, 2016 meeting and for second reading and final adoption at its July 22, 2016 meeting.

In accordance with the TEC, §7.102(f), the SBOE approved the amendments for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2017-2018 school year. The earlier effective date will implement the latest policy in a timely manner.

SUMMARY OF COMMENTS AND RESPONSES. Following is a summary of the public comments received and the corresponding responses regarding the proposed amendments to Chapter 33, Subchapter A.

Comment. The Texas Ethics Commission requested that §33.5 be amended in subsection (f)(1) to include Texas Government Code, §572.021, Financial Statement Required, and §2252.908, Disclosure of Interested Parties, in the list of statutes applicable to State Board of Education Members and Permanent School Fund Service Providers.

Response. The SBOE agreed and took action to add Texas Government Code, §572.021 and §2252.908, to §33.5(f)(1).

STATUTORY AUTHORITY. The amendments are adopted under the Texas Education Code (TEC), §7.102(c)(31), which states that the State Board of Education (SBOE) may invest the Permanent School Fund (PSF) within the limits of the authority granted by the Texas Constitution, Article VII, §5, and the TEC, Chapter 43; TEC, §7.102(c)(33), which authorizes the SBOE to adopt an annual report on the status of the guaranteed bond program and states that the SBOE may adopt rules as necessary to administer the guaranteed bond program as provided under the TEC, Chapter 45, Subchapter C; TEC, §43.0031, which requires the SBOE to adopt and enforce an ethics policy regarding management and investment of the PSF; TEC,

§43.0032, which requires disclosure of certain relationships with entities that provide services relating to the management and investment of the PSF, requires the board to define those relationships, and prohibits giving advice when relationships exist in certain circumstances; TEC, §43.0033, which requires certain persons providing services to the SBOE regarding management and investment of the PSF to file expenditure reports; TEC, §43.0034, which requires the SBOE to adopt forms for conflicts of interest and expenditure reports; TEC, §43.004, which requires the SBOE to adopt written investment objectives for the PSF and employ a service to analyze the performance of the PSF; Texas Government Code, §2263.004, which requires the SBOE to adopt by rule standards of conduct applicable to certain financial advisors or service providers; and Texas Constitution, Article VII, §5, which describes the PSF, the limit on distributions to the Available School Fund, the setting of spending rates by the SBOE, and the ten-year distribution test; authorizes a bond guarantee utilizing the PSF; and describes the management of the PSF by the SBOE.

CROSS REFERENCE TO STATUTE. The amendments implement the Texas Education Code, §§7.102(c)(31) and (33), 43.0031-43.0034, and 43.004; Texas Government Code, §2263.004; and the Texas Constitution, Article VII, Section 5(a)(2), (d), and (f).

§33.5. Code of Ethics.

(a) General principles. The Texas Permanent School Fund (PSF) is held in public trust for the benefit of the schoolchildren of Texas. All those charged with the management of the PSF will aspire to the highest standards of ethical conduct. The purpose of the PSF code of ethics is to assist and help guide all such persons in the proper discharge of their duties and to assist them in avoiding even the appearance of impropriety.

(b) Fiduciary responsibility. The members of the State Board of Education (SBOE) serve as fiduciaries of the PSF and are responsible for prudently investing its assets. The SBOE members or anyone acting on their behalf shall comply with the provisions of this section, the Texas Constitution, Texas statutes, and all other applicable provisions governing the responsibilities of a fiduciary.

(c) Compliance with constitution and code of ethics. The SBOE members are public officials governed by the provisions of the Texas Government Ethics Act, as stated in the Texas Government Code, Chapter 572.

(d) Definitions. For purposes of this chapter, the following terms shall have the following meanings.

(1) SBOE Member, for the purposes of the PSF code of ethics, means a member of the SBOE shall be deemed to include the SBOE Member or a person related to the member within the second degree of affinity or consanguinity.

(2) Person means any individual, corporation, firm, limited liability company, limited partnership, trust, association, or other legal entity.

(3) Investment manager or manager means a Person who manages and invests PSF assets and may be either an internal investment manager or an external investment manager.

(4) PSF Service Providers are the following Persons:

(A) any Person who is an external investment manager, as described in §33.20(b)(1) of this title (relating to Responsible Parties and Their Duties), or who is responsible by contract for providing

legal advice regarding the PSF, executing PSF brokerage transactions, or acting as a custodian of the PSF;

(B) any Person except the Texas Education Agency (TEA) or a member of the PSF staff who acts as the sponsor, general partner, managing member, manager, or adviser to an investment fund or other investment vehicle (which, by way of example but without limitation, may include a partnership, a limited liability company, trust, association, or other entity) in which the PSF is invested. Such Persons hereafter in this chapter referred to as Fund Managers;

(C) a member of the Committee of Investment Advisors;

(D) any Person who is Investment Counsel as described in §33.20(b)(4) of this title or provides consultant services for compensation regarding the management and investment of the PSF;

(E) any Person who provides investment and management advice to an SBOE Member, with or without compensation, if an SBOE Member:

(i) gives the Person access to PSF records or information that are identified as confidential; or

(ii) asks the Person to interview, meet with, or otherwise confer with a PSF Service Provider or TEA staff;

(F) any Person who is a member of the PSF staff who is responsible for managing or investing assets of the PSF, executing brokerage transactions, acting as a custodian of the PSF, or providing investment or management advice regarding the investment or management of the PSF to an SBOE Member or PSF staff;

(G) any Person who is a member of TEA legal staff who is responsible for providing legal advice regarding the investment or management of the PSF; or

(H) any Person who submits a response to a Request for Proposal (RFP) or Request for Qualifications (RFQ), or similar types of solicitations, while such response is pending. An applicant is not required to file reports under this section except as required in the RFP or RFQ process.

(5) Expenditure, for purposes of this section, means any expenditure other than an expenditure made on behalf of an employee acting in the scope of their employment.

(6) For purposes of this chapter, Fund Managers are not considered to be external investment managers, consultants, or Investment Counsel.

(e) Assets affected by this section. The provisions of this section apply to all PSF assets, both publicly and nonpublicly traded investments.

(f) General ethical standards.

(1) SBOE Members and PSF Service Providers must comply with all laws applicable to them, which may include one or more of the following statutes: Texas Government Code, Chapter 2263 (Ethics and Disclosure Requirements for Outside Financial Advisors and Service Providers), §572.051 (Standards of Conduct; State Agency Ethics Policy), §552.352 (Distribution or Misuse of Confidential Information), §572.002 (General Definitions), §572.004 (Definition: Regulation), §572.054 (Representation by Former Officer or Employee of Regulatory Agency Restricted; Criminal Offense), §572.058 (Private Interest in Measure or Decision; Disclosure; Removal from Office for Violation), §572.021 (Financial Statement Required), §2252.908 (Disclosure of Interested Parties), and Chapter 305 (Registration of Lobbyists); Texas Penal Code, Chapter 36 (Bribery and Corrupt Influ-

ence) and Chapter 39 (Abuse of Office); and Texas Education Code, §43.0031 (Permanent School Fund Ethics Policy), §43.0032 (Conflicts of Interest), and §43.0033 (Reports of Expenditures). The omission of any applicable statute listed in this paragraph does not excuse violation of its provisions.

(2) SBOE Members and PSF Service Providers must be honest in the exercise of their duties and must not take actions that will discredit the PSF.

(3) SBOE Members and PSF Service Providers shall be loyal to the interests of the PSF to the extent that such loyalty is not in conflict with other duties, which legally have priority (which, by way of example but without limitation, may include obligations of Fund Managers to other investors in commingled funds). SBOE Members and PSF Service Providers shall avoid personal, employment, or business relationships that create conflicts of interest as defined in subsection (i)(1) of this section. Should an SBOE Member or a PSF Service Provider become aware of any conflict of interest involving himself or herself or another SBOE Member or PSF Service Provider, he or she has an affirmative duty to disclose the conflict to the SBOE chair and vice chair and the commissioner within seven days of discovering the conflict and, in the case of a conflict involving himself or herself, to cure the conflict in a manner provided for under this section prior to the next SBOE or committee meeting and such SBOE Member shall take no action nor participate in the RFP or RFQ process, or similar types of solicitations, that concerns the conflict.

(4) SBOE Members and PSF Service Providers shall not use nonpublic information gained through their relationship with the PSF to seek or obtain personal gain beyond agreed compensation and/or any properly authorized expense reimbursement. This should not be interpreted to forbid the use of PSF as a reference or the communication to others of the fact that a relationship with PSF exists, provided that no misrepresentation is involved.

(5) An SBOE Member shall report in writing the name and address of any PSF Service Provider, as defined by subsection (d)(4)(E) of this section, who provides investment and management advice to that SBOE Member. The SBOE Member shall submit the report to the commissioner of education for distribution to the SBOE within 30 days of the PSF Service Provider first providing investment and management advice to that SBOE Member.

(6) SBOE Members and PSF Service Providers shall report in writing any action described by the Texas Education Code, §7.108, to the commissioner of education for distribution to the SBOE within seven days of discovering the violation.

(7) A PSF Service Provider shall not make any gift or donation to a school or other charitable interest on behalf of, at the request of, or in coordination with an SBOE Member. Any PSF Service Provider or SBOE Member shall disclose in writing to the commissioner of education any information regarding such a donation.

(8) A PSF Service Provider shall disclose in writing to the commissioner of education for dissemination to all SBOE Members any business or financial transaction greater than \$50 in value with an SBOE Member, the commissioner of education, or any member of PSF staff or TEA legal staff who is a PSF Service Provider within 30 days of the transaction. Excluded from this subsection are checking accounts, savings accounts, credit cards, brokerage accounts, mutual funds, or other financial accounts that are provided to the SBOE Member or to a member of the PSF staff or TEA legal staff under the same terms and conditions as they are provided to members of the general public.

(9) An SBOE Member shall disclose in writing to the commissioner of education on a quarterly basis any business or financial

transaction greater than \$50 in value between the SBOE Member, or a business entity in which the SBOE Member has a significant ownership interest, and a PSF Service Provider. A report shall be filed even if there has not been a business or financial transaction greater than \$50 in value between the SBOE Member, or a business entity in which the SBOE Member has a significant ownership interest, and a PSF Service Provider. Excluded from this subsection are checking accounts, savings accounts, credit cards, brokerage accounts, mutual funds, or other financial accounts that are provided to an SBOE Member under the same terms and conditions as they are provided to members of the general public. The reports shall be filed on or before January 15, April 15, July 15, and October 15 and shall cover the preceding three calendar months. The first report filed for each SBOE Member shall cover the preceding one-year period. Subsection (u) of this section does not apply to the first report filed. The commissioner of education shall communicate the information included in the disclosure to all SBOE Members.

(g) Notification of disclosure. In order to preserve the integrity and public trust in the PSF, it is deemed necessary and appropriate to allow all SBOE Members a reasonable time to promptly review and respond to any disclosures or written inquiries made by applicants or made by PSF Service Providers as provided in SBOE operating procedures. In compliance with Texas Government Code, §2156.123, no SBOE Member or PSF Service Provider should publicly disclose any submission materials prior to completion of the RFP or RFQ process. For purposes of this subsection, an RFP or RFQ is completed upon final award of an RFP, or selection of qualified bidders for an RFQ, or closure without any selection. This subsection does not allow an SBOE Member to refrain from publicly disclosing a conflict of interest as required by subsections (f)(3) and (i)(4) of this section and Texas Government Code, §572.058.

(h) Disclosure.

(1) If an SBOE Member solicited a specific investment action by the PSF staff or a PSF Service Provider, the SBOE Member shall publicly disclose the fact to the SBOE in a public meeting. The disclosure shall be entered into the minutes of the meeting. For purposes of this section, a matter is a prospective directive to the PSF staff or a PSF Service Provider to undertake a specific investment or divestiture of securities for the PSF. This term does not include ratification of prior securities transactions performed by the PSF staff or a PSF Service Provider and does not include an action to allocate classes of assets within the PSF.

(2) In addition, an SBOE Member shall fully disclose any substantial interest in any publicly or nonpublicly traded PSF investment (business entity) on the SBOE Member's annual financial report filed with the Texas Ethics Commission pursuant to Texas Government Code, §572.021. An SBOE Member has a substantial interest if the SBOE Member:

- (A) has a controlling interest in the business entity;
- (B) owns more than 10% of the voting interest in the business entity;
- (C) owns more than \$25,000 of the fair market value of the business entity;
- (D) has a direct or indirect participating interest by shares, stock, or otherwise, regardless of whether voting rights are included, in more than 10% of the profits, proceeds, or capital gains of the business entity;
- (E) is a member of the board of directors or other governing board of the business entity;

(F) serves as an elected officer of the business entity; or

(G) is an employee of the business entity.

(i) Conflicts of interest.

(1) A conflict of interest exists whenever SBOE Members or PSF Service Providers have business, commercial, or other relationships, including, but not limited to, personal and private relationships, that could reasonably be expected to diminish their independence of judgment in the performance of their duties. For example, a person's independence of judgment is diminished when the person is in a position to take action or not take action with respect to PSF and such act or failure to act is, may be, or reasonably appears to be influenced by considerations of personal gain or benefit rather than motivated by the interests of the PSF. Conflicts include, but are not limited to, beneficial interests in securities, corporate directorships, trustee positions, familial relationships, or other special relationships that could reasonably be considered a conflict of interest with the duties to the PSF. Further, Texas Education Code, §43.0032, requires disclosure and no participation, unless a waiver is granted, when an SBOE Member or a PSF Service Provider has a business, commercial, or other relationship that could reasonably be expected to diminish a person's independence of judgment in the performance of the person's responsibilities relating to the management or investment of the PSF. Such business, commercial, or other relationship is defined to be a relationship that is prohibited under Texas Government Code, §572.051, or that would require public disclosure under Texas Government Code, §572.058, or a relationship that does not rise to this level but that is determined by the SBOE to create an unacceptable risk to the integrity and reputation of the PSF investment program.

(2) Any SBOE Member or PSF Service Provider who has a possible conflict of interest as defined in paragraph (1) of this subsection shall disclose the possible conflict to the commissioner of education and the chair and vice chair of the SBOE on the disclosure form. The disclosure form is provided in this paragraph entitled "Potential Conflict of Interest Disclosure Form."
Figure: 19 TAC §33.5(i)(2) (No change.)

(3) A person who files a statement under paragraph (2) of this subsection disclosing a possible conflict of interest may not give advice or make decisions about a matter affected by the possible conflict of interest unless the SBOE, after consultation with the general counsel of the TEA, expressly waives this prohibition. The SBOE may delegate the authority to waive this prohibition. If a waiver is not granted by the SBOE or its delegate to an SBOE Member or a PSF Service Provider for a possible conflict of interest, the SBOE Member or PSF Service Provider may request an opinion from the Texas Ethics Commission as to a determination of whether a conflict of interest exists. An SBOE Member will be given the assistance of the TEA ethics advisor to help draft a request for an opinion, if such assistance is requested. When the SBOE Member or PSF Service Provider receives the opinion of the Texas Ethics Commission and if a waiver is still sought, the SBOE Member or PSF Service Provider shall forward the opinion to the SBOE chair and vice chair and the commissioner. An opinion of the Texas Ethics Commission that determines a conflict exists is final and the SBOE may not waive the conflict of interest. An opinion of the Texas Ethics Commission that determines that no conflict exists will automatically result in an SBOE waiver.

(4) If an SBOE Member believes he or she has a conflict of interest based on the existence of certain relationships described in Texas Government Code, §572.058, the SBOE Member shall publicly disclose the conflict at an SBOE meeting or committee meeting and the SBOE Member shall not vote or otherwise participate in any decision involving the conflict. In accordance with Texas Government

Code, §572.058, the SBOE may not waive the prohibition under this paragraph. This requirement is in addition to the requirement of filing a disclosure under paragraph (2) of this subsection.

(5) Texas Government Code, §572.051, establishes standards of conduct for state officers and employees. SBOE Members and TEA employees shall abide by these standards.

(j) Prohibited transactions and interests.

(1) For purposes of this section, the term "direct placement" (with respect to investments that are not publicly traded) is defined as a direct sale of fixed income securities, generally to institutional investors, with or without the use of brokers or underwriters, primarily offered to Qualified Institutional Buyers (QIBs) and not registered by the Securities and Exchange Commission. The term does not include offerings or sales of interests in investment funds or investment vehicles.

(2) For the purposes of this section, the term "placement agent" is defined as any third party, whether or not affiliated with a PSF Service Provider, that is a party to an agreement or arrangement (whether written or oral) with a PSF Service Provider for direct or indirect payment of a fee in connection with a PSF investment.

(3) No SBOE Member or PSF Service Provider shall:

(A) have a financial interest in a direct placement investment of the PSF;

(B) serve as an officer, director, or employee of an entity in which a direct placement investment is made by the PSF; or

(C) serve as a consultant to, or receive any fee, commission or payment from, an entity in which a direct placement investment is made by the PSF.

(4) No SBOE Member shall:

(A) act as a representative or agent of a third party in dealing with a PSF investment manager, Investment Counsel, or consultant in connection with a PSF investment; or

(B) be employed for two years after the end of his or her term on the SBOE with an organization in which the PSF invested, unless the organization's stock or other evidence of ownership is traded on the public stock or bond exchanges.

(5) A PSF Service Provider shall:

(A) not act as a representative or agent of a third party in dealing with a PSF investment manager, Investment Counsel, or consultant in connection with a PSF investment; and

(B) except as approved by the SBOE, not use a placement agent in connection with a PSF investment unless:

(i) the relationship of the PSF Service Provider with the placement agent, any compensation, and a description of the services provided by the placement agent in connection with a PSF investment are disclosed in writing to PSF staff;

(ii) the placement agent is registered with the Securities and Exchange Commission (SEC) or the Financial Industry Regulatory Authority (FINRA) or, if not required to register with the SEC or FINRA, is registered with an applicable regulatory body;

(iii) such placement agent does not share any fees with a non-registered person or entity; and

(iv) in executed closing documents for the PSF investment, the PSF Service Provider contractually represents and war-

rants that the information provided about the placement agent is true, correct, and complete in all material respects.

(6) A placement agent shall file campaign contribution reports in the same manner as does a PSF Service Provider under subsection (o)(1) of this section for the period during which the placement agent provides services in connection with a PSF investment.

(k) Solicitation of support. No SBOE Member shall solicit or receive a campaign contribution on behalf of any political candidate, political party, or political committee from a PSF Service Provider. The PSF Service Provider shall report any such incident in writing to the commissioner of education for distribution to the SBOE.

(l) Hiring external professionals. The SBOE may contract with investment managers to make or assist with PSF investments. The SBOE has the authority and responsibility to hire other external professionals, including custodians, Investment Counsel, or consultants. The SBOE shall select each professional based on merit and cost and subject to the provisions of §33.55 of this title (relating to Standards for Selecting Consultants, Investment Managers, Custodians, and Other Professionals To Provide Outside Expertise for the Fund).

(m) Responsibilities of PSF Service Providers. The PSF Service Providers shall be notified in writing of the code of ethics contained in this section. Any existing contracts for investment and any future investment shall strictly conform to this code of ethics. The PSF Service Provider shall report in writing any suggestion or offer by an SBOE Member to deviate from the provisions of this section to the commissioner of education for distribution to the SBOE within 30 days of the PSF Service Provider discovering the violation. The PSF Service Provider shall report in writing any violation of this code of ethics committed by another PSF Service Provider to the commissioner of education for distribution to the SBOE within 30 days of the PSF Service Provider discovering the violation. A PSF Service Provider or other person retained in a fiduciary capacity must comply with the provisions of this section.

(n) Gifts and entertainment.

(1) Bribery. SBOE Members are prohibited from soliciting, offering, or accepting gifts, payments, and other items of value in exchange for an official act, including a vote, recommendation, or any other exercise of official discretion pursuant to Texas Penal Code, §36.02.

(2) Acceptance of gifts.

(A) An SBOE Member may not accept gifts, favors, services, or benefits that may reasonably tend to influence the SBOE Member's official conduct or that the SBOE Member knows or should know are intended to influence the SBOE Member's official conduct. For purposes of this paragraph, a gift does not include an item with a value of less than \$50, excluding cash, checks, loans, direct deposit, or negotiable instruments.

(B) An SBOE Member may not accept a gift, favor, service, or benefit from a Person that the SBOE Member knows is interested or is likely to become interested in a charter, contract, purchase, payment, claim, or other pecuniary transaction over which the SBOE has discretion.

(C) An SBOE Member may not accept a gift, favor, service, or benefit from a Person that the SBOE Member knows to be subject to the regulation, inspection, or investigation of the SBOE or the TEA.

(D) An SBOE Member may not solicit, accept, or agree to accept a gift, favor, service, or benefit from a Person with whom the

SBOE Member knows that civil or criminal litigation is pending or contemplated by the SBOE or the TEA.

(E) Except as prohibited in subparagraphs (A)-(D) of this paragraph and subject to the requirements for PSF Service providers and lobbyists in subparagraph (F) of this paragraph, an SBOE Member may accept a gift, favor, service, or benefit if it fits into one of the following categories:

(i) items worth less than \$50, but may not be cash, checks, loans, or negotiable instruments;

(ii) item is given in the context of a relationship, such as kinship, or a personal, professional, or business relationship that is independent of the SBOE Member's official capacity;

(iii) fees for services rendered outside the SBOE Member's official capacity;

(iv) government property issued by a governmental entity that allows the use of the property; or

(v) food, lodging, entertainment, and transportation, if accepted as a guest and the donor is present.

(F) In addition to the requirements of subparagraph (E) of this paragraph, the following provisions govern the disposition of an individual who is a PSF Service Provider or who is both a lobbyist registered with the Texas Ethics Commission and who represents a person subject to the SBOE's or the TEA's regulation, inspection, or investigation. A gift, favor, service, or benefit from a PSF Service Provider or lobbyist will not be considered a violation of the prohibition set forth in subparagraph (C) of this paragraph.

(i) An SBOE Member may not accept the following from a PSF Service Provider or lobbyist, even if otherwise permitted under subparagraph (E) of this paragraph:

(I) loans, cash, checks, direct deposits, or negotiable instruments;

(II) transportation or lodging for a pleasure trip;

(III) transportation or lodging in connection with a fact-finding trip or to a seminar or conference at which the SBOE Member does not provide services;

(IV) entertainment worth more than \$250 in a calendar year;

(V) gifts, other than awards and mementos, that combined are worth more than \$250 in value for a calendar year. Gifts do not include food, entertainment, lodging, and transportation if accepted as a guest and the PSF Service Provider or lobbyist is present; or

(VI) individual awards and mementos worth more than \$250 each if from a lobbyist or worth \$50 or more each if from a PSF Service Provider.

(ii) An SBOE Member may accept food and beverages as a guest if the PSF Service Provider or lobbyist is present.

(G) An SBOE Member may not solicit, agree to accept, or accept an honorarium in consideration for services that the SBOE Member would not have been asked to provide but for the SBOE Member's official position. An SBOE Member may accept food, transportation, and lodging in connection with a speech performed as a result of the SBOE Member's position in accordance with the rulings with the Texas Ethics Commission, which may place limitations on the type of entity that may fund such travel. An SBOE Member must report the

food, lodging, or transportation accepted under this subparagraph in the SBOE Member's annual personal financial statement.

(H) Under no circumstances shall an SBOE Member accept a prohibited gift if the source of the gift is not identified or if the SBOE Member knows or has reason to know that the gift is being offered through an intermediary.

(I) If an unsolicited prohibited gift is received by an SBOE Member, he or she should return the gift to its source. If that is not possible or feasible, the gift should be donated to charity. The SBOE Member shall report the return of the gift or the donation of the gift to the commissioner of education.

(J) A PSF Service Provider shall file a report annually on January 31 of each year on the expenditure report provided in this subparagraph entitled "Report of Expenditures of Persons Providing Services to the State Board of Education Relating to the Management and Investment of the Permanent School Fund." The report shall be for the time period beginning on January 1 and ending on December 31 of the previous year. The expenditure report must describe in detail any expenditure of more than \$50 made by the Person on behalf of:
Figure: 19 TAC §33.5(n)(2)(J)

- (i) an SBOE Member;
- (ii) the commissioner of education; or
- (iii) an employee of the TEA or of a nonprofit corporation created under the Texas Education Code, §43.006.

(K) A PSF Service Provider shall file a report annually with the TEA's PSF office, in the format specified by the PSF staff, on or before January 31 of each year. The report will be deemed to be filed when it is actually received. The report shall be for the time period beginning on January 1 and ending on December 31 of the previous year. It shall list any individuals who served in any of the following capacities at any time during the reporting period:

- (i) all members of the governing body of the PSF Service Provider;
- (ii) the officers of the PSF Service Provider;
- (iii) any broker who conducts transactions with PSF funds;
- (iv) all members of the governing body of the firm of a broker who conducts transactions with PSF funds; and
- (v) all officers of the firm of a broker who conducts transactions with PSF funds.

(L) This subsection does not apply to campaign contributions.

(M) Each SBOE Member and each PSF Service Provider shall, no later than April 15, file an annual report affirmatively disclosing any violation of this code of ethics known to that Person during the time period beginning January 1 and ending December 31 of the previous year which has not previously been disclosed in writing to the commissioner of education for distribution to all board members, or affirmatively state that the Person has no knowledge of any such violation. For purposes of this subparagraph only, "SBOE Member" means only the individual elected official.

(o) Campaign contributions.

(1) A PSF Service Provider shall, no later than January 31 and July 31, file a semi-annual report of each political contribution that the PSF Service Provider has made to an SBOE Member or a candidate

seeking election to the SBOE in writing to the commissioner of education. The report shall be for the six-month time period preceding the reporting dates and include the name of each SBOE Member or candidate seeking election to the SBOE who received a contribution, the amount of each contribution, and date of each contribution. Subsection (u) of this section does not apply to the first report filed. A report shall be filed even if the PSF Service Provider made no reportable contribution during the reporting period to an SBOE Member or a candidate seeking election to the SBOE. The commissioner of education shall communicate the information included in the disclosure to all SBOE Members.

(2) Any person or firm filing a response to an RFP or RFQ relating to the management and investments of the PSF shall disclose in the response whether at any time in the preceding four years from the due date of the response to the RFP or RFQ the person or firm has made a campaign contribution to a candidate for or member of the SBOE.

(p) Compliance with professional standards.

(1) SBOE Members and PSF Service Providers who are members of professional organizations which promulgate standards of conduct must comply with those standards.

(2) To the extent applicable to them, PSF Service Providers must comply with the Code of Ethics and Standards of Professional Conduct of the Chartered Financial Analyst Institute.

(q) Transactions involving PSF Service Providers.

(1) A PSF Service Provider other than a PSF executing broker shall not engage in any transaction involving the assets of the PSF with a Person who is an SBOE Member, Investment Counsel, a consultant to the SBOE or to an SBOE Member, or a member of the PSF staff or TEA legal staff who is responsible for managing or investing assets of the PSF or providing investment or management advice or legal advice regarding the investment or management of the PSF.

(2) A PSF Service Provider other than a PSF executing broker shall report to the SBOE on a quarterly basis all investment transactions or trades and any fees or compensation paid or received in connection with the transactions or trades with a Person who is an SBOE Member, Investment Counsel, a consultant to the SBOE or an SBOE Member, or a member of the PSF staff or TEA legal staff who is responsible for managing or investing assets of the PSF or providing investment or management advice or legal advice regarding the investment or management of the PSF.

(r) Compliance and enforcement.

(1) The SBOE will enforce this section through its chair or vice chair or the commissioner of education.

(2) Any violation of this section will be reported to the chair and vice chair of the SBOE and the commissioner of education and a recommended action will be presented to the SBOE by the chair or the commissioner. A violation of this section may result in the termination of the contract or a lesser sanction. Repeated minor violations may also result in the termination of the contract.

(3) The PSF compliance officer under the direction of the TEA confidentiality officer shall act as custodian of all statements, waivers, and reports required under this section for purposes of public disclosure requirements.

(4) The ethics advisor of the TEA shall respond to inquiries from the SBOE Members and PSF Service Providers concerning the provisions of this section. The ethics advisor may confer with the general counsel and the executive administrator of the PSF.

(5) No payment shall be made to a PSF Service Provider who has failed to timely file a completed report as described by subsection (m) of this section, until a completed report is filed.

(s) Ethics training. The SBOE shall receive annual training regarding state ethics laws through the Texas Ethics Commission and the TEA's ethics advisor.

(t) TEA general ethical standards. The commissioner of education and PSF staff shall comply with the General Ethical Standards for the Staff of the Permanent School Fund and the Commissioner of Education.

(u) Reporting period. A new report required by an amendment to the code of ethics need only concern events after the effective date of the amendment. An amendment to a rule that presently requires a report does not affect the reporting period unless the amendment explicitly changes the reporting period.

(v) Statutory statement.

(1) A "statutory financial advisor or service provider" as defined in this subsection shall on or before April 15 file a statement as required by Texas Government Code, §2263.005, with the commissioner of education and the state auditor, for the previous calendar year. The statement will be deemed filed when it is actually received. A statutory financial advisor or service provider shall promptly file a new or amended statement with the commissioner of education and the state auditor whenever there is new information required to be reported under Texas Government Code, §2263.005(a).

(2) A "statutory financial advisor or service provider" is a member of the Committee of Investment Advisors or an individual or business entity, including a financial advisor, financial consultant, money or investment manager, or broker, who is not an employee of the TEA, but who provides financial services or advice to the TEA or the SBOE or an SBOE member in connection with the management and investment of the PSF and who may reasonably be expected to receive, directly or indirectly, more than \$5,000 in compensation from the TEA or the SBOE during a fiscal year.

(3) An annual statement required to be filed under this subsection will be made using the form developed by the state auditor.

§33.15. Objectives.

(a) Investment objectives.

(1) Investment objectives have been formulated based on the following considerations:

(A) the anticipated financial needs of the Texas public free school system in light of expected future contributions to the Texas Permanent School Fund (PSF);

(B) the need to preserve capital;

(C) the risk tolerance set by the State Board of Education (SBOE) and the need for diversification;

(D) observations about historical rates of return on various asset classes;

(E) assumptions about current and projected capital market and general economic conditions and expected levels of inflation;

(F) the need to invest according to the prudent person rule; and

(G) the need to document investment objectives, guidelines, and performance standards.

(2) Investment objectives represent desired results and are long-term in nature, covering typical market cycles of three to five years. Any shortfall in meeting the objectives should be explainable in terms of general economic and capital market conditions and asset allocation.

(3) The investment objectives are consistent with generally accepted standards of fiduciary responsibility.

(4) Under the provisions of this chapter, investment managers shall have discretion and authority to implement security selection and timing.

(b) Goal and objectives for the PSF.

(1) Goal. The goal of the SBOE for the PSF shall be to invest for the benefit of current and future generations of Texans consistent with the safety of principal, in light of the strategic asset allocation plan adopted. To achieve this goal, PSF investment shall be carefully administered at all times.

(2) Objectives.

(A) The preservation and safety of principal shall be a primary consideration in PSF investment.

(B) Fixed income securities shall be purchased at the highest total return consistent with the preservation and safety of principal.

(C) To the extent possible, the PSF management shall hedge against inflation.

(D) Securities, except investments for cash management purposes, shall be selected for investment on the basis of long-term investment merits rather than short-term gains.

(c) Investment rate of return and risk objectives.

(1) Because the education needs of the future generations of Texas school children are long-term in nature, the return objective of the PSF shall also be long-term and focused on fairly balancing the benefits between the current generation and future generations while preserving the real per capita value of the PSF.

(2) Investment rates of return shall adhere to the Chartered Financial Analyst (CFA) Institute Global Investment Performance Standards (GIPS) guidelines in calculating and reporting investment performance return information.

(3) The overall risk level of PSF assets in terms of potential for price fluctuation shall not be extreme and risk variances shall be acceptable in the context of the overall goals and objectives for the investment of the PSF assets. The primary means of achieving such a risk profile are:

(A) a broad diversification among asset classes that react as independently as possible through varying economic and market circumstances;

(B) careful control of risk level within each asset class by avoiding over-concentration and not taking extreme positions against the market indices; and

(C) a degree of emphasis on stable growth.

(4) Over time, the volatility of returns (or risk) for the total fund, as measured by standard deviation of investment returns, should be comparable to investments in market indices in the proportion in which the PSF invests.

(5) The rate of return objective of the total PSF fund shall be to earn, over time, an average annual total rate of return that meets or

exceeds the rate of return of a composite benchmark index, consisting of representative benchmark indices for the asset classes in which the PSF is invested that are aggregated in proportion to the actual asset allocation of the PSF for the relevant time period, while maintaining an acceptable risk level compared to that of the composite benchmark index.

(6) The rate of return objective of each asset class in which the PSF is invested, other than the short-term cash fund, shall be to earn, over time, an average annual average rate of return that meets or exceeds that of a representative benchmark index for such asset class in U.S. dollars, combining dividends, capital appreciation, income, and interest income, as applicable, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(7) The objective of the short-term cash fund shall be to provide liquidity for the timely payment of security transactions, while earning a competitive return. The expected return, over time, shall meet or exceed that of the representative benchmark index, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(8) Notwithstanding the risk parameters specified in paragraphs (4)-(6) of this subsection, consideration shall be given to marginal risk variances exceeding the representative benchmark indices if returns are commensurate with the risk levels of the respective portfolios.

(d) Asset allocation policy.

(1) The SBOE shall adopt and implement a strategic asset allocation plan based on a well diversified, balanced investment approach that uses a broad range of asset classes indicated by the following characteristics of the PSF:

- (A) the long-term nature of the PSF;
- (B) the spending policy of the PSF;
- (C) the relatively low liquidity requirements of the PSF;
- (D) the investment preferences and risk tolerance of the SBOE;
- (E) the rate of return objectives; and
- (F) the diversification objectives of the PSF, specified in the Texas Constitution, Article VII, §5(d), the Texas Education Code, Chapter 43, and the provisions of this chapter.

(2) The strategic asset allocation plan shall contain guideline percentages, at market value of the total fund's assets, to be invested in various asset classes. The guideline percentages will include both a target percentage and an acceptable strategic range for each asset class, recognizing that the target mix may not be attainable at a specific point in time since actual asset allocation will be dictated by current and anticipated market conditions, as well as the overall directions of the SBOE.

(3) The SBOE Committee on School Finance/Permanent School Fund, with the advice of the PSF investment staff, shall review the provisions of this section at least annually and, as needed, rebalance the assets of the portfolio according to the asset allocation rebalancing procedure specified in the PSF Investment Procedures Manual. The SBOE Committee on School Finance/Permanent School Fund shall consider the industry diversification and the percentage allocation within the following asset classes:

- (A) domestic equities;
- (B) international equities;
- (C) emerging market equities;
- (D) domestic fixed income;
- (E) emerging market debt local currency;
- (F) real estate;
- (G) private equity;
- (H) absolute return;
- (I) real return;
- (J) risk parity;
- (K) cash; and
- (L) other asset classes as approved by the SBOE.

- (A) domestic equities;
- (B) international equities;

- (C) emerging market equities;
- (D) domestic fixed income;
- (E) emerging market debt local currency;
- (F) real estate;
- (G) private equity;
- (H) absolute return;
- (I) real return;
- (J) risk parity;
- (K) cash; and
- (L) other asset classes as approved by the SBOE.

(4) To the extent practicable, investments shall not exceed the strategic ranges the SBOE establishes for each asset class, recognizing the inability to actively reduce allocations to certain asset classes.

(5) Periodically, the SBOE shall allocate segments of the total fund to each investment manager and specify guidelines, investment objectives, and standards of performance that apply to those assets.

§33.20. *Responsible Parties and Their Duties.*

(a) The Texas Constitution, Article VII, §§1-8, establishes the Available School Fund, the Texas Permanent School Fund (PSF), and the State Board of Education (SBOE), and specifies the standard of care SBOE members must exercise in managing PSF assets. In addition, the constitution directs the legislature to establish suitable provisions for supporting and maintaining an efficient public free school system, defines the composition of the PSF and the Available School Fund, and requires the SBOE to set aside sufficient funds to provide free instructional materials for the use of children attending the public free schools of this state.

(b) The SBOE shall be responsible for overseeing all aspects of the PSF and may contract with any of the following parties, whose duties and responsibilities are as follows.

(1) An external investment manager is a Person the SBOE retains by contract to manage and invest a portion of the PSF assets under specified guidelines.

(2) A custodian is an organization, normally a financial company, the SBOE retains to safe keep, and provide accurate and timely reports of, PSF assets.

(3) A consultant is a Person the SBOE retains to advise the SBOE on PSF matters based on professional expertise.

(4) Investment Counsel is a Person retained under criteria specified in the PSF Investment Procedures Manual to advise PSF investment staff and the SBOE Committee on School Finance/Permanent School Fund within the policy framework established by the SBOE. Investment Counsel may be assigned such tasks as asset allocation reviews, manager searches, spending policy recommendations and research related to the management of PSF assets.

(5) A performance measurement consultant is a Person retained to provide the SBOE Committee on School Finance/Permanent School Fund an analysis of the PSF portfolio performance. The outside portfolio performance measurement service firm shall perform the analysis on a quarterly or as-needed basis. Quarterly reports shall be distributed to each member of the SBOE Committee on School Finance/Permanent School Fund, and a representative of the firm shall be available as necessary to brief the committee.

(6) The State Auditor's Office is an independent state agency that performs an annual financial audit of the Texas Education Agency (TEA) at the direction of the Texas Legislature. The financial audit, conducted according to generally accepted auditing standards, is designed to test compliance with generally accepted accounting principles. The state auditor performs tests of the transactions of the PSF Investment Office as part of this annual audit, including compliance with governing statutes and SBOE policies and directives. The TEA Internal Audit Division will participate in the audit process by participating in entrance and exit conferences, being provided copies of all reports and management letters furnished by the external auditor, and having access to the external auditor's audit programs and working papers.

(7) The SBOE may retain independent external auditors to review the PSF accounts annually or on an as-needed basis. The TEA Internal Audit Division will participate in the audit process by participating in entrance and exit conferences, being provided copies of all reports and management letters furnished by the external auditor, and having access to the external auditor's audit programs and working papers.

(c) The SBOE shall meet on a regular or as-needed basis to conduct the affairs of the PSF.

(d) In case of emergency or urgent public necessity, the SBOE Committee on School Finance/Permanent School Fund or the SBOE, as appropriate, may hold an emergency meeting under the Texas Government Code, §551.045.

(e) The SBOE shall have the following exclusive duties:

(1) determining the strategic asset allocation mix between asset classes based on the attending economic conditions and the PSF goals and objectives;

(2) ratifying all investment transactions pertaining to the purchase, sale, or reinvestment of assets by all internal and external investment managers for the current reporting period;

(3) appointing members to the SBOE Investment Advisory Committee;

(4) approving the selection of, and all contracts with, external investment managers, financial advisors, Investment Counsel, financial or other consultants, or other external professionals retained to help the SBOE invest PSF assets;

(5) approving the selection of, and the performance measurement contract with, a well-recognized and reputable firm retained to evaluate and analyze PSF investment results. The service shall compare investment results to the written investment objectives of the SBOE and also compare the investment of the PSF with the investment of other public and private funds against market indices and by managerial style;

(6) setting policies, objectives, and guidelines for investing PSF assets; and

(7) representing the PSF to the state.

(f) The SBOE may establish committees to administer the affairs of the PSF. The duties and responsibilities of any committee established shall be specified in the PSF Investment Procedures Manual.

(g) The PSF shall have an executive administrator, with a staff to be adjusted as necessary, who functions directly with the SBOE through the SBOE Committee on School Finance/Permanent School Fund concerning investment matters, and who functions as part of the internal operation under the commissioner of education. At all times,

the PSF executive administrator and staff shall invest PSF assets as directed by the SBOE according to the Texas Constitution and all other applicable Texas statutes, as amended, and SBOE rules governing the operation of the PSF. The PSF staff shall:

(1) administer the PSF, including investing and managing assets and contracting in connection therewith, according to SBOE goals and objectives;

(2) execute all directives, policies, and procedures from the SBOE and the SBOE Committee on School Finance/Permanent School Fund;

(3) keep records and provide a continuous and accurate accounting of all PSF transactions, revenues, and expenses and provide reports on the status of the PSF portfolio;

(4) advise any officials, investment firms, or other interested parties about the powers, limitations, and prohibitions regarding PSF investments that have been placed on the SBOE or PSF investment staff by statutes, attorney general opinions and court decisions, or by SBOE policies and operating procedures;

(5) continuously research all internally managed securities held by the PSF and report to the SBOE Committee on School Finance/Permanent School Fund and the SBOE any information requested, including reports and statistics on the PSF, for the purpose of administering the PSF;

(6) establish and maintain a procedures manual that implements this section to be approved by the SBOE;

(7) make recommendations regarding investment and policy matters to the SBOE Committee on School Finance/Permanent School Fund and the SBOE; and

(8) establish and maintain accounting policies and internal control procedures concerning all receipts, disbursements and investments of the PSF, according to the procedures adopted by the SBOE.

§33.25. *Permissible and Restricted Investments and General Guidelines for Investment Managers.*

(a) Permissible investments. Any investment that satisfies the prudence standard, is consistent with the Fund's investment policy and portfolio objectives, and is used in executing investment strategies approved by the State Board of Education (SBOE).

(b) Prohibited transactions and restrictions. Except as provided in subsection (a) of this section or as approved or delegated by the SBOE, the following prohibited transactions and restrictions apply to all Texas Permanent School Fund (PSF) investment managers with respect to the investment or handling of PSF assets, except as otherwise noted:

(1) short sales of any kind;

(2) purchasing letter or restricted stock;

(3) buying or selling on margin;

(4) engaging in purchasing or writing options or similar transactions;

(5) purchasing or selling futures on commodities contracts;

(6) borrowing by pledging (or otherwise encumbering PSF assets);

(7) purchasing the equity or debt securities of the PSF investment manager's own organization or an affiliated organization;

(8) engaging in any purchasing transaction, after which the cumulative market value of common stock in a single corporation ex-

ceeds 2.5% of the PSF total market value or 5.0% of the manager's total portfolio market value;

(9) engaging in any purchasing transaction, after which the cumulative number of shares of common stock in a single corporation held by the PSF exceeds 5.0% of the outstanding voting stock of that issuer;

(10) engaging in any purchasing transaction, after which the cumulative market value of fixed income securities or cash equivalent securities in a single corporation (excluding the U.S. government, its federal agencies, and government sponsored enterprises) exceeds 2.5% of the PSF total market value or 5.0% of the investment manager's total portfolio market value with the PSF;

(11) purchasing tax exempt bonds;

(12) purchasing guaranteed investment contracts (GICs) from an insurance company or bank investment contracts (BICs) from a bank not rated at least AAA by Standard & Poor's or Moody's;

(13) purchasing any publicly traded fixed income security not rated investment grade by Standard & Poor's (BBB-), Moody's (Baa3), or Fitch (BBB-), subject to the provisions of the PSF Investment Procedures Manual and the following restrictions:

(A) when ratings are provided by the three rating agencies, the middle rating shall be used;

(B) when ratings are provided by two ratings agencies, the lower rating is used; or

(C) when a rating is provided by one rating agency, the sole rating is used;

(14) purchasing short-term money market instruments rated below A-1 by Standard & Poor's or P-1 by Moody's;

(15) engaging in any transaction that results in unrelated business taxable income (excluding current holdings);

(16) engaging in any transaction considered a "prohibited transaction" under the Internal Revenue Code or the Employee Retirement Income Security Act (ERISA);

(17) purchasing precious metals or other commodities;

(18) engaging in any transaction that would leverage a manager's position;

(19) lending securities owned by the PSF, but held in custody by another party, such as a bank custodian, to any other party for any purpose, unless lending securities according to a separate written agreement the SBOE approved; and

(20) purchasing fixed income securities without a stated par value amount due at maturity.

(c) General guidelines for investment managers.

(1) Each investment manager retained to manage a portion of PSF assets shall be aware of, and operate within, the provisions of this chapter and all applicable Texas statutes.

(2) As fiduciaries of the PSF, investment managers shall discharge their duties solely in the interests of the PSF according to the prudent expert rule, engaging in activities that include the following.

(A) Diversification. Each manager's portfolio should be appropriately diversified within its applicable asset class.

(B) Securities trading.

(i) Each manager shall send copies of each transaction record to the PSF investment staff and custodians.

(ii) Each manager shall be required to reconcile the accounts under management on a monthly basis with the PSF investment staff and custodians.

(iii) Each manager shall be responsible for complying fully with PSF policies for trading securities and selecting brokerage firms, as specified in §33.40 of this title (relating to Trading and Brokerage Policy). In particular, the emphasis of security trading shall be on best execution; that is, the highest proceeds to the PSF and the lowest costs, net of all transaction expenses. Placing orders shall be based on the financial viability of the brokerage firm and the assurance of prompt and efficient execution.

(iv) The SBOE shall require each external manager to indemnify the PSF for all failed trades not due to the negligence of the PSF or its custodian in instances where the selection of the broker dealer is not in compliance with §33.40 of this title (relating to Trading and Brokerage Policy).

(C) Acknowledgments in writing.

(i) Each external investment manager retained by the PSF must be a person, firm, or corporation registered as an investment adviser under the Investment Adviser Act of 1940, a bank as defined in the Act, or an insurance company qualified to do business in more than one state, and must acknowledge its fiduciary responsibility in writing. A firm registered with the Securities and Exchange Commission (SEC) must annually provide a copy of its Form ADV, Section II.

(ii) The SBOE may require each external manager to obtain coverage for errors and omissions in an amount set by the SBOE, but the coverage shall be at least the greater of \$500,000 or 1.0% of the assets managed, not exceeding \$10 million. The coverage should be specific as to the assets of the PSF. The manager shall annually provide evidence in writing of the existence of the coverage.

(iii) Each external manager may be required by the SBOE to obtain fidelity bonds, fiduciary liability insurance, or both.

(iv) Each manager shall acknowledge in writing receiving a copy of, and agreeing to comply with, the provisions of this chapter.

(D) Discretionary investment authority. Subject to the provisions of this chapter, any investment manager of marketable securities or other investments, retained by the PSF, shall have full discretionary investment authority over the assets for which the manager is responsible. Specialist advisors and investment managers retained for alternative asset investments may have a varying degree of discretionary authority, which will be outlined in contract documentation.

(d) Reporting procedures for investment managers. The investment manager shall:

(1) prepare a monthly and quarterly report for delivery to the SBOE, the SBOE Committee on School Finance/Permanent School Fund, and the PSF investment staff that shall include, in the appropriate format, items requested by the SBOE. The monthly reports shall briefly cover the firm's economic review; a review of recent and anticipated investment activity; a summary of major changes that have occurred in the investment markets and in the portfolio, particularly since the last report; and a summary of the key characteristics of the PSF portfolio. Quarterly reports shall comprehensively cover the same information as monthly reports but shall also include any changes in the firm's structure, professional team, or product offerings; a detail of the portfolio holdings; and transactions for the period. Periodically, the PSF investment staff shall provide the investment manager a detailed description of, and format for, these reports;

(2) when requested by the SBOE Committee on School Finance/Permanent School Fund, make a presentation describing the professionals retained for the PSF, the investment process used for the PSF portfolio under the manager's responsibility, and any related issues;

(3) when requested by the PSF investment staff, meet to discuss the management of the portfolio, new developments, and any related matters; and

(4) implement a specific investment process for the PSF. The manager shall describe the process and its underlying philosophy in an attachment to its investment management agreement with the PSF and manage according to this process until the PSF and manager agree in writing to any change.

§33.30. Standards of Performance.

(a) The State Board of Education (SBOE) Committee on School Finance/Permanent School Fund shall set and maintain performance standards for the total Texas Permanent School Fund (PSF), for each asset class in which the assets of the PSF are invested, and for all investment managers based on criteria that include the following:

- (1) time horizon;
- (2) real rate of return;
- (3) representative benchmark index;
- (4) volatility of returns (or risk), as measured by standard deviation; and
- (5) universe comparison.

(b) The SBOE Committee on School Finance/Permanent School Fund shall develop and implement the procedures necessary to establish and recommend to the SBOE the performance standards criteria.

(c) Performance standards shall be included in the PSF Investment Procedures Manual.

§33.35. Guidelines for the Custodian and the Securities Lending Agent.

Completing custodial and security lending functions in an accurate and timely manner is necessary for effective investment management and accurate records.

(1) A custodian shall have the following responsibilities regarding the segments of the funds for which the custodian is responsible.

(A) Provide complete custody and depository services for the designated accounts.

(B) Provide for investment of any cash on a daily basis to avoid uninvested amounts.

(C) Implement the investment actions in a timely and effective manner as directed by the investment managers.

(D) Collect all realizable income and principal and properly report the information on the periodic statements to the Texas Permanent School Fund (PSF) investment staff, the investment managers, or other appropriate parties.

(E) Provide monthly and annual accounting statements, as well as on-line, real-time accounting, that includes all transactions. Accounting shall be based on accurate security values for cost and market value and provided within a time frame acceptable to the State Board of Education (SBOE).

(F) Report to the PSF investment staff situations in which security pricing is either not possible or subject to considerable uncertainty.

(G) Distribute all proxy voting materials in a timely manner.

(H) Provide research and assistance to the SBOE and the PSF investment staff on all issues related to accounting and administration.

(I) Confirm that the depth of resources and personnel associated with the designated funds are comparable to those of the nation's leading custodial banks.

(2) A securities lending agent for the PSF shall have the following responsibilities.

(A) Provide complete transaction reporting for the designated funds.

(B) Provide a monthly accounting, as well as on-line, real-time accounting for securities lending transactions, based on accurate security values.

(C) Report to the PSF investment staff any irregular situation that is outside the standard of practice for securities lending or inconsistent with the provisions of the securities lending agreement.

(D) Implement a securities lending program for the PSF in a manner that does not impair any rights of the PSF by virtue of PSF ownership in securities.

(E) As requested, provide research and assistance to the SBOE and the PSF investment staff on all issues related to accounting and administration.

(F) Provide indemnification to the PSF satisfactory to the SBOE in the event of default on securities lending transactions.

(G) Fully disclose all revenues and other fees associated with the securities lending program.

(H) Comply with restrictions on types of securities lending transactions or eligible investments of cash collateral or any other restrictions imposed by the SBOE or the PSF investment staff. Unless the SBOE gives its written approval, the following guidelines apply to the PSF Securities Lending Program. Cash collateral reinvestment guidelines must meet the following standards.

(i) Permissible investments.

(I) U.S. Government and U.S. Agencies, under the following criteria:

(-a-) any security issued by or fully guaranteed as to payment of principal and interest by the U.S. Government or a U.S. Government Agency or sponsored Agency, and eligible for transfer via Federal Reserve Bank book entry, Depository Trust Company book entry, and/or Participants Trust Company book entry;

(-b-) maximum 397-day maturity on fixed rate;

(-c-) maximum three-year maturity on floating rate, with maximum reset period of 94 days and use a standard repricing index such as London InterBank Offered Rate (LIBOR), Federal Funds, Treasury Bills, or commercial paper; and

(-d-) no maximum dollar limit.

(II) Bank obligations, under the following criteria:

(-a-) time deposits with maximum 60-day maturity on fixed rate or three-year maturity for floating rate, with

maximum reset period of 60 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-b-) negotiable Certificates of Deposit with maximum 397-day maturity on fixed rate or three-year maturity on floating rate, with maximum reset period of 94 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-c-) bank notes with maximum 397-day maturity on fixed rate or three-year maturity on floating rate, with maximum reset period of 94 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-d-) bankers acceptances with maximum 45-day maturity;

(-e-) issued by banks with at least \$25 billion in assets and, for floating rate bank obligations with a maturity greater than 397 days, a long-term rating of AA2 and AA by Moody's Investor Service and Standard & Poor's Corporation at time of purchase; and, for fixed rate or floating rate bank obligations with a remaining maturity of 397 days or less, a short-term rating of "Tier 1" as defined in clause (ii)(IV) of this subparagraph or, for such bank obligations without a short-term rating, an issuer rating of Tier 1. In addition, placements can be made in branches within the following countries:

(-1-) Canada;

(-2-) France;

(-3-) United Kingdom; and

(-4-) United States; and

(-f-) dollar limit maximum per institution of 5.0% of investment portfolio at time of purchase.

(III) Commercial paper, under the following criteria:

(-a-) dollar limit maximum per issuer of 5.0% of investment portfolio at time of purchase including any other obligations of that issuer as established in subclause (II)(-d-) of this clause. If backed 100% by bank Letter of Credit, then dollar limit is applied against the issuing bank;

(-b-) must be rated "Tier 1" as defined in clause (ii)(IV) of this subparagraph; and

(-c-) maximum 397-day maturity.

(IV) Asset backed commercial paper, under the following criteria:

(-a-) dollar limit maximum per issuer of 5.0% of investment portfolio;

(-b-) must be rated "Tier 1" as defined in clause (ii)(IV) of this subparagraph; and

(-c-) maximum 397-day maturity.

(V) Asset backed securities, under the following criteria:

(-a-) maximum 397-day weighted average life on fixed rate;

(-b-) maximum three-year weighted average life on floating rate, with maximum reset period of 94 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper; and

(-c-) rated Aaa and AAA by Moody's Investor Service and Standard & Poor's Corporation at time of purchase. One AAA rating may suffice if only rated by one Nationally Recognized Securities Rating Organization (NRSRO).

(VI) Corporate debt (other than commercial paper), under the following criteria:

(-a-) must be senior debt;

(-b-) maximum 397-day maturity on fixed rate;

(-c-) maximum three-year maturity on floating rate, with maximum reset period of 94 days and use a standard repricing index such as LIBOR, Federal Funds, Treasury Bills, or commercial paper;

(-d-) for floating rate corporate obligations with a maturity greater than 397 days, a long-term rating of AA2 and AA by Moody's Investor Service and Standard & Poor's Corporation at time of purchase; and, for fixed rate or floating rate corporate obligations with a remaining maturity of 397 days or less, a short-term rating of "Tier 1" as defined in clause (ii)(IV) of this subparagraph or, for such corporate obligations without a short-term rating, an issuer rating of Tier 1; and

(-e-) dollar limit maximum per issuer of 5.0% of investment portfolio at time of purchase, including any other obligations of that issuer.

(VII) Reverse repurchase agreements, under the following criteria:

(-a-) counterparty must be "Tier 1" rated as defined in clause (ii)(IV) of this subparagraph for fixed rate and AA2 and AA by Moody's Investor Service and Standard & Poor's Corporation for floating rate or be a "Primary Dealer" in Government Securities as per the New York Federal Reserve Bank;

(-b-) underlying collateral may be any security permitted for direct investment;

(-c-) lending agent or a third party custodian must hold collateral under tri-party agreement;

(-d-) collateral must be marked to market daily and maintained at the following margin levels:

(-1-) U.S. Government, U.S. Government Agency, sponsored Agency, International Organization at 100%;

(-2-) Certificate of Deposits, Bankers Acceptance, bank notes, commercial paper at 102% under one year to maturity and rated at least "Tier 1" as defined in clause (ii)(IV) of this subparagraph; and

(-3-) corporate debt (other than commercial paper) at 105% rated at least AA2/AA or better by Moody's Investor Service and Standard & Poor's Corporation at time of purchase;

(-e-) due to daily margin maintenance, dollar limits and maturity limits of underlying collateral are waived, except with respect to the maturity limit in subclause (II)(-d-) of this clause;

(-f-) maximum 180-day maturity; and

(-g-) dollar limit for total reverse repurchase agreements is the greater of \$300 million or 15% of value of cash collateral portfolio with one counterparty at time of purchase.

(VIII) Foreign sovereign debt, under the following criteria:

(-a-) any security issued by or fully guaranteed as to payment of principal and interest by a foreign government whose sovereign debt is rated AA2/AA or better by Moody's Investor Service and Standard & Poor's Corporation at time of purchase. Securities must be delivered to Lending Agent or a third party under a Tri-Party agreement;

(-b-) dollar limit maximum per issuer or guarantor of 2.5% of investment portfolio; and

(-c-) maximum maturity of 397 days.

(IX) Short Term Investment Fund (STIF) and/or Registered Mutual Funds, under the following criteria:

(-a-) funds must comprise investments similar to those that would otherwise be approved for securities lending investment under the provisions of this subparagraph, not invest in derivatives, and not re-hypothecate assets;

(-b-) lender must approve each fund in writing and only upon receipt of offering documents and qualified letter; and

(-c-) fund must have an objective of a constant share price of one dollar.

(ii) Investment parameters.

(I) Maximum weighted average maturity of investment portfolio must be 180 days.

(II) Maximum weighted average interest rate exposure of investment portfolio must be 60 days.

(III) All investments must be U.S. dollar-denominated.

(IV) "Tier 1" credit quality is defined as the highest short-term rating category by the following NRSROs:

- (-a-) Standard & Poor's;
- (-b-) Moody's Investors Service;
- (-c-) Fitch Investors Service; and
- (-d-) Duff & Phelps, LLC.

(V) At time of purchase all investments must be rated in the highest short-term numerical category by at least two NRSROs, one of which must be either Standard & Poor's or Moody's Investors Service.

(VI) Issuer's ratings cannot be on negative credit watch at the time of purchase.

(VII) Interest and principal only (IO, PO) stripped mortgages are not permitted.

(VIII) Mortgage backed securities are not permitted.

(IX) Complex derivative or structured securities, including, but not limited to the following are not permitted:

- (-a-) inverse floating rate notes;
- (-b-) defined range floating rate notes;
- (-c-) trigger notes; and
- (-d-) set-up notes.

(I) Provide a copy of the investment policy governing the custodian's securities lending program, as amended, to the PSF investment staff.

(J) Confirm that the depth of resources and personnel associated with the designated funds are comparable to those of the nation's leading securities lending agents.

§33.60. Performance and Review Procedures.

As requested by the State Board of Education (SBOE) or Texas Permanent School Fund (PSF) investment staff, evaluation and periodic investment reports shall supply critical information on a continuing basis, such as the amount of trading activity, investment performance, cash positions, diversification ratios, rates of return, and other perspectives of the portfolios. The reports shall address compliance with investment policy guidelines.

(1) Performance measurements. The SBOE Committee on School Finance/Permanent School Fund shall review the quarterly performance of each portfolio of the PSF in terms of the provisions of this chapter. The investment performance review shall include comparisons with representative benchmark indices, a broad universe of

investment managers, and the consumer price index. A time-weighted return formula (which minimizes the effect of contributions and withdrawals) shall be used for investment return analysis. The review also may include quarterly performance analysis and comparisons of retained firms. The services of an outside, independent consulting firm that provides performance measurement and evaluation shall be retained.

(2) Meeting and reports. Upon request, the SBOE Committee on School Finance/Permanent School Fund shall meet with the PSF investment managers and custodian to review their responsibilities, the PSF portfolio, and investment results in terms of the provisions of this chapter.

(3) Review and modification of investment policy statement. The SBOE Committee on School Finance/Permanent School Fund shall review the provisions of this chapter at least once a year to determine if modifications are necessary or desirable. Upon approval by the SBOE, any modifications shall be promptly reported to all investment managers and other responsible parties.

(4) Compliance with this chapter and Texas statutes. Annually, the SBOE Committee on School Finance/Permanent School Fund shall confirm that the PSF and each of its managed portfolios have complied with the provisions of this chapter concerning exclusions imposed by the SBOE, proxy voting, and trading and brokerage selection.

(5) Significant events. The SBOE must be notified promptly if any of the following events occur within the custodian or external investment manager organizations:

(A) any event that is likely to adversely impact to a significant degree the management, professionalism, integrity, or financial position of the custodian or investment manager. A custodian must report the loss of an account of \$500 million or more. An investment manager must report the loss of an account of \$25 million or more;

(B) a loss of one or more key people;

(C) a significant change in investment philosophy;

(D) the addition of a new portfolio manager on the sponsor's account;

(E) a change in ownership or control, through any means, of the custodian or investment manager; or

(F) any violation of policy.

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 August 1, 2016.

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Cristina De La Fuente-Valadez

Director, Rulemaking

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



CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER C. TEXAS CERTIFICATE OF HIGH SCHOOL EQUIVALENCY

19 TAC §§89.42, 89.43, 89.46, 89.47

The State Board of Education (SBOE) adopts amendments to §§89.42, 89.43, 89.46, and 89.47, concerning the Texas Certificate of High School Equivalency. The amendments are adopted without changes to the proposed text as published in the May 13, 2016 issue of the *Texas Register* (41 TexReg 3414) and will not be republished. The sections address official testing centers, eligibility for a Texas Certificate of High School Equivalency, accommodations, and issuance of the certificate. The adopted amendments update provisions related to the administration of high school equivalency examinations by multiple providers, including offering both paper-based and computer-based testing formats; accommodations for applicants with documented disabilities; court-ordered examinations; and fees and other provisions for the issuance of certificates.

REASONED JUSTIFICATION. In November 2011, the committee discussed proposed modifications to the current high school equivalency program. The board asked Texas Education Agency (TEA) staff to produce a Request for Information (RFI) to identify available options for the operation of the Texas Certificate of High School Equivalency and report to the board the results of the RFI. At the November 2012 committee meeting, TEA staff presented the results of the RFI and provided information regarding the potential development of a new Texas High School Equivalency Examination. The committee requested that the TEA continue its relationship with the GED® Testing Service and not issue a Request for Proposals (RFP) for a Texas High School Equivalency Examination.

At the September 2013 meeting, the board approved for second reading and final adoption proposed amendments to 19 TAC Chapter 89, Adaptations for Special Populations, Subchapter C, Texas Certificate of High School Equivalency, to update the rules, including the expansion of eligible entities that may apply to become testing centers and the change in the fee structure.

In November 2013, the committee requested that the TEA draft an RFP to solicit proposals for a provider for the Texas Certificate of High School Equivalency examination.

Beginning in January 2014, all tests administered as part of the Texas Certificate of High School Equivalency, with the exception of tests provided by correctional institutions, transitioned from paper-based tests to computer-based tests.

On January 5, 2015, the TEA released a competitive RFP. Responses were due to the TEA on February 17, 2015. At the April 2015 SBOE meeting, the TEA staff presented the results of the RFP. The SBOE requested that the TEA extend the existing provider's Memorandum of Understanding for six months beyond the expiration date and begin the development of a new RFP to potentially identify multiple test providers.

At the July 2015 meeting, the board approved a decision matrix of requirements to be included in a future RFP. During the September 2015 meeting, the board approved the competitive RFP to be released in fall 2015. On October 6, 2015, the TEA released a competitive RFP. Responses were due to the TEA on November 17, 2015.

On January 29, 2016, the board voted to award contracts to three separate companies to provide high school equivalency assessments in Texas. The three companies are Data Recognition Cor-

poration, Educational Testing Service, and GED® Testing Service.

The rules in 19 TAC Chapter 89, Subchapter C, provide for administration of high school equivalency testing and certification, including provisions relating to official testing centers, test taker eligibility, accommodations for examinees with disabilities, and the issuance of high school equivalency certificates.

Adopted amendments to 19 TAC Chapter 89, Subchapter C, update the rules as follows.

Section 89.42, Official Testing Centers, was amended to establish entities eligible to serve as official paper-based testing centers, identify potential testing center violations, and update provisions related to the administration of high school equivalency examinations as both paper-based and computer-based testing formats.

Section 89.43, Eligibility for a Texas Certificate of High School Equivalency, was amended to add the statutory reference for court-ordered examinations and the high school equivalency program and to clarify the age requirements.

Section 89.46, Accommodations, was amended to prohibit testing centers from charging fees or prepayments to evaluate requests for accommodations and from charging additional fees for the administration of examinations with approved accommodations.

Section 89.47, Issuance of the Certificate, was amended to update the total state administrative fee and the calculation of that administrative fee; clarify that the certificate must indicate the language, format, and provider of each test taken; and specify that notification of nonissuance or cancellation of a certificate will be made by the state administrator instead of the testing entity.

The amendments to 19 TAC Chapter 89, Subchapter C, were approved by the SBOE for first reading and filing authorization at its April 8, 2016 meeting and for second reading and final adoption at its July 22, 2016 meeting.

In accordance with the TEC, §7.102(f), the SBOE approved the amendments for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2017-2018 school year. The earlier effective date will allow the agency to implement the multiple vendor system as soon as possible.

SUMMARY OF COMMENTS AND RESPONSES. Following is a summary of the public comments received and the corresponding responses regarding the proposed amendments to 19 TAC Chapter 89, Subchapter C.

Comment. An individual commented that the SBOE should allow more than the three named testing agencies for paper-based tests for adults with learning disabilities that need formal accommodations.

Response. The SBOE provides the following clarification. Currently only three entities provide high school equivalency exams nationwide. No additional vendors are in the market at this time.

Comment. Tarrant Literacy Coalition and one individual commented that additional locations, including local workforce development boards, should be approved test centers.

Response. The SBOE provides the following clarification. Currently, local workforce development boards are eligible to administer computer-based testing. The SBOE will consider expanding the list of eligible paper-based testing centers as a separate rule action at a future date.

Comment. Data Recognition Corporation requested that the list of approved paper-based testing centers be expanded to include adult education providers and workforce development boards.

Response. The SBOE will consider expanding the list of eligible paper-based testing centers as a separate rule action at a future date.

STATUTORY AUTHORITY. The amendments are adopted under the Texas Education Code, §7.111, which requires the SBOE to adopt rules to develop and deliver high school equivalency examinations and provide for the administration of the examinations online.

CROSS REFERENCE TO STATUTE. The amendments implement the Texas Education Code, §7.111.

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 103. HEALTH AND SAFETY SUBCHAPTER DD. COMMISSIONER'S RULES CONCERNING VIDEO SURVEILLANCE OF CERTAIN SPECIAL EDUCATION SETTINGS

19 TAC §103.1301

The Texas Education Agency (TEA) adopts new §103.1301, concerning video surveillance of certain special education settings. The new section is adopted with changes to the proposed text as published in the April 8, 2016 issue of the *Texas Register* (41 TexReg 2567). The adopted new section reflects the requirements in Texas Education Code (TEC), §29.022, as added by Senate Bill (SB) 507, 84th Texas Legislature, Regular Session, 2015.

REASONED JUSTIFICATION. In order to promote the safety of students receiving special education and related services in certain self-contained classrooms and other special education settings, SB 507, 84th Texas Legislature, Regular Session, 2015, added TEC, §29.022, to require video surveillance.

Beginning with the 2016-2017 school year, on request by a parent, trustee, or staff member, a school district or open-enrollment charter school must provide video equipment, including video cameras with audio recording capabilities, to campuses. Campuses that receive such equipment must place, operate, and maintain video cameras in certain self-contained classrooms or other special education settings. Video recordings are confidential under the section and may only be released for viewing to certain individuals.

The adopted new rule reflects the requirements in TEC, §29.022, and provides clarification. Specifically, the rule specifies the special educational settings to which the new law applies; defines

terms; clarifies that special education funds cannot be used to implement the law; includes a provision relating to dispute resolution; requires that school district boards of trustees and charter school governing bodies adopt policies and procedures to implement the law; and includes provisions relating to confidentiality issues and child abuse reporting.

In response to public comment, the following changes were made at adoption.

In subsection (b)(1) and (2), the definitions of "parent" and "staff member" were modified to clarify that a parent or staff member that makes a request for video surveillance in a specific classroom must be the parent of a child in the classroom or a staff member assigned to the classroom.

Subsection (b)(9)(A) was amended to replace the word "or" with the word "and" to correct a typographical error.

Subsection (f) was amended to specify that TEC, §29.022, and the rule apply to video surveillance during the regular school year and during extended school year services.

Subsection (g)(2) was amended to specify that local policies and procedures must include the procedures for responding to a request for video surveillance.

Subsection (g)(3) was modified to clarify that the written notice provided to campus staff and parents that video and audio surveillance will be conducted in the classroom setting must be provided in advance.

Subsection (g)(5) was amended to clarify that the statement regarding the personnel who will have access to video equipment or video recordings is intended for personnel whose positions have some role or responsibility for the operation or maintenance of the video equipment or the video recordings.

The term "routine" was deleted from subsection (g)(9) to align with the rule's authorizing statute.

Subsection (h)(3) was modified to clarify that training in de-escalation and restraint techniques applies only to administrators and not to peace officers or school nurses.

The term "notify" in subsection (i) was replaced with the phrase "submit a report to" to align with 19 TAC §61.1051, Reporting Child Abuse and Neglect.

Finally, subsection (j) was amended to specify that a recording believed to document a possible violation of school district, open-enrollment charter school, or campus policy may be used in a disciplinary action against district or charter school personnel and must be released for viewing by the district or charter school employee who is the subject of the disciplinary action at the request of the employee.

The agency has determined that for the first five-year period the new section is in effect, enforcing or administering the new section has no foreseeable economic implications relating to costs or revenues of the state or local governments. However, the authorizing statute, TEC, §29.022, has fiscal implications for school districts and open-enrollment charter schools. The agency is not able to report the total number of self-contained classrooms or other special education settings that may be subject to the requirements in TEC, §29.022. Whether a classroom or setting is subject to the statute is dependent upon whether a majority of the students in regular attendance receive special education services in the classroom or setting for a majority of the instructional day. According to school district representatives, the costs asso-

ciated with implementing TEC, §29.022, will vary widely from district to district based on the number of self-contained classrooms and other special education settings in the district, the number of cameras needed to cover each classroom or setting, the district's existing technological infrastructure, the economies of scale (i.e., smaller districts will purchase fewer video cameras at a higher price while larger ones will purchase more cameras at a lower price), and other factors. On a per classroom basis, school districts have estimated costs ranging between \$3,500 and \$5,500. School districts have estimated that conducting video surveillance districtwide could cost anywhere from \$350,000 to \$6.8 million.

SUMMARY OF COMMENTS AND AGENCY RESPONSES. The public comment period on the proposal began April 8, 2016, and ended May 9, 2016. In addition, a public hearing was held on May 19, 2016. Following is a summary of public comments received and corresponding agency responses regarding proposed new 19 TAC Chapter 103, Health and Safety, Subchapter DD, Commissioner's Rules Concerning Video Surveillance of Certain Special Education Settings, §103.1301, Video Surveillance of Certain Special Education Settings.

Comment. An individual expressed concern that the agency has noted that the proposed rule does not fall under the Individuals with Disabilities Education Act (IDEA).

Agency Response. The comment is outside of the scope of the proposed rulemaking. The agency clarifies that IDEA and its implementing regulations do not require video surveillance of classrooms in which special education and related services are provided to eligible students.

Comment. A special education teacher commented that these matters are scary, threatening, and a bad idea. The teacher further commented that the technology will be costly and that schools are already shorthanded on technology services. Finally, the teacher stated that a couple of bad apples should not bring on such a huge undertaking.

Agency Response. The comments are outside of the scope of the proposed rulemaking.

Comment. A school district administrator expressed disagreement with various aspects of TEC, §29.022. The administrator further stated that it is the hope of many that as the process unfolds, it can be done with guidance and consideration from the legislature and the agency.

Agency Response. The comment is outside of the scope of the proposed rulemaking.

Comment. A school district administrator expressed support for video surveillance in special education classrooms and commented that cameras will be a safeguard for all concerned. Two individuals also expressed support for video surveillance in special education classrooms.

Agency Response. The agency agrees that the rule is appropriate. In response to other comments, the agency has amended §103.1301(b)(1), (2), and (9); (g)(2), (3), (5), and (9); (h)(3); (i); and (j) at adoption.

Comment. A school district administrator commented that finding a particular incident on a video recording will not be easy as no one will be monitoring the video feed. The commenter further stated that districts will spend a significant amount of time and funds to defend what, in many cases, are ethically appropriate practices. Finally, the commenter expressed concern that the

mandate is unfunded and will cost the administrator's district \$1 million.

Agency Response. The comment regarding finding a particular incident on a video recording is outside of the scope of the proposed rulemaking. The agency agrees that there will be certain costs to districts associated with implementation of the requirements related to video surveillance.

Comment. A school district administrator commented that the administrator's district estimates that implementing TEC, §29.022, will cost the district \$350,000. The commenter further stated that the district is eager for the rulemaking process to be completed.

Agency Response. The agency agrees that there will be certain costs to districts associated with implementation of the requirements related to video surveillance.

Comment. The law firm of Thompson & Horton submitted comments on behalf of its attorneys and four school districts. Thompson & Horton commented that the fiscal note for the proposed rules is wholly inadequate and asserted that Texas Education Agency has a duty to calculate all costs of SB 507 and include them in its notice. Thompson & Horton further stated that if the rule is not in substantial compliance with the fiscal note requirement, it is voidable under Texas Government Code, §2001.035(a). Thompson & Horton also asserted that the commissioner's duty to accurately estimate the cost to school districts of whichever construction he adopts is important because of the potential conflict between TEC, §29.022, and other statutes relating to how districts budget and spend funds. According to Thompson & Horton, if the proposed rule interprets TEC, §29.022, broadly, a single member of a board of trustees, a single employee, or a single parent could force the district to spend millions of dollars in a manner that is not in accordance with the budget adopted by the school board. The Texas Association of School Boards (TASB) submitted similar comments related to the fiscal note and recommended that the agency include an estimate of costs in compliance with the Texas Administrative Procedure Act.

Agency Response. The agency disagrees. It remains the agency's position that the costs to school districts and open-enrollment charter schools related to operating and maintaining video equipment and video recordings result from the enactment of TEC, §29.022, not from enforcing or administering the new rule. The agency is not able to report the total number of self-contained classrooms or other special education settings that may be subject to the requirements in TEC, §29.022. Whether a classroom or setting is subject to the statute is dependent upon whether a majority of the students in regular attendance receive special education services in the classroom or setting for a majority of the instructional day. According to school district representatives, the costs associated with implementing TEC, §29.022, will vary widely from district to district based on the number of self-contained classrooms and other special education settings in the district, the number of cameras needed to cover each classroom or setting, the district's existing technological infrastructure, the economies of scale (i.e., smaller districts will purchase fewer video cameras at a higher price while larger ones will purchase more cameras at a lower price), and other factors. On a per classroom basis, school districts have estimated costs ranging between \$3,500 and \$5,500. School districts have estimated that conducting video surveillance districtwide could cost anywhere from \$350,000 to

\$6.8 million. The agency will revise the fiscal note at adoption to include this additional information.

Comment. A school district's general counsel commented that the cost of complying with the statute is overwhelming and that the logistics of complying with it are extremely complicated. The commenter further stated that the commenter's district anticipates spending over \$1 million to install the video cameras and storage equipment and will spend additional amounts to maintain the cameras and implement other requirements in the statute.

Agency Response. The agency agrees that there will be certain costs to districts associated with implementation of the requirements related to video surveillance.

Comment. An individual commented that while some may dislike the fact that TEC, §29.022, has fiscal implications for school districts and open-enrollment charter schools, the financial burden is not undue and will be more than offset by three probable benefits: (1) the deterrence of abuse and neglect by educators; (2) the deterrence of false accusations against educators; and (3) increased public confidence that classroom safety is being monitored.

Agency Response. The comment is outside of the scope of the proposed rulemaking.

Comment. A school district employee submitted excerpts from an agency letter requesting the Texas Attorney General's opinion regarding the proper construction of TEC, §29.022, and commented that the statute should clarify the questions the agency asked.

Agency Response. The comment is outside of the scope of the proposed rulemaking.

Comment. A school district employee asked various questions regarding the requirements for video cameras and storage servers and how to deal with technical problems and other events that may arise.

Agency Response. The comment is outside of the scope of the proposed rulemaking.

Comment. A school district administrator asked various questions about the intent of TEC, §29.022, and the proposed rule.

Agency Response. The comment is outside of the scope of the proposed rulemaking.

Comment. A school district employee commented that SB 507 is not fair and that a few instances of misconduct should not mark all school staff. The commenter further stated that more money should be put toward increasing salaries and hiring additional staff so that no staff members are alone with students.

Agency Response. The comment is outside of the scope of the proposed rulemaking.

Comment. A special education teacher commented that the teacher was allowed to survey special education teachers who are members of the Houston Federation of Teachers and that more than 300 teachers responded to the survey. According to the commenter, 64% of respondents indicated that they would either leave teaching or teaching students with special needs if cameras were installed in their classrooms. The commenter further stated that the shortage of special education teachers should be expected to get worse in the next few years.

Agency Response. The comment is outside of the scope of the proposed rulemaking.

Comment. An individual commented that the proposed rule leaves too much up to school districts.

Agency Response. The agency disagrees and has determined that the rule appropriately addresses issues that fall within the commissioner's rulemaking authority.

Comment. An individual asked whether something must occur before a parent can request video surveillance.

Agency Response. The agency provides the following clarification. Neither TEC, §29.022, nor the rule require that an incident occur before a parent may request video surveillance.

Comment. An individual commented that placing video cameras in every special education classroom after someone merely requests it is poor governmental planning. The commenter further stated that the statute is an unfunded mandate that is not needed. The commenter also stated that schools go out of their way to be problem solvers to help students and that video cameras should only be required when evidence shows a need for them.

Agency Response. The comment is outside of the scope of the proposed rulemaking.

Comment. An individual commented that video surveillance should not be limited to certain special education settings and should be conducted at bus stops, in cafeterias, and in restrooms. Two individuals commented that video surveillance should be conducted in all places that a child goes during the day or week.

Agency Response. The agency disagrees. TEC, §29.022, requires video surveillance in limited special education instructional settings.

Comment. An individual commented that he is amazed at the agency's efforts to stop the installation of video cameras in special needs classrooms.

Agency Response. The agency provides the following clarification. The rule does not contain a provision that allows a school district or charter school a means to opt out of the requirements in TEC, §29.022.

Comment. Several individuals commented that the agency has created a "loophole" for school districts to opt out of installing video cameras in special education classrooms and encouraged the agency to ensure that the statute is implemented as intended.

Agency Response. The agency disagrees. The rule does not contain a provision that allows a school district or charter school a means to opt out of the requirements in TEC, §29.022.

Comment. An individual commented that a single request needs to justify the installation of video cameras.

Agency Response. The agency provides the following clarification. TEC, §29.022(a), requires a school district or open-enrollment charter school to provide equipment, including a video camera, to each school in the district or each charter school campus in which a student who receives special education services in a self-contained classroom or other special education setting is enrolled on request by a parent, trustee, or staff member.

Comment. An individual commented that it is imperative to the health and safety of children with special needs that all classrooms in all schools be required to install and maintain cameras anytime the classrooms are being used. Another individual com-

mented that video cameras should be installed inside all special needs classrooms beginning with the 2016-2017 school year.

Agency Response. The agency provides the following clarification. TEC, §29.022(a), requires a school district or open-enrollment charter school to provide equipment, including a video camera, to each school in the district or each charter school campus in which a student who receives special education services in a self-contained classroom or other special education setting is enrolled on request by a parent, trustee, or staff member. The agency further clarifies that the requirements in TEC, §29.022, begin with the 2016-2017 school year.

Comment. A school district employee recommended that the proposed rule include minimum requirements for video cameras such as how many frames per second will be required to be recorded, the camera resolution, whether motion only recording is permitted, etc. A school district administrator also recommended that technical specifications and minimum requirements for cameras be included in the rule.

Agency Response. The agency disagrees and has maintained language as proposed. TEC, §29.022, does not include any specifications for video cameras except that it requires that they be capable of (1) covering all areas of the classroom or setting, except for a bathroom or other area in which a student's clothes are changed, and (2) recording audio from all areas of the classroom or setting. The agency has determined that school districts and charter schools are in the best position to determine the type of equipment that is needed to conduct the required surveillance in a particular special education instructional setting.

Comment. An individual asked whether the requirement that campuses that receive video equipment must place, operate, and maintain video cameras in self-contained classrooms means that all video equipment and recordings be located in the self-contained classroom. The commenter also asked whether the systems will be under lock and key and whether staff who work in self-contained classrooms will have access to the video equipment and recordings.

Agency Response. The agency provides the following clarification. The agency does not interpret TEC, §29.022, to require that video recordings be stored in the classroom in which the video cameras are located. The agency also clarifies that the individuals who have access to video recordings are outlined in subsection (h).

Comment. A school district administrator, a school district employee, and the Austin Independent School District (ISD) requested clarification on the timeline for placing video cameras in a classroom after a request for video surveillance has been made. The administrator commented that with the Education Department General Administrative Regulations (EDGAR), it is a much longer and more tedious process to purchase equipment and, in some cases, may take up to six months for bids, contracts, and purchase orders to be completed. Three individuals commented that the proposed rule should include timelines for installing video cameras once a request has been made.

Agency Response. The agency disagrees and has maintained language as proposed. TEC, §29.022, does not include a timeline for installing video equipment after a request for video surveillance has been received. Because the number of classrooms and settings that are subject to the requirements of the statute could vary significantly from one school district or charter school to another, school districts and charter schools are in the

best position to determine a reasonable time period for installing the equipment after a request has been received. The agency clarifies that the EDGAR regulations only apply to expenditures for which federal grant funds are used. As stated in subsection (d), neither IDEA funds nor state special education funds may be used to implement the requirements of TEC, §29.022.

Comment. An individual recommended that the proposed rule should require that school districts and charter schools provide a response to a request for video surveillance within 10 days of receipt of the request and should require the installation of the video equipment between 30 to 60 days after the initial 10-day period.

Agency Response. The agency disagrees and has maintained language as proposed. TEC, §29.022, does not include a timeline for installing video equipment after a request for video surveillance has been received. Because the number of classrooms and settings that are subject to the requirements of the statute could vary significantly from one school district or charter school to another, school districts and charter schools are in the best position to determine a reasonable time for installing the equipment after a request has been received.

Comment. The Houston ISD commented that the authors of SB 507 intended for video cameras to be installed only in a specific classroom but that the language in the bill causes confusion as to whether a request requires video surveillance districtwide or only in a specific classroom. Houston ISD further stated that it is glad that the commissioner has requested an opinion from the Texas Attorney General regarding this issue. Houston ISD also commented that the bill could potentially affect its ability to recruit and retain special education teachers because many have expressed concerns that the bill does not require video surveillance of general education teachers. Houston ISD stated that if one request triggers the installation of video cameras districtwide, the cost will be approximately \$6.8 million and that its implementation costs would be significantly reduced if a request only requires the installation of video cameras in a specific classroom.

Agency Response. The agency provides the following clarification. While the express language in TEC, §29.022(a), reflects that a single request requires that video surveillance be conducted districtwide, some legislators have made post-enactment statements that the intent was for one request to trigger video surveillance in one instructional setting. The agency has sought guidance from the Texas Attorney General regarding whether TEC, §29.022(a), can reasonably be construed to mean that a request for video surveillance only requires that video surveillance be conducted in one self-contained instructional setting. The agency will modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion.

Comment. TASB and Thompson & Horton recommended that subsection (a) be changed to specify that one request only triggers a requirement that video equipment be placed in the classroom that the parent, staff member, or trustee designates. The commenters further stated that the commissioner has broad rule-making authority under TEC, §29.022, and should adopt rules that limit a single request to a single special education setting. Alternatively, the commenters recommended that the commissioner adopt a rule stating that a requestor can limit his or her request to a single classroom. Two school district administrators and a school district's general counsel also recommended that the rules clarify that a single request for video surveillance applies to a single classroom.

Agency Response. The agency disagrees and has maintained language as proposed. Stakeholders disagree as to the number of self-contained instructional settings affected by a single request for video surveillance. While the express language in TEC, §29.022(a), reflects that a single request requires that video surveillance be conducted districtwide, some legislators have made post-enactment statements that the intent was for one request to trigger video surveillance in one instructional setting. The agency has sought guidance from the Texas Attorney General regarding whether TEC, §29.022(a), can reasonably be construed to mean that a request for video surveillance only requires that video surveillance be conducted in one self-contained instructional setting. The agency will modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion.

Comment. A school district administrator commented that there are concerns regarding whether a request for video surveillance requires that cameras be placed in every classroom in the school district that is subject to TEC, §29.022. The commenter further stated that while one parent may have the right to request video surveillance, that right should not overshadow the rights of other students. Two individuals commented that the proposed rule should clarify whether a single request triggers a school district's duty to install cameras at a single campus or across the entire district. Two school district employees asked whether a request for video surveillance triggers a requirement that cameras be installed at all of a district's campuses.

Agency Response. The agency provides the following clarification. The agency has sought guidance from the Texas Attorney General regarding whether TEC, §29.022(a), can reasonably be construed to mean that a request for video surveillance only requires that video surveillance be conducted in one self-contained instructional setting. The agency will modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion.

Comment. The Texas affiliate of the American Federation of Teachers (Texas AFT) and approximately 60 individuals commented that the commissioner should construe the statute as requiring video surveillance in one classroom when a request for video surveillance is received.

Agency Response. The agency disagrees and has maintained language as proposed. The agency has sought guidance from the Texas Attorney General regarding whether TEC, §29.022(a), can reasonably be construed to mean that a request for video surveillance only requires that video surveillance be conducted in one self-contained instructional setting. The agency will modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion.

Comment. A school district administrator asked whether a board member's request for video surveillance triggers a requirement to place video cameras throughout the entire district, at a specific campus, or a specific classroom.

Agency Response. The agency provides the following clarification. The agency has sought guidance from the Texas Attorney General regarding whether TEC, §29.022(a), can reasonably be construed to mean that a request for video surveillance only requires that video surveillance be conducted in one self-contained instructional setting. The agency will modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion.

Comment. A teacher and an education service center (ESC) employee asked for clarification regarding whether audio surveillance is required in bathrooms and changing areas. The teacher

also asked how the other students' confidentiality rights are not violated when a parent requests video surveillance.

Agency Response. The agency provides the following clarification. TEC, §29.022(c), reflects that audio surveillance must be conducted in bathrooms and areas in which a student's clothes are changed but that no video surveillance may be conducted in such areas.

Comment. A lawyer and two school district administrators recommended that language be added to the rule to clarify that video surveillance may be discontinued if the teacher or student whose parent requested video surveillance is no longer assigned to the classroom. A former school district administrator asked what happens if video surveillance is requested and the individual who made the request is no longer associated with the district.

Agency Response. The agency provides the following clarification. TEC, §29.022, does not address whether video surveillance in a classroom may be discontinued under the circumstances described by the commenters. The agency has requested the Texas Attorney General's opinion regarding whether the statute may reasonably be construed to allow a school district or charter school to discontinue video surveillance in a self-contained instructional setting if the circumstances surrounding the request have changed substantially (e.g., the student whose parent requested video surveillance is no longer assigned to the classroom or has left the campus or district, the teacher who requested video surveillance is no longer assigned to the classroom, the term of office of the trustee who requested video surveillance has ended, etc.). The agency will modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion.

Comment. A school district administrator commented that the rule needs greater specificity as to which classes are covered and when cameras may be removed.

Agency Response. The agency disagrees. The agency has determined that the definitions of "self-contained classroom" and "other special education setting" in subsection (b) make clear which classrooms are subject to the requirements of TEC, §29.022.

Comment. A school district administrator commented that the definitions of "parent," "staff member," and "trustee" are very helpful. The commenter also stated that she appreciated the definition of "self-contained classroom." A former school district administrator also commented in support of the agency's desire to provide clarification by providing definitions.

Agency Response. The agency agrees. In response to other comments, the agency has amended §103.1301(b)(1), (2), and (9).

Comment. Several school district administrators and employees, the Texas Council of Administrators of Special Education (TCASE), a lawyer, and two ESC employees recommended that the definitions of "parent" and "staff member" be modified to clarify that a parent or staff member that makes a request for video surveillance in a specific classroom must be the parent of a child in the classroom or a staff member assigned to the classroom. Specifically, the commenters recommended that the article "a" preceding the term "self-contained classroom" be changed to the article "the."

Agency Response. The agency agrees and has modified the definitions of "parent" and "staff member" in subsection (b)(1)

and (2) by replacing the article "a" with the article "the" as recommended.

Comment. Thompson & Horton commented that it agrees with the definitions in subsection (b) but recommended that the definitions of "parent" and "staff member" be modified to clarify that a parent or staff member who makes a request for video surveillance must be the parent of a child in the classroom or a staff member assigned to the classroom.

Agency Response. The agency agrees and has modified the definitions of "parent" and "staff member" in subsection (b)(1) and (2) by replacing the article "a" with the article "the" as recommended.

Comment. TASB expressed its support for the definitions of "staff member," "self-contained classroom," and "other special education setting." The Texas Classroom Teachers Association (TCTA) commented that it supports the definition of "staff member."

Agency Response. The agency agrees and has maintained the definitions of "self-contained classroom," and "other special education setting" as proposed. In response to other comments, the agency has modified the definition of "staff member" in subsection (b)(2) by replacing the article "a" with the article "the."

Comment. A school district's general counsel commented that the definition of "parent" is unclear and recommended that the rule state that "parent" has the same meaning it does under IDEA. Disability Rights Texas (DRTx), The Arc of Texas (The Arc), and Texas Council for Developmental Disabilities (TCDD) also recommended that the term "parent" be defined as the term is defined in IDEA. One school district administrator recommended that the term "parent" be defined.

Agency Response. The agency disagrees. The rule incorporates the definition of "parent" in TEC, Chapter 26, which outlines the parental rights and responsibilities concerning various educational activities and matters. This basic definition is more appropriate for the implementation of TEC, §29.022, than the intricate definition of "parent" in IDEA, which includes surrogate parents whose appointments are for the sole purpose of representing the child in matters related to the child's special education evaluation and programming but not in other general matters. In response to other comments, the agency has modified the definition of "parent" in subsection (b)(1) by replacing the article "a" with the article "the."

Comment. DRTx, The Arc, and TCDD recommended that the term "staff member" be revised to include all school employees and contractors of the campus at which a self-contained classroom or other special education setting is located within the school district or open-enrollment charter school. An individual commented that the intent of SB 507 was for any staff member to be able to request video surveillance.

Agency Response. The agency disagrees and finds no indication that there was a legislative intent for any district or campus employee or contractor to be allowed to request video surveillance. Therefore, the rule defines the term "staff member" as a teacher, related service provider, paraprofessional, or educational aide assigned to work in the self-contained instructional setting and a campus principal or assistant principal of the campus at which the self-contained instructional setting is located. The agency has sought guidance from the Texas Attorney General regarding whether the term "staff member" in TEC, §29.022, can reasonably be construed in this manner. The agency will

modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion. In response to other comments, the agency has modified the definition of "staff member" in subsection (b)(2) by replacing the article "a" with the article "the."

Comment. The Texas Association of School Administrators (TASA) recommended that the term "related service provider" be deleted from the definition of "staff member" because a related service provider is not a school district employee.

Agency Response. The agency disagrees with the assertion that related service providers are not school district employees. While some related service providers are contractors, many are school district and charter school employees. In response to other comments, the agency has modified the definition of "staff member" in subsection (b)(2) by replacing the article "a" with the article "the."

Comment. TCASE, two school district administrators, and Austin ISD commented that they agree with the definitions in subsection (b)(3)-(8).

Agency Response. The agency agrees and has maintained language as proposed.

Comment. A school district administrator asked whether the term "residential care" in paragraphs (5) and (6) of subsection (b) of the proposed rule refers to private facilities that a district might contract with or to residential facilities that a district operates. The commenter also questioned how a district can spend public funds to ensure that a private facility complies with a request for video surveillance.

Agency Response. The agency provides the following clarification. The definitions of "self-contained classroom" and "other special education setting" in subsection (b) refer to certain instructional arrangements/settings described in the student attendance accounting handbook adopted under 19 TAC §129.1025, Adoption by Reference: Student Attendance Accounting Handbook. The instructional arrangement/setting "residential care and treatment facility--self-contained (mild/moderate/severe) regular campus" applies to a student who resides in a residential facility and receives special education and related services in a self-contained classroom on a local school district campus for 50% or more of the instructional day. The instructional arrangement/setting "residential care and treatment facility--full-time early childhood special education setting" applies to a student who is three to five years of age, resides in a residential facility, and receives full-time special education and related services in educational programs designed primarily for children with disabilities on a local school district campus (other than a separate campus). The instructional arrangement/setting "residential care and treatment facility--separate campus" applies to a student who resides in a residential facility and receives special education and related services on a local school district campus in a self-contained classroom at a separate campus (i.e., a campus that serves only students who receive special education and related services). With regard to all three instructional arrangements/settings, the term "residential care and treatment facility" refers to where the student lives, not the setting in which the student receives instruction.

Comment. Approximately 60 individuals commented that the definitions of "self-contained classroom" and "other special education setting" in subsection (b) of the proposed rule should be modified to clarify that a majority of the students in regular at-

tendance "in the classroom" are provided with special education and related services.

Agency Response. The agency disagrees and has determined that additional clarification is not necessary.

Comment. A school district administrator thanked the agency for defining "other special education setting" and encouraged the agency not to modify the definition.

Agency Response. The agency agrees and has maintained language as proposed.

Comment. An individual asked how the term "certain special education settings" is defined and whether the term "self-contained classroom" includes "learning resource rooms."

Agency Response. The agency provides the following clarification. The term "certain special education settings" is not defined in the rule. The term is used in the title of the rule to indicate that the rule applies to some, but not all, settings where students receive special education services. The specific settings to which the rule applies are "self-contained classrooms" and "other special education settings" as those terms are described in subsection (b)(5)-(8). "Learning resource room" is not an instructional arrangement/setting described in the student attendance accounting handbook adopted under 19 TAC §129.1025. The handbook, however, includes an instructional arrangement/setting referred to as "resource room/services" that applies to a student who is provided special education and related services in a setting other than general education for less than 50% of the instructional day. In determining whether a classroom is a "self-contained classroom" or "other special education setting" for purposes of TEC, §29.022, the focus must be on whether a majority of the students in regular attendance have one of the instructional arrangements/settings listed in the definitions.

Comment. An individual recommended that the definition of "self-contained classroom" in subsection (b) be modified to state that part-time early childhood special education settings are also included. The commenter also stated that video cameras should be set up on playgrounds because abuse is not limited to classroom settings.

Agency Response. The agency disagrees and has maintained language as proposed. There is no instructional arrangement/setting for "part-time early childhood (preschool program for children with disabilities) special education setting" in the student attendance accounting handbook adopted under 19 TAC §129.1025. Furthermore, TEC, §29.022, requires video surveillance in limited special education instructional settings and does not require video surveillance of playgrounds.

Comment. An individual commented that the inclusion of the term "other special education setting" in TEC, §29.022, was intended to apply to other small rooms on a campus.

Agency Response. The agency disagrees and has maintained language as proposed. The term "other special education setting" was added through an amendment to SB 507 and intended to apply to classrooms located on separate campuses (i.e., campuses that serve only students who receive special education and related services) because the introduced bill only included the term "self-contained classroom," which only applies to certain classrooms on regular school campuses (i.e., campuses that serve both students in general education and students in special education).

Comment. Houston ISD asked how school districts determine whether an elementary classroom is subject to the video surveillance requirements where some students are in and out of general education during the day. Houston ISD also asked whether a district is required to have a head and minute count to determine "majority." Finally, Houston ISD asked what a district's rights are when a parent requests video surveillance for a classroom that is not subject to the video surveillance requirements. A former school district administrator expressed confusion over how to determine if a classroom meets the definition of "self-contained classroom" or "other special education setting" when the classroom serves students with varying instructional arrangements.

Agency Response. The agency provides the following clarification. A classroom is subject to the video surveillance if a majority of the students in regular attendance have one of the instructional arrangements/settings listed in subsections (b)(5) or (6), as applicable. For example, if a classroom on a regular school campus serves 12 students who receive special education services and 9 spend 50% or more of the instructional day in the classroom and have an instructional arrangement/setting of "self-contained (mild/moderate/severe) regular campus" while 3 spend between 21% and 50% of the instructional day in the classroom and have an instructional arrangement/setting of "resource room/services," the classroom would be subject to the requirements in TEC, §29.022, because a majority of the students in regular attendance have an instructional arrangement/setting listed in subsection (b)(5).

Comment. Many commenters noted that there appears to be a typographical error in subsection (b)(9)(A) and recommended that the term "or" at the end of the subsection be replaced with the term "and."

Agency Response. The agency agrees that the inclusion of the term "or" at the end of subsection (b)(9)(A) was an error. The rule has been modified at adoption to replace the term "or" with the term "and."

Comment. The Association of Texas Professional Educators (ATPE) recommended that language be added to the definition of "incident" in subsection (b)(9) stating that an incident also includes the alleged assault of or injury to a teacher or other school employee.

Agency Response. The agency disagrees and has maintained language as proposed. The stated purpose of TEC, §29.022, is to promote student safety and there are no provisions in the statute that support the recommendation.

Comment. TASA recommended that in subsection (b)(9)(A), the term "described" be changed to "defined" and that the term "employee" be changed to "staff member." TASA commented that the changes would clarify the meanings of the terms and be consistent with the definition of "staff member" in subsection (b)(2).

Agency Response. The agency disagrees. The term "described" is used throughout the rule. Furthermore, the term "employee" is used in subsection (b)(9)(A) to correspond to the terminology used in TEC, §29.022(i)(1), and applies to an employee who is involved in an incident documented by a recording. The term "staff member" in the rule refers to the campus personnel who may request video surveillance of the special education instructional setting. In response to other comments, the agency has amended subsection (b)(9)(A) to replace the term "or" with the term "and."

Comment. Two individuals commented that the definition of "incident" in subsection (b)(9) should be broader. An individual commented that the definition of "incident" should include emotional abuse. An individual commented that the definition should include mental and verbal abuse. An individual commented that the definition of "incident" should not be limited to events or circumstances that involve alleged abuse or neglect.

Agency Response. The agency disagrees. The intent of TEC, §29.022, is to promote student safety by documenting and deterring incidents involving child abuse or neglect under the Texas Family Code in certain special education instructional settings. Therefore, the rule defines the term "incident" consistent with the intent of the statute. In response to other comments, the agency has amended subsection (b)(9)(A) to replace the term "or" with the term "and."

Comment. DRTx, The Arc, and TCDD recommended that the definition of "incident" be revised to include abuse and neglect perpetrated by employees, contractors, volunteers, or other persons on the campus, including guests.

Agency Response. The agency disagrees. The term "employee" is used in subsection (b)(9)(A) to correspond to the terminology used in TEC, §29.022(i)(1), which outlines the individuals who may view a video recording. In response to other comments, the agency has amended subsection (b)(9)(A) to replace the term "or" with the term "and."

Comment. TCASE, two school district administrators, and a school district employee recommended that a definition for "in regular attendance" be added to subsection (b) to clarify that the child is enrolled in a class for which attendance is regularly taken for state attendance accounting purposes.

Agency Response. The agency disagrees with the recommendation and has determined that additional clarification is not necessary. In response to other comments, the agency has amended §103.1301(b)(1), (2), and (9) at adoption.

Comment. Five individuals expressed disagreement with the language in subsection (c) of the proposed rule and do not believe that state agencies should be excluded from the requirements in TEC, §29.022.

Agency Response. The agency disagrees. There is no language in TEC, §29.022, reflecting that it applies to the state agencies that operate educational programs.

Comment. A school district employee commented that an unfunded initiative to require video surveillance in special education classrooms while not allowing the use of special education funds to implement the requirement places a significant burden on school districts and may cause some to eliminate quality instructional programs. The commenter further stated that while the costs of the camera equipment and installation are nominal, the costs of video storage are significant. An individual requested that the agency reconsider the language in subsection (d).

Agency Response. The agency understands the commenters' concerns and clarifies that neither federal nor state special education funds may be used to implement the requirements of TEC, §29.022, because IDEA does not require video surveillance in special education classrooms. The purpose of TEC, §29.022, is to promote student safety.

Comment. TCASE, two school district administrators, and Austin ISD commented that they agree with subsection (d).

Agency Response. The agency agrees and has maintained language as proposed.

Comment. A school district administrator and Thompson & Horton commented that they agree that the special education dispute resolution procedures are not applicable because the statute is designed to promote student safety, not the provision of a free appropriate public education.

Agency Response. The agency agrees and has maintained language as proposed.

Comment. Four special education advocates and an individual recommended that the second sentence in subsection (e) of the proposed rule be modified to state that complaints must be addressed *initially* through local grievance procedures or other dispute resolution options. The commenters further recommended that the following sentence be added to the end of subsection (e): "A decision is appealable to the commissioner of the (Texas Education Agency) or, at the commissioner's discretion, to the (State Office of Administrative Hearings)." Another individual commented that the proposed rule allows disputes to begin and end with the school district and recommended that a step be added to allow parents to appeal to the commissioner.

Agency Response. The agency disagrees and has maintained language as proposed. There is no provision in TEC, §29.022, establishing a complaint or appeal process for complaints relating to the statute. While TEC, §7.057(a), allows a person who is aggrieved by actions or decisions of a school district board of trustees that violate the school laws of Texas to file an appeal with the commissioner, the agency notes that commissioner decisions have held that the statute does not apply to decisions made by the governing body of an open-enrollment charter school.

Comment. DRTx, The Arc, TCDD, and an individual recommended that language be added to subsection (e) stating that parents dissatisfied with the action or inaction of a school district or charter school may file a grievance with the commissioner of education under TEC, §7.057.

Agency Response. The agency disagrees and has maintained language as proposed. TEC, §7.057(a), allows a person who is aggrieved by actions or decisions of a school district board of trustees that violate the school laws of Texas to file an appeal with the commissioner; however, commissioner decisions have held that the statute does not apply to decisions made by the governing body of an open-enrollment charter school.

Comment. An individual commented that she does not understand subsection (e) because parents do not have a way to appeal a decision.

Agency Response. The agency provides the following clarification. There is no provision in TEC, §29.022, establishing a complaint or appeal process for complaints relating to TEC, §29.022. While TEC, §7.057(a), allows a person who is aggrieved by actions or decisions of a school district board of trustees that violate the school laws of Texas to file an appeal with the commissioner, commissioner decisions have held that the statute does not apply to decisions made by the governing body of an open-enrollment charter school.

Comment. One individual requested that the agency reconsider the language in subsection (e).

Agency Response. The agency disagrees and has maintained language as proposed. There is no provision in TEC, §29.022,

establishing a complaint or appeal process for complaints relating to TEC, §29.022. Furthermore, it is important for the rule to clarify that the special education dispute resolution procedures do not apply to alleged violations of TEC, §29.022.

Comment. Several individuals expressed their disapproval of the provision requiring that complaints alleging violations of TEC, §29.022, be addressed through local grievance procedures or other dispute resolution channels. Some of the commenters stated that the provision will enable school districts and open-enrollment charter schools to circumvent or opt out of the statute. Two individuals commented that the special education dispute resolution procedures should apply to disputes relating to video surveillance.

Agency Response. The agency disagrees. There is no provision in TEC, §29.022, establishing a complaint or appeal process for complaints relating to TEC, §29.022. In addition, the agency clarifies that the rule does not contain a provision that allows a school district or charter school a means to opt out of the requirements in the statute. Finally, the special education dispute resolution procedures do not apply to alleged violations of TEC, §29.022, because IDEA does not require video surveillance in special education classrooms.

Comment. TCASE and several school district administrators and employees recommended that "other dispute resolution channels" be changed to "other local dispute resolution channels" in subsection (e). One of the administrators commented that the recommendation is necessary so as not to allow Office of Civil Rights (OCR) or other state or federal claims.

Agency Response. The agency disagrees and has maintained language as proposed. It is not the agency's role to attempt to limit an individual's right to file a complaint or claim with OCR or any other agency.

Comment. An individual commented that the dispute resolution channels must be posted and known and that the parent or caregiver should not feel at a loss due to lack of information on how to pursue the process.

Agency Response. The agency disagrees and clarifies that subsection (g) requires that each school district board of trustees and open-enrollment charter school governing body adopt written policies relating to TEC, §29.022, so that parents, school personnel, and other interested persons have access to the policies and procedures related to video surveillance. Although the rule does not specifically require that a copy of the policies be provided to each parent or posted at a particular location, there is nothing in the rule that would prohibit a school district or charter school from doing so if it so chooses.

Comment. DRTx, The Arc, TCDD, and several individuals commented that there is no language in TEC, §29.022, that supports subsection (f). Two individuals expressed their disagreement with subsection (f).

Agency Response. The agency agrees. In response to the comments, the agency has amended subsection (f) to state that TEC, §29.022, and the rule apply to video surveillance during the regular school year and during extended school year services.

Comment. A school district administrator commented that the clarification regarding extended school year services is helpful.

Agency Response. The agency disagrees. TEC, §29.022, does not expressly state that the requirements do not apply to extended school year services. In response to other comments,

the agency has amended subsection (f) to specify that the statute and the rule apply to the regular school year and to extended school year services.

Comment. TCASE, TASB, Thompson & Horton, Austin ISD, and two school district administrators commented that they agree with subsection (f).

Agency Response. The agency disagrees. TEC, §29.022, does not expressly state that the requirements do not apply to extended school year services. In response to other comments, the agency has amended subsection (f) to specify that the statute and the rule apply to the regular school year and to extended school year services.

Comment. A school district employee asked for clarification regarding whether the proposed rule requires school district boards of trustees and governing bodies of open-enrollment charter schools to adopt policies for conducting video surveillance in special education classrooms or for conducting video surveillance generally.

Agency Response. The agency provides the following clarification. The rule states that each school district board of trustees and open-enrollment charter school governing body must adopt written policies relating to video surveillance under TEC, §29.022, which relates to video surveillance in certain special education settings.

Comment. A school district administrator commented that subsection (g) of the proposed rule is comprehensive enough for everyone to understand what must be included in the district policy. TCASE and two school district administrators commented that they agree with subsection (g).

Agency Response. The agency agrees. In response to other comments, the agency has amended subsection (g) to provide further clarification regarding what must be contained in local policies and procedures.

Comment. TCTA recommended that subsection (g) be amended to include a requirement for board policies to address training on confidentiality issues for staff who are charged with overseeing the use, release, and storage of video recordings.

Agency Response. The agency disagrees. TEC, §29.022, does not include a training requirement for school personnel. Local officials are in the best position to determine the training needs of the personnel involved with implementing the statute. In response to other comments, the agency has amended subsection (g) to provide further clarification regarding what must be contained in local policies and procedures.

Comment. TCTA commented that it supports the inclusion of subsection (g)(2) and recommended that language be added stating that board policies must include the procedures for the school district or open-enrollment charter school to respond to requests for video surveillance. TCTA also recommended that language be added to subsection (g)(3) clarifying that notice must be provided before video cameras are placed in a classroom.

Agency Response. The agency agrees and has added language to subsection (g)(2) stating that the policies must include the procedures for responding to a request for video surveillance. The agency has also amended subsection (g)(3) to clarify that advanced written notice must be provided to campus staff and parents.

Comment. Two individuals recommended that the proposed rule specify how and when a parent must be notified if a report of an incident is made by someone other than the parent.

Agency Response. The agency disagrees. School districts and open-enrollment charter schools are in the best position to develop procedures for notifying parents of alleged incidents involving their children. In response to other comments, the agency has amended subsection (g) to provide further clarification regarding what must be contained in local policies and procedures.

Comment. TASB commented that school districts would benefit from guidance regarding how notice should be provided when new staff is employed at a campus, new students enroll in a class, or video surveillance is conducted in a classroom for multiple years. TASB also recommended that subsection (g)(3) be amended to clarify that a school district can comply with the notice requirement by providing written notice to the applicable staff and parents by a certain time period, such as before the first instructional day of a school year.

Agency Response. The agency disagrees. TEC, §29.022, requires that before video cameras will be placed in a special education instructional setting, campus staff and parents be notified of the placement. There is no express requirement that notice be provided to new campus staff or the parents of new students. If video surveillance in a special education instructional setting will continue the next school year, the school district or open-enrollment charter school can meet the notice requirement by providing notice to all campus staff and to the parents of students receiving special education services in the setting before the first instructional day of the new school year.

Comment. Texas AFT and approximately 60 individuals recommended that language be added to subsection (g)(4) stating that video and audio recording is not to be conducted at times when students are not in the classroom such as planning and preparation periods, duty-free lunch periods, and before and after the instructional day. A school district administrator recommended that the rule clarify whether video cameras must be operated before or after school, during teacher conference periods, or during lunch when no students are in the classroom.

Agency Response. The agency disagrees and has determined that additional clarification is not necessary. Subsection (g)(4) specifies that cameras must be operated during the instructional day when students are present.

Comment. An individual commented that he is opposed to video cameras being turned off at any time during the instructional day and stated that SB 507 requires that cameras be in operation at all times during the instructional day when students are in the self-contained classroom or other special education setting.

Agency Response. The agency disagrees. Subsection (g)(4) specifies that cameras must be operated during the instructional day when students are present.

Comment. TCTA asked for clarification regarding the distinction between subsections (g)(5) and (g)(13) and recommended that the agency clarify the meanings of "access to" and "viewing." TCTA also recommended that the language "and by whom, and a description of the procedures for viewing the videos" be added to the end of subsection (g)(13). Finally, TCTA commented that if it is not the agency's intent to distinguish between the individuals who will have "access to" video cameras and video recordings and those who may "view" video recordings, then the agency

should combine subsections (g)(5) and (g)(13) into one subsection.

Agency Response. The agency agrees that subsection (g)(5) requires additional clarification and has amended the subsection at adoption to state that the policy adopted by the school district or charter school must include a statement regarding the personnel who will have access to video equipment or video recordings for purposes of operating and maintaining the equipment or recordings. Subsection (g)(5) relates to the personnel whose positions have some role or responsibility for the operation or maintenance of the video equipment or the video recordings. The agency has determined that it is important for a school district's or open-enrollment charter school's policies to identify the staff responsible for the operation and maintenance of the equipment and the maintenance of the recordings. Subsection (g)(13) relates to TEC, §29.022(i), which states that a video recording is confidential and may not be released or viewed except as provided by the TEC, §29.022(i) or (j).

Comment. ATPE recommended that language be added to subsection (g)(6) to clarify that school officials may remove video equipment or make other modifications upon the withdrawal of a request for video surveillance or when the student is no longer assigned to the classroom or setting. Thompson & Horton and a school district administrator also recommended that subsection (g)(6) be amended to state that video equipment need not remain in a classroom after the circumstances that led to the placement of the equipment have changed. Thompson & Horton further recommended that the rule be amended to make clear that the placement of video equipment in a classroom is confined to one academic year because student placements, teacher assignments, and even classrooms may change during the summer months. TASB commented that the agency has the authority to adopt a rule defining when a special education setting no longer meets the requirements of TEC, §29.022(a), because, for example, the student who was the subject of a parent's request is no longer assigned to that setting. TASB also commented that TEC, §26.009, prohibits a school district from recording a student's image or voice without parental consent unless a statutory exception applies and recommended that the agency adopt a rule requiring a district to no longer record students without parental consent once the circumstances underlying the request have changed.

Agency Response. The agency understands the commenters' concerns but has maintained language as proposed at this time. TEC, §29.022, does not address whether video surveillance in a classroom may be discontinued under the circumstances described. The agency has requested the Texas Attorney General's opinion regarding whether the statute may reasonably be construed to allow a school district or charter school to discontinue video surveillance in a self-contained instructional setting if the circumstances surrounding the request have changed substantially. The agency will modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion.

Comment. Austin ISD asked for clarification regarding how long video cameras must be kept in a classroom if the circumstances surrounding the request for video surveillance have changed.

Agency Response. The agency provides the following clarification. The agency has requested the Texas Attorney General's opinion regarding whether the statute may reasonably be construed to allow a school district or charter school to discontinue video surveillance in a self-contained instructional setting if the circumstances surrounding the request have changed substan-

tially. The agency will modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion.

Comment. An individual commented that the intent of the law was to not be able to remove video equipment once installed and stated that the rule should specify that video equipment should remain in the classroom as long as the classroom remains a special education classroom used for students who meet the criteria of the law.

Agency Response. The agency provides the following clarification. The agency has requested the Texas Attorney General's opinion regarding whether the statute may reasonably be construed to allow a school district or charter school to discontinue video surveillance in a self-contained instructional setting if the circumstances surrounding the request have changed substantially. The agency will modify the rule, as necessary, upon receipt of the Texas Attorney General's opinion.

Comment. A lawyer recommended that subsection (g)(7) of the proposed rule be amended to clarify whether audio surveillance may be conducted inside bathrooms and other areas used for toileting or diapering a student or removing or changing a student's clothes. A school district administrator commented that the audio specifications for bathrooms and changing areas need to be specified in the rule.

Agency Response. The agency disagrees and has maintained language as proposed. The agency has determined that TEC, §29.022(c), and subsection (g)(7) clearly reflect that audio surveillance must be conducted in bathrooms and areas in which a student's clothes are changed but that no video surveillance may be conducted in such areas. TEC, §29.022, does not include any specifications for video cameras except that it requires that they be capable of (1) covering all areas of the classroom or setting, except for a bathroom or other area in which a student's clothes are changed, and (2) recording audio from all areas of the classroom or setting. School districts and charter schools are in the best position to determine the type of equipment that is needed to conduct the required surveillance in a particular area.

Comment. Texas AFT and approximately 60 individuals commented that the term "routine" in subsection (g)(9) should be deleted because it does not appear in TEC, §29.022.

Agency Response. The agency agrees and has deleted the term "routine" from subsection (g)(9).

Comment. An individual expressed disagreement with subsection (g)(9).

Agency Response. The agency disagrees. Subsection (g)(9) is based on TEC, §29.022(h), which prohibits a school district or open-enrollment charter school from allowing regular or continual monitoring of a video recorded under the statute or the use of video recorded under the statute for teacher evaluation or for any other purpose other than the promotion of safety of students receiving special education services in a self-contained classroom or other special education setting. In response to other comments, the agency has amended subsection (g)(9) to delete the term "routine."

Comment. Approximately 60 individuals and Texas AFT's general counsel recommended that subsection (g)(10) of the proposed rule be modified to require that campuses post notices at the entrances of classrooms in which video and audio surveillance is conducted.

Agency Response. The agency disagrees and has maintained language as proposed. TEC, §29.022, does not require that notices be posted at the entrances of classrooms in which video and audio surveillance is conducted. Though the agency believes that it would be good practice for campuses to post such notices, it would be unnecessarily prescriptive to require campuses to do so by rule.

Comment. Two individuals commented that the language in subsections (g)(2) and (g)(11) of the proposed rule is too vague.

Agency Response. The agency agrees that subsection (g)(2) requires additional clarification and has amended the subsection to clarify that the policy adopted by the school district or charter school must include the procedures for responding to a request for video surveillance. The agency disagrees that subsection (g)(11) is too vague and has maintained language as proposed.

Comment. A school district's general counsel commented that the term "complaint" in subsection (g)(11) is confusing and stated that school districts interpret "complaint" to mean a complaint filed under Board Policies DGBA, FNG, or GF. The commenter recommended that the term "complaint" be deleted and that the provision be modified to state, "the procedures for reporting that an incident occurred in a self-contained classroom..."

Agency Response. The agency disagrees and has maintained language as proposed. The use of the term "complaint" in the rule is consistent with the terminology in TEC, §29.022(i).

Comment. An individual commented that parents and caregivers of students being recorded must be given a copy of the policies and procedures developed in accordance with subsection (g) of the proposed rule.

Agency Response. The agency provides the following clarification. Subsection (g) requires that each school district board of trustees and open-enrollment charter school governing body adopt written policies relating to TEC, §29.022, so that parents, school personnel, and other interested persons have access to the policies and procedures related to video surveillance. Although the rule does not specifically require that a copy of the policies be provided to each parent or posted at a particular location, there is nothing in the rule that would prohibit a school district or charter school from doing so if it so chooses.

Comment. An individual commented that video recordings should be retained for at least a year instead of six months.

Agency Response. The agency disagrees. TEC, §29.022(e), expressly states that video recorded from a camera placed under the statute must be retained for at least six months after the date the video was recorded.

Comment. A school district administrator requested that the commissioner work with the legislature to address the unreasonable requirement for six months of video storage.

Agency Response. The comment is outside of the scope of the proposed rulemaking. Furthermore, the agency clarifies that Texas Government Code, §556.006, prohibits state agencies from attempting to influence the passage or defeat of a legislative measure.

Comment. An individual recommended that subsection (g)(13) define the limited circumstances under which video recordings may be viewed. The commenter further stated that parents should have the right to view video recordings before filing a formal complaint or requesting an investigation or legal proceeding.

Agency Response. The agency disagrees and has maintained language as proposed. Subsection (g)(13) relates to TEC, §29.022(i), which states that a video recording is confidential and may not be released or viewed except as provided in the TEC, §29.022(i) or (j). The agency has determined that it is not necessary for the rule to restate the circumstances under which video recordings may be viewed. The agency also clarifies that TEC, §29.022, does not require that a parent have the right to view video recordings before filing a complaint. Instead, TEC, §29.022(i), expressly states that a school district or open-enrollment charter school may release a recording for viewing by a parent of a student who is involved in an incident documented by the recording "for which a complaint has been reported to the district" on request of the parent.

Comment. Three individuals recommended that subsection (g)(13) be deleted.

Agency Response. The agency disagrees that subsection (g)(13) should be deleted. The agency has determined that it is important that a local policy include a statement regarding confidentiality and provide notice of circumstances under which recordings may be viewed.

Comment. DRTx, The Arc, and TCDD recommended that subsection (g) be revised to include uniform statewide guidelines for requesting video surveillance. The commenters also recommended that uniform statewide guidelines for reporting a complaint be included. Finally, the commenters recommended that subsection (g) be revised to require that school districts and charter schools develop policies that prohibit staff, volunteers, students, and others from obstructing video and audio recordings and requiring staff with concerns about the functioning or maintenance of the equipment to report it to an appropriate contact in the information technology department.

Agency Response. The agency disagrees. It is not the agency's role to develop specific board policies. In addition, the agency has determined that it would be unnecessarily prescriptive to require by rule that board policies include a statement prohibiting individuals from obstructing recordings and requiring staff to report concerns about the functioning or maintenance of the equipment. In response to other comments, the agency has amended subsection (g) to provide further clarification regarding what must be contained in local policies and procedures.

Comment. An ESC employee recommended that language be added to the rule stating that technology staff or other designated personnel must ensure that video equipment is in working order.

Agency Response. The agency disagrees. The agency has determined that it would be unnecessarily prescriptive to require by rule that board policies include the recommended statement.

Comment. An individual asked who will be in charge of monitoring video equipment and to whom incidents must be reported.

Agency Response. The agency provides the following clarification. Subsection (g) requires that each school district board of trustees and open-enrollment charter school governing body adopt written policies that include, among other things, the individuals responsible for the operation or maintenance of video equipment and the procedures for reporting a complaint alleging that an incident occurred in a special education setting in which video surveillance is conducted.

Comment. An individual commented that subsection (g) is too vague and gives the false impression that school districts have discretion on how TEC, §29.022, is interpreted. The commenter

further stated that the agency should create clear and precise policies for implementing the statute.

Agency Response. The agency disagrees. Subsection (g) requires that boards adopt policies that are consistent with specific requirements in TEC, §29.022, while also giving them discretion in developing policies and procedures that are not specifically prescribed in the statute.

Comment. TCASE recommended that the agency provide school districts with "bright line guidance and resources" to assist in making Family Educational Rights and Privacy Act (FERPA), confidentiality, and education record decisions. TCASE further commented that the rules may not be the most practical avenue for providing such guidance and recommended that the agency develop a guidance letter that provides examples as well as relevant legal citations. A school district administrator commented that guidance outlining what constitutes an education record and how video and audio recordings relate to FERPA and confidentiality requirements would be helpful. Several other school district administrators and employees also requested that the agency consider developing a guidance letter.

Agency Response. The agency agrees that it would not be practical to attempt to address the FERPA implications of video recordings in the rule. While the agency understands the commenters' concerns, the agency is unable to provide bright-line guidance for school districts and charter schools due to the fact that the U.S. Department of Education's Family Policy Compliance Office (FPCO) has yet to issue formal guidance relating to the disclosure of video surveillance recordings. Accordingly, school districts and open-enrollment charter schools that conduct video surveillance under TEC, §29.022, will need to carefully evaluate each request to view a video recording and consult with their legal counsel as necessary.

Comment. TCTA recommended that the phrase "documented by a video recording" in subsection (h)(1) be changed to "documented by the video recording." According to TCTA, use of the term "the" clarifies that the recording is the one that can be viewed.

Agency Response. The agency disagrees and has maintained language as proposed. The agency has determined that the subsection does not require clarification.

Comment. The Texas Computer Education Association (TCEA) asked whether subsection (h)(1) allows for the superintendent to designate school district employees who may view video recordings or whether it refers to staff members and employees who are involved in an incident described in subsection (b)(9). TCEA further stated that technology staff will need to be involved in this process as they will monitor and access the video equipment to ensure that it is functioning properly. TCEA also recommended that language be added stating that outside contractors who provide technical support for the video and audio equipment to troubleshoot any technical problems with the system may view recordings.

Agency Response. The agency provides the following clarification. Subsection (h)(1) refers to staff members and employees who are involved in an incident described in subsection (b)(9).

Comment. A school district administrator requested that the rule be amended to include language allowing access to technical support staff who implement the camera systems. Another school district administrator asked whether staff who are responsible for operating and maintaining the video equipment

and burning the video are allowed to view the recordings. A school district employee recommended that language be added to the rule stating that appropriate technology staff may have access to video recordings as necessary. TASB commented that the rule should clarify that incidental viewing by school district employees or contractors who are responsible for operating and maintaining video equipment is not a violation of the statute.

Agency Response. The agency agrees that the rule requires additional clarification. Subsection (g)(5) requires that a board's policies include a statement regarding the staff whose positions have some role or responsibility for the operation or maintenance of the video equipment or the video recordings. The language in subsection (g)(5) has been modified at adoption to provide additional clarification. It is implicit in TEC, §29.022, that certain school district or open-enrollment charter school personnel will be required to operate and maintain video equipment and to maintain video recordings, and the agency has determined that TEC, §29.022(i), is not intended to restrict appropriate personnel from carrying out the activities necessary to implement the statute. TEC, §29.022(i), provides that the video recordings are confidential (as opposed to being public information) and outlines a few limited circumstances under which a school district or open-enrollment charter school shall "release a recording for viewing" by certain individuals.

Comment. An ESC employee requested clarification regarding whether subsection (h)(3) requires that peace officers and school nurses be trained in de-escalation and restraint techniques.

Agency Response. The agency clarifies that the phrase "trained in de-escalation and restraint techniques" in subsection (h)(3) is derived from TEC, §29.022(i)(3), and is intended to modify the term "administrator." The agency has modified subsection (h)(3) at adoption to clarify that the phrase only applies to an administrator and not to a peace officer or school nurse.

Comment. An ESC employee requested that the agency consider removing "a human resources staff member" from subsection (h)(3) and merely allow a human resources staff member to become involved once it has been determined that a possible violation of policy has occurred.

Agency Response. The agency disagrees. TEC, §29.022(i)(3), expressly provides that a school district or open-enrollment charter school shall release a recording for viewing by a human resources staff member designated by the board of trustees of the school district or the governing body of the open-enrollment charter school in response to a complaint or an investigation of district or school personnel or a complaint of abuse committed by a student. In response to other comments, the agency has amended subsection (h)(3) to provide further clarification on who must be trained in de-escalation and restraint techniques.

Comment. ATPE recommended that additional guidance be added to subsections (h)(3) and (j) with regard to the availability of recordings to human resources personnel. ATPE stated that human resources personnel do not have "a legitimate educational interest" in student records under FERPA and that school officials could unintentionally violate FERPA in reliance on the proposed rule.

Agency Response. The agency disagrees. To the extent that a video recording made under TEC, §29.022, is an education record under FERPA, it is not the agency's role to determine which school officials within a school district or open-enrollment charter school have legitimate educational interests in the infor-

mation. FERPA requires that schools specify criteria for determining who constitutes a school official and what constitutes a legitimate educational interest. The agency also notes that FPCO guidance has advised that an official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

Comment. An individual commented that subsection (h) is redundant and should be removed because confidentiality is clearly addressed in TEC, §29.022(i).

Agency Response. The agency disagrees and has maintained subsection (h) in the rule. While subsection (h) restates language in TEC, §29.022(i), the subsection also adds clarifying language that is not in the statute.

Comment. Approximately 60 individuals and Texas AFT's general counsel recommended that language be added to subsection (h)(1) stating that a staff member involved in an incident documented by a video recording is considered to be a school official with legitimate educational interests as described in 34 Code of Federal Regulations, §99.31(a)(1)(i)(A).

Agency Response. The agency disagrees and has maintained language as proposed. It is not the agency's role to determine which school officials within a school district or open-enrollment charter school have legitimate educational interests to FERPA-protected information.

Comment. One individual commented that the proposed rule should include timelines for saving and providing access to video recordings. Another individual also recommended that the proposed rule include a timeline for providing a parent access to a video recording once a suspected incident has been reported.

Agency Response. The agency disagrees. TEC, §29.022(i), does not impose a timeline for releasing a video recording for viewing. The agency has determined that school districts and open-enrollment charter schools are in the best position to determine a reasonable time period for providing access to video recordings. To the extent that a video recording made under TEC, §29.022, is an education record under FERPA, a school would be required to comply with a request for access to the record within a reasonable period of time, but not more than 45 days after it has received the request.

Comment. A former school district administrator raised questions about how schools should respond to requests for video recordings in human resources matters, due process hearings, police matters, and court proceedings. The administrator and Houston ISD asked how schools should address situations where one or more parents wants video surveillance in a classroom but other parents do not.

Agency Response. The agency provides the following clarification. TEC, §29.022(i) and (j), outline the limited circumstances under which a school district or open-enrollment charter school must or may release a recording for viewing or allow access to a recording. The agency also clarifies that TEC, §29.022, does not require that each parent consent to the placement of video cameras in his or her child's special education instructional setting.

Comment. Houston ISD asked what a school district's rights are when a parent regularly alleges potential abuse and wants to view video recordings on a frequent basis.

Agency Response. The agency provides the following clarification. In order for a parent to have a right to view a video recording

of his or her child under TEC, §29.022(i)(1), the following circumstances must apply: (1) the parent's child must have been involved in an "incident" (as that term is described in subsection (b)(9)); (2) the incident must be documented by the video recording; (3) a complaint relating to the incident must have been reported to the school district or open-enrollment charter school; and (4) the parent must request to view the video recording.

Comment. A school district employee asked how SB 507 works in conjunction with FERPA and commented that it seems to be a complicated relationship. The commenter also stated that if recordings are education records under FERPA, they must be maintained for five to seven years, not just six months.

Agency Response. The agency agrees that the FERPA implications of TEC, §29.022, are complex and cannot be easily laid out in the rule. The agency disagrees with the comment that if a video recording is an education record under FERPA, it must be maintained for five to seven years. The agency clarifies that not all education records under FERPA become part of a student's cumulative record or special education eligibility folder. The agency also notes that video recordings under TEC, §29.022, are not addressed in the *Retention Schedule for Records of Public School Districts* (Local Schedule SD) adopted by the Texas State Library and Archives Commission and do not fit precisely into any of the categories listed in the schedule.

Comment. A school district administrator asked whether video recordings are education records under FERPA.

Agency Response. The agency provides the following clarification. The agency's review of the available FPCO guidance reflects that video surveillance recordings of students can be considered education records under FERPA in some situations. The FERPA implications of TEC, §29.022, are complex and cannot be easily laid out in the rule.

Comment. Three individuals recommended that the rule be amended to give parents the right to bring an advocate or other individual to view a recording of their child.

Agency Response. The agency disagrees. There is no language in TEC, §29.022, that supports the recommendation.

Comment. An ESC employee recommended that language be added stating that video recordings are safety records, not education records.

Agency Response. The agency disagrees. The agency's review of the available FPCO guidance reflects that video surveillance recordings of students can be considered education records under FERPA in some situations.

Comment. TASB expressed support for the reference to FERPA in subsection (h).

Agency Response. The agency agrees and has maintained the reference to FERPA in subsection (h) as proposed.

Comment. Austin ISD requested guidance on conflicts that may arise when students are administered state assessments in classrooms in which video surveillance is conducted and stated that it would be helpful to have the rule state that no professional educator will be penalized if the administration of a state assessment is captured on a video recording and test security is somehow compromised.

Agency Response. The agency disagrees. School district and open-enrollment charter school personnel must follow the procedures for maintaining the security and confidentiality of state

assessments that are specified in the Test Security Supplement adopted in 19 TAC §101.3031, Required Test Administration Procedures and Training Activities to Ensure Validity, Reliability, and Security of Assessments, and in the appropriate test administration materials.

Comment. A school district administrator commented that the rules should provide clarification regarding whether school districts are required to redact the images of other students before allowing a parent to view a video of his or her child.

Agency Response. The agency disagrees. TEC, §29.022, does not address redactions from video recordings. To the extent a video recording made under TEC, §29.022, is an education record under FERPA, a school should follow the relevant FPCO guidance in determining whether the images of other students must be redacted.

Comment. An individual questioned the applicability of FERPA to video recordings if the video surveillance requirements in TEC, §29.022, do not fall under IDEA.

Agency Response. The agency provides the following clarification. The fact that video surveillance is not required by IDEA is not relevant to the applicability of FERPA to video recordings made under TEC, §29.022.

Comment. An individual asked for clarification regarding the requirements for a parent to obtain a copy of a video recording of the parent's child.

Agency Response. The agency provides the following clarification. TEC, §29.022, does not expressly give a parent the right to "obtain a copy" of a video recording of his or her child. The statute merely describes situations in which a school district or open-enrollment charter school "shall release a recording for viewing" by a parent of a student who is involved in an incident documented by the recording for which a complaint has been reported. In order for a parent to have a right to view a video recording of his or her child under TEC, §29.022(i)(1), the following circumstances must apply: (1) the parent's child must have been involved in an "incident" (as that term is described in subsection (b)(9)); (2) the incident must be documented by the video recording; (3) a complaint relating to the incident must have been reported to the school district or open-enrollment charter school; and (4) the parent must request to view the video recording.

Comment. TCDD recommended that the rule include the existing laws and rules governing the reporting and the investigation of child abuse and neglect. TCDD also recommended that the rule include the requirements for reporting instances of abuse and neglect to the State Board for Educator Certification.

Agency Response. The agency disagrees and has determined that subsection (i) contains sufficient information. In response to other comments, the agency has amended subsection (i) to replace the term "notify" with the phrase "submit a report."

Comment. TCDD commented that the agency should identify gaps in existing laws and rules governing the investigation and resolution of abuse and neglect allegations involving school districts and charter schools and take action to secure a legislative or regulatory remedy. TCDD also recommended that the agency, either independently or in collaboration with the Texas Department of Family Protective Services, should create and maintain a central registry of both alleged and confirmed perpetrators of child abuse.

Agency Response. The comment is outside of the scope of the proposed rulemaking. Furthermore, the agency clarifies that Texas Government Code, §556.006, prohibits state agencies from attempting to influence the passage or defeat of a legislative measure.

Comment. TASA recommended that the term "notify" in subsection (i) be changed to "report."

Agency Response. The agency agrees and has replaced the term "notify" in subsection (i) with the phrase "submit a report to," which is consistent with 19 TAC §61.1051, Reporting Child Abuse and Neglect.

Comment. TCASE and several school district administrators and employees recommended that language be added to clarify that in order to view a video recording based on a policy violation, the video recording must document a violation of policy related to abuse or neglect. The commenters further recommended that language be added to clarify that a video recording cannot be used in a due process hearing or legal proceeding unless the hearing or proceeding involves allegations of abuse or neglect.

Agency Response. The agency disagrees. The language in subsection (j) is derived from TEC, §29.022(j). The agency has determined that the rule should align with the language in the authorizing statute, and the statute does not specify that a violation of policy refers only to a policy related to abuse or neglect.

Comment. TASB commented that districts would benefit from guidance regarding their obligation to release a video recording in a legal proceeding when a recording documents a violation of district policy that does not rise to the level of abuse or neglect. TASB recommended that the rule be amended to clarify that a recording that documents a violation of district or campus policy other than the policies that prohibit abuse or neglect do not give rise to a parent's right to request that the recording be released in a legal proceeding. TASB further recommended that the rule define the term "legal proceeding" to clarify that the term does not include a special education due process hearing.

Agency Response. The agency disagrees. The agency has determined that the rule should align with the language in the authorizing statute, and the statute does not specify that a violation of policy refers only to a policy related to abuse or neglect. Similarly, the agency has determined that the authorizing statute does not limit the types of legal proceedings to which TEC, §29.022(j), applies.

Comment. TCTA recommended that language be added to clarify that a school district or charter school staff member who is the subject of the video recording and believed to have possibly violated a policy may have access to the video recording.

Agency Response. The agency agrees and has amended the language in subsection (j) to state that a recording believed to document a possible violation of school district, open-enrollment charter school, or campus policy may be used in a disciplinary action against district or charter school personnel and must be released for viewing by the district or charter school employee who is the subject of the disciplinary action at the request of the employee. Given that TEC, §29.022(i)(1), gives a school employee who is the subject of a complaint the right to view the video recording, an employee who is the subject of a disciplinary action should have a right to view the recording.

Comment. TASA recommended that the term "believes" in subsection (j) be replaced with "has cause to believe."

Agency Response. The agency disagrees. The language in the rule is consistent with the language in TEC, §29.022(j). In response to other comments, the agency has amended subsection (j) to provide further clarification.

Comment. A school district administrator recommended adding language to clarify that a video recording will only become a student's education record if an incident involving the student occurs. Another school district administrator asked that the agency define when a video recording is an education record under FERPA and recommended that a video recording only be considered an education record if an incident is observed involving student safety. An individual commented that it would be helpful if the agency added guidance as to when a video recording will become part of a student's education record.

Agency Response. The agency disagrees and has maintained language as proposed. The FERPA implications of TEC, §29.022, are complex, and it would not be practical to attempt to address them in the rule or this response. The agency is unable to provide clear guidance for school districts and charter schools concerning the application of FERPA to the video recordings due to the fact that FPCO has yet to issue formal guidance relating to the disclosure of video surveillance recordings.

Comment. An individual commented that the proposed rule should clarify the rules for a parent's viewing a video recording that includes the parent's child and other children.

Agency Response. The agency disagrees. TEC, §29.022, does not address the issue raised in the comment. To the extent a video recording is an education record under FERPA, a school district or charter school will need to act in accordance with the available FPCO guidance.

Comment. A school district employee recommended that the rule state that parents cannot just come in and watch video recordings of their child just to see how the child's day is going. The commenter further stated that parents need to know that they only have a right to view video recordings when an alleged incident has occurred.

Agency Response. The agency agrees that the rule does not allow for a parent to watch video recordings of his or her child just to see how the child's day is going. The agency provides the following clarification. Subsection (h) outlines the circumstances under which a video recording may be released for viewing. In order for a parent to have a right to view a video recording of his or her child under TEC, §29.022(i)(1), the following circumstances must apply: (1) the parent's child must have been involved in an "incident" (as that term is described in subsection (b)(9)); (2) the incident must be documented by the video recording; (3) a complaint relating to the incident must have been reported to the school district or open-enrollment charter school; and (4) the parent must request to view the video recording.

Comment. An individual commented that subsection (k) of the proposed rule conflicts with TEC, §29.022(i).

Agency Response. The agency disagrees. Subsection (k) includes two sentences. The first sentence corresponds to the last sentence in TEC, §29.022(j). The second sentence is based on the supremacy clause in the U.S. Constitution, which provides that the federal government, in exercising any of the powers enumerated in the Constitution, must prevail over any conflicting or inconsistent state exercise of power.

Comment. A school district's general counsel commented that further clarification is needed to determine under what specific

circumstances a parent is entitled to view video camera footage. The commenter further stated that parents should only be allowed to view footage if it shows abuse or neglect as defined in Texas Family Code, Chapter 261.

Agency Response. The agency disagrees and has determined that further clarification is not needed. Subsection (h) outlines the circumstances under which a video recording may be released for viewing. In order for a parent to have a right to view a video recording of his or her child under TEC, §29.022(i)(1), the following circumstances must apply: (1) the parent's child must have been involved in an "incident" (as that term is described in subsection (b)(9)); (2) the incident must be documented by the video recording; (3) a complaint relating to the incident must have been reported to the school district or open-enrollment charter school; and (4) the parent must request to view the video recording.

STATUTORY AUTHORITY. The new section is adopted under the Texas Education Code (TEC), §29.022, as added by Senate Bill (SB) 507, 84th Texas Legislature, Regular Session, 2015, which requires video surveillance in certain special education settings in order to promote student safety. TEC, §29.022(k), authorizes the commissioner to adopt rules to implement and administer TEC, §29.022, including rules regarding the special education settings to which the section applies.

CROSS REFERENCE TO STATUTE. The new section implements the Texas Education Code, §29.022, as added by Senate Bill 507, 84th Texas Legislature, 2015.

§103.1301. *Video Surveillance of Certain Special Education Settings.*

(a) Requirement to implement. Beginning with the 2016-2017 school year, in order to promote student safety, on request by a parent, trustee, or staff member, a school district or open-enrollment charter school must provide video equipment to campuses in accordance with Texas Education Code (TEC), §29.022, and this section. Campuses that receive video equipment must place, operate, and maintain video cameras in self-contained classrooms or other special education settings in accordance with TEC, §29.022, and this section.

(b) Definitions. For purposes of TEC, §29.022, and this section, the following terms have the following meanings.

(1) Parent means a person described in TEC, §26.002, whose child receives special education and related services for at least 50 percent of the instructional day in the self-contained classroom or other special education setting. Parent also means a student who receives special education and related services for at least 50 percent of the instructional day in the self-contained classroom or other special education setting and who is 18 years of age or older or whose disabilities of minority have been removed for general purposes under Texas Family Code, Chapter 31, unless the student has been determined to be incompetent or the student's rights have been otherwise restricted by a court order.

(2) Staff member means a teacher, related service provider, paraprofessional, or educational aide assigned to work in the self-contained classroom or other special education setting. Staff member also includes the principal or an assistant principal of the campus at which the self-contained classroom or other special education setting is located.

(3) Trustee means a member of a school district's board of trustees or a member of an open-enrollment charter school's governing body.

(4) Open-enrollment charter school means a charter granted to a charter holder under TEC, §12.101 or §12.152, identified with its own county district number.

(5) Self-contained classroom means a classroom on a regular school campus (i.e., a campus that serves students in general education and students in special education) of a school district or an open-enrollment charter school in which a majority of the students in regular attendance are provided special education and related services and have one of the following instructional arrangements/settings described in the student attendance accounting handbook adopted under §129.1025 of this title (relating to Adoption by Reference: Student Attendance Accounting Handbook):

(A) self-contained (mild/moderate/severe) regular campus;

(B) full-time early childhood (preschool program for children with disabilities) special education setting;

(C) residential care and treatment facility--self-contained (mild/moderate/severe) regular campus;

(D) residential care and treatment facility--full-time early childhood special education setting;

(E) off home campus--self-contained (mild/moderate/severe) regular campus; or

(F) off home campus--full-time early childhood special education setting.

(6) Other special education setting means a classroom on a separate campus (i.e., a campus that serves only students who receive special education and related services) of a school district or open-enrollment charter school in which a majority of the students in regular attendance are provided special education and related services and have one of the following instructional arrangements/settings described in the student attendance accounting handbook adopted under §129.1025 of this title:

(A) residential care and treatment facility--separate campus; or

(B) off home campus--separate campus.

(7) Video camera means a video surveillance camera with audio recording capabilities.

(8) Video equipment means one or more video cameras and any technology and equipment needed to place, operate, and maintain video cameras as required by TEC, §29.022, and this section. Video equipment also means any technology and equipment needed to store and access video recordings as required by TEC, §29.022, and this section.

(9) Incident means an event or circumstance that:

(A) involves alleged "abuse" or "neglect," as those terms are described in Texas Family Code, §261.001, of a student by an employee of the school district or charter school or alleged "physical abuse" or "sexual abuse," as those terms are described in Texas Family Code, §261.410, of a student by another student; and

(B) allegedly occurred in a self-contained classroom or other special education setting in which video surveillance under TEC, §29.022, and this section is conducted.

(c) Exclusions. A school district or open-enrollment charter school is not required to provide video equipment to a campus of another district or charter school or to a nonpublic school. In addition, the Texas School for the Deaf, the Texas School for the Blind and Visually

Impaired, the Texas Juvenile Justice Department, and any other state agency that provides special education and related services to students are not subject to the requirements in TEC, §29.022, and this section.

(d) Use of funds. A school district or open-enrollment charter school may solicit and accept gifts, grants, and donations from any person to implement the requirements in TEC, §29.022, and this section. A district or charter school is not permitted to use Individuals with Disabilities Education Act, Part B, funds or state special education funds to implement the requirements of TEC, §29.022, and this section.

(e) Dispute resolution. The special education dispute resolution procedures in 34 Code of Federal Regulations, §§300.151-300.153 and 300.504-300.515, do not apply to complaints alleging that a school district or open-enrollment charter school has failed to comply with TEC, §29.022, and/or this section. Complaints alleging violations of TEC, §29.022, and/or this section must be addressed through the district's or charter school's local grievance procedures or other dispute resolution channels.

(f) Regular school year and extended school year services. TEC, §29.022, and this section apply to video surveillance during the regular school year and during extended school year services.

(g) Policies and procedures. Each school district board of trustees and open-enrollment charter school governing body must adopt written policies relating to video surveillance under TEC, §29.022, and this section. At a minimum, the policies must include:

(1) a statement that video surveillance is for the purpose of promoting student safety in certain self-contained classrooms and other special education settings;

(2) the procedures for requesting video surveillance and the procedures for responding to a request for video surveillance;

(3) the procedures for providing advanced written notice to the campus staff and the parents of the students assigned to a self-contained classroom or other special education setting that video and audio surveillance will be conducted in the classroom or setting;

(4) a requirement that video cameras be operated at all times during the instructional day when students are in the self-contained classroom or other special education setting;

(5) a statement regarding the personnel who will have access to video equipment or video recordings for purposes of operating and maintaining the equipment or recordings;

(6) a requirement that a campus continue to operate and maintain any video camera placed in a self-contained classroom or other special education setting for as long as the classroom or setting continues to satisfy the requirements in TEC, §29.022(a);

(7) a requirement that video cameras placed in a self-contained classroom or other special education setting be capable of recording video and audio of all areas of the classroom or setting, except that no video surveillance may be conducted of the inside of a bathroom or other area used for toileting or diapering a student or removing or changing a student's clothes;

(8) a statement that video recordings must be retained for at least six months after the date the video was recorded;

(9) a statement that the regular or continual monitoring of video is prohibited and that video recordings must not be used for teacher evaluation or monitoring or for any purpose other than the promotion of student safety;

(10) at the school district's or open-enrollment charter school's discretion, a requirement that campuses post a notice at the

entrance of any self-contained classroom or other special education setting in which video cameras are placed stating that video and audio surveillance are conducted in the classroom or setting;

(11) the procedures for reporting a complaint alleging that an incident occurred in a self-contained classroom or other special education setting in which video surveillance under TEC, §29.022, and this section is conducted;

(12) the local grievance procedures for filing a complaint alleging violations of TEC, §29.022, and/or this section; and

(13) a statement that video recordings made under TEC, §29.022, and this section are confidential and a description of the limited circumstances under which the recordings may be viewed.

(h) Confidentiality of video recordings. A video recording made under TEC, §29.022, and this section is confidential and may only be viewed by the following individuals, to the extent not limited by the Family Educational Rights and Privacy Act of 1974 (FERPA) or other law:

(1) a staff member or other school district or charter school employee or a parent of a student involved in an incident described in subsection (b)(9) of this section that is documented by a video recording for which a complaint has been reported to the district or charter school;

(2) appropriate Texas Department of Family and Protective Services personnel as part of an investigation under Texas Family Code, §261.406;

(3) a peace officer, school nurse, administrator trained in de-escalation and restraint techniques as provided by commissioner rule, or a human resources staff member designated by the school district's board of trustees or open-enrollment charter school's governing body in response to a complaint or an investigation of an incident described in subsection (b)(9) of this section; or

(4) appropriate Texas Education Agency or State Board for Educator Certification personnel or agents as part of an investigation.

(i) Child abuse and neglect reporting. If a person described in subsection (h)(3) or (4) of this section views a video recording and has cause to believe that it documents a possible abuse or neglect of a child under Texas Family Code, Chapter 261, the person must submit a report to the Texas Department of Family and Protective Services or other authority in accordance with the local policy adopted under §61.1051 of this title (relating to Reporting Child Abuse and Neglect) and Texas Family Code, Chapter 261.

(j) Disciplinary actions and legal proceedings. If a person described in subsection (h)(2), (3), or (4) of this section views a video recording and believes that it documents a possible violation of school district, open-enrollment charter school, or campus policy, the person may allow access to the recording to appropriate legal and human resources personnel of the district or charter school to the extent not limited by FERPA or other law. A recording believed to document a possible violation of school district, open-enrollment charter school, or campus policy may be used in a disciplinary action against district or charter school personnel and must be released in a legal proceeding at the request of a parent of the student involved in the incident documented by the recording. A recording believed to document a possible violation of school district, open-enrollment charter school, or campus policy must be released for viewing by the district or charter school employee who is the subject of the disciplinary action at the request of the employee.

(k) Access rights. Subsections (i) and (j) of this section do not limit the access of a student's parent to an educational record of the

student under FERPA or other law. To the extent any provisions in TEC, §29.022, and this section conflict with FERPA or other federal law, federal law prevails.

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 26, 2016.

TRD-201603686

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: August 15, 2016

Proposal publication date: April 8, 2016

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



CHAPTER 129. STUDENT ATTENDANCE

SUBCHAPTER B. STUDENT ATTENDANCE ACCOUNTING

19 TAC §129.21

The State Board of Education (SBOE) adopts an amendment to §129.21, concerning student attendance accounting. The amendment is adopted without changes to the proposed text as published in the May 13, 2016 issue of the *Texas Register* (41 TexReg 3417) and will not be republished. The section addresses requirements for student attendance accounting for state funding purposes. The adopted amendment modifies the requirements for taking attendance for board-approved off-campus activities to allow paraprofessionals to take attendance.

REASONED JUSTIFICATION. Section 129.21 provides the student attendance accounting requirements school districts must follow and describes the manner in which student attendance is earned. The rule also provides a list of conditions under which a student who is not actually on campus at the time attendance is taken may be considered in attendance for FSP funding purposes.

The adopted amendment to 19 TAC §129.21(j)(1) allows paraprofessionals to take attendance at off-campus activities approved by the local school board.

The amendment to 19 TAC §129.21 was approved by the SBOE for first reading and filing authorization at its April 8, 2016 meeting and for second reading and final adoption at its July 22, 2016 meeting.

In accordance with the TEC, §7.102(f), the SBOE approved the amendment for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2017-2018 school year. The earlier effective date will allow districts flexibility in a timely manner and align the rule with the student attendance accounting handbook adopted by commissioner rule.

SUMMARY OF COMMENTS AND RESPONSES. No public comments were received on the proposal.

STATUTORY AUTHORITY. The amendment is adopted under the Texas Education Code (TEC), §42.004, which requires the commissioner, in accordance with rules adopted by the State Board of Education, to take such action and require such reports as are necessary to administer the Foundation School Program

under the TEC, Chapter 42; and TEC, §12.106, which provides for charter schools to receive funding under certain conditions through the TEC, Chapter 42.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, §42.004 and §12.106.

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 August 1, 2016.

TRD-201603837

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: August 21, 2016

Proposal publication date: May 13, 2016

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



TITLE 22. EXAMINING BOARDS

PART 18. TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

CHAPTER 371. EXAMINATION AND LICENSURE

22 TAC §371.3

The Texas State Board of Podiatric Medical Examiners adopts amendments to §371.3, regarding Fees without changes to the proposed text as published in the June 3, 2016, issue of the *Texas Register* (41 TexReg 3971). The text will not be republished.

The changes to §371.3 are being adopted to cover the requirements of Senate Bill 195 (84th Texas Legislature; relating to prescriptions for certain controlled substances, access to information about those prescriptions, and the duties of prescribers and other entities registered with the Federal Drug Enforcement Administration; authorizing fees) which requires the board to assess or increase fees sufficient to generate during FY 2017 \$10,000.00 in funds to be transferred to the Texas State Board of Pharmacy to administer the Prescription Drug Monitoring Program.

Texas Occupations Code §202.153 Fees states that the board by rule shall establish fees in amounts reasonable and necessary to cover the cost of administering this chapter.

No comments were received in response to the proposed rule amendments.

The amendments are being adopted under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The adopted amendment for §371.3 implements Texas Occupations Code §202.153 Fees.

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 August 1, 2016.

TRD-201603795

Hemant Makan

Executive Director

Texas State Board of Podiatric Medical Examiners

Effective date: September 1, 2016

Proposal publication date: June 3, 2016

For further information, please call: (512) 305-7000



TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 21. TRADE PRACTICES

SUBCHAPTER V. PHARMACY BENEFITS

The Texas Department of Insurance adopts amendments to 28 TAC Chapter 21, Subchapter V, relating to Pharmacy Benefits, §§21.3001 - 21.3004, 21.3010, 21.3011, and 21.3023; repeals §21.3005 and §21.3021; and it adds new §21.3030 without changes from the proposal that was published in the February 5, 2016, issue of the *Texas Register* (41 TexReg 917). TDI adopts amendments to §21.3020 and §21.3022, and it adds new §§21.3031 - 21.3034 with nonsubstantive changes to the text as proposed.

REASONED JUSTIFICATION.

HB 1624, 84th Legislature, Regular Session (2015) relates to the transparency of certain information related to health benefit plan coverage. During the legislative session, interested parties asserted that health benefit plan issuers do not post complete or easily accessible prescription drug formularies online. The parties noted that there is often no information available to health insurance shoppers about cost sharing for prescription drugs under the plans until after they purchase a plan.

HB 1624 requires a health benefit plan issuer to display formulary information on a public website maintained by the issuer, as required by the commissioner by rule. The bill requires a direct electronic link to the formulary information to be displayed in a conspicuous manner in the electronic summary of benefits and coverage portion of each plan issued by a health benefit plan issuer on the issuer's website, and it requires the information to be publicly accessible to enrollees, prospective enrollees, and others without providing a password, user name, or personally identifiable information. The bill also requires a health benefit plan issuer to make plan-specific formulary information available, including disclosures relating to the cost-sharing amount for each drug, prior authorization requirements, a description of how the drug will be included or excluded from the deductible, and an explanation of coverage for each formulary drug.

HB 1624 requires the commissioner to develop and adopt by rule requirements to promote consistency and clarity in the disclosure of formularies to facilitate comparison shopping among health benefit plans. New §§21.3030 - 21.3034 implement this requirement. For example, §21.3033 requires a health bene-

fit plan issuer to create a "Summary of Formulary Benefits" designed to help consumers understand the prescription drug benefits offered under a specific plan so they can compare the benefits to those offered by other plans. The information is intended to help consumers compare both the value and scope of the formulary benefits.

HB 1624 added Insurance Code §§1369.0542 - 1369.0544, relating to formulary disclosures, and Insurance Code §§1451.501 - 1451.505, relating to health care provider directories. This adoption addresses only the Insurance Code sections relating to formulary disclosures, as new or amended sections are not necessary to implement the Insurance Code sections relating to health care provider directories.

Amendments.

The amendments to §§21.3001 - 21.3004, 21.3010, 21.3011, and 21.3023 make nonsubstantive changes to the rule text for consistency with current TDI rule-drafting style; correct typographical, grammatical, and punctuation errors; simplify and clarify certain provisions; update Insurance Code citations; and conform TDI rules to current law.

The amendments to §21.3020 add terms, and the amendments to §21.3022 clarify notice of modifications to drug coverage.

An amendment conforms §21.3002(7) to Insurance Code §1369.151, which states the subchapter is applicable to state employees, Medicaid, and the Child Health Insurance Program (CHIP) plans. Another amendment conforms §21.3003 to Insurance Code §1369.153, which designates the information that must be located on the front and back of an enrollee's identification card. An amendment conforms the term "health benefit plan" in §21.3020(10) to Insurance Code §1369.052 and §1369.053, which state that the subchapter is applicable to individual, small group, and large group health benefit plans, but that it is not applicable to CHIP and Medicaid Managed Care Organizations, respectively. An amendment conforms §21.3022 to Insurance Code §1369.0541, which specifies conditions under which modifications of drug coverage may occur and adds notice requirements.

The repeal of §21.3005 is necessary because it applies to identification cards that were in effect on September 1, 1999, and it is no longer applicable.

The repeal of §21.3021 streamlines the rules implementing Insurance Code Chapter 1369, Subchapter B. The requirements contained in §21.3021 are included in §21.3030(a) to implement Insurance Code §1369.054.

New §§21.3030 - 21.3034 implement the portions of HB 1624, 84th Legislature, Regular Session (2015) that added Insurance Code §§1369.0542 - 1369.0544, which require health benefit plan issuers to post on their website formulary information for each health benefit plan they issue, and make the information available to enrollees, prospective enrollees, and others through a toll-free telephone number.

Amendments to Subchapter V divide the subchapter into four new divisions for ease of reference and organizational purposes. New Division 1, titled "General Provisions," encompasses existing §21.3001 and relates to applicability and severability. New Division 2, titled "Identification Cards," encompasses existing §§21.3002 - 21.3004 and relates to pharmacy cards and standard identification cards. Division 2 does not include §21.3005, as that section is repealed. New Division 3, titled "Off-Label Drugs," encompasses existing §21.3010

and §21.3011 and relates to coverage of off-label drugs. New Division 4, titled "Prescription Drug Formulary Coverage and Disclosure Requirements," encompasses existing §§21.3020, 21.3022, and 21.3023, relating to continuation of benefits and adverse determination of nonformulary prescription drugs, and new §§21.3030 - 21.3034, relating to required drug formulary disclosures. Division 4 does not include §21.3021, as that section is repealed. The provisions contained in repealed §21.3021 are incorporated in §21.3030(a).

Amendments throughout Subchapter V remove the word "group" where it precedes "health benefit plan" to conform with Insurance Code §1369.151. In addition to the substantive amendments and additions, the amendments also contain conforming changes for clarity and agency style, and to update Insurance Code citations.

The following explanation provides an overview and description of additional reasoned justification for the amendments to the rules.

§21.3001. **Applicability and Severability.** An amendment to §21.3001 deletes the word "scope" from the title of the section and replaces it with "applicability." Amendments to §21.3001(a)(1) - (3) add language to clarify which sections in Subchapter V apply to subchapters of Insurance Code Chapter 1369, and delete text referencing Insurance Code articles that have been recodified.

§21.3002. **Definitions; Pharmacy Identification Cards.** The amendment to §21.3002(1) deletes and replaces current text with new text that defines "administrator" as it is defined in Insurance Code §4151.001(1).

The amendment to §21.3002(7) replaces current text with new text that defines "health benefit plan" as it is described in Insurance Code §1369.151, and includes a health benefit plan providing coverage for pharmacy benefits. The amendment also adds the phrase "exempt from state regulation under," so the definition now reads, "This definition includes the term, 'plan,' as defined in Insurance Code §4151.001(4), but does not include a self-funded employee welfare benefit plan exempt from state regulation under ERISA, 29 U.S.C. §1002(1)(A)."

The amendment to §21.3002(9) replaces current text with new text that defines "issuer" as those entities described in Insurance Code §1369.151, but not those excluded by Insurance Code §1369.152.

The amendment to §21.3002(10) adds new text "exempt from state regulation under" to clarify the definition of "pharmacy benefit manager." The definition now reads, "As defined in Insurance Code §4151.151, but does not include a pharmacy benefit manager for a self-funded employee welfare benefit plan exempt from state regulation under ERISA, 29 U.S.C. §1002(1)(A)."

§21.3003. **Standard Identification Cards.** The amendment to §21.3003(b) adds the requirement that the information listed in §21.3003(b)(1) - (7) be included on the front of each identification card. The amendment to §21.3003(b)(2) incorporates language from current §21.3003(b)(3) and provides an option to include either the name or logo of the issuer, the administrator, or the pharmacy benefit manager on the front of the card.

Current §21.3003(b)(4) is redesignated §21.3003(b)(3), and current §21.3003(b)(5) is redesignated §21.3003(b)(4). The amendment to current §21.3003(b)(6) moves the text to new §21.3003(c), and redesignates current §21.3003(b)(7) as §21.3003(b)(5) and current §21.3003(b)(8) as §21.3003(b)(6).

The amendment to new §21.3003(7) adds the requirement that for a plan issued under Insurance Code Chapters 843 or 1301, the letters "TDI" or "DOI" be prominently displayed on the front of each identification card.

New §21.3003(c) requires the issuer of a health benefit plan to include the information described in current §21.3003(b)(6) on the identification card of each enrollee, but does not specify which side of the card. Current §21.3003(c) is redesignated §21.3003(d).

§21.3004. **Issuance of Standard Identification Cards.** Amendments to §21.3004(c) - (d) remove references to §21.3005, as this adoption repeals §21.3005.

§21.3005. **Previously Issued Identification Cards.** Section 21.3005 is repealed because both subsections of §21.3005 relate to updating information on enrollee identification cards in effect on September 1, 1999, and therefore, are no longer relevant.

§21.3010. **Definitions; Coverage of Off-Label Drugs.** Amendments to §21.3010 make changes for clarity, to conform to agency style, and to update Insurance Code citations.

§21.3011. **Minimum Standards of Coverage for Off-Label Drug Use.** Amendments to §21.3011 make changes for clarity, to conform to agency style, and to update Insurance Code citations.

§21.3020. **Definitions; Prescription Drug Formulary.** Amendments to §21.3020 make changes for clarity, to conform to agency style, update Insurance Code citations, and remove the word "group" preceding "health benefit plan" to comply with Insurance Code §1369.052. Revisions to this section also add definitions for terms used in new §§21.3030 - 21.3033.

An amendment to §21.3020 deletes the current definition for the term "adverse determination" and replaces it with a reference to the definition for the term as defined in Insurance Code §4201.002.

The new term, "allowed amount," is added to §21.3020(2) and is defined as "the amount the health benefit plan issuer allows as reimbursement for a health care service, supply, or prescription drug, including reimbursement amounts for which a patient is responsible due to deductibles, payments, or coinsurance."

In response to comments, the proposed term, "commonly prescribed drug list," defined as "a list of the 150 most frequently prescribed drugs published annually by the New York State Board of Pharmacy, available at <https://apps.health.ny.gov/pdpw/Drug-Info/DrugInfo.action>," is removed from the requirements of §21.3033.

The definition of "delegated entity" clarifies that third-party administrators are those defined in Insurance Code §4151.001(1) and pharmacy benefits are those defined in Insurance Code §4151.151.

The term, "direct electronic link," is defined as "a hyperlink that, when clicked, delivers a user directly to the applicable website destination."

The term, "drug," is added and defined by referencing the term in the Texas Pharmacy Act, Occupations Code §551.003.

The definition for "drug formulary or formulary" is clarified on adoption in response to comment to exclude open formularies. The definition states that "This term does not include a health benefit plan that: (A) offers coverage for any FDA-approved drug; (B) does not include a tiered structure; (C) does not contain

a list of drugs; and (D) does not include utilization requirements for particular drugs or classes of drugs. This removes the requirements for an open formulary to comply with this division.

Amendments to current "health group benefit plan" remove the word "group" from the defined term, and define it as an insurance policy or evidence of coverage as described in Insurance Code §1369.052, but not those described in Insurance Code §1369.053, that provides coverage for a discrete package of benefits, paired with specific cost-sharing parameters.

The term, "off-label drug use," is added and defined as "the use of a drug that is approved by the Food and Drug Administration for the treatment of one medical condition, but is used to treat another medical condition or at different dosage forms, dosage regimens, populations, or other parameters not mentioned in the approved labeling."

The term, "summary health plan document," is added and defined as "a document summarizing the coverage provided under a health benefit plan, including a summary of benefits and coverage, as required under 42 U.S. Code §300gg-15 and 45 CFR §147.200; and a disclosure of terms and conditions of a policy, as required under §3.3705(b) of this title (relating to Nature of Communications with Insureds; Readability, Mandatory Disclosure Requirements, and Plan Designations), or an evidence of coverage, as required under §11.1600(b) of this title (relating to Information to Prospective and Current Contract Holders and Enrollees)."

The definitions are redesignated to conform to the changes.

§21.3021. Required Disclosure of Drug Formulary. The repeal of §21.3021 is necessary in order to group all the formulary disclosure requirements in §§21.3030 - 21.3033. The requirements under §21.3021 are included under §21.3030(a) and Insurance Code §1369.054.

§21.3022. Continuation of Benefits. Amendments to §21.3022 remove the word, "group," preceding "health benefit plan," for consistency with Insurance Code §1369.052.

Amendments also add new text to specify conditions under which health benefit plans may make modifications to drug coverage under Insurance Code §1369.0541. Specifically, the amendment to §21.3022(a) clarifies that modifications to drug coverage are not permitted until the plan's renewal date. The amendment to §21.3022(b) replaces existing text with new text describing the conditions under which a health benefit plan issuer may make modifications to drug coverage. In response to comments, TDI moved the substance of proposed subsection (c) to subsection (b) to clarify the text regarding the modifications that require notice. Also in response to comments, TDI created new subsection (c), which allows modifications more favorable to the consumer to be made without notice and at any time, including the addition of drugs to formularies, a reduction in cost sharing, or the deletion of utilization management requirements.

§21.3023. Nonformulary Prescription Drugs; Adverse Determination. Amendments to §21.3023 correct typographical, grammatical, and punctuation errors; make changes to conform to agency style; update Insurance Code citations; and remove the word, "group," preceding "health benefit plan," to comply with Insurance Code §1369.052.

§21.3030. Availability of Formulary Information. New §21.3030(a) incorporates provisions from repealed §21.3021 and requires an issuer of a health benefit plan or its delegated

entity to include plain language disclosures related to formularies in the coverage documentation provided to enrollees, which is consistent with Insurance Code §1369.054. New §21.3030(b) requires an issuer of a health benefit plan to make a paper copy of the formulary information required under new §21.3032 and §21.3033, available to a current or prospective enrollee on request. New §21.3030(c) permits a health benefit plan issuer to exclude the plan-level cost-sharing information on the paper copy as long as the enrollee can obtain the information by calling a toll-free number. New §21.3030(d) requires the paper copy to use at least 10-point font.

§21.3031. Formulary Information on Issuer's Website. New §21.3031 describes how the issuer of a health benefit plan displays the formulary information required under new §21.3032 and §21.3033.

New §21.3031(a) requires a health benefit plan issuer to display the formulary information on a website that is publicly accessible without requiring the use of paid software, a password, user name, or personally identifiable information. New §21.3031(a)(1) - (2) state that formulary information must be electronically searchable by drug name and use at least 10-point font.

New §21.3031(b) requires that each health plan document include a direct link to the website containing the formulary information and describes the direct-link requirements.

New §21.3031(c) permits an issuer of a health benefit plan to develop a web-based tool to display plan-specific cost-sharing information required under §21.3032(c). New §21.3032(c)(1) - (4) describe the required elements that the web-based tool must contain. Section 21.3031(c)(1) requires the web-based tool to be publicly accessible to enrollees, prospective enrollees, and others without the use of a password or user name. Section 21.3031(c)(2) requires the tool to allow consumers to electronically search formulary information by the name under which the health benefit plan is marketed. Section 21.3031(c)(3) requires the tool to contain plan-specific cost-sharing information for each drug. Section 21.3031(c)(3)(A) - (C) describe the plan-specific cost-sharing information the health benefit plan issuer must include.

In response to comments, TDI has removed the requirement for the formulary information to state the amount of the deductible in §21.3031(c)(3)(B), but adds that the formulary information must state where the deductible can be found.

In response to a comment suggesting that using the actual cost of the drug would be more feasible than the median for drug calculation purposes, TDI revises §21.3031(c)(3)(B) to adopt an alternative option. The health benefit plan issuer has the choice to provide the actual cost or median, but the rules require that the information be identified as either actual cost or median so that the option being used is clear to the consumer.

To clarify §21.3031(c)(3)(C), the proposed language has been changed from the cost-sharing amount to be calculated "after the enrollee has met any deductible requirement," to "excluding any deductible requirement."

Section 21.3031(c)(4) requires that the web tool include a direct electronic link to a chart displaying each formulary that applies to each health benefit plan issued by the health benefit plan issuer and include a direct electronic link to the Summary of Benefits and Coverage and formulary document for each health plan listed. The chart may be limited to health benefit plans being

sold in the market in which the applicable health benefit plan is issued.

§21.3032. Formulary Disclosure Requirements. New §21.3032(a) requires the information provided under the section to include each prescription drug dispensed in a pharmacy or administered by a physician, and it specifies that the information must differentiate between drugs covered under the plan's pharmacy benefits and medical benefits. In response to a comment, the word, "direct electronic link," was added to this subsection so that the last sentence now reads: "Information pertaining to drugs covered under the plan's medical benefits may be provided as an addendum or direct electronic link and must include each parameter that is applicable." This clarifies that a link is the electronic equivalent of an addendum.

New §21.3032(b)(1) - (4) describe the coverage information that must be included for each drug. In response to a comment, the phrase "that limits access to the drug" has been removed from the disclosure "of any prior authorization, step therapy, or other protocol requirement," because the phrase is unnecessary.

New §21.3032(c) requires the formulary information to include plan-specific cost-sharing information for each drug. New §21.3032(c)(1) requires the formulary information to indicate whether the drug is subject to a pharmacy or medical deductible. In response to comments, TDI has removed the requirement for the formulary information to state the amount of the deductible, but adds that the formulary information must state where the deductible can be found.

New §21.3032(c)(2) requires the formulary information to include the cost-sharing amount for each drug under the pharmacy or medical benefit in a retail, mail order, or physician- or practitioner-administered setting, if applicable, after the enrollee has met any deductible requirement. New §21.3032(c)(2)(A) - (B) describe the cost-sharing information that must be included.

In response to a comment, the "practitioner-administered" setting was added to the physician-administered setting. For clarity, the proposed language has been changed from the cost-sharing amount to be calculated "after the enrollee has met any deductible requirement," to "excluding any deductible requirement."

New §21.3032(d) requires the cost-sharing amounts to reflect the cost to the consumer for a month-long supply of the prescribed drug, unless otherwise noted, and it describes the requirements for calculating the cost-sharing amount for the drug.

In response to a comment suggesting that using the actual cost of the drug would be more feasible than the median for drug calculation purposes, TDI adopts an alternative option. The formulary information may provide the actual cost or median, but the rule requires that the information be identified as either actual cost or median so that the option being used is clear to the consumer.

New §21.3032(e) requires a legend on each page of the formulary information and describes the required elements of the legend.

§21.3033. Facilitating Comparison Shopping. New §21.3033(a) requires that the formulary information must include a summary titled "Summary of Formulary Benefits." The summary is designed to help current and prospective enrollees understand the prescription drug benefits offered under the plan and to compare the benefits by one plan to those offered by other plans. New §21.3033(a)(1) - (5) describe the title of each section of the

summary, the elements the summary must include, and the order in which to include them. A citation is added to the language for clarity.

New §21.3033(a)(1) requires a section in the summary titled "How to Find Information on the Cost of Prescription Drugs," which explains how a consumer can determine cost sharing from the plan's summary health plan document, formulary information, and web-based tool, if applicable.

For clarity, the proposed language has been changed from the cost-sharing amount to be calculated "after the enrollee has met any deductible requirement," to "excluding any deductible requirement." In response to a comment suggesting that using the actual cost of the drug would be more feasible, TDI adopts an alternative option. The formulary information may provide the actual cost or median, but the rule requires that the information be identified as either actual cost or median so that option being used is clear to the consumer.

New §21.3033(a)(2) requires a section in the summary titled "Formulary by Health Benefit Plan," which includes a chart displaying each formulary that applies to each health benefit plan issued by the issuer and a direct electronic link to the Summary of Benefits and Coverage and formulary document for each health plan listed. This chart may be limited to health benefit plans being sold in the market in which the health benefit plan is issued.

New §21.3033(a)(3) requires a section in the summary titled "Drugs by Cost-Sharing Tier."

In response to comments, TDI removed the proposed requirement for a list of total number of drugs because it was not informative. TDI retains the requirement for the percent of drugs in each cost-sharing tier for all drugs in the formulary.

The proposed new §21.3033(a)(4) titled "Coverage for Commonly Prescribed Drugs," is deleted. The proposal included a requirement for information on coverage for commonly prescribed drugs for comparison purposes. In response to comments, this paragraph is not included in the adopted rule, deleting the requirement that prices be compared to the New York List of Commonly Prescribed Drugs.

The next paragraph is redesignated §21.3033(a)(4). It requires a section in the summary titled "How Prescription Drugs are Covered under the Plan," to include information on how prescription drugs are covered under the plan. New §21.3033(a)(4)(A) - (F) describe the information an issuer must include in the summary.

New §21.3033(a)(4)(A) requires a section in the summary titled "Formulary Composition," which explains the method the health benefit plan issuer uses to determine the prescription drugs to include or exclude from the formulary, whether the formulary is open or closed, and a statement on how often the issuer reviews the formulary.

New §21.3033(a)(4)(B) requires a section in the summary titled "Right to Appeal," which explains an enrollee's right to appeal a denial of a medically necessary drug that is not covered under the formulary.

New §21.3033(a)(4)(C) requires a section in the summary titled "Continuation of Coverage," which explains the consumer's right to continued coverage consistent with amended §21.3022 and Insurance Code §1369.055 and §1369.0541.

New §21.3033(a)(4)(D) requires a section in the summary titled "Off-Label Drug Use," which explains coverage for off-label drug use.

New §21.3033(a)(4)(E) requires a section in the summary titled "Cost Sharing," which explains how cost sharing is determined under the plan, including: information on deductibles; formulary tiers or cost-sharing levels if the formulary is multitier; the difference between preferred and nonpreferred drugs, if applicable; differences in coverage for in-network and out-of-network pharmacies; and the difference in coverage between retail pharmacy and mail-order pharmacy, if applicable.

New §21.3033(a)(4)(F) requires a section in the summary titled "Medical Management Requirements," which explains each type of medical management requirement used by the health benefit plan, including prior authorization, step therapy, or other protocol requirements that limit access to prescription drugs, as applicable.

New §21.3033(b) requires the summary information under subsection (a) to be located on the first page of the formulary document under the title "Summary of Formulary Benefits."

§21.3034. Effective Date. In response to comments, another subsection is added to this section. Subsection (a) extends the effective date of the changes to the identification cards under §§21.3002 - 21.3004 of this title (relating to Definitions; Pharmacy Identification Cards, Standard Identification Cards, and Issuance of Standard Identification Cards) to January 1, 2017. Subsection (a) is redesignated as subsection (b). It states the effective dates of new §§21.3030 - 21.3033 for plans being marketed in the individual market. Subsection (b) is redesignated as subsection (c) and states the effective dates of new §§21.3030 - 21.3033 for plans being marketed in the group market.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. A hearing was held on February 24, 2016, and oral and written comments were received. Comments were received from the Coalition for Nurses in Advanced Practice; Office of Public Insurance Counsel; Pharmaceutical Care Management Association; American Cancer Society Cancer Action Network, Inc.; Prime Therapeutics; Center for Public Policy Priorities; America's Health Insurance Plans; Texas Association of Health Plans; and the National Multiple Sclerosis Society.

Comment: Regarding §21.3003, one commenter stated that the front of the identification card is getting crowded.

Agency Response: The requirement to place "TDI" or "DOI" on the front of the card is already required under §21.2820; the addition of §21.3003 is intended to simplify compliance by locating all requirements for pharmacy ID cards in one section of the code. The other content requirements for the front of the card are required by Insurance Code §1369.153. However, TDI has revised §21.3034 to move the effective date of this requirement to January 1, 2017.

Comment: Regarding §21.3020, one commenter stated that the definition for "summary health plan document," should not specifically incorporate federal requirements, which are subject to change.

Agency Response: TDI disagrees with the comment and declines to make a change. The definition incorporates the statutory requirement at TIC §1369.0542(b), requiring issuers to include a link to the formulary information from the summary of benefits and coverage. If the requirements change, the definition will also change.

Comment: Regarding §21.3021, one commenter stated that they were pleased to see the dollar amount rather than the dollar range required in the web tool and for the cost-sharing amount

after meeting the deductible. The commenter pointed out that the predeductible and postdeductible cost of prescription drugs is important to consumers.

Another commenter supported both web-based tool and online formulary to provide information on the dollar cost, including coinsurance.

Agency Response: TDI appreciates the supportive comments.

Comment: Regarding §21.3022, one commenter interpreted the proposed rule to allow mid-year modifications if moving a drug to a higher cost-sharing tier if there is a generic drug available, although the statute only allows modifications at renewal. Another commenter suggested the rule should prohibit a plan from moving a drug to a higher cost-sharing tier midyear if a generic is available.

A third commenter acknowledged that the renewal date in the proposed rule conformed to statute, but emphasized the need for flexibility in formula modifications.

Two commenters stated that formularies are updated during the year to include the release of new prescription drugs and to update usage warnings or FDA notices to discontinue use. The commenters stated they would like to be able to move a brand-name drug to a higher-cost tier if a generic is released midyear. Both entities consider only allowing modifications on the plan's renewal date to be administratively unmanageable because plans become effective and expire at different times of the year. Restricting formulary changes limits the plans' abilities to mitigate the excessive price hikes by drug manufacturers. One commenter pointed out that prohibiting the movement of brand-names to a higher tier when generics are available hurts businesses and consumers.

Agency Response: TDI disagrees with the comments and has revised the rule text to provide clarification.

Insurance Code §1369.0541 only authorizes modifications of drug coverage on the plan's renewal date. The "at the time of coverage renewal" language has existed in the statute since 2011. The language in subsection (b)(5) referencing moving a drug to a higher cost-sharing tier if there is a generic drug available concerns whether notice must be given when coverage is modified at renewal under subsection (a) and does not permit that type of change to be accomplished midyear. TDI has clarified this in the rule text.

Doctors must use their judgment about whether to prescribe drugs if the FDA has withdrawn approval or the drugs have been recalled. TDI has revised the rule so that modifications more favorable to the consumer may be made without notice and at any time, including the addition of drugs to formularies, a reduction in cost sharing, or the deletion of utilization management requirements. The legislative history of HB 1405, 82nd Legislature, Regular Session (2011) demonstrates that the intent of the bill was to prevent occurrences that were detrimental to the consumer such as increasing the cost of a drug or dropping a drug altogether, before the renewal date.

Comment: Regarding §21.3030, two commenters pointed out a typographical error referencing §21.3032(c), formulary information on issuer's website, when it should have referenced §21.3032(c), formulary disclosure requirements.

One commenter also recommended that plans provide a statement clearly explaining that consumers can obtain actual drug cost-sharing information by calling the toll-free number.

Another commenter suggested that there be a direct link to either the web tool or formulary that includes cost-sharing information with the toll-free number on every page of the mailed copy.

Agency Response: TDI agrees with the comment regarding a typographical error, and the change has been made regarding the citation.

TDI disagrees with the recommendations regarding an additional statement and the toll-free number. An additional statement would be an additional cost to the insurer and thus cannot be made at this time. Notice of the toll-free number is available in the summary health plan document. An issuer has the option of providing a direct link to the web tool or formulary. Adding a requirement for the toll-free number on every page of the mailed copy would be an additional cost.

Comment: Regarding §21.3031(a), one commenter supported the drug coverage information being available to enrollees and potential enrollees. The commenter stated the online tool and formulary is very important to cancer patients, especially being able to see what their coinsurance means as far as out-of-pocket costs.

Regarding §21.3031(b), another commenter supported language that requires a direct link to the formulary information. It supported the web-based tool language, and points out that some health plans are already providing drug cost information via web tools, and health plans are already providing postdeductible cost-sharing information to their members.

Agency Response: TDI appreciates the supportive comments.

Comment: Regarding §21.3031(c)(3)(A), a commenter stated that the information provided should describe whether the drug is subject to a pharmacy or medical deductible, not the actual deductible.

Agency Response: TDI agrees with the commenter and has revised the proposed text. TDI has removed the requirement to state the actual deductible. TDI has added that the web-based tool must indicate where that deductible can be found, so that consumers can find it in their plan documents.

Comment: Regarding §21.3031(c)(3)(B), a commenter stated that the rule should not specify that the cost-sharing amount be rounded to the next highest dollar because some plans may be able to calculate specific amounts without rounding, and some may prefer to round down as appropriate. The commenter said the median is not feasible because the contracts are not based on the simple monetary amount for each drug, but rather are often tied to Maximum Allowable Cost pricing, average wholesale pricing, etc.

Another commenter suggested that the wording regarding "the full price of the drug" in §21.3031(c)(3)(B) and (c)(3)(C)(ii) be changed because although the commenter thinks the median price is reasonable, if it is not feasible then TDI should consider using a different definition for full cost that is consistent across carriers.

Agency Response: TDI agrees in part with the commenters and has added an alternative option in the text as adopted to address these concerns. The health benefit plan issuer has the choice whether to provide the exact cost-sharing amount or round up. This issuer also has the choice whether to provide the actual cost or median, but the rules require that the information be identified as either actual cost or median so that option is clear to the consumer. Subsection (c)(3)(C) is also changed to clarify that

cost-sharing information is required excluding any deductible requirements.

Comment: Regarding §21.3031(c)(3)(C) and §21.3032(c)(2), a commenter stated that the phrase "physician-administered setting" should include other practitioners or providers who may legally prescribe in Texas. The commenter suggested revising the term so that it reads "physician- or practitioner-administered setting."

In both §21.3031 and §21.3032, another commenter indicated support for the requirement that information covered under both medical and pharmacy benefits be shared; and asked that plan specificity, including the amount of the copayment and amount or range of coinsurance after the deductible, be retained in the rule.

In both §21.3031 and §21.3032, a third commenter stated that they consider the statute to require a description of the deductible, but not the actual deductible. The commenter expressed concern that calculating for each deductible will be very complex. The commenter asked that the disclosure assume 100 percent enrollee cost sharing.

Agency Response: TDI agrees with the comments in part and has made the change to "physician- or practitioner-administered setting." TDI has eliminated the actual deductible language, but retains the requirements addressing cost sharing as it relates to copayments and coinsurance excluding the deductible. Taking the deductible out of the calculation should reduce the complexity of the different products. A 100 percent cost sharing would be 100 percent of the negotiated price; this does not give the necessary copay and coinsurance dollar amounts. Some plans already provide the copay and coinsurance amounts for existing enrollees.

Comment: Regarding §21.3032(a), a commenter commended TDI for requiring that coverage and cost information for drugs covered under a plan's medical benefit be included in the formulary information. The commenter added that many cancer treatment medications are administered intravenously by a provider. Another commenter stated that including the medical benefit will greatly benefit consumers who receive provider-administered drugs.

Another commenter stated their support that the information for prescription drugs covered both medical and pharmacy, and found providing drugs covered under medical benefits as an addendum acceptable. The commenter suggested that if the direct link takes you to the pharmacy drug list and the addendum is located elsewhere, TDI should require information about the separate addendum, including where to find it and how to use it.

A third commenter stated that because costs are not tied to pharmacy rates and the benefits are considered to be medical rather than pharmacy benefits, that the medical drug coverage is not part of a formulary. The commenter stated that providing cost-sharing and other information will be more complex and take longer to implement. The commenter also stated that it would be more feasible and informative to provide general information regarding application of deductibles to prescription drug benefits, and that calculation of the drug cost sharing is difficult.

Agency Response: TDI appreciates the supportive comments and agrees to revise the section to provide additional clarification. Insurance Code Chapter 1369 Subchapter B specifically applies to drugs dispensed in a pharmacy and to those typically administered by a physician or provider. The proposal delayed

the effective date of this part of the rule until November 1, 2016. TDI will limit the requirement to an amount excluding the deductible requirement. This significantly reduces the complexity of the algorithm.

The words "direct electronic link" was added to §21.3032(a), so that the last sentence is, "Information pertaining to drugs covered under the plan's medical benefits may be provided as an addendum or direct electronic link to the formulary and must include each parameter that is applicable." This clarifies that a link is the electronic equivalent of an addendum.

Comment: Regarding §21.3032(b), one commenter stated they were not opposed to disclosures of prior authorization requirements, but found the characterization of prior authorization to be unnecessary and potentially misleading.

Agency Response: TDI agrees that the verbiage "limiting access," as it refers to prior authorization, is unnecessary. However, the term "other protocol requirement," should be interpreted to mean any plan provision that limits access to a formulary drug, regardless of whether limiting access is the primary intent of the provision.

Comment: Regarding §21.3032(c) and (d), four commenters stated that the calculation related to the postdeductible amounts would be very complex because of the variety of benefit designs. One of the commenters estimated that it would have to customize over 1,700 formularies. The commenters added that the complexity of separately postdeductible cost sharing will take years, millions of dollars to implement, and the calculations would require hundreds of pages. One commenter stated that it has over 4,000 pages for open formularies.

Another commenter estimates a build out would cost \$3 million even if the rule is delayed to November 2017. The commenter stated that they do not want to pass these costs on to consumers. Another commenter stated that including all drugs within an open formulary creates a technical challenge and provides little benefit to the consumer. This is especially difficult for the medical drugs because they are not considered part of the formulary. The commenter adds that since they are a pharmacy benefit manager, they do not have access to medical drug pricing.

Another commenter supports the option for carriers to disclose patient costs in online formulary documents, specifically in dollar costs or a dollar cost range.

Agency Response: TDI disagrees with the comments and declines to change the requirement for cost-sharing information. The requirement for cost-sharing information cannot be changed because Insurance Code §1369.0543(d)(1) requires "the dollar amount of a copayment," and "an enrollee's cost-sharing amount stated in dollars." The web tool requirement in Insurance Code §1369.0543(e) provides for a search for drug information "by the name under which the health benefit plan is marketed."

However, TDI adopts §21.3032(c) and (d) with changes so that the cost-sharing amount can be calculated as if there is not a deductible. Regarding open formularies, the definition of "drug formulary" in Insurance Code §1369.051 references a "list" of covered drugs. In light of the comment, TDI has modified the definition of "drug formulary" in §21.3020 to make it clear that the rule does not apply to a true open formulary which does not list, tier, or restrict access to covered drugs. This reduces the complexity of the calculation. Regarding access to medical drug pricing, although one commenter may not have access to the

information as a pharmacy benefit manager, it is working with an issuer that has that information.

Comment: A commenter stated that for the group fully insured market, the rule would require a long list of plans and associated formularies and summary-of-benefits links that would not be available to the consumer.

Agency Response: TDI disagrees with the comment and declines to make a change. In this case, the consumer is the employer. The statute does not exempt group plans.

Comment: Regarding §21.3032(e), a commenter asked that the legend be added to the web tool. Another commenter supports the use of a legend to make disclosures more consumer friendly.

Agency Response: TDI agrees that the legend will be useful for consumers, but does not think a change is necessary. The wording of §21.3032(e) requires a legend whether it is on the website or on paper.

Comment: Regarding §21.3033, two commenters stated that having the total number of drugs and each cost-sharing amount will not help with comparison shopping. They stated that providing the information is likely to be more confusing than helpful to consumers because it would not account for generics versus brand-name drugs, different dosages available, etc. In addition, displaying the long list of plans and formulas for the group fully insured market could add confusion for the consumers because it could lead to consumers reviewing information that is not applicable to their plan. One of the commenters stated that most consumers shop primarily on premium rates.

Another commenter appreciated having all the information in one place when comparison shopping. The commenter added that complexity of understanding formulary costs and the personal costs that come with choosing the wrong plan are borne by consumers today. This shifts some of that burden from consumers to insurers and pharmacy benefits managers who are better equipped to efficiently compile this information.

Agency Response: TDI agrees to revise the text as adopted to avoid confusion for consumers. The adopted rules delete the requirement to list the total number of drugs, but retains the requirement to list the percent of drugs in each cost-sharing tier. TDI agrees that having all the information in one place is beneficial to consumers.

Comment: One commenter said they anticipate that §21.3033 will be extremely helpful to Texas consumers. It will help consumers who are shopping for the most comprehensive prescription drug cover and those consumers living with a chronic illness. People living with multiple sclerosis may also develop other conditions. Although it may be challenging for health plans and pharmacy benefit managers, it should not be the consumer's burden to piece together information from several sources. The commenter believes that creating consistent headings and a consistent order for information will help consumers when comparing formularies, but notes that under the header, "How to Find Information on the Cost of Prescription Drugs" in §21.3033(a)(1), an addendum with medical-benefit drugs should be included.

Agency Response: TDI agrees with the commenter. The addendum should include the medical drugs under §21.3032(a).

Comment: Regarding §21.3033(a)(2), one commenter would like a clearly marked link to the chart from the disclosure and web tool.

Agency Response: TDI does not agree that a revisions is necessary to address the commenter's concern. The Summary of Formulary Benefits, including the chart, is required to be included as part of the formulary disclosure document under §21.3033(b). The web tool is required to link to the chart under §21.3031(c)(4).

Comment: Regarding §21.3033(a)(4), two commenters stated they were unable to find any evidence that consumers use a list like the New York list when deciding which company to choose. The rules infer that reduced management is a greater value; this minimizes the value of safety and efficacy oversight. The New York List of Commonly Prescribed Drugs is not meaningful, is confusing, and does not provide much value. Another commenter suggested the alternative of providing drugs by drug class.

Agency Response: TDI agrees to revise the rule text as adopted to address the commenters' concern. The adopted rules remove the comparison to the New York list. Providing information only by drug class would be too general.

Comment: Three commenters urged TDI not to implement product disclosures that go beyond the federal regulations. Specifically, a commenter asked TDI to delete the requirement that paper copies of formularies would have to calculate the cost to the enrollee in dollar amounts of each covered drug based on their benefit plan cost sharing and deductible.

Another commenter expressed concern that requiring more detailed information than what is required under federal regulations will make the consumer research and shopping experiences overwhelming and confusing. The commenter added that these disclosures may not be seen by consumers who work directly with the online shopping sites or exchanges and brokers or agents, which could add unnecessary costs and confusion to the health care system.

Agency Response: TDI disagrees with the commenters and declines to make the requested change. Insurance Code §1369.0543 requires TDI to go beyond the federal requirements. Calculations will be made as if there is no deductible, which reduces the complexity of the calculations. In addition, publishing the information on the website will greatly reduce the requests for paper copies.

Comment: Regarding §21.3033(a)(4), one commenter stated that §21.3033(a)(4) included an excessive list of additional disclosures that are redundant or unnecessary.

Agency Response: TDI disagrees with the commenter and declines to revise the provision. This paragraph standardizes important information and places it in one area to provide consistency and clarity.

Comment: Regarding §21.3034, two commenters indicated that they would like to see the individual market rules take effect when proposed so the information is available during the next open enrollment period.

Another commenter requested that TDI take into consideration the complexity of the new requirements and extend the effective date appropriately. The commenter requested that the changes to the identification cards be effective January 1, 2017, or after.

Agency Response: TDI agrees with the first two commenters regarding a need for the rules to be effective for the individual market during the next open enrollment period. HB 1624, 84th Legislature, Regular Session (2015), was passed in May 2015. TDI is extending the effective date for the group market until Septem-

ber 2017. The effective date for the individual market needs to be before the next enrollment period.

In response to the third commenter, TDI agrees to extend the effective date for the changes to identification cards. TDI is adding a subsection to §21.3034 that extends the effective date for the identification cards to January 1, 2017.

DIVISION 1. GENERAL PROVISIONS

28 TAC §21.3001

STATUTORY AUTHORITY. The amendments to §21.3001 are adopted under Insurance Code §§1369.005, 1369.057, 1369.151, 1369.154, and 36.001.

Section 1369.005 provides that the commissioner may adopt rules to implement Insurance Code Chapter 1369, Subchapter A. Section 1369.057 provides that the commissioner may adopt rules to implement Insurance Code Chapter 1369, Subchapter B. Section 1369.151 extends the applicability of Insurance Code Chapter 1369, Subchapter D, to include state employee, Medicaid, and CHIP plans. Section 1369.154 provides that the commissioner may adopt rules to implement Insurance Code Chapter 1369, Subchapter D. 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 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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Texas Department of Insurance

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



DIVISION 2. IDENTIFICATION CARDS

28 TAC §§21.3002 - 21.3004

STATUTORY AUTHORITY. The amendments to §§21.3002 - 21.3004 are adopted under Insurance Code §§843.209, 1369.052, 1369.151, 1369.153, 1369.154, 1301.162, and 36.001.

Section 843.209 requires that HMO identification cards indicate that the HMO is regulated under Insurance Code. Section 1369.052 extends the applicability of Subchapter B to individual, small group, and large group health benefit plans. Section 1369.151 extends the applicability of Insurance Code Chapter 1369, Subchapter D, to include state employee, Medicaid, and CHIP plans. Section 1369.153 designates identification card content that must be located on the front of the card. Section 1369.154 provides that the commissioner may adopt rules to implement Chapter 1369, Subchapter D. Section 1301.162 requires that identification cards issued by insurers regulated by the Insurance Code display the first date on which an individual became insured under the plan or a toll-free number a physician or health care provider may use to obtain that date. 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 this state.

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DIVISION 3. OFF-LABEL DRUGS

28 TAC §§21.3010, §21.3011

STATUTORY AUTHORITY. The amendments are adopted under Insurance Code §§1369.004, 1369.005, and 36.001.

Section 1369.004 describes the drug coverage a health benefit plan that covers drugs is required to provide for treatment of an enrollee for a chronic, disabling, or life-threatening illness. Section 1369.005 provides that the commissioner may adopt rules to implement Insurance Code Chapter 1369, 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 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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DIVISION 4. PRESCRIPTION DRUG FORMULARY COVERAGE AND DISCLOSURE REQUIREMENTS

28 TAC §§21.3020, 21.3022, 21.3023, 21.3030 - 21.3034

STATUTORY AUTHORITY. The amendments to §§21.3020, 21.3022, and 21.3023; and new §§21.3030 - 21.3034 are adopted under Insurance Code §§1369.005, 1369.052 - 1369.054, 1369.0541 - 1369.0544, 1369.055 - 1369.057, 1369.151, 1369.154, and 36.001.

Section 1369.005 provides that the commissioner may adopt rules to implement Insurance Code Chapter 1369, Subchapter A. Section 1369.052 extends the applicability of Subchapter B to individual, small group, and large group health benefit plans.

Section 1369.053 provides exceptions to the applicability of Insurance Code Chapter 1369 Subchapter B, and it exempts CHIP and Medicaid Managed Care Organizations. Section §1369.054 describes the notice and disclosure of certain information required if an issuer of a health benefit plan covers prescription drugs and uses one or more drug formularies to specify the prescription drugs covered under the plan. Section 1369.0541 specifies conditions under which modifications of drug coverage may occur and creates notice requirements. Section 1369.0542 requires a health benefit plan issuer to post formulary information on its website as required by the commissioner by rule. Section 1369.0543 describes the required formulary disclosures and requires the commissioner to adopt rule requirements to promote consistency and clarity in the disclosure of formularies to facilitate consumers when comparison shopping among health benefit plans. Section 1369.0544 allows a health benefit plan issuer to make the formulary information available through a toll-free telephone number. Section 1369.055 describes the continuation of drug coverage requirements an issuer of a health benefit plan must offer if prescription drugs are covered. Section 1369.056 describes the circumstances under which a refusal of a health benefit plan issuer to provide benefits to an enrollee for a prescription drug is an adverse determination. Section 1369.057 provides that the commissioner may adopt rules to implement Insurance Code Chapter 1369, Subchapter B. Section 1369.151 extends the applicability of Insurance Code Chapter 1369, Subchapter D, to include state employee, Medicaid, and CHIP plans. Section 1369.154 provides that the commissioner may adopt rules to implement Insurance Code Chapter 1369, Subchapter D. 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 this state.

§21.3020. Definitions; Prescription Drug Formulary.

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

(1) Adverse determination--As defined in Insurance Code §4201.002.

(2) Allowed amount--The amount that the applicable health benefit plan issuer allows as reimbursement for a health care service, supply, or prescription drug, including reimbursement amounts for which a patient is responsible due to deductibles, copayments, or coinsurance.

(3) Contracted benefit level--The copayment amount or coinsurance percentage established at the beginning of the current plan year and described in the coverage documentation.

(4) Coverage documentation--A policy, certificate of coverage, evidence of coverage, enrollee handbook, or a plan document distributed by an issuer or its delegated entity to an enrollee or to the master contract holder, for distribution to enrollees.

(5) Delegated entity--An entity or an association of entities, including third-party administrators, as they are defined in Insurance Code §4151.001(1), and pharmacy benefit managers, as they are defined in Insurance Code §4151.151, that provides reimbursement for covered services or undertakes to arrange for or provide benefits or services to an enrollee under a health benefit plan, and that performs on behalf of the issuer of a health benefit plan, any function regulated by this division.

(6) Direct electronic link--A hyperlink that, when clicked, delivers a user directly to the applicable website destination.

(7) Drug--As defined in the Texas Pharmacy Act, Occupations Code §551.003.

(8) Drug formulary or formulary--A list of drugs for which a health benefit plan provides coverage, approves payment, or encourages or offers incentives for physicians or other health care providers to prescribe. This term does not include a health benefit plan that:

- (A) offers coverage for any FDA approved drug;
- (B) does not include a tiered structure;
- (C) does not contain a list of drugs; and
- (D) does not include utilization requirements for particular drugs or classes of drugs.

(9) Enrollee--As defined in Insurance Code §1369.051(2).

(10) Health benefit plan--An insurance policy or evidence of coverage as described in Insurance Code §1369.052, but not those described in Insurance Code §1369.053, that provides coverage for a discrete package of benefits, paired with specific cost-sharing parameters. This term includes health benefit plans providing coverage for pharmacy benefits only.

(11) Issuer--Those entities described in Insurance Code §1369.052, but not those excluded by Insurance Code §1369.053.

(12) Multitier formulary--A drug formulary with benefit levels in addition to generic and brand-name prescription drug benefit levels.

(13) Off-label drug use--The use of a drug that is approved by the Food and Drug Administration for the treatment of one medical condition but is used to treat another medical condition, or at different dosage forms, dosage regimens, populations, or other parameters not mentioned in the approved labeling.

(14) Plain language--As prescribed in §3.602 of this title (relating to Plain Language Requirements).

(15) Plan year--A 365-day period that begins on the date the health benefit plan's coverage commences, or a period of one full calendar year as defined in the health benefit plan's coverage documentation.

(16) Prescription drug--As defined in Insurance Code §1369.051(4).

(17) Renewal date--For each health benefit plan, the earlier of the date specified in the coverage documentation for renewal or the policy anniversary date. In determining the renewal date for association or multiple employer trust health benefit plans, issuers may use the date specified for renewal or the policy anniversary date of either the master contract, plan document, or certificate of coverage of each group in the association or trust. Issuers must use the same method of determining renewal dates for all health benefit plans.

(18) Summary health plan document--A document summarizing the coverage provided under a health benefit plan, including:

(A) a summary of benefits and coverage, as required under 42 U.S.C. §300gg-15 and 45 CFR §147.200; and

(B) a disclosure of terms and conditions of a policy, as required under §3.3705(b) of this title (relating to Nature of Communications with Insureds; Readability, Mandatory Disclosure Requirements, and Plan Designations), or an evidence of coverage, as required under §11.1600(b) of this title (relating to Information to Prospective and Current Contract Holders and Enrollees).

§21.3022. *Continuation of Benefits.*

(a) An issuer of a health benefit plan that offers prescription drug benefits must make a prescription drug that was approved or covered for a medical condition or mental illness available to each enrollee at the contracted benefit level until the health benefit plan renewal date. Modifications to drug coverage are not permitted until the plan's renewal date.

(b) A health benefit plan issuer may make modifications to drug coverage provided under a health benefit plan if:

(1) the modification occurs at the time of coverage renewal;

(2) the modification is effective uniformly among all group health benefit plan sponsors covered by identical or substantially identical health benefit plans, or all individuals covered by identical or substantially identical individual health benefit plans, as applicable; and

(3) not later than the 60th day before the date the modification is effective, the issuer provides written notice of the modification to the commissioner, each affected group health benefit plan sponsor, each affected enrollee in an affected group health benefit plan, and each affected individual health benefit plan holder for modifications that:

(A) remove a drug from a formulary;

(B) add a requirement that an enrollee receive prior authorization for a drug;

(C) impose or alter a quantity limit for a drug;

(D) impose a step-therapy restriction for a drug; or

(E) move a drug to a higher cost-sharing tier unless a generic drug alternative is available.

(c) For purposes of this section, modifications that are more favorable to the consumer may be made without notice at any time, including modifications that:

(1) add drugs to formularies;

(2) reduce cost sharing; or

(3) delete a utilization review requirement.

§21.3031. *Formulary Information on Issuer's Website.*

(a) Except as permitted under subsection (c) of this section, an issuer of a health benefit plan must display the formulary information required under §21.3032 and §21.3033 of this title (relating to Formulary Disclosure Requirements and Facilitating Comparison Shopping) on a website that is publicly accessible to enrollees, prospective enrollees, and others without requiring the use of paid software, a password, user name, or personally identifiable information. The formulary information must:

(1) be electronically searchable by drug name; and

(2) use at least 10-point font.

(b) Each summary health plan document must include a direct electronic link to the website that contains the formulary information. The direct electronic link must deliver the user directly to the formulary information associated with the health benefit plan described by the health plan document, without requiring additional navigation or user input.

(c) As an alternative to displaying the information required under §21.3032(c) of this title alongside the formulary information required generally under subsection (a) of this section, a health benefit plan issuer may elect to make plan-specific cost-sharing information available through a web-based tool. A direct electronic link to the web-based tool must be included on each page of the formulary disclosure that lists each drug. The purpose of this alternative method is to

encourage the provision of the most timely and accurate drug price information. In order to qualify for this alternative method, a web-based tool must:

(1) be publicly accessible to enrollees, prospective enrollees, and others without requiring the use of paid software or the necessity of a password, user name, or personally identifiable information;

(2) allow consumers to electronically search formulary information by the name under which the health benefit plan is marketed;

(3) include the following plan-specific cost-sharing information for each drug:

(A) whether the drug is subject to a pharmacy or medical deductible and where the deductible may be found;

(B) the full price of the drug, based on the plan's median allowed amount or the actual cost for the drug using the most up-to-date data available, and a statement as to whether the price is based on the median or the actual cost;

(C) the cost-sharing amount the enrollee will owe for each drug under the pharmacy or medical benefit in a retail, mail order, or physician- or practitioner-administered setting, if applicable, excluding any deductible requirement, including as applicable:

(i) the dollar amount of a copayment; and

(ii) for a drug subject to coinsurance, the dollar amount of cost sharing the enrollee will owe, calculated based on the full price of the drug and the cost-sharing parameters under the enrollee's health benefit plan for the tier under which the drug is assigned; and

(4) include, prominently displayed on the web page under the header "Formulary by Health Benefit Plan," a direct electronic link to a chart displaying each formulary that applies to each health benefit plan issued by the issuer and includes a direct electronic link to the Summary of Benefits and Coverage and formulary document for each health plan listed. This chart may be limited to health benefit plans being sold in the market in which the applicable health benefit plan is issued.

§21.3032. *Formulary Disclosure Requirements.*

(a) The formulary information required under this section must include each prescription drug covered under the plan that is dispensed in a network pharmacy or administered by a physician or health care provider and clearly differentiate between drugs covered under the plan's pharmacy benefits and medical benefits. Information pertaining to drugs covered under the plan's medical benefits may be provided as an addendum or link to the formulary and must include each parameter that is applicable.

(b) The formulary information must include the following coverage information for each drug:

(1) an explanation of coverage under the health benefit plan;

(2) an indication of whether the drug is preferred, if applicable, under the plan;

(3) a disclosure of any prior authorization, step therapy, or other protocol requirement; and

(4) the specific tier the drug falls under, if the plan uses a multitier formulary.

(c) The formulary information must include the following plan-specific cost-sharing information for each drug:

(1) whether the drug is subject to a pharmacy or medical deductible and where the deductible may be found;

(2) the cost-sharing amount for each drug under the pharmacy or medical benefit, in a retail, mail order, or physician- or practitioner-administered setting, if applicable, excluding any deductible requirement, including, as applicable:

(A) the dollar amount of a copayment; and

(B) for a drug subject to coinsurance:

(i) an enrollee's cost-sharing amount stated in dollars; or

(ii) a cost-sharing range denoted as follows:

(I) under \$100 - \$;

(II) \$100 - \$250 - \$\$;

(III) \$251 - \$500 - \$\$\$;

(IV) \$501 - \$1,000 - \$\$\$\$; or

(V) over \$1,000 - \$\$\$\$\$.

(d) Cost-sharing amounts must reflect the cost to the consumer, rounded to the next highest dollar amount, for a month-long supply unless otherwise noted. Cost-sharing information reflecting the cost for a different duration supply should indicate the applicable duration. The cost-sharing amount for a given drug must be calculated based on the plan's median allowed amount or the actual cost for the drug, using the most up-to-date data available and the cost-sharing parameters under the enrollee's health benefit plan for the tier under which the drug is assigned. The information must include whether the cost-sharing amount is based on the median or the actual cost.

(e) Any formulary information presented using abbreviations must provide a legend on each page explaining the meaning of each abbreviation used, including the dollar amounts that correspond to the cost-sharing range.

§21.3033. *Facilitating Comparison Shopping.*

(a) The formulary information required by §21.3032 of this title (relating to Formulary Disclosure Requirements) must include a summary titled "Summary of Formulary Benefits" that includes this statement: "The information in this document is designed to help you understand the prescription drug benefits offered under this plan and to compare these benefits to those offered by other plans. Information contained in this summary is designed to help you compare both the value and scope of formulary benefits." The summary must also include, in the following order:

(1) Under the header, "How to Find Information on the Cost of Prescription Drugs," a description of how a consumer may use the plan's summary health plan document, formulary information, and web-based tool, if applicable, to determine the cost sharing they may owe, and an explanation that cost-sharing information reflects a consumer's share of the cost excluding any deductible requirement, calculated using an estimate of the full price of the drug, which is based on the plan's median or the actual cost allowed amount at a given point in time.

(2) Under the header, "Formulary by Health Benefit Plan," a chart that displays each formulary that applies to each health benefit plan issued by the issuer and includes a direct electronic link to the Summary of Benefits and Coverage for each health plan listed. This chart may be limited to health benefit plans being sold in the market in which the applicable health benefit plan is issued.

(3) Under the header, "Drugs by Cost-Sharing Tier," if the drug formulary is a multitier formulary, a summary that displays the percent of drugs in each cost-sharing tier for all drugs in the formulary.

(4) Under the header, "How Prescription Drugs are Covered under the Plan":

(A) under a section titled, "Formulary Composition," an explanation of the method the issuer uses to determine the prescription drugs to be included in or excluded from the formulary, an explanation of whether the formulary is open or closed, and a statement of how often the issuer reviews the contents of the formulary.

(B) Under a section titled, "Right to Appeal," an explanation that if a drug is not covered under the formulary, but the enrollee's physician has determined that the drug is medically necessary, the consumer has the right to appeal, consistent with §21.3023 of this title (relating to Nonformulary Prescription Drugs; Adverse Determination) and Insurance Code §1369.056. A statement of how cost sharing will be determined for drugs covered as a result of a successful appeal.

(C) Under a section titled, "Continuation of Coverage," an explanation of a consumer's right to continued coverage for a prescription drug at the coverage level or tier at which the drug was covered at the beginning of the plan year, until the enrollee's plan renewal date, consistent with §21.3022 of this title (relating to Continuation of Benefits) and Insurance Code §1369.055 and §1369.0541.

(D) Under a section titled, "Off-Label Drug Use," an explanation of how formulary drugs are covered under the plan, including an explanation of coverage for off-label drug use.

(E) Under a section titled, "Cost Sharing," an explanation of how cost sharing is determined under the plan, including whether a deductible applies to prescription drug coverage; how cost sharing for prescription drugs counts towards the plan's deductible; how drugs are categorized into each of the formulary tiers or cost-sharing levels, whether the drug formulary is a multitier formulary; the difference between preferred and nonpreferred drugs, if applicable; the difference in coverage for drugs dispensed from in-network and out-of-network pharmacies; and the difference in coverage for drugs dispensed in a retail pharmacy and a mail-order pharmacy, if applicable.

(F) Under a section titled, "Medical Management Requirements," an explanation of each type of medical management requirement used by the health benefit plan, including prior authorization, step therapy, or other protocol requirements that limit access to prescription drugs, as applicable.

(b) Formulary information must include the summary information required under subsection (a) of this section beginning on the first page of the formulary document under the title, "Summary of Formulary Benefits."

§21.3034. *Effective Date.*

(a) The requirements under §§21.3002 - 21.3004 of this title (relating to Definitions; Pharmacy Identification Cards, Standard Identification Cards, and Issuance of Standard Identification Cards) are effective January 1, 2017.

(b) The requirements under §§21.3030 - 21.3033 of this title (relating to Availability of Formulary Information, Formulary Disclosure Requirements, and Facilitating Comparison Shopping) are effective for plans marketed in the individual market on or after November 1, 2016, with an effective date on or after January 1, 2017.

(c) The requirements under §§21.3030 - 21.3033 of this title are effective for plans marketed in the group market on or after September 1, 2017.

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 29, 2016.

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Norma Garcia

General Counsel

Texas Department of Insurance

Effective date: August 18, 2016

Proposal publication date: February 5, 2016

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



28 TAC §21.3005, §21.3021

STATUTORY AUTHORITY. The repeal of §21.3005 and §21.3021 is adopted under Insurance Code §§1369.052, 1369.054, 1369.057, 1369.154, and 36.001.

Section 1369.052 extends the applicability of Subchapter B, to individual, small group, and large group health benefit plans. Section 1369.054 provides the notice and disclosure of certain information required by issuers of a health benefit plan that covers prescription drugs and uses one or more drug formularies to specify the prescription drugs covered under the plan. Section 1369.057 provides that the commissioner may adopt rules to implement Chapter 1369, Subchapter B. Section §1369.154 provides that the commissioner may adopt rules to implement Chapter 1369, Subchapter D. 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 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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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 51. EXECUTIVE SUBCHAPTER B. AUTHORITY TO CONTRACT

31 TAC §51.60, §51.61

The Texas Parks and Wildlife Commission (Commission) in a duly noticed meeting on March 24, 2016, adopted an amend-

ment to §51.60, concerning Authority to Contract, and new §51.61, concerning Enhanced Contract Monitoring, without changes to the proposed text as published in the February 19, 2016, issue of the *Texas Register* (41 TexReg 1198).

The amendment and new rule implement the requirements of Senate Bill (S.B.) 20 as enacted by the 84th Texas Legislature (2015). Senate Bill 20 amended Government Code, Chapter 2261, by adding new §2261.253(c), which states "each state agency by rule shall establish a procedure to identify each contract that requires enhanced contract or performance monitoring and submit information on the contract to the governing board...." Government Code, §2261.253(c) further requires that the agency's governing body be immediately notified of any serious issue or risk that is identified with respect to a contract monitored under that section.

S.B. 20 also added Government Code, §2261.254, which requires a state agency's governing board to approve contracts with a value in excess of \$1 million, and requires the presiding officer of the state agency to sign such contract. However, the approval and signature of such contracts may be delegated to the state agency's executive director. Department regulations (31 TAC §51.60) currently delegate authority to enter contracts to the department's executive director.

The amendment to §51.60 alters the current delegation of contracting authority to ensure compliance with S.B. 20 and to ensure proper review and approval of agency contracts. Subsection (a) clarifies that the delegation of authority includes, but is not limited to, contracts for the purchase of goods or services with a value exceeding \$1 million. The Commission is a part-time body that generally holds five meetings each year. Given the number of contracts entered by the department and the part-time nature of the Commission, delegating contracting authority to the executive director will help ensure that contracts are processed more efficiently.

The amendment to §51.60 also adds new subsection (b) to require the executive director to implement appropriate policies and procedures regarding the solicitation and signature of agency contracts. New subsection (b)(1) requires the implementation of policies and procedures to ensure that contracts are awarded in a manner that is fair and equitable and in accordance with applicable law. New subsection (b)(2) ensures proper review and approval of agency contracts, including review by department legal staff. The department currently has internal policies, procedures and processes for soliciting, awarding, reviewing and approving agency contracts. The amendment codifies a requirement to maintain such policies and procedures.

The amendment to §51.60 also adds new subsection (c) to clearly authorize the executive director to delegate authority to sign department contracts with a value of less than \$1 million to appropriate department staff, unless otherwise prohibited by statute or regulation. The delegation of contract signature authority would be subject to the requirements of subsection (b) of the section. In other words, a contract for which signature has been delegated would still be required to go through the appropriate review and approval process.

New §51.61 sets forth the criteria to be used by the department in determining whether a contract should be subject to enhanced contract monitoring. New subsection (a) requires the department to determine if enhanced contract monitoring is needed based on the criteria set out in subsection (b) of the section.

New §51.61(b) lists and describes the criteria to be considered by the department, to the extent applicable, in determining if enhanced contract monitoring is necessary. The criteria to be considered are: Total Contract Price; Total Contract Duration; Funding Source; User Impacts; Criticality of Deliverable Timing; Impact of Contract Failure; Locations Impacted; Availability of Resources for Contract Management; Complexity of Project; Health and Safety Risk; Business Process Impact; Payment Methodology Risks; and, End Users' Training Needs. In addition, for technology contracts, the department will consider Software Technology Customization; Impact on Existing Technology; and, Interface Connectivity. The department intends to rate proposed contracts using the criteria listed in proposed new subsection (b). Those contracts with a higher rating will receive enhanced monitoring and oversight by the department.

New §51.61(c) provides that the department may determine, after considering the factors listed in subsection (b), that certain types or classes of contracts are low-risk and have a low likelihood of serious issues. As a result, there would be no requirement to individually evaluate whether such contracts require enhanced contract monitoring. For example, certain very low-dollar, short-term contracts may be categorically excluded from the assessment required by subsection (b).

New §51.61(d) requires the department's director of contracting and procurement to notify the executive director regarding any serious risk or issue identified in connection with a contract subject to enhanced contract monitoring. The executive director will then be required to notify the Parks and Wildlife Commission of any such serious risk or issue identified.

The department received no comments opposing adoption of the proposed rules.

The department received two comments supporting adoption of the proposed rules.

No groups or associations commented concerning adoption of the proposed rules.

The amendment and new rule are adopted under the authority of Government Code, §2261.253, which requires state agencies to identify each contract that requires enhanced contract or performance monitoring and submit information on the contract to the agency's governing board and requires that the agency's governing body be immediately notified of any serious issue or risk that is identified with respect to a contract monitored under that section; §2261.254, which requires a state agency's governing board to approve and the presiding officer of the governing body to sign contracts with a value in excess of \$1 million, but authorizes the delegation of approval and signature authority for such contracts to the state agency's executive director; and Parks and Wildlife Code, §11.0171, which requires the commission to adopt by rule policies and procedures consistent with state procurement practices for soliciting and awarding contracts under that 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 27, 2016.

TRD-201603716

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CHAPTER 57. FISHERIES
SUBCHAPTER N. STATEWIDE RECREATIONAL AND COMMERCIAL FISHING
PROCLAMATION

The Texas Parks and Wildlife Commission in a duly noticed meeting on March 24, 2016 approved adoption of amendments to §§57.972, 57.973, and 57.981, concerning the Statewide Recreational and Commercial Fishing Proclamations, as published in the February 19, 2016, issue of the *Texas Register* (41 TexReg 1200). The rules are adopted without changes to the proposed text.

The amendment to §57.972, concerning General Rules, implements the provisions of House Bill (H.B.) 1579, enacted by the 84th Texas Legislature (2015), which amended Parks and Wildlife Code, §66.216, to provide that no person may possess a finfish of any species taken from coastal water, except broadbill swordfish, shark, or king mackerel, that has the head removed unless the fish has been finally processed and delivered to the final destination or to a certified wholesale or retail dealer; and that no person may possess a finfish of any species taken from coastal water, except broadbill swordfish or king mackerel, that has the tail removed unless the fish has been finally processed and delivered to the final destination or to a certified wholesale or retail dealer.

The amendment to §57.973, concerning Devices, Means, and Methods, clarifies regulations governing gear restrictions on pole-and-line. The department has received several comments to the effect that the current wording of paragraph (13)(A) is confusing and does not make it clear that "snagging" and "jerk-ing" are unlawful acts included in the provision. The amendment makes that distinction clear.

The amendment to §57.981, concerning Bag, Possession, and Length Limits, consists of several components.

The amendment to §57.981 alters harvest regulations for smallmouth bass on Lake Meredith in Hutchinson, Moore, and Potter counties, replacing the current 12-15 inch slot length limit and three-fish daily bag with the statewide standard (14-inch minimum length limit and a daily bag limit of five fish). Lake Meredith contained a smallmouth bass population until approximately 2011, when golden alga blooms extirpated the population in the reservoir. Drought has also had an impact as the reservoir was below 1% capacity from 2011 to 2014. Restocking of smallmouth bass is being evaluated, and the 14-inch limit is an appropriate regulation for managing a newly-stocked population.

The amendment to §57.981 also eliminates the current statewide standard regulation for saugeye and merges saugeye regulations with the current statewide standard regulation for walleye. The previous harvest regulations for saugeye (18-inch minimum and three-fish daily bag limit) are replaced with no minimum length limit and a five-fish daily bag limit, of which no more than two fish less than 16 inches could be lawfully retained. The saug-

eye is a hybrid between walleye and sauger, stocked to prey on stunted crappie populations and to provide another fishing opportunity for anglers. Stockings were not successful in achieving those goals, and the saugeye stocking program has been discontinued. Existing saugeye populations will likely be gone within the next 5-10 years. A separate regulation is not needed since saugeye will no longer be stocked.

The amendment to §57.981 also alters harvest regulations for largemouth bass on Lake Naconiche in Nacogdoches County. Current harvest regulations consist of an 18-inch minimum length limit and a five-fish daily bag limit. The amendment imposes a 16-inch maximum length limit and five-fish daily bag; however, one fish 24 inches or greater may be retained alive for immediate weighing using personal scales. Bass weighing 13 pounds or more may be donated to the ShareLunker Program; otherwise, fish must be immediately released. Lake Naconiche was opened in 2012 with an 18-inch minimum length limit. The bass population is still developing and has trophy potential. Establishing a maximum length limit of 16 inches could increase numbers of trophy-sized bass in the population by providing protection to large bass currently vulnerable to harvest (larger than 18 inches). A maximum length limit that allows retention of only ShareLunker bass (13 pounds or larger) could increase contributions to the ShareLunker program. Allowing harvest of bass less than 16 inches could decrease intraspecific competition and increase growth rates.

The amendment to §57.981 also alters harvest regulations for largemouth bass in Chambers, Galveston, Jefferson, Newton, and Orange counties. The current harvest regulations in these counties consists of a 14-inch minimum length limit and a five-fish daily bag limit. The amendment imposes a 12-inch minimum length limit (the five-fish daily bag would be retained). Additional changes affect the Sabine River from the Toledo Bend dam to a line across Sabine Pass between Texas Point and Louisiana Point and in Chambers, Galveston, Jefferson, and Orange counties, including any waters that form boundaries with adjacent counties. There has been increased local interest in bass fishing and tournament angling in this area of Southeast Texas. Numerous professional and high school/college bass tournaments have occurred. Anglers have noted catching numerous bass over 12 inches but less than 14 inches. The department has agreed to investigate bass populations in that area and has determined that populations are abundant but slow-growing, with few fish exceeding 14 inches. These population characteristics mirror those in coastal bass populations along the Gulf. The amendment will have minimal impact to the population but will allow anglers the option of weighing in 12- and 13-inch bass in catch-and-release tournaments.

The amendment to §57.981 also affects harvest regulations for channel and blue catfish on Lake Tawakoni in Hunt, Raines, and Van Zandt counties. The current harvest regulations consist of a 14-inch minimum length limit and a 25-fish daily bag limit. The amendment eliminates the minimum length limit and retains the 25-fish bag limit, but anglers would be allowed to retain only seven fish 20 inches or greater in length, and of these seven fish, only two could be 30 inches or greater. The blue catfish fishery in Tawakoni was the result of a stocking in 1989 of 366,675 blue catfish fingerlings. The harvest of large fish concerned some anglers and those anglers have expressed a desire for reduced harvest of catfish larger than 30 inches. Staff question whether the trophy fishery can be sustained at its current level into the future. Special sampling was started in 2013 to assess the blue catfish fishery. An angler survey was conducted and most an-

glers were satisfied with current limits but respondents did support reducing harvest of large blue catfish. Population modeling was done to assess potential impacts on 20- to 30-inch fish under various regulation scenarios. The regulation as adopted was selected to best address concerns about over-harvest of large blue catfish, redirect some of the harvest, and to potentially increase the catch of blue catfish greater than 30 inches. Blue catfish are the focus of the regulation; channel catfish will be minimally impacted.

The amendment to §57.981 also corrects the maximum length limit stated for black drum. Last year, the department eliminated an awkward tabular format for establishing bag, possession, and length limits. In the process, the 30-inch maximum length limit for black drum was inadvertently eliminated. The amendment corrects that oversight. The 30-inch maximum size limit was originally selected in 1990 and was in effect continuously since that time. This length limit was selected to protect spawning adults, especially during the spring spawning run when these fish are most accessible by anglers.

The amendment to §57.981 also increases the recreational minimum length limit for amberjack to reflect recent federal actions regarding that species. The amendment increases the recreational minimum size limit for amberjack from 34 inches to 38 inches (total length). The National Marine Fisheries Service (NMFS) recently issued regulations to implement management measures in the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico, one of which was to increase the recreational minimum size limit for amberjack. The change is intended to provide an opportunity for a greater number of sexually mature greater amberjack to spawn, which could assist in efforts to end overfishing and rebuild stock. The department has determined that the federal action is consistent with sound fisheries management principles and that making the state regulation identical to the federal regulation will help achieve management goals, be beneficial to the resource, and prevent angler confusion.

The department received nine comments opposing adoption of the portion of the proposed amendment to §57.973 that affects pole-and-line gear restrictions. Of those comments, two articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that the rule should not apply to nongame fish. The department disagrees with the comment and responds that snagging is an indiscriminant method of catching fish, which could lead to the accidental snagging of game fish, potentially resulting in high mortality of non-targeted game fish. No changes were made as a result of the comment.

One commenter opposed adoption and stated opposition to rules requiring live wells to be drained. The department disagrees that the comment is germane to pole-and-line gear restrictions or to other amendments to the statewide fishing proclamation. No changes were made as a result of the comment.

The department received 50 comments supporting adoption of the portion of the proposed amendment to §57.973 that affects pole-and-line gear restrictions.

The department received five comments opposing adoption of the portion of the proposed amendment to §57.981 that affects smallmouth bass on Lake Meredith. All five commenters provided a reason or rationale for opposing adoption. Those com-

ments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that smallmouth bass have no place in Texas waters and should not be managed at all other than to be eliminated. The department disagrees with the comment and responds that the construction of reservoirs in Texas created artificial habitats that were not suitable for some native fishes; in order to provide beneficial recreational uses of these reservoirs, the department stocks fishes native to nearby states that are compatible with native species and that can provide recreational benefit to anglers. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule should impose a minimum length of 15 inches and a bag limit of three per day. The department disagrees with the comment and responds that the 12-15 inch slot limit was implemented on Lake Meredith in 1992 because abundant spawning of smallmouth bass was resulting in an overabundance of small bass. A 14-inch limit will provide sufficient protection from harvest to achieve the goal of reestablishing smallmouth bass. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there is too much emphasis on trophy fishing and that people should be allowed to keep more of what they catch. The department disagrees with the comment and responds that the rule is intended to protect a newly-stocked population from overfishing. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the current limits should be retained until a healthy smallmouth bass population is confirmed. While the department agrees that retaining a healthy smallmouth bass population is a goal, the department disagrees that the rule as adopted is contradictory to that goal. The department also responds that the rule as adopted will afford more, not less protection, than the current regulation while the population is becoming established following restocking. No changes were made as a result of the comment.

One commenter opposed adoption and stated opposition to rules requiring live wells to be drained. The department disagrees that the comment is germane to harvest regulations on Lake Meredith or to other amendments to the statewide fishing proclamation. No changes were made as a result of the comment.

The department received 39 comments supporting the adoption of the portion of the proposed amendment to §57.981 that affects smallmouth bass on Lake Meredith.

The department received two comments opposing adoption of the portion of the proposed amendment to §57.981 that affects saugeye. Both commenters provided a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated opposition to rules requiring live wells to be drained. The department disagrees that the comment is germane to harvest regulations for saugeye or to other amendments to the statewide fishing proclamation. No changes were made as a result of the comment.

One commenter opposed adoption and stated that harvest regulations for saugeye should be eliminated completely. The department disagrees with the comment and responds that two reservoirs have both walleye and saugeye. Anglers could have difficulty distinguishing between these fishes and could be subject to

finer if they harvested walleye mistakenly identified as saugeye. No changes were made as a result of the comment.

The department received 41 comments supporting the adoption of the portion of the proposed amendment to §57.981 that affects saugeye.

The department received eight comments opposing adoption of the portion of the proposed amendment to §57.981 that affects largemouth bass on Lake Naconiche. Of those comments, three provided a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that anglers should be allowed to retain trophy fish. The department disagrees with the comment and responds that allowing the retention of numerous larger, older fish would have a deleterious impact on populations. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there is too much emphasis on the trophy fishery and that people should be allowed to keep more of what they catch. The department disagrees with the comment and responds that the protection of older, larger fish results in a healthier and more sustainable populations, while the removal of such fish, in sufficient numbers, has the opposite effect. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule will result in the overharvest of younger fish and that the department instead should implement a 12-16 inch slot limit. The department disagrees with the comment and responds that there are numerous slot limits on other waterbodies that allow the harvest of bass smaller than 14 or 16 inches in length in addition to two reservoirs that have harvest regulations similar to those adopted for Lake Naconiche. The department has not detected overharvest in any of those populations and does not believe that overharvest will occur Lake Naconiche as a result of the same harvest regulation. No changes were made as a result of the comment.

The department received 41 comments supporting adoption of the portion of the proposed amendment to §57.981 that affects largemouth bass on Lake Naconiche.

The department received nine comments opposing adoption of the portion of the proposed amendment to §57.981 that affects largemouth bass in Chambers, Galveston, Jefferson, Newton, and Orange counties. Of those comments, five articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that reducing the minimum size limit will prevent larger numbers of larger fish in the future. The department disagrees with the comment and responds that bass mortality rates calculated from population data indicate that natural mortality is high, resulting in few fish reaching 14 inches, the current length limit. Population model data indicate that reducing the length limit to 12 inches will have minimal impact on the production of larger fish. No changes were made as a result of the comment.

One commenter opposed adoption and stated that management should not be changed for tournament anglers. The department disagrees with the comment and responds that while the change to 12 inches will benefit tournament anglers, the change will also allow non-tournament anglers the opportunity to harvest some bass. In addition, population model data indicate that reducing

the length limit to 12 inches will have minimal impact on bass populations. No changes were made as a result of the comment.

One commenter opposed adoption and stated that a three-fish bag limit with a 15-inch should be implemented. The department disagrees with the comment and responds that bass mortality rates calculated from population data indicate that natural mortality is high resulting in few fish reaching 14 inches, the current length limit. Population model data indicate that reducing the length limit to 12 inches will have minimal impact on the production of larger fish. Increasing the length limit to 15 would further exacerbate the negative impacts of high natural mortality. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule is being implemented to benefit trophy anglers and tournaments. The department disagrees with the comment and responds that while the change to 12 inches will benefit tournament anglers, the change will also allow non-tournament anglers the opportunity to harvest some bass. In addition, population models indicate that reducing the length limit to 12 inches will have minimal impact on bass populations. No changes were made as a result of the comment.

One commenter opposed adoption and stated opposition to rules requiring live wells to be drained. The department disagrees that the comment is germane to harvest regulations for largemouth bass or to other amendments to the statewide fishing proclamation. No changes were made as a result of the comment.

The department received 47 comments supporting adoption of the portion of the proposed amendment to §57.981 that affects largemouth bass in Chambers, Galveston, Jefferson, Newton, and Orange counties.

The department received 14 comments opposing adoption of the portion of the proposed amendment to §57.981 that affects channel and blue catfish on Lake Tawakoni. Of those comments, 11 articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that there is too much emphasis on the trophy fishery and that people should be allowed to keep more of what they catch. The department disagrees with the comment and responds that the regulation is intended to protect older, larger fish, which results in a healthier and more sustainable population. No changes were made as a result of the comment.

One commenter opposed adoption and stated opposition to rules requiring live wells to be drained. The department disagrees that the comment is germane to harvest regulations for catfish or to other amendments to the statewide fishing proclamation. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the same objective could be achieved by allowing angler to retain only five fish of over 25 inches in length. The department disagrees with the comment and responds that population modeling data indicate that reducing the harvest of 20-30 inch blue catfish will provide the optimal long-term benefits for maintaining the population at its current levels. No changes were made as a result of the comment.

One commenter opposed adoption and stated that flathead catfish should be included because they are a desirable species for hand-fishing. The department disagrees with the comment and responds that flathead catfish are managed under sepa-

rate, more restrictive regulations consisting of an 18-inch minimum length limit and a five-fish daily bag limit. Population studies done on hand-fishing activities at Lake Palestine in Texas have not indicated any negative impacts to flathead catfish populations. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule should be similar to the rules for red drum (one "trophy" per year) because large blue catfish will be overharvested under the rule as proposed. The department disagrees with the comment and responds that population modeling data indicate that reducing harvest to one trophy fish per year is not necessary because the bag limit as adopted is sufficient to sustain the population structure in Lake Tawakoni. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the current minimum length limit should be retained, but the take of fish 30 inches or more in length should be prohibited. The department disagrees with the comment and responds that population modeling data indicate that the regulation as adopted will protect the sustainability of the population. No changes were made as a result of the comment.

One commenter opposed adoption and stated that only one fish over 30 inches should be allowed to be retained, there should be a boat limit of five fish of greater than twenty inches, and that fish greater than thirty inches in length should be required to be tagged. The department disagrees with the comment and responds that population modeling data indicate that severe harvest reduction is not necessary and that the bag limit as adopted is sufficient to sustain the population structure. No changes were made as a result of the comment.

One commenter opposed adoption and stated that only one fish larger than 30 inches and one fish larger than 40 inches should be allowed to be retained. The department disagrees with the comment and responds that population modeling data indicate that severe harvest reduction is not necessary and that the bag limit as adopted is sufficient to sustain the population structure. No changes were made as a result of the comment.

One commenter opposed adoption and stated that only one fish of greater than 30 inches in length should be allowed to be retained. The department disagrees with the comment and responds that population modeling data indicate that reducing harvest to this level is not necessary, and the bag limit being implemented is sufficient to sustain the population structure in Lake Tawakoni. No changes were made as a result of the comment.

One commenter opposed adoption and stated that by limiting the harvest to 20-inch fish, the regulations would prevent anglers from retaining fish large enough to eat. The department disagrees with the comment and responds that a 20-inch blue catfish on average weighs 3 pounds, which most anglers would judge as more than adequate for harvest. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the regulations seemed to be intended to aid fishing guides. The department disagrees with the comment and responds that the rule as adopted will protect the sustainability of the population and benefit all anglers. No changes were made as a result of the comment.

The department received 46 comments supporting adoption of the portion of the proposed amendment to §57.981 that affects channel and blue catfish on Lake Tawakoni.

The department received six comments opposing adoption of the portion of the proposed amendment to §57.981 that affects black drum. Of those comments, two articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that management goals are not needed. The department disagrees with the comment and responds that the department has a statutory duty to manage black drum, along with all other native fishes. As a result, management goals are necessary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that one black drum over 30 inches should be allowed to be retained. The department disagrees with the comment and responds that establishing the minimum length limit for black drum is not the intent of the rule. The rule is intended to restore a pre-existing regulation that was inadvertently omitted during an administrative reorganization of the rules. In addition, as noted elsewhere in this preamble, the 30-inch maximum size limit was originally selected in 1990 and was in effect continuously since that time. This length limit was selected to protect spawning adults, especially during the spring spawning run when these fish are most accessible by anglers. No changes were made as a result of the comment.

The department received 44 comments supporting adoption of the portion of the proposed amendment to §57.981 that affects black drum.

The department received nine comments opposing adoption of the portion of the proposed amendment to §57.981 that affects greater amberjack. Of those comments, three articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Two commenters opposed adoption and stated that negative population impacts on amberjack are a result of commercial fishing activities, not recreational. The department disagrees with the comment and responds that the federal fisheries management plan recommends the minimum length increase as a way to replenish stocks and the department agrees, irrespective of the cause of overfishing. No changes were made as a result of the comments.

One commenter opposed adoption and stated that management goals are not needed and that the money should instead be spent protecting our borders. The department disagrees with the comment and responds that the department has a statutory duty to manage all native fishes and that border security is beyond the scope of the rules. No changes were made as a result of the comment.

The department received 35 comments supporting adoption of the portion of the proposed amendment to §57.981 that affects greater amberjack.

DIVISION 1. GENERAL PROVISIONS

31 TAC §57.972, §57.973

The amendments are adopted under the authority of Parks and Wildlife Code, §47.004 and §47.005, which authorize the commission to adopt rules governing the issuance and use of resident and nonresident fishing guide licenses; Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess aquatic animal life in this state; the means, methods, and places in which it is lawful to take, or possess aquatic animal life in this state; the species,

quantity, age or size, and, to the extent possible, the sex of the aquatic animal life authorized to be taken or possessed; and the region, county, area, body of water, or portion of a county where aquatic animal life may be taken or possessed; and §67.004, which requires the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species.

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 27, 2016.

TRD-201603718

Ann Bright

General Counsel

Texas Parks and Wildlife Department

Effective date: September 1, 2016

Proposal publication date: February 19, 2016

For further information, please call: (512) 389-4775



DIVISION 2. STATEWIDE RECREATIONAL FISHING PROCLAMATION

31 TAC §57.981

The amendment is adopted under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to take or possess aquatic animal life in this state; the means, methods, and places in which it is lawful to take or possess aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the aquatic animal life authorized to be taken or possessed; and the region, county, area, body of water, or portion of a county where aquatic animal life may be taken or possessed.

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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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



CHAPTER 65. WILDLIFE SUBCHAPTER A. STATEWIDE HUNTING PROCLAMATION

The Texas Parks and Wildlife Commission in duly noticed meeting on March 24, 2016, adopted the repeal of §65.27 and amendments to §§65.3, 65.7, 65.9, 65.10, 65.24, 65.25, and 65.42, concerning the Statewide Hunting Proclamation. Section 65.42 is adopted with changes to the proposed text as published in

the February 19, 2016, issue of the *Texas Register* (41 TexReg 1205). The repeal of §65.27 and the amendments to §§65.3, 65.7, 65.9, 65.10, 65.24, and 65.25 are adopted without changes and will not be republished.

The change to §65.42, concerning Deer, replaces inaccurate rule text concerning the implementation of the open season for white-tailed deer in Winkler County. In the proposal preamble, the department stated the intent to open both a general and special archery-only season for white-tailed deer in Winkler County, with the take of antlerless deer restricted to MLD Permit only (to be consistent with the harvest regulations in adjacent counties); however, the published rule text indicated that no permit is required to hunt antlerless deer unless MLD antlerless permits have been issued for the tract of land, which isn't the case. The change rectifies the oversight.

The repeal of §65.27, concerning Antlerless and Spike-buck Deer Control Permits (control permits) is necessary because the department is eliminating that permit program. Participation has diminished to the point that fewer than five permits per year are issued, which does not justify the administrative costs to the department, especially considering that the department's Managed Lands Deer Permit (MLDP) program (and its successor program, scheduled to take effect September 1, 2017) allows landowners and land managers to achieve the same goals without having to purchase a permit. As a result of the elimination of the program, the amendments to §65.7, concerning Harvest Log; §65.10, concerning Possession of Wildlife Resources; §65.24, concerning Permits; §65.25, concerning Wildlife Management Plan (WMP); and §65.42, concerning Deer are necessary to remove references to the control permit.

The amendment to §65.3, concerning Definitions, adds a new definition for "unbranched antlered deer", defined as "a buck deer having at least one unbranched antler." The new definition is necessary because the amendment to §65.42, concerning Deer, among other things, eliminates the current late antlerless and spike buck season and replaces it with a special late season during which harvest would be restricted to antlerless and unbranched antlered deer.

The amendment to §65.9, concerning Open Seasons: General Rules, adds language to subsection (b) to clarify that the provision applies only to white-tailed deer. The provisions of §65.42(c) specify the permit requirements for the harvest of antlerless mule deer during archery-only open seasons and thus there is an unintentional conflict with the current provisions of §65.9(b). The amendment would eliminate that conflict.

The amendment to §65.42, concerning Deer, consists of several actions.

As mentioned previously in this preamble, the department has eliminated the Late Antlerless and Spike Buck Season and replaced it with a Special Late Season, during which harvest is restricted to antlerless and unbranched antlered deer. In another rulemaking, the department adopted new §65.29 (41 TexReg 806) to create a Managed Lands Deer Program (MLDP) beginning September 1, 2017. In order to provide greater management flexibility to program participants, new §65.29 in certain situations allows for the harvest of unbranched antlered deer. The department considers that in those counties where the "antler restriction rule" (defining a legal buck as a buck with at least one unbranched antler or an inside spread of 13 inches or greater and limiting the harvest to no more than one buck with an inside spread of 13 inches or greater) is in place, the new MLDP rule

could cause confusion with respect to which buck deer are lawful to take. Therefore, the department has chosen to create a single standard (the unbranched antlered deer) to facilitate compliance and enforcement.

The amendment to §65.42 also expands the number of "doe days" (time periods when antlerless deer may be taken without a permit in parts of the state where antlerless harvest regulations are conservative) in 23 counties. The current deer harvest regulations in Bell (east of IH35), Burleson, Ellis, Falls, Free-stone, Kaufman, Limestone, Milam, Navarro, and Williamson (east of IH35) counties have allowed the harvest of antlerless deer only by permit. Deer population trends in this area have experienced a 23% population increase during the past six years. The doe/buck ratio of 3.5 is considered relatively high and likely extends both the breeding and fawning seasons, thus resulting in poor recruitment (33-42%). The implementation of antler-restriction regulations in these counties has helped improve the adult sex ratio, but current antlerless deer harvest regulations are a barrier to successful management of the increasing deer population. The fifteen-year average hunter success in the Post Oak region is 45.2% and trends suggest an increasing hunter success, but antlerless harvest comprises only 34.5% of total harvest (15-year avg.). Increased doe harvest during the general season is needed to reduce the impact of the deer herd upon the habitat, improve the sex ratio, shorten the breeding season, and improve fawning success. Therefore, the department is implementing four "doe days" in these counties, during which hunters may harvest antlerless deer without a permit. The amendment will also have the additional benefit of increasing hunting opportunity.

The amendment also expands "doe days" in Anderson, Brazos, Camp, Gregg, Grimes, Henderson, Lamar, Leon, Madison, Morris, Red River, Robertson, and Upshur counties, from the current four days to 16 days. These counties span the eastern edge of the Post Oak Savannah and the western edge of the Pineywoods ecoregions. Deer populations in this group of counties appear to be on an increasing trend (based on survey results), and data indicate that populations are currently at or slightly above desired densities. At current population and harvest levels, habitat quality and quantity will be degraded, affecting all species on the landscape. The doe/buck ratio is skewed towards does (6.3:1), and the reduced number of bucks creates increased hunting pressure on the buck segment of the deer herd. Buck harvest in these counties appears to have increased slightly, while antlerless deer harvest has remained stable, based on age/weight/antler data collection efforts. Most of these counties are experiencing suboptimal antlerless harvest, which is indicated by an increasing trend in the age structure of the doe population. Antlerless harvest remains well below 50% of the total harvest, which is undesirable. Overall, the deer herd in these counties appears to be above carrying capacity and not responding satisfactorily to the current number of "doe days." The expansion from four "doe days" to 16 "doe days" is expected to provide additional hunting opportunity while reducing the number of deer to benefit the deer population and the native habitat. The additional doe harvest may also alleviate some of the harvest pressure on the buck segment of the herd and result in a more balanced sex ratio, ultimately increasing the number of bucks in the population.

The department has received requests to open a white-tailed deer season in several counties in the western panhandle. This area of the state encompasses the western edge of the white-tailed deer range in Texas. The department has confirmed that

white-tailed deer populations have expanded westward towards the New Mexico border and continued westward expansion is expected. Therefore, the amendment to §65.42 implements both general and special archery-only seasons for white-tailed deer in Andrews, Bailey, Castro, Cochran, Gaines, Hale, Hockley, Lamb, Lubbock, Lynn, Parmer, Terry and Yoakum counties, with a bag limit of three deer (no more than one buck and no more than two antlerless), which is identical to adjoining/nearby counties that currently have a season. The amendment also implements both a general and special archery-only season for white-tailed deer in Winkler County, with a bag limit of three deer (no more than one buck and no more than two antlerless, with the take of antlerless deer restricted to MLD Permit only). The new season is identical to adjoining/nearby counties that currently have a season. The new seasons are not expected to result in negative population impacts but will provide additional hunting opportunity where white-tailed deer populations are expanding.

The amendment to §65.42 also implements a late muzzleloader-only season in Anderson, Bell (East of IH 35), Brazos, Burleson, Comal (East of IH 35), Delta, Ellis, Fannin, Falls, Franklin, Free-stone, Grimes, Hays (East of IH 35), Henderson, Hopkins, Hunt, Kaufman, Lamar, Leon, Limestone, Madison, Milam, Navarro, Rains, Red River, Robertson, Smith, Titus, Travis (East of IH 35), Van Zandt, Williamson (East of IH 35), and Wood counties. The department has determined that additional conservative harvest in these counties will provide increased hunting opportunity while potentially helping achieve antlerless deer harvest goals, which is necessary to stabilize deer populations and reduce adverse habitat impacts.

The department has received several requests from the U.S. Forest Service (USFS) to allow youth on USFS lands to harvest antlerless deer without a permit during youth-only seasons. The department does not believe the resulting harvest would exert any negative impacts on deer populations in any county where USFS lands are located and would have the benefit of providing additional youth hunting opportunity. Therefore, the amendment to §65.42 authorizes the take of antlerless deer by youth without a permit during youth-only seasons. Additionally, the amendment clarifies that the harvest of deer during youth seasons is restricted to persons 16 years of age and younger, except on properties where Level 2 or Level 3 MLDPs have been issued. Under the provisions of §65.26 of this subchapter, concerning Managed Lands Deer Permits, harvest of deer on Level 2 and Level 3 MLDP properties is authorized during the period of validity of the permits, not by the season and bag limit established for counties in §65.42; however, harvest on Level 1 MLDP properties is lawful during any open season. The department seeks to clarify that Level 1 MLDPs cannot be used by adults to harvest deer during the youth-only season.

The department received 14 comments opposing adoption of the proposed amendments that collectively eliminate the antlerless and spike buck deer control permit. None of the commenters provided a reason or rationale for opposing adoption. No changes were made as a result of the comments.

The department received 302 comments supporting adoption of the proposed amendments that collectively eliminate the antlerless and spike buck deer control permit.

The department received 10 comments opposing adoption of the proposed amendments to §65.3 and §65.42, concerning Definitions, that adds a new definition for "unbranched antlered deer", defined as "a buck deer having at least one unbranched antler"

and creates a special late season for the take of antlerless and unbranched antlered deer. Of the 10 comments, three offered a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that antlerless deer should not be harvested after November in order to avoid the harvest of bred does. The department disagrees with the comment and responds that the primary goal of regulations governing the harvest of antlerless deer is to prevent depletion of the resource. The current harvest regulations for antlerless deer will not result in any negative impacts on the reproductive potential in any RMU ("resource management unit," a subset of an ecological area with similar hunting pressure, deer harvest, deer density, and deer production estimates). No changes were made as a result of the comment.

Two commenters opposed adoption and stated that harvest regulations should protect spikes in order to allow them to become branch-antlered deer. The department disagrees with the comments and responds that the special late season is implemented in those RMUs where biological data indicated populations that can withstand additional harvest of deer and is intended to give landowners and wildlife managers additional opportunity to protect habitat quality and quantity. No changes were made as a result of the comments.

The department received 386 comments supporting adoption of the proposed amendments to §65.3 and §65.42, that adds a new definition for "unbranched antlered deer", defined as "a buck deer having at least one unbranched antler" and creates a special late season for the take of antlerless and unbranched antlered deer.

The department received no comments supporting or opposing adoption of the proposed amendment to §65.9 that clarified provisions governing the harvest of antlerless deer during archery seasons.

The department received 47 comments opposing adoption of the portion of the proposed amendment to §65.42 that expanded "doe days" in 23 counties or portion of counties. Of the 47 comments, 24 offered a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that "doe days" should be implemented in Kaufman County. The department disagrees with the comment and responds that Kaufman County is characterized by increasing urbanization and habitat fragmentation, small deer populations, small acreages, and relatively high hunting pressure, which dictates that the department implement the most restrictive harvest regime for does (harvest by permit only) in order to ensure that populations are able to sustain themselves. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that there are too many unnecessary regulations. The department disagrees with the comment and responds that the rule is not unnecessary because it represents the discharge of the department's statutory duty to manage and conserve wildlife resources. No changes were made as a result of the comments.

One commenter opposed adoption and stated that "doe days" should be eliminated and the department should instead establish a bag limit for does. The department disagrees with the comment and notes that there is an overall bag limit on deer, so unlimited take of doe deer is not allowed. The department

also responds that eliminating "doe days" would probably be widely unpopular and is not biologically necessary. The underlying concept of "doe days" is the fair distribution of hunting opportunity while simultaneously reducing the possibility of excessive harvest and subsequent negative population impacts. "Doe days" are implemented in RMUs where habitat quality/availability, tract sizes, and hunting pressure data are predictors of potential undesirable harvest of antlerless deer under the traditional "either-sex" hunting seasons. Properties under department management plans receive a specific number of antlerless permits representing a biologically sustainable harvest. The limited harvest of antlerless deer during specified "doe days" (i.e., without a permit requirement) allows landowners and hunters who either don't want to participate in department management programs or have properties too small to justify permit issuance the opportunity to harvest antlerless deer without permits during a limited time period. The department believes that under this harvest structure, the antlerless segment of the population receives adequate protection and hunting opportunity is distributed as equitably as possible. An antlerless bag limit in the absence of doe days would have to take the form of a permit program in which owners/lessees of smaller tracts and tracts consisting of suboptimal habitat would receive permits infrequently, if at all. Under the current harvest structure, opportunity is more equitably distributed. No changes were made as a result of the comment.

One commenter opposed adoption and stated that "doe days" should not be increased in Red River or Lamar counties because the doe population needs to be conserved. The department disagrees that the rule as adopted will result in negative impacts to doe populations in Red River or Lamar counties and responds that the deer herd in these counties appears to be above carrying capacity and antlerless harvest remains well below 50% of the total harvest, which is undesirable. The expansion from four "doe days" to 16 "doe days" is expected to provide additional hunting and management opportunity while improving habitat quality. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be at least 30 "doe days" in Lamar County because the doe population is too large. The department disagrees with the comment and responds that although there may be localized instances of overabundance of antlerless deer in Lamar County, in general there is a need to impose somewhat conservative harvest strategy in order to prevent overharvest of the doe segment of the population. No changes were made as a result of the comment.

One commenter opposed adoption and stated the season in Titus County should be shortened because deer numbers are down; similarly, three commenters opposed adoption and stated that "doe days" should not be increased in Leon County because the deer population is not increasing, one commenter opposed adoption and stated that there are not enough deer in Morris County to sustain additional "does days", and four commenters opposed adoption and stated that there is a lack of deer in Milam County. The department disagrees with the comments and responds, as stated in the proposal preamble, that the biological parameters indicate that additional antlerless harvest is not only sustainable in these counties, but desirable. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the increase in "doe days" will kill off the deer population. The department disagrees with the comments and responds that as stated in the proposal preamble, the biological data from the affected RMUs

indicate that population levels have reached a point that an increase in antlerless harvest is necessary in order to prevent habitat degradation. No changes were made as a result of the comment.

One commenter opposed adoption and stated that more does should be harvested. The department agrees with the comment. No changes were made as a result of the comment.

One commenter opposed adoption and stated that "doe days" should be implemented in Gonzales County. The department disagrees with the comment and responds that the rules as proposed were intended to address deer populations in specific RMUs on the basis of biological trend data. Trend data for Gonzales County indicates that the current antlerless harvest regulation (harvest by permit only) should be maintained. No changes were made as a result of the comment.

The department received several comments opposing adoption because specific counties in East Texas were not selected for additional "doe days." Two commenters opposed adoption and stated that "doe days" should be increased in Wood County; one commenter opposed adoption and stated that "doe days" should be increased in Van Zandt County; one commenter opposed adoption and stated that "doe days" should be increased in Fannin County; and one commenter opposed adoption and stated that additional "doe days" should be implemented in Marion County. The department disagrees with the comments and responds that biological data indicate that the current number of "doe days" established in the respective counties are providing effective management of the antlerless segment of the population at the current time and do not need to be altered. No changes were made as a result of the comments.

One commenter opposed adoption and stated that deer census data is inaccurate due to double-counting. The department disagrees with the comment and responds that although statistical analysis of a mobile population of inference is inherently imprecise, various indices in addition to census data (locker plant visits, harvest logs, browse surveys, etc.), gathered systematically over time will produce accurate population trend data. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be 10 "doe days" instead of 16. In a similar vein, one commenter opposed adoption and stated that all counties should have seven "doe days." The department disagrees with the comments and responds that in an effort to systematize harvest regulations to make analysis more effective and meaningful, the department several years ago implemented a three-tiered system of "doe days" (4 days, 16 days, and from opening day until the Sunday following Thanksgiving). This system basically provides for a high, medium, and low control of antlerless harvest. The department believes that either seven or 10 "doe days" would provide very little in the way of additional management opportunity, as these values fall between the "high" and "medium" values for antlerless harvest control, which isn't necessary to avoid negative population impacts and isn't justifiable in terms of the additional regulatory complexity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that allowing four does to be harvested during the "doe days" in Limestone County will damage the population. The department agrees with the comment and responds that the bag limit for antlerless deer in Limestone County is two. No changes were made as a result of the comment.

The department received 404 comments supporting adoption of the proposed amendment to §65.42 that expanded "doe days" in 23 counties or portions of counties.

The department received 18 comments opposing adoption of the proposed amendment to §65.42 that implements both general and special archery-only seasons for white-tailed deer in Andrews, Bailey, Castro, Cochran, Gaines, Hale, Hockley, Lamb, Lubbock, Parmer, Terry, Winkler, and Yoakum counties. Of the 15 comments, three offered a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that Grayson County should be included. The department disagrees with the comment and responds that the intent of the rule is to address deer population expansion in the Panhandle. Grayson County is not in the Panhandle. No changes were made as a result of the comment.

The department received 385 comments supporting adoption of the proposed amendment to §65.42 that implements both general and special archery-only seasons for white-tailed deer in Andrews, Bailey, Castro, Cochran, Gaines, Hale, Hockley, Lamb, Lubbock, Parmer, Terry, and Yoakum counties.

The department received 108 comments opposing adoption of the proposed amendment to §65.42 that implements both general and special archery-only seasons for white-tailed deer in Lynn County. Of the 108 comments (105 of which were via petition), all offered a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One-hundred seven commenters opposed adoption and stated that the season would allow hunters in the field during the mule deer rut, creating the possibility of mule deer being harvested by accident. The department disagrees with the comment and responds that there are many counties in Texas that have concurrent seasons for white-tail and mule deer and that misidentification of species does not appear to be a common occurrence. No changes were made as a result of the comment.

One-hundred six commenters opposed adoption and stated that there is no habitat for white-tailed deer in the western two-thirds of Lynn County and that poaching will increase if a season is opened. The department disagrees with the comment and responds that because habitat on the edge of the white-tailed deer range in the Panhandle is ephemeral, the deer population responds by expanding and contracting in response to the presence or absence of habitat; thus, harvest has little to no negative impacts on the population. Additionally, the department responds that there is no correlation between poaching and the presence or absence of a hunting season. No changes were made as a result of the comment.

One-hundred five commenters opposed adoption and stated that game wardens will be spread too thin. The department understands the commenters to be raising concerns (much like the comments described above) that the opening of a white-tailed deer season in Lynn County will result in the need for additional game wardens to address possible poaching. As noted above, there is no correlation between poaching and the presence or absence of a hunting season. However, the department is committed to ensuring the availability of an appropriate number of game wardens and the ability of game wardens to enforce department regulations. No changes were made as a result of the comments.

The department received 385 comments supporting adoption of the proposed amendment to §65.42 that implements both general and special archery-only seasons for white-tailed deer in Lynn County.

The department received 18 comments opposing adoption of the proposed amendment to §65.42 that allows youth on USFS lands to harvest antlerless deer without a permit during youth-only seasons and clarifies rules affecting MLDP use during the youth seasons. Of those comments, six provided a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that youth-only seasons are discriminatory and should be eliminated. The department disagrees with the comments and responds that the rules as adopted do not violate any provision of the state or federal constitutions with respect to discrimination against any class of individuals. No changes were made as a result of the comments.

One commenter opposed adoption and stated that allowing youth to hunt without a permit might lead them to believe that permits are never required and that there could be confusion with respect to enforcement. The department disagrees with the comment and responds that in addition to the duty of all hunters to know the rules, youth taking advantage of hunting opportunity that is specifically restricted to persons 17 years of age or younger likely know that eventually they will be too old to take advantage of that opportunity. The department also is confident that enforcement personnel are able to enforce youth-only seasons. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the youth seasons are abused by adults. The department disagrees with the comment and responds that adult abuse of youth seasons is not believed to be a common occurrence and that if it is detected, the persons responsible will be cited for violations. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be an antlerless-only season for disabled hunters. The department disagrees with the comment and responds that youth seasons are intended to increase youth interest in hunting and to offer adults the opportunity to mentor youth. No changes were made as a result of the comment.

One commenter opposed adoption and stated that no white-tailed deer should be taken without a permit/tag. The department disagrees with the comment and responds that the rule as adopted does not waive any tagging requirements, only permit requirements in those counties in which the antlerless harvest is controlled by means of permits. The antlerless harvest caused by harvest during the youth season is biologically insignificant and the elimination of permit requirements is intended to make it easier for youth to become engaged with hunting. No changes were made as a result of the comment.

The department received 315 comments supporting adoption of the proposed amendment to §65.42 that allows youth on USFS lands to harvest antlerless deer without a permit during youth-only seasons and clarifies rules affecting MLDP use during the youth seasons.

The department received 28 comments opposing adoption of the portion of the proposed amendment to §65.42 that implements a muzzleloader season in 32 additional counties. Of the 28 com-

ments, 10 offered a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that a muzzleloader season is not necessary to manage the deer herd. The department agrees with the comment and responds that while the general season presents the greatest opportunity for management, the muzzleloader season is provided as a method of providing hunter opportunity with a very low impact to the resource, although it does provide an additional opportunity for landowners and wildlife managers to meet management goals that might not have been completely accomplished during the general season. No changes were made as a result of the comment.

One commenter opposed adoption and stated that since muzzleloaders are legal during the general season, there is no reason for the general season to be reduced. The department disagrees with the comment and responds that the muzzleloader season is in addition to the general season. In other words, the general season is not reduced to accommodate a muzzleloader season. No changes were made as a result of the comment.

One commenter opposed adoption and stated that either the general season should be extended or a special late firearm season should be added. The department disagrees with the comment and responds that to extend the general season, bag limits would have to be reduced in order to prevent overharvest. Additionally, the muzzleloader season is a special late firearm season. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season should be modified to allow handguns and shotguns. The department disagrees with the comment and responds that the late muzzleloader season is intended to provide primitive firearms enthusiasts with a limited opportunity to hunt without competition from modern firearms. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season should be restricted to antique weapons because modern muzzleloaders are the same thing as a single-shot rifle. The department disagrees with the comment and responds that the current restriction (to firearms loaded only through the muzzle) is sufficient in preserving the essential distinction between primitive firearms and firearms that employ cartridges. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the muzzleloader season should be restricted to open-sights, caplock or flintlock ignition, patched round ball or full-caliber conical ball, and loose powder, and should be implemented in McLennan County. The department disagrees with the comment and responds that the current restriction (to firearms loaded only through the muzzle) is sufficient to preserve the essential distinction between primitive firearms and firearms that employ cartridges, and that additional regulatory complexity would be unnecessary and unwelcome. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be no weapons restrictions during late seasons. The department disagrees with the comment and responds that in some RMUs there could be negative population impacts from overharvest if there are no weapons restrictions. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season should be extended into mid-January. The department agrees with the comment and responds that the late muzzleloader season as adopted begins in mid-January. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be a late archery season for bucks only. The department disagrees with the comment and responds that there is already a special archery-only open season that is twice as long as the muzzleloader season. No changes were made as a result of the comment.

One commenter opposed adoption and stated that instead of a late muzzleloader season, the general season should be lengthened. The department disagrees with the comment and responds that in some RMUs there could be negative population impacts from overharvest if the general season were to be extended, and that to counterbalance that the bag limits would have to be reduced during the general season.

The department received 331 comments supporting adoption of the portion of the proposed amendment to §65.42 that implements a muzzleloader in 32 additional counties.

DIVISION 1. GENERAL PROVISIONS

31 TAC §§65.3, 65.7, 65.9, 65.10, 65.24, 65.25

The amendments are adopted under the authority of Parks and Wildlife Code, Chapter 42, which allows the department to issue tags for deer during each year or season; and Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed.

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 27, 2016.

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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Proposal publication date: February 19, 2016

For further information, please call: (512) 389-4775



31 TAC §65.27

The repeal is adopted under the authority of Parks and Wildlife Code, Chapter 42, which allows the department to issue tags for animals during each year or season; and Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity,

age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed.

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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DIVISION 2. OPEN SEASONS AND BAG LIMITS

31 TAC §65.42

The amendment is adopted under the authority of Parks and Wildlife Code, Chapter 42, which allows the department to issue tags for deer during each year or season; and Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed.

§65.42. *Deer.*

(a) No person may exceed the applicable county bag limit or the annual bag limit of five white-tailed deer (no more than three bucks) and two mule deer (no more than one buck), except as provided by:

(1) §65.26 of this title (relating to Managed Lands Deer Permits (MLDP)--White-tailed Deer);

(2) §65.34 of this title (relating to Managed Lands Deer Permits (MLDP)--Mule Deer);

(3) §65.28 of this title (relating to Landowner Assisted Management Permits (LAMPS));

(4) an antlerless mule deer permit issued under §65.32 of this title (relating to Antlerless Mule Deer Permits);

(5) special permits under the provisions of Subchapter H of this chapter (relating to Public Lands Proclamation); or

(6) special antlerless permit issued by the U.S. Forest Service (USFS) for use on USFS lands that are part of the department's public hunting program.

(b) White-tailed deer. The open seasons, annual bag limits, and special provisions for white-tailed deer shall be as follows. If Managed Lands Deer Permits (MLDPs) have been issued for a tract of land in any county, they must be attached to all deer harvested on the tract of land, regardless of season. An MLDP buck permit may not be used to

harvest or tag an antlerless deer. An MLDP antlerless permit may not be used to tag a buck deer. The counties and parts of counties listed in paragraphs (1) and (2) of this subsection are in the South Zone. All other counties and parts of counties listed in this subsection are in the North Zone.

(1) In Aransas, Bee, Brooks, Calhoun, Cameron, Dimmit, Duval, Frio, Hidalgo, Jim Hogg, Jim Wells, Kenedy, Kinney (south of U.S. Highway 90), Kleberg, LaSalle, Live Oak, Maverick, McMullen, Medina (south of U.S. Highway 90), Nueces, Refugio, San Patricio, Starr, Uvalde (south of U.S. Highway 90), Val Verde (that southeastern portion located both south of U.S. Highway 90 and east of Spur 239), Webb, Willacy, Zapata, and Zavala counties, there is a general open season.

(A) Open season: from the first Saturday in November through the third Sunday in January.

(B) Bag limit: five deer, no more than three bucks.

(C) Special late general season. In the counties listed in this paragraph there is a special late general season for the take of antlerless and unbranched antlered deer only. Open season: 14 consecutive days starting the first Monday following the third Sunday in January.

(D) No permit is required to hunt antlerless deer unless MLDP antlerless permits have been issued for the tract of land.

(2) In Atascosa County there is a general open season.

(A) Open season: from the first Saturday in November through the third Sunday in January.

(B) Bag limit: five deer, no more than two bucks.

(C) Special late general season. In the counties listed in this paragraph there is a special late general season for the take of antlerless and unbranched antlered deer only. Open season: 14 consecutive days starting the first Monday following the third Sunday in January.

(D) No permit is required to hunt antlerless deer unless MLDP antlerless permits have been issued for the tract of land.

(3) In Bandera, Baylor, Bexar, Blanco, Burnet, Callahan, Coke, Coleman, Comal (west of Interstate 35), Concho, Crockett, Edwards, Gillespie, Glasscock, Haskell, Hays (west of Interstate 35), Howard, Irion, Jones, Kendall, Kerr, Kimble, Kinney (north of U.S. Highway 90), Knox, Llano, Mason, McCulloch, Medina (north of U.S. Highway 90), Menard, Mitchell, Nolan, Pecos, Real, Reagan, Runnels, San Saba, Schleicher, Shackelford, Sterling, Sutton, Taylor, Terrell, Throckmorton, Tom Green, Travis (west of Interstate 35), Upton, Uvalde (north of U.S. Highway 90), Val Verde (north of U.S. Highway 90; and that portion located both south of U.S. 90 and west of Spur 239), and Wilbarger counties, there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: five deer, no more than two bucks.

(C) Special late general season. In the counties listed in this paragraph there is a special late general season for the take of antlerless and unbranched antlered deer only. Open season: 14 consecutive days starting the first Monday following the first Sunday in January.

(D) No permit is required to hunt antlerless deer unless MLDP antlerless permits have been issued for the tract of land.

(4) In Archer, Bell (west of IH 35), Bosque, Brown, Clay, Coryell, Hamilton, Hill, Jack, Lampasas, McLennan, Mills, Palo Pinto, Somervell, Stephens, Wichita, Williamson (west of IH 35) and Young counties, there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: five deer, no more than two bucks.

(C) Special late general season. In the counties listed in this paragraph there is a special late general season for the take of antlerless and unbranched antlered deer only. Open season: 14 consecutive days starting the first Monday following the first Sunday in January.

(D) Special provisions.

(i) Buck deer. The provisions of this clause do not apply on properties for which Level 2 or Level 3 MLDPs have been issued. In the counties listed in this paragraph, a legal buck is a buck deer having:

(I) at least one unbranched antler; or

(II) an inside spread of 13 inches or greater. The inside spread requirement does not apply to any buck that has an unbranched antler. Not more than one buck with an inside spread of 13 inches or greater may be taken.

(ii) Antlerless deer. No permit is required to hunt antlerless deer unless MLDP antlerless permits have been issued for the tract of land.

(5) In Armstrong, Borden, Briscoe, Carson, Childress, Collingsworth, Cottle, Crosby, Dickens, Donley, Fisher, Floyd, Foard, Garza, Gray, Hall, Hardeman, Hemphill, Hutchinson, Kent, King, Lipscomb, Motley, Ochiltree, Roberts, Scurry, Stonewall, and Wheeler counties, there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: five deer, no more than one buck.

(C) Special late general season. In the counties listed in this paragraph there is a special late general season for the take of antlerless and unbranched antlered deer only. Open season: 14 consecutive days starting the first Monday following the first Sunday in January.

(D) No permit is required to hunt antlerless deer unless MLDP antlerless permits have been issued for the tract of land.

(6) In Brewster, Culberson, Jeff Davis, Presidio, and Reeves counties, there is a general open season.

(A) Open season: from first Saturday in November through the first Sunday in January.

(B) Bag limit: four deer, no more than two bucks.

(C) No permit is required to hunt antlerless deer unless MLDP antlerless permits have been issued for the tract of land.

(7) In Comanche, Cooke, Denton, Eastland, Erath, Hood, Johnson, Montague, Parker, Tarrant, and Wise counties, there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: four deer, no more than two bucks and no more than two antlerless.

(C) Special late general season. In the counties listed in this paragraph there is a special late general season for the take of antlerless and unbranched antlered deer only. Open season: 14 consecutive days starting the first Monday following the first Sunday in January.

(D) Special provisions.

(i) Buck deer. The provisions of this clause do not apply on properties for which Level 2 or Level 3 MLDPs have been issued. In the counties listed in this paragraph, a legal buck is a buck deer having:

(I) at least one unbranched antler; or

(II) an inside spread of 13 inches or greater. The inside spread requirement does not apply to any buck that has an unbranched antler. Not more than one buck with an inside spread of 13 inches or greater may be taken.

(ii) Antlerless deer.

(I) On USFS, Corps of Engineers, and river authority lands in the counties listed in this paragraph, the take of antlerless deer shall be by permit only, except on USFS lands in Montague and Wise counties, where antlerless deer may be taken without permits from Thanksgiving Day through the Sunday immediately following Thanksgiving Day.

(II) On all tracts of land other than those listed in subclause (I) of this clause, no permit is required to hunt antlerless deer unless MLDP antlerless permits have been issued for the tract of land.

(8) In Angelina, Brazoria, Chambers, Cherokee, Fort Bend, Galveston, Goliad (south of U.S. Highway 59), Hardin, Harris, Houston, Jackson (south of U.S. Highway 59), Jasper, Jefferson, Liberty, Matagorda, Montgomery, Newton, Orange, Polk, San Jacinto, Trinity, Tyler, Victoria (south of U.S. Highway 59), Walker, and Wharton (south of U.S. Highway 59) counties, there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: Four deer, no more than two bucks and no more than two antlerless.

(C) Special provisions.

(i) Buck deer. The provisions of this clause do not apply on properties for which Level 2 or Level 3 MLDPs have been issued. In the counties listed in this paragraph, a legal buck is a buck having:

(I) at least one unbranched antler; or

(II) an inside spread of 13 inches or greater. The inside spread requirement does not apply to any buck that has an unbranched antler. Not more than one buck with an inside spread of 13 inches or greater may be taken.

(ii) Antlerless deer. If permits have been issued for the harvest of antlerless deer, they must be attached to all antlerless deer harvested on the tract of land.

(I) On USFS, Corps of Engineers, and river authority lands in the counties listed in this paragraph, the take of antlerless deer shall be by permit only.

(II) On all other tracts of land in the counties listed in this paragraph, antlerless deer may be taken without permits from opening day through the Sunday immediately following Thanksgiving Day. From the Monday immediately following Thanksgiving

Day until the end of the season, antlerless deer may be taken by antlerless MLD permit or LAMPS permit only.

(III) On tracts of land for which LAMPS permits have been issued, no LAMPS permit is required for the harvest of antlerless deer during the archery-only or muzzleloader-only open season.

(9) In Anderson, Bowie, Brazos, Camp, Cass, Gregg, Grimes, Harrison, Henderson, Lamar, Leon, Madison, Marion, Morris, Nacogdoches, Panola, Red River, Robertson, Rusk, Sabine, San Augustine, Shelby, and Upshur counties, there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: four deer, no more than two bucks and no more two antlerless.

(C) Special provisions.

(i) Buck deer. The provisions of this clause do not apply on properties for which Level 2 or Level 3 MLDPs have been issued. In the counties listed in this paragraph, a legal buck is a buck deer having:

(I) at least one unbranched antler; or

(II) an inside spread of 13 inches or greater. The inside spread requirement does not apply to any buck that has an unbranched antler. Not more than one buck with an inside spread of 13 inches or greater may be taken.

(ii) Antlerless deer. If permits have been issued for the harvest of antlerless deer, they must be attached to all antlerless deer harvested on the tract of land.

(I) On USFS, Corps of Engineers, and river authority lands in the counties listed in this paragraph, the take of antlerless deer shall be by permit only.

(II) On all other tracts of land in the counties listed in this paragraph, antlerless deer may be taken without permits during the first 16 days of the season. After the first 16 days of the season, antlerless deer may be taken by antlerless MLD permit or LAMPS permit only.

(III) On tracts of land for which LAMPS permits have been issued, no LAMPS permit is required for the harvest of antlerless deer during the archery-only or muzzleloader-only open season.

(10) In Bell (East of IH 35), Burleson, Delta, Ellis, Falls, Fannin, Franklin, Freestone, Hopkins, Hunt, Kauffman, Limestone, Milam, Navarro Rains, Smith, Titus, Van Zandt, Williamson (East of IH 35), and Wood counties, there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: four deer, no more than two antlerless and no more than two bucks.

(C) Special provisions.

(i) Buck deer. The provisions of this clause do not apply on properties for which Level 2 or Level 3 MLDPs have been issued. In the counties listed in this paragraph, a legal buck is a buck deer having:

(I) at least one unbranched antler; or

(II) an inside spread of 13 inches or greater. The inside spread requirement does not apply to any buck that has an un-

branched antler. Not more than one buck with an inside spread of 13 inches or greater may be taken.

(ii) Antlerless deer. If permits have been issued for the harvest of antlerless deer, they must be attached to all antlerless deer harvested on the tract of land.

(I) On USFS, Corps of Engineers, and river authority lands in the counties listed in this paragraph, the take of antlerless deer shall be by permit only, except in Fannin County.

(II) On all other tracts of land in the counties listed in this paragraph, antlerless deer may be taken without permits from Thanksgiving Day through the Sunday immediately following Thanksgiving Day. At all other times, antlerless deer may be taken by antlerless MLD permit or LAMPS permit only.

(III) On tracts of land for which LAMPS permits have been issued, no LAMPS permit is required for the harvest of antlerless deer during the archery-only or muzzleloader-only open season.

(11) In Collin, Dallas, Grayson, and Rockwall counties there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: four deer, no more than two antlerless and no more than two bucks.

(C) Special provisions. Lawful means are restricted to lawful archery equipment and crossbows only, including MLDP properties.

(i) Buck deer. The provisions of this clause do not apply on properties for which Level 2 or Level 3 MLDPs have been issued. In the counties listed in this paragraph, a legal buck is a buck deer having:

(I) at least one unbranched antler; or

(II) an inside spread of 13 inches or greater. The inside spread requirement does not apply to any buck that has an unbranched antler. Not more than one buck with an inside spread of 13 inches or greater may be taken.

(ii) Antlerless deer. No permit is required to hunt antlerless deer unless MLD antlerless permits have been issued for the tract of land.

(12) In Austin, Bastrop, Caldwell, Colorado, Comal (east of IH 35), De Witt, Fayette, Goliad (north of U.S. Highway 59), Gonzales, Guadalupe, Hays (east of IH 35), Jackson (north of U.S. Highway 59), Karnes, Lavaca, Lee, Travis (east of IH 35), Victoria (north of U.S. Highway 59), Waller, Washington, Wharton (north of U.S. Highway 59), and Wilson counties, there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: four deer, no more than two antlerless and no more than two bucks.

(C) Special provisions.

(i) Buck deer. The provisions of this clause do not apply on properties for which Level 2 or Level 3 MLDPs have been issued. In the counties listed in this paragraph, a legal buck is a buck deer having:

(I) at least one unbranched antler; or

(II) an inside spread of 13 inches or greater. The inside spread requirement does not apply to any buck that has an unbranched antler. Not more than one buck with an inside spread of 13 inches or greater may be taken.

(ii) Antlerless deer.

(I) Antlerless deer may be taken by MLD antlerless or LAMPS permits only.

(II) On tracts of land for which LAMPS permits have been issued, no LAMPS permit is required for the harvest of antlerless deer during the archery-only or muzzleloader-only open season.

(13) In Andrews, Bailey Castro, Cochran, Dallam, Dawson, Deaf Smith, Gaines, Hale, Hansford, Hartley, Hockley, Lamb, Lubbock, Lynn, Martin, Moore, Oldham, Parmer, Potter, Randall, Sherman, Swisher, Terry, and Yoakum counties, there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: three deer, no more than one buck and no more than two antlerless.

(C) No permit is required to hunt antlerless deer unless MLDP antlerless permits have been issued for the tract of land.

(14) In Crane, Ector, Loving, Midland, Ward, and Winkler counties, there is a general open season.

(A) Open season: from the first Saturday in November through the first Sunday in January.

(B) Bag limit: three deer, no more than one buck and no more than two antlerless.

(C) Antlerless deer may be taken by MLD antlerless permits only.

(15) In all other counties, there is no general open season.

(16) Archery-only open seasons. In all counties where there is a general open season for white-tailed deer, there is an archery-only open season during which either sex of white-tailed deer may be taken as provided for in §65.11(2) and (3) of this title (relating to Means and Methods).

(A) Open season: from the Saturday closest to September 30 for 35 consecutive days.

(B) Bag limit: the bag limit in any given county is as provided for that county during the general open season.

(C) No permit is required to hunt antlerless deer unless MLDP permits have been issued for the property.

(17) Muzzleloader-only open seasons, and bag and possession limits shall be as follows. In Anderson, Angelina, Austin, Bastrop, Bell (East of IH 35), Bowie, Brazoria, Brazos, Brewster, Burleson, Caldwell, Camp, Cass, Chambers, Cherokee, Colorado, Comal (East of IH 35), Culberson, Delta, DeWitt, Ellis, Fannin, Falls, Fayette, Fort Bend, Franklin, Freestone, Galveston, Goliad, Gonzales, Gregg, Grimes, Guadalupe, Hardin, Harris, Harrison, Hays (East of IH 35), Henderson, Hopkins, Houston, Hunt, Jackson, Jasper, Jeff Davis, Jefferson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Liberty, Limestone, Madison, Marion, Matagorda, Milam, Montgomery, Morris, Nacogdoches, Navarro, Newton, Orange, Panola, Polk, Presidio, Rains, Red River, Reeves, Robertson, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Smith, Titus, Travis (East of IH 35), Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Waller, Washington, Wharton,

Williamson (East of IH 35), Wilson and Wood counties, there is an open season during which deer may be taken only with a muzzleloader.

(A) Open Season: 14 consecutive days starting the first Monday following the first Sunday in January.

(B) Bag limit: as specified in this section for the general season in the county in which take occurs.

(C) Special provisions:

(i) Buck deer. In any given county, all restrictions established in this subsection for the take of buck deer during the general season remain in effect.

(ii) Antlerless deer. No permit is required for the take of antlerless deer, except:

(I) on properties for which antlerless MLDPs have been issued; and

(II) in the counties that are also listed in paragraph (12) of this section.

(18) Special Youth-Only Seasons. There shall be special youth-only general hunting seasons in all counties where there is a general open season for white-tailed deer.

(A) early open season: the Saturday and Sunday immediately before the first Saturday in November.

(B) late open season: 14 consecutive days starting the first Monday following the first Sunday in January.

(C) Bag limits, provisions for the take of antlerless deer, and special requirements in the individual counties listed in paragraphs (1) - (14) of this subsection shall be as specified for the first two days of the general open season in those counties, except as provided in subparagraph (D) of this paragraph.

(D) Provisions for the take of antlerless deer in the individual counties listed in paragraph (10) of this subsection shall be as specified in those counties for the period of time from Thanksgiving Day through the Sunday immediately following Thanksgiving Day.

(E) Other than properties where Level 2 or Level 3 MLDPs have been issued, only licensed hunters 16 years of age or younger may hunt deer during the seasons established by subparagraphs (A) and (B) of this paragraph, and any lawful means may be used.

(F) The stamp requirement of Parks and Wildlife Code, Chapter 43, Subchapter I, does not apply during the seasons established by this paragraph.

(G) Antlerless deer may be taken without an antlerless deer permit on USFS lands.

(c) Mule deer. The open seasons and annual bag limits for mule deer shall be as follows:

(1) In Armstrong, Borden, Briscoe, Carson, Childress, Coke, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Fisher, Floyd, Foard, Garza, Gray, Hall, Hansford, Hardeman, Hartley, Hemphill, Hutchinson, Kent, King, Knox, Lipscomb, Moore, Motley, Ochiltree, Oldham, Potter, Randall, Roberts, Scurry, Sherman, Stonewall, Swisher, and Wheeler counties, there is a general open season.

(A) Open season: Saturday before Thanksgiving for 16 consecutive days.

(B) Bag limit: two deer, no more than one buck.

(C) Antlerless deer may be taken only by Antlerless Mule Deer or MLD Permits.

(2) In Brewster, Crane, Crockett, Culberson, Ector, El Paso, Hudspeth, Jeff Davis, Loving, Midland, Pecos, Presidio, Reagan, Reeves, Terrell, Upton, Val Verde, Ward, and Winkler counties, there is a general open season.

(A) Open season: the Friday immediately following Thanksgiving for 17 consecutive days.

(B) Bag limit: two deer, no more than one buck.

(C) Antlerless deer may be taken only by Antlerless Mule Deer or MLD Permits.

(3) In Andrews, Bailey, Castro, Cochran, Dawson, Gaines, Hale, Hockley, Lamb, Lubbock, Martin, Parmer, Terry, and Yoakum counties, there is a general open season.

(A) Open season: Saturday before Thanksgiving for nine consecutive days.

(B) Bag limit: two deer, no more than one buck.

(C) Antlerless deer may be taken by permit only.

(4) In all other counties, there is no general open season for mule deer.

(5) Archery-only open seasons and bag and possession limits shall be as follows. During an archery-only open season, deer may be taken only as provided for in §65.11(2) and (3) of this title (relating to Lawful Means).

(A) In Armstrong, Borden, Briscoe, Carson, Childress, Coke, Collingsworth, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Deaf Smith, Dickens, Donley, Ector, El Paso, Fisher, Floyd, Foard, Garza, Gray, Hall, Hansford, Hardeman, Hartley, Hemphill, Hudspeth, Hutchinson, Jeff Davis, Kent, King, Knox, Lipscomb, Loving, Midland, Moore, Motley, Ochiltree, Oldham, Potter, Presidio, Randall, Reagan, Reeves, Roberts, Scurry, Sherman, Stonewall, Swisher, Upton, Val Verde, Ward, Wheeler, and Winkler counties, there is an open season.

(i) Open season: from the Saturday closest to September 30 for 35 consecutive days.

(ii) Bag limit: one buck deer.

(B) In Brewster, Pecos, and Terrell counties, there is an open season.

(i) Open season: from the Saturday closest to September 30 for 35 consecutive days.

(ii) Bag limit: two deer, no more than one buck. Antlerless deer may be harvested without a permit unless MLD antlerless permits have been issued for the property.

(C) In all other counties, there is no archery-only open season for mule deer.

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 27, 2016.
TRD-201603722

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SUBCHAPTER N. MIGRATORY GAME BIRD PROCLAMATION

31 TAC §§65.315, 65.318 - 65.321

The Texas Parks and Wildlife Commission (Commission) in a duly noticed meeting on March 24, 2016, adopted amendments to §§65.315 and 65.318 - 65.321, concerning the Migratory Game Bird Proclamation. The amendment to §65.315 is adopted with changes to the proposed text as published in the February 19, 2016, issue of the *Texas Register* (41 TexReg 1216). The amendments to §§65.318 - 65.321 are adopted without change and will not be republished.

The change to §65.315, concerning Open Seasons and Bag and Possession Limits - Early Season, alters season dates for dove in the Special White-winged Dove Area (SWWDA). The department proposed a season to run from September 23 to November 13, 2016, and December 17, 2016, to January 19, 2017. The Commission instead adopted a season to run from September 23 to November 9 and December 17 to January 23, removing four days from the end of the first segment and adding those days to the end of the second segment. The change is intended to provide for greater hunting opportunity later in the season.

The United States Fish and Wildlife Service (Service) issues annual frameworks for the hunting of migratory game birds in the United States. Regulations adopted by individual states may be more restrictive than the federal frameworks, but may not be less restrictive. Responsibility for establishing seasons, bag limits, means, methods, and devices for harvesting migratory game birds within Service frameworks is delegated to the Texas Parks and Wildlife Commission (Commission) under Parks and Wildlife Code, Chapter 64, Subchapter C. Parks and Wildlife Code, §64.022, authorizes the Commission to delegate rulemaking authority to the Executive Director. Department regulations (31 TAC §65.313(f)) authorize the Executive Director, after notification of the Chairman of the Commission, to engage in rule-making.

Until this year, the Service issued annual regulatory frameworks for migratory game birds at different times of the year (the preliminary early-season (dove, teal, snipe, woodcock, rails, gallinules) frameworks in late June and the preliminary late-season (ducks, geese, cranes) frameworks in early August). Because no regular Commission meetings occur between May and August, the early-season regulations were normally adopted by the Executive Director in early July. Beginning this year, however, the Service will issue all final migratory game bird frameworks in November of the previous year, which means that the Commission is able to adopt migratory game bird regulations as part of the regular statewide hunting proclamation process and hunters of migratory game birds will know season dates, bag limits, and other regulations much earlier than in previous years.

The amendment to §65.315, concerning Open Seasons and Bag and Possession Limits - Early Season, adjusts the season dates for early-season migratory game birds to allow for calendar shift

(i.e., to ensure that seasons open on the desired day of the week, since dates from a previous year do not fall on the same days in following years). With regard to dove, the amendment differs from last year in that this year the Service is allowing Texas 90 days of dove hunting opportunity within the current frameworks for all three dove zones, an increase of 20 days per zone. The amendment therefore adds 19 days of additional hunting opportunity to the end of the first segment and one day to the end of the second segment in the North Zone; 12 days to the end of the first segment and eight days to the end of the second segment in the Central Dove Zone; and 18 days to the end of the first segment and two days to the end of the second segment in the South Dove Zone (with the exception noted previously with respect to the SWWDA). The department believes the amendment as adopted appropriately distributes the additional days of hunting opportunity in each zone to coincide with hunter preference.

The amendment to §65.315 also implements a 16-day statewide teal season to run from September 10 - 25, 2016. By federal rule, the number of days in the September teal season count against the 107 days of total hunting opportunity allowed for ducks, coots, and mergansers. In addition, the amendment implements a 16-day early Canada goose season in the Eastern Zone to run from September 10 - 25, 2016.

The amendment to §65.318, concerning Open Seasons and Bag and Possession Limits - Late Season, alters season dates in both duck zones compared to last year and adjusts the season dates to account for calendar shift while retaining the bag and possession limits from last year. The North Zone last year had a 12-day split starting the Monday after Thanksgiving. For the 2016-17 season, there will be a five-day split starting the Saturday after Thanksgiving. Staff intends the altered season structure to provide additional December and January weekend opportunity, allowing hunting every weekend during peak migration of December and January, which harvest data shows to be the two best months of the season for overall duck harvest in the North Zone.

In the South Duck Zone, the season will run to the end of the federal framework, unlike last year. Last year, the department determined that running the season to the end of the framework (January 31) was undesirable because it would have resulted in a very late closure and it was more advantageous to offer more time in November, which is the best harvest month in the South Zone. This year, the department returns to a season that runs to the end of framework because calendar shift offers a more reasonable closure date (January 29) that provides ample hunting opportunity both early and late in the season.

With respect to geese, the season structure (adjusted for calendar shift) and bag and possession limits from last year are retained, except that the opening date in the West Zone is delayed by one week. Department data indicate that due to continuing delayed migrations in the fall and the persistence of very large numbers of geese in west Texas in early February, opening the season one week later will result in additional hunting opportunity.

The amendment to §65.319, concerning Extended Falconry Season--Early Season Species, adjusts season dates to reflect calendar shift; however, the season length for doves will be reduced by 17 days because the federal frameworks allow 107 days of total opportunity for doves and the proposed amendment to §65.315 would allow 90 full days of gun-hunting opportunity for doves.

The amendment to §65.320, concerning Extended Falconry Season--Late Season Species, adjusts season dates to reflect calendar shift.

The amendment to §65.321, concerning Special Management Provisions, adjusts the dates for the conservation season on light geese to account for calendar shift.

The proposed amendments are generally necessary to implement commission policy to provide the greatest hunter opportunity possible, consistent with hunter and landowner preference for starting dates and segment lengths, under frameworks issued by the Service. It is the policy of the commission to adopt the most liberal provisions possible, consistent with hunter preference, under the Service frameworks in order to provide maximum hunter opportunity.

The department received 17 comments opposing adoption of the portion of the proposed amendment to §65.315 that establishes season dates and bag limits for the North Dove Zone. Of those comments, 12 articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Eleven commenters opposed adoption and stated that the second season segment should be longer. The department disagrees with the comments and responds that hunter preference is for a longer first segment, when there are more hunters in the field. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there are not enough birds to justify lengthening the season. The department disagrees with the comment and responds that dove populations are believed to be able to withstand an additional 20 days of hunting pressure and there is no biological reason not to lengthen the season. No changes were made as a result of the comment.

The department received 84 comments supporting adoption of the portion of the proposed amendment to §65.315 that establishes season dates and bag limits for the North Dove Zone.

The department received five comments opposing adoption of the portion of the proposed amendment to §65.315 that establishes season dates and bag limits for the Central Dove Zone. Of those comments, three articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that the additional days of hunting opportunity should be added to the end of the second season segment. The department disagrees with the comment and responds that hunter preference is for a longer first segment, when most hunters are in the field. No changes were made as a result of the comment.

One commenter opposed adoption and stated that dove season should not be concurrent with deer season. The department disagrees with the comment and responds that making opening day for both deer and dove seasons provides additional hunting opportunity because hunters can hunt two popular species. No changes were made as a result of the comment.

One commenter opposed adoption and stated that all 20 days of additional opportunity should be added to the first season segment. The department disagrees with the comment and responds that additional days have been added to both segments in order to distribute hunting opportunity equitably. No changes were made as a result of the comment.

The department received 95 comments supporting adoption of the portion of the proposed amendment to §65.315 that establishes season dates and bag limits for the Central Dove Zone.

The department received five comments opposing adoption of the portion of proposed §65.315 that establishes season dates and bag limits for the South Dove Zone (which includes the Special White-winged Dove Area). All five commenters articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Two commenters opposed adoption and stated that the season should open on the first day allowable under the federal framework. The department agrees with the comments and responds that the season as adopted opens on the earliest day allowed under the federal frameworks. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department should petition the Service to allow a statewide September 1 opening day. The department disagrees with the comment and responds that at the current time a September 1 opener in the South Zone is not possible because it is not permitted under the federal frameworks and is not likely to be permitted because of nesting success interruption and survivability concerns. No changes were made as a result of the comment.

One commenter opposed adoption and stated that all of the additional days of opportunity should be added to the first season segment. The department disagrees with the comment and responds that additional days have been added to both segments in order to distribute hunting opportunity equitably. No changes were made as a result of the comment.

One commenter opposed adoption and stated that early hunting opportunity in the SWWDA should be full-day. The department disagrees with the comment and responds that although the federal frameworks authorize four full days of opportunity prior to September 23 in the SWWDA, the commission had traditionally adopted four half-days of opportunity. No changes were made as a result of the comment.

The department received 77 comments supporting adoption of the portion of the proposed amendment to §65.315 that establishes season dates and bag limits for the South Dove Zone.

The department received 11 comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for the North Duck Zone. Of those comments, six articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that the duck migration in Central Texas is from early November until Thanksgiving. The department agrees with the comment and responds that the first season segment as adopted is from November 12 - 27, which is from early November until Thanksgiving. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be a weekend closure in the middle of the season to allow pressured birds to rest. The department disagrees with the comment and responds that although the season as adopted includes a split in order to afford ducks a chance to rally and congregate, there is no biological or sociological reason for such a split to include a weekend, which is the time of week when most hunters are able to get out into the field. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the North Zone should open earlier than the South Zone. The department disagrees with the comment and responds that the peak harvest of ducks in the North Zone occurs later in the year. Although huntable numbers of ducks are available in November, the department has selected an opening date intended to maximize hunting opportunity when ducks numbers are at their highest, migration is at its peak, and habitat conditions are at their best. No changes were made as a result of the comments.

One commenter opposed adoption and stated that if the split is only going to be five days it should be done away with in favor of a continuous season. The department disagrees with the comment and responds that a split is necessary to give ducks the opportunity to rally and congregate with enough time left in the framework to allow for additional quality hunting opportunity, and that a five-day period is certainly sufficient for this to occur. The season structure as adopted is designed to open and close on a weekend and to contain a split. A continuous season would result in the season closing on a weekday, which frustrates the commission's desire to maximize weekend hunting opportunity. Without a minimum split of five days, a weekend of hunting would be lost. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the split should be longer to allow ducks to rest. The department disagrees with the comment and responds that a five-day period is certainly sufficient for ducks to rally and congregate. No changes were made as a result of the comment.

The department received 75 comments supporting adoption of the portion of the proposed amendment to §65.318 that establishes season dates and bag limits for the North Duck Zone.

The department received eight comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for the South Duck Zone. Of those comments two articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that the season should open earlier, the split should be longer, and that snow goose hunting under the conservation order should be allowed during the split. The department disagrees with the comment and responds that the season as adopted was selected to take advantage of the time period when the greatest number of ducks are migrating to the South Zone, that a 12-day split is sufficient time to allow ducks to rally and congregate, and that the light-geese conservation season cannot be opened unless all other migratory bird hunting seasons are closed. To open the conservation season during a split in the duck season, the department would have to close seasons for geese and sandhill crane, which would reduce overall hunter opportunity and conflict with commission policy to provide the maximum hunter opportunity possible under federal frameworks issued by the Service. No changes were made as a result of the comment.

One commenter opposed adoption and stated a preference for a five-day split. The department disagrees with the comment and responds that a 12-day split in the South Zone was chosen in order to allow ducks to increase their numbers with late arrivals. No changes were made as a result of the comment.

The department received 73 comments supporting adoption of the portion of the proposed amendment to §65.315 that establishes season dates and bag limits for the South Duck Zone.

The department received three comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for the Western Goose Zone. Of those comments, two articulated a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that there should be a moratorium on goose hunting because of population declines. The department disagrees with the comment and responds that the season length and bag limits as adopted are consistent with the department's management plan for geese and there is no threat of negative population impacts. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the conservation season should begin January 1 and run through February 20. The department disagrees with the comment and responds that hunter preference for other species of waterfowl precludes the opening of the conservation season any earlier, since under the federal frameworks all other seasons would have to be closed in order to implement the conservation season. No changes were made as a result of the comment.

No groups or associations commented on the adoption of the proposed rules.

The amendments are adopted under Parks and Wildlife Code, Chapter 64, which authorizes the Commission and the Executive Director to provide the open season and means, methods, and devices for the hunting and possessing of migratory game birds.

§65.315. Open Seasons and Bag and Possession Limits---Early Season.

(a) Rails.

(1) Dates: September 10 - 25, 2016 and November 5 - December 28, 2016.

(2) Daily bag and possession limits:

(A) king and clapper rails: 15 in the aggregate per day; 45 in the aggregate in possession.

(B) sora and Virginia rails: 25 in the aggregate per day; 75 in the aggregate in possession.

(b) Dove seasons.

(1) North Zone.

(A) Dates: September 1 - November 13, 2016 and December 17, 2016 - January 1, 2017.

(B) Daily bag limit: 15 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate, including no more than two white-tipped doves per day.

(C) Possession limit: 45 mourning doves, white-winged doves, and white-tipped doves in the aggregate, including no more than 6 white-tipped doves in possession.

(2) Central Zone.

(A) Dates: September 1 - November 6, 2016 and December 17, 2016 - January 8, 2017.

(B) Daily bag limit: 15 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate, including no more than two white-tipped doves per day.

(C) Possession limit: 45 mourning doves, white-winged doves, and white-tipped doves in the aggregate, including no more than 6 white-tipped doves in possession.

(3) South Zone.

(A) Dates: Except in the special white-winged dove area as defined in §65.314 of this title (relating to Zones and Boundaries for Early Season Species), September 23 - November 13, 2016 and December 17, 2016 - January 23, 2017.

(B) Daily bag limit: 15 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate, including no more than two white-tipped doves per day.

(C) Possession limit: 45 mourning doves, white-winged doves, and white-tipped doves in the aggregate, including no more than 6 white-tipped doves in possession.

(4) Special white-winged dove area.

(A) Dates: September 3, 4, 10, and 11, 2016.

(i) Daily bag limit: 15 white-winged doves, mourning doves, and white-tipped (white-fronted) doves, in the aggregate to include no more than two mourning doves and two white-tipped doves per day.

(ii) Possession limit: 45 white-winged doves, mourning doves, and white-tipped doves in the aggregate to include no more than 6 mourning doves and 6 white-tipped doves in possession.

(B) Dates: September 23 - November 9, 2016 and December 17, 2016 - January 23, 2017

(i) Daily bag limit: 15 white-winged doves, mourning doves, and white-tipped (white-fronted) doves, in the aggregate to include no more than two white-tipped doves per day;

(ii) Possession limit: 45 white-winged doves, mourning doves, and white-tipped doves in the aggregate to include no more than 6 white-tipped doves in possession.

(c) Gallinules.

(1) Dates: September 10 - 25, 2016 and November 5 - December 28, 2016.

(2) Daily bag and possession limits: 15 in the aggregate per day; 45 in the aggregate in possession.

(d) September teal-only season.

(1) Dates: September 10-25, 2016.

(2) Daily bag and possession limits: six in the aggregate per day; 18 in the aggregate in possession.

(e) Red-billed pigeons, and band-tailed pigeons. No open season.

(f) Shorebirds. No open season.

(g) Woodcock: December 18, 2016 - January 31, 2017. The daily bag limit is three. The possession limit is nine.

(h) Wilson's snipe (Common snipe): October 29, 2015 - February 12, 2017. The daily bag limit is eight. The possession limit is 24.

(i) Canada geese: September 10 - 25, 2016 in the Eastern Goose Zone as defined in §65.317(b) of this title (relating to Zones and Boundaries for Late Season Species). The daily bag limit is five. The possession limit is 15.

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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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 28. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES

SUBCHAPTER B. CODIS RESPONSIBILITIES OF THE DIRECTOR

37 TAC §28.24, §28.31

The Texas Department of Public Safety (the department) adopts amendments to §28.24 and §28.31, concerning CODIS Responsibilities of the Director. The amendments are adopted without changes to the proposed text as published in the July 1, 2016, issue of the *Texas Register* (41 TexReg 4793) and will not be republished.

Amendments to §28.24 are necessary to ensure compliance with Texas Government Code, §411.147. The amendment to §28.31 is necessary to correct an incorrect reference to statute.

No comments were received regarding the adoption of these amendments.

These amendments are adopted pursuant to Texas Government Code, §411.144(a), which authorizes the director by rule to establish procedures for a DNA laboratory or criminal justice agency in the collection, preservation, shipment, analysis, and use of DNA sample for forensic DNA analysis in a manner that permits the exchange of DNA evidence between DNA laboratories and the use of the evidence in a criminal case and §§411.144(e), 411.147(a), and 411.152(a).

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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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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Proposal publication date: July 1, 2016

For further information, please call: (512) 424-5848

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 104. INDEPENDENT LIVING SERVICES

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), adopts new Subchapter A, General Rules, §104.101, concerning Purpose, §104.103, concerning Legal Authority, §104.105, concerning Definitions; new Subchapter B, Allocation of Funds, §104.201, concerning Allocation of Funds; new Subchapter C, Independent Living Services, §104.301, concerning Purpose, §104.305, concerning Eligibility, §104.307, concerning Independent Living Plan, §104.309, concerning Waiting List, §104.311, concerning Scope of Services; new Subchapter D, Consumer Participation, §104.401, concerning Consumer Participation System, §104.403, concerning Fee Schedule Amount, §104.405, concerning Insurance Payments; new Subchapter E, Consumer Rights, §104.501, concerning Rights of Consumers, §104.503, concerning Complaint Process; new Subchapter F, Technical Assistance and Training, §104.601 concerning Administering Agency's Role in Providing Technical Assistance; and new Subchapter G, Referrals, §104.701, concerning Expectations of Administering Agency's Employees.

New §§104.101, 104.103, 104.105, 104.201, 104.301, 104.305, 104.307, 104.309, 104.311, 104.401, 104.403, 104.405, 104.501, 104.503, 104.601, and 104.701 are adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3433) and will not be republished.

BACKGROUND AND JUSTIFICATION

The new sections are being adopted pursuant to H.B. 2463, 84th Legislature, Regular Session, 2015, which requires the integration of independent living services for individuals who are blind or visually impaired and independent living services for individuals with significant disabilities. The bill further requires the independent living services program that DARS operates under Title VII of the federal Rehabilitation Act of 1973 (29 U.S.C. Section 796 et seq.) are directly provided by centers for independent living, except as provided by the Texas Human Resources Code, §117.080(b), and are not directly provided by the department.

Effective September 1, 2016, responsibility for independent living services for individuals with significant disabilities will transfer to HHSC. Under Texas Government Code, §§531.0201, 531.02011, and 531.02012, a rule adopted by or on behalf of DARS that relates to a function that is transferred under one of those sections becomes a rule of the receiving state agency upon transfer of the related function and remains in effect:

- until altered by the commission or other receiving state agency, as applicable; or
- unless it conflicts with a rule of the receiving state agency.

SECTION-BY-SECTION SUMMARY

DARS adopts §104.101, Purpose, establishing the purpose of DARS independent living services.

DARS adopts §104.103, Legal Authority, establishing the legal authority under which independent living services are administered.

DARS adopts §104.105, Definitions, establishing definitions for Ability to pay, Act, Accessible format, Adjusted income, Allotment, Allowable deductions, Attendant care, Blind, Center for Independent Living (CIL), Client Assistance Program (CAP), Comparable services or benefits, Consumer, Consumer participation, Consumer participation system, Consumer representative, DARS, Fee, Federal poverty level guidelines, Independent living plan, Nonprofit, Private, Service provider, Severe visual impairment, Significant disability, Sliding fee scale, Transition services, and Waived independent living plan.

DARS adopts §104.201, Allocation of Funds, establishing the method by which DARS allocates funds to a service provider. The section further establishes that service provider ensures comparable services or benefits are exhausted before using funds allocated under adopted Chapter 104.

DARS adopts §104.301, Purpose, establishing the purpose for the adopted subchapter.

DARS adopts §104.305, Eligibility, establishing the eligibility criteria for independent living services. The section establishes that eligibility is determined by the service provider, based on the documented diagnosis of a licensed practitioner. The section establishes that consumers who are determined to be eligible for independent living services on or before August 31, 2016, remain eligible on September 1, 2016. The section further establishes requirements of the service provider when a consumer is determined eligible and when a consumer is determined ineligible.

DARS adopts §104.307, Independent Living Plan, establishing that services are provided in accordance with an independent living plan that is developed jointly between the service provider and the consumer, unless the consumer signs a waiver giving up their right to participate in the development of the independent plan, in which case services are provided in accordance with a waived independent living plan developed by the service provider. The section further establishes that the independent living plan must be coordinated, to the extent possible, with vocational rehabilitation, habilitation, and education services. The section further establishes under what conditions services are terminated.

DARS adopts §104.309, Waiting list, establishing that a consumer is placed on a waiting list by the service provider when the consumer is determined eligible, has a signed independent living plan or waived independent living plan, and there is no funding for a service on the independent living plan that must be purchased. The section establishes that the waiting list must be reviewed every six months by the service provider. The section further establishes that a consumer is removed from the waiting list when funding becomes available, the consumer is no longer eligible, or the consumer is no longer interested.

DARS adopts §104.311, Scope of Services, establishing that the service provider may provide independent living core services and independent living services under adopted Chapter 104.

DARS adopts §104.401, Consumer Participation System, establishing that the service provider administers the consumer participation system and establishes the elements of that system.

The section establishes that a service provider must develop a process to reconsider and adjust the consumer's fee for service based on circumstances that are both extraordinary and documented, and establishes those extraordinary circumstances.

DARS adopts §104.403, Fee Schedule Amount, establishing the method for calculating the fee paid by the consumer for purchased services, including factors that affect the fee paid by the consumer for purchased services allowable deductions. The section establishes that consumer's fee for service is equal to the amount on the DARS sliding fee scale according to the household's annual adjusted income. The section establishes that the consumer is required to provide proof of annual gross income and allowable deductions. The section further establishes that if the consumer does not provide the service provider with supporting documentation for the household's allowable deductions, the service provider determines the consumer's fee for service based on the consumer's documented annual gross income with no allowable deductions.

DARS adopts §104.405, Insurance Payments, establishing that if the consumer has medical and dental insurance that covers an independent living service received by the consumer and the agreement for in-network services made between the insurance company and the service provider or service provider's subcontractor requires that the service provider or subcontractor accept as payment in full the deductible, copayment, or coinsurance and insurance reimbursement, then the consumer's fee for service is either the deductible, copayment, or coinsurance, or the amount calculated by the DARS fee schedule, whichever is less. The section further establishes that the consumer pays the premiums for medical and dental insurance and that neither DARS nor the service provider pays the premiums.

DARS adopts §104.501, Rights of Consumers, establishing the rights of the consumer and when those rights must be provided to the consumer in writing.

DARS adopts §104.503, Complaint Process, establishing the process by which a consumer may file a complaint with DARS or the Client Assistance Program implemented in Texas by Disability Rights Texas.

DARS adopts §104.601, Administering Agency's Role in Providing Technical Assistance, establishing that DARS gives the service provider technical assistance, as needed, to help the service provider offer a full range of independent living services.

DARS adopts §104.701, Expectations of Administering Agency's Employees, establishing that when individuals contact DARS seeking independent living services, DARS will refer those individuals to the local service provider.

COMMENTS

DARS received three comments from the American Foundation for the Blind Center on Vision Loss, Disability Rights Texas, and an individual during the 30-day comment period.

Comment: A commenter questioned why DARS is mentioned in the rules since DARS will be abolished on September 1, 2016, when the rules will become effective.

Response: DARS recommends no changes to the rules based on this comment. The responsibility for independent living services for individuals with significant disabilities will transfer to HHSC on September 1, 2016. The adopted rules will become effective on August 31, 2016. A rule adopted by or on behalf of DARS that relate to a function that is transferred under Texas

Government Code, §§531.0201, 531.02011, and 531.02012, becomes a rule of the receiving state agency upon transfer of the related function and remains in effect:

- until altered by the commission or other receiving state agency, as applicable; or
- unless it conflicts with a rule of the receiving state agency.

Comment: A commenter stated that it would be appropriate to include a definition for the meaning of "history of service delivery" in §104.201(a)(3). Texas Human Resources Code, §117.080(b) states that the rules include an equitable and transparent methodology for allocating funds under the independent living services program. The commenter recommends that a definition to the phrase be included in the rule text.

Response: DARS recommends no changes to the rules based on this comment. The history of service delivery is the number of previous consumers served and the cost of services provided by county. This is explained in the independent living standards for the service providers.

Comment: A commenter wanted to ensure that the independent living services for older individuals who are blind continue to serve consumers in the home. The commenter suggested language to add to §104.311(b) that includes all services are available at an accessible location for consumers who rely on public transportation. The commenter also wanted to add that the independent living services be provided in the consumer's home when there is no public transportation.

Response: DARS recommends no changes to the rules based on this comment. The scope of services in the rules describes the service arrays that are provided under the independent living services program. The independent living services standards describe the service delivery method for the services of the program. The standards include providing services in the consumer's home when necessary.

Comment: A commenter questioned the consumer participation requirement in §§104.401, 104.403, and 104.405 that is based on the consumer's adjusted gross income and percentage of the federal poverty level for that income. The commenter is concerned that using the adjusted gross income could lead to more disposable income than what the consumer actually is able to access and, therefore, may end up requiring more financial participation than the consumer can contribute without hardship.

Response: DARS recommends no changes to the rules based on this comment. The requirement for consumer participation has been part of the independent living services program and is being revised to be similar to other HHSC programs. The service provider will explain the cost participation requirement to the consumer to ensure the consumer understands and can fulfill this requirement before agreeing to a plan of services. The consumer can request a re-review at any time. The consumer will need to provide information regarding any new or exceptional circumstances (documentation), and the service provider can re-assess the consumer's ability to pay.

Comment: A commenter appreciated that the rules included a new Subchapter E, Consumer Rights, but would like to expand on the service provider requirements when notifying the consumer in writing about the rights. The commenter stated that it would be more beneficial if the consumers are informed of the ability to utilize the Client Assistance Program (CAP) anytime during the independent living services process. The CAP is available for the consumers to resolve issues that include the se-

lection of the service provider, if there is a disagreement of what type of service is needed, and other issues that arise. The rules only mention that CAP is available at ineligibility and closure of a case.

Response: DARS recommends no changes to the rules based on this comment. The rules explain the complaint process to the consumers and state that the consumer may file a complaint alleging that a requirement of the independent living services was violated. The independent living standards provide detailed information about filing of a complaint with CAP and state that the service provider should notify the consumers of CAP at application, the development of the independent living plan, and any-time services are reduced, suspended, or terminated.

SUBCHAPTER A. GENERAL RULES

40 TAC §§104.101, 104.103, 104.105

STATUTORY AUTHORITY

The adopted new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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Sylvia F. Hardman
General Counsel

Department of Assistive and Rehabilitative Services
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SUBCHAPTER B. ALLOCATION OF FUNDS

40 TAC §104.201

STATUTORY AUTHORITY

The adopted new rule is authorized by the Texas Human Resources Code, Chapter 117. This new rule is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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SUBCHAPTER C. INDEPENDENT LIVING SERVICES

40 TAC §§104.301, 104.305, 104.307, 104.309, 104.311

STATUTORY AUTHORITY

The adopted new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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SUBCHAPTER D. CONSUMER PARTICIPATION

40 TAC §§104.401, 104.403, 104.405

STATUTORY AUTHORITY

The adopted new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this adoption.

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SUBCHAPTER E. CONSUMER RIGHTS
40 TAC §104.501, §104.503

STATUTORY AUTHORITY

The adopted new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this adoption.

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**SUBCHAPTER F. TECHNICAL ASSISTANCE
AND TRAINING**

40 TAC §104.601

STATUTORY AUTHORITY

The adopted new rule is authorized by the Texas Human Resources Code, Chapter 117. This new rule is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this adoption.

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SUBCHAPTER G. REFERRALS
40 TAC §104.701

STATUTORY AUTHORITY

The adopted new rule is authorized by the Texas Human Resources Code, Chapter 117. This new rule is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this adoption.

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**CHAPTER 106. DIVISION FOR BLIND
SERVICES**

**SUBCHAPTER C. INDEPENDENT LIVING
PROGRAM**

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), adopts the repeal of Chapter 106, Division for Blind Services, Subchapter C, Independent Living Program, Division 1, General Information, §§106.901, 106.903, 106.905, and 106.907; Division 2, Program Requirements, §§106.1007, 106.1009, 106.1011, 106.1013, 106.1015, and 106.1017; Division 3, Independent Living Services, §106.1107 and §106.1109; Division 4, Consumer Participation, §§106.1207, 106.1209, 106.1211, 106.1213, 106.1215, and 106.1217; and Division 5, Maximum Affordable Payment, §106.1307.

The repeals of §§106.901, 106.903, 106.905, 106.907, 106.1007, 106.1009, 106.1011, 106.1013, 106.1015, 106.1017, 106.1107, 106.1109, 106.1207, 106.1209, 106.1211, 106.1213, 106.1215, 106.1217, and 106.1307 are adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3442) and will not be republished.

BACKGROUND AND JUSTIFICATION

The repeal is being adopted pursuant to H.B. 2463, 84th Legislature, Regular Session, 2015. The bill requires the integration of independent living services for individuals who are blind or visually impaired and independent living services for individuals with significant disabilities. The bill further requires the independent living services program that DARS operates under Title VII of the federal Rehabilitation Act of 1973 (29 U.S.C. Section 796 et seq.) are directly provided by centers for independent living, except as provided by the Texas Human Resources Code, Section 117.080 (b), and are not directly provided by the department.

SECTION-BY-SECTION SUMMARY

The sections are being repealed to create a new Subchapter D, Independent Living Services for Older Individuals who are Blind, which will implement the integration of the independent living services. The repeals include the following:

Division 1, General Information

Division 2, Program Requirements

Division 3, Independent Living Services

Division 4, Consumer Participation

Division 5, Maximum Affordable Payment

COMMENTS

DARS did not receive any comments regarding the proposed repeal of the sections during the comment period. DARS did receive two comments for the new Subchapter D, Independent Living Services for Older Individuals who are Blind. These comments are addressed in the Subchapter D adoption preamble, which is published elsewhere in this issue.

DIVISION 1. GENERAL INFORMATION

40 TAC §§106.901, 106.903, 106.905, 106.907

STATUTORY AUTHORITY

The adopted repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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Sylvia F. Hardman

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Department of Assistive and Rehabilitative Services

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DIVISION 2. PROGRAM REQUIREMENTS

40 TAC §§106.1007, 106.1009, 106.1011, 106.1013, 106.1015, 106.1017

STATUTORY AUTHORITY

The adopted repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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DIVISION 3. INDEPENDENT LIVING SERVICES

40 TAC §106.1107, §106.1109

STATUTORY AUTHORITY

The adopted repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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DIVISION 4. CONSUMER PARTICIPATION

40 TAC §§106.1207, 106.1209, 106.1211, 106.1213, 106.1215, 106.1217

STATUTORY AUTHORITY

The adopted repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas

Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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Department of Assistive and Rehabilitative Services

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DIVISION 5. MAXIMUM AFFORDABLE PAYMENT

40 TAC §106.1307

STATUTORY AUTHORITY

The adopted repeal is authorized by the Texas Human Resources Code, Chapter 117. The repeal is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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SUBCHAPTER D. INDEPENDENT LIVING SERVICES FOR OLDER INDIVIDUALS WHO ARE BLIND

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), adopts new Subchapter D, Independent Living Services for Older Individuals who are Blind. The subchapter consists of Division 1, General Rules: §106.901, concerning Purpose; §106.903, concerning Legal Authority; and §106.905, concerning Definitions; Division 2, Allocation of Funds: §106.1001, concerning Allocation of Funds; Division 3, Independent Living Services for Older Individuals Who are Blind:

§106.1101, concerning Purpose; §106.1105, concerning Eligibility; §106.1107, concerning Independent Living Plan; §106.1109, concerning Waiting List; and §106.1111, concerning Scope of Services; Division 4, Consumer Participation: §106.1201, concerning Consumer Participation System; §106.1203, concerning Fee Schedule Amount; and §106.1205, concerning Insurance Payments; Division 5, Consumer Rights: §106.1301, concerning Rights of Consumers; and §106.1303, concerning Complaint Process; Division 6, Technical Assistance and Training: §106.1351, concerning Administering Agency's Role in Providing Technical Assistance; and Division 7, Referrals: §106.1371, concerning Expectations of Administering Agency's Employees.

New §§106.901, 106.903, 106.905, 106.1001, 106.1101, 106.1105, 106.1107, 106.1109, 106.1111, 106.1201, 106.1203, 106.1205, 106.1301, 106.1303, 106.1351, and 106.1371 are adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3444) and will not be republished.

BACKGROUND AND JUSTIFICATION

The new rules are being adopted pursuant to H.B. 2463, 84th Legislature, Regular Session, 2015. The bill requires the integration of independent living services for individuals who are blind or visually impaired and independent living services for individuals with significant disabilities. The bill further requires the independent living services program that DARS operates under Title VII of the federal Rehabilitation Act of 1973 (29 U.S.C. Section 796 et seq.) are directly provided by centers for independent living, except as provided by the Texas Human Resources Code, §117.080(b), and are not directly provided by the department.

Effective September 1, 2016, responsibility for independent living services for older individuals who are blind will transfer to the Texas Workforce Commission. Under Texas Government Code, §§531.0201, 531.02011, and 531.02012, a rule adopted by or on behalf of DARS that relate to a function that is transferred under one of those sections becomes a rule of the receiving state agency upon transfer of the related function and remains in effect:

- until altered by the commission or other receiving state agency, as applicable; or
- unless it conflicts with a rule of the receiving state agency.

SECTION-BY-SECTION SUMMARY

DARS adopts §106.901, Purpose, establishing the purpose of DARS independent living services for older individuals who are blind.

DARS adopts §106.903, Legal Authority, establishing the legal authority under which independent living services for older individuals who are blind are administered.

DARS adopts §106.905, Definitions, establishing definitions for Ability to pay, Act, Accessible format, Adjusted income, Allotment, Allowable deductions, Attendant care, Blind, Center for Independent Living (CIL), Client Assistance Program (CAP), Comparable services or benefits, Consumer, Consumer participation, Consumer participation system, Consumer representative, DARS, Fee, Federal poverty level guidelines, Independent living plan, Nonprofit, Older individual who is blind, Private, Service provider, Severe visual impairment, Significant disability, Sliding fee scale, Transition services, and Waived independent living plan.

DARS adopts §106.1001, Allocation of Funds, establishing the method by which DARS allocates funds to a service provider. The section further establishes that service provider ensures comparable services or benefits are exhausted before using funds allocated under adopted Chapter 106, Subchapter D.

DARS adopts §106.1101, Purpose, establishing the purpose for the adopted Division.

DARS adopts §106.1105, Eligibility, establishing the eligibility criteria for independent living services for older individuals who are blind. The section establishes that eligibility is determined by the service provider, based on the documented diagnosis of a licensed practitioner. The section establishes that consumers who are determined to be eligible for independent living services for older individuals who are blind on or before August 31, 2016, remain eligible on September 1, 2016. The section further establishes requirements of the service provider when a consumer is determined eligible and when a consumer is determined ineligible.

DARS adopts §106.1107, Independent Living Plan, establishing that services are provided in accordance with an independent living plan that is developed jointly between the service provider and the consumer, unless the consumer signs a waiver giving up their right to participate in the development of the independent plan, in which case services are provided in accordance with a waived independent living plan developed by the service provider. The section further establishes that the independent living plan and services must be coordinated, to the extent possible, with vocational rehabilitation, habilitation, and education services. The section further establishes under what conditions services are terminated.

DARS adopts §106.1109, Waiting List, establishing that a consumer is placed on a waiting list by the service provider when the consumer is determined eligible, has a signed independent living plan or waived independent living plan, and there is no funding for a service on the independent living plan that must be purchased. The section establishes that the waiting list must be reviewed every six months by the service provider. The section further establishes that a consumer is removed from the waiting list when funding becomes available, the consumer is no longer eligible, or the consumer is no longer interested.

DARS adopts §106.1111, Scope of Services, establishing that the service provider may provide independent living core services, independent living services, and independent living services for older individuals who are blind under adopted Chapter 106, Subchapter D.

DARS adopts §106.1201, Consumer Participation System, establishing that the service provider administers the consumer participation system and establishes the elements of that system. The section establishes that a service provider must develop a process to reconsider and adjust the consumer's fee for service based on circumstances that are both extraordinary and documented, and establishes those extraordinary circumstances.

DARS adopts §106.1203, Fee Schedule Amount, establishing the method for calculating the fee paid by the consumer for purchased services, including factors that affect the fee paid by the consumer for purchased services allowable deductions. The section establishes that consumer's fee for service is equal to the amount on the DARS sliding fee scale according to the household's annual adjusted income. The section establishes that the consumer is required to provide proof of annual gross income

and allowable deductions. The section further establishes that if the consumer does not provide the service provider with supporting documentation for the household's allowable deductions, the service provider determines the consumer's fee for service based on the consumer's documented annual gross income with no allowable deductions.

DARS adopts §106.1205, Insurance Payments, establishing that if the consumer has medical and dental insurance that covers an independent living service received by the consumer and the agreement for in-network services made between the insurance company and the service provider or service provider's subcontractor requires that the service provider or subcontractor accept as payment in full the deductible, copayment, or coinsurance and insurance reimbursement, then the consumer's fee for service is either the deductible, copayment, or coinsurance, or the amount calculated by the DARS fee schedule, whichever is less. The section further establishes that the consumer pays the premiums for medical and dental insurance and that neither DARS nor the service provider pays the premiums.

DARS adopts §106.1301, Rights of Consumers, establishing the rights of the consumer and when those rights must be provided to the consumer in writing.

DARS adopts §106.1303, Complaint Process, establishing the process by which a consumer may file a complaint with DARS or the Client Assistance Program implemented in Texas by Disability Rights Texas.

DARS adopts §106.1351, Administering Agency's Role in Providing Technical Assistance, establishing that DARS gives the service provider technical assistance, as needed, to help the service provider offer a full range of independent living services for older individuals who are blind.

DARS adopts §106.1371, Expectations of Administering Agency's Employees, establishing that when individuals contact DARS seeking independent living services for older individuals who are blind, DARS will refer those individuals to the local service provider.

COMMENTS

DARS received two comments from the American Foundation for the Blind Center on Vision Loss and an individual during the 30-day comment period.

Comment: A commenter questioned why DARS is mentioned in the rules since DARS will be abolished on September 1, 2016, when the rules will become effective.

Response: DARS recommends no changes to the rules based on this comment. The responsibility for independent living services for older individuals who are blind will transfer to the Texas Workforce Commission on September 1, 2016. The adopted rules will become effective on August 31, 2016. A rule adopted by or on behalf of DARS that relates to a function that is transferred under Texas Government Code, §§531.0201, 531.02011, and 531.02012, becomes a rule of the receiving state agency upon transfer of the related function and remains in effect:

- until altered by the commission or other receiving state agency, as applicable; or
- unless it conflicts with a rule of the receiving state agency.

Comment: A commenter wanted to ensure that the independent living services for older individuals who are blind continue to serve consumers in the home. The commenter suggested

language to add to §106.1111(b) that includes all services are available at an accessible location for consumers who rely on public transportation. The commenter also wanted to add that the independent living services be provided in the consumer's home when there is no public transportation.

Response: DARS recommends no changes to the rules based on this comment. The scope of services in the rules describes the service arrays that are provided under the independent living services program. The independent living services standards describe the service delivery method for the services of the program. The standards include providing services in the consumer's home when necessary.

DIVISION 1. GENERAL RULES

40 TAC §§106.901, 106.903, 106.905

STATUTORY AUTHORITY

The adopted new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this adoption.

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DIVISION 2. ALLOCATION OF FUNDS

40 TAC §106.1001

STATUTORY AUTHORITY

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DIVISION 3. INDEPENDENT LIVING SERVICES FOR OLDER INDIVIDUALS WHO ARE BLIND

40 TAC §§106.1101, 106.1105, 106.1107, 106.1109, 106.1111

STATUTORY AUTHORITY

The adopted new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this adoption.

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DIVISION 4. CONSUMER PARTICIPATION

40 TAC §§106.1201, 106.1203, 106.1205

STATUTORY AUTHORITY

The adopted new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050



DIVISION 5. CONSUMER RIGHTS

40 TAC §106.1301, §106.1303

STATUTORY AUTHORITY

The adopted new rules are authorized by the Texas Human Resources Code, Chapter 117. These new rules are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this adoption.

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DIVISION 6. TECHNICAL ASSISTANCE AND TRAINING

40 TAC §106.1351

STATUTORY AUTHORITY

The adopted new rule is authorized by the Texas Human Resources Code, Chapter 117. This new rule is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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DIVISION 7. REFERRALS

40 TAC §106.1371

STATUTORY AUTHORITY

The adopted new rule is authorized by the Texas Human Resources Code, Chapter 117. This new rule is adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this adoption.

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CHAPTER 107. DIVISION FOR REHABILITATION SERVICES

SUBCHAPTER E. INDEPENDENT LIVING SERVICES PROGRAM

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), adopts the repeal of Chapter 107, Division for Rehabilitation Services, Subchapter E, Independent Living Services Program, Division 1, General Information, §§107.801, 107.803, and 107.805; Division 2, Program Requirements, §§107.907, 107.909, and 107.911; Division 3, Independent Living Services, §107.1007 and §107.1009; and, Division 4, Consumer Participation, §107.1107.

The repeal of §§107.801, 107.803, 107.805, 107.907, 107.909, 107.911, 107.1007, 107.1009, and 107.1107 are adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3453) and will not be republished.

BACKGROUND AND JUSTIFICATION

The repeal is being adopted pursuant to H.B. 2463, 84th Legislature, Regular Session, 2015. The bill requires the integration of independent living services for individuals who are blind or visually impaired and independent living services for individuals

with significant disabilities. The bill further requires the independent living services program that DARS operates under Title VII of the federal Rehabilitation Act of 1973 (29 U.S.C. Section 796 et seq.) are directly provided by centers for independent living, except as provided by the Texas Human Resources Code, Section 117.080(b), and are not directly provided by the department.

SECTION-BY-SECTION SUMMARY

The sections are being repealed to create a new Chapter 104, Independent Living Services, which will implement the integration of the independent living services. The repeals include the following:

- Division 1, General Information
- Division 2, Program Requirements
- Division 3, Independent Living Services
- Division 4, Consumer Participation

COMMENTS

DARS did not receive any comments regarding the proposed repeal of the sections during the comment period. DARS did receive two comments for the new Chapter 104, Independent Living Services. These comments are addressed in the adoption preamble for Chapter 104, which is published elsewhere in this issue.

DIVISION 1. GENERAL INFORMATION

40 TAC §§107.801, 107.803, 107.805

STATUTORY AUTHORITY

The adopted repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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DIVISION 2. PROGRAM REQUIREMENTS

40 TAC §§107.907, 107.909, 107.911

STATUTORY AUTHORITY

The adopted repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides

the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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DIVISION 3. INDEPENDENT LIVING SERVICES

40 TAC §107.1007, §107.1009

STATUTORY AUTHORITY

The adopted repeals are authorized by the Texas Human Resources Code, Chapter 117. These repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this 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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DIVISION 4. CONSUMER PARTICIPATION

40 TAC §107.1107

STATUTORY AUTHORITY

The adopted repeal is authorized by the Texas Human Resources Code, Chapter 117. These repeals are adopted pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation of and provision of health and human services by the health and human services agencies. No other statute, article, or code is affected by this adoption.

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PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

SUBCHAPTER D. SCHOOL INVESTIGATIONS

40 TAC §§700.401 - 700.412

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§700.401 - 700.412, concerning school investigations, in Chapter 700, Child Protective Services (CPS), without changes to the proposed text published in the May 20, 2016, issue of the *Texas Register* (41 Tex Reg 3630).

The justification of the amendments is to comply with legislative changes from the most recent legislative session. Senate Bill (SB) 206, enacted during the 84th Regular Session of the Texas Legislature, amended Texas Family Code §261.406(b) regarding entities that must be notified when DFPS completes an investigation of alleged abuse or neglect of a child by school personnel or volunteers in a school setting. Prior law mandated that upon completion of a school investigation, DFPS send a copy of the investigation report to the Texas Education Agency (TEA), the State Board for Educator Certification, the local school board or the school's governing body, the superintendent of the school district, and the school principal or director (unless the principal or director is alleged to have committed the abuse and neglect), to allow those officials to take appropriate action. The statute was amended to limit DFPS's duty to only providing notification of the completed report to TEA. The rationale for the change was that the notice requirement was unnecessarily burdensome for CPS caseworkers and that other provisions in the Family Code already contained more appropriate reporting provisions to ensure proper steps are taken to notify any entity within the school hierarchy as necessary to protect a child from potential harm. The entities other than TEA may still receive copies of the completed report upon request.

In addition, minor edits were made to update and "clean-up" the current rules.

The amendment to §700.401: (1) clarifies that CPS investigates abuse and neglect in a school setting as defined in §700.402(a)(2) of this title (relating to What do the terms used in this subchapter mean when Child Protective Services investigates reports of child abuse and neglect in a school?); (2) updates the rule to a question and answer format; and

(3) updates the name of the department to the Department of Family and Protective Services.

The amendment to §700.402: (1) clarifies which terms and definitions only apply to school investigations and which terms and definitions apply to school investigations as well as investigations that are not conducted in a school setting; (2) deletes terms and definitions that are already defined in Subchapter E of this chapter (relating to Intake, Investigation, and Assessment Investigations); (3) updates the definition of school personnel and volunteers to persons who have access to children in a school setting and are providing services to or caring for children (4) clarifies that a school setting for purposes of a Child Protective Services school investigation does not include school settings involving only children in facilities of the Texas Department of Aging and Disability Services and the Texas Department of State Health Services when the facility contracts with the local school district to provide educational services and does not include school settings that are a part of childcare operations regulated by the Child Care Licensing division of the Texas Department of Family and Protective Services (DFPS); (5) updates the definition of a reporter as the person who makes a report of child abuse or neglect to DFPS or a law enforcement agency; (6) adds the definition for alleged victim; (7) updates the rule to a question and answer format; and (8) reorganizes the structure of the rule.

The amendment to §700.403: (1) deletes the definition of "reasonable physical discipline" as it is already defined in Subchapter E of this chapter; (2) rewrites subsection (b) to clarify that any action that school personnel or volunteers take to avoid imminent harm to the child or others should not involve acts of unnecessary force or inappropriate use of restraints or seclusion; (3) adds a new subsection (c) to clarify that notwithstanding subsection (b), which concerns acts that are not considered abuse and neglect in a school setting, allegations that otherwise meet the definition of abuse or neglect will be investigated by the department; (4) updates the rule to a question and answer format; and (5) updates a citation in subsection (a).

The amendment to §700.404: (1) updates the rule to a question and answer format; (2) updates a citation in subsection (a)(1); and (3) updates the name of the department to the Department of Family and Protective Services in subsection (a)(6).

The amendment to §700.405: (1) updates the rule to a question and answer format; and (2) and clarifies that Child Protective Services is not the only division in the Department of Family and Protective Services that provides notice to law enforcement of a report of child abuse or neglect occurring in a school setting.

The amendment to §700.406: (1) updates the rule to a question and answer format; (2) clarifies that in addition to a CPS supervisor, an Investigation Screener may also review intake reports and approve or change the initial priority and action recommended for the report; and (3) changes Child Protective Services (CPS) to the Department of Family and Protective Services (DFPS) to clarify that CPS is not the only division of DFPS that assigns priorities for investigations.

The amendment to §700.407 updates the rule to a question and answer format.

The amendment to §700.408: (1) updates the rule to a question and answer format; (2) clarifies that investigative action and supervisor approval of an investigation must be completed within 30 *calendar* days and 10 *calendar* days respectively; (3) adds a citation from rule §700.507 of this title (relating to Response to Allegations of Abuse or Neglect) in subsection (d) to clarify when

an investigation may be closed administratively; and (4) updates an incorrect citation in subsection (d).

The amendment to §700.409: (1) clarifies that interviews and examinations conducted in a school investigation must follow all applicable standards; (2) clarifies that appropriate school personnel must be notified when the investigator interviews and examines a child on school premises; (3) updates the rule to a question and answer format; and (4) updates the name of the department to the Department of Family and Protective Services in subsection (a).

The amendment to §700.410 are non-substantive and include updating the rule to a question and answer format.

The amendment to §700.411: (1) updates the rule to clarify that DFPS is only mandated to send a copy of the completed report of the investigation to the Texas Education Agency (TEA) and that DFPS will send a copy of the report to State Board for Education Certification, the president of the local school board or local governing body for the school, the superintendent of the school district, and the school principal only upon request; (2) adds new subsection (b) to notify the entities other than TEA that they can find information on obtaining a redacted copy of the report from the DFPS public website; (3) new subsection (c) clarifies that when the overall investigation disposition is "reason-to-believe in an investigation in a school under the jurisdiction of TEA, the report of the investigation must include information about the designated perpetrator's right to challenge the disposition through the Office of Consumer Affairs review process, in addition to an administrative review of the investigation findings; (4) new subsection (d) clarifies that after the completion of an investigation of a school that is not under the jurisdiction of TEA, DFPS does not release the results of the investigation to persons having control over the designated perpetrator's access to children, but instead follows the provisions in Subchapter F of this chapter (relating to Release Hearings) prior to releasing the results of the investigation; (5) changes Child Protective Services (CPS) to Department of Family and Protective Services (DFPS) throughout the rule to clarify that CPS is not the only agency in DFPS that provides notification to school officials when a school investigation is closed; (6) updates the department's name to the Department of Family and Protective Services in subsection (e); and (7) updates the rule to a question and answer format.

The amendment to §700.412: (1) updates the rule to a question and answer format; (2) updates a citation within the rule; and (3) changes Child Protective Services to Department of Family and Protective Services (DFPS) to clarify that other divisions in DFPS are involved in notifying school and non-school entities when a school investigation is closed.

The sections will function so that the public will have a better understanding of what constitutes abuse and neglect in a school setting and how DFPS investigates abuse and neglect in a school setting. In addition, the amendment to §700.411, which will require DFPS to send a copy of the completed investigation report in a school investigation to TEA only, rather than several other entities with the knowledge that the other entities already communicate with each other and still have the option of requesting the report, will allow caseworkers to spend more time on other pertinent issues.

No comments were received regarding adoption of the section.

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Com-

missioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment to §700.409 implements Texas Family Code §261.303. The amendment to §700.411 implements revised Texas Family Code §261.406(b).

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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Trevor Woodruff

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Department of Family and Protective Services

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For further information, please call: (512) 438-4358

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SUBCHAPTER Q. PURCHASED PROTECTIVE SERVICES

DIVISION 1. RESIDENTIAL CHILD-CARE CONTRACTS

40 TAC §700.1701

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), new §700.1701, in Chapter 700, concerning Child Protective Services without changes to the proposed text published in the May 20, 2016, issue of the *Texas Register* (41 Tex Reg 3635). The text of this rule will not be republished.

The justification of the new section is to comply with the mandates of Senate Bill 830 from the 84th Texas Legislature, Regular Session 2015, which amended Chapter 531 of the Texas Government Code by adding Subchapter Y and also amended §40.0041 of the Human Resources Code by adding Subsections (g) and (h) concerning the Ombudsman For Children and Youth in Foster Care. Pursuant to the bill, the Health and Human Services Commission was tasked with appointing an ombudsman for children and youth in the conservatorship of DFPS to serve as a neutral party in assisting the children and youth with complaints regarding issues concerning any Health and Human Services (HHSC) agency, including DFPS.

The summary of the changes is as follows:

New §700.1701: (1) specifies in subsection (a) that residential child-care facilities that care for children in the conservatorship of DFPS must prominently display a sign produced by DFPS or the Ombudsman For Children and Youth in Foster Care related to the existence and contact information for the ombudsman office; and (2) specifies in subsection (b) that the residential child care facilities must implement procedures to allow children and youth in the conservatorship of DFPS to make complaints in private or

in a space that is separate from facility staff, volunteers, or the foster family.

The Department discussed the rule proposal and collaborated with HHSC's Office of the Ombudsman prior to drafting the rules. Additional stakeholder input will be obtained during the public comment period for the rules.

The new section will function so that children and youth in foster care will have an avenue to make complaints regarding any issues or concerns they have while in foster care to an entity that is independent of DFPS in order to ensure that their rights are protected.

No comments were received regarding adoption of the section.

The new section is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section implements Texas Human Resources Code §40.0041.

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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Trevor Woodruff

General Counsel

Department of Family and Protective Services

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For further information, please call: (512) 929-6739



CHAPTER 702. GENERAL ADMINISTRATION

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§702.801, 702.811, 702.813, 702.841, 702.843, 702.845, 702.847, and 702.849; repeal of §§702.815, 702.817, 702.819, 702.821, 702.823, and 702.825; and new §§702.815, 702.817, 702.819, 702.821, 702.823, 702.825, 702.827, and 702.829, in Chapter 702, concerning General Administration, without changes to the proposed text published in the May 20, 2016, issue of the *Texas Register* (41 TexReg 3636). The text of the rules will not be republished.

The justification of the amendments, repeals, and new sections is to comply with the mandates of Senate Bill 830 from the 84th Texas Legislature, Regular Session 2015, which amended Chapter 531 of the Texas Government Code by adding Subchapter Y and also amended Section 40.0041 of the Human Resources Code by adding Subsections (g) and (h) concerning the Ombudsman For Children and Youth in Foster Care.

Pursuant to the bill, the Health and Human Services Commission (HHSC) was tasked with appointing an ombudsman for children and youth in the conservatorship of DFPS to serve as a neutral party in assisting the children and youth with complaints regarding issues concerning any HHSC agency, including DFPS. Pursuant to the bill, the following new rules are being adopted:

(1) New rule §702.815 which clarifies that a current foster child or youth may file complaints with the Ombudsman For Children and Youth in Foster Care and explains the types of issues for which the foster children or youth may file a complaint and seek assistance from the office.

(2) New rule §702.817 which explains how DFPS will assist the Ombudsman for Children and Youth in Foster Care in reviewing and investigating complaints.

In addition to the above changes, the purpose of the amendments and repeals to Subchapter I of this chapter is also to update the rules where they are no longer accurate, as the rules were last updated in 2002. The updates seek to conform the rules to the Office of Consumer Affairs' (OCA's) current practice and policy concerning its process for receiving and reviewing complaints regarding case-specific activities of the DFPS program areas as well as reviewing substantiated findings of child abuse or neglect.

The summary of the changes is as follows:

The amendment to §702.801: (1) clarifies that OCA only reviews designated perpetrator findings for child abuse and neglect allegations; and (2) updates the name of the department and OCA.

The amendment to §702.811 updates the names of the department and OCA as well as the link to the DFPS public website.

The amendment to §702.813 clarifies that the following individuals may file complaints with OCA, in addition to the individuals already listed in the rule: (1) consumers, service recipients, and persons or entities regulated by DFPS who have a concern or complaint regarding a specific case; (2) individuals from the public who have a concern or complaint regarding a specific case, including but not limited to extended family, friends of the family, or foster parents; (3) other state agencies when the complaint is regarding a specific case; (4) government officials, including judges; and (5) former foster children or youth, including youth that are 18 years of age or older and are in extended foster care. The rule also updates the names of the department and OCA.

Section 702.815 is being repealed and incorporated into new §702.819.

New §702.815 explains (1) that children and youth under 18 years of age that are currently in the conservatorship of DFPS may file complaints with HHSC's Ombudsman For Children and Youth in Foster Care regarding any issues that are within the authority of any agency under HHSC, including DFPS, and further provides the various methods of contacting the office to file a complaint; (2) that current foster youth and children may also contact the office to seek assistance in reporting allegations of abuse or neglect to DFPS.

Section 702.817 is being repealed and incorporated into new §702.821.

New §702.817 explains that DFPS will assist the Ombudsman For Children and

Youth in Foster Care in reviewing and investigating complaints filed by current foster children and youth by: (1) collaborating

with the office to develop and implement an annual outreach plan to promote awareness of the office among the youth and children; (2) providing the office with access to DFPS records relating to complaints, cooperating with the office in responding to questions that the office may have regarding complaints, and providing information requested by the office in order to assist in resolving complaints; and (3) cooperating with the office to create consequences, based on the circumstances of the complaint and the severity of the retaliation, for any person who is found to have retaliated against a child or youth in the conservatorship of DFPS because of a complaint made to the office.

Section 702.819 is being repealed and incorporated into new §702.823.

New §702.819 incorporates the contents of repealed §702.815 except for the following changes: (1) clarifies that the Review of Perpetrator Designation is only available for substantiated child abuse and neglect findings; (2) clarifies that the complaint process is not available for complaints related to civil rights issues and DFPS personnel issues, or when OCA determines that a review of the complaint would interfere with an ongoing litigation, investigation, or prosecution; (3) updates the title of the rule; and (4) updates the names of the department and OCA.

Section 702.821 is being repealed and incorporated into new §702.825.

New §702.821 incorporates the contents of repealed §702.817 except for the following changes: (1) updates OCA's toll-free number, fax number, email, and link to the DFPS public website for purposes of contacting OCA to file a complaint; and (2) updates the names of the department and OCA.

Section 702.823 is being repealed and incorporated into new §702.827.

New §702.823 incorporates the contents of repealed §702.819 except that the names of the department and OCA have been updated.

New §702.825 incorporates the contents of repealed §702.821 except for the following changes: (1) updates the rule to clarify that the Office of Consumer Affairs provides the complainant information by mail or telephone regarding the procedure for investigating and resolving a complaint; and (2) updates the names of the department and OCA.

Section 702.827 is being repealed and incorporated into new §702.823.

New §702.827 incorporates the contents of repealed §702.823 except for the following changes: (1) clarifies that OCA reviews complaints to determine whether applicable rule and statute were violated in addition to DFPS's policies and procedures; (2) clarifies that OCA adheres to confidentiality requirements specified in state and federal law in addition to the Texas Open Records Act; (3) deletes the part of subsection (a) that states that OCA does not investigate issues in ongoing or forthcoming litigation or when the complaint relates to a law enforcement investigation or criminal prosecution if OCA determines it would interfere with the litigation and investigation as it has been incorporated into new rule §702.819; (4) clarifies that OCA provides status information on a quarterly basis to *all* persons or entities who file a complaint regarding a specific case, if there is a pending complaint, unless the information would jeopardize an undercover investigation; (5) updates the rule to reflect that electronic and paper copies of OCA case files will be purged

every two years after the complaint is closed; and (6) updates the names of the department and OCA.

New §702.829 incorporates the contents of repealed §702.825 except for the following changes: (1) clarifies that reports regarding the number, type, and resolution of complaints made against DFPS must be sent to the State Office Program Administrators, and not the executive director; (2) updates the rule to note that OCA also provides monthly reports to the HHSC's Office of the Ombudsman that is included in the written report to HHSC's executive director; and (3) updates the names of department and OCA.

The amendment to §702.841: (1) reflects that a Review of Perpetrator Designation is only available for substantiated findings of child abuse or neglect; (2) clarifies that a review is not available if the request for review is to challenge orders or findings made by the court in which the suit affecting the parent-child relationship has been filed, if there is pending litigation against DFPS that relates to the designation, or if the requestor does not otherwise qualify for a review regardless of if the requestor qualified for an Administrative Review of Investigation Findings (ARIF); and (3) updates the names of the department and OCA.

The amendment to §702.843: (1) updates OCA's toll-free number, fax number, email, and link to the DFPS public website for purposes of contacting OCA to request a Review of Perpetrator Designation; (2) clarifies that a designated perpetrator of child abuse or neglect has 45 days from the date of the ARIF to request a review; and (3) updates the names of the department and OCA.

The amendment to §702.845 updates the name of OCA and deletes the timeframe for acknowledgement of a request for a Review of Perpetrator Designation.

The amendment to §702.847 clarifies that a Review of Perpetrator Designation is conducted as a desk review and updates the names of the department and OCA.

The amendment to §702.849 reflects the current procedure OCA follows once a Review of Perpetrator Designation is complete, including clarifying that: (1) if OCA does not concur with the ARIF, the ARIF documents and OCA review material are forwarded to the CPS assistant commissioner or designee for consideration; (2) if OCA and the program assistant commissioner or designee do not agree on the disposition, the case is forwarded to the DFPS general counsel who reviews the case and makes the final decision as the DFPS commissioner's designee. It also updates the names of the department and OCA.

The Department discussed the rule proposals and collaborated with HHSC's Office of the Ombudsman prior to drafting the rules. Additional stakeholder input will be obtained during the public comment period for the rules.

The amendments, repeals, and new sections will function so that children and youth in foster care will have an avenue to make complaints regarding any issues or concerns they have while in foster care to an entity that is independent of DFPS in order to ensure that their rights are protected.

No comments were received regarding adoption of these sections.

SUBCHAPTER I. OFFICE OF CONSUMER AFFAIRS SERVICES

DIVISION 1. OFFICE OF CONSUMER AFFAIRS

40 TAC §702.801

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment generally implements Human Resources Code §40.0041.

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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For further information, please call: (512) 929-6739



DIVISION 2. OFFICE OF CONSUMER AFFAIRS COMPLAINT PROCESS

40 TAC §§702.811, 702.813, 702.815, 702.817, 702.819, 702.821, 702.823, 702.825, 702.827, 702.829

The amendments and new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections implement Texas Government Code §§531.992; 531.993; 531.995 and Texas Human Resources Code §40.0041.

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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DIVISION 2. OMBUDSMAN COMPLAINT PROCESS

40 TAC §§702.815, 702.817, 702.819, 702.821, 702.823, 702.825

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals generally implement Human Resources Code §40.0041.

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DIVISION 3. OFFICE OF CONSUMER AFFAIRS REVIEW OF PERPETRATOR DESIGNATION

40 TAC §§702.841, 702.843, 702.845, 702.847, 702.849

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment generally implements Human Resources Code §40.0041.

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CHAPTER 711. INVESTIGATIONS IN DADS AND DSHS FACILITIES AND RELATED PROGRAMS

SUBCHAPTER O. EMPLOYEE MISCONDUCT REGISTRY

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§711.1402, 711.1404, 711.1408, 711.1413, 711.1414, 711.1415, 711.1417, 711.1427, 711.1429, 711.1431, 711.1432, and 711.1434, the repeal of §711.1406 and §711.1411, and new §711.1406 in Chapter 711, concerning Investigations in Department of Aging and Disability Services (DADS) and Department of State Health Services (DSHS) Facilities and Related Programs, without changes to the proposed text published in the May 20, 2016, issue of the *Texas Register* (41 TexReg 3646).

The justification of the amendments, new section and repeals is to update the terminology and process requirements regarding the due process rights of an employee prior to placement on the Emergency Misconduct Registry (EMR).

The EMR is a publicly available, searchable database maintained by the Department of Aging and Disability Services pursuant to Chapter 253 of the Texas Health and Safety Code. The EMR is a list of persons who are not permitted to work in certain settings because they have been found to have committed reportable conduct. A finding of reportable conduct is a finding that an employee has been found to have committed certain, more serious abuse, neglect, or exploitation of a person who is elderly or a person with a disability.

Under authority in Chapter 48 of the Texas Human Resources Code, Subchapter I, DFPS is required to submit the names of certain employees whom Adult Protective Services (APS) has determined committed reportable conduct to DADS for placement on the EMR. If APS determines an employee has committed reportable conduct, the employee is offered a due process hearing prior to placement on the EMR, and if the finding is upheld, the employee is given an opportunity to file for judicial review of the finding.

The changes make APS' requirements consistent with governing Texas law, the Administrative Procedure Act, found in Chapter 2001 of the Texas Government Code. In addition, they standardize terminology so that the employee's administrative remedies are more clearly explained. They also make modest updates to reflect changes enacted in the 84th Regular Session of the

Texas legislature that expanded APS' investigative scope and jurisdiction in certain settings, including some settings in which employees are eligible for potential placement on the EMR. Finally, the changes streamline unnecessary provisions out of the subchapter so that it is easier to follow.

A summary of the changes follows:

Amendment to §711.1402 removes definitions of terms not used in the subchapter and updates definitions for changes made in 84th Regular Session, including changes in Senate Bill (SB) 1880 and SB 760: (1) makes definition of "agency" consistent with law; (2) updates terminology from "facility investigation" to "provider investigation" and clarifies meaning; (3) adds definition of "individual receiving services"; and (4) renumbers and makes minor edits.

Amendments to §711.1404: (1) updates section title so that it is comprehensive; and (2) modifies sections defining physical abuse, sexual abuse, emotional or verbal abuse, neglect, exploitation and financial exploitation for in-home and provider investigations by referring to the identical definitions already in rule. Specifically, for in-home investigations the operative terms are defined in 40 TAC Chapter 705, Subchapter A. For provider investigations the operative terms are defined in Subchapter A of Chapter 711. Rather than repeat the definitions in full, rules were modified to refer back to the definitions in other provisions of the rules.

The repeal of §711.1406 modifies definitions for provider investigations as described above and combines the remaining subsection into §711.1404 of this chapter.

New §711.1406 adds clarity regarding the meaning of the term "agency", the employees of which are potentially subject to the EMR.

Amendment to §711.1408 has minor rewording for clarity and consistency.

The repeal of §711.1411 deletes unnecessary provision as the substance of the rule is also covered in §711.1432 of this chapter.

Amendment to §711.1413: (1) clarifies terminology regarding the "appeal" of a finding of reportable conduct. Terminology was used inconsistently to refer both to the EMR hearing as well as a subsequent request for judicial review; and (2) adds a provision to the notice of finding letter for an employee who is found to have committed reportable conduct, requiring the employee to keep DFPS informed of the employee's current employment and residential contact information.

Amendment to §711.1414: (1) updates terminology; shortens and clarifies provision; and (2) adds requirement that the employee is responsible for providing DFPS with current telephone numbers in addition to the physical address the employee is already required to provide to DFPS.

Amendment to §711.1415 updates terminology regarding EMR hearings for consistency.

Amendment to §711.1417 updates terminology regarding EMR hearings for consistency.

Amendment to §711.1427 adds requirement that the costs of transcribing testimony from an EMR hearing be paid by the employee seeking judicial review unless the employee establishes indigence.

Amendment to §711.1429 updates terminology and cross-reference.

Amendment to §711.1431 makes timelines and requirements for requesting judicial review of a finding of reportable conduct consistent with the Texas Administrative Procedure Act. Specifically: (1) makes the filing of a timely motion for rehearing in accordance with Subchapters F and G of Government Code Chapter 2001 a prerequisite to judicial review; (2) updates the guidance regarding seeking judicial review by referring to the operative law on point, Subchapters F and G of Government Code Chapter 2001; and (3) clarifies the time frame for reporting a finding to the EMR after an order becomes final.

Amendment to §711.1432 provides clarity regarding the exhaustion of an employee's administrative remedies and DFPS' actions once those rights have been exhausted.

Amendment to §711.1434 updates terminology.

The amendments, new section and repeals will function so that employees who are potentially subject to the EMR will have a better understanding of the process for disputing a finding made against them that is eligible for the EMR. In addition, employers will have a greater understanding of the process that may lead to an employee's placement on the EMR.

No comments were received regarding adoption of the sections.

40 TAC §§711.1402, 711.1404, 711.1406, 711.1408, 711.1413 - 711.1415, 711.1417, 711.1427, 711.1429, 711.1431, 711.1432, 711.1434

The amendments and new section are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section implement Human Resources Code §§48.401 - 48.408.

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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40 TAC §711.1406, §711.1411

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which pro-

vides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department

The repeals implement Human Resources Code §§48.401 - 48.408.

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 745. LICENSING

The Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§745.21, 745.243, 745.301, 745.303, 745.321, 745.341, 745.343, 745.345, 745.347, 745.351, 745.385, 745.403, 745.439, and 745.8521; and new §§745.471, 745.473, 745.475, 745.477, 745.479, 745.481, 745.483, and 745.485. The sections are adopted without changes to the proposed text as published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3889) and will not be republished.

The justification of the revisions are needed to: (1) implement recommendations the Sunset Advisory Commission made in the *Department of Family and Protective Services Staff Report with Commission Decisions* published in August 2014, and required by Senate Bill (S.B.) 206, Sections 77, 78, and 79, that was passed by the 84th Texas Legislature in 2015 relating to the renewal of permits; (2) make conforming changes in Subchapters D and K relating to the implementation of a renewal process; and (3) make other clarifying changes and updates to Subchapters A and D of this chapter, as part of Licensing's comprehensive review of all Licensing rules and minimum standards.

S.B. 206 amended §§42.048, 42.050, and 42.052 of the Human Resources Code (HRC). The amended statute requires a renewal process for child care licenses, certifications, and registrations and directs DFPS to develop rules relating to: (1) renewal periods; (2) a process for staggered renewals; (3) a process for resolving a late application for renewal; (4) expiration dates; and (5) conditions for renewal.

A summary of the changes related to permit renewal includes: (1) defining the terms "full license," "full permit," and "initial license;" (2) removing references to a "non-expiring" permit or license; (3) requiring the renewal of a full license, certificate, and registration every two years to avoid expiration; (4) designating a "renewal period" during which the operation is to apply for renewal of its permit; (5) allowing an operation 30 additional days after the renewal period to apply for renewal if the operation is late in applying; (6) staggering the renewals so that all affected operations would not have to renew their permits at the same time; (7) outlining what an operation must submit as part of a renewal application; (8) detailing what happens after Licensing

receives a renewal application; (9) explaining under what circumstances a permit expires and how an expired permit affects an operation; (10) adding language to indicate a full license is effective as long as it has not expired; (11) clarifying that a permit is subject to renewal requirements even if an enforcement action is being taken by Licensing; (12) requiring a registered home or licensed operation to apply for renewal if the permit is due for renewal while it is voluntarily suspended; and (13) requiring an operation to post the written notice of the permit's renewal.

DFPS also requested HHSC to propose changes to Subchapter D of this chapter (relating to Application Process), that were not related to permit renewal. HRC §42.042(b) requires DFPS to evaluate rules at least every six years. In addition, part of Licensing's business plan is to review, analyze, and update rules to strengthen the protection of children in out-of-home care and improve providers' understanding of the rules. DFPS revised some of the rules in Subchapter D to clarify and update them with current laws and practices in the industry. DFPS has requested HHSC to propose rule changes to the remaining Subchapters in Chapter 745 at a later date.

A summary of the changes not related to permit renewal that were proposed in these rules, include: (1) adding references to "shelter care" to several rules applicable to shelter care operations that lacked those references; (2) clarifying the definition for the term "regulation;" (3) adding items to the lists of required application materials in order to be consistent with other rule changes that have been made or are being proposed in other rule packets; (4) removing the initial license fee as an item required for a completed application for a license because the fee will be required for issuance of an initial permit; (5) clarifying that Licensing's 10-day time frame for reviewing an application pertains to an application for a compliance certificate; (6) clarifying that an applicant for a compliance certificate has unlimited attempts to submit all of the information and material that is required for Licensing to accept an application; (7) clarifying when Licensing issues an initial license; (8) replacing "initial permit" with "initial license;" (9) removing outdated language that no longer is applicable; and (10) making minor corrections to improve the reader's understanding of the subject matter or to improve sentence flow.

A summary of the changes follows:

The amendment to §745.21: (1) adds references to "shelter care operations" to several definitions that lacked those references; (2) defines the terms "full license," "full permit," and "initial license"; and (3) clarifies the definition of "regulation."

The amendment to §745.243: (1) adds items to the lists of required application materials in order to be consistent with other rule changes that have been made or are being proposed in other rule packets; (2) removes the initial license fee as an item required for a completed application for a license (changes to §745.345 of this chapter proposed in this packet require the initial license fee be paid prior to issuance of the initial permit); and (3) makes minor corrections to improve the reader's understanding of the subject matter.

The amendment to §745.301: (1) clarifies that Licensing's 10-day time frame for reviewing an application pertains to both temporary shelter and employer-based child care operations by replacing "employer-based child care" with "compliance certificate;" and (2) makes minor corrections to improve the sentence flow.

The amendment to §745.303 clarifies that an applicant for a compliance certificate has unlimited attempts to submit a completed application. The childcare at these operations is derivative of a broader purpose; for example, a domestic violence shelter may have an on-site daycare so that a mother will be able to search for employment or a home. Moreover, Subchapters F and G, HRC, require a streamlined application process for compliance certificates.

The amendment to §745.321: (1) adds "shelter care" to the same places where employer-based child care is referenced since the requirements are the same for both; and (2) makes minor corrections to improve the sentence flow.

The amendment to §745.341: (1) removes the term "non-expiring permit" and includes the terms "initial license," "full license," and "full permit" that were added to §745.21 of this chapter; and (2) adds a reference to "shelter care operations" to the list of operations that receive a full permit.

The amendment to §745.343: (1) removes the term "non-expiring permit" and includes the terms "initial license" and "full license;" and (2) adds language to indicate a full license is effective as long as it has not expired.

The amendment to §745.345: (1) clarifies when Licensing issues an initial license; (2) replaces "initial permit" with "initial license;" and (3) makes minor corrections to improve the reader's understanding of the subject matter.

The amendment to §745.347: (1) replaces "initial permit" with "initial license;" (2) replaces "non-expiring permit" with "full license;" and (3) makes a minor correction to improve the sentence flow.

The amendment to §745.351: (1) replaces "initial permit" with "initial license;" (2) replaces "non-expiring permit" with "full license;" and (3) makes a minor correction to improve the reader's understanding of the subject matter.

The amendment to §745.385 adds language to indicate a license or certificate expires.

The amendment to §745.403 removes outdated references to timeframes that are no longer applicable.

The amendment to §745.439 adds a reference to a "shelter care operation" to ensure shelter care operations are treated the same as employer-based child care operations since they have the same type of permit.

New §745.471: (1) indicates a full license, certificate, or registration will expire if it is not renewed; and (2) conveys that there are no renewal requirements for a compliance certificate or listing.

New §745.473: (1) requires an operation with a permit that requires renewal to apply for its renewal every two years; (2) designates a time frame for the operation's "renewal period" during which the operation is to apply for renewal of its permit; (3) allows an operation 30 additional days after the renewal period to apply for renewal if the operation is late in applying for renewal; and (4) creates a staggered renewal schedule for existing operations and operations that receive a permit on or after the effective date of these rules.

New §745.475: (1) requires a completed renewal application in order for Licensing to evaluate a permit for renewal; and (2) indicates what the operation must submit to Licensing in order for the application to be complete.

New §745.477: (1) details what happens after Licensing receives a renewal application; (2) indicates Licensing will evaluate whether the criteria for renewal are met; (3) indicates how and when Licensing will notify the operation that Licensing has approved the renewal of the permit or that the renewal application is incomplete; (4) allows the operation unlimited attempts to submit any missing information and to correct the deficiencies during the renewal period; (5) allows the operation 15 days to submit a completed application from the date it was rejected if the application was submitted during the late renewal period; and (6) provides that CCL may exceed the 15-day limit for good cause.

New §745.479 requires the operation to post the notice of the permit's renewal at the operation.

New §745.481 explains when a permit expires.

New §745.483: (1) requires an operation to cease operating immediately if its permit expires; and (2) requires an operation to submit a new application (as required by §745.243 of this chapter) and pay any necessary fees before resuming operation.

New §745.485 clarifies that a permit is subject to renewal requirements even if Licensing is taking an enforcement action.

The amendment to §745.8521: (1) replaces "non-expiring permit" with "registration or full license;" and (2) requires a registered home or licensed operation to apply for renewal if the permit is due for renewal while it is voluntarily suspended.

While developing the proposed rules for this packet, CCL received feedback from two different workgroups: (1) Between June and September 2015, CCL staff from different areas of the program and parts of the state met three times to develop the renewal policy that would later be incorporated into rule format; and (2) On February 2, 2016, CCL met with a workgroup of providers to discuss what renewal policy was developed and how providers would be affected and Licensing incorporated the workgroup's recommendations into the proposed rules.

The sections will function by enforcing these sections so that the safety of children in care and the quality of their care will be improved.

No comments were received regarding the adoption of these rules.

SUBCHAPTER A. PRECEDENCE AND DEFINITIONS

DIVISION 3. DEFINITIONS FOR LICENSING

40 TAC §745.21

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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. APPLICATION PROCESS

DIVISION 3. SUBMITTING THE APPLICATION MATERIALS

40 TAC §745.243

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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DIVISION 5. ACCEPTING OR RETURNING THE APPLICATION

40 TAC §745.301, §745.303

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules

governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §42.042.

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DIVISION 6. REVIEWING THE APPLICATION FOR COMPLIANCE WITH MINIMUM STANDARDS, RULES, AND STATUTES

40 TAC §745.321

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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DIVISION 7. THE DECISION TO ISSUE OR DENY A PERMIT

40 TAC §§745.341, 745.343, 745.345, 745.347, 745.351

The amendments are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including

the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC §§42.042, 42.048, 42.050, and 42.052.

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DIVISION 8. DUAL AND MULTIPLE PERMITS

40 TAC §745.385

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §§42.042, 42.048, 42.050, and 42.052.

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DIVISION 9. REAPPLYING FOR A PERMIT

40 TAC §745.403

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of

services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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DIVISION 10. RELOCATION OF OPERATION

40 TAC §745.439

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §42.042.

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DIVISION 12. PERMIT RENEWAL

40 TAC §§745.471, 745.473, 745.475, 745.477, 745.479, 745.481, 745.483, 745.485

The new sections are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of

services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new sections implement HRC §§42.042, 42.048, 42.050, and 42.052.

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SUBCHAPTER K. INSPECTIONS AND INVESTIGATIONS

DIVISION 4. VOLUNTARY ACTIONS

40 TAC §745.8521

The amendment is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC §§42.042, 42.048, 42.050, and 42.052.

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 August 1, 2016.

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Trevor Woodruff

General Counsel

Department of Family and Protective Services

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Proposal publication date: May 27, 2016

For further information, please call: (512) 438-5836



TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

The Texas Department of Transportation (department) adopts amendments to §1.4, Public Access to Commission Meetings; §1.5, Public Hearings; and §1.11, Petition, concerning management of the department. The amendments to §§1.4, 1.5 and 1.11 are adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3454) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Government Code, §2001.039 requires a state agency to review each of its rules every four years or more frequently and, as the result of the review, to decide whether to readopt, amend, or repeal the rule. In the course of reviewing 43 TAC Chapter 1, the department identified several changes that need to be made as technical corrections of the rules or to accurately reflect procedures currently being followed by the department.

Amendments to §1.4, Public Access to Commission Meetings, correct information related to special accommodations. Subsection (e) is amended to clarify that requests for disability accommodations should be made to the person or office specified in the notice of the hearing and to extend the period of prior notice to the department, so that appropriate arrangements can be made for such a request. Each notice contains information for making a request for a disability accommodation.

Amendments to §1.5, Public Hearings, correct the listing of reasons for which the commission may hold public hearings. Currently, subsection (a)(6) provides that the commission may hold hearings to receive comments before converting a segment of the non-tolled state highway system to a toll project under Transportation Code, §228.203. Section 228.203 was repealed by S.B. No. 1029, Acts of the 83rd Legislature, Regular Session, 2013; therefore, subsection (a)(6) is deleted, the paragraphs of subsection (a) are redesignated accordingly, and references to the redesignated paragraphs are changed.

The amendments also change subsection (d) relating to disability accommodations to correspond to the changes made to §1.4(e). The changes relate to where requests for accommodations should be directed and the period for making such a request.

Amendments to §1.11, Petition, clarify the term "interested person" is subject to the limitations provided by Government Code, §2001.021, the provision in the Administrative Procedure Act relating to a petition to a state agency to request the adoption of a rule. Under §2001.021, an interested person must be a Texas resident or a business entity, governmental subdivision, or public or private organization located in this state. The amendments also correct the term used for the administrative head of the department.

COMMENTS

No comments concerning the amendments to §§1.4, 1.5 and 1.11 were received.

SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS

43 TAC §1.4, §1.5

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

Government Code, Chapter 2001, Subchapter B. Transportation Code, Sec. 228.204.

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 28, 2016.

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Joanne Wright

Deputy General Counsel

Texas Department of Transportation

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For further information, please call: (512) 463-8630



SUBCHAPTER D. PROCEDURE FOR ADOPTION OF RULES

43 TAC §1.11

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

Government Code, Chapter 2001, Subchapter B. Transportation Code, Sec. 228.204.

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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