

# PROPOSED RULES

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

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

## TITLE 7. BANKING AND SECURITIES PART 7. STATE SECURITIES BOARD CHAPTER 109. TRANSACTIONS EXEMPT FROM REGISTRATION

### 7 TAC §109.7

The Texas State Securities Board proposes an amendment to §109.7, concerning secondary trading exemption under the Texas Securities Act, §5.O. The proposal would update the "manual exemption" contained in §5.O of the Act. Included in §5.O is the requirement that certain information about the issuer appear in either a recognized securities manual or on a form (Form 133.5 or 133.6) filed with the Securities Commissioner. The definition of "recognized securities manual," as defined by the Board in §109.7(e), would be amended as follows.

First, to emphasize that the information relied on to claim the exemption must be current, an explanation would be added to reference the type of information required in subsection (d) and a reminder that the financial information provided must be within 18 months of the date of the sale relying upon the exemption.

Second, to add the electronic information available on [www.otcmarkets.com](http://www.otcmarkets.com), in connection with a current or recent listing on the OTCQX or OTCQB, as a "recognized securities manual" for purposes of §5.O(9). The OTCQX and OTCQB markets require that companies listing on these markets disclose all of the information required by §5.O and §109.7 and that the information be publicly available for free on OTC Markets Group's website.

Finally, for greater ease in using the exemption and to limit the need to amend it when publications are merely added or re-named, subsection (e) would be amended to recognize the publisher of the Mergent manuals, rather than list the name of each specific manual.

Although the list of manuals in subsection (e) will include the S&P Capital IQ Standard Corporation Descriptions, S&P ceased publication of its manual as of May 2, 2016. Prior publications of the manual are available online. At the present time the Board is not removing the S&P publication from the list of manuals since some of the financial information contained therein may not be stale and parties may continue to rely upon the listing to meet the exemption.

Clinton Edgar, Director, Registration Division, has determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Edgar also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that registered dealers seeking reliance upon the exemption contained in §5.O of the Texas Securities Act will have notice of the manuals included among the Board's "recognized securities manuals" for purposes of the exemption. There will be no effect on micro- or small businesses. Since the rule will have no adverse economic effect on micro- or small businesses, preparation of an economic impact statement and a regulatory flexibility analysis is not required. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal must be in writing and will be accepted for 30 days following publication of the proposed section in the *Texas Register*. Written comments should be submitted to Marlene K. Sparkman, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167 or faxed to (512) 305-8336. Comments may also be submitted electronically to [proposal@ssb.texas.gov](mailto:proposal@ssb.texas.gov). In order to be considered by the Board at adoption, comments must be received no later than 30 days following publication.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Article 581 5.O.

*§109.7. Secondary Trading Exemption under the Texas Securities Act, Section 5.O*

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

(e) The term "recognized securities manual" as used in the Texas Securities Act, Section 5.O(9)(c), is limited to the S&P Capital IQ Standard Corporation Descriptions, Best Insurance Reports Life-Health, any Mergent's Manual, and the OTC Markets Group Inc. website ([www.otcmarkets.com](http://www.otcmarkets.com)) in connection with a current or recent listing on the OTCQX or OTCQB markets. This designation encompasses both print and electronic data and includes periodic supplements to these publications. The information provided in the recognized securities manual must contain the information specified in subsection (d) of this section. All information provided must be current. The time for determining whether the entries are current is at the date of the particular sale, not the date the manual listings are published. If a listing is not continually updated, the exemption would not be available once the published balance sheet becomes more than 18 months old. ~~the following and includes any electronic publication format that is as readily~~

available to the general public as the printed version, including, without limitation, CD-Rom and electronic dissemination over the Internet.}]

[(1) S&P Capital IQ Standard Corporation Descriptions (including the Daily News Section).}]

[(2) Best's Insurance Reports Life-Health.}]

[(3) Mergent's Bank and Finance Manual and News Reports.}]

[(4) Mergent's Industrial Manual and News Reports.}]

[(5) Mergent's Public Utility Manual and News Reports.}]

[(6) Mergent's Transportation Manual and News Reports.}]

[(7) Mergent's Municipal and Government Manual and News Reports.}]

[(8) Mergent's International Manual and News Reports. and}]

[(9) Mergent's OTC Industrial Manual and News Reports, provided however, that Mergent's OTC Industrial News Reports are recognized solely for the purpose of updating a current listing in the OTC Industrial Manual. A registered dealer who, between the date of the last publication of Mergent's OTC Industrial Manual and the effective date of this rule, relies upon a listing in the Mergent's OTC Industrial News Reports to comply with §5.0 of the Act may continue to rely upon such listing until the publication date of the next Mergent's OTC Industrial Manual, which follows the effective date of this rule.}]

(f) (No change.)

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

Filed with the Office of the Secretary of State on September 30, 2016.

TRD-201605076

John Morgan

Securities Commissioner

State Securities Board

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For further information, please call: (512) 305-8301



## TITLE 19. EDUCATION

### PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

#### CHAPTER 1. AGENCY ADMINISTRATION SUBCHAPTER T. WORKFORCE EDUCATION COURSE MANUAL ADVISORY COMMITTEE

##### 19 TAC §§1.220 - 1.226

The Texas Higher Education Coordinating Board (Coordinating Board) proposes new §§1.220 - 1.226, Subchapter T, Workforce Education Course Manual Advisory Committee. The proposed new sections authorize the Board to create an advisory committee to provide advice regarding content, structure, currency and presentation of the Workforce Education Course Manual (WECM) and its courses. The new sections will affect students

when courses updated by the committee are adopted by the Board.

Dr. Rex Peebles, Assistant Commissioner for Academic Quality and Workforce, has determined that for the first five years there will be no fiscal implications for state or local governments as a result of adding these new sections.

Dr. Peebles has also determined that for the first five years the new rules are in effect, the public benefits anticipated as a result of administering the sections will be the clarification of which lower division courses are required in an associate of applied science degree or workforce certificate and improved transferability and applicability of courses from college to college. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposed new sections may be submitted by mail to Rex C. Peebles, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas, 78711 or via email at [AQWComments@THECB.state.tx.us](mailto:AQWComments@THECB.state.tx.us). Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new sections are proposed under the Texas Education Code, §130.001(a)(5), which provides the Coordinating Board with the authority to develop and establish advisory commissions composed of representatives of public junior colleges and other citizens of the state to provide advice and counsel to the coordinating board with respect to public junior colleges and Texas Government Code, §2110.005, which requires a state agency that establishes an advisory committee to adopt rules that state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency.

The new sections affect the implementation of Texas Education Code §130.001.

§1.220. Authority and Specific Purposes of the Workforce Education Course Manual Advisory Committee.

(a) Authority: The authority for this subchapter is provided in the Texas Education Code, §130.001.

(b) Purposes. The Workforce Education Course Manual (WECM) Advisory Committee is created to provide the Board with advice and recommendation(s) regarding content, structure, currency and presentation of the Workforce Education Course Manual (WECM) and its courses; recommendations regarding field engagement in processes, maintenance, and use of the WECM; and assistance in identifying new disciplines of study, developments within existing disciplines represented by courses in the manual, vertical and horizontal alignment of courses within disciplines, and obsolescence of disciplines of study and courses.

§1.221. Definitions.

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

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education, the Chief Executive Officer of the Board.

§1.222. Committee Membership and Officers.

(a) Membership shall consist of faculty and administrators from public community, state, and technical colleges with demonstrated leadership in workforce education.

(b) Membership on the committee shall include: representatives from public community, state, and technical colleges as defined in TEC, §61.003; and

(1) one (1) ex-officio representative from the Texas Association of College Technical Educators (TACTE), nominated by the TACTE Board; and

(2) one (1) ex-officio representative from the Texas Administrators of Continuing Education (TACE), nominated by the TACE Board; and

(3) one (1) ex-officio representative from the Texas Association of College Registrars and Admissions Officers (TACRAO), nominated by the TACRAO Board.

(c) The number of committee members shall not exceed twenty-four (24).

(d) Members of the committee shall select:

(1) the presiding officer, who will be responsible for conducting meetings and conveying committee recommendations to the Board; and

(2) the vice chair, who will succeed the presiding officer at the end of the presiding officer's year of service.

(e) Members shall serve staggered terms of up to three years.

§1.223. Duration.

The committee shall be abolished no later than January 31, 2021, in accordance with Texas Government Code, §2110.008. It may be reestablished by the Board.

§1.224. Meetings.

The committee shall meet at least twice yearly. Special meetings may be called as deemed appropriate by the presiding officer. Meetings shall be open to the public and broadcast via the web, unless prevented by technical difficulties. Minutes shall be available to the public after they have been prepared by the Board staff and reviewed by members of the committee.

§1.225. Tasks Assigned to the Committee.

Tasks assigned the committee include recommendations concerning:

(1) the addition of courses to the workforce education course manual;

(2) the deletion of courses from the workforce education course manual;

(3) the revision of courses in the workforce education course manual;

(4) the approval of local need course requests; and

(5) other activities necessary for the maintenance of the workforce education course manual.

§1.226. Report to the Board; Evaluation of Committee Costs and Effectiveness.

The committee chairperson shall report any recommendations to the Board on no less than an annual basis. The committee shall also report committee activities to the Board to allow the Board to properly evaluate the committee's work, usefulness, and the costs related to the committee's existence. The Board shall report its evaluation to the Legislative Budget Board in its biennial Legislative Appropriations Request.

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

Filed with the Office of the Secretary of State on October 3, 2016.

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Bill Franz

General Counsel

Texas Higher Education Coordinating Board

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



## CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND/OR SELECTED PUBLIC COLLEGES OF HIGHER EDUCATION IN TEXAS

### SUBCHAPTER A. GENERAL PROVISIONS

#### 19 TAC §5.5

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §5.5, concerning the Uniform Admission Policy. Specifically, §5.5(b)(1)(D) is amended to reflect the College Board's new Scholastic Aptitude Test (SAT) college readiness benchmarks for automatic admission to general academic teaching institutions. The new college readiness scores are (1) a combined critical reading (formerly "verbal") and mathematics score of 1070 with a minimum of 500 if the SAT was administered prior to March 5, 2016; and (2), a minimum score of 480 on the Evidenced-Based Reading and Writing (EBRW) test and a minimum score of 530 on the mathematics test (no combined score), if the SAT was administered on or after March 5, 2016. Current language in §5.5(b)(1)(D) uses outdated readiness scores based on Texas Education Code (TEC) §51.803(a)(2)(B), which lists the outdated readiness scores. The amendments update the rule to reflect current readiness scores. Since this statutory provision also allows a student to qualify if he/she met the equivalent of the stated scores, the agency is updating Board rules to reflect the new standards. In addition, current §5.5(h) references TEC §51.805(a), which also cites the obsolete SAT standards. Proposed language for subsection (h) would refer back to proposed amended §5.5(b)(1)(D), rather than to the statute.

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

Mr. Booker has also determined that for each of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be consistency in the SAT college readiness benchmarks cited in Board rule and by the SAT developer, the College Board. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Jerel Booker, J.D., P.O. Box 12788, Austin, Texas 78711, or via email in care of Jane Caldwell, who may be reached at [jane.caldwell@thehb.state.tx.us](mailto:jane.caldwell@thehb.state.tx.us). Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §51.803, which provides the Coordinating Board with the authority to adopt rules for the Uniform Admission Policy.

The amendments affect Texas Education Code, §51.803.

§5.5. *Uniform Admission Policy.*

(a) (No change.)

(b) All applicants from Texas schools accredited by a generally recognized accrediting agency and who graduate in the top 10 percent of their high school class or who graduate in the top 25 percent of their high school class, to the extent the governing board of a general academic teaching institution has adopted such an admission policy, shall be admitted to a general academic teaching institution if the student meets the following conditions:

(1) The student has met one of the following:

(A) Successfully completed the distinguished level of achievement under the Foundation, Recommended, or Advanced High School Program from a Texas public high school as outlined under Texas Education Code, §28.025, as well as, 19 TAC §§74.63, 74.64, 74.73, and 74.74 (relating to the distinguished level of achievement under the Foundation, Recommended High School Program, or Distinguished Achievement High School Program--Advanced High School Program);

(B) Successfully completed a curriculum from a high school in Texas other than a public high school that is equivalent in content and rigor to the distinguished level of achievement under the Foundation, the Recommended, or Advanced High School Program as outlined under subsection (c) of this section;

(C) Satisfied ACT's College Readiness Benchmarks on the ACT assessment; or

(D) Earned on the SAT assessment; [a score of at least a 1500 out of 2400, or the equivalent; and]

(i) if the SAT was administered prior to March 5, 2016, a combined critical reading (formerly "verbal") and mathematics score of 1070 with a minimum of 500 on the critical reading test; or

(ii) if the SAT was administered on or after March 5, 2016, a minimum score of 480 on the Evidenced-Based Reading and Writing (EBRW) test and a minimum score of 530 on the mathematics test (no combined score); and

(2) The student submitted an official high school transcript or diploma that must, not later than the end of the student's junior year, indicate whether the student has satisfied the requirements outlined under paragraph (1)(A) or (B) of this subsection.

(3) For applicants who graduate in the top 10 percent of their high school class and want to be considered for automatic admission under Texas Education Code, §51.803, the student must:

(A) Submit a complete application defined by the institution before the expiration of the institution's established deadline; and

(B) Have graduated from high school within the two years prior to the academic year for which the student is applying for admission.

(c) - (g) (No change.)

(h) The 18 admissions factors outlined in Texas Education Code, §51.805(b) may be considered by a general academic teaching institution when an applicant is eligible for admission under the "other admissions" provision as described in Texas Education Code, §51.805, but only after the applicant has met the curriculum or the ACT/SAT

test score requirements as outlined under subsection (b)(1) of this section [Texas Education Code, §51.805(a)]. Applicants participating in the minimum, recommended, or advanced high school program may be considered under the "other admissions" provision according to this subsection.

(i) - (j) (No change.)

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

Filed with the Office of the Secretary of State on September 29, 2016.

TRD-201605057

Bill Franz

General Counsel

Texas Higher Education Coordinating Board

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



## SUBCHAPTER C. APPROVAL OF NEW ACADEMIC PROGRAMS AT PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND REVIEW OF EXISTING DEGREE PROGRAMS

### 19 TAC §5.44

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §5.44, concerning the approval of new academic programs at public universities and health-related institutions. The intent of the amendments is to clarify and streamline rules regarding the presentation of requests for new programs from public institutions of higher education to the Texas Higher Education Coordinating Board.

Dr. Rex C. Peebles, Assistant Commissioner for Academic Quality and Workforce, has determined that for the first five years there will be no fiscal implications for state or local governments as a result of amending this section.

Dr. Peebles has also determined that for the first five years the amendments are in effect, the public benefits anticipated as a result of administering the sections will be the clarifying of rules regarding the submission of requests for new degree and certificate programs from public institutions of higher education to the Texas Higher Education Coordinating Board. There is no impact on local employment.

Comments on the proposed amendments may be submitted by mail to Rex C. Peebles, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or via email at [AQWComments@THECB.state.tx.us](mailto:AQWComments@THECB.state.tx.us). Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, Chapter 61, Subchapter C, §61.0512(a), which authorizes the Coordinating Board to evaluate requests for new degree and certificate programs from public institutions of higher education.

The proposed amendments affect the implementation of Texas Education Code, §61.0512(a).

§5.44. *Presentations of Requests and Steps for Implementation.*

(a) Requests for new degree programs must [shall] be made in accordance with the following procedures.

(1) Institutions must [shall] request new bachelor's and master's programs using the most recent version of the appropriate degree program request form.

(2) Institutions must submit documentation sufficient to establish that the new program meets all of the criteria listed in §5.45 of this title (relating to Criteria for New Baccalaureate and Master's Degree Programs). Board staff will review for completeness all requests for new programs within five business days of receipt. If Board staff determines that the request is incomplete and additional information or documentation is needed, the institution must respond with all of the requested information or documentation within ten working days or the request will be returned to the institution. An institution may resubmit a request that was incomplete as soon as it has obtained the requested information or documentation.

(3) New bachelor's and master's programs will [shall] be approved if all of the following conditions are met:

(A) The proposed program has institutional and governing board approval.

(B) The institution certifies compliance with the Standards for New Bachelor's and Master's Programs.

(C) The institution certifies that adequate funds are available to cover the costs of the new program.

(D) New costs during the first five years of the program would not exceed \$2 million.

(E) The proposed program is a non-engineering program [(i.e., not classified under CIP code 14)].

(F) The proposed program would be offered by a university or health-related institution.

(4) If a proposed bachelor's or master's program meets the conditions in paragraph (3) of this subsection, the institution may [shall] submit a request to the Assistant Commissioner of Academic Quality and Workforce [Workforce, Academic Affairs and Research] to add the program to the institution's Program Inventory. If a proposed program does not meet the conditions outlined in paragraph (3) of this subsection, the institution must submit a proposal using the most recent version of the full request form.

(5) If the minimum number of semester credit hours required to complete a proposed bachelor's program exceeds 120, the institution must provide detailed documentation describing the compelling academic reason for the number of required hours, such as programmatic accreditation requirements, statutory requirements, or licensure/certification requirements that cannot be met without exceeding the 120-semester credit hour limit. The [~~Coordinating~~] Board staff will review the documentation provided and make a determination to approve or deny a request to exceed the 120-semester credit hour limit.

(6) The institution proposing the program must [shall] notify all public institutions of higher education within 50 miles of the teaching site of their intention to offer the program at least 30 days prior to submitting their request to the Coordinating Board. If no objections occur, the Coordinating Board staff will [shall] update the institution's program inventory [~~accordingly~~]. If objections occur, the proposing institution must resolve those objections prior to submitting the request to the Coordinating Board. If the proposing institution cannot resolve

the objection(s), and the institution wishes to submit the proposed program, the proposing institution may request the assistance of the Assistant Commissioner of Academic Quality and Workforce [Workforce, Academic Affairs and Research] to mediate the objections and determine whether the proposing institution may submit the proposed program. No new program will [shall] be approved [~~implemented~~] until all objections are resolved.

(7) The Coordinating Board reserves the right to audit a degree program at any time to ensure compliance with any of the criteria outlined in paragraph (3) of this subsection.

(8) An institution requesting a new doctoral program must [shall] submit a proposal using the most recent version of the standard doctoral program request form.

(b) Requests for new certificate programs will [shall] be made in accordance with the following procedures.

(1) New undergraduate and graduate certificate programs will [shall] be approved if all of the following conditions are met:

(A) The certificate program has institutional approval.

(B) The institution certifies that adequate funds are available to cover the costs of the new certificate program.

(C) The certificate program meets all other criteria in §5.48 of this title (relating to Criteria for Certificate Programs at Universities and Health-Related Institutions).

(2) If a proposed certificate program meets the conditions in paragraph (1) of this subsection, the institution may [shall] submit a request to the Assistant Commissioner of Academic Quality and Workforce [Workforce, Academic Affairs and Research]. If a proposed certificate program does not meet the conditions outlined in paragraph (1) of this subsection, the institution must submit a proposal using the most recent version of the full [~~standard program~~] request form.

(3) The institution proposing the certificate program must [shall] notify all public higher education institutions within 50 miles of the teaching site of their intention to offer the certificate program at least 30 days prior to submitting their request to the Coordinating Board. If no objections occur, the Coordinating Board staff shall update the institution's program inventory [~~accordingly~~]. If objections occur, the proposing institution must resolve those objections prior to submitting the request to the Coordinating Board. If the proposing institution cannot resolve the objection(s), and the institution wishes to submit the proposed certificate program, the proposing institution may request the assistance of the Assistant Commissioner of Academic Quality and Workforce [Workforce, Academic Affairs and Research] to mediate the objections and determine whether the proposing institution may submit the request for the proposed certificate program. No new certificate program will [shall] be implemented until all objections are resolved.

(4) The Coordinating Board reserves the right to audit a certificate program at any time to ensure compliance with any of the conditions outlined in §5.48 [~~§5.45~~] of this title.

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

Filed with the Office of the Secretary of State on September 29, 2016.

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Bill Franz  
General Counsel  
Texas Higher Education Coordinating Board  
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For further information, please call: (512) 427-6114



CHAPTER 15. NATIONAL RESEARCH  
UNIVERSITIES  
SUBCHAPTER B. RESEARCH UNIVERSITY  
DEVELOPMENT FUND

**19 TAC §§15.20 - 15.22**

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of §§15.20 - 15.22, concerning distribution of Research University Development Fund (RUDF) to research and emerging research universities. The statute authorizing rules for the RUDF, created by the 81st Texas Legislature, Regular Session, 2009, was deleted effective September 1, 2013 by Senate Bill 215, 83rd Texas Legislature, Regular Session, 2013. Between September 1, 2009 and September 1, 2013, the RUDF was codified as Texas Education Code Title 3, Subtitle B, Subchapter C, §§62.051 - 62.054.

Dr. Rex C. Peebles, Assistant Commissioner for Academic Quality and Workforce, has determined that there will be no fiscal implications for state or local governments as a result of repealing these sections.

Dr. Peebles has also determined that there will be no change in public benefit and no impact on local employment as a result of repealing these sections.

Comments on the proposed repeal may be submitted by mail to Dr. Rex C. Peebles, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or via email at [AQWComments@THECB.state.tx.us](mailto:AQWComments@THECB.state.tx.us). Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The repeal is proposed based on the repeal of Texas Education Code 62.054, by the 83rd Texas Legislature, Regular Session, which authorized the Coordinating Board to adopt rules for the administration of the program.

The proposed repeal does not affect the implementation of the Texas Education Code.

§15.20. *Purpose and Authority.*

§15.21. *Definitions.*

§15.22. *Distribution of Research University Development Fund (RUDF).*

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

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Bill Franz  
General Counsel  
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PART 2. TEXAS EDUCATION AGENCY  
CHAPTER 89. ADAPTATIONS FOR SPECIAL  
POPULATIONS  
SUBCHAPTER C. TEXAS CERTIFICATE OF  
HIGH SCHOOL EQUIVALENCY

**19 TAC §89.42**

The State Board of Education (SBOE) proposes an amendment to §89.42, concerning the Texas Certificate of High School Equivalency. The section establishes provisions for official testing centers. The proposed amendment would expand the entities eligible to serve as official paper-based testing centers and define the requirements for paper-based testing centers.

At the September 2013 meeting, the SBOE 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.

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 Texas Education Agency (TEA) released a competitive Request for Proposals (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 Corporation, Educational Testing Service, and GED® Testing Service.

At the July 2016 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 provisions relating to official testing centers, test taker eligibility, accommodations for examinees with disabilities, and the issuance of high school equivalency certificates. In response to public comments on the proposed amendments to 19 TAC Chapter 89, Subchapter C, the SBOE Committee on Instruction asked

staff to present a future item that would authorize additional entities as paper-based testing centers.

The proposed amendment to 19 TAC §89.42 would expand the entities eligible to serve as official paper-based testing centers and define the requirements for paper-based testing centers.

The SBOE approved the proposed amendment for first reading and filing authorization at its September 16, 2016 meeting.

A testing center that wishes to administer a paper-based test will be required to certify that it will make certain documentation available on request by the TEA, which may include a written description of the testing center management structure, a description and photographs of the facility, assurances regarding test security, procedures for administering the test, an emergency plan, and any changes impacting operations. In addition, the center will be required to provide certain information to the test vendor.

Any documentation required to be kept would correspond with the reporting requirements described previously.

FISCAL NOTE. Monica Martinez, associate commissioner for standards and support services, has determined that for the first five-year period the proposed amendment is in effect there will be no additional costs to persons or entities required to comply with the proposed rule action.

There is no effect on local economy for the first five years that the proposed amendment is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

PUBLIC BENEFIT/COST NOTE. Ms. Martinez has determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be added flexibility in test options and locations for individuals to access the test. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

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

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

STATUTORY AUTHORITY. The amendment is proposed under the Texas Education Code, §7.111, which requires the State Board of Education 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 amendment implements the Texas Education Code, §7.111.

§89.42. *Official Testing Centers.*

(a) Entities eligible to serve as official computer-based testing centers include:

- (1) an accredited school district;
- (2) an institution of higher education;
- (3) an education service center;
- (4) a local workforce development board;
- (5) a United States Department of Labor One-Stop Career Center;
- (6) a United States Department of Labor Job Corps Center;
- (7) a public or private correctional institution;
- (8) a public or private technical institution or career preparation school;
- (9) any other public or private postsecondary institution offering academic or technical education or vocational training under a certificate program or an associate degree program; and
- (10) an independent, stand-alone testing center.

(b) Entities eligible to serve as official paper-based testing centers include:

- (1) an accredited school district;
- (2) an institution of higher education; ~~and~~
- (3) an education service center;[-]
- (4) an entity approved to provide services under the Adult Education and Family Literacy Act; and
- (5) a local workforce development board.

(c) In order for a testing center to administer a paper-based test, the testing center must certify in its application that it will make the following documentation available upon request by the Texas Education Agency (TEA):

(1) a written description of the testing center management structure and how any instruction provided by the center will be separate from testing, including a certification that tests will be administered and/or proctored by an individual that has not provided direct instruction to the test taker in the previous 12 months;

(2) a written narrative and photographs that describe and show:

- (A) the building;
- (B) distraction-free testing rooms;
- (C) a separate but attached registration and admission room;
- (D) sufficient separation of testing space from classrooms used for instruction; and
- (E) desk layout that includes partitions or sufficient spacing to separate test takers by at least five feet;

(3) a written plan detailing how the testing center will ensure test security, including:

- (A) a secure area for staff to inventory test material and prepare documents for testing sessions;
- (B) restricted access to administrator workstations, monitors, and printers;

(C) a dedicated locked storage unit for secure test material in a locked room with access only to test administrators; and

(D) a secure area for the shipping and receiving of all test materials, answer sheets, and related materials;

(4) written procedures for administering the test; and

(5) a written detailed emergency plan.

(d) A testing center that administers a paper-based test must provide to the test vendor for review written procedures for administering the test. In addition, the testing center must notify both the TEA and the test vendor in writing of testing center changes such as testing personnel, testing rooms, storage of secure documentation, the emergency plan, or any other change impacting operations.

(e) [(e)] The appropriate official of an eligible entity desiring to provide the testing service to residents in the community must request approval from the TEA [Texas Education Agency (TEA)] to apply for authorization from the authorized testing organization. If the need for a testing center in the location exists, the appropriate entity official, in writing, shall inform the state administrator appointed by the commissioner of education that the establishment of an official testing center is requested at that particular entity. The contract to operate a center shall be between the applicant entity and the authorized testing organization and its partners.

(f) [(f)] The authorization to function as an official testing center may be withdrawn by the TEA if the testing center is in violation of State Board of Education rules. Potential violations include neglecting to follow test, vendor, or jurisdictional policies and procedures; unauthorized use or sale of test candidate information; or misrepresentation of the testing center's authority to issue transcripts or credentials on behalf of the TEA.

(g) [(g)] A testing center may administer the test by paper, computer, or both, as approved by the TEA, to eligible candidates.

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

Filed with the Office of the Secretary of State on October 3, 2016.

TRD-201605082

Cristina De La Fuente-Valadez  
Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: November 13, 2016

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



## TITLE 22. EXAMINING BOARDS

### PART 1. TEXAS BOARD OF ARCHITECTURAL EXAMINERS

#### CHAPTER 5. REGISTERED INTERIOR DESIGNERS

The Texas Board of Architectural Examiners (Board) proposes the amendment of 22 TAC §5.31, pertaining to registration of interior designers by examination, and §5.51, pertaining to requirements for examination. The proposed amendments would eliminate the Architect Registration Examination (ARE) as an ac-

ceptable examination to qualify for registration as a registered interior designer (RID), beginning on January 1, 2019.

The Board's rules identifying the ARE as an acceptable examination were adopted in response to the 2013 legislation that will eventually eliminate examination grandfathering for registered interior designers. The statute, Tex. Occ. Code §1051.351, as amended in 2013, states the following: "A person who holds a certificate of registration issued under Chapter 1053 without examination may not renew the certificate on or after September 1, 2017, unless, before September 1, 2017, the person has passed the registration examination adopted by the board under Section 1053.154 and in effect on January 1, 2014." The bill that ultimately became law under §1051.305 differed slightly from a previous version, which stated that a person seeking to renew a registration would be required to pass the examination adopted by the Board in effect on September 1, 2013. Under the rules in effect on September 1, 2013, this would have been limited to the National Council for Interior Design Qualification (NCIDQ) examination. At the time of this legislation, it was the Board's understanding that, by moving the deadline to January 1, 2014, the legislature intended for the Board to engage in rulemaking to identify the ARE as an additional acceptable examination, so that architects who had previously become registered as RIDs without taking the NCIDQ would be able to retain registration on the basis of having passed the ARE.

Subsequently, on September 18, 2013, the Board amended §5.31 and §5.51 to recognize the ARE as an additional qualifying examination for initial registration as an RID, and these amended rules were in effect on January 1, 2014, thereby preserving the ability of any RID to renew the registration after September 1, 2017, if he or she has passed either the NCIDQ or ARE. However, at the time the amendments were adopted, the Board expressed an intention to revisit the issue to determine whether the ARE should continue to be accepted as a qualifying examination for registration as an RID for future applicants.

After considering the issue, the Board proposes to eliminate the ARE as an acceptable examination to qualify for prospective registration as an RID under §5.31 and §5.51. The proposed rule change is prospective and will not affect any person who is already registered as an RID. Any RID who has passed the ARE will be able to retain registration under §1051.351, because that person will have passed a registration examination adopted by the board under §1053.154 and in effect on January 1, 2014. Furthermore, the Board proposes for the ARE to remain an acceptable examination for registration until December 31, 2018, as described in proposed §5.31(b) and §5.51(a), to allow an extended period for a person who may have acted in reliance upon the rule to qualify for registration as an RID.

#### FISCAL NOTE

Lance Brenton, General Counsel, Texas Board of Architectural Examiners, has determined that for the first five-year period the amended rule is in effect, the amendments will have no significant adverse fiscal impact upon state government, local government, or the Texas Board of Architectural Examiners.

#### PUBLIC BENEFIT/COST OF COMPLIANCE

For the first five-year period the amended rule is in effect, the public benefit of the proposed rule change will be a registration examination that is specifically designed to measure competence in interior design. Architecture and interior design are distinct professions, with different areas of emphasis within each. In turn, the areas of emphasis within the ARE and the NCIDQ

differ in accordance with the requirements of practice for each profession. The Board recognizes the need for an applicant for registration as an RID to demonstrate specific competence in interior design, which is what the NCIDQ is designed to measure.

The cost of compliance with this rule change is as follows. First, the rule change will not result in the loss of interior design registration for a person who is currently registered. Additionally, because the Board is adopting an extended implementation period under which applicants are eligible to qualify for interior design registration based upon passage of the ARE until December 31, 2018, no costs will be incurred prior to that date. Subsequent to January 1, 2019, any person seeking registration as an RID will be required to pass the NCIDQ examination. The current cost to take the three sections of the examination is \$1,310. However, it is important to note that registration as an interior designer does not grant an architect any additional legal rights, other than use of the term "registered interior designer." An architect is entitled to work on the same projects and offer the same professional services regardless of whether he or she is registered as an interior designer.

The proposed rules will have no negative fiscal impact on small or micro-business and no Economic Impact Statement or Regulatory Flexibility Analysis is required.

#### CROSS REFERENCE TO STATUTE

The proposed amendments to these rules do not affect any other statutes.

#### PUBLIC COMMENT

Comments may be submitted to Lance Brenton, General Counsel, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337. Comments must be received by November 15, 2016.

## SUBCHAPTER B. ELIGIBILITY FOR REGISTRATION

### 22 TAC §5.31

#### STATUTORY AUTHORITY

The amendment to §5.31 is proposed under §§1051.202, 1053.152, and 1053.154 of the Texas Occupations Code.

Section 1051.202 authorizes the Board to adopt reasonable rules as necessary to regulate the practices of architecture, landscape architecture, and interior design.

Section 1053.152 requires the Board to establish the qualifications for the issuance or renewal of an interior design registration, which includes passage of an examination, payment of required fees, and other qualifications as determined by the Board.

Section 1053.154 requires an applicant for interior design registration to pass the examination adopted by the board. Additionally, §1053.154 authorizes the Board to adopt the NCIDQ examination or a comparable examination.

#### §5.31. *Registration by Examination.*

(a) In order to obtain Interior Design registration by examination in Texas, an Applicant shall demonstrate that the Applicant has a combined total of at least six years of approved Interior Design education and experience and shall successfully complete the Interior Design registration examination or a predecessor or other examination deemed equivalent by NCIDQ as more fully described in Subchapter C of this chapter.

(b) Alternatively, prior to December 31, 2018, an Applicant may obtain Interior Design registration by examination by successfully completing the Architectural Registration Examination or another examination deemed equivalent by NCARB after fulfilling the prerequisites of §1.21 and §1.41 of this title relating to Board approval to take the Architectural Registration Examination for architectural registration by examination. This subsection is repealed effective January 1, 2019.

(c) For purposes of this section, an Applicant has "approved Interior Design education" if:

(1) The Applicant graduated from:

(A) a program that has been granted professional status by the Council for Interior Design Accreditation (CIDA) or the National Architectural Accreditation Board (NAAB);

(B) a program that was granted professional status by CIDA or NAAB not later than two years after the Applicant's graduation;

(C) a program that was granted candidacy status by CIDA or NAAB and became accredited by CIDA or NAAB not later than three years after the Applicant's graduation; or

(D) an Interior Design education program outside the United States where an evaluation by World Education Services or another organization acceptable to the Board has concluded that the program is substantially equivalent to a CIDA or NAAB accredited professional program;

(2) The Applicant has a doctorate, a master's degree, or a baccalaureate degree in Interior Design;

(3) The Applicant has:

(A) A baccalaureate degree in a field other than Interior Design; and

(B) An associate's degree or a two- or three-year certificate from an Interior Design program at an institution accredited by an agency recognized by the Texas Higher Education Coordinating Board;

(4) The Applicant has:

(A) A baccalaureate degree in a field other than Interior Design; and

(B) An associate's degree or a two- or three-year certificate from a foreign Interior Design program approved or accredited by an agency acceptable to the Board.

(d) ~~[(b)]~~ In addition to educational requirements, an applicant for Interior Design registration by examination in Texas must also complete approved experience as more fully described in Subchapter J of this chapter (relating to Table of Equivalents for Education and Experience in Interior Design).

(e) ~~[(e)]~~ The Board shall evaluate the education and experience required by subsection (a) of this section in accordance with the Table of Equivalents for Education and Experience in Interior Design.

(f) ~~[(f)]~~ For purposes of this section, the term "approved Interior Design education" does not include continuing education courses.

(g) ~~[(g)]~~ An Applicant for Interior Design registration by examination who enrolls in an Interior Design educational program after September 1, 2006, must graduate from a program described in subsection (c)(1) ~~[(a)(1)]~~ of this section.

(h) ~~[(h)]~~ In accordance with federal law, the Board must verify proof of legal status in the United States. Each Applicant shall provide

evidence of legal status by submitting a certified copy of a United States birth certificate or other documentation that satisfies the requirements of the Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996. A list of acceptable documents may be obtained by contacting the Board's office.

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

Filed with the Office of the Secretary of State on September 29, 2016.

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Lance Brenton

General Counsel

Texas Board of Architectural Examiners

Earliest possible date of adoption: November 13, 2016

For further information, please call: (512) 305-8519



## SUBCHAPTER C. EXAMINATION

### 22 TAC §5.51

#### STATUTORY AUTHORITY

The amendment to §5.51 is proposed under §§1051.202, 1053.152, and 1053.154 of the Texas Occupations Code.

Section 1051.202 authorizes the Board to adopt reasonable rules as necessary to regulate the practices of architecture, landscape architecture, and interior design.

Section 1053.152 requires the Board to establish the qualifications for the issuance or renewal of an interior design registration, which includes passage of an examination, payment of required fees, and other qualifications as determined by the Board.

Section 1053.154 requires an applicant for interior design registration to pass the examination adopted by the board. Additionally, §1053.154 authorizes the Board to adopt the NCIDQ examination or a comparable examination.

#### §5.51. Requirements.

(a) An Applicant for Interior Design registration by examination in Texas must successfully complete all sections of the National Council for Interior Design Qualification (NCIDQ) examination or a predecessor or other examination NCIDQ deems equivalent to the NCIDQ examination. ~~Alternatively, prior to December 31, 2018, [in lieu of successfully completing the NCIDQ examination,]~~ an applicant may obtain Interior Design registration by examination by successfully completing [complete] all sections of the Architectural Registration Examination (ARE), or another examination NCARB deems equivalent to the ARE, after fulfilling the requirements of §1.21 and §1.41 of this title relating to Board approval to take the ARE for architectural registration by examination.

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

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

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TRD-201605061

Lance Brenton

General Counsel

Texas Board of Architectural Examiners

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For further information, please call: (512) 305-8519



## TITLE 34. PUBLIC FINANCE

### PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

#### CHAPTER 109. DOMESTIC RELATIONS ORDERS

The Texas County and District Retirement System ("TCDRS") proposes amendments to §§109.2, 109.12, and 109.14, and proposes to repeal §109.6, concerning Domestic Relations Orders. This proposed rulemaking implements §841.0091 of the Texas Government Code, which provides that the TCDRS Board may adopt rules to allow the TCDRS System to split a member's accrued benefit into two separate benefit accounts upon the acceptance of a qualified domestic relations order. Under the current rules, the ex-spouse of a member ("alternate payee") is linked to the member's account and may not commence a distribution unless and until the member commences a benefit or dies. Under the proposed amendments, a separate account is created for the alternate payee and the alternate payee may commence the benefit awarded to him independently of the action by the member.

The proposed amendment to §109.2 defines the term Vested.

The proposed repeal of §109.6 removes unnecessary language concerning the contents of a qualified domestic relations order.

The proposed amendment to §109.12 specifies when an alternate payee is eligible to receive the benefit awarded under the qualified domestic relations order and what form of benefit is available to the alternate payee. In addition, the amendment defines the rights of an alternate payee's beneficiary should the alternate payee die before commencing a benefit.

The proposed amendment to §109.14 makes conforming changes as required by the new language proposed in §109.12 concerning the timing and form of the distribution to the alternate payee, and provides that all distributions must be made in accordance with federal tax law.

Ann McGeehan, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. McGeehan has also determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of administering the proposed amendments will be improved administration of qualified domestic relation orders. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted to Ann McGeehan, General Counsel, Texas County and District Retirement System, P.O. Box 2034, Austin, Texas

78768-2034, faxed to (512) 328-8887, or submitted electronically to legaldept@tcdrs.org.

### 34 TAC §109.2

The amendments are proposed under the Government Code, §804.003(n) and §841.0091, which authorize the Board of Trustees to adopt rules to implement Chapter 804 and to divide a member's accrued benefit into two separate benefits that, in combination at the time of division, are actuarially equivalent to the undivided accrued benefit.

The Government Code, §841.0091 is affected by these proposed amendments.

#### §109.2. Definitions.

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

(1) Accumulated contributions--The contributions, other member deposits, and interest credited to a member's individual account in the employees saving fund.

(2) Act--Texas Government Code, Title 8, Subtitle F, as amended.

(3) Actuarial present value--The value of a benefit that, as computed by the system in its sole discretion, is consistent with §841.001(1) of the Act.

(4) Alternate payee--A spouse, former spouse, child, or other dependent of a member or retiree who is recognized by a domestic relations order as having a right to receive all or a portion of the benefits payable by the system with respect to such member or retiree.

(5) Benefits--Any of the payments or benefits described in §109.12 [~~§109.6(a) and (b)~~] of this title [~~(relating to Order Should Divide All Benefits)~~].

(6) Domestic relations liaison--A person (who may or may not be an employee of the system) who is designated by the director of the system to receive and take action concerning domestic relations orders that are sent or delivered to the system.

(7) Domestic relations order--Any judgment, decree, or order (including one which approves a property settlement agreement) which:

(A) relates to the provision of child support, temporary support, or marital property rights to a spouse, former spouse, child, or other dependent of a member or former member of the system; and

(B) is made pursuant to the Texas Family Code or any other applicable domestic relations or community property law.

(8) Participant--A member, former member of the system who has sums of money on deposit with the system or who is or may become entitled to receive any benefit from the system based on membership in the system, or a former member of the system who has commenced receiving a monthly benefit from the system.

(9) Parties--The participant and all alternate payees named in a domestic relations order.

(10) Vested--A participant is vested when he or she has earned the right to receive a lifetime monthly benefit in the future under the terms of the plan.

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

Filed with the Office of the Secretary of State on October 3, 2016.

TRD-201605084

Ann McGeehan  
General Counsel

Texas County and District Retirement System

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For further information, please call: (512) 637-3247



### 34 TAC §109.6

The repeal is proposed under the Government Code, §804.003(n) and §841.0091, which authorize the Board of Trustees to adopt rules to implement Chapter 804 and to divide a member's accrued benefit into two separate benefits that, in combination at the time of division, are actuarially equivalent to the undivided accrued benefit.

The Government Code, §841.0091 is affected by this proposal.

#### §109.6. Order Should Divide All Benefits.

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

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Ann McGeehan  
General Counsel

Texas County and District Retirement System

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For further information, please call: (512) 637-3247



### 34 TAC §109.12

The amendments are proposed under the Government Code, §804.003(n) and §841.0091, which authorize the Board of Trustees to adopt rules to implement Chapter 804 and to divide a member's accrued benefit into two separate benefits that, in combination at the time of division, are actuarially equivalent to the undivided accrued benefit.

The Government Code, §841.0091 is affected by these proposed amendments.

#### §109.12. Payments to Alternate Payees.

(a) At any time after a qualified domestic relations order is filed and approved by the system, the alternate payee may withdraw in a lump sum the accumulated contributions attributable to the interest awarded to the alternate payee by the qualified domestic relations order.

(b) The alternate payee may commence a life annuity calculated in accordance with the terms of the plan and based on the interest awarded to such alternate payee at such time when the participant:

(1) is eligible to retire;

(2) commences a disability retirement;

(3) dies and was eligible for a survivor death benefit under §844.407 of the Government Code; or

(4) has attained the age at which the participant would have been eligible to retire, if the participant withdrew his or her account and was vested at the time of withdrawal.

(c) An alternate payee may commence an annuity under subsection (b)(1) of this section even if the participant has not retired or

under subsection (b)(4) even if the participant is not eligible for an annuity benefit.

(d) If the participant dies before commencing a benefit, and the participant was eligible for a survivor annuity under §844.407 of the Government Code, then the alternate payee may commence an annuity under subsection (b)(3) or withdraw the accumulated contributions awarded under the qualified domestic relations order.

(e) If the participant dies before commencing a benefit, and the participant was not eligible for a survivor annuity death benefit under §844.407 of the Government Code, then the alternate payee may withdraw the accumulated contributions associated with the interest awarded under the qualified domestic relations order.

(f) The alternate payee must commence a distribution when the participant attains age 70 1/2 or when the alternate payee attains age 70 1/2, whichever is earlier. If the participant is still a depositing member and not vested, then the alternate payee is not required to commence an annuity or take a withdrawal. If the participant is vested when a mandatory distribution is required, the alternate payee is eligible for an annuity benefit.

(g) If the alternate payee dies before commencing a benefit, and the participant is eligible for a survivor annuity benefit under §844.407 of the Government Code or has commenced a disability retirement, then the alternate payee's beneficiary must commence a survivor annuity pursuant to §844.407 that is actuarially equivalent to the deceased alternate payee's benefit awarded under the qualified domestic relations order.

(h) If the alternate payee dies before commencing a benefit and the participant is not eligible for a survivor benefit under §844.407 of the Government Code, then the alternate payee's beneficiary is eligible for a benefit equal to the accumulated contributions awarded to the alternate payee at the time of the alternate payee's death.

(i) If the alternate payee dies after commencing a life annuity, then the alternate payee's beneficiary may be eligible for a lump sum payment equal to the difference of the aggregate annuity payments made to the alternate payee, less the accumulated contributions associated with the interest awarded to the alternate payee, if any.

~~[(a) In the event that an eligible participant or surviving beneficiary of an eligible participant applies for a withdrawal of the participant's accumulated contributions after the date that a domestic relations order is received by the system, the system will make a lump-sum payment to the alternate payee if the domestic relations order so provides and the order has been determined to be a qualified domestic relations order.]~~

~~[(b) In the event that the participant or the participant's beneficiary begins receiving an annuity after the date that a qualified domestic relations order is received by the system, and the order provides for a division of the annuity in that event, the benefit payable to the alternate payee will be an annuity payable monthly during the lifetime of the alternate payee, which annuity is the actuarial equivalent of the portion of the participant's benefit that was awarded to the alternate payee under the domestic relations order.]~~

~~(j) [(e)] Subsections (a) and [Subsection] (b) of this section will apply to all domestic relations orders approved in accordance with this chapter after January 1, 2017 [1990], and to such domestic relations orders approved prior to that date as are construed to provide for such an annuity or withdrawal.~~

~~(k) [(d)] If a qualified domestic relations order is received by the system after the participant begins receiving a retirement annuity, the system shall divide the annuity into two single life annuities; one~~

payable to the alternate payee and the other payable to the participant in accordance with the order and the rules of the plan. The system shall compute the two single life annuities by determining the actuarial present value of participant's current annuity as of the date that the system has approved the order, and creating an annuity payable to the alternate payee based on the actuarial present value of participant's current annuity awarded under the order to the alternate payee and creating a second life annuity payable to participant based on the remaining actuarial present value of participant's current annuity. Payments to the participant and to the alternate payee cease upon their respective deaths.

(l) [(e)] If a qualified domestic relations order is received by the system after the participant begins receiving a retirement annuity under which participant chose a dual life option, or a guaranteed term option and the term has not expired, and designated a person other than the alternate payee as beneficiary, then the system, in computing the two single life annuities to be paid to the participant and alternate payee respectively, shall first calculate the actuarial present value of the participant's current annuity that is not attributable to the beneficiary as of the date that the system has approved the order. The interest of the beneficiary in the participant's current retirement annuity will not be affected by the division of benefits. The actuarial present value of the participant's current annuity that is not attributed to the beneficiary is then divided into two single life annuities. The single life annuity payable to alternate payee is based on the actuarial present value of participant's current annuity not attributable to the beneficiary awarded under the order to the alternate payee, and the participant's single life annuity is computed based on the remaining actuarial present value of participant's current annuity not attributable to the beneficiary.

~~[(f) If a person's membership in the system has terminated, and under the terms of a qualified domestic relations order, an alternate payee would be entitled to receive a portion of the benefit that would be payable to the former member, or the former member's beneficiary, and if a valid application for the benefit has not been filed with the system within 60 days from the date the system mails notice of membership termination in accordance with Government Code, §845.505 so that payment can be made to the alternate payee, the director may commence payment of the benefit that would be payable to the alternate payee if the person entitled to apply for the former member's benefit had filed an application for a retirement annuity. If the person entitled to apply for the former member's benefit would be entitled to only the accumulated contributions of the former member, the alternate payee will receive the amount that would be payable to the alternate payee if the person had filed an application for withdrawal of accumulated contributions.]~~

~~[(g) In accordance with Government Code, §804.004, and in lieu of a life annuity described in §844.006(d) of that code or in subsection (b) or subsection (f) of this section that would otherwise be payable to an alternate payee under a qualified domestic relations order, the system is authorized, but not required, to make a single lump-sum payment to the alternate payee in an amount that is the actuarial equivalent of such life annuity if:]~~

~~[(1) The actuarially equivalent amount is not more than \$25,000; or,]~~

~~[(2) At the time the monthly annuity payments would commence, the alternate payee has directed that payment of the monthly annuity is to be delivered outside of the United States and any possession of the United States. The determination of whether to pay an amount authorized by this subsection in lieu of the interest awarded by the qualified domestic relations order is at the sole and exclusive discretion of the system.]~~

(m) [(h)] The mortality assumption for alternate payees for determining the actuarial equivalent of a benefit payable to an alternate payee shall be the same as the mortality assumption for beneficiaries as set forth in §103.1 [§103-1(a)] of this title (relating to Actuarial Tables) with regard to service retirements.

(n) [(i)] If participant's employer grants a cost of living adjustment pursuant to the terms of the plan, [and if participant is an eligible retiree for purposes of receiving the cost of living adjustment,] and if alternate payee has commenced an annuity, then the alternate payee is eligible to receive a cost of living adjustment to his or her annuity. [an annuity pursuant to the approved domestic relations order submitted to the system, then the alternate payee shall receive a pro-rated cost of living adjustment attributable to the monthly benefit awarded to alternate payee.]

(o) Notwithstanding any other provision of this chapter, all distributions made under this chapter must be determined and made in accordance with §401(a) of the Internal Revenue Code, including but not limited to §401(a)(9); and §415.

(j) ~~Except as provided in subsection (f) of this section, no payment shall be made by the system to an alternate payee before the time that the participant or the participant's beneficiary files a valid application for a refund or a retirement annuity.~~

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

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TRD-201605085

Ann McGeehan

General Counsel

Texas County and District Retirement System

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For further information, please call: (512) 637-3247



### 34 TAC §109.14

The amendments are proposed under the Government Code, §804.003(n) and §841.0091, which authorize the Board of Trustees to adopt rules to implement Chapter 804 and to divide a member's accrued benefit into two separate benefits that, in combination at the time of division, are actuarially equivalent to the undivided accrued benefit.

The Government Code, §841.0091 is affected by these proposed amendments.

§109.14. *Provisions Incorporated by Reference.*

An order on the form set forth in §109.13 of this title (relating to Form of Qualified Domestic Relations Order) expressly incorporates all of the following by reference.

(1) The order shall not be interpreted in any way to require the Plan to provide any type or form of benefit or any option not otherwise provided under the Plan.

(2) The order shall not be interpreted in any way to require the Plan to provide increased benefits determined on the basis of actuarial value.

(3) The order shall not be interpreted in any way to require the Plan to pay any benefits to an/any Alternate Payee named in the order which are required to be paid to another alternate payee under

another order previously determined to be a qualified domestic relations order.

~~(4) The order shall not be interpreted in any way to require the payment of benefits to Alternate Payee before the retirement of Participant, the distribution of a withdrawal of contributions to Participant as authorized by the statutes governing the Plan, or other distribution to Participant required by law.~~

(4) ~~(5)~~ If the Plan provides for a reduced benefit upon "early retirement," the order shall be interpreted to require that, in the event of Participant's retirement before normal retirement age, the benefits payable to Alternate Payee shall be reduced in a proportionate amount.

(5) ~~(6)~~ The order shall not be interpreted to require the designation of a particular person as the recipient of benefits in the event of Participant's death, or to require the selection of a particular benefit payment plan or option.

(6) ~~(7)~~ In the event that, after the date of the order, the amount of any benefit otherwise payable to Participant is increased as a result of amendments to the law governing the Plan, Alternate Payee shall receive a proportionate part of such increase unless such an order would disqualify the order under the rules the Plan has adopted with regard to qualified domestic relations orders.

(7) ~~(8)~~ In the event that, after the date of the order, the amount of any benefit otherwise payable to Participant is reduced by law, the portion of benefits payable to Alternate Payee shall be reduced in a proportionate amount.

(8) ~~(9)~~ If, as a result of Participant's death after the date of the order, a payment is made by the Plan to Participant's estate, surviving spouse, or designated beneficiaries, which payment does not relate in any way to Participant's length of employment or accumulated contributions with the Plan, but rather is purely a death benefit payable as a result of employment or retired status at the time of death, no portion of such payment is community property, and Alternate Payee shall have no interest in such death benefit.

(9) ~~(10)~~ If the board of trustees of the Plan has by provided that, in lieu of paying an alternate payee the interest awarded by a qualified domestic relations order, the Plan may pay the alternate payee an amount that is the actuarial equivalent of an annuity payable in equal monthly installments for the life of the alternate payee, or a lump sum, then and in that event the Plan is authorized to make such a payment under the order.

(10) ~~(11)~~ All payments to Alternate Payee under the order shall terminate upon Alternate Payee's death, and Alternate Payee's beneficiary may be entitled to a benefit under §109.12. ~~[or at such earlier date as may be required as a result of the retirement option selected by Participant.]~~

(11) ~~(12)~~ All benefits payable under the Plan, other than those payable ~~[under paragraph 4 of the order]~~ to Alternate Payee as provided in a qualified domestic order, shall be payable to Participant in such manner and form as Participant may elect in his/her sole and undivided discretion, subject only to Plan requirements.

(12) ~~(13)~~ Alternate Payee must [is ORDERED to] report any retirement payments received on any applicable income tax return, and must [to] promptly notify the Plan of any changes in Alternate Payee's mailing address. The Plan is authorized to issue a Form 1099R on any direct payment made to Alternate Payee.

(13) ~~(14)~~ Participant is designated a constructive trustee for receiving any retirement benefits under the Plan that are due to Alternate Payee but paid to Participant. Participant must [is ORDERED

to) pay the benefit defined in this paragraph directly to Alternate Payee within three days after receipt by Participant. All payments made directly to Alternate Payee by the Plan shall be a credit against this order.

(14) [(45)] The Court retains jurisdiction to amend the order so that it will constitute a qualified domestic relations order under the Plan even though all other matters incident to this action or proceeding have been fully and finally adjudicated.

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

Filed with the Office of the Secretary of State on October 3, 2016.

TRD-201605086

Ann McGeehan

General Counsel

Texas County and District Retirement System

Earliest possible date of adoption: November 13, 2016

For further information, please call: (512) 637-3247



## TITLE 43. TRANSPORTATION

### PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

#### CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

The Texas Department of Transportation (department) proposes amendments to §§9.11, 9.13, 9.15, 9.17, and 9.18, concerning Highway Improvement Contracts and §9.227, Information from Bidders, concerning the Disadvantaged Business Enterprise (DBE) Program.

##### EXPLANATION OF PROPOSED AMENDMENTS

These rules amend the department's rules relating to highway improvement contracts to improve compliance with federal regulations concerning the participation of disadvantaged business enterprises (DBE) in those types of contracts. Additionally, the amendments correct citations within the rules to other rule provisions.

Amendments to §9.11, Definitions, update section references in the definitions of disadvantaged business enterprise, historically underutilized business, and small business enterprise to the appropriate rules.

Amendments to §9.13, Notice of Letting and Issuance of Bid Forms, add subsection (e)(1)(B)(vii), which prohibits the department from issuing a bid form for a highway construction or maintenance contract to an individual or entity that is prohibited from submitting a bid on the project under §9.18(b).

Amendments to §9.15, Acceptance, Rejection, and Reading of Bids, update a rule citation and conform wording within the section to the terminology used in the cited section.

Amendments to §9.17, Award of Contract, add subsections (i) and (j), which set out the periods during which an apparent successful bidder is required to submit the DBE information required by §9.227 to be awarded the contract. This change is necessary to comply with the DBE bidding requirements of federal regulation, 49 C.F.R. §26.53.

Amendments to §9.18, After Contract Award, clarify that for a construction contract containing a DBE goal, failure to submit the DBE information required by §9.227 within the period described by §9.17(i), as added in this rulemaking, will result in forfeiture of the bid guaranty. This change is necessary to comply with the DBE bidding requirements of federal regulation, 49 C.F.R. §26.53. The amendments also change the heading of the section to "Contract Execution, Forfeiture of Bid Guaranty, and Bond Requirements" to more clearly describe the contents of the section.

Amendments to §9.227, Information from Bidders, reorganize, without substantive change, the section for additional clarity and conform the section to the changes made by this rulemaking to §9.17 and §9.18.

##### FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mr. Tracy Cain, P.E., Director, Construction Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

##### PUBLIC BENEFIT AND COST

Mr. Cain has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be efficiency and compliance with federal regulations. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

##### SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §9.17 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Award of Contract Rules." The deadline for receipt of comments is 5:00 p.m. on November 14, 2016. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

### SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

#### 43 TAC §§9.11, 9.13, 9.15, 9.17, 9.18

##### STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.004, which authorizes the commission to adopt rules to prescribe conditions under which a bid may be rejected by the department.

##### CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 223, Subchapter A.

*§9.11. Definitions.*

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

(1) Advertisement--The public announcement required by law inviting bids for work to be performed or materials to be furnished.

(2) Alternate bid item--A bid item identified by the department as an acceptable substitute for a regular bid item.

(3) Apparent low bidder--The bidder determined to have the numerically lowest total bid as a result of the tabulation of bids by the department.

(4) Available bidding capacity--The contractor's approved bidding capacity less uncompleted work on department contracts.

(5) Award--The commission's acceptance of a contractor's bid for a proposed contract that authorizes the department to enter into a contract.

(6) Bid--The offer of the bidder for performing the work described in the plans and specifications including any changes made by addenda.

(7) Bid bond--The security executed by the contractor and the surety furnished to the department to guarantee payment of liquidated damages if the contractor fails to enter into an awarded contract.

(8) Bidder--An individual, partnership, limited liability company, corporation, or joint venture submitting a bid for a proposed contract.

(9) Bidder's Questionnaire--A prequalification form that reflects detailed equipment and experience data but waives audited financial data.

(10) Bidding capacity--The maximum dollar value a contractor may have under contract with the department at any given time.

(11) Bid error--A mathematical mistake by the bidder in the unit bid price entered in the bid.

(12) Bid guaranty--The security furnished by the bidder as a guaranty that the bidder will enter into a contract if awarded the work.

(13) Building contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the construction or maintenance of a department building or appurtenant facilities. Building contracts are considered to be highway improvement contracts.

(14) Certificate of insurance--A form approved by the department covering insurance requirements stated in the contract.

(15) Certification of Eligibility Status form--A notarized form describing any suspension, voluntary exclusion, ineligibility determination actions by an agency of the federal government, indictment, conviction, or civil judgment involving fraud, official misconduct, each with respect to the bidder or any person associated with the bidder in the capacity of owner, partner, director, officer, principal investor, project director/supervisor, manager, auditor, or a position involving the administration of federal funds, covering the three-year period immediately preceding the date of the qualification statement.

(16) Commission--The Texas Transportation Commission or authorized representative.

(17) Confidential Questionnaire--A prequalification form reflecting detailed financial and experience data.

(18) Construction contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the construction or reconstruction of a segment of the state highway system.

(19) Department--The Texas Department of Transportation.

(20) Disadvantaged business enterprise (DBE)--Has the meaning assigned by §9.202(4) [~~§9.51(10)~~] of this chapter (relating to Definitions).

(21) District engineer--The chief executive officer in each of the designated district offices of the department.

(22) Electronic Bidding System (EBS)--The department's automated system that allows bidders to enter and submit their bid information electronically.

(23) Electronic vault--The secure location where electronic bids are stored prior to bid opening.

(24) Emergency--Any situation or condition of a designated state highway, resulting from a natural or man-made cause, that poses an imminent threat to life or property of the traveling public or which substantially disrupts or may disrupt the orderly flow of traffic and commerce.

(25) Executive director--The executive director of the Texas Department of Transportation or the director's designee not below the level of district engineer or division director.

(26) Highway improvement contract--A contract entered into under Transportation Code, Chapter 223, Subchapter A, for the construction, reconstruction, or maintenance of a segment of the state highway system, or for the construction or maintenance of a building or other facility appurtenant to a building.

(27) Historically underutilized business (HUB)--Has the meaning assigned by §9.352 [~~§9.51(16)~~] of this chapter (relating to Definitions).

(28) Joint venture--Any combination of individuals, partnerships, limited liability companies, or corporations submitting a single bid.

(29) Letting official--The executive director or any department employee empowered by the executive director to officially receive bids and close the receipt of bids at a letting.

(30) Maintenance contract--A contract entered under Transportation Code, Chapter 223, Subchapter A, for the maintenance of a segment of the state highway system.

(31) Materially unbalanced bid--A bid which generates a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the state.

(32) Mathematically unbalanced bid--A bid containing lump sum or unit bid items that do not reflect reasonable actual costs plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other indirect costs.

(33) Regular bid item--A bid item contained in a bid form and not designated as an alternate bid item.

(34) Routine maintenance contract--Contracts let through the routine maintenance contracting procedure to preserve and repair roadways and rights of way, with all its components, to its designed or accepted configuration.

(35) Small business enterprise (SBE)--Has the meaning assigned by §9.302 [~~§9.51(22)~~] of this chapter (relating to Definitions).

§9.13. *Notice of Letting and Issuance of Bid Forms.*

(a) Notice to bidders. A person may apply to have his or her name placed on a mailing list to receive the Notice to Contractors for a fee of \$65 per year to cover costs of mailing the notices.

(b) Fee exemption. The following entities are not required to pay the notice subscription fee:

- (1) qualified bidders approved under §9.12 of this subchapter (relating to Qualification of Bidders);
- (2) other state agencies;
- (3) other state departments of transportation;
- (4) disadvantaged business enterprises and historically underutilized businesses;
- (5) offices of the federal government; and
- (6) organizations performing work under supportive service contracts awarded by the commission.

(c) Notice of Bids. The department will advertise contracts on the Electronic State Business Daily maintained and operated by the Comptroller of Public Accounts.

(d) Bid form.

(1) Bid form content. A bid form may include:

- (A) the location and description of the proposed work;
- (B) an approximate estimate of the various quantities and kinds of work to be performed or materials to be furnished;
- (C) a schedule of items for which unit prices are requested;
- (D) the time within which the work is to be completed; and
- (E) the special provisions and special specifications.

(2) Form of request. A request for a bid form on a highway improvement contract may be made orally or in writing.

(e) Issuance of bid form.

(1) Construction and maintenance contracts.

(A) Issuance. Except where prohibited under subparagraph (B) of this paragraph, the department will, upon receipt of a request, issue a bid form for a construction or maintenance contract as follows:

(i) for a project on which audited financial prequalification is not waived, only to a prequalified bidder, and only if the estimated cost of the project is within that bidder's available bidding capacity; and

(ii) for a project on which audited financial qualification is waived under §9.12(c) of this subchapter, only if the estimated cost of the project is within that bidder's available bidding capacity.

(B) Non-issuance. Except as provided in subparagraph (C) of this paragraph, the department will not issue a bid form requested by a bidder for a construction or maintenance contract if at the time of the request the bidder:

(i) is disqualified by an agency of the federal government as a participant in programs and activities involving federal assistance and benefits, and the contract is for a federal-aid project;

(ii) is suspended or debarred by order of the commission;

(iii) is prohibited from rebidding a specific project because of default of the first awarded contract;

(iv) has not fulfilled the requirements for qualification under §9.12 of this subchapter;

(v) is prohibited from rebidding that project as a result of having previously submitted a mathematically and materially unbalanced bid resulting in the rejection of the bid by the commission; [or]

(vi) is prohibited from rebidding that project as a result of having submitted a bid containing an error resulting in the rejection of bids by the commission; or[-]

(vii) is prohibited from rebidding that project under §9.18(b) of this subchapter (relating to Contract Execution, Forfeiture of Bid Guaranty, and Bond Requirements).

(C) Exception. The department may issue a bid form under a temporary approval to a bidder who would be ineligible under subparagraph (B)(iv) of this paragraph if the bidder has substantially complied with the requirements of §9.12 of this subchapter.

(2) Building contracts.

(A) Issuance. Except as provided in subparagraph (B) of this paragraph, the department will issue, upon request, a bid form to a bidder having complied with §9.12(e) of this subchapter.

(B) Non-issuance. The department will not issue a bid form requested by a bidder for a building contract if, at the time of the request, the bidder:

(i) is disqualified by an agency of the federal government as a participant in programs and activities involving federal assistance and benefits and the contract is a federal-aid project;

(ii) is suspended or debarred by order of the commission; or

(iii) is prohibited from bidding that project because of default of the first awarded contract.

(3) All contracts. The department will not issue a bid form for a highway improvement contract to a bidder if the bidder or a subsidiary or affiliate of the bidder has received compensation from the department to participate in the preparation of the plans or specifications on which the bid or contract is based.

§9.15. *Acceptance, Rejection, and Reading of Bids.*

(a) Public reading. Bids will be opened and read in accordance with Transportation Code, §223.004 and §223.005. Bids for contracts with an engineer's estimate of less than \$300,000 may be filed with the district engineer at the headquarters for the district, and opened and read at a public meeting conducted by the district engineer, or his or her designee on behalf of the commission.

(b) Bids not read.

(1) The department will not accept and will not read a bid if:

(A) the bid is submitted by an unqualified bidder;

(B) the bid is in a form other than the official bid form issued to the bidder;

(C) the certification and affirmation are not signed;

(D) the bid was not in the hands of the letting official at the time and location specified in the advertisement;

(E) the bidder modifies the bid in a manner that alters the conditions or requirements for work as stated in the bid;

(F) the bid guaranty, when required, does not comply with §9.14(d) of this subchapter;

(G) the bidder did not attend a specified mandatory pre-bid conference;

(H) the bid does not include a fully completed HUB [historically underutilized business subcontracting] plan in accordance with §9.356 [§9.54(e)(1)] of this chapter when required;

(I) a computer printout bid, when used, does not have the unit bid prices entered in designated spaces, is not signed in the name of the firm or firms to whom the bid was issued, or omits required bid items or includes items not shown in the bid;

(J) the bidder was not authorized to be issued a bid form under §9.13(e) of this subchapter;

(K) the bid did not otherwise conform with the requirements of §9.14 of this subchapter;

(L) the bidder fails to properly acknowledge receipt of all addenda;

(M) the bid submitted has the incorrect number of bid items; or

(N) the bidder bids more than the maximum or less than the minimum number of allowable working days shown on the plans when working days is a bid item.

(2) If bids are submitted on the same project separately by a joint venture and one or more members of that joint venture, the department will not accept and will not read any of the bids submitted by the joint venture and those members for that project.

(3) If bids are submitted on the same project by affiliated bidders as determined under §9.12(d) of this subchapter, the department will not accept and will not read any of the bids submitted by the affiliated bidders for that project.

(c) Revision of bid.

(1) For a manually submitted bid, a bidder may change a bid price before it is submitted to the department by changing the price in the printed bid form and initialing the revision in ink;

(2) For a manually submitted bid, a bidder may change a bid price after it is submitted to the department by requesting return of the bid in writing prior to the expiration of the time for receipt of bids, as stated in the advertisement. The request must be made by a person authorized to bind the bidder. The department will not accept a request by telephone or telegraph, but will accept a properly signed facsimile request. The revised bid must be resubmitted prior to the time specified for the close of the receipt of bids.

(3) For an electronically submitted bid, a bidder may change a unit bid price in EBS and resubmit electronically to the electronic vault until the time specified for the close of the receipt of bids. Each bid submitted will be retained in the electronic vault. The electronic bid with the latest date and time stamp by the vault will be used for bid tabulation purposes.

(d) Withdrawal of bid.

(1) A bidder may withdraw a manually submitted bid by submitting a request in writing before the time and date of the bid opening. The request must be made by a person authorized to bind the bidder. The department will not accept telephone or telegraph requests, but will accept a properly signed facsimile request. Except as provided

in §9.16(c) of this subchapter and §9.17(d) of this subchapter, a bidder may not withdraw a bid subsequent to the time for the receipt of bids.

(2) A bidder may withdraw an electronically submitted bid by submitting an electronic or written request to withdraw the bid. An electronic withdrawal request must be submitted using EBS. The request, whether electronic or written, must be submitted by a person who is authorized by the bidder to submit the request and received by the department before the time and date of the bid opening.

(e) Unbalanced bids. The department will examine the unit bid prices of the apparent low bid for reasonable conformance with the department's estimated prices. The department will evaluate a bid with extreme variations from the department's estimate, or where obvious unbalancing of unit prices has occurred. For the purposes of the evaluation, the department will presume the same retainage percentage for all bidders. In the event that the evaluation of the unit bid prices reveals that the apparent low bid is mathematically and materially unbalanced, the bidder will not be considered in future bids for the same project.

§9.17. *Award of Contract.*

(a) The commission may reject any and all bids opened, read, and tabulated under §9.15 and §9.16 of this subchapter (relating to Acceptance, Rejection, and Reading of Bids and Tabulation of Bids, respectively). It will reject all bids if:

(1) there is reason to believe collusion may have existed among the bidders;

(2) the lowest bid is determined to be both mathematically and materially unbalanced;

(3) the lowest bid is higher than the department's estimate and the commission determines that re-advertising the project for bids may result in a significantly lower low bid;

(4) the lowest bid is higher than the department's estimate and the commission determines that the work should be done by department forces; or

(5) the lowest bid is determined to contain a bid error that meets the notification requirements contained in §9.16(e)(1) of this subchapter and satisfies the criteria contained in §9.16(e)(2) of this subchapter.

(b) Except as provided in subsection (c), (d), (e), [ØF] (f), or (i) of this section, if the commission does not reject all bids, it will award the contract to the lowest bidder.

(c) In accordance with Government Code, Chapter 2252, Subchapter A, the commission will not award a contract to a nonresident bidder unless the nonresident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the greater of:

(1) the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which:

(A) the nonresident's principal place of business is located; or

(B) the nonresident is a resident manufacturer; or

(2) the amount by which a resident bidder would be required to underbid the nonresident bidder to obtain a comparable contract in the state in which a majority of the manufacturing related to the contract will be performed.

(d) For a maintenance contract for a building or a segment of the state highway system involving a bid amount of less than \$300,000, if the lowest bidder withdraws its bid after bid opening, the execu-

tive director may recommend to the commission that the contract be awarded to the second lowest bidder.

(1) For purposes of this subsection, the term "withdrawal" includes written withdrawal of a bid after bid opening, failure to provide the required insurance or bonds, or failure to execute the contract.

(2) The executive director may recommend award of the contract to the second lowest bidder if he or she, in writing, determines that the second lowest bidder is willing to perform the work at the unit bid prices of the lowest bidder; and

(A) the unit bid prices of the lowest bidder are reasonable, and delaying award of the contract may result in significantly higher unit bid prices;

(B) there is a specific need to expedite completion of the project to protect the health or safety of the traveling public; or

(C) delaying award of the contract would jeopardize the structural integrity of the highway system.

(3) The commission may accept the withdrawal of the lowest bid after bid opening if it concurs with the executive director's determinations.

(4) If the commission awards a contract to the second lowest bidder and the department successfully enters into a contract with the second lowest bidder, the department will return the lowest bidder's bid guaranty upon execution of that contract. The lowest bidder may be considered in default and will be subject to debarment under §9.101, et seq. of this chapter.

(e) If the lowest bidder is not a preferred bidder and the contract will not use federal funds, the department, in accordance with Transportation Code, Chapter 223, Subchapter B, will award the contract to the lowest-bidding preferred bidder if that bidder's bid does not exceed the amount equal to 105 percent of the lowest bid. For purposes of this subsection, "preferred bidder" means a bidder whose principal place of business is in this state or a state that borders this state and that does not give a preference similar to Transportation Code, §223.050.

(f) When additional information is required to make a final decision, the commission may defer the award or rejection of the contract until the next regularly scheduled commission meeting.

(g) Contracts with an engineer's estimate of less than \$300,000 may be awarded or rejected by the executive director under the same conditions and limitations as provided in subsections (a)-(c) of this section.

(h) The commission may rescind the award of any contract prior to contract execution upon a determination that it is in the best interest of the state. In such an instance, the bid guaranty will be returned to the bidder. No compensation will be paid to the bidder as a result of this cancellation.

(i) If, for a contract with a DBE goal, the lowest bidder fails to submit the DBE information required by §9.227 of this chapter (related to Information from Bidders) within five calendar days after the date that the bids are opened, the commission may:

(1) reject all bids; or

(2) reject the bid of the lowest bidder and award the contract to the next lowest bidder.

(j) If a contract is to be awarded to the next lowest bidder under subsection (i) of this section, the next lowest bidder shall submit the DBE information required by §9.227 of this subchapter within one calendar day after the date of receipt of the notification of bid acceptance.

§9.18. [After] Contract Execution, Forfeiture of Bid Guaranty, and Bond Requirements [Award].

(a) Contract execution.

(1) Except as provided in paragraphs (2) and (3) of this subsection, within 15 days after the bidder receives written notification of the award of a contract, the [successful] bidder must execute and furnish to the department the contract with:

(A) a performance bond and a payment bond, if required and as required by Government Code, Chapter 2253, with powers of attorneys attached, each in the full amount of the contract price except as provided by subsection (c) of this section, executed by a surety company or surety companies authorized to execute surety bonds under and in accordance with state law. Department interpretations made in accordance with §9.16(b)(2) of this subchapter (relating to Tabulation of Bids) will be used to determine the contract amount for providing a performance bond and payment bond, if required, and as required by the Government Code, Chapter 2253;

(B) a certificate of insurance showing coverages in accordance with contract requirements;

(C) when required, written evidence of current good standing from the Comptroller of Public Accounts; and

(D) a list of all quoting subcontractors and suppliers.

(2) A [successful] bidder awarded [on] a routine maintenance contract will be required to provide the certificate of insurance prior to the date the contractor begins work as specified in the department's order to begin work.

(3) The [Within the time specified in the contract, the successful] bidder selected for the award of [on] a construction contract containing a DBE or SBE goal, who is not a DBE or SBE, must submit all the information required by the department in accordance with §9.227 [§9.53(e)] of this chapter (relating to Information from Bidders [Disadvantaged Business Enterprise (DBE) Program]) within the period described by §9.17(i) of this subchapter for a contract containing a DBE goal, or §9.319 [and §9.55(e)] of this chapter (relating to Contractor's Commitment Agreement [Small Business Enterprise (SBE) Program]) and §9.320 of this subchapter (relating to Contractor's Good Faith Efforts) within the period specified in the contract for a contract containing a SBE goal. The [successful] bidder must comply with paragraph (1) of this subsection within 15 days after written notification of acceptance by the department of the [successful] bidder's documentation to achieve the DBE or SBE goal.

(b) Bid guaranty. The department will retain the bid guaranty of the [successful] bidder awarded a contract until after the contract has been executed and bonded. If the [successful] bidder selected for the award of a contract with a DBE goal fails to submit the DBE information required by §9.227 of this chapter (related to Information from Bidders) within the period described by §9.17(i) of this subchapter or if the bidder awarded a contract does not comply with subsection (a) of this section, the bid guaranty will become the property of the state, not as a penalty but as liquidated damages; ~~provided, however, the department may, based on documentation submitted by the contractor, grant a 15-day extension to comply with the requirements under subsection (a)(3) of this section.~~ A bidder who forfeits a bid guaranty will not be considered in future bids for the same work unless there has been a substantial change in the design of the project subsequent to the forfeiture of the bid guaranty.

(c) Performance or payment bonds. For maintenance contracts the department may require that a performance or payment bond:

(1) be in an amount equal to the greatest annual amount to be paid under the contract and remain in effect for one year from the date work is resumed after any default by the contractor; or

(2) be in an amount equal to the amount to be paid the contractor during the term of the bond and be for a term of two years, renewable annually in two-year increments.

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

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TRD-201605067

Joanne Wright

Deputy General Counsel

Texas Department of Transportation

Earliest possible date of adoption: November 13, 2016

For further information, please call: (512) 463-8630



## SUBCHAPTER J. DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

### 43 TAC §9.227

#### STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.004, which authorizes the commission to adopt rules to prescribe conditions under which a bid may be rejected by the department.

#### CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 223, Subchapter A.

§9.227. *Information from Bidders.*

(a) Before the execution of a contract, the apparent successful bidder must submit to the department:

(1) the names and addresses of each subcontractor, identifying DBEs that will participate in the contract;

(2) a description of the work that each DBE will perform;

(3) the dollar amount of the participation of each DBE;

(4) written documentation of the bidder's commitment to use each DBE subcontractor whose participation the bidder submits to meet a contract goal; and

(5) written confirmation from each DBE that it is participating in the contract as provided in the bidder's commitment.]; and]

[(6) if the contract goal is not met by DBE commitments, evidence of the bidder's good faith efforts to obtain DBE participation to meet the contract goal.]

(b) Each bidder shall document the bidder's good faith efforts to obtain commitment to meet the contract goal. Good faith efforts are shown if the bidder documents that:

(1) sufficient DBE participation has been obtained to meet the contract goal; or

(2) the bidder took the types of action that may be considered as good faith efforts as referenced in 49 C.F.R. Part 26, Appendix A, to obtain the commitments to meet the contract goal even though the bidder did not succeed in obtaining sufficient DBE participation to meet the contract goal.

(c) In addition to the information required under subsection (a) of this section, if the contract goal is not met by DBE commitments, the apparent successful bidder must submit to the department, before the execution of a contract, evidence of the bidder's good faith efforts to obtain DBE participation to meet the contract goal.

(d) [(e)] If the apparent successful bidder [to whom the contract is conditionally awarded refuses, neglects, or] fails to obtain the commitments to meet the DBE contract goal and fails [or] to comply with good faith efforts requirements described by subsection (b) of this section, the proposal guaranty filed with the bid is forfeited to the department.

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

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Joanne Wright

Deputy General Counsel

Texas Department of Transportation

Earliest possible date of adoption: November 13, 2016

For further information, please call: (512) 463-8630



## CHAPTER 11. DESIGN

### SUBCHAPTER G. TRANSPORTATION ALTERNATIVES SET-ASIDE PROGRAM

#### 43 TAC §§11.400 - 11.418

The Texas Department of Transportation (department) proposes new §§11.400 - 11.418, concerning the Transportation Alternatives Set-Aside Program.

#### EXPLANATION OF PROPOSED NEW SECTIONS

The proposed new sections implement the Transportation Alternatives Set-Aside Program (TA Set-Aside Program) as authorized by the federal Fixing America's Surface Transportation Act (FAST Act). The FAST Act establishes the TA Set-Aside Program as part of the Surface Transportation Block Grant, and replaces the Transportation Alternatives Program (TAP) which was established as an independent funding category under the Moving Ahead for Progress in the 21st Century Act (MAP-21). Like the TAP, the TA Set-Aside Program provides funding for a variety of alternative transportation projects. The TA Set-Aside Program is contained in 23 U. S. C. §133(h).

A majority of the concepts contained in the new sections are carried forward from the department's administrative rules concerning the TAP, and will be familiar to interested parties.

New Subchapter G is titled "Transportation Alternatives Set-Aside Program" to accurately reflect and conform to federal law.

New §11.400, Purpose, describes the purpose of the subchapter, which is to set out the policies and procedures for the implementation and administration of the TA Set-Aside Program.

New §11.401, Definitions, defines various terms used in the new subchapter, which are standard and recognizable within the transportation planning community.

New §11.402, Program Administration, briefly describes the sub-allocation of TA Set-Aside funds as required by federal law, and provides that each Metropolitan Planning Organization (MPO) serving an urbanized area with a population over 200,000 shall implement the TA Set-Aside Program for the award of funds in that area. The remaining TA Set-Aside funds will be distributed through a competitive process administered by the department.

New §11.403, Project Selection and Implementation by MPOs, provides general guidance for MPOs that are responsible for the review and selection of TA Set-Aside projects. The department is not mandating how the MPOs will conduct the selection process; however, project selection and implementation shall be conducted in accordance with applicable state and federal laws and regulations. Eligibility determinations shall be made by the MPO, subject to audit by the Federal Highway Administration (FHWA). MPOs are required to provide the department a list of all projects submitted during a program call, specifically identifying the selected projects, and shall include selected projects within their respective Transportation Improvement Programs (TIPs). A project sponsor requesting an adjustment to the minimum local funding match requirement based on the county's status as an economically disadvantaged county is required to obtain written authorization from the department and must include that authorization with the application submitted to the MPO. If an adjustment is granted, the adjustment percentage in effect at the time the application is submitted will be used and the county must remain eligible for the adjustment until the date the project sponsor enters into the local agreement. Projects, or substantially similar projects, submitted during a program call administered by the MPO are not eligible for consideration under a program call administered by the department. In addition, MPOs shall report annually to the department on TA Set-Aside project applications and projects awarded TA Set-Aside funding.

New §11.404, Eligible Activities, describes those activities for which TA Set-Aside funds may be awarded under a program call administered by the department. As under the TAP, these activities include construction of on-road and off-road trail facilities for pedestrians, bicyclists, and other non-motorized forms of transportation; construction of infrastructure-related projects and systems to improve safe routes for non-drivers; conversion and use of abandoned railroad corridors for trails for pedestrians, bicyclists, or other non-motorized transportation users; and construction of infrastructure-related projects to improve the ability of students to bike and walk to school. Several types of activities that are defined as "transportation alternatives" under federal law will not be considered for funding under a program call administered by the department. The agency continues to place an emphasis on facilities for pedestrians, bicyclists and other non-motorized forms of transportation, as well as certain types of infrastructure projects formerly eligible under the Safe Routes to School Program, in an effort to encourage the development of a safe and multimodal transportation system. Projects requiring the acquisition of real property through eminent domain or condemnation are not eligible. Whether proposed as an independent project or an element of a larger project, the project must be limited to

a logical unit of work and be constructible as an independent project.

New §11.405, Allowable Costs, provides that the use of federal funds is limited to construction-related project expenditures and eligible project costs incurred by the department. The costs of preliminary engineering are not allowable, and expenditures for routine operation and maintenance are not reimbursable unless specifically allowed under the applicable federal program category. These limitations were previously established under the TAP.

New §11.406, Local Funding Match, specifies that the local funding match will be a cash match or in-kind contribution provided by or through the project sponsor. In-kind contributions for development of project plans, specifications, and estimates (PS&E) may be considered part of the local funding match; however, these costs must be incurred after project selection, execution of the project agreement and issuance of the authorization to proceed. Unless specifically authorized under federal law or regulation, funds from other federal programs may not be used as a local funding match. Donated services will not be accepted as a part of the local match, but may be used to reduce the overall cost of the project. If a selected project is to be administered by the department, the project sponsor must provide the local funding match prior to the commencement of project activities for each phase of work. The local match associated with the department's administrative cost must be provided in cash.

New §11.407, Call for Nominations, describes the method by which the department will announce a call for projects and the type of information that will be included in the notice. The department may limit a program call to a particular type of eligible activity, in order to focus its efforts towards making an overall impact in a specific area.

New §11.408, Nomination Package, specifies the manner in which a project sponsor must submit its nomination and the type of information and justification that must be included in the nomination package. Project sponsors must provide persuasive evidence of support from the local community and a commitment to provide a minimum local match of 20% of the allowable project costs. If the project is located in a county that has been certified by the Texas Transportation Commission (commission) as an economically disadvantaged county, the nomination package may include a request for adjustment to the minimum local match requirement. For those projects in which the commission is authorized by law to provide state cost participation, the department may adjust the match amount. If an adjustment is granted, the adjustment percentage in effect at the time the nomination package is submitted will be used and the county must remain eligible for the adjustment until the date the project sponsor enters into the local agreement. Project submissions must be received by the published deadline and any nomination package that fails to include the required items will be considered incomplete and will not be considered for funding. The department may request supplemental information as needed to conduct project screening and evaluation.

New §11.409, Project Screening and Evaluation, describes the method by which the department will conduct the project review process. As with the TAP, the executive director will appoint a project evaluation committee consisting of department staff to review and evaluate all aspects of the project. The committee will provide selection recommendations to the director of the division responsible for administering the TA Set-Aside Program,

who will review the recommendations and provide a final list of recommended projects to the commission for consideration.

New §11.410, Finding of Ineligibility; Request for Reconsideration, provides that the department will notify project sponsors of ineligible activities proposed and the reason for the determination, and describes how a project sponsor may request a reconsideration of the determination.

New §11.411, Selection of Projects by the Commission, describes the process by which the commission will select projects for funding under the TA Set-Aside Program. In making the selection, the commission will consider: (1) recommendations from the director of the division responsible for administering the program; (2) the potential benefit to the state of the project; and (3) whether the project enhances the surface transportation system. The commission will not be bound by the department's recommendations. Funds awarded by the commission are a fixed amount and any additional funds needed for the project must be provided by the project sponsor or sought during subsequent program calls.

New §11.412, Inclusion of Selected Projects in Planning Documents, provides that the department will request that MPOs include projects selected by the commission within their respective TIPs. The department will also include all selected projects in the Statewide Transportation Improvement Program (STIP).

New §11.413, Project Implementation, describes the operational responsibilities of project sponsors, as well as the department's role, during implementation of the project. These guidelines will help ensure effective and efficient implementation of each project selected by the commission. Project sponsors are expected to implement or arrange for implementation of a selected project; however, the department, in its sole discretion, may agree to implement a project on behalf of a project sponsor. All selected projects shall be developed according to current standards and specifications and in accordance with new Subchapter G. Project sponsors must enter into a local agreement with the department and comply with all applicable state and federal requirements related to the development of federal-aid highway projects. The department will ensure that all required opportunities for public involvement have been followed and that all environmental documentation has been completed prior to funding construction activities. Funding from other federal programs may only be used when specifically authorized by federal law or regulation. Changes to the scope of work must be approved in advance by the executive director. The department is responsible for final project inspection and acceptance. If the project sponsor does not complete the project as approved, the department may seek reimbursement of the expended federal funds.

New §11.414, Payment of Costs, provides that the department will submit all requests for reimbursement to FHWA and describes the manner in which costs for locally-administered projects may be submitted for reimbursement. All project costs are borne by the project sponsor until reimbursement can be obtained. Costs incurred prior to inclusion of the project in the STIP, execution of the local agreement, and prior to state and federal authorization are not eligible for reimbursement.

New §11.415, Elimination of Project from the TA Set-Aside Program, specifies that a project will be eliminated from the program if the department is notified of opposition from the local jurisdiction in which the project is located. In addition, the executive director may eliminate a project from the program if: (1) the project sponsor fails to meet the requirements of new Subchapter G; (2)

implementation of the project would require a significant deviation from the activities proposed in the nomination package; (3) the project sponsor withdraws from the project; (4) a construction contract has not been awarded within three years of project selection; (5) a local agreement has not been executed within one year of project selection; or (6) the executive director determines that federal funding may be jeopardized because the project has not been implemented or completed.

New §11.416, Project Transfer; Approval of Change, outlines the basic steps required to transfer a project to another entity in the event of a legislative action and specifies that the disposition must be approved by FHWA.

New §11.417, Maintenance and Operation; Dedication for Public Use, provides that a selected project shall be maintained and operated for the purpose for which it was approved and funded, and offers guidance regarding the expected project lifespan as it relates to the federal investment.

New §11.418, Annual Reporting to FHWA, provides that the department will report annually to FHWA on the total number of TA Set Aside project applications and the total number of projects that are awarded TA Set-Aside funding.

#### FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Eric Gleason, Director of Public Transportation, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

#### PUBLIC BENEFIT AND COST

Mr. Gleason has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be a more efficient and robust transportation system through the development of various types of federally-funded transportation projects as allowed under the Transportation Alternatives Set-Aside Program. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

#### SUBMITTAL OF COMMENTS

Written comments on the proposed new §§11.400 - 11.418 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "TA SET-ASIDE PROGRAM." The deadline for receipt of comments is 5:00 p.m. on November 14, 2016. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed new sections, or is an employee of the department.

#### STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

## CROSS REFERENCE TO STATUTE

Title 23, United States Code, §133(h).

### §11.400. Purpose.

The sections under this subchapter prescribe the policies and procedures for the implementation and administration of the Transportation Alternatives Set Aside Program (TA Set-Aside Program), as authorized by 23 U.S.C. §133(h).

### §11.401. Definitions.

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

- (1) Commission--Texas Transportation Commission.
- (2) Department--Texas Department of Transportation.
- (3) Executive director--The executive director of the Texas Department of Transportation or the executive director's designee.
- (4) FHWA--Federal Highway Administration.
- (5) Local agreement--An agreement between the project sponsor and the department which includes a commitment for the required local funding, describes the total scope and course of project activities, and outlines the responsibilities and duties of the participants.
- (6) Metropolitan planning organization (MPO)--The organization or policy board of an organization created and designated under 23 U.S.C. §134, and 49 U.S.C. §5303, to make transportation planning decisions for the metropolitan planning area and carry out the metropolitan planning process.
- (7) Project--An undertaking to implement or construct an eligible activity at a specific location or locations, or, if the context so implies, the particular activity so implemented or constructed.
- (8) Project sponsor--An eligible entity as described by 23 U.S.C. §133(h), that nominates a particular project for consideration, exercises jurisdiction over the geographic area in which that project is located, and commits to the project's development, implementation, construction, maintenance, management, and financing.
- (9) State--The State of Texas or any of its political subdivisions.
- (10) Statewide Transportation Improvement Program (STIP)--A four year short-range program developed by the department as a compilation of all metropolitan transportation improvement programs, together with rural transportation improvement programs, that include recommendations from rural planning organizations and department districts for the areas of the state that are outside of the boundaries of a metropolitan planning organization, including transportation between cities.
- (11) Surface transportation system--An interconnected surface transportation network for moving people and goods using various combinations of transportation modes.
- (12) Transportation Improvement Program (TIP)--A short-range program developed by each metropolitan planning organization in cooperation with the department and public transportation operators that covers a four-year period and contains a prioritized listing of all projects proposed for federal funding and regionally significant projects proposed for state, federal, and local funding in a metropolitan area.

### §11.402. Program Administration.

(a) The state is required to suballocate, in accordance with 23 U.S.C. §133(h), a part of its TA Set-Aside apportionment to urbanized areas with populations over 200,000.

(b) Each MPO serving an urbanized area with a population over 200,000 shall implement the TA Set-Aside Program for the award of funds suballocated within that area. Section 11.403 of this subchapter (relating to Project Selection and Implementation by MPOs) applies only to the use of those TA Set-Aside funds.

(c) For TA Set-Aside funds not covered by subsection (b) of this section, the commission will select projects through a competitive process administered by the department. Sections 11.404 - 11.417 of this subchapter apply only to the use of those TA Set-Aside funds.

### §11.403. Project Selection and Implementation by MPOs.

(a) This section applies only to an MPO serving an urbanized area with a population over 200,000 and the award of TA Set-Aside funds suballocated for such an urbanized area.

(b) The MPO, in consultation with the department, shall develop a competitive process to allow project sponsors to submit project applications for funding that achieve the objectives of the TA Set-Aside Program.

(c) The MPO shall coordinate determinations regarding project eligibility, subject to audit by the FHWA.

(d) The MPO, in consultation with the department, shall conduct project selection in accordance with all applicable federal and state laws and regulations.

(e) Following the conclusion of the competitive process, the MPO shall provide to the department a list of all projects submitted during the program call on which the selected projects are identified, and immediately shall begin the process required to include the selected projects in its TIP.

(f) The MPO shall conduct project implementation in accordance with all applicable federal and state laws and regulations.

(g) If a project is located on state right-of-way, the project sponsor is responsible for securing a land-use permit from the department prior to construction.

(h) A project sponsor requesting an adjustment to the minimum local funding match requirements based on the county's status as an economically disadvantaged county is required to obtain written authorization from the department, in the form prescribed by the department, and must include the form with the application submitted to the MPO. If an adjustment is granted, the adjustment percentage in effect for the county at the time the application is submitted to the MPO will be used. The county must remain eligible for the adjustment until the date the project sponsor enters into the local agreement.

(i) Projects, or substantially similar projects, submitted during a program call administered by the MPO are not eligible for consideration under a program call administered by the department.

(j) Not later than November 15 of each year, the MPO shall submit to the department a report that describes:

(1) the number of project applications received by the MPO for the preceding federal fiscal year (the period of October 1 through September 30), including the aggregate cost of the projects for which applications are received and the types of projects to be carried out, expressed as percentages of the MPO's total apportionment for TA Set-Asides; and

(2) the number of projects selected for funding by the MPO for the preceding federal fiscal year, including the aggregate cost and location of projects selected.

§11.404. Eligible Activities.

(a) During a program call administered by the department, TA Set-Aside funds may be awarded for any of the following activities:

(1) construction of on-road and off-road trail facilities for pedestrians, bicyclists, and other non-motorized forms of transportation, including sidewalks, bicycle infrastructure, pedestrian and bicycle signals, traffic calming techniques, lighting and other safety-related infrastructure, and transportation projects to achieve compliance with the Americans with Disabilities Act of 1990;

(2) construction of infrastructure-related projects and systems that will provide safe routes for non-drivers, including children, older adults, and individuals with disabilities to access daily needs;

(3) conversion and use of abandoned railroad corridors for trails for pedestrians, bicyclists, or other non-motorized transportation users; and

(4) construction of infrastructure-related projects to improve the ability of students to walk and bicycle to school, including sidewalk improvements, traffic calming and speed reduction improvements, pedestrian and bicycle crossing improvements, on-street bicycle facilities, off-street bicycle and pedestrian facilities, secure bicycle parking facilities, and traffic diversion improvements in the vicinity of schools.

(b) A project that will require the acquisition of real property through the exercise of eminent domain or condemnation is not eligible for participation in the TA Set-Aside Program.

(c) Whether proposed as an independent project or as an element of a larger transportation project, the project must be limited to a logical unit of work and be constructible as an independent project.

§11.405. Allowable Costs.

(a) Costs are allowable only if they are necessary construction-related project expenditures that are eligible for reimbursement under applicable statutes and regulations.

(b) The costs of preliminary engineering, including planning, design, and plans, specifications, and estimates, are not allowable costs.

(c) Eligible pre-construction costs incurred by the department are reimbursable. All other pre-construction costs are the responsibility of the project sponsor.

(d) Expenditures for routine operation and maintenance are not allowable costs unless specifically allowed under the individual federal category for which the project qualifies.

§11.406. Local Funding Match.

(a) The local funding match is a cash match or in-kind contribution provided by or through the project sponsor. An in-kind contribution may include only actual and documented costs incurred by the project sponsor for the development of project plans, specifications, and estimates that would otherwise be eligible for reimbursement under applicable statutes and regulations.

(b) Costs incurred prior to execution of the local agreement or prior to federal and state approval and authorization to proceed are not eligible for consideration as in-kind contributions.

(c) Funds from other federal programs may be used as a local funding match only when specifically authorized by federal law or regulation.

(d) Donated services may not be accepted as a local funding match, but may be used to reduce the overall cost of the project.

(e) If a project selected by the commission is implemented by the department, the project sponsor must provide the local funding match prior to the commencement of project activities for each phase of work.

(f) Projects selected by the commission will include an administrative cost for the department's oversight. The local funding match associated with this administrative cost must be provided in cash.

§11.407. Call for Nominations.

(a) The department will issue a notice of a call for project nominations by publication in the *Texas Register*.

(b) The notice will include information regarding the content of the nomination package, the procedures applicable to the program call, and the specific evaluation criteria to be used during the project selection process.

(c) All or a portion of a call for nominations may be designated for a particular eligible activity.

§11.408. Nomination Package.

(a) To nominate a project during a program call administered by the department, the project sponsor must submit its nomination in the form prescribed by the department.

(b) The nomination package must present persuasive evidence of support for the proposed project from the communities in which it would be implemented and include a commitment to provide a local funding match of at least 20% of the allowable costs of the project.

(c) If the project is located in a county that has been certified by the commission as an economically disadvantaged county, the nomination package may include a request for adjustment to the minimum local funding match requirement. For those projects in which the commission is authorized by law to provide state cost participation, the department may adjust the amount required by subsection (b) of this section. If an adjustment is granted, the adjustment percentage in effect for the county at the time the program call is initiated will be used. The county must remain eligible for the adjustment until the date the project sponsor enters into the local agreement.

(d) A complete nomination package must be received by the department not later than the specified deadline published in the *Texas Register*. A nomination package that fails to include any of the items specified in this section or the respective program call is considered to be incomplete and will not be considered for funding. The department may request supplemental information as needed to conduct project screening and evaluation.

§11.409. Project Screening and Evaluation.

(a) The executive director will appoint a project evaluation committee consisting of department staff to review, evaluate, and make recommendations on projects submitted during a program call administered by the department.

(b) The committee will screen each project to determine whether it is eligible for funding under applicable federal and state law and whether it meets technical standards established by applicable law and accepted professional practice.

(c) The committee will evaluate the benefits of each project that is determined to be eligible under subsection (b) of this section or §11.410 of this subchapter based on the specific selection criteria set forth in the program call.

(d) The committee will provide project selection recommendations and supporting documentation to the director of the division responsible for administering the TA Set-Aside Program.

(e) The director of the division responsible for administering the TA Set-Aside Program will review the recommendations and supporting documentation submitted by the committee and provide a final list of recommended projects to the commission for consideration.

§11.410. Finding of Ineligibility; Request for Reconsideration.

(a) The department will by certified mail, return receipt requested, notify the project sponsor of ineligible activities proposed and the reason for the determination.

(b) A request for reconsideration of a finding of ineligibility may be initiated only by a letter from the nominating entity to the executive director setting forth reasons in support of a finding of eligibility. The letter requesting reconsideration must be received by the department not later than 15 days after the day that nominating entity received the department's notification, as established by the return receipt.

(c) The determination of the executive director in response to the request for reconsideration is final.

§11.411. Selection of Projects by the Commission.

(a) The commission, by written order, will select projects for funding under the TA Set-Aside Program based on:

(1) recommendations from the director of the division responsible for administering the TA Set-Aside Program;

(2) the potential benefit to the state of the project; and

(3) whether the project enhances the surface transportation system.

(b) The commission is not bound by project selection recommendations provided by the department.

(c) The department will notify the project sponsor of the selection.

(d) The commission will specify a fixed amount of TA Set Aside funds for each project. Project costs in excess of this amount are the responsibility of the project sponsor. The project sponsor may seek additional funds through the TA Set Aside Program in subsequent program calls.

(e) A project that is not selected must be resubmitted to receive consideration during subsequent program calls.

§11.412. Inclusion of Selected Projects in Planning Documents.

(a) If a project selected by the commission is to be implemented in a metropolitan area, the department will request that the MPO for that area immediately begin the process required to include the selected project in its TIP.

(b) The department will also immediately begin the process required to include all selected projects in the STIP.

§11.413. Project Implementation.

(a) The project sponsor shall implement or arrange for implementation of each project selected by the commission in accordance with statutory requisites and contracting procedures applicable to the type and character of the project. The department, in its sole discretion, may agree to implement a project on behalf of a project sponsor.

(b) All projects shall be developed:

(1) to current standards and specifications established or recognized by the federal government and the department; and

(2) in accordance with this subchapter.

(c) All project sponsors must enter into a local agreement and shall comply with all federal and state procedures and requirements applicable to development of federal-aid transportation projects.

(d) Before funding any construction activities, the department will ensure that required opportunities for public involvement have been provided and proper environmental documentation has been completed.

(e) Funds from other federal programs may be used only if specifically authorized by federal law or regulation. Private cash donations may be accepted if authorized by law.

(f) Any change in the scope of work that was specified in the nomination package and approved by the commission must have the advance written approval of the executive director.

(g) The department is responsible for the inspection and final acceptance of all projects selected by the commission and for certification of project completion.

(h) If the project sponsor does not complete the project as originally approved by the commission, the department may seek reimbursement of the expended federal funds from the sponsor.

§11.414. Payment of Costs.

(a) The department will submit all requests for reimbursement of allowable costs to FHWA.

(b) A project sponsor must use the forms and procedures specified by the department to request reimbursement of allowable costs incurred.

(c) For locally administered projects, the entire project cost is borne by the project sponsor until reimbursement can be obtained from FHWA for eligible activities.

(d) Costs incurred prior to the inclusion of the project in the STIP, execution of the local agreement, or federal and state approval and authorization to proceed are not eligible for reimbursement.

§11.415. Elimination of Project from the TA Set-Aside Program.

(a) A project will be eliminated from participation in the TA Set-Aside Program if prior to the execution of the local agreement, the governing body of a municipality or county in which project activities are proposed, by resolution, order, or other official action, notifies the department of its opposition to the project.

(b) The executive director may eliminate a project or a portion of a project from participation in the TA Set-Aside Program if:

(1) the project sponsor fails to satisfy any requirement of this subchapter;

(2) implementation of the project would involve significant deviation from the activities proposed in the nomination package and approved by the commission;

(3) the project sponsor withdraws from participation in the project;

(4) a construction contract has not been awarded or construction has not been initiated within three years after the date that the commission selected the project;

(5) a local agreement is not executed within one year after the date that the commission selected the project; or

(6) the executive director determines that federal funding may be lost because the project has not been implemented or completed.

§11.416. Project Transfer; Approval of Change.

(a) If legislative action requires transfer of the project to another entity, the department may terminate the existing project agreement and execute an agreement with the responsible entity.

(b) A transfer under subsection (a) of this section must receive approval from FHWA.

§11.417. Maintenance and Operation; Dedication for Public Use.

(a) A project selected by the commission shall be maintained and operated for the purpose for which it was approved and funded and for a period of time that is commensurate with the amount of federal investment in the project.

(b) A project selected by the commission shall be dedicated for public use for the greater of:

(1) a period that is commensurate with the amount of federal investment in the project; or

(2) 10 years, if the amount of federal investment in the project is \$1 million or less, or 20 years, if the amount of federal investment is more than \$1 million.

(c) If at any time the project sponsor can no longer maintain and operate the project for its intended purpose, the sponsor shall return the federal share used for the project in accordance with current deferral recapture procedures.

§11.418. Annual Reporting to FHWA.

The department will annually submit a report to FHWA that describes:

(1) the total number of project applications received for the federal fiscal year (the period of October 1 through September 30), including the aggregate cost of the projects for which applications are received and the types of projects to be carried out, expressed as percentages of the total apportionment for TA Set-Asides; and

(2) the total number of projects selected for funding for each federal fiscal year, including the aggregate cost and location of projects selected.

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

Filed with the Office of the Secretary of State on September 29, 2016.

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Joanne Wright

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Texas Department of Transportation

Earliest possible date of adoption: November 13, 2016

For further information, please call: (512) 463-8630



## CHAPTER 16. PLANNING AND DEVELOPMENT OF TRANSPORTATION PROJECTS

The Texas Department of Transportation (department) proposes amendments to §16.105, concerning Transportation Programs, and §§16.152 - 16.154, and 16.160, concerning Transportation Funding.

### EXPLANATION OF PROPOSED AMENDMENTS

House Bill (HB) 20, 84th Legislature, Regular Session, 2015, requires changes be made to several of the planning and programming processes that the Texas Transportation Commission (commission) and the department use to prioritize and finance transportation projects. HB 20 also requires the commission to adopt a performance-based planning and programming process with performance metrics, measures and scoring for project selection.

In response to HB 20, and as a part of the implementation effort, the department created the Planning Organization Stakeholder Committee (POSC) in July of 2015. The POSC is comprised of representatives from seven metropolitan planning organizations as well as representatives from seven department districts. The objectives of the committee are to: (1) support the development of an implementation strategy focused on the programming, performance measure, and planning components of HB 20, along with coordination with legislative and stakeholder committees; (2) provide input for, and comments on, the department's HB 20 Initial Report and Preliminary Report; (3) assist in the development and implementation of updates to transportation funding categories and formulas; and (4) provide review and input to the development of the department's cash flow projections.

In addition to the POSC, the department formed a Core Strategy Team (CST) charged with reviewing and updating the agency's mission, vision, values and goals in order to set the foundation for the performance measures and metrics to be used in a performance-based planning process. The new values, vision, mission and goals developed by the CST were adopted by the commission on February 25, 2016. The new goals and objectives are as follows: (1) deliver the right projects - implement effective planning and forecasting processes that deliver the right projects on-time and on-budget; (2) focus on the customer - people are at the center of everything we do; (3) foster stewardship - ensure efficient use of state resources; (4) optimize system performance - develop and operate an integrated transportation system that provides reliable and accessible mobility, and enables economic growth; (5) preserve our assets - deliver preventive maintenance for the department's system and capital assets to protect our investments; (6) promote safety - champion a culture of safety; and (7) value our employees - respect and care for the well-being and development of our employees.

The proposed amendments are necessary to implement the performance-based planning requirements of HB 20, integrate the department's new strategic goals and objectives, and respond to considerations of the POSC regarding improvements to the planning and forecasting processes related to the Unified Transportation Program (UTP). As the department continues to collaborate with planning partners, legislative committees and the POSC in the development of the specific performance measures, metrics and processes that will guide project selection criteria and funding distributions, additional rule changes are expected.

Amendments to §16.105(b)(1) clarify that the financial constraint associated with the development of the UTP is based on the planning cash flow forecast prepared and published in accordance with §16.152(a). This clarification is necessary in light of proposed amendments to §16.152, which provide for the use of separate financial forecasts for purposes of planning and letting.

Amendments to §16.105(b)(3) remove specific requirements related to the organization of the UTP document. This change will provide the department with increased flexibility to organize and publish the UTP in the most user-friendly and readily-accessible format.

Amendments to §16.105(d)(1)(A) revise the project selection criteria to incorporate language contained in the department's new strategic goals and objectives, as adopted by the commission in February 2016.

Amendments to §16.105(d)(2) address the requirements of Transportation Code §201.9991, as added by HB 20, with respect to the department's use of performance metrics and measures to evaluate and rank projects listed in the UTP. The amendments specify that the department will consider performance metrics and measures to evaluate and rank the priority of each project listed in the UTP. Furthermore, projects will be ranked using a performance-based scoring system and the scoring system will be used for prioritizing projects for which financial assistance is sought from the commission. The amendments also provide that the scoring system must account for the diverse needs of the state so as to fairly allocate funding to all regions of the state.

Amendments to §16.105(e) provide guidance with regard to what constitutes a "major change" for purposes of updating the UTP, which requires a formal update to the program and an opportunity for public involvement. The amendments also require the department to present information regarding the development of the UTP and any updates to the commission the month prior to final adoption of the UTP and any updates. These changes are intended to focus public engagement on significant modifications to UTP.

Amendments to §16.105(f) modify the process for administratively revising the UTP and describe the types of changes that qualify as administrative revisions to the program. The existing process for handling administrative revisions is overly cumbersome and difficult to administer.

Amendments to §16.152 distinguish between the two types of financial forecasts to be used by the department for purposes of planning and letting. Amendments to §16.152(a) provide that the long-range financial forecast currently known as the cash flow forecast will be identified as the planning cash flow forecast. Amendments to §16.152(b) require the chief financial officer to issue a base cash flow forecast to be used for the development of the letting schedule, which will cover a period of not less than two years following the date the forecast is issued. The distinction between these two financial forecasts is critical since the planning cash flow forecast will include additional funding projections beyond those contained in the base cash flow forecast. In addition, the base cash flow forecast will provide constraints to the letting of projects funded under allocation programs, as further described in proposed amendments to §16.154(d). Amendments to §16.152(f) reflect recent changes in nomenclature within the department; specifically, the Finance Division is now referred to as the Financial Management Division. Amendments to §16.152(g) specify that the planning cash flow forecast is to be used for development of the UTP.

Amendments to §16.153(a)(9) are necessary due to the transition from the Transportation Alternatives Program to the Transportation Alternatives Set-Aside Program, as required by federal law.

Amendments to §16.153(c) address the requirements of Transportation Code §201.9991, as added by HB 20, and provide that the commission will use a performance-based process, subject to the mandates of state and federal law, to determine the amount to be allocated to each program funding category for the appropriate period of time in order to achieve established per-

formance outcomes. The amendments also clarify the distinction between highway program funding categories and program funding categories for other modes of transportation and transportation infrastructure, for purposes of determining funding allocations.

Amendments to §16.154(a)(3) specify that funds under Category 4 (Statewide Connectivity Corridor Projects) will be allocated to districts as an allocation program for specific corridors as opposed to specific projects. As in the past, the allocation will be based on an engineering analysis of three corridor types. However, if applicable to the particular corridor type, the commission will also consider the formula used for allocating funds under Category 2 (Metropolitan and Urban Corridor Projects). The amendments further provide that, with regard to mobility corridors, the analysis will include congestion considerations throughout the state. These changes emphasize the need for a corridor-level plan for connectivity while also providing flexibility to allocate funds to districts for use on projects along the commission-approved corridors.

Amendments to §16.154(d) provide that the letting of projects funded within allocation programs is subject to the constraints established by the base cash flow forecast described in §16.152(b). The current language implies that all projects within UTP allocation programs could be let without constraint. In light of the proposed amendments to §16.152, which distinguish between the two different forecasts governing the planning and letting processes, this change was needed to clarify that the base cash flow forecast is the constraint for letting projects within allocation programs.

Amendments to §16.154(e) revise the definition of "project," for purposes of listing projects in the UTP, to mean a connectivity or new capacity roadway project. This change is consistent with the definitions contained in Transportation Code §201.9901, as added by HB 20.

Amendments to §16.154(f) clarify that the department may not exceed the planning cash flow forecast in distributing funds in the twelve categories of the UTP and may not exceed the base cash flow forecast in distributing funds for purposes of letting. These changes are necessary in light of the amendments to §16.152, as previously described.

Amendments to §16.160(a) specify that changes in UTP category funding levels may also result from consideration of performance results. These revisions are necessary to comply with Transportation Code §201.9991, as added by HB 20, which requires the commission to establish a performance-based process for setting funding levels for the categories of projects in the UTP.

Amendments to §16.160(b) update references to the planning cash flow forecast in light of the amendments to §16.152, as previously described. Amendments to this section also ensure that performance results are considered in a determination to increase or decrease the allocation of funds to one or more categories. These changes are necessary to comply with Transportation Code §201.9991, as added by HB 20, which requires the commission to establish a performance-based process for setting funding levels for the categories of projects in the UTP.

Amendments to §16.160(d) provide that significant changes to the base cash flow forecast may result in changes to the letting schedule in order to maintain fiscal constraint. The amendments also specify that projects eligible for letting include all authorized projects or allocation programs covered in the UTP and STIP

and that specific projects will be advanced or delayed relative to the order of listed priorities in the applicable programs, fund source eligibility and the completion of project benchmarks sufficient to proceed to construction. These changes are needed to clarify the relationship between the letting schedule and the base cash flow forecast, as explained in the proposed amendments to §16.152, and how changes to the letting schedule will be handled in relation to the changing base cash flow forecast. In addition, this language supports the provisions of Transportation Code §201.809, as amended by HB 20, which require the department to include performance metrics and measures in the evaluation of project delivery for projects in the letting schedule. The preference for allocation of funding increases has been eliminated, as this process is to be governed by the use of performance results in accordance with the provisions of Transportation Code §201.9991, as added by HB 20.

Amendments to §16.160(f) reflect recent changes in nomenclature within the department, as previously described.

#### FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mr. Lauren Garduño, Interim Director, Transportation Planning and Programming Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

#### PUBLIC BENEFIT AND COST

Mr. Garduño has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be clarity on how the department is incorporating the newly-adopted strategic goals and performance-based planning and forecasting processes required by HB 20 into the department's UTP and letting schedule. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

#### SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§16.105, 16.152 - 16.154, and 16.160 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Transportation Projects Rules" The deadline for receipt of comments is 5:00 p.m. on November 14, 2016. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

### SUBCHAPTER C. TRANSPORTATION PROGRAMS

#### 43 TAC §16.105

#### STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the

conduct of the work of the department, and more specifically, Transportation Code, §201.809, which requires the commission to adopt rules to develop and implement a performance-based planning and programming process and performance metrics and performance measures; §201.991, which requires the commission to adopt rules related to the unified transportation program; and §201.9991, which requires the commission to adopt rules to prioritize and approve projects included in the statewide transportation plan.

#### CROSS REFERENCE TO STATUTE

Transportation Code, §§201.809, 201.991 and 201.9991.

§16.105. *Unified Transportation Program (UTP).*

(a) General. The department will develop a unified transportation program (UTP) that covers a period of ten years to guide the development and authorize construction and maintenance of transportation projects and projects involving aviation, public transportation, and the state's waterways and coastal waters. In developing the UTP, the department will collaborate with local transportation entities and public transportation operators as defined by 23 C.F.R. Part 450.

(b) Requirements. The UTP will:

(1) be financially constrained for planning and development purposes based on the planning cash flow forecast prepared and published in accordance with §16.152(a) of this subchapter (relating to Cash Flow Forecasts) and estimate funding levels and the allocation of funds to each district, metropolitan planning organization (MPO), and other authorized entity for each year in accordance with Subchapter D of this chapter (relating to Transportation Funding);

(2) list all projects and programs that the department intends to develop, or on which the department intends to initiate construction or maintenance, during the UTP period, and the applicable funding category to which a project or program is assigned, after consideration of the:

- (A) statewide long-range transportation plan (SLRTP);
- (B) metropolitan transportation plans (MTP);
- (C) transportation improvement programs (TIP);
- (D) MPO annual reevaluations of project selection in MTPs and TIPs, if any, in accordance with subsection (c) of this section;
- (E) statewide transportation improvement programs (STIP);
- (F) recommendations of rural planning organizations (RPO) as provided in this subchapter; and
- (G) list of major transportation projects in accordance with §16.106 of this subchapter (relating to Major Transportation Projects); and

~~[(3) be organized by funding category, district, mode of transportation, and the year a project is scheduled for development or letting; and]~~

(3) [(4)] designate the priority ranking within a program funding category of each listed project in accordance with subsection (d)(2) of this section.

(c) MPO annual reevaluation of project selection. An MPO may annually reevaluate the status of project priorities and selection in its approved metropolitan transportation plan (MTP) and transportation improvement program (TIP) and provide a report of any changes to the department at the times and in the manner and format established by

the department. The reevaluation must be consistent with criteria applicable to development of the MTP and TIP in accordance with federal requirements.

(d) Project selection.

(1) The commission will consider the following criteria for project selection in the UTP as applicable to the program funding categories described in §16.153 of this chapter (relating to Funding Categories):

(A) the potential of the project to meet transportation goals for the state, including efforts to:

(i) maintain a safe transportation system for all transportation users;

(ii) optimize system performance by mitigating congestion, enhancing connectivity and mobility, improving the reliability of the system, facilitating the movement of freight and international trade, and fostering economic competitiveness through infrastructure investments [address travel congestion];

(iii) maintain and preserve system infrastructure [connect Texas communities]; and

(iv) accomplish any additional transportation goals for the state identified in the statewide long-range transportation plans as provided in §16.54 of this chapter (relating to Statewide Long-Range Transportation Plan (SLRTP));

(B) the potential of the project to assist the department in attainment of the measurable targets for the transportation goals identified in subparagraph (A) of this paragraph; and

(C) adherence to all accepted department design standards as well as applicable state and federal law and regulations.

(2) The department will consider performance metrics and measures to evaluate and [establish criteria to] rank the priority of each project listed in the UTP based on the transportation needs for the state and the goals identified in paragraph (1)(A) of this subsection. A project will be ranked within its applicable program funding category, using a performance-based scoring system, and classified as tier one, tier two, or tier three for ranking purposes. The scoring system will be used for prioritizing projects for which financial assistance is sought from the commission and must account for the diverse needs of the state so as to fairly allocate funding to all regions of the state. Major transportation projects will have a tier one classification and be designated as the highest priority projects within an applicable funding category. A project that is designated for development or construction in accordance with the mandates of state or federal law or specific requirements contained in other chapters of this title may be prioritized in a funding category as a designated project in lieu of a tier one, tier two, or tier three ranking.

(3) The commission will determine and approve the final selection of projects and programs to be included in the UTP, except for the selection of federally funded projects by an MPO serving in an area designated as a transportation management area (TMA) as provided in §16.101(n) of this subchapter (relating to Transportation Improvement Program (TIP)). A federally funded project selected by an MPO designated as a TMA will be approved by the commission, subject to:

(A) satisfaction of the project selection criteria in paragraph (1) of this subsection;

(B) compliance with federal law; and

(C) the district's and MPO's allocation of funds for the applicable years.

(e) Approval of unified transportation program (UTP). Not later than August 31 of each year, the commission will adopt the unified transportation program for the next fiscal year. The UTP may be updated more frequently if necessary to authorize a major change to one or more funding allocations or project listings in the most recent UTP. For the purpose of updating the UTP, the term "major change" refers to the authorization of new projects or the revision of project funding allocations which exceed 10 percent of the project cost or \$500,000, whichever is greater, occurring in non-allocation program categories, excluding revisions to local funding contributions and projects designated under miscellaneous state and federal programs. The foregoing does not apply to project funding allocations in Category 4 Statewide Connectivity Corridor Projects and Category 12 Strategic Priority as described in §16.153(a) of this subchapter (relating to Funding Categories) and all revisions to projects funded in those categories must be first included in an update to the UTP approved by the commission. The department will present information regarding the development of the UTP and any updates to the commission the month prior to final adoption of the UTP and any updates. The department will hold a hearing prior to:

(1) final adoption of the UTP and any updates; and

(2) approval of any adjustments to the program resulting from changes to the allocation of funds under §16.160 of this chapter (relating to Funding Allocation Adjustments).

(f) Administrative revisions. The UTP may be administratively revised at any time and for any reason that does not constitute a major change as described in subsection (e) of this section, with the exception of project funding allocations in Category 4 Statewide Connectivity Corridor Projects and Category 12 Strategic Priority as described in subsection (e).

~~[(1) The UTP may be administratively revised at any time for minor or nondiscretionary changes to funding allocations and project listings, including the changes specified in this paragraph.]~~

~~[(A) A project may be added to the UTP, or a project within the UTP may be moved forward or delayed if:]~~

~~[(i) the status of a listed project or projects change, and if the moved or added project can be developed and let during a two-year period within the district's or MPO's allocated funds in the applicable program funding category for that period;]~~

~~[(ii) the project and funding for the project is specifically identified in a commission minute order for pass-through toll financing; or]~~

~~[(iii) the project and funding for the project is specifically identified in a federal or state legislative act or appropriation, including a federal earmark.]~~

~~[(B) A district or MPO, subject to the mandates of state and federal law and specific requirements contained in other sections of this chapter for selection of projects and management of funds, may transfer all or a portion of its allocated funds either within a program funding category or between program funding categories during the first two years of the UTP if the transferred funds are returned to the contributing program funding category within the same two year period and the two year total allocation for each applicable program funding category as listed in the UTP is not exceeded or reduced.]~~

~~[(C) A district or MPO, subject to the mandates of state and federal law and specific requirements contained in other sections of this chapter for selection of projects and management of funds, may transfer all or a portion of its allocated funds from a program funding category to another district or MPO during the first two years of the~~

UTP if the transferred funds are returned to the contributing program funding category within the same two year period and the two year total allocation for each applicable program funding category for each district and MPO as listed in the UTP is not exceeded or reduced.]

~~[(D) A local government may provide additional funding contribution or participation for a project.]~~

~~[(E) A district may transfer all or a portion of its allocated funds in a program funding category to an adjoining district for a project that extends across the districts' common boundary.]~~

~~[(F) A district or MPO, subject to the mandates of state and federal law and specific requirements contained in other sections of this chapter for selection of projects and management of funds, may transfer any unspent excess allocated funds remaining in a program funding category at the end of a fiscal year to the same program funding category for the next fiscal year.]~~

~~[(G) Projects that are listed only for informational purposes in program funding categories identified as allocation programs in §16.154 of this chapter (relating to Transportation Allocation Funding Formulas) may be added to or deleted from the categories.]~~

~~[(2) The department, an MPO, an RPO, or a public transportation operator as defined by 23 C.F.R. Part 450 may request an administrative revision of the UTP. A revision request by a public transportation operator must be applicable to projects in the public transportation portion of the UTP and, if the public transportation operator is located within the boundaries of an MPO or RPO, it must obtain consent of the applicable MPO or RPO prior to making the request.]~~

~~[(3) If an administrative revision is requested, the department will, in coordination with the other affected parties, determine whether a revision is appropriate and may, consistent with the authority to select projects under subsection (d) of this section, develop a revised list of projects for the applicable period.]~~

~~[(4) An administrative revision under this subsection is not an update or adjustment to which subsections (e), (g), and (h) of this section apply.]~~

~~[(5) The department will incorporate an administrative revision into the UTP if the request complies with the requirements of this subsection and compliance is confirmed by the chief planning and project officer. If a requested revision is a minor or nondiscretionary change to a funding allocation or project listing in the UTP, but does not comply with the specific requirements described for changes in paragraph (1) of this subsection, the requested revision may not be incorporated into the UTP unless it is also approved by the chief financial officer. In determining whether to approve the administrative revision request, the chief financial officer shall consider the fiscal impact of the requested revision in the context of the current cash flow forecast.]~~

~~[(6) Department staff will provide a written report to the commission within two months after the end of each quarter identifying all administrative revisions implemented under this subsection during that quarter.]~~

~~(g) Public involvement during development of the unified transportation program.~~

~~(1) The department will seek to effectively engage the general public and stakeholders in development of the UTP.~~

~~(2) The department will hold public meetings throughout the state that will cover each district during development of the UTP as early as the department determines is feasible to assure public input into the process. The department will also hold public meetings throughout applicable areas of the state during development of each update to the~~

program that will cover each district affected by the update. The department will publish notice of each public meeting as appropriate to maximize attendance at the meeting.

(3) The department will report its progress on the program and provide an opportunity for a free exchange of ideas, views, and concerns relating to project selection, funding categories, level of funding in each category, the allocation of funds for each year of the program, and the relative importance of the various selection criteria. A representative from each district will attend each public meeting applicable to the district and be available for the discussion.

(4) The department may conduct a public meeting by video-conference or other electronic means that provide for direct communication among the participants.

(h) Public involvement prior to final adoption. The department, prior to adoption of the unified transportation program and approval of any updates to the program, will hold at least one statewide hearing on its project selection process including the UTP's funding categories, the level of funding in each category, the allocation of funds for each year of the program, and the relative importance of the various selection criteria.

(1) The department will publish a notice of the applicable hearing in the *Texas Register* a minimum of 15 days prior to it being held and will inform the public where to send any written comments.

(2) The department will accept written public comments for a period of at least 30 days after the date the notice appears in the *Texas Register*.

(3) A copy of the proposed project selection process, the UTP, and any adjustments to the plan, as applicable, will be available for review at the time the notice of hearing is published at each of the district offices and at the department's Transportation Planning and Programming Division offices in Austin. A copy will also be available on the department website.

(i) Publication. The department will publish the entire approved unified transportation program, updates, adjustments, and administrative revisions together with any summary documents highlighting project benchmarks, priorities, and forecasts on the department's website. The documents will also be available for review at each of the district offices and at the department's Transportation Planning and Programming Division offices in Austin.

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

Filed with the Office of the Secretary of State on September 29, 2016.

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For further information, please call: (512) 463-8630



## SUBCHAPTER D. TRANSPORTATION FUNDING

43 TAC §§16.152 - 16.154, 16.160

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.809, which requires the commission to adopt rules to develop and implement a performance-based planning and programming process and performance metrics and performance measures; §201.991, which requires the commission to adopt rules related to the unified transportation program; and §201.9991, which requires the commission to adopt rules to prioritize and approve projects included in the statewide transportation plan.

#### CROSS REFERENCE TO STATUTE

Transportation Code, §§201.809, 201.991 and 201.9991.

#### §16.152. *Cash Flow Forecasts [Forecast].*

(a) Planning cash flow forecast [Forecast]. On or before September 1 of each year, the department's chief financial officer will issue a planning cash flow forecast for each source of funding that covers a period of not less than the 20 years following the date the forecast is issued and is based on the funding assumptions developed under §16.151 of this subchapter (relating to Long-Term Planning Assumptions).

(b) Base cash flow forecast. On or before September 1 of each year, the department's chief financial officer will issue a base cash flow forecast for each source of funding to guide the development of the letting schedule that covers a period of not less than two years following the date the forecast is issued.

(c) [(b)] Requirements. Each [The] forecast must identify:

(1) all state and federal sources of funding available for transportation projects and projects involving aviation, public transportation, rail, and the state's waterways and coastal waters, including bond proceeds; and

(2) any limitations imposed by state or federal law on the use of the identified source.

(d) [(e)] First two years. The first year or two years of each [the] forecast, as appropriate, must be based on the amounts appropriated by the legislature to the department for that period.

(e) [(d)] Updates. The department's chief financial officer will update each [the] forecast more frequently than annually if significant changes in the department's funding occur.

(f) [(e)] Publication. Each [cash flow] forecast and update will be available on the department's website for viewing by the public and the documents will be available for review at each of the district offices and at the department's Financial Management [Finance] Division offices in Austin.

(g) [(f)] Uses of planning cash flow forecast. The commission will use the planning cash flow forecast to estimate funding levels for each year of the unified transportation program as provided in §16.105 of this chapter (relating to Unified Transportation Program (UTP)), to determine the annual amount of funding in each of the program funding categories described in §16.153 of this subchapter (relating to Funding Categories), and to allocate funding to the districts, metropolitan planning organizations, and other authorized entities in accordance with §16.154 of this subchapter (relating to Transportation Allocation Funding Formulas).

(h) [(g)] Funding definition. In this subchapter, unless the context clearly indicates otherwise, "funds" or "funding" means the estimates of federal, state, and local money reasonably expected to be

available for expenditure on transportation projects and projects involving aviation, public transportation, rail, and the state's waterways and coastal waters during the relevant period.

#### §16.153. *Funding Categories.*

(a) Highway program funding categories. The ten-year unified transportation program (UTP) described in §16.105 of this chapter (relating to Unified Transportation Program (UTP)) will contain the following 12 program funding categories for highway related projects:

(1) Category 1 Preventive Maintenance and Rehabilitation - preventive maintenance and rehabilitation on the existing state highway system, including:

(A) Preventive maintenance - minor roadway modifications to improve operations and safety; and

(B) Rehabilitation - installation, rehabilitation, replacement, and maintenance of pavement, bridges, traffic control devices, traffic management systems, and ancillary traffic devices;

(2) Category 2 Metropolitan and Urban Corridor Projects - mobility and added capacity projects along a corridor that improve transportation facilities in order to decrease travel time and the level or duration of traffic congestion, and safety, maintenance, or rehabilitation projects that increase the safe and efficient movement of people and freight in metropolitan and urbanized areas;

(3) Category 3 Non-Traditionally Funded Transportation Projects - transportation related projects that qualify for funding from sources not traditionally part of the state highway fund including state bond financing under programs such as Proposition 12 (General Obligation Bonds), Texas Mobility Fund, pass-through toll financing, unique federal funding, regional toll revenue, and local participation funding;

(4) Category 4 Statewide Connectivity Corridor Projects - mobility and added capacity projects on major state highway system corridors which provide statewide connectivity between urban areas and corridors, to create a highway connectivity network composed of the Texas Highway Trunk System, National Highway System, and connections from those two systems to major ports of entry on international borders and Texas water ports;

(5) Category 5 Congestion Mitigation and Air Quality Improvement - congestion mitigation and air quality improvement area projects to address attainment of a national ambient air quality standard in the nonattainment areas of the state;

(6) Category 6 Structures Replacement and Rehabilitation - replacement and rehabilitation of deficient existing bridges located on the public highways, roads, and streets in the state, construction of grade separations at existing highway-railroad grade crossings, and rehabilitation of deficient railroad underpasses on the state highway system;

(7) Category 7 Metropolitan Mobility and Rehabilitation (TMA) - transportation needs within the boundaries of designated metropolitan planning areas of metropolitan planning organizations located in a transportation management area;

(8) Category 8 Safety - safety related projects both on and off the state highway system including the federal Highway Safety Improvement Program, Railway-Highway Crossing Program, Safety Bond Program, and High Risk Rural Roads Program;

(9) Category 9 Transportation Alternatives - transportation related activities as described in Chapter 11, Subchapter G [F], of this title (relating to the Transportation Alternatives Set-Aside Program);

(10) Category 10 Supplemental Transportation Projects - transportation related projects that do not qualify for funding in other categories, including landscape and aesthetic improvement, erosion control and environmental mitigation, construction and rehabilitation of roadways within or adjacent to state parks, fish hatcheries, and similar facilities, replacement of railroad crossing surfaces, maintenance of railroad signals, construction or replacement of curb ramps for accessibility to pedestrians with disabilities, and miscellaneous federal programs;

(11) Category 11 District Discretionary - projects eligible for federal or state funding selected at the district engineer's discretion; and

(12) Category 12 Strategic Priority - projects with specific importance to the state including those that generally promote economic opportunity, increase efficiency on military deployment routes or to retain military assets in response to the federal military base realignment and closure reports, and maintain the ability to respond to both man-made and natural emergencies.

(b) Program funding categories for other modes of transportation and transportation infrastructure. The UTP will contain the following program funding categories for aviation, public transportation, rail, and the state's waterways and coastal waters projects:

(1) Aviation Capital Improvement Program - projects based on the anticipated funding levels of the Federal Aviation Administration Airport Improvement Program and the Texas Aviation Facilities Development Program for general aviation airport development in Texas;

(2) Public transportation- projects based on the anticipated funding levels for public transportation including fixed route city bus service, rural demand response service, special transit service for elderly and persons with disabilities, and intercity bus service from city to city;

(3) Rail - rail related projects including light rail, freight rail, passenger rail, and high-speed rail; and

(4) State waterways and coastal waters - water related projects including lands, easements, and rights of way for the widening, deepening, and expansion of the main channel of the Gulf Intracoastal Waterway (GIWW), including beneficial use projects of dredged material, and other maritime related projects.

(c) Determination of funding allocations. The commission will use a performance-based process to determine, subject to the mandates of state and federal law, the amount of funds to be allocated to each program funding category described in subsection (a) of this section for the appropriate period of time, in order to achieve established performance outcomes. The commission will determine, subject to the mandates of state and federal law and specific requirements contained in other chapters of this title, [for programs and projects described in subsection (b) of this section,] the amount of funds to be allocated to each program funding category described in subsection (b) of this section for the appropriate period of time.

*§16.154. Transportation Allocation Funding Formulas.*

(a) Formula allocations. The commission will, subject to the mandates of state and federal law, allocate funds from program funding Categories 1, 2, 4, 5, 7, 9, and 11, as described in §16.153 of this subchapter (relating to Funding Categories), to the districts and metropolitan planning organizations (MPO) as follows:

(1) Category 1 Preventive Maintenance and Rehabilitation - will be allocated to all districts as an allocation program according to the following formulas:

(A) Preventive maintenance.

(i) Ninety-eight percent for roadway maintenance with 65 percent based on on-system lane miles, and 33 percent based on the pavement distress score Pace factor; and

(ii) Two percent for bridge maintenance based on square footage of on-system span bridge deck area;

(B) Rehabilitation. Thirty-two and one half percent based on three-year average lane miles of pavement distress scores less than 70, 20 percent based on on-system vehicle miles traveled per lane mile, 32.5 percent based on equivalent single axle load miles for on-system, off-system, and interstate, and 15 percent based on the pavement distress score Pace factor;

(2) Category 2 Metropolitan and Urban Corridor Projects - will be allocated to MPOs for specific projects in the following manner:

(A) 87 percent to MPOs operating in areas that are transportation management areas, according to the following formula: 30 percent based on total vehicle miles traveled on and off the state highway system, 17 percent based on estimated population within the boundaries of the metropolitan planning area using data derived from the most recent census provided by the U.S. Bureau of the Census (census population), 10 percent based on lane miles on-system, 14 percent based on truck vehicle miles traveled on-system, 7 percent based on percentage of census population below the federal poverty level, 15 percent based on congestion, and 7 percent based on fatal and incapacitating vehicle crashes;

(B) 13 percent to MPOs operating in areas that are not transportation management areas, according to the following formula: 20 percent based on total vehicle miles traveled on and off the state highway system, 25 percent based on estimated population within the boundaries of the metropolitan planning area using data derived from the most recent census provided by the U.S. Bureau of the Census (census population), 8 percent based on lane miles on-system, 15 percent based on truck vehicle miles traveled on-system, 4 percent based on percentage of census population below the federal poverty level, 8 percent based on centerline miles on-system, 10 percent based on congestion, and 10 percent based on fatal and incapacitating vehicle crashes;

(3) Category 4 Statewide Connectivity Corridor Projects - will be allocated to districts as an allocation program for specific corridors [projects] selected by the commission based on engineering analysis of [projects on] three corridor types and, if applicable to the particular corridor type, considering the formula specified in subsection (a)(2) of this section:

(A) Mobility corridors - congestion considerations throughout the state [in areas that are not in the boundaries of an MPO];

(B) Connectivity corridors - two-lane roadways requiring upgrade to four-lane divided roadways to connect the urban areas of the state; and

(C) Strategic corridors - strategic corridors on the state highway network that provide statewide connectivity;

(4) Category 5 Congestion Mitigation and Air Quality Improvement - will be allocated to districts and MPOs as an allocation program for projects in a nonattainment area population weighted by ozone and carbon monoxide pollutant severity;

(5) Category 7 Metropolitan Mobility and Rehabilitation (TMA) - will be allocated to MPOs operating in areas that are transportation management areas as an allocation program based on the applicable federal formula;

(6) Category 9 Transportation Alternatives- a portion of the funds in this category will be allocated to MPOs serving urbanized areas with populations over 200,000 as an allocation program based on the areas' relative share of population, unless FHWA approves a joint request from the department and the relevant MPOs to use other factors in determining the allocation; and

(7) Category 11 District Discretionary - will be allocated to all districts as an allocation program based on state legislative mandates, but if there is no mandate or the amount of available funding in this category exceeds the minimum required by a mandate, the funding allocation for this category or the excess funding, as applicable, will be allocated according to the following formula: 70 percent based on annual on-system vehicle miles traveled, 20 percent based on annual on-system lane miles, and 10 percent based on annual on-system truck vehicle miles traveled. The commission may supplement the funds allocated to individual districts on a case-by-case basis to cover project cost overruns.

(b) Pace factor calculation. For purposes of subsection (a)(1) of this section, the Pace factor is a calculation used to adjust funding among districts according to increases or decreases in a district's need to improve its pavement distress scores. It will slow the rate of improvement for districts with the highest condition scores and accelerate the rate of improvement for districts with the lowest condition scores. The Pace factor is calculated by:

- (1) determining the district with the highest distress score;
- (2) determining the deviation of a district's distress score from the highest score;
- (3) totaling the deviations for all districts as determined by paragraph (2) of this subsection.

(c) Non-formula allocations. The commission, subject to the mandates of state and federal law and specific requirements contained in other chapters of this title for programs and projects described in subsection (a) of this section, will determine the amount of funding to be allocated to a district, metropolitan planning organization, political subdivision, governmental agency, local governmental body, recipient of a governmental transportation grant, or other eligible entity from each of the following program funding categories described in §16.153 of this subchapter:

- (1) Category 3 Non-Traditionally Funded Transportation Projects for specific projects;
- (2) Category 6 Structures Replacement and Rehabilitation as an allocation program;
- (3) Category 8 Safety Projects generally funded as an allocation program with some specific projects designated under the Safety Bond Program;
- (4) Category 9 Transportation Alternatives- of the remaining funds in this category, a portion will be allocated to certain areas of the state, for specific projects, based on the areas' relative share of the population, and a portion may be allocated in any area of the state for specific projects or transferred to other eligible federal programs, as authorized by law;
- (5) Category 10 Supplemental Transportation Projects generally funded as an allocation program with some specific projects designated under miscellaneous federal programs;
- (6) Category 12 Strategic Priority for specific projects;
- (7) Aviation Capital Improvement Program;
- (8) Public transportation;

(9) Rail; and

(10) State waterways and coastal waters.

(d) Allocation program. For the purposes of this chapter, the term "allocation program" refers to a type of program funding category identified in the unified transportation program for which the responsibility for selecting projects and managing the allocation of funds has been delegated to department districts, selected administrative offices of the department, and MPOs. Within the applicable program funding category, each district, selected administrative office, or MPO is allocated a funding amount and projects can be selected, developed, and, subject to the base cash flow forecast prepared and published in accordance with §16.152(b) of this subchapter (relating to Cash Flow Forecasts), let to contract with the cost of each project to be deducted from the allocated funds available for that category.

(e) Listing of projects. The department will list the projects that the department intends to develop and let during the ten-year unified transportation program (UTP) under §16.105 of this chapter (relating to Unified Transportation Program (UTP)), and reference for each listed project the program funding category to which it is assigned. If a program funding category is an allocation program, the listing is for informational purposes only and contains those projects reasonably expected at the time the UTP is adopted or updated to be selected for development or letting during the applicable period. For the purpose of listing projects in the UTP, "project" means a connectivity or new capacity roadway project. The term does not include a safety project, bridge project, federal discretionary project, maintenance project, preservation project, transportation alternatives project, or locally funded project. [does not include preventive maintenance and rehabilitation under Category 4 Preventive Maintenance and Rehabilitation as described in subsection (a) of this section.]

(f) Limitation on distribution. In distributing funds to the districts, metropolitan planning organizations, and other entities described in subsections (a) and (c) of this section, the department may not exceed the planning cash flow forecast prepared and published in accordance with §16.152(a) [§16.152] of this subchapter (relating to Cash Flow Forecasts). In developing and distributing funds for purposes of letting, the department may not exceed the base cash flow forecast prepared and published in accordance with §16.152(b) of this subchapter. [Forecast].

(g) Formula revisions. The commission will review and, if determined appropriate, revise both the formulas and criteria for allocation of funds under subsections (a) - (c) of this section at least as frequently as every four years.

(h) Supplemental allocations. The commission may supplement the funds allocated to individual districts under subsections (a)(1) and (7) of this section in response to special initiatives, safety issues, or unforeseen environmental factors. Supplemental funding under this subsection is not required to be allocated proportionately among the districts and is not required to be allocated according to the formulas specified in subsections (a)(1) and (7) of this section. In determining whether to allocate supplemental funds to a particular district, the commission may consider safety issues, traffic volumes, pavement widths, pavement conditions, oil and gas production, well completion, or any other relevant factors.

#### *§16.160. Funding Allocation Adjustments.*

(a) Changes in funding. Changes in the allocation of funds under §16.153 or §16.154 of this subchapter (relating to Funding Categories and Transportation Allocation Funding Formulas, respectively) may result from significant changes in the department's funding and consideration of performance results.

(b) Allocation revisions. If a significant change in funding is identified by the department's chief financial officer in an updated planning cash flow forecast prepared and published in accordance with §16.152(a) of this subchapter (relating to Cash Flow Forecasts), the commission may revise the allocation of funds to each program funding category or from the program funding categories to the districts and metropolitan planning organizations (MPO) and may approve:

(1) a specific percentage increase or decrease in the allocation of funds and, subject to the mandates of state and federal law, apply the percentage change equally to each program funding category; or

(2) an increase or decrease in the allocation of funds to one or more program funding categories, after considering the:

(A) total amount of the change;

(B) priority of the funding category based on performance results and the category's relationship to the stated commission goals as provided in the statewide long-range transportation plan under §16.54 of this chapter (relating to Statewide Long-Range Transportation Plan (SLRTP));

(C) mandates of state and federal law; and

(D) best interests of the state.

(c) Adjustment of programs. After the commission approves a change in the allocation of funds to a program funding category under subsection (b) of this section, the funds allocated to individual districts and MPOs will be adjusted and the unified transportation program, statewide transportation improvement program, and metropolitan transportation improvement programs will be revised in accordance with the applicable change in funding. Specific projects will be advanced or delayed in the order of the planning organization's and department's listed priorities in the applicable programs.

(d) Letting. If a significant change in funding is identified by the department's chief financial officer in an updated base cash flow forecast prepared and published in accordance with §16.152(b) of this subchapter (relating to Cash Flow Forecasts), the chief financial officer may revise the letting schedule to maintain the constraint of the base cash flow forecast. Projects eligible for letting include all authorized

projects or allocation programs covered in the unified transportation program or the statewide transportation improvement program. Specific projects will be advanced or delayed relative to the order of listed priorities in the applicable programs, fund source eligibility, and the completion of project benchmarks sufficient to proceed to construction. [Preference for allocation of funding increases: If the allocation of funds to a district or MPO is reduced under subsection (e) of this section, any subsequent increase in the allocation of funds to the applicable program funding category will be allocated first to the accounts of the districts and MPOs that were previously reduced.]

(e) Public involvement. The department will hold at least one statewide public hearing regarding a proposed change in the allocation of funds to a program funding category under this section with an available comment period of at least 30 days after the date the hearing notice appears in the *Texas Register* in accordance with the procedures set forth in §16.105(h) of this chapter (relating to Unified Transportation Program (UTP)).

(f) Publication. Documents describing each change in the allocation of funds to a program funding category will be available for viewing by the public on the department's website and at each of the district offices and at the department's Financial Management [Finance] Division offices in Austin.

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

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