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 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER B. ACCESSIBILITY AND REASONABLE ACCOMMODATIONS

10 TAC §§1.201 - 1.206

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 1 Administration, Subchapter B, §1.201 (concerning Purpose), §1.202 (concerning Definitions), §1.203 (concerning General Certifications and Effect of Non Compliance), §1.204 (concerning Reasonable Accommodations), §1.205 (concerning Compliance with the Fair Housing Act), and §1.206 (concerning Applicability of the Construction Standards for Compliance with §504 of the Rehabilitation Act of 1978) for the following reasons:

The Department has established the Disability Advisory Workgroup and that group and individual members of that group have worked with staff to help them understand the ways in which this rule operates can more effectively meet the needs of persons with disabilities.

§1.201 (Purpose), §1.202 (Definitions), and §1.203 (General Certifications and Effect of Non Compliance) have been amended to provide additional clarification and take into account the revised definition of "disability" based the guidance recently published by the U.S. Department of Justice ("DOJ") related to Amendments of Americans with Disabilities Act ("ADA") Title II and Title III Regulations to implement ADA Amendments Act of 2008 (RIN 1190-AA59). The revised language clarifies that the term "disability" shall be interpreted broadly so that persons with disabilities who were denied coverage previously under the ADA would again be able to rely on the protections of the ADA.

Regarding §1.204 (concerning Reasonable Accommodations), the amendments made herein to this subsection are consistent to those proposed at the Board meeting of July 28, 2016, which were originally proposed to codify a time frame by which a housing provider must respond to a reasonable accommodation request and provide clarification related to financial responsibility when the cost of the accommodation is *de minimis*.

Section 1.208 (concerning Public and Common Use Areas in Multifamily Housing Developments) is being repealed as the content was already covered or is merged into another Subchapter.

Amendments include no substantive changes not required by federal law, but rather provide further clarification specific to the expectations, including examples of the unit distribution requirement, and to address all current Department programs.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be improved compliance with affordable housing program administered by the Department. There will not be any increased economic cost to any individuals required to comply with the new section that are not required by participating in a federal program.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 28, 2016, through November 28, 2016, to receive input on the proposed repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Stephanie Naquin, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3359. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME NOVEMBER 28, 2016.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

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

§1.201. Purpose.

(a) The purpose of this subchapter is to provide guidance regarding the requirements of the Americans with Disabilities Act, §504 of the 1973 Rehabilitation Act and the Fair Housing Act by all recipients of awards from the Texas Department of Housing and Community Affairs ("the Department") including but not limited to:

(1) Community Services Block Grant (CSBG);

(2) Low Income Home Energy Assistance Program (LIHEAP) (including the two (2) programs utilizing this funding source: the LIHEAP Weatherization Assistance Program (LIHEAP WAP) and the Comprehensive Energy Assistance Program (CEAP));

(3) Emergency Solutions Grant (ESG);

(4) State Housing Trust Fund (SHTF) [~~(HTF)~~];

(5) Low Income Housing Tax Credit (LIHTC);

(6) Multifamily Bond Programs (Bond);

(7) National Housing Trust Fund (NHTF);

(8) [~~(7)~~] Neighborhood Stabilization Program (NSP);

(9) [~~(8)~~] HOME;

(10) TCAP;

(11) TCAP- Returned Funds (TCAP RF);

(12) [~~(9)~~] Section 8;

(13) [~~(10)~~] Department of Energy Weatherization Assistance Program (DOE WAP); and

(14) [~~(11)~~] Homeless Housing and Services Program (HHSP).

(b) Unless otherwise indicated in the funding announcement, this subchapter does not apply to contracts for the procurement of goods or services by the Department.

§1.202. Definitions.

[~~(a)~~] Capitalized words in this Subchapter have the meaning assigned in the specific Chapter and Rules of the Title that govern the program associated with matter or assigned by federal or state law. In addition, the following terms are used for the purposes of this Subchapter: [~~The following terms are used for purposes of this subchapter:~~]

(1) 2010 ADA Standards--The term 2010 ADA Standards refers to the 2010 ADA Standards for Accessible Design implementing Title II of the Americans with Disabilities Act of 1990, including the ADA Amendments of 2008, found at 28 CFR Part 35. This term includes both the Title II (28 CFR §35.151) and 2004 ADAAG (36 CFR Part 1991). If there is a conflict between 2004 ADAAG and Title II the requirements of Title II prevail.

(2) Accessible Route--A continuous unobstructed path connecting accessible elements and spaces in a facility or building that complies with the space and reach requirements of the applicable accessibility [~~construction~~] standard. [~~(Source: 24 CFR Subtitle A Subpart A §8.3 Definitions. Definition of Accessible Route)~~]

(3) Alteration--Any physical change in a facility or its permanent fixtures or equipment. It includes, but is not limited to, remodeling, renovation, rehabilitation, reconstruction, changes or rearrangements in structural parts and extraordinary repairs. It does not include normal maintenance or repairs, reroofing, interior decoration, or changes to mechanical systems. (Source: 24 CFR Subtitle A Subpart A §8.3 Definitions. Definition of Alteration)

(4) Disability--A physical or mental impairment that substantially limits one or more major life activities; or having a record of such an impairment; or being regarded as having such an impairment. Nothing in this definition requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. Included in this meaning is the term handicap as defined in the Fair Housing Act, and the term disability as defined in the Americans with Disabilities Act. (Source: 24 CFR Subtitle A Subpart A §8.3 Definitions. Definition of Individual with Handicaps. 24 CFR §100.201 and §100.202(d), 28 CFR §35.108)

(5) Multifamily Housing Development--A project that includes five or more dwelling units. A project may consist of five single family homes, a single building with five or more units, or five or more units in multiple buildings each with one or more units. A project includes the whole of one or more residential structures and appurtenant structures, equipment, roads, walks, and parking lots which are covered by a single contract or application, or which are treated as a whole for processing purposes, whether or not located on a common site. (Source: 24 CFR Subtitle A Subpart A §8.3 Definitions. Definition of multifamily housing project and definition of project)

(6) Reasonable Accommodation--An accommodation and/or modification that is an alteration, change, exception, or adjustment to a program, service, building, dwelling unit, that will allow a qualified person with a Disability to:

(A) Participate fully in a program;

(B) Take advantage of a service;

(C) Live in a dwelling; or

(D) Use and enjoy a dwelling.

(7) Recipient--Includes a Subrecipient or Administrator and means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to whom assistance or an award is extended for any program or activity directly or through another Recipient, including any successor, assignee, or transferee of a Recipient, but excluding the ultimate beneficiary of the assistance. Recipients include private entities in partnership with Recipients to own or operate a program or service. This term includes Development Owner.

(8) Replacement Cost--The total development cost for construction and equipment for a newly constructed housing facility of the size and type being altered. Construction and equipment costs do not include the cost of land, demolition, site improvements, nondwelling facilities or administrative costs for project development activities. (Source: 24 CFR Subtitle A Subpart A §8.4 Definitions. Definition of replacement cost)

[~~(b) Other capitalized words used herein have the meaning assigned in §10.3 of this title (relating to Definitions), or assigned by federal or state law.~~]

§1.203. General Certifications and Effect of Non Compliance.

(a) No individual with a Disability shall, by reason of their Disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any Department awarded program or activity.

(b) There are additional requirements for compliance with §504 of the 1973 Rehabilitation Act; Title VI of the Civil Rights Act of 1964; the Fair Housing Act; the Americans with Disabilities Act; and other civil rights laws, regulations and Executive Orders by Recipients of Department program or activities. This subchapter addresses only the requirements relating to physical accessibility in new construction, alterations, and reasonable accommodations under §504, the American with Disabilities Act, and the Fair Housing Act. Other disability-related requirements include but are not limited to:

(1) Operating housing that is not segregated based upon disability or type of disability, unless authorized by federal statute or executive order;

(2) Providing auxiliary aids and services necessary for effective communication with persons with disabilities; and

(3) Operating programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(c) Compliance with accessibility requirements, as applicable,including compliance with the Fair Housing Act, the Americans with Disabilities Act, and §504 of the Rehabilitation Act of 1973, other civil rights laws, regulations and Executive Orders; and Chapters 2105

and 2306 of the Texas Government Code is the sole responsibility of the Recipient. By providing guidance and monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Recipient.

(d) Failure to comply with the provisions of this subchapter may result in the assessment of administrative penalties and/or debarment.

§1.204. Reasonable Accommodations.

(a) To show that a requested Reasonable Accommodation may be necessary, there must be an identifiable relationship between the requested accommodation and the individual's Disability.

(b) Responses to Reasonable Accommodation requests must be provided within a reasonable amount of time, not to exceed 14 calendar days. The response must either be to grant the request, deny the request, offer alternatives to the request, or request additional information to clarify the Reasonable Accommodation request. Should additional information be required and an interactive process is necessary, this process must also be completed within a reasonable amount of time. An undue delay in responding to a reasonable accommodation request may be a failure to provide a reasonable accommodation.

(1) EXAMPLE: A resident requests to move their rent due date to coincide with their social security disability check. It would not be considered reasonable to wait 14 calendar days to respond to this request.

(2) EXAMPLE: A resident requests a designated accessible parking space. An individual's Disability status and the connection to the Reasonable Accommodation request are not clear. Documentation must be requested within 14 calendar days to clarify the resident's request, engaging in an interactive process to determine the nature of the request and the needs of the resident.

(3) EXAMPLE: An applicant with a Disability requires a service animal to alert of impending seizures. The shelter has a no pets policy. It would not be reasonable to wait 14 calendar days to respond to this request.

(4) EXAMPLE: A person with a Disability requests modifying door knobs to levers. The property must respond to the request within 14 calendar days, although it is reasonable that it may take additional time to install the modified door knobs.

(5) EXAMPLE: A housing provider requires that tenants sign 12 month leases. A household signs the lease, but after a few months has to move out in order to live in a nursing home. The household requests a reasonable accommodation to be let out of his lease early without a fee. The property may request additional information if the Disability and relationship between the request is not clear, but must ask for this information within 14 calendar days.

(6) EXAMPLE: An applicant requests a reasonable accommodation to have assistance in filling out a program application for the Housing Trust Fund Program. It would not be reasonable to wait 14 calendar days to respond to this request.

(c) [~~(b)~~] When a resident or applicant requires an accessible unit, feature, space or element, or a policy modification, or other Reasonable Accommodation to accommodate a Disability, the Recipient must provide and pay for the requested accommodation, unless doing so would result in a fundamental alteration in the nature of the program or an undue financial and administrative burden. A fundamental alteration is an accommodation that is so significant that it alters the essential nature of the Recipient's operations. A Recipient that owns a LIHTC or Multifamily Bond Development with no federal or state funds awarded before September 1, 2001 must allow but may not need to [~~not~~] pay for the Reasonable Accommodation, except if [~~unless~~] the accommodation requested should have been made as part of the original design and construction requirements under the Fair Housing Act, or is a Reasonable Accommodation identified by the U.S. Department of Justice with a de minimis cost (e.g., assigned parking spot, no deposit for service/assistance animals, etc).

(d) [~~(c)~~] A Recipient may not charge a fee or place conditions on a resident or applicant in exchange for making the accommodation. For example, while housing providers may require applicants or residents to pay a pet deposit they may not require applicants and residents to pay a deposit for a service/assistance animal.

(e) [~~(d)~~] A Reasonable Accommodation request of an individual with a Disability that amounts to an Alteration [~~alteration~~] should be made to meet the needs of the individual with a Disability, rather than any particular accessible code specification.

(1) Recipients are not required to make structural changes where other methods, which may not cost as much, are effective in making [~~federally assisted housing~~] programs or activities readily accessible to and usable by persons with Disabilities.

(2) In choosing among available methods for meeting the requirements of this section, the Recipient shall give priority to those methods that offer programs and activities to qualified individuals with Disabilities in the most integrated setting appropriate.

(3) Undue burden.

(A) The determination of undue financial and administrative burden will be made by the Department on a case-by-case basis, involving various factors, such as the cost of the reasonable accommodation, the financial resources of the Development, the benefits the accommodation would provide to the requester, and the availability of alternative accommodations that would adequately meet the requester's Disability-related needs. [~~(For more examples of undue financial and administrative burden, see HUD Handbook 4350.3, Exhibit 2-6.)~~]

(B) In considering whether an expense would constitute an undue burden the Department may, as applicable, consider the following items (though it may consider factors not on this list):

(i) Payment for Alteration [~~alteration~~] from operating funds, residual receipts accounts, or reserve replacement accounts must be sought using appropriate approval procedures.

(ii) The approved amount must normally be able to be replenished through property rental income within one year without a corresponding raise in rental rates.

(iii) A projected inability to replenish an operating fund account or the reserve for replacement account within one year for funds spent in providing alterations under this subchapter is some evidence that the Alteration would be an undue financial and administrative burden. (Source: HUD Handbook 4350.3, §2-43(C), and §2-43(D, Example A))

(C) If providing accessibility would result in an undue financial and administrative burden, the Recipient [~~recipient~~] must still take other reasonable steps to achieve accessibility.

(D) If a structural change would constitute an undue financial and administrative burden, and the tenant/requestor still wants that particular change to be made, the tenant/requestor must be allowed to make and pay for the accommodation. [~~(Source: HUD Handbook 4350.3, §2-45)~~]

(4) Recipients are not required to install an elevator solely for the purpose of making units accessible as a reasonable accommodation. (Source: HUD Handbook 4350.3, §2-37(E))

(5) Recipients do not have to make mechanical rooms and similar spaces accessible when, because of their intended use, they do not require accessibility by the public, by tenants, or by employees with physical disabilities. (Source: HUD Handbook 4350.3, §2-37(D))

[~~(6) Recipients are not required to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member. (Source: 24 CFR §8.32(e). HUD Handbook 4350.3, §2-37(B))~~]

(f) [~~(e)~~] If a Recipient refuses to provide a requested accommodation because it is either an undue financial and administrative burden or would result in a fundamental alteration to the nature of the program, the Recipient must make a reasonable attempt to engage in an interactive dialogue with the requester to determine if there is an alternative accommodation that would adequately address the requester's Disability-related needs. If an alternative accommodation would meet the individual's needs and is reasonable, the Recipient must provide it.

(1) EXAMPLE: A resident requires an accessible parking space that will accommodate her wheelchair-equipped van. A Reasonable Accommodation includes relocating and enlarging an existing parking space that will serve the van.

(2) EXAMPLE: A Colonia Self-Help Center provides computer lab classes with laptops at the Center for eligible Colonia residents to learn computer skills. A participant with a Disability is unable to leave their home to participate in the class due to their Disability. The participant requests a reasonable accommodation to borrow a laptop computer to participate in the class from home. Providing a loan of the laptop computer with the training software is a reasonable accommodation because it allows the prospective participant with a disability to fully participate in the Colonia Self-Help Center program. However, it would be fundamental alteration to renovate the participant's home for broadband (unless the home is being rehabilitated for other reasons). [~~A colonia self-help center operates a tool lending program. The tools are located on the second floor of a building with no elevator. As an alternative to installing a lift or elevator, center staff may retrieve tools for residents who use wheelchairs. The aides must be available during the operating hours of the center.~~]

(3) EXAMPLE: A family has a young child with asthma. A certain sealant used by a weatherization provider has been known to trigger asthma attacks. The weatherization provider should see if a comparable sealant could be used that would not trigger asthma.

(4) EXAMPLE: A Development has five parking spaces located outside the main entrance to the building and another parking lot with 20 spaces a half block away. All five of the parking spaces near the entrance to the building have been assigned to residents with Disabilities who need a parking space near their door because of their Disabilities. A sixth tenant with difficulty in walking long distances moves into the Development and requests a parking space near his door. The Recipient has explored the options and concluded that the only way to provide more parking spaces near the door would be to widen the parking area by purchasing valuable real estate next door. It would be an undue financial and administrative burden for the Recipient to provide the sixth tenant with a parking space near the entrance. An alternative accommodation could be to provide the sixth tenant with an assigned parking space in the lot half block away until such time as one of the five spaces near the door becomes available.

(5) EXAMPLE: A resident needs grab bars at the toilet in her bathroom. She does not require other accessible features. The Recipient must install grab bars consistent with the resident's needs in the bathroom.

(6) EXAMPLE: A resident needs a ramped entrance to her ground floor unit to accommodate her wheelchair. She does not wish to move to an accessible unit. The Recipient must provide an accessible entrance at the resident's current unit, unless it would be an undue financial and administrative hardship or a fundamental alteration of the program to do so.

(7) EXAMPLE: A resident uses a scooter type wheelchair which is 38 inches in width. She requests a ramp to enter her ground floor unit. The ramp which she requests must be at least 40 inches wide, it must have a slope of no more than 3%, and the landing at the front door, which opens outward, must be enlarged to provide adequate maneuvering space to enter the doorway. The changes must be provided, even though they may exceed the usual specifications for such alterations, unless it would be an undue financial and administrative hardship or a fundamental alteration of the program to do so.

(8) EXAMPLE: A resident with quadriplegia requests replacement of a bathtub in his unit with a roll-in shower. Due to the location of existing plumbing in the building and the size of the existing bathroom, a plumber confirms that installation of a roll-in shower in that unit is impossible. The on-site manager should meet with the resident to explain why the roll-in shower cannot be installed and to explore alternative accommodations with the resident.

(g) [~~(f)~~] Recipients must follow federal and state regulations regarding service/assistance animals.

§1.205. Compliance with the Fair Housing Act.

(a) Generally, housing designed and constructed for first occupancy after March 13, 1991 must comply with the Fair Housing Act.This includes Units, common areas, and amenities added to existing buildings, or on land under common ownership and contiguous with housing otherwise exempt from the Fair Housing Act.

(b) Compliance with the Fair Housing Act makes it unlawful to discriminate based on a person's disability, race, color, religion, sex, familial status, or national origin unless there is an exception in federal law.

(c) Although HUD recognizes seven safe harbors for compliance with the design and construction requirements, the Department requires compliance with HUD's Fair Housing Act Design Manual.

§1.206. Applicability of the Construction Standards for Compliance with §504 of the Rehabilitation Act of 1978.

(a) The following types of Multifamily Housing Developments must comply with the construction standards of §504 of the Rehabilitation Act of 1973, as further defined through the Uniform Federal Accessibility Standards (UFAS):

(1) New construction and reconstruction HOME and NSP Multifamily Housing Developments that began construction before March 12, 2012;

(2) Rehabilitation HOME and NSP Multifamily Housing Developments that submitted a full application for funding before January 1, 2014; and

(3) All Housing Tax Credit and Tax Exempt Bond Developments that were awarded after September 1, 2001, and submitted a full application before January 1, 2014.

(b) The following types of Multifamily Housing Developments must comply with the construction requirements of 2010 ADA standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" *Federal Register 79 FR 29671* and not otherwise modified in this subchapter:

(1) New construction and reconstruction HOME and NSP Multifamily Housing Developments that began construction after March 12, 2012;and

(2) All Multifamily Housing [~~Rehabilitation HOME and NSP Multifamily Housing~~] Developments that submit a full application for funding after January 1, 2014[~~; and~~]

[~~(3) All Housing Tax Credit and Tax Exempt Bond Developments that submit a full application for funding after January 1, 2014.~~]

(c) After March 12, 2012, Recipients of ESG [~~Emergency Solutions Grant~~] and HHSP [~~Homeless Housing and Services Program~~] funds must comply with the 2010 ADA Standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" *Federal Register 79 FR 29671* and not otherwise modified in this subchapter.

(d) Effect on LURAs. These rules do not serve to amend contractual undertakings memorialized in a recorded LURA but may, by operation of law, place requirements on a property owner beyond those contained in the LURA.

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 14, 2016.

TRD-201605327
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 475-2330

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SUBCHAPTER B. SECTION 504 OF THE REHABILITATION ACT OF 1973 AND THE FAIR HOUSING ACT

10 TAC §1.208, §1.211

The Texas Department of Housing and Community Affairs (the "Department") proposes repeal of 10 TAC Chapter 1 Administration, Subchapter B, §1.208 (concerning Public and Common Use Areas in Multifamily Housing Developments) and §1.211 (concerning Additions of Units to Existing Multifamily Housing Developments). The information covered in §1.208 (concerning Public and Common Use Areas in Multifamily Housing Developments) and §1.211 (concerning Additions of Units to Existing Multifamily Housing Developments) is now addressed in other sections as a result of changes made to the Department's rule due to the newly published guidance from the DOJ on August 11, 2016.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal is in effect, there will be no change in the public benefit anticipated as a result of the repeal. There will be no economic impact to any individuals required to comply with the repeal.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 28, 2016, through November 28, 2016, to receive input on the proposed repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Stephanie Naquin, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3359. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME NOVEMBER 28, 2016.

STATUTORY AUTHORITY.

The repeal is proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The proposed repeal affects no other code, article, or statute.

§1.208. Public and Common Use Areas in Multifamily Housing Developments.
§1.211. Additions of Units to Existing Multifamily Housing Developments.

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 14, 2016.

TRD-201605323
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 475-2330

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CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER E. POST AWARD AND ASSET MANAGEMENT REQUIREMENTS

10 TAC §§10.400 - 10.408

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC, Chapter 10, Subchapter E, §§10.400 - 10.408. The purpose of the repeal is to allow for clarification and correction of information in certain sections of the rule and to allow for the adoption of new sections that will ensure accurate processing of post award activities and communicate more effectively with multifamily development owners regarding their responsibilities after funding or award by the Department.

FISCAL NOTE. Mr. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal is in effect, the

public benefit anticipated as a result of the repeal will be to allow for the adoption of new rules to enhance the State's ability to provide decent, safe, sanitary and affordable housing. There will not be any economic cost to any individuals required to comply with the repeal.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small businesses or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 28, 2016, until November 28, 2016, to receive input on the repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941, ATTN: Raquel Morales, or by email to *raquel.morales@tdhca.state.tx.us.* ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M., AUSTIN LOCAL TIME ON NOVEMBER 28, 2016.

STATUTORY AUTHORITY. The repeal is proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. The proposed repeal affects no other code, article or statute.

§10.400. Purpose.
§10.401. General Commitment or Determination Notice Requirements and Documentation.
§10.402. Housing Tax Credit and Tax Exempt Bond Developments.
§10.403. Direct Loans.
§10.404. Reserve Accounts.
§10.405. Amendments and Extensions.
§10.406. Ownership Transfers (§2306.6713).
§10.407. Right of First Refusal.
§10.408. Qualified Contract Requirements.

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 14, 2016.

TRD-201605299
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 475-0577

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10 TAC §§10.400 - 10.408

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 10, Subchapter E, §§10.400 - 10.408. The purpose of the new rule is to clarify and correct information in all sections of the adopted rule to ensure accurate processing of post award activities and communicate more effectively with multifamily development owners regarding their responsibilities after funding or award by the Department. Post award activities include requests for action to be considered on developments awarded funding from the Department through the end of the affordability period.

FISCAL NOTE. Mr. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new sections are in effect, enforcing or administering the new sections does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections will improve the State's ability to ensure that State resources used for affordable multifamily housing are efficient and result in viable developments. There will not be any new, increased economic cost to any individuation required to comply with the new sections in addition to the costs under current program rules.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no new economic effect on small businesses or micro-businesses in addition to the costs under current program rules.

REQUEST FOR PUBLIC COMMENT. The public comment period will be October 28, 2016, until November 28, 2016, to receive input on the new sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941, ATTN: Raquel Morales, or by email to *raquel.morales@tdhca.state.tx.us.* ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME ON NOVEMBER 28, 2016.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. If adopted as proposed the new sections will affect 10 Texas Administrative Code §10.622 and 10.624.

§10.400. Purpose.

The purpose of this Subchapter is to establish the requirements governing the post award and asset management activities associated with awards of multifamily development assistance pursuant to Tex. Gov't Code, Chapter 2306 and its regulation of multifamily funding provided through the Texas Department of Housing and Community Affairs (the "Department") as authorized by the legislature. This subchapter is designed to ensure that Developers and Development Owners of low-income Developments that are financed or otherwise funded through the Department maintain safe, decent and affordable housing for the term of the affordability period. Therefore, unless otherwise indicated in the specific section of this subchapter, any uncorrected issues of noncompliance outside of the corrective action period or outstanding fees (related to the Development subject to the request) owed to the Department, must be resolved satisfactorily to the Department, EARAC or excepted by the Board, before a request for any post award activity described in this subchapter will be completed.

§10.401. General Commitment or Determination Notice Requirements and Documentation.

(a) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established from time to time by the Department and the Board.

(b) All Commitments or Determination Notices, whether reflected in the Commitment or Determination Notice or not, are made subject to full compliance with all applicable provisions of law and rule, including but not limited to the Qualified Allocation Plan, the Uniform Multifamily Rules, the Multifamily Housing Revenue Bond Rules, all provisions of Commitment and Contract, satisfactory completion of underwriting, and satisfactory resolution of any conditions of underwriting, award, and administrative deficiencies.

(c) The Department shall notify, in writing, the mayor, chief county judge, or other appropriate official of the municipality or county, as applicable, in which the Development is located informing him/her

of the Board's issuance of a Commitment or Determination Notice, as applicable.

(d) The Department may cancel a Commitment, Determination Notice or Carryover Allocation prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or completion of construction with respect to a Development and/or apply administrative penalties if:

(1) the Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to meet any of the conditions of such Commitment, Determination Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Application process for the Development;

(2) any material statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) an event occurs with respect to the Applicant or the Development Owner which would have made the Application ineligible for funding pursuant to Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules if such event had occurred prior to issuance of the Commitment, Determination Notice or Carryover Allocation; or

(4) the Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to comply with this chapter or other applicable Department rules, procedures, or requirements of the Department.

(e) Direct Loan Commitment. The Department shall execute, with the Development Owner, a Commitment which shall confirm that the Board has approved the loan and provide the loan terms. The Commitment may be abbreviated and will generally not express all terms and conditions that will be included in the loan documents. Department staff may choose to issue an Award Letter and Loan Term Sheet in lieu of a Commitment in instances in which a Federal Commitment cannot be made until loan closing or until all financing is secured. An Award Letter is subject to all of the same terms and conditions as a Commitment except that it may not constitute a Federal Commitment. For HOME and National Housing Trust Fund Direct Loans, an actual Federal Commitment may not occur in the HUD IDIS system until all financing is secured or loan closing, whichever comes first, at which time all terms and conditions will be included in the loan documents. The Award Letter shall list an expiration date no earlier than thirty (30) days from the date issued by the Department unless signed and returned. To the extent the terms reflected in an Award Letter are amended by the Department, a new Award Letter would be issued by the Department to govern the award.

§10.402. Housing Tax Credit and Tax Exempt Bond Developments.

(a) Commitment. For Competitive HTC Developments, the Department shall issue a Commitment to the Development Owner which shall confirm that the Board has approved the Application and state the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in Subchapter D of this chapter (relating to Underwriting and Loan Policy) and the determination that the Development satisfies the requirements of this chapter and other applicable Department rules. The Commitment shall expire on the date specified therein, which shall be thirty (30) calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Commitment, pays the required fee specified in §10.901 of this Chapter (relating to Fee Schedule), and satisfies any conditions set forth therein by the Department. The Commitment expiration date may not be extended.

(b) Determination Notices. For Tax Exempt Bond Developments, the Department shall issue a Determination Notice which shall confirm the Board's determination that the Development satisfies the requirements of this chapter as applicable and other applicable Department rules in accordance with the §42(m)(1)(D) of the Internal Revenue Code (the "Code"). The Determination Notice shall also state the Department's determination of a specific amount of housing tax credits that the Development may be eligible for, subject to the requirements set forth in the Department's rules, as applicable. The Determination Notice shall expire on the date specified therein, which shall be thirty (30) calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Determination Notice, pays the required fee specified in §10.901 of this chapter, and satisfies any conditions set forth therein by the Department. The Determination Notice expiration date may not be extended without prior Board approval for good cause. The Determination Notice will terminate if the Tax Exempt Bonds are not closed within the timeframe provided for by the Board on its approval of the Determination Notice, by the expiration of the Certificate of Reservation associated with the Determination Notice, or if the financing or Development changes significantly as determined by the Department pursuant to its rules and any conditions of approval included in the Board approval or underwriting report.

(c) Tax Credit Amount. The amount of tax credits reflected in the IRS Form(s) 8609 may be greater or less than the amount set forth in the Determination Notice based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits will only be permitted if it is determined necessary by the Department, as required by §42(m)(2)(D) of the Code through the submission of the Cost Certification package. Increases to the amount of tax credits that exceed 110 percent of the amount of credits reflected in the Determination Notice must be approved by the Board. Increases to the amount of tax credits that do not exceed 110 percent of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director and are subject to the Credit Increase Fee as described in §10.901 of this chapter.

(d) Documentation Submission Requirements at Commitment of Funds. No later than the expiration date of the Commitment (or no later than December 31 for Competitive HTC Applications, whichever is earlier) or Determination Notice, the documentation described in paragraphs (1) - (6) of this subsection must be provided. Failure to provide these documents may cause the Commitment or Determination Notice to be rescinded:

(1) for entities formed outside the state of Texas, evidence that the entity filed a Certificate of Application for foreign qualification in Texas, a Franchise Tax Account Status from the Texas Comptroller of Public Accounts and a Certificate of Fact from the Office of the Secretary of State. If the entity is newly registered in Texas and the Franchise Tax Account Status or Certificate of Fact are not available, a statement can be provided to that effect;

(2) for Texas entities, a copy of the Certificate of Filing for the Certificate of Formation from the Office of the Secretary of State; a Certificate of Fact from the Secretary of State and a Franchise Tax Account Status from the Texas Comptroller of Public Accounts. If the entity is newly registered and the Certificate of Fact and the Franchise Tax Account Status are not available, a statement can be provided to that effect;

(3) evidence that the signer(s) of the Commitment or Determination Notice have sufficient authority to sign on behalf of the Applicant in the form of a corporate resolution which indicates the sub-entity in Control consistent with the entity contemplated and described in the Application;

(4) evidence of final zoning that was proposed or needed to be changed pursuant to the Development plan;

(5) evidence of satisfaction of any conditions identified in the Credit Underwriting Analysis Report or any other conditions of the award required to be met at Commitment or Determination Notice; and

(6) documentation of any changes to representations made in the Application subject to §10.405 of this chapter (relating to Amendments and Extensions).

(7) for Applications underwritten with a property tax exemption, documentation must be submitted in the form of a letter from an attorney identifying the statutory basis for the exemption and indicating that the exemption is reasonably achievable, subject to appraisal district review. Additionally, any Development with a proposed Payment in Lieu of Taxes ("PILOT") agreement must provide evidence regarding the statutory basis for the PILOT and its terms.

(e) Post Bond Closing Documentation Requirements.

(1) Regardless of the issuer of the bonds, no later than sixty (60) calendar days following closing on the bonds, the Development Owner must submit the documentation in subparagraphs (A) - (D) of this paragraph.

(A) a training certificate from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager has attended at least five (5) hours of Fair Housing training. The certificate must not be older than two years from the date of submission;

(B) a training certificate from a Department approved "architect and engineer Fair Housing trainer" showing that the lead architect or engineer responsible for certifying compliance with the Department's accessibility and construction standards has attended at least five (5) hours of Fair Housing training. The certificate must not be older than two years from the date of submission;

(C) evidence that the financing has closed, such as an executed settlement statement; and

(D) a confirmation letter from the Compliance Division evidencing receipt of the Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Administrator of Accounts forms pursuant to §10.607(a).

(f) Carryover (Competitive HTC Only). All Developments which received a Commitment, and will not be placed in service and receive IRS Form(s) 8609 in the year the Commitment was issued, must submit the Carryover documentation, in the form prescribed by the Department in the Carryover Manual, no later than the Carryover Documentation Delivery Date as identified in §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) of the year in which the Commitment is issued pursuant to §42(h)(1)(C) of the Code.

(1) Commitments for credits will be terminated if the Carryover documentation has not been received by this deadline, unless an extension has been approved. This termination is final and not appealable, and immediately upon issuance of notice of termination, staff is directed to award the credits to other qualified Applicants on the approved waiting list.

(2) If the interim or permanent financing structure, syndication rate, amount of debt or syndication proceeds are finalized but different at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be re-evaluated by the Department for a reduction of credit or change in conditions.

(3) All Carryover Allocations will be contingent upon the Development Owner providing evidence that they have and will maintain Site Control through the 10 Percent Test or through the anticipated closing date, whichever is earlier. For purposes of this paragraph, any changes to the Development Site acreage between Application and Carryover must be addressed by written explanation or, as appropriate, in accordance with §10.405.

(4) Confirmation of the right to transact business in Texas, as evidenced by the Franchise Tax Account Status (the equivalent of the prior Certificate of Account Status) from the Texas Comptroller of Public Accounts and a Certificate of Fact from the Office of the Secretary of State must be submitted with the Carryover Allocation.

(g) 10 Percent Test (Competitive HTC Only). No later than July 1 of the year following the submission of the Carryover Allocation Agreement or as otherwise specified in the applicable year's Qualified Allocation Plan, under §11.2, documentation must be submitted to the Department verifying that the Development Owner has expended more than 10 percent of the Development Owner's reasonably expected basis, pursuant to §42(h)(1)(E)(i) and (ii) of the Code (as amended by The Housing and Economic Recovery Act of 2008), and Treasury Regulations, §1.42-6. The Development Owner must submit, in the form prescribed by the Department, documentation evidencing paragraphs (1) - (8) of this subsection, along with all information outlined in the Post Award Activities Manual. Satisfaction of the 10 Percent Test will be contingent upon the submission of the items described in paragraphs (1) - (8) of this subsection as well as all other conditions placed upon the Application in the Commitment. Requests for an extension will be reviewed on a case by case basis as addressed in §10.405(d) of this Subchapter and a point deduction evaluation will be completed in accordance with Tex. Gov't Code §2306.6710(b)(2) and §11.9(f) of this title. Documentation to be submitted for the 10 Percent Test includes:

(1) an Independent Accountant's Report and Taxpayer's Basis Schedule form. The report must be prepared on the accounting firm's letterhead and addressed to the Development Owner or an Affiliate of the Development Owner. The Independent Accountant's Report and Taxpayers Basis Schedule form must be signed by the Development Owner. If, at the time the accountant is reviewing and preparing their report, the accountant has concluded that the taxpayer's reasonably expected basis is different from the amount reflected in the Carryover Allocation agreement, then the accountant's report should reflect the taxpayer's reasonably expected basis as of the time the report is being prepared;

(2) any conditions of the Commitment or Real Estate Analysis underwriting report due at the time of 10% Test submission;

(3) evidence that the Development Owner has purchased, transferred, leased, or otherwise has ownership of the Development Site. The Development Site must be identical to the Development Site that was submitted at the time of Application submission. For purposes of this paragraph, any changes to the Development Site acreage between Application and 10 Percent Test must be addressed by written explanation or, as appropriate, in accordance with §10.405;

(4) a current survey or plat of the Development Site, prepared and certified by a duly licensed Texas Registered Professional Land Surveyor. The survey or plat must clearly delineate the flood plain boundary lines and show all easements and encroachments;

(5) for New Construction, Reconstruction, and Adaptive Reuse Developments, a certification from a Third Party civil engineer or architect stating that all necessary utilities will be available at the Development Site and that there are no easements, licenses, royalties, or other conditions on or affecting the Development that would materially or adversely impact the ability to acquire, develop, and operate

as set forth in the Application. Copies of supporting documents may be required by the Department;

(6) for the Development Owner and on-site or regional property manager, a training certificate from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager attended at least five (5) hours of Fair Housing training. For architects and engineers, a training certificate from a Department approved "architect and engineer Fair Housing trainer" showing that the lead architect or engineers responsible for certifying compliance with the Department's accessibility and construction standards has attended at least five (5) hours of Fair Housing training within the last year. Certifications required under this paragraph must not be older than two years from the date of submission of the 10 Percent Test Documentation;

(7) a Certification from the lender and syndicator identifying all known Guarantors. If identified Guarantors have changed from the Guarantors or Principals identified at the time of Application, a non-material amendment must be requested by the Applicant in accordance with §10.405 of this subchapter, and the new Guarantors or Principals must be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation Reviews); and

(8) a Development Owner's preliminary construction schedule or statement showing the prospective construction loan closing date, construction start and end dates, prospective placed in service date for each building, and planned first year of the credit period.

(h) Construction Status Report (All Multifamily Developments). All multifamily developments must submit a construction status report. The initial report must be submitted:

(1) For Competitive Housing Tax Credit Developments, 90 days after submission of the 10 Percent Test documentation (this includes Developments funded with HTC and TDHCA Multifamily Direct Loans);

(2) For Tax-Exempt Bond Developments, 90 days after expiration of the Certificate of Reservation; or

(3) For Developments awarded under the Department's Multifamily Direct Loan programs only, 90 days after loan closing.

(i) The initial report for all multifamily Developments shall consist of the items identified in paragraphs (1) - (5) of this subsection, unless stated otherwise. All subsequent reports shall contain items identified in paragraph (3) of this subsection and must include any changes or amendments to items in paragraphs (1) - (2) if applicable. Construction status reports shall be due by the tenth day of the month following each reporting quarter's end (January, April, July, and October) and continue on a quarterly basis until the entire development is complete as evidenced by the final Application and Certificate for Payment (AIA Document G702 and G703) or equivalent form approved for submission by the construction lender and/or investor. The construction status report submission consists of:

(1) the executed partnership agreement with the investor (identifying all Guarantors) or, for Developments receiving an award only from the Department's Direct Loan Programs, other documents setting forth the legal structure and ownership. If identified Guarantors or Principals of a Guarantor entity were not already identified as a Principal of the Owner, Developer, or Guarantor at the time of Application, a non-material amendment must be requested in accordance with §10.405 of this subchapter and the new Guarantors and all of its Principals, as applicable, must be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation Reviews);

(2) the executed construction contract and construction loan agreement. If the loan has not closed, the anticipated closing date must be provided and, upon closing, the agreement must be provided to the Department;

(3) the most recent Application and Certificate for Payment (AIA Document G702 and G703) certified by the Architect of Record (or equivalent form approved for submission by the construction lender and/or investor); and

(4) all Third Party construction inspection reports not previously submitted. If the lender and/or investor does not require third party construction inspection reports, the Development Owner must hire a third party inspector to perform these inspections on a quarterly basis and submit the reports to the Department;

(5) Minority Owned Business Report (HTC only).

(j) LURA Origination (HTC Only). The Development Owner must request a copy of the HTC LURA as directed in the Post Award Activities Manual. The Department will draft a LURA for the Development Owner that will impose the income and rent restrictions identified in the Development's final underwriting report and other representations made in the Application, including but not limited to specific commitments to provide tenant services, to lease to Persons with Disabilities, and/or to provide specific amenities. After origination, the Department executed LURA and all exhibits and addendums will be sent to the Development Owner to execute and record in the real property records for the county in which the Development is located. The original recorded LURA must be returned to the Department no later than the end of the first year of the Credit Period. In general, no Housing Tax Credits are allowed to be issued for a building unless there is a properly executed and recorded LURA in effect at the end of the first year of the Credit Period. Nothing in this section negates a Development Owner's responsibility for full compliance with §42(h)(6) of the Code. The Department will not issue IRS Form(s) 8609 until it receives the original, properly-recorded LURA, or has alternative arrangements which are acceptable to the Department and approved by the Executive Director. Electronically recorded LURAs provided to the Department will be acceptable in lieu of the original, recorded copy.

(k) Cost Certification (Competitive and Non-Competitive HTC, and related activities only). The Department conducts a feasibility analysis in accordance with §42(m)(2)(C)(i)(III) of the Code and Subchapter D of this chapter (relating to Underwriting and Loan Policy) to make a final determination on the allocation of Housing Tax Credits. The requirements for cost certification include those identified in paragraphs (1) - (3) of this subsection.

(1) Development Owners must file cost certification documentation no later than January 15 following the first year of the Credit Period, as defined in §42(f)(1) of the Code.

(2) The Department will evaluate the cost certification documentation and notify the Development Owner of any additional required documentation needed to complete the review. The Department reserves the right to request additional documents or certifications as it deems necessary or useful in the determination of the Development's eligibility for a final Housing Tax Credit allocation amount. Any communication issued to the Development Owner pertaining to the cost certification documentation may also be sent to the syndicator.

(3) IRS Form(s) 8609 will not be issued until the conditions as stated in subparagraphs (A) - (G) of this paragraph have been met. The Development Owner has:

(A) provided evidence that all buildings in the Development have been placed in service by:

(i) December 31 of the year the Commitment was issued;

(ii) December 31 of the second year following the year the Carryover Allocation Agreement was executed; or

(iii) the approved Placed in Service deadline;

(B) provided a complete final cost certification package in the format prescribed by the Department. As used herein, a complete final cost certification package means a package that meets all of the Department's criteria with all required information and exhibits listed in clauses (i) - (xxxvi) of this subparagraph, and pursuant to the Post Award Activities Manual. If any item on this list is determined to be unclear, deficient, or inconsistent with the cost certification review completed by the Department, a Request for Information (RFI) will be sent to the Development Owner. Failure to respond to the requested information within a thirty (30) day period from the date of request may result in the termination of the cost certification review and request for 8609s and require a new request be submitted with a Cost Certification Extension Fee as described in Subchapter G of this chapter (relating to Fee Schedule, Appeals and Other Provisions).

(i) Owner's Statement of Certification;

(ii) Owner Summary & Organization Charts for the Owner, Developer, and Guarantors;

(iii) Evidence of Qualified Nonprofit or CHDO Participation;

(iv) Evidence of Historically Underutilized Business (HUB) Participation;

(v) Development Team List;

(vi) Development Summary with Architect's Certification;

(vii) Development Change Documentation;

(viii) As Built Survey;

(ix) Closing Statement;

(x) Title Policy;

(xi) Title Policy Update;

(xii) Placement in Service;

(xiii) Evidence of Placement in Service;

(xiv) Architect's Certification of Completion Date and Date Ready for Occupancy;

(xv) Auditor's Certification of Acquisition/Rehabilitation Placement in Service Election;

(xvi) Independent Auditor's Report;

(xvii) Independent Auditor's Report of Bond Financing;

(xviii) Development Cost Schedule;

(xix) Contractor's Application for Final Payment (G702/G703);

(xx) Additional Documentation of Offsite Costs;

(xxi) Rent Schedule;

(xxii) Utility Allowances;

(xxiii) Annual Operating Expenses;

(xxiv) 30 Year Rental Housing Operating Pro Forma;

(xxv) Current Operating Statement;

(xxvi) Current Rent Roll;

(xxvii) Summary of Sources and Uses of Funds;

(xxviii) Financing Narrative;

(xxix) Final Limited Partnership Agreement with all amendments and exhibits;

(xxx) All Loan Agreements and Promissory Notes (except for Agreements and Notes issued directly by the Department);

(xxxi) Architect's Certification of Fair Housing Requirements;

(xxxii) Development Owner Assignment of Individual to Compliance Training;

(xxxiii) TDHCA Compliance Training Certificate (not older than two years from the date of cost certification submission);

(xxxiv) TDHCA Final Inspection Clearance Letter;

(xxxv) Completion Certificate (TDHCA Issued Bonds Only); and

(xxxvi) Other Documentation as Required;

(C) informed the Department of and received written approval for all amendments, extensions, and changes in ownership relating to the Development in accordance with §10.405 of this chapter (relating to Amendments and Extensions) and §10.406 of this chapter (relating to Ownership Transfers (§2306.6713));

(D) paid all applicable Department fees, including any past due fees;

(E) met all conditions noted in the Department underwriting report, Determination Notice, and Commitment;

(F) corrected all issues of noncompliance, including but not limited to noncompliance status with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for the subject Development, as described in this chapter. Developments in the corrective action period and/or with any uncorrected issues of noncompliance outside of the corrective action period or that have had a monitoring review where noncompliance was identified, will not be issued IRS Form(s) 8609s until all events of noncompliance are assessed, corrected, or otherwise approved by the Executive Award Review and Advisory Committee;

(G) completed an updated underwriting evaluation in accordance with Subchapter D of this chapter based on the most current information at the time of the review.

§10.403. Review of Annual HOME/NSP and National Housing Trust Fund Rents.

(a) Applicability. For participants of the Department's Multifamily HOME Direct Loan program, where Commitment of Funds occurred on or after August 23, 2013, the Department is required by 24 CFR §92.252(f) to review and approve or disapprove HOME/NSP rents on an annual basis. The Department is required by 24 CFR 93.302(c)(2) to review and approve or disapprove NHTF rents on an annual basis. Development Owners must submit documentation for the review of HOME/NSP/NHTF rents by no later than January 30th of each year as further described in the Post Award Activities Manual.

(b) Documentation for Review. The Department will furnish an Annual Rent Approval Request packet for this purpose that will include a request for Development information and an Owner's proposed rent schedule and will require submission of a current rent roll and an approved utility allowance letter from the Department's Compliance Division. The Department may request additional documentation to perform a determination, as needed, including but not limited to annual operating statements, market surveys, or other information related to determining whether rents are sufficient to maintain the financial viability of a project or are in compliance with maximum rent limits.

(c) Review Process. Rents will be approved or disapproved within 30 days of receipt of all items required to be submitted by the Development Owner, and will be issued in the form of a signed letter from the Asset Management Division. Development Owners must keep copies of all approval letters on file at the Development site to be reviewed at the time of Compliance Monitoring reviews.

(d) Compliance. Development Owners for whom this section is applicable are subject to compliance under §10.622 under Subchapter F and may be subject to penalties under §10.624. Approval of rents by the Asset Management Division will be limited to a review of the documentation submitted and will not guarantee compliance with the Department's rules in Subchapter F or otherwise absolve an Owner of any past, current, or future non-compliance related to Department rules, guidance, Compliance Monitoring visits, or any other rules or guidance to which the Development or its Owner may be subject.

§10.404. Reserve Accounts.

(a) Replacement Reserve Account (§2306.186). The Department will require Development Owners to provide regular maintenance to keep housing sanitary, safe and decent by establishing and maintaining a reserve for replacement account for the Development in accordance with Tex. Gov't Code, §2306.186. The reserve account must be established, in accordance with paragraphs (3), (4), (5), and (6) of this subsection, and maintained through annual or more frequent regularly scheduled deposits, for each Unit in a Development of 25 or more rental units regardless of the amount of rent charged for the Unit. If the Department is processing a request for loan modification or other request under this subchapter, and the Development does not have an existing replacement reserve account, or sufficient funds in the reserve to meet future capital expenditure needs of the Development as determined by a history of uncorrected UPCS violations, ongoing issues related to keeping housing sanitary, safe, and decent, an account balance below the annual reserve deposit amount as specified in this section, or as indicated by the number or cost of repairs included in a PCA, the Development Owner will be required to establish and maintain a replacement reserve account or review whether the amount of regular deposits to the replacement reserve account can be increased, regardless of the number of units at the Development. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section. The duties of the Development Owner under this section cease on the date of a change in ownership of the Development; however, the subsequent Development Owner of the Development is subject to the requirements of this section and any additional or revised requirements the Department may impose after reviewing a Development's compliance history, a PCA submitted by the Owner, or the amount of reserves that will be transferred at the time of any property sale.

(1) The LURA requires the Development Owner to begin making annual deposits to the replacement reserve account on the later of the:

(A) date that occupancy of the Development stabilizes as defined by the First Lien Lender or, in the absence of a First Lien Lender other than the Department, the date the Property is at least 90 percent occupied; or

(B) the date when the permanent loan is executed and funded.

(2) The Development Owner shall continue making deposits into the replacement reserve account until the earliest of the:

(A) date on which the owner suffers a total casualty loss with respect to the Development or the date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(B) date on which the Development is demolished;

(C) date on which the Development ceases to be used as a multifamily rental property; or

(D) end of the Affordability Period specified by the LURA, or if an Affordability Period is not specified and the Department is the First Lien Lender, then when the Department's loan has been fully repaid or as otherwise agreed by the Owner and Department.

(3) If the Department is the First Lien Lender with respect to the Development or if the establishment of a Reserve Account for repairs has not been required by the First Lien Lender or Bank Trustee, each Development Owner receiving Department assistance for multifamily rental housing shall deposit annually into a separate, Development-specific Reserve Account through the date described in paragraph (2) of this subsection:

(A) For New Construction Developments, not less than $250 per Unit. Withdrawals from such account will be restricted for up to five years following the date of award except in cases in which written approval from the Department is obtained relating to casualty loss, natural disaster, reasonable accommodations (but not for the construction standards required by the NOFA or program regulations), or demonstrated financial hardship; or

(B) For Adaptive Reuse, Rehabilitation and Reconstruction Developments, the greater of the amount per Unit per year either established by the information presented in a Property Condition Assessment in conformance with Subchapter D of this chapter (relating to Underwriting and Loan Policy) or $300 per Unit per year.

(4) For all Developments, a Property Condition Assessment ("PCA") must be conducted at intervals that are consistent with requirements of the First Lien Lender, other than the Department. If the Department is the First Lien Lender, or the First Lien Lender does not require a Third Party PCA, a PCA must be conducted at least once during each five (5) year period beginning with the eleventh (11th) year after the awarding of any financial assistance from the Department. PCAs conducted by the Owner at any time or for any reason other than as required by the Department in the year beginning with the eleventh (11th) year of award must be submitted to the Department for review within 30 days of receipt by the Owner.

(5) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond trust indenture or tax credit syndication, the Development Owner shall comply with the lesser of the replacement reserve requirements of the First Lien Lender or the requirements in paragraph (3) of this subsection. In addition, the Department should be listed as a party to receive notice under any replacement reserve agreement entered into by the Development Owner. The Development Owner shall submit on an annual basis, within the Department's required Development Owner's Financial Certification packet, requested information regarding:

(A) the reserve for replacement requirements under the first lien loan agreement (if applicable) referencing where those requirements are contained within the loan documents;

(B) compliance with the first lien lender requirements outlined in subparagraph (A) of this paragraph;

(C) if the Owner is not in compliance with the lender requirements, the Development Owner's plan of action to bring the Development in compliance with all established reserve for replacement requirements; and

(D) whether a PCA has been ordered and the Owner's plans for any subsequent capital expenditures, renovations, repairs, or improvements.

(6) Where there is no First Lien Lender but the allocation of funds by the Department and Tex. Gov't Code, §2306.186 requires that the Department oversee a Reserve Account, the Development Owner shall provide at their sole expense an escrow agent acceptable to the Department to act as Bank Trustee as necessary under this section. The Department shall retain the right to replace the escrow agent with another Bank Trustee or act as escrow agent at a cost plus fee payable by the Development Owner due to breach of the escrow agent's responsibilities or otherwise with thirty (30) days prior notice of all parties to the escrow agreement.

(7) Penalties and Non-Compliance. If the Development Owner fails to comply with the replacement reserve account requirements stated herein, and request for extension or waiver of these requirements is not approved by the Department, then a penalty of up to $200 per dwelling Unit in the Development and/or characterization of the Development as being in default with this requirement, may be imposed:

(A) a Reserve Account, as described in this section, has not been established for the Development;

(B) the Department is not a party to the escrow agreement for the Reserve Account, if required;

(C) money in the Reserve Account:

(i) is used for expenses other than necessary repairs, including property taxes or insurance; or

(ii) falls below mandatory annual, monthly, or Department approved deposit levels;

(D) Development Owner fails to make any required deposits;

(E) Development Owner fails to obtain a Third-Party Property Condition Assessment as required under this section or submit a copy of a PCA to the Department within 30 days of receipt; or

(F) Development Owner fails to make necessary repairs in accordance with the Third Party Property Condition Assessment or §10.621 of this chapter (relating to Property Condition Standards).

(8) Department-Initiated Repairs. The Department or its agent may make repairs to the Development within 30 days of written notice from the Department if the Development Owner fails to complete necessary repairs indicated in the submitted Property Condition Assessment or identified by Department physical inspection. Repairs may be deemed necessary if the Development Owner fails to comply with federal, state, and/or local health, safety, or building code requirements. Payment for necessary repairs must be made directly by the Development Owner or through a replacement Reserve Account established for the Development under this section. The Department or its agent will be allowed to produce a Request for Bids to hire a contractor to complete and oversee necessary repairs. On a case-by-case basis, the Department may determine that the money in the Reserve Account may be used for expenses other than necessary repairs, including property taxes or insurance, if:

(A) Development income before payment of return to Development Owner or deferred developer fee is insufficient to meet operating expense and debt service requirements; or

(B) Development income after payment of operating expenses, but before payment of return to Development Owner or deferred developer fee is insufficient to fund the mandatory deposit levels;

(C) In the event of (A) or (B) above, funds withdrawn must be replaced from Cash Flow after payment of Operating Expenses but before return to Development Owner or deferred developer fee until the mandatory deposit level is replenished. The Department reserves the right to re-evaluate payments to the reserve, increase such payments or require a lump sum deposit to the reserve, or require the Owner to enter into a separate Reserve Agreement if necessary to protect the long term feasibility of the Development.

(9) Exceptions to Replacement Reserve Account. This section does not apply to a Development for which the Development Owner is required to maintain a Reserve Account under any other provision of federal or state law.

(10) In the event of paragraph (7) or (8) of this subsection, the Department reserves the right to require by separate Reserve Agreement a revised annual deposit amount and/or require Department concurrence for withdrawals from the Reserve Account to bring the Development back into compliance. Establishment of a new Bank Trustee or transfer of reserve funds to a new, separate and distinct account may be required if necessary to meet the requirements of such Agreement. The Agreement will be executed by the Department, Development Owner, and financial institution representative.

(b) Lease-up Reserve Account. A lease-up reserve funds start-up expenses in excess of the revenue produced by the Development prior to stabilization. The Department will consider a reasonable lease-up reserve account based on the documented requirements from a third-party lender, third-party syndicator, or the Department. During the underwriting at the point of the Cost Certification review, the lease-up reserve may be counted as a use of funds only to the extent that it represents operating shortfalls net of escrows for property taxes and property insurance. Funds from the lease-up reserve used to satisfy the funding requirements for other reserve accounts may not be included as a use of funds for the lease-up reserve. Funds from the lease-up reserve distributed or distributable as cash flow to the Development Owner will be considered and restricted as developer fee.

(c) Operating Reserve Account. At various stages during the application, award process, and during the operating life of a Development, the Department will conduct a financial analysis of the Development's total development costs and operating budgets, including the estimated operating reserve account deposit required. For example, this analysis typically occurs at application and cost certification review. The Department will consider a reasonable operating reserve account deposit in this analysis based on the needs of the Development and requirements of third-party lenders or investors. The amount used in the analysis will be the amount described in the project cost schedule or balance sheet, if it is within the range of two (2) to six (6) months of stabilized operating expenses plus debt service. The Department may consider a greater amount proposed or required by the Department, any superior lien lender, or syndicator, if the detail for such greater amount is reasonable and well documented. Reasonable operating reserves in

this chapter do not include capitalized asset management fees, guaranty reserves, or other similar costs. In no instance will operating reserves exceed twelve (12) months of stabilized operating expenses plus debt service (exclusive of transferred replacement reserves for USDA or HUD financed rehabilitation transactions). Operating reserves are generally for the term of the permanent loan. In no instance will operating reserves released within five (5) years be included as a cost.

(d) Special Reserve Account. If the funding program requires or allows for the establishment and maintenance of a Special Reserve Account for the purpose of assisting residents at the Development with expenses associated with their tenancy, this will be established in accordance with a written agreement with the Development Owner.

(1) The Special Reserve Account is funded through a one-time payment or annually through an agreed upon percentage of net cash flow generated by the Development, excess development funds at completion as determined by the Department, or as otherwise set forth in the written agreement. For the purpose of this account, net cash flow is defined as funds available from operations after all expenses and debt service required to be paid have been considered. This does not include a deduction for depreciation and amortization expense, deferred developer fee payment, or other payments made to related parties, except as allowed by the Department for property management. Proceeds from any refinancing or other fund raising from the Development will be considered net cash flow for purposes of funding the Special Reserve Account. The account will be structured to require Department concurrence for withdrawals.

(2) All disbursements from the account must be approved by the Department.

(3) The Development Owner will be responsible for setting up a separate and distinct account with a financial institution acceptable to the Department. A Special Reserve Account Agreement will be drafted by the Department and executed by the Department, Development Owner, and financial institution representative.

(4) Use of the funds in the Special Reserve Account is determined by a plan that is pre-approved by the Department. The Owner must create, update and maintain a plan for the disbursement of funds from the Special Reserve Account. The plan should be established at the time the account is created and updated and submitted for approval by the Department as needed. The plan should consider the needs of the tenants of the property and the existing and anticipated fund account balances such that all of the fund uses provide benefit to tenants. Disbursements from the fund will only be approved by the Department if they are in accordance with the current approved plan.

(e) Other Reserve Accounts. Additional reserve accounts may be recognized by the Department as necessary and required by the Department, superior lien lender, or syndicator.

§10.405. Amendments and Extensions.

(a) Amendments to Housing Tax Credit (HTC) Application or Award Prior to Land Use Restriction Agreement (LURA) recording or amendments that do not result in a change to the LURA (§2306.6712). Once a Development receives a Commitment or Determination Notice, the Department expects the Development Owner to construct or rehabilitate, operate, and own the Development consistent with the representations in the Application. The Department must receive notification of any amendments to the Application. Regardless of development stage, the Board shall re-evaluate a Development that undergoes a material change, as identified in paragraph (3) of this subsection at any time after the initial Board approval of the Development (§2306.6731(b)). The Board may deny an amendment request and subsequently may rescind any Commitment or Determination Notice issued for an Application, and may reallocate the credits to other Applicants on the waiting list.

(1) Requesting an amendment. The Department shall require the Applicant to file a formal, written request for an amendment to the Application. Such request must include a detailed explanation of the amendment request and other information as determined to be necessary by the Department, and the applicable fee as identified in §10.901(13) of this chapter (relating to Fee Schedule) in order to be received and processed by the Department. Department staff will evaluate the amendment request to determine if the change would affect an allocation of Housing Tax Credits by changing any item that received points, by significantly affecting the most recent underwriting analysis, or by materially altering the Development as further described in this subsection.

(2) Notification Items. The Department must be notified of the changes described in subparagraphs (A) - (E) of this paragraph. The changes identified are subject to staff agreement based on a review of the amendment request, and any additional information or documentation requested. Notification items will be considered satisfied when an acknowledgment of the specific change(s) is received from the Department.

(A) changes to Development Site acreage required by the City or other local governmental authority, or changes resulting from survey discrepancies, as long as such change does not also result in a modification to the residential density of at least 5 percent;

(B) minor modifications to the site plan that will not significantly impact development costs, including, but not limited to, relocation or rearrangement of buildings on the site (as long as the same number of residential and non-residential buildings remain the same), and movement, addition, or deletion of ingress/egress to the site;

(C) increases in net rentable square footage or common areas that will not significantly impact development costs;

(D) changes in amenities that do not require a change to the recorded LURA and do not negatively impact scoring, including changes to outdated amenities that could be replaced by an amenity with equal benefit to the resident community;

(E) any other amendment not identified or determined to be non-material or material in paragraphs (3) and (4) of this subsection.

(3) Nonmaterial amendments. The Executive Director may administratively approve all non-material amendments, including, but not limited to:

(A) any amendment that is determined by staff to exceed either the scope of notification acknowledgement, as identified in paragraph (2) above or a material alteration, as identified in paragraph (4) below;

(B) changes in the natural person(s) used to meet the experience requirement in §10.204(6) of this chapter (relating to Required Documentation for Application Submission);

(C) changes in Developers or Guarantors (to the extent Guarantors were identified in the Application). Changes in Developers or Guarantors will be subject to Previous Participation requirements as further described in §10.204(13).

(4) Material amendments. Amendments considered material pursuant to paragraph (4) of this subsection must be approved by the Board. Amendment requests which require Board approval must submit the request and all required documentation necessary for staff's review of the request to the Department at least forty-five (45) calendar

days prior to the Board meeting in which the amendment is anticipated to be considered. Before the fifteenth (15th) day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting. (§2306.6717(a)(4)). Material Amendment requests may be denied if the Board determines that the modification proposed in the amendment would materially alter the Development in a negative manner or would have adversely affected the selection of the Application in the Application Round. Material alteration of a Development includes, but is not limited to:

(A) a significant modification of the site plan;

(B) a modification of the number of units or bedroom mix of units;

(C) a substantive modification of the scope of tenant services;

(D) a reduction of 3 percent or more in the square footage of the units or common areas;

(E) a significant modification of the architectural design of the Development;

(F) a modification of the residential density of at least 5 percent;

(G) exclusion of any requirements as identified in Subchapter B of this chapter (relating to Site and Development Requirements and Restrictions) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules or Pre-Clearance for Applications); or

(H) any other modification considered significant by the Board.

(5) Amendment requests will be denied if the Department finds that the request would have changed the scoring of an Application in the competitive process such that the Application would not have received a funding award or if the need for the proposed modification was reasonably foreseeable or preventable by the Applicant at the time the Application was submitted, unless good cause is found for the approval of the amendment.

(6) This section shall be administered in a manner that is consistent with §42 of the Code. If a Development has any uncorrected issues of noncompliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such non-compliance or outstanding payment must be resolved to the satisfaction of the Department prior to approving an amendment request unless otherwise approved by the Executive Award Review and Advisory Committee.

(7) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants identified in the Application and Credit Underwriting Analysis Report at the time of award and as approved by the Board, the procedure described in subparagraphs (A) and (B) of this paragraph will apply to the extent such request is not prohibited based on statutory and/or regulatory provisions:

(A) for amendments that involve a reduction in the total number of Low-Income Units, or a reduction in the number of Low-Income Units at any rent or income level, as approved by the Board, evidence must be presented to the Department to support the amendment. In addition, for such changes prior to issuance of IRS Forms 8609 by the Department, the lender and syndicator must submit written confirmation that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request; however, any affirmative recommendation to the Board is contingent upon concurrence from Department staff that the Unit adjustment is necessary for the continued financial feasibility of the Development; and

(B) if it is determined by the Department that the loss of low-income targeting points would have resulted in the Application not receiving an award in the year of allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all Persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for twenty-four (24) months from the time that the amendment is approved.

(b) Amendments to the LURA. Department approval shall be required for any amendment to a LURA in accordance with this section. An amendment request shall be submitted in writing, containing a detailed explanation of the request, the reason the change is necessary, the good cause for the change, financial information if the change will result in any financial impact on the development, information related to whether the necessity of the amendment was reasonably foreseeable at the time of application, and other information as determined to be necessary by the Department, along with any applicable fee as identified in §10.901 of this chapter (relating to Fee Schedule). The Department may order a Market Study or appraisal to evaluate the request which shall be at the expense of the Development Owner and the Development Owner will remit funds necessary for such report prior to the Department commissioning such report. LURAs will only be amended if non-compliance or outstanding payment is resolved to the satisfaction of the Department. The Department will not approve changes that would violate state or federal laws including the requirements of §42 of the Code, 24 CFR Part 92 (HOME Final Rule), 24 CFR Part 93 (NHTF Interim Rule), Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan), Tex. Gov't Code, Chapter 2306, the Fair Housing Act, and, for Tax-Exempt Bond Developments, compliance with their Regulatory Agreement and corresponding bond financing documents. Prior to staff taking a recommendation to the Board for consideration, the procedures described in paragraph (3) of this subsection must be followed.

(1) Non-Material Amendments. The Executive Director or designee may administratively approve all amendments not defined as Material Amendments pursuant to paragraph (2) below. An amendment to the LURA is not considered material if the change is the result of a Department work out arrangement as recommended by the Department's Asset Management Division.

(2) Material Amendments. Development Owners seeking amendment requests that require Board approval must submit the request and all required documentation necessary for staff's review of the request to the Department at least forty-five (45) calendar days prior to the Board meeting in which the amendment is anticipated to be considered. Before the fifteenth (15th) day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting. (§2306.6717(a)(4)). The Board must consider and approve the following material amendments:

(A) reductions to the number of Low-Income Units;

(B) changes to the income or rent restrictions;

(C) changes to the Target Population;

(D) the removal of material participation by a HUB or Nonprofit Organization as further described in §10.406 of this subchapter;

(E) a change in the Right of First Refusal period as described in amended §2306.6725 of the Tex. Gov't Code;

(F) any amendment deemed material by the Executive Director.

(3) Prior to staff taking a recommendation to the Board for consideration, the Development Owner must provide notice and hold a public hearing regarding the requested amendment(s) at least fifteen (15) business days prior to the scheduled Board meeting where the request will be considered. Development Owners will be required to submit a copy of the notification with the amendment request. If an amendment is requested prior to issuance of IRS Forms 8609 by the Department, notification must be provided to the recipients described in subparagraphs (A) - (E) of this paragraph. If an amendment is requested after issuance of IRS Forms 8609 by the Department, notification must be provided to the recipients described in subparagraph (A) - (B) of this paragraph.

(A) each tenant of the Development;

(B) the current lender and investor;

(C) the State Senator and State Representative of the districts whose boundaries include the Development Site;

(D) the chief elected official for the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction); and

(E) the county commissioners of the county in which the Development Site is located (if the Development Site is located outside of a municipality).

(4) Contents of Notification. The notification must include, at a minimum, all of the information described in subparagraphs (A) - (D) of this paragraph.

(A) the Development Owner's name, address and an individual contact name and phone number;

(B) the Development name, address, city and county;

(C) the change(s) requested; and

(D) the date, time and location of the public hearing where the change(s) will be discussed.

(5) Verification of public hearing. Minutes of the public hearing and attendance sheet must be submitted to the Department within three (3) business days after the date of the public hearing.

(6) Approval. Once the LURA Amendment has been approved administratively or by the Board, as applicable, Department staff will provide the Development Owner with a LURA amendment for execution and recordation in the county where the Development is located.

(c) HTC Extensions. Extensions must be requested if the original deadline associated with Carryover, the 10 Percent Test (including submission and expenditure deadlines), construction status reports, or cost certification requirements will not be met. Extension requests submitted at least thirty (30) calendar days in advance of the applicable deadline will not be required to submit an extension fee as described in §10.901 of this chapter. Any extension request submitted fewer than thirty (30) days in advance of the applicable deadline or after the applicable deadline will not be processed unless accompanied by the applicable fee. Extension requests will be approved by the Executive Director or Designee, unless, at staff's discretion it warrants Board approval due to extenuating circumstances stated in the request. The extension request must specify a requested extension date and the reason why such an extension is required. If the Development Owner is requesting an extension to the Carryover submission or 10 percent Test deadline(s), a point deduction evaluation will be completed in accordance with Tex. Gov't Code, §2306.6710(b)(2), and §11.9(f) of this title (relating to Competitive HTC Selection Criteria). Therefore, the Development Owner must clearly describe in their request for an extension how the need for the extension was beyond the reasonable control of the Applicant/Development Owner and could not have been reasonably anticipated. Carryover extension requests will not be granted an extended deadline later than December 1st of the year the Commitment was issued.

§10.406. Ownership Transfers (§2306.6713).

(a) Ownership Transfer Notification. All multifamily Development Owners must provide written notice and a completed Ownership Transfer packet, if applicable, to the Department at least forty-five (45) calendar days prior to any sale, transfer, or exchange of the Development or any portion of or Controlling interest in the Development. Except as otherwise provided herein, the Executive Director's prior written approval of any such transfer is required. The Executive Director may not unreasonably withhold approval of the transfer requested in compliance with this section.

(b) Exceptions. The following exceptions to the ownership transfer process outlined herein apply:

(1) A Development Owner shall be required to notify the Department but shall not be required to obtain Executive Director approval when the transferee is an Affiliate of the Development Owner with no new Principals or the transferee is a Related Party who does not Control the Development and the transfer is being made for estate planning purposes.

(2) Transfers that are the result of an involuntary removal of the general partner by the investment limited partner do not require advance approval but must be reported to the Department as soon as possible by submission of an Ownership Transfer packet, due to the sensitive timing and nature of this decision.

(3) Changes to the investment limited partner, non-Controlling limited partner, or other non-Controlling partners affiliated with the investment limited partner do not require Executive Director approval. A General Partner's acquisition of the interest of the investment limited partner does not require Executive Director approval, unless some other change in ownership is occurring as part of the same overall transaction.

(4) Changes resulting from foreclosure wherein the lender or financial institution involved in the transaction is the same resulting owner do not require advance approval but must be reported to the Department as soon as possible, due to the sensitive timing and nature of the decision.

(c) General Requirements.

(1) Any new Principal in the ownership of a Development must be eligible under §10.202 of Subchapter C (relating to Ineligible Applicants and Applications). In addition, Principals will be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation).

(2) Changes in Developers or Guarantors must be addressed as non-material amendments to the application under §10.405 of this Subchapter.

(3) To the extent an investment limited partner or its Affiliate assumes a Controlling interest in a Development Owner, such acquisition shall be subject to the Ownership Transfer requirements set forth herein. Principals of the investment limited partner or Affiliate will be considered new Principals and will be reviewed as stated under paragraph (1) of this subsection.

(4) Simultaneous transfer or concurrent offering for sale of the General Partner's and Limited Partner's control and interest will be subject to the Ownership Transfer requirements set forth herein and will trigger a Right of First Refusal, if applicable.

(d) Transfer Actions Warranting Debarment. If the Department determines that the transfer, involuntary removal, or replacement was due to a default by the General Partner under the Limited Partnership Agreement, or other detrimental action that put the Development at risk of failure or the Department at risk for financial exposure as a result of non-compliance, staff may make a recommendation to the Board for the debarment of the entity and/or its Principals and Affiliates pursuant to the Department's debarment rule. In addition, a record of transfer involving Principals in new proposed awards will be reported and may be taken into consideration by the Executive Award and Review Committee, in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation), prior to recommending any new financing or allocation of credits.

(e) Transfers Prior to 8609 Issuance or Construction Completion. Prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or the completion of construction (for all Developments funded through other Department programs) an Applicant may request an amendment to its ownership structure to add Principals. The party(ies) reflected in the Application as having control must remain in the ownership structure and retain such control, unless approved otherwise by the Board. A development sponsor, General Partner or Development Owner may not sell the Development in whole or voluntarily end their control prior to the issuance of 8609s.

(f) NonProfit Organizations. If the ownership transfer request is to replace a nonprofit organization within the Development ownership entity, the replacement nonprofit entity must adhere to the requirements in paragraph (1) or (2) of this subsection.

(1) If the LURA requires ownership or material participation in ownership by a Qualified Non-Profit Organization, and the Development received Tax Credits pursuant to §42(h)(5) of the Code, the transferee must be a Qualified Non-Profit Organization that meets the requirements of §42(h)(5) of the Code and Tex. Gov't Code §2306.6706 and can demonstrate planned participation in the operation of the Development on a regular, continuous, and substantial basis.

(2) If the LURA requires ownership or material participation in ownership by a qualified non-profit organization or CHDO, the Development Owner must show that the transferee is a nonprofit organization or CHDO, as applicable, that complies with the LURA.

(3) Exceptions to the above may be made on a case by case basis if the Development is past its Compliance Period/Federal Affordability Period, was not reported to the IRS as part of the Department's Non-Profit Set Aside in any HTC Award year, and follows the procedures outlined in §10.405(b)(1) - (5) of this chapter (relating to LURA Amendments that require Board Approval). The Board must find that:

(A) the selling nonprofit is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(B) the participation by the nonprofit was substantive and meaningful during the full term of the Compliance Period but is no longer substantive or meaningful to the operations of the Development; and

(C) the proposed purchaser is an affiliate of the current Owner or otherwise meets the Department's standards for ownership transfers.

(g) Historically Underutilized Business ("HUB") Organizations. If a HUB is the general partner of a Development Owner and it (i) is being removed as the result of a default under the organizational documents of the Development Owner, (ii) determines to sell its ownership interest or (iii) determines to maintain its ownership interest but is unable to maintain its HUB status, in either case, after the issuance of 8609's, the purchaser of that general partnership interest or the general partner is not required to be a HUB as long as the LURA does not require such continual ownership, or the procedures outlined in §10.405(b)(1) - (5) of this chapter (relating to LURA Amendments that require Board Approval) have been followed and approved. All such transfers must be approved by the Executive Director and require that the Executive Director find that:

(1) the selling HUB is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(2) the participation by the HUB has been substantive and meaningful, or would have been substantial and meaningful had the HUB not defaulted under the organizational documents of the Development Owner, enabling it to realize not only financial benefit but to acquire skills relating to the ownership and operation of affordable housing; and

(3) the proposed purchaser meets the Department's standards for ownership transfers

(h) Documentation Required. A Development Owner must submit documentation requested by the Department to enable the Department to understand fully the facts and circumstances that gave rise to the need for the transfer and the effects of approval or denial. Documentation must be submitted as directed in the Post Award Activities Manual, which includes but is not limited to:

(1) a written explanation outlining the reason for the request;

(2) ownership transfer information, including but not limited to the type of sale, amount of Development reserves to transfer in the event of a property sale, and the prospective closing date;

(3) pre and post transfer organizational charts with TINs of each organization down to the level of natural persons in the ownership structure as described in §10.204(13)(A) of Subchapter C;

(4) a list of the names and contact information for transferees and Related Parties;

(5) Previous Participation information for any new Principal as described in §10.204(13)(B) of Subchapter C;

(6) agreements among parties associated with the transfer;

(7) Owners Certifications with regard to materials submitted further described in the Post Award Activities Manual;

(8) detailed information describing the organizational structure, experience, and financial capacity of transferees and related parties holding a controlling interest in any Principal or Controlling entity;

(9) evidence and certification that the tenants in the Development have been notified in writing of the proposed transfer at least 30 calendar days prior to the date the transfer is approved by the Depart-

ment. The ownership transfer approval letter will not be issued until this 30 day period has expired;

(10) any required exhibits and the list of exhibits related to specific circumstances of transfer or Ownership as detailed in the Post Award Activities Manual.

(i) Once the Department receives all necessary information under this section and as required under the Post Award Activities Manual, staff shall initiate a qualifications review of a transferee, in accordance with Chapter 1, Subchapter C of this title, to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter and §10.202 of Subchapter C (relating to ineligible applicants and applications).

(j) Credit Limitation. As it relates to the Housing Tax Credit amount further described in §11.4(a) of this title (relating to Tax Credit Request and Award Limits), the credit amount will not be applied in circumstances described in paragraphs (1) and (2) of this subsection:

(1) in cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(2) in cases where the general partner is being replaced if the award of credits was made at least five (5) years prior to the transfer request date.

(k) Penalties, Past Due Fees and Underfunded Reserves. The Development Owner must comply with any additional documentation requirements as stated in Subchapter F of this chapter (relating to Compliance Monitoring). The Development Owner, as on record with the Department, will be liable for any penalties or fees imposed by the Department even if such penalty can be attributable to the new Development Owner unless such ownership transfer is approved by the Department. In the event a transferring Development has a history of uncorrected UPCS violations, ongoing issues related to keeping housing sanitary, safe, and decent, an account balance below the annual reserve deposit amount as specified in §10.404(a) (relating to Replacement Reserve Accounts), or that appears insufficient to meet capital expenditure needs as indicated by the number or cost of repairs included in a PCA, the prospective Development Owner may be required to establish and maintain a replacement reserve account or increase the amount of regular deposits to the replacement reserve account by entering into a Reserve Agreement with the Department. The Department may also request a plan and timeline relating to needed repairs or renovations that will be completed by the departing and/or incoming Owner as a condition to approving the Transfer.

(l) Ownership Transfer Processing Fee. The ownership transfer request must be accompanied by the corresponding ownership transfer fee as outlined in §10.901 of this chapter (relating to Fee Schedule).

§10.407. Right of First Refusal.

(a) General. This section applies to Development Owners that agreed to offer a Right of First Refusal ("ROFR") to a Qualified Entity or as applicable a Qualified Nonprofit Organization, as memorialized in the applicable LURA. For the purposes of this section a Qualified Nonprofit Organization also includes an entity 100% owned by a Qualified Nonprofit Organization pursuant to §42(h)(5)(C) of the Code and operated in a similar manner. The purpose of this section is to provide administrative procedures and guidance on the process and valuation of properties under the LURA. All requests for ROFR submitted to the Department, regardless of existing regulations, must adhere to this process.

(1) The Development Owner may market the Property for sale and sell the Property to a Qualified Entity, or as applicable a Qualified Nonprofit Organization without going through the ROFR process outlined in this section unless otherwise restricted or prohibited and only in the following circumstances:

(A) the LURA includes a 90-day ROFR and the Development Owner is selling to a Qualified Nonprofit Organization;

(B) the LURA includes a two (2) -year ROFR and the Development Owner is selling to a Qualified Nonprofit Organization that meets the definition of a Community Housing Development Organization ("CHDO") under 24 CFR Part 92, as approved by the Department; or

(C) the LURA includes a 180-day ROFR, and the Development Owner is selling to a Qualified Entity that meets the definition of a CHDO under 24 CFR Part 92, or an entity that is controlled by a CHDO, as approved by the Department. Where the Development Owner is not required to go through the ROFR process, it must go through the ownership transfer process in accordance with §10.406.

(2) A ROFR request must be made in accordance with the LURA for the Development. If there is a conflict between the Development's LURA and this subchapter, every effort will be made to harmonize the provisions. If the conflict cannot be resolved, requirements in the LURA will supersede this subchapter. If there is a conflict between the Development's LURA and Tex. Gov't Code Chapter 2306, every effort will be made to harmonize the provisions. A Development Owner may request a LURA amendment to make the ROFR provisions in the LURA consistent with Tex. Gov't Code Chapter 2306 at any time.

(3) If a LURA includes the ROFR provision, the Development Owner may not request a Preliminary Qualified Contract (if such opportunity is available under the applicable LURA and §10.408) until the requirements outlined in this section have been satisfied.

(4) The Department reviews and approves all ownership transfers pursuant to §10.406. Thus, if a proposed purchaser is identified in the ROFR process, the Development Owner and proposed purchaser must complete the ownership transfer process. A Development Owner may not transfer a Development to a Qualified Nonprofit Organization or Qualified Entity that is considered an ineligible entity under the Department's rules. In addition, ownership transfers to a Qualified Entity or as applicable a Qualified Nonprofit Organization pursuant to the ROFR process are subject to Chapter 1, Subchapter C of this title (relating to Previous Participation Reviews).

(5) Satisfying the ROFR requirement does not terminate the LURA or the ongoing application of the ROFR requirement to any subsequent Development Owner.

(6) The ROFR process is triggered upon:

(A) the Development Owner's determination to sell the Development to an entity other than as permitted in paragraph (1) of this subsection; or

(B) the simultaneous transfer or concurrent offering for sale of a General Partner's and limited partner's interest in the Development Owner's ownership structure.

(7) The ROFR process is not triggered if a Development Owner seeks to transfer the Development to a newly formed entity:

(A) that is under common control with the Development Owner;

(B) the primary purpose of the formation of which is to facilitate the financing of the rehabilitation of the development using assistance administered through a state financing program and

(C) the original ROFR language in the property's LURA has been amended to reflect updated provisions of Tex. Gov't Code from the 84th legislature if the Development Owner signed and recorded a LURA prior to September 1, 2015 or the Development Owner signed a new LURA after September 1, 2016.

(8) This section applies only to a Right of First Refusal memorialized in the Department's LURA. This section does not authorize a modification of any other agreement between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity. The enforceability of a contractual agreement between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity may be impacted by the Development Owner's commitments at Application and recorded LURA.

(b) Right of First Refusal Offer Price. There are two general expectations of the ROFR offer or sale price identified in the outstanding LURAs. The descriptions in paragraphs (1) and (2) of this subsection do not alter the requirements or definitions included in the LURA but provide further clarification as applicable:

(1) Fair Market Value is established using either a current appraisal (completed within three months prior to the ROFR request and in accordance with §10.304 of this chapter (relating to Appraisal Rules and Guidelines)) of the Property or an executed purchase offer that the Development Owner would like to accept. In either case the documentation used to establish Fair Market Value will be part of the ROFR property listing on the Department's website. The purchase offer must contain specific language that the offer is conditioned upon satisfaction of the ROFR requirement. If a subsequent ROFR request is made within six months of the previously approved ROFR posting, the lesser of the prior ROFR posted value or new appraisal/purchase contract amount must be used in establishing Fair Market Value;

(2) Minimum Purchase Price, pursuant to §42(i)(7)(B) of the Code, is the sum of:

(A) the principal amount of outstanding indebtedness secured by the project (other than indebtedness incurred within the five (5) -year period immediately preceding the date of said notice); and

(B) all federal, state, and local taxes incurred or payable by the Development Owner as a consequence of such sale. If the Property has a minimum Applicable Fraction of less than 1, the offer must take this into account by multiplying the purchase price by the applicable fraction and the fair market value of the non-Low-Income Units. Documentation submitted to verify the Minimum Purchase Price calculation will be part of the ROFR property listing on the Department's website.

(c) Required Documentation. Upon establishing the value of the Property, the ROFR process is the same for all types of LURAs. To proceed with the ROFR request, documentation must be submitted as directed in the Post Award Activities Manual, which includes:

(1) ROFR fee as identified in §10.901 of this chapter (relating to Fee Schedule);

(2) a notice of intent to the Department and to such other parties as the Department may direct at that time;

(3) evidence and certification that the residents of the Development have been provided with a notice of intent;

(4) documentation evidencing any contractual ROFR between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity, along with evidence that such Qualified Nonprofit Organization or Qualified Entity is in good standing in the state of its organization;

(5) documentation verifying the ROFR offer price of the Property:

(A) if the Development Owner receives an offer to purchase the Property from any buyer other than a Qualified Entity or Qualified Nonprofit Organization that the Development Owner would like to accept, the Development Owner may execute a sales contract, conditioned upon satisfaction of the ROFR requirement, and submit the executed sales contract to establish fair market value; or

(B) if the Development Owner of the Property chooses to establish fair market value using an appraisal, the Development Owner must submit an appraisal of the Property completed during the last three (3) months prior to the date of submission of the ROFR request, establishing a value for the Property in compliance with Subchapter D of this chapter (relating to Underwriting and Loan Policy) in effect at the time of the request. The appraisal should take into account the existing and continuing requirements to operate the Property under the LURA and any other restrictions that may exist. Department staff will review all materials within thirty (30) calendar days of receipt. If, after the review, the Department does not agree with the fair market value proposed in the Development Owner's appraisal, the Department may order another appraisal at the Development Owner's expense; or

(C) if the LURA requires valuation through the Minimum Purchase Price calculation, submit documentation verifying the calculation of the Minimum Purchase Price as described in subsection (b)(2) of this section regardless of any existing offer or appraised value;

(5) description of the Property, including all amenities and current zoning requirements;

(6) copies of all documents imposing income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Property;

(7) a current title policy dated not more than six months prior to the date of submission of the ROFR request;

(8) the most recent Physical Needs Assessment, pursuant to Tex. Gov't Code §2306.186(e) conducted by a Third-Party;

(9) copy of the monthly operating statements, including income statements and balance sheets for the Property for the most recent twelve (12) consecutive months (financial statements should identify amounts held in reserves);

(10) the three (3) most recent consecutive audited annual operating statements, if available;

(11) detailed set of photographs of the Property, including interior and exterior of representative units and buildings, and the Property's grounds (including digital photographs that may be easily displayed on the Department's website);

(12) current and complete rent roll for the entire Property;

(13) if any portion of the land or improvements is leased for other than residential purposes, copies of the commercial leases

(d) Posting and offers. Within 30 business days of receipt of all required documentation, the Department will review the submitted documents and notify the Development Owner of any deficiencies. During that time, the Department will notify any Qualified Entity or as applicable any Qualified Nonprofit Organization identified by the Development Owner as having a contractual ROFR of the Development Owner's intent to sell. Once the deficiencies are resolved and the Development Owner and Department come to an agreement on the ROFR offer price of the Property, the Department will list the Property for sale on the Department's website and contact entities on the buyer list maintained by the Department to inform them of the availability of the

Property at the agreed upon ROFR offer price as determined under this section. The Department will notify the Development Owner when the Property has been listed. The ROFR posting period commences on the date the Property is posted for sale on the Department's website. During the ROFR posting period, a Qualified Nonprofit Organization or Qualified Entity can submit an offer to purchase as follows:

(1) if the LURA requires a 90 day ROFR posting period with no priority for any particular kind of Qualified Nonprofit Organization, any Qualified Nonprofit Organization may submit an offer to purchase the property.

(2) If the LURA requires a two (2) -year ROFR posting period, a Qualified Nonprofit Organization may submit an offer to purchase the Property as follows:

(A) during the first six (6) months of the ROFR posting period, only a Qualified Nonprofit Organization that is a Community Housing Development Organization ("CHDO") under 24 CFR Part 92, or an entity that is 100% owned by a CHDO, as approved by the Department, may submit an offer;

(B) during the next six (6) months of the ROFR posting period, only a Qualified Nonprofit Organization as described by Tex. Gov't Code §2306.6706, or an entity that is 100% owned by Qualified Nonprofit Organization as described by Texas Government Code §2306.6706, or a tenant organization may submit an offer; and

(C) during the final twelve (12) months of the ROFR posting period, any Qualified Nonprofit Organization may submit an offer.

(3) If the LURA requires a 180-day ROFR posting period a Qualified Entity may submit an offer to purchase the Property as follows:

(A) during the first sixty (60) days of the ROFR posting period, only a Qualified Entity that is a CHDO under 24 CFR Part 92, or an entity that is controlled by CHDO, as approved by the Department, may submit an offer;

(B) during the second sixty (60) days of the ROFR posting period, only a Qualified Entity as described by Tex. Gov't Code §2306.6706 or an entity that is controlled by Qualified Entity as described by Tex. Gov't Code §2306.6706, or a tenant organization such may submit an offer;

(C) during the final sixty (60) days of the ROFR posting period, any Qualified Entity may submit an offer.

(4) If the LURA does not specify a required ROFR posting timeframe, or, is unclear on the required ROFR posting timeframe, and the required ROFR value is determined by the Minimum Purchase Price method, any Development that received a tax credit allocation prior to September 1, 1997, is required to post for a 90-day ROFR period and any Development that received a tax credit allocation on or after September 1, 1997, and until September 1, 2015, is required to post for a 2-year ROFR, unless the LURA is amended under §10.405(b), or after September 1, 2015 is required to post for a 180-day ROFR period as described in Tex. Gov't Code, §2306.6726.

(e) Acceptance of offers. A Development Owner may accept or reject any offer received during the ROFR posting period; provided however, that to the extent the LURA gives priority to certain classifications of Qualified Nonprofit Organizations or Qualified Entities to make offers during certain portions of the ROFR posting period, the Development Owner can only negotiate a purchase contract with such classifications of entities during their respective periods. For example, during the CHDO priority period, the Development Owner may only accept an offer from and enter into negotiations with a Qualified Nonprofit Organization or Qualified Entity in that classification.

(f) Satisfaction of ROFR.

(1) A Development Owner that has posted a Property under the ROFR process is deemed to have satisfied the ROFR requirements in the following circumstances:

(A) the Development Owner does not receive any bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(B) the LURA identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR, the LURA does not include a priority, such entity does not elect to purchase the Property, and a written denial is submitted to and approved by the Department;

(C) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price, the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(D) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price, the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period; or

(E) an offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period at or above the posted ROFR offer price.

(2) A Development Owner that has posted a Property under the ROFR process does not satisfy the ROFR requirements in the following circumstances:

(A) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price, and the Development Owner does not accept the offer;

(B) the LURA identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR, and such entity no longer exists or is no longer conducting business;

(C) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price, the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and then fails to accept any of such other offers;

(D) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price, the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, and such failure is determined to be the fault of the Development Owner;

(E) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price, the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers; or

(F) an offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period at or above the posted ROFR offer price, and the Development Owner fails to accept any of such offers.

(3) Upon expiration of the ROFR posting period, if no bona fide offers from a Qualified Nonprofit Organization or Qualified Entity have been received, the Department will notify the Development Owner in writing that the ROFR requirement has been met.

(g) Activities Upon Satisfaction of ROFR.

(1) If a Development Owner satisfies the ROFR requirement pursuant to subsection (f)(1) - (3) above, it may request a Preliminary Qualified Contract (if such opportunity is available under §10.408) or proceed with the sale to an entity that is not a Qualified Nonprofit Organization or Qualified Entity at or above the ROFR offer price.

(2) Following notice that the ROFR requirement has been met, if the Development Owner does not post the Property for Qualified Contract in accordance with §10.408 or sell the Property to an entity that is not a Qualified Nonprofit Organization or Qualified Entity within twenty-four (24) months of the Department's written indication that the ROFR has been satisfied, the Development Owner must follow the ROFR process for any subsequent transfer.

(3) If the Department determines that the ROFR requirement has not been met during the ROFR posting period, the Owner may not re-post under this provision at a ROFR offer price that is higher than the originally posted ROFR offer price until twenty-four (24) months has expired from the Department's written indication that the ROFR has not been satisfied. The Development Owner may market the Property for sale and sell the Property to a Qualified Nonprofit Organization or Qualified Entity during this twenty-four (24) month period.

(h) Sale and closing.

(1) Prior to closing a sale of the Property, the Development Owner must obtain Department approval of the transfer through the ownership transfer process in accordance with §10.406 of this chapter (relating to Ownership Transfers (§2306.6713)). The request should include, among other required transfer documents outlined in the Post Award Activities Manual, the final settlement statement and final sales contract with all amendments.

(2) If the closing price is materially less than the ROFR offering price or the terms and conditions of the sale change materially from what was submitted in the ROFR posting, in the Department's sole determination, the Development Owner must go through the ROFR process again with a revised ROFR offering price equal to the reduced closing price or adjusted terms and conditions based upon the revised terms, before disposing of the Property.

(i) Appeals. A Development Owner may appeal a staff decision in accordance with §10.902 of this chapter (relating to the Appeals Process (§2306.0321; §2306.6715)).

§10.408. Qualified Contract Requirements.

(a) General. Pursuant to §42(h)(6) of the Code, after the end of the 14th year of the Compliance Period, the Development Owner of a Development utilizing Housing Tax Credits can request that the allocating agency find a buyer at the Qualified Contract Price. If a buyer cannot be located within one (1) year, the Extended Use Period will expire. This section provides the procedures for the submittal and review of a Qualified Contract Request.

(b) Eligibility. Development Owners who received an award of credits on or after January 1, 2002 are not eligible to request a Qualified Contract prior to the thirty (30) year anniversary of the date the property was placed in service (§2306.185). Unless otherwise permitted in the LURA, Development Owners awarded credits prior to 2002 may submit a Qualified Contract Request at any time after the end of the year proceeding the last year of the Initial Affordability Period, following the Department's determination that the Development Owner is eligible. The Initial Affordability Period starts concurrently with the credit period, which begins at placement-in-service or is deferred until the beginning of the next tax year, if there is an election. Unless the Development Owner has elected an Initial Affordability Period longer than the Compliance Period, as described in the LURA, this can commence at any time after the end of the 14th year of the Compliance Period. References in this section to actions which can occur after the 14th year of the Compliance Period shall refer, as applicable, to the year preceding the last year of the Initial Affordability Period, if the Development Owner elected an Initial Affordability Period longer than the Compliance Period.

(1) If there are multiple buildings placed in service in different years, the end of the Initial Affordability Period will be based upon the date the last building placed in service. For example, if five buildings in the Development began their credit periods in 1990 and one began in 1991, the 15th year would be 2005.

(2) If a Development received an allocation in multiple years, the end of the Initial Affordability Period will be based upon the last year of a multiple allocation. For example, if a Development received its first allocation in 1990 and a subsequent allocation and began the credit period in 1992, the 15th year would be 2006.

(c) Preliminary Qualified Contract Request. All eligible Development Owners must file a Preliminary Qualified Contract Request.

(1) In addition to determining the basic eligibility described in subsection (b) of this section, the pre-request will be used to determine that:

(A) the Development does not have any uncorrected issues of noncompliance outside the corrective action period;

(B) there is a Right of First Refusal (ROFR) connected to the Development that has been satisfied;

(C) the Compliance Period has not been extended in the LURA and, if it has, the Development Owner is eligible to file a pre-request as described in paragraph (2) of this subsection; and

(2) In order to assess the validity of the pre-request, the Development Owner must submit:

(A) Preliminary Request Form;

(B) Qualified Contract Pre-Request fee as outlined in §10.901 of this chapter (relating to Fee Schedule);

(C) copy of all regulatory agreements or LURAs associated with the Property (non-TDHCA);

(D) copy of the most recent Physical Needs Assessment, pursuant to Tex. Gov't Code §2306.186(e), conducted by a Third Party.

(3) The pre-request will not bind the Development Owner to submit a Request and does not start the One (1) Year Period (1YP). A review of the pre-request will be conducted by the Department within ninety (90) days of receipt of all documents and fees described in paragraph (2) of this subsection. If the Department determines that this stage is satisfied, a letter will be sent to the Development Owner stating that they are eligible to submit a Qualified Contract (QC) Request.

(d) Qualified Contract Request. A Development Owner may file a QC Request anytime after written approval is received from the Department verifying that the Development Owner is eligible to submit the Request.

(1) Documentation that must be submitted with a Request is outlined in subparagraphs (A) - (P) of this paragraph:

(A) a completed application and certification;

(B) the Qualified Contract price calculation worksheets completed by a Third-Party certified public accountant (CPA). The CPA shall certify that they have reviewed annual partnership tax returns for all years of operation, loan documents for all secured debt, and partnership agreements. They shall also certify that they are not being compensated for the assignment based upon a predetermined outcome;

(C) a thorough description of the Development, including all amenities;

(D) a description of all income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Development;

(E) a current title report;

(F) a current appraisal with the effective date within six months of the date of the QC Request and consistent with Subchapter D of this chapter (relating to Underwriting and Loan Policy);

(G) a current Phase I Environmental Site Assessment (Phase II if necessary) with the effective date within six months of the date of the QC Request and consistent with Subchapter D of this chapter;

(H) a copy of the most recent Physical Needs Assessment of the property conducted by a Third Party, if different from the assessment submitted during the preliminary qualified contract request, consistent with Subchapter D of this chapter and in accordance with the requirement described in Tex. Gov't Code, §2306.186(e);

(I) a copy of the monthly operating statements for the Development for the most recent twelve (12) consecutive months;

(J) the three most recent consecutive annual operating statements;

(K) a detailed set of photographs of the development, including interior and exterior of representative units and buildings, and the property's grounds (including digital photographs that may be easily displayed on the Department's website);

(L) a current and complete rent roll for the entire Development;

(M) a certification that all tenants in the Development have been notified in writing of the request for a Qualified Contract. A copy of the letter used for the notification must also be included;

(N) if any portion of the land or improvements is leased, copies of the leases;

(O) the Qualified Contract Fee as identified in §10.901 of this chapter; and

(P) additional information deemed necessary by the Department.

(2) Unless otherwise directed by the Department pursuant to subsection (g) of this section, the Development Owner shall contract with a broker to market and sell the Property. The Department may, at its sole discretion, notify the Owner that the selected Broker is not approved by the Department. The fee for this service will be paid by the seller, not to exceed six percent of the QC Price.

(3) Within 90 days of the submission of a complete Request, the Department will notify the Development Owner in writing of the acceptance or rejection of the Development Owner's QC Price calculation. The Department will have one (1) year from the date of the acceptance letter to find a Qualified Purchaser and present a QC. The Department's rejection of the Development Owner's QC Price calculation will be processed in accordance with subsection (e) of this section and the 1YP will commence as provided therein.

(e) Determination of Qualified Contract Price. The QC Price calculation is not the same as the Minimum Purchase Price calculation for the ROFR. The CPA contracted by the Development Owner will determine the QC Price in accordance with §42(h)(6)(F) of the Code taking the following into account:

(1) distributions to the Development Owner of any and all cash flow, including incentive management fees and reserve balance distributions or future anticipated distributions, but excluding payments of any eligible deferred developer fee. These distributions can only be confirmed by a review of all prior year tax returns for the Development;

(2) all equity contributions will be adjusted based upon the lesser of the consumer price index or 5 percent for each year, from the end of the year of the contribution to the end of year fourteen or the end of the year of the request for a QC Price if requested at the end of the year or the year prior if the request is made earlier than the last year of the month; and

(3) these guidelines are subject to change based upon future IRS Rulings and/or guidance on the determination of Development Owner distributions, equity contributions and/or any other element of the QC Price.

(f) Appeal of Qualified Contract Price. The Department reserves the right, at any time, to request additional information to document the QC Price calculation or other information submitted. If the documentation does not support the price indicated by the CPA hired by the Development Owner, the Department may engage its own CPA to perform a QC Price calculation and the cost of such service will be paid for by the Development Owner. If a Development Owner disagrees with the QC Price calculated by the Department, a Development Owner may appeal in writing. A meeting will be arranged with representatives of the Development Owner, the Department and the CPA contracted by the Department to attempt to resolve the discrepancy. The 1YP will not begin until the Department and Development Owner have agreed to the QC Price in writing. Further appeals can be submitted in accordance with §10.902 of this title (relating to Appeals Process (§2306.0321; §2306.6715)).

(g) Marketing of Property. By submitting a Request, the Development Owner grants the Department the authority to market the Development and provide Development information to interested parties. Development information will consist of pictures of the Development, location, amenities, number of Units, age of building, etc. Development Owner contact information will also be provided to interested parties. The Development Owner is responsible for providing staff any requested information to assist with site visits and inspections. Market-

ing of the Development will continue until such time that a Qualified Contract is presented or the 1YP has expired. Notwithstanding subsection (d)(2) of this section, the Department reserves the right to contract directly with a Third Party in marketing the Development. Cost of such service, including a broker's fee not to exceed 6 percent, will be paid for by the existing Development Owner. The Department must have continuous cooperation from the Development Owner. Lack of cooperation will cause the process to cease and the Development Owner will be required to comply with requirements of the LURA for the remainder of the Extended Use Period. A prospective purchaser must complete all requirements of an ownership transfer request and be approved by the Department prior to closing on the purchase. Responsibilities of the Development Owner include but are not limited to the items described in paragraphs (1) - (3) of this subsection. The Development Owner must:

(1) allow access to the Property and tenant files;

(2) keep the Department informed of potential purchasers; and

(3) notify the Department of any offers to purchase.

(h) Presentation of a Qualified Contract. If the Department finds a Qualified Purchaser willing to present an offer to purchase the property for an amount at or above the QC Price, the Development Owner may accept the offer and enter into a commercially reasonable form of earnest money agreement or other contract of sale for the property and provide a reasonable time for necessary due diligence and closing of the purchase. If the Development Owner chooses not to accept the QC offer that the Department presents, the QC request will be closed and the possibility of terminating the Extended Use Period through the Qualified Contract process is eliminated; the Property remains bound by the provisions of the LURA. If the Development Owner decides to sell the development for the QC Price pursuant to a QC, the consummation of such a sale is not required for the LURA to continue to bind the Development for the remainder of the Extended Use Period.

(1) The Department will attempt to procure a QC only once during the Extended Use Period. If the transaction closes under the contract, the new Development Owner will be required to fulfill the requirements of the LURA for the remainder of the Extended Use Period.

(2) If the Department fails to present a QC before the end of the 1YP, the Department will file a release of the LURA and the Development will no longer be restricted to low-income requirements and compliance. However, in accordance with §42(h)(6)(E)(ii) of the Code, for a three (3) year period commencing on the termination of the Extended Use Period, the Development Owner may not evict or displace tenants of Low-Income Units for reasons other than good cause and will not be permitted to increase rents beyond the maximum tax credit rents. Additionally, the Development Owner should submit to the Department a request to terminate the LURA and evidence, in the form of a signed certification and a copy of the letter, to be approved by the Department, that the tenants in the Development have been notified in writing that the LURA will be terminated and have been informed of their protections during the three (3) year time frame.

(3) Prior to the Department filing a release of the LURA, the Development Owner must correct all instances of noncompliance at the Development.

(i) Compliance Monitoring during Extended Use Period. For Developments that continue to be bound by the LURA and remain affordable after the end of the Compliance Period, the Department will monitor in accordance with the Extended Use Period Compliance Policy in Subchapter F of this Chapter (relating to Compliance Monitoring).

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 14, 2016.

TRD-201605298
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 475-0577

CHAPTER 12. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 12, §§12.1 - 12.10, concerning the 2016 Multifamily Housing Revenue Bond Rules. The purpose of the repeal is to allow for the proposal and adoption of new sections. The proposed new Chapter 12, concerning the 2017 Multifamily Housing Revenue Bond Rules, is published concurrently with this proposed repeal in this issue of the *Texas Register.*

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal will be in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be the adoption of new rules for multifamily housing revenue bonds; providing updates and greater clarity, and enhancing the state's ability to provide decent, safe, and sanitary housing administered by the Department. There will not be any economic cost to any individuals required to comply with the repeal.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 28, 2016, to November 18, 2016, to receive input on the repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Shannon Roth, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-0764. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME NOVEMBER 18, 2016.

STATUTORY AUTHORITY. The repeal is proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The proposed repeal affects no other code, article, or statute.

§12.1. General.

§12.2. Definitions.

§12.3. Bond Rating and Investment Letter.

§12.4. Pre-Application Process and Evaluation.

§12.5. Pre-Application Threshold Requirements.

§12.6. Pre-Application Scoring Criteria.

§12.7. Full Application Process.

§12.8. Refunding Application Process.

§12.9. Regulatory and Land Use Restrictions.

§12.10. Fees.

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

Filed with the Office of the Secretary of State on October 14, 2016.

TRD-201605311
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 475-3800

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10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 12, §§12.1 - 12.10, concerning the 2017 Multifamily Housing Revenue Bond Rules. The purpose of the proposed new rules is to implement changes that will improve the 2017 Private Activity Bond Program. The Multifamily Housing Revenue Bond Rules outline the threshold and scoring related requirements associated with private activity bond funding from the Department. The proposed repeal of existing Chapter 12 is published concurrently with this rulemaking.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new sections will be in effect, enforcing or administering the new sections do not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new sections will be in effect, the public benefit anticipated as a result of the new sections will be the adoption of new rules for multifamily housing revenue bonds; providing updates and greater clarity and thereby enhancing the state's ability to provide decent, safe, and sanitary housing administered by the Department. The average cost of filing an application is between $50,000 and $60,000, which may vary depending on the specific type of application, location of the development site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no new or additional economic effect on small or micro-businesses. The average cost of filing an application is between $50,000 and $60,000, which may vary depending on the specific type of application, location of the development site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 28, 2016, to November 18, 2016, to receive input on the new sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Shannon Roth, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-1895. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME NOVEMBER 18, 2016.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The proposed new sections affect no other code, article, or statute.

§12.1. General.

(a) Authority. The rules in this chapter apply to the issuance of multifamily housing revenue bonds ("Bonds") by the Texas Department of Housing and Community Affairs ("Department"). The Department is authorized to issue Bonds pursuant to Tex. Gov't Code, Chapter 2306. Notwithstanding anything in this Chapter to the contrary, Bonds which are issued to finance the Development of multifamily rental housing are subject to the requirements of the laws of the State of Texas, including but not limited to Tex. Gov't Code, Chapters 1372 and 2306, and federal law pursuant to the requirements of Internal Revenue Code ("Code"), §142.

(b) General. The purpose of this chapter is to state the Department's requirements for issuing Bonds, the procedures for applying for Bonds and the regulatory and land use restrictions imposed upon Bond financed Developments. The provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit program. Applicants seeking a Housing Tax Credit Allocation should consult Chapter 11 of this title (relating to the Housing Tax Credit Program Qualified Allocation Plan) and Chapter 10 of this title (relating to Uniform Multifamily Rules) for the current program year. In general, the Applicant will be required to satisfy the requirements of the Qualified Allocation Plan ("QAP") and Uniform Multifamily Rules in effect at the time the Certificate of Reservation is issued by the Texas Bond Review Board. If the applicable QAP or Uniform Multifamily Rules contradict rules set forth in this Chapter, the applicable QAP or Uniform Multifamily Rules will take precedence over the rules in this Chapter. The Department encourages participation in the Bond program by working directly with Applicants, lenders, Bond Trustees, legal counsels, local and state officials and the general public to conduct business in an open, transparent and straightforward manner.

(c) Costs of Issuance. The Applicant shall be responsible for payment of all costs related to the preparation and submission of the pre-application and Application, including but not limited to, costs associated with the publication and posting of required public notices and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any stage during the process, the Applicant is solely responsible for determining whether to proceed with the Application and the Department disclaims any and all responsibility and liability in this regard.

(d) Taxable Bonds. The Department may issue taxable Bonds and the requirements associated with such Bonds, including occupancy requirements, shall be determined by the Department on a case by case basis.

(e) Waivers. Requests for waivers of program rules must be made in accordance with §10.207 of this title (relating to Waiver of Rules for Applications).

§12.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Tex. Gov't Code, Chapter 2306, §§141, 142, and 145 of the Internal Revenue Code, and Chapter 10 of this title (relating to Uniform Multifamily Rules).

(1) Institutional Buyer--Shall have the meaning prescribed under 17 CFR §230.501(a), but excluding any natural person or any director or executive officer of the Department (17 CFR §230.501(a)(4) - (6)), or as defined by 17 CFR §230.144(a), promulgated under the Securities Act of 1933, as amended.

(2) Persons with Special Needs--Shall have the meaning prescribed under Tex. Gov't Code, §2306.511.

(3) Bond Trustee--A financial institution, usually a trust company or the trust department in a commercial bank, that holds collateral for the benefit of the holders of municipal securities. The Bond Trustee's obligations and responsibilities are set forth in the Indenture.

§12.3. Bond Rating and Investment Letter.

(a) Bond Ratings. All publicly offered Bonds issued by the Department to finance Developments shall have a debt rating the equivalent of at least an "A" rating assigned to long-term obligations by Standard & Poor's Ratings Services, a division of The McGraw-Hill Companies, Inc. or Moody's Investors Service, Inc. If such rating is based upon credit enhancement provided by an institution other than the Applicant or Development Owner, the form and substance of such credit enhancement shall be subject to approval by the Board, evidenced by a resolution authorizing the issuance of the credit enhanced Bonds.

(b) Investment Letters. Bonds rated less than "A," or Bonds which are unrated must be placed with one or more Institutional Buyers and must be accompanied by an investor letter acceptable to the Department. Subsequent purchasers of such Bonds shall also be qualified as Institutional Buyers and shall execute and deliver to the Department an investor letter in a form satisfactory to the Department. Bonds rated less than "A" and Bonds which are unrated shall be issued in physical form, in minimum denominations of one hundred thousand dollars ($100,000), and shall carry a legend requiring any purchasers of the Bonds to sign and deliver to the Department an investor letter in a form acceptable to the Department.

§12.4. Pre-Application Process and Evaluation.

(a) Pre-Inducement Questionnaire. Prior to the filing of a pre-application, the Applicant shall submit the Pre-Inducement Questionnaire, in the form prescribed by the Department, so the Department can get a preliminary understanding of the proposed Development plan before a pre-application and corresponding fees are submitted. Information requested by the Department in the questionnaire includes, but is not limited to, the financing structure, borrower and key principals, previous housing tax credit or private activity bond experience, related party or identity of interest relationships and contemplated scope of work (if proposing Rehabilitation). After reviewing the pre-inducement questionnaire, Department staff will follow-up with the Applicant to discuss the next steps in the process and may schedule a pre-inducement conference call or meeting. Prior to the submission of a pre-application, it is essential that the Department and Applicant communicate regarding the Department's objectives and policies in the development of affordable housing throughout the State using Bond financing. The acceptance of the questionnaire by the Department does not constitute a pre-application or Application and does not bind the Department to any formal action regarding an inducement resolution.

(b) Undesirable Neighborhood Characteristics. If the Development Site has any of the characteristics described in §10.101(a)(3)(B) of this title (relating to Site and Development Requirements and Restrictions), the Applicant must disclose the presence of such characteristics to the Department. Disclosure may be done at time of pre-application and handled in connection with the inducement or it can be addressed at the time of Application submission. The Applicant understands that any determination made by staff or the Board at the time of bond inducement regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the undesirable neighborhood characteristics become available while the full Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated and presented to the Board. The Application may be subject to termination should staff conclude that the Development Site has any characteristics found in §10.101(a)(3)(B) of this title (relating to Site and Development Requirements and Restrictions) and the Applicant failed to disclose.

(c) Pre-Application Process. An Applicant who intends to pursue Bond financing from the Department shall submit a pre-application by the corresponding pre-application submission deadline, as set forth by the Department. The required pre-application fee as described in §12.10 of this chapter (relating to Fees) must be submitted with the pre-application in order for the pre-application to be accepted by the Department. Department review at the time of the pre-application is limited and not all issues of eligibility and documentation submission requirements pursuant to Chapter 10 of this title (relating to Uniform Multifamily Rules) are reviewed. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or other deficiencies at the time of pre-application. If the Development meets the criteria as described in §12.5 of this chapter (relating to Pre-Application Threshold Requirements), the pre-application will be scored and ranked according to the selection criteria as described in §12.6 of this chapter (relating to Pre-Application Scoring Criteria).

(d) Scoring and Ranking. The Department will rank the pre-application according to score within each priority defined by Tex. Gov't Code, §1372.0321. All Priority 1 pre-applications will be ranked above all Priority 2 pre-applications which will be ranked above all Priority 3 pre-applications. This priority ranking will be used throughout the calendar year. The selection criteria, as further described in §12.6 of this Chapter, reflect a structure which gives priority consideration to specific criteria as outlined in Tex. Gov't Code, §2306.359. In the event two or more pre-applications receive the same score, the Department will use the tie breaker factors as outlined in §11.7 of this title (relating to Tie Breaker Factors) in the order they are presented to determine which pre-application will receive preference in consideration of a Certificate of Reservation.

(e) Inducement Resolution. After the pre-applications have been scored and ranked, the pre-application will be presented to the Department's Board for consideration of an inducement resolution declaring the Department's initial intent to issue Bonds with respect to the Development. Approval of the inducement resolution does not guarantee final Board approval of the Bond Application. Department staff may recommend that the Board not approve an inducement resolution for a pre-application or that an inducement resolution be approved despite the presence of undesirable neighborhood characteristics not fully evaluated by staff. The Applicant recognizes the risk involved in moving forward should this be the case and the Department assumes no

responsibility or liability in that regard. Each Development is unique, and therefore, making the final determination to issue Bonds is often dependent on the issues presented at the time the full Application is considered by the Board.

§12.5. Pre-Application Threshold Requirements.

The threshold requirements of a pre-application include the criteria listed in paragraphs (1) - (8) of this section. As the Department reviews the pre-application the assumptions as reflected in Chapter 10, Subchapter D of this title (relating to Underwriting and Loan Policy) will be utilized even if not reflected by the Applicant in the pre-application.

(1) Submission of the multifamily bond pre-application in the form prescribed by the Department;

(2) Completed Bond Review Board Residential Rental Attachment for the current program year;

(3) Site Control, evidenced by the documentation required under §10.204(10) of this title (relating to Required Documentation for Application Submission). The Site Control must be valid through the date of the Board meeting at which the inducement resolution is considered and must meet the requirements of §10.204(10) of this title at the time of Application;

(4) Boundary survey or plat clearly identifying the location and boundaries of the subject Property;

(5) Organizational Chart showing the structure of the Development Owner and of any Developer and Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner, Developer and Guarantor, as applicable.

(6) Distribution List Form, as provided in the pre-application, to include the anticipated financing participants;

(7) Evidence of Entity Registration or Reservation with the Texas Office of the Secretary of State;

(8) A certification, as provided in the pre-application, that the Applicant met the requirements and deadlines for public notifications as identified in §10.203 of this title (relating to Public Notifications (§2306.6705(9)). Notifications must not be older than three (3) months prior to the date of Application submission. Re-notification will be required by Applicants who have submitted a change from pre-application to Application that reflects a total Unit increase of greater than 10 percent or a 5 percent increase in density (calculated as units per acre) as a result of a change in the size of the Development Site. In addition, should a change in elected official occur between the submission of a pre-application and the submission of an Application, Applicants are required to notify the newly elected (or appointed) official within fourteen (14) days of when they take office.

§12.6. Pre-Application Scoring Criteria.

This section identifies the scoring criteria used in evaluating and ranking pre-applications. The criteria identified below include those items required under Tex. Gov't Code, §2306.359 and other criteria considered important by the Department. Any scoring items that require supplemental information to substantiate points must be submitted in the pre-application, as further outlined in the Multifamily Bond Pre-Application Procedures Manual. Applicants proposing multiple sites will be required to submit a separate pre-application for each Development Site. Each Development Site will be scored on its own merits and the final score will be determined based on an average of all of the individual scores.

(1) Income and Rent Levels of the Tenants. Pre-applications may qualify for up to (10 points) for this item.

(A) Priority 1 designation includes one of clauses (i) - (iii) of this subparagraph. (10 points)

(i) Set aside 50 percent of Units rent capped at 50 percent AMGI and the remaining 50 percent of units rents capped at 60 percent AMGI; or

(ii) Set aside 15 percent of units rent capped at 30 percent AMGI and the remaining 85 percent of units rent capped at 60 percent AMGI; or

(iii) Set aside 100 percent of units rent capped at 60 percent AMGI for Developments located in a census tract with a median income that is higher than the median income of the county, MSA or PMSA in which the census tract is located.

(B) Priority 2 designation requires the set aside of at least 80 percent of the Units capped at 60 percent AMGI (7 points).

(C) Priority 3 designation. Includes any qualified residential rental development. Market rate units can be included under this priority (5 points).

(2) Cost of Development per Square Foot. (1 point) For this item, costs shall be defined as either the Building Cost or the Hard Costs as represented in the Development Cost Schedule, as originally provided in the pre-application. This calculation does not include indirect construction costs. Pre-applications that do not exceed $95 per square foot of Net Rentable Area will receive one (1) point. Rehabilitation will automatically receive (1 point).

(3) Unit Sizes. (5 points) The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction) provided they are requested in the Private Activity Bond Pre-Application Scoring Form.

(A) five-hundred-fifty (550) square feet for an Efficiency Unit;

(B) six-hundred-fifty (650) square feet for a one Bedroom Unit;

(C) eight-hundred-fifty (850) square feet for a two Bedroom Unit;

(D) one-thousand-fifty (1,050) square feet for a three Bedroom Unit; and

(E) one-thousand, two-hundred-fifty (1,250) square feet for a four Bedroom Unit.

(4) Extended Affordability. (2 points) A pre-application may qualify for points under this item for Development Owners that are willing to extend the State Restrictive Period for a Development to a total of thirty-five (35) years.

(5) Unit and Development Construction Features. A minimum of (7 points) must be selected, as certified in the pre-application, for providing specific amenity and quality features in every Unit at no extra charge to the tenant. The amenities and corresponding point structure is provided in §10.101(b)(6)(B) of this title (relating to Site and Development Requirements and Restrictions). The amenities selected at pre-application may change at Application so long as the overall point structure remains the same. The points selected at pre-application and/or Application and corresponding list of amenities will be required to be identified in the LURA and the points selected must be maintained throughout the State Restrictive Period. Applications involving scattered site Developments must have a specific amenity lo-

cated within each Unit to count for points. Rehabilitation Developments will start with a base score of (3 points).

(6) Common Amenities. All Developments must provide at least the minimum threshold of points for common amenities based on the total number of Units in the Development as provided in subparagraphs (A) - (F) of this paragraph. The common amenities include those listed in §10.101(b)(5) of this title and must meet the requirements as stated therein. The Owner may change, from time to time, the amenities offered; however, the overall points as selected at Application must remain the same. For Developments with 41 Units or more, at least two (2) of the required threshold points must come from the Green Building Features as identified in §10.101(b)(5)(C)(xxxiii) of this title.

(A) Developments with 16 to 40 Units must qualify for (4 points);

(B) Developments with 41 to 76 Units must qualify for (7 points);

(C) Developments with 77 to 99 Units must qualify for (10 points);

(D) Developments with 100 to 149 Units must qualify for (14 points);

(E) Developments with 150 to 199 Units must qualify for (18 points); or

(F) Developments with 200 or more Units must qualify for (22 points).

(7) Tenant Supportive Services. (8 points) By electing points, the Applicant certifies that the Development will provide supportive services, which are listed in §10.101(b)(7) of this title, appropriate for the proposed tenants and that there will be adequate space for the intended services. The provision and complete list of supportive services will be included in the LURA and must be maintained throughout the State Restrictive Period. The Owner may change, from time to time, the services offered; however, the overall points as selected at Application must remain the same. The services provided should be those that will directly benefit the Target Population of the Development and accessible to all. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. These services are intended to be provided by a qualified and reputable provider in the specified industry such that the experience and background of the provider demonstrates sufficient knowledge to be providing the service. In general, on-site leasing staff or property maintenance staff would not be considered a qualified provider. Where applicable, the services must be documentated by a written agreement with the provider.

(8) Underserved Area. An Application may qualify to receive up to (2 points) if the Development Site is located in an Underserved Area as further described in §11.9(c)(6)(A) - (E) of this title.

(9) Development Support/Opposition. (Maximum +24 to -24 points) Each letter will receive a maximum of +3 to -3 and must be received ten (10) business days prior to the date of the Board meeting at which the pre-application will be considered. Letters must clearly state support or opposition to the specific Development. State Representatives or Senators as well as local elected officials to be considered are those in office at the time the pre-application is submitted and represent the district containing the proposed Development Site. Letters of support from State or local elected officials that do not represent the district containing the proposed Development Site will not qualify for points under this exhibit. Neutral letters, letters that do not specifically refer to the Development or do not explicitly state support will receive (zero (0) points). A letter that does not directly express support but expresses it indirectly by inference (i.e., a letter that says "the local jurisdiction supports the Development and I support the local jurisdiction") will be treated as a neutral letter.

(A) State Senator and State Representative of the districts whose boundaries include the proposed Development Site;

(B) Mayor of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(C) All elected members of the Governing Body of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(D) Presiding officer of the Governing Body of the county in which the Development Site is located;

(E) All elected members of the Governing Body of the county in which the Development Site is located;

(F) Superintendent of the school district in which the Development Site is located; and

(G) Presiding officer of the board of trustees of the school district in which the Development Site is located.

(10) Preservation Initiative. (10 points) Preservation Developments, including rehabilitation proposals on properties which are nearing expiration of an existing affordability requirement within the next two (2) years or for which there has been a rent restriction requirement in the past ten (10) years may qualify for points under this item. Evidence must be submitted in the pre-application.

(11) Declared Disaster Areas. (7 points) If at the time the complete pre-application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development Site is located in an area declared to be a disaster area under Tex. Gov't Code, §418.014.

§12.7. Full Application Process.

(a) Application Submission. Once the inducement resolution has been approved by the Board, an Applicant who elects to proceed with submitting a full Application to the Department must submit the complete tax credit Application pursuant to §10.201 of this title (relating to Procedural Requirements for Application Submission).

(b) Eligibility Criteria. The Department will evaluate the Application for eligibility and threshold at the time of full Application pursuant to Chapter 10 of this title (relating to Uniform Multifamily Rules). If there are changes to the Application at any point prior to closing that have an adverse affect on the score and ranking order and that would have resulted in the pre-application being placed below another pre-application in the ranking, the Department will terminate the Application and withdraw the Certificate of Reservation from the Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). The Development and the Applicant must satisfy the requirements set forth in Chapter 10 of this title (relating to Uniform Multifamily Rules) and Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan) in addition to Tex. Gov't Code, Chapter 1372, the applicable requirements of Tex. Gov't Code, Chapter 2306, and the Code. The Applicant will also be required to select a Bond Trustee from the Department's approved list as published on its website.

(c) Bond Documents. Once the Application has been submitted and the Applicant has deposited funds to pay costs, the Department's bond counsel shall draft Bond documents.

(d) Public Hearings. For every Bond issuance, the Department will hold a public hearing in order to receive comments from the public pertaining to the Development and the issuance of the Bonds. The Applicant or member of the Development Team must be present at the public hearing and will be responsible for conducting a brief presentation on the proposed Development and providing handouts at the hearing that should contain at a minimum, a description of the Development, maximum rents and income restrictions. If the proposed Development is Rehabilitation then the presentation should include the proposed scope of work that is planned for the Development. All handouts must be submitted to the Department for review at least two (2) days prior to the public hearing. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant, as well as any facility rental fees or required deposits.

(e) Approval of the Bonds. Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board, upon presentation by Department staff, will consider the approval of the final Bond resolution relating to the issuance, final Bond documents and in the instance of privately placed Bonds, the pricing, terms and interest rate of the Bonds. The process for appeals and grounds for appeals may be found under §1.7 of this title (relating to Staff Appeals Process) and §1.8 of this title (relating to Board Appeals Process). To the extent applicable to each specific Bond issuance, the Department's conduit multifamily Bond transactions will be processed in accordance with 34 TAC Part 9, Chapter 181, Subchapter A (relating to Bond Review Rules) and Tex. Gov't Code, Chapter 1372.

(f) Local Permits. Prior to closing on the Bond financing, all necessary approvals, including building permits from local municipalities, counties, or other jurisdictions with authority over the Development Site must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees must be submitted to the Department.

§12.8. Refunding Application Process.

(a) Application Submission. Owners who wish to refund or modify tax-exempt bonds that were previously issued by the Department must submit to the Department a summary of the proposed refunding plan or modifications. To the extent such modifications constitute a re-issuance under state law the Applicant shall then be required to submit a refunding Application in the form prescribed by the Department pursuant to the Bond Refunding Application Procedures Manual.

(b) Bond Documents. Once the Department has received the refunding Application and the Applicant has deposited funds to pay costs, the Department's bond counsel will draft the necessary Bond documents.

(c) Public Hearings. Depending on the proposed modifications to existing Bond covenants a public hearing may be required. Such hearing must take place prior to obtaining Board approval and must meet the requirements pursuant to §12.7(d) of this chapter (relating to Full Application Process) regarding the presence of a member of the Development Team and providing a summary of proposed Development changes.

(d) Rule Applicability. Refunding Applications must meet the requirements pursuant to Chapter 10 of this title (relating to Uniform Multifamily Rules) and Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan) with the exception of criteria stated therein specific to the Competitive Housing Tax Credit Program. At the time of the original award the Application would have been subject to eligibility and threshold requirements under the QAP in effect the year the Application was awarded. Therefore, it is anticipated the Refunding Application would not be subject to the site and development requirements and restrictions pursuant to §10.101 of this title (relating to Site and Development Requirements and Restrictions). The circumstances surrounding a refunding Application are unique to each Development; therefore, upon evaluation of the refunding Application, the Department is authorized to utilize its discretion in the applicability of the Department's rules as it deems appropriate.

§12.9. Regulatory and Land Use Restrictions.

(a) Filing and Term of Regulatory Agreement. A Bond Regulatory and Land Use Restriction Agreement will be filed in the property records of the county in which the Development is located for each Development financed from the proceeds of Bonds issued by the Department. The term of the Regulatory Agreement will be based on the criteria as described in paragraphs (1) - (3) of this subsection, as applicable:

(1) the longer of thirty (30) years, from the date the Development Owner takes legal possession of the Development;

(2) the end of the remaining term of the existing federal government assistance pursuant to Tex. Gov't Code, §2306.185; or

(3) the period required by the Code.

(b) Federal Set Aside Requirements.

(1) Developments which are financed from the proceeds of Private Activity Bonds must be restricted under one of the two minimum set-asides as described in subparagraphs (A) and (B) of this paragraph:

(A) at least 20 percent of the Units within the Development shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed 50 percent of the area median income; or

(B) at least 40 percent of the Units within the Development shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed 60 percent of the area median income.

(2) The Development Owner must designate at the time of Application which of the two set-asides will apply to the Development and must also designate the selected priority for the Development in accordance with Tex. Gov't Code, §1372.0321. Units intended to satisfy set-aside requirements must be distributed equally throughout the Development, and must include a reasonably proportionate amount of each type of Unit available in the Development.

(3) No tenant qualifying under either of the set-asides shall be denied continued occupancy of a Unit in the Development because, after commencement of such occupancy, such tenant's income increases to exceed the qualifying limit; provided, however, that should a tenant's income, as of the most recent determination thereof, exceed 140 percent of the applicable income limit and such tenant constitutes a portion of the set-aside requirement of this section, then such tenant shall only continue to qualify for so long as no Unit of comparable or smaller size is rented to a tenant that does not qualify as a Low-Income Tenant.

§12.10. Fees.

(a) Pre-Application Fees. The Applicant is required to submit, at the time of pre-application, the following fees: $1,000 (payable to TDHCA), $2,500 (payable to the Department's bond counsel) and $5,000 (payable to the Texas Bond Review Board (BRB) pursuant to Tex. Gov't Code, §1372.006(a)). These fees cover the costs of pre-application review by the Department, its bond counsel and filing fees to the BRB.

(b) Application Fees. At the time of Application the Applicant is required to submit a tax credit application fee of $30 per unit based on the total number of units and $10,000 for the bond application fee (for multiple site Applications the application fee shall be $10,000 or $30 per unit based on the total number of units, whichever is greater). Such fees cover the costs associated with Application review and the Department's expenses in connection with providing financing for a Development. For Developments proposed to be structured as part of a portfolio such application fees may be reduced on a case by case basis at the discretion of the Executive Director.

(c) Closing Fees. The closing fee for Bonds, other than refunding Bonds is equal to 50 basis points (0.005) of the issued principal amount of the Bonds. The Applicant will also be required to pay at closing of the Bonds the first two years of the administration fee equal to 20 basis points (0.002) of the issued principal amount of the Bonds and a Bond compliance fee equal to $25/unit (excludes market rate units) Such compliance fee shall be applied to the third year following closing.

(d) Application and Issuance Fees for Refunding Applications. For refunding Applications the application fee will be $10,000 unless the refunding is not required to have a public hearing, in which case the fee will be $5,000. The closing fee for refunding Bonds is equal to 25 basis points (0.0025) of the issued principal amount of the refunding Bonds. If applicable, administration and compliance fees due at closing may be prorated based on the current billing period of such fees. If additional volume cap is being requested other fees may be required as further described in the Bond Refunding Applications Procedures Manual.

(e) Administration Fee. The annual administration fee is equal to 10 basis points (0.001) of the outstanding bond amount on its date of calculation and is paid as long as the Bonds are outstanding.

(f) Bond Compliance Fee. The Bond compliance monitoring fee is equal to $25/Unit (excludes market rate units).

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 14, 2016.

TRD-201605310
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 475-3800

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CHAPTER 13. MULTIFAMILY DIRECT LOAN RULE

10 TAC §§13.1 - 13.12

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 13, concerning the Multifamily Direct Loan Rule. The purpose of the proposed new rule is to explain the purpose of the Multifamily Direct Loan Rule, determine how applications are prioritized, how applications may score points, the post-award process including loan closing and disbursement requests, and the type of amendments that can be requested under the Multifamily Direct Loan program.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new sections are in effect, enforcing or administering the new sections does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections will be to explain the purpose of the Multifamily Direct Loan Rule, define terms and provide guidance on program dates. The average cost of filing an application is between $15,000 and $30,000, which may vary depending on the specific type of application, location of the development site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no new or additional economic effect on small or micro-businesses. The average cost of filing an application is between $15,000 and $30,000, which may vary depending on the specific type of application, location of the development site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 28, 2016, to November 28, 2016, to receive input on the new sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Andrew Sinnott, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-0764, attn: Andrew Sinnott. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME NOVEMBER 28, 2016.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Additionally, the new sections are proposed pursuant to Tex. Gov't Code §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

The new sections affect no other statutes, articles or codes.

§13.1. Purpose.

(a) Authority. The rules in this Chapter apply to the funds provided to Multifamily Developments through the Multifamily Direct Loan Program ("MFDL" or "Direct Loan Program") by the Texas Department of Housing and Community Affairs ("Department"). Notwithstanding anything in this Chapter to the contrary, loans and grants issued to finance the Development of multifamily rental housing are subject to the requirements of the laws of the State of Texas, including but not limited to Tex Gov't Code, Chapter 2306, and federal law pursuant to the requirements of Title II of the Cranston-Gonzalez National Affordable Housing Act and the implementing regulations 24 CFR Part 91, Part 92, and Part 93 as they may be applicable to a specific fund source. The Department is authorized to administer HOME funds pursuant to Tex Gov't Code, §2306.111. Tex Gov't Code Chapter 2306, Subchapter I, Housing Finance Division: This Chapter is not applicable to the State Housing Trust Fund or Section 811.

(b) General. This Chapter applies to an award of MFDL funds by the Department and establishes the general requirements associated with the application and award process for such funds. Applicants pursuing MFDL assistance from the Department are required to certify, among other things, that they have familiarized themselves with all ap-

plicable rules that govern that specific program including, but not limited to this Chapter, Chapter 1 (relating to Administration), Chapter 2 (relating to Enforcement), and Chapter 10 of this Title (relating to Uniform Multifamily Rules). Chapter 11 of this Title (relating to Housing Tax Credit Program Qualified Allocation Plan ("QAP")) and Chapter 12 of this Title (relating to Multifamily Housing Revenue Bond Rules) will apply if MFDL funds are layered with those other Department programs. Any conflict with rule of other programs or with federal regulations will be resolved on a case by case basis, that allows for compliance with all requirements. Conflicts that cannot be resolved may result in Application ineligibility.

(c) Waivers. Requests for waivers of any program rules or requirements must be made in accordance with §10.207 of this title (relating to Waiver of Rules for Applications). In no instance will the Department consider waiver requests that would violate federal program requirements or state or federal statute.

§13.2. Definitions.

The following words and terms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Tex. Gov't Code, Chapter 2306, §§141, 142, and 145 of the Internal Revenue Code, 24 CFR Part 91, Part 92, Part 93 and 2 CFR Part 200, and Chapter 10 of this Title (relating to Uniform Multifamily Rules).

(1) Community Housing Development Organization (CHDO)--a private nonprofit organization that has experience developing and/or owning affordable rental housing and that meets the requirements in 24 CFR Part 92 for purposes of receiving HOME funds under the CHDO set-aside. In addition, a member of a CHDO's board cannot be a Principal of the development beyond his/her role as a board member of the CHDO or be an employee of the development team, and may not receive financial benefit other than reimbursement of expenses from the CHDO (e.g. a voting board member cannot also be the paid executive director of the CHDO).

(2) Encumbered Funds or Revenue--funding or revenue that has a state or federal program designation and must be allocated in accordance with such statute or regulation. (e.g. HOME Program income must be re-allocated as HOME funding and therefore would be encumbered as such.)

(3) Choice limiting activity--any transfer of title that occurs prior to a Development obtaining environmental clearance after an application for federal funds (HOME and NHTF) has been submitted. Choice limiting activities may also include closing on loans including loans for interim financing, signing of a contract, and commencing construction. All applicants for MFDL funds, regardless of whether or not the Development Site is in a Participating Jurisdiction, must include the following language in the purchase contract or site control agreement:

(A) "Notwithstanding any other provision of this Contract, Purchaser shall have no obligation to purchase the Property, and no transfer of title to the Purchaser may occur, unless and until TDHCA has provided Purchaser and/or Seller with a written notification that:

(i) it has completed a federally required environmental review and its request for release of federal funds has been approved and, subject to any other Contingencies in this Contract,

(ii) the purchase may proceed, or

(iii) the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property; or

(B) it has determined that the purchase is exempt from federal environmental review and a request for release of funds is not required. TDHCA shall use its best efforts to conclude the environmental review of the property expeditiously."

(4) Matching contribution (Match)--a contribution to a proposed Development from nonfederal sources that may be in the form of one or more of the following:

(A) Cash contribution (grant), except for cash contributions made by investor limited partner in a tax credit transaction or owner equity (including deferred developer fee);

(B) Reduced fees or donated labor from certain eligible contractors, subcontractors, architects, attorneys, engineers, excluding any contributions from a party related to the Developer or Owner;

(C) Net present value of yield foregone from a below market interest rate loan;

(D) Waived or reduced fees from cities or counties not related to the Applicant in connection with the proposed development;

(E) Donated land or land sold below market value, as evidenced by a third party appraisal, from an unrelated party.

(5) Section 234 Condominium Housing basic mortgage limits ("234 Condo Limits")--the per-unit subsidy limits for all MFDL funding. These limits take into account whether or not a Development is elevator served and any local conditions that may make development of multifamily housing more or less expensive in a given metropolitan statistical area. Currently, the high cost percentage adjustment applicable to the 234 Condo Limits for HUD's Fort Worth Multifamily Hub is applicable for all Developments that TDHCA finances through the MFDL Program.

§13.3. General Loan Requirements.

(a) Direct Loan funds may be made available through a Notice of Funding Availability ("NOFA") or other similar governing document that includes the basic Application and funding requirements. MFDL funds may be used to directly assist distressed developments previously funded by the Department when approved by specific action of the Governing Board.

(b) Direct Loan funds are composed of annual HOME and National Housing Trust Fund allocations from HUD, repayment of TCAP loans, HOME Program Income and any other similarly encumbered funding that may become available except as otherwise noted in this Chapter. Similar funds include any funds that are required to be loaned or granted for the development of multifamily property and are not governed by another Chapter in this Title.

(c) Direct Loan funds may be used for the acquisition, new construction, reconstruction, or rehabilitation of affordable housing with suitable amenities, including real property acquisition, site improvements, conversion, demolition, or operating cost reserves, all subject to HUD guidance. Other expenses, such as financing costs, relocation expenses of any displaced persons, families, businesses, or organizations may be included.

(d) While all costs associated with the Development and known by the sponsor must be disclosed as part of the Application, costs ineligible for reimbursement with Direct Loan funds in accordance with 24 CFR Part 91, Part 92, Part 93, and 2 CFR Part 200, include but are not limited to:

(1) Offsite costs;

(2) Stored Materials;

(3) Site Amenities;

(4) Detached Community Buildings;

(5) Carports and/or garages;

(6) Parking garages;

(7) Commercial Space costs;

(8) Reserve accounts not related to NHTF;

(9) TDHCA fees;

(10) Delinquent fees, taxes, or charges;

(11) Costs incurred more than 24 months prior to the effective date of the Direct Loan Contract;

(12) Other costs limited by Award or NOFA, or as established by the Board.

§13.4. Set-asides, Regional Allocation, and Priorities.

(a) Set-asides: Specific types of Applications or Developments for which a portion of MFDL funds may be reserved in a NOFA will be grouped in set-asides. The Soft Repayment set-aside, CHDO set-aside, and General set-aside, as described below, are fixed set-asides that will be included in the annual NOFA. The remaining set-asides described below are flexible set-asides and are applicable only when identified in the NOFA. The amount of a single award may be credited to multiple set-asides, in which case the depleted portion of funds may be repositioned into an oversubscribed set-aside prior to a defined collapse deadline. Applications under any and all set-asides may or may not be layered with other Department Multifamily programs except as provided in this section or as determined by the Board to address unique circumstances not addressed by these rules.

(1) Fixed Set-Asides:

(A) Supportive Housing/Soft Repayment Set-Aside. The Supportive Housing/Soft Repayment ("SH/SR") Set-aside will be limited by the unencumbered interest revenue generated by multifamily loan payments and any amount under the NHTF allocation received by the Department and not otherwise programmed. The SH/SR set-aside is reserved for developments that are not able to support amortizing debt due to higher costs for supportive services or extremely low income and rent restrictions. Soft repayment loans may be provided with deferred payable, deferred forgivable or cash flow terms. Applicants seeking to qualify under this set-aside must propose Developments that meet either:

(i) the Supportive Housing requirements in 10 TAC §10.3(a) in the Uniform Multifamily Rules including the other underwriting consideration for Supportive Housing Developments §10.302(g)(3) of the Underwriting and Loan Policy; or

(ii) the requirements in clauses (i) - (iii), funding exclusively units targeting 30% households;

(I) All units assisted with MFDL funds must be available for and have rents no higher than households earning 30% Area Median Income (AMI) or less.

(II) Any units assisted with MFDL funds may not also be receiving project-based rental assistance, other than MFDL funds.

(III) Any units assisted with MFDL funds may not also be receiving tenant-based voucher or rental assistance to the extent that there are other available units within the Development that the voucher-holder may occupy.

(B) CHDO Set-aside. A portion of the Department's annual HOME allocation, equal to at least 15%, will be set aside for eligible Community Housing Development Organizations ("CHDO") meeting the requirements of the definition of Community Housing Development Organization found in 24 CFR §92.2 and §13.2(a). Applicants under the CHDO Set-Aside must be proposing to develop housing in Development Sites located outside Participating Jurisdictions unless the award is made within the Persons with Disabilities ("PWD") set-aside. CHDO funds are typically available as fully-repayable amortizing debt consistent with §13.4 of this Chapter relating to debt structure policy. In instances where an application submitted under the CHDO Set-Aside also qualifies under the SH/SR Set-Aside, CHDO funds may be structured in accordance with the SH/SR Set-Aside requirements. A CHDO operating expenses grant may be awarded in conjunction with an award of MFDL funds under the CHDO set-aside.

(C) General. The General set-aside is for all other applications that do not meet the requirements of the SH/SR or CHDO set-asides or flexible set-asides, if any. A portion of the General set-aside may be repositioned into the CHDO set-aside in order to fully fund a CHDO award that meets or exceeds the set-aside amount.

(2) Flexible Set-Asides:

(A) 4% and Bond Layered. The 4% and Bond Layered set-aside is reserved for applications meeting all MFDL requirements that are layered with 4% Housing Tax Credits and Private Bond funds that do not meet the definition of CHDO.

(B) Persons with Disabilities ("PWD"). The PWD set-aside is reserved for developments restricting units for tenants who meet the requirements of §2306.111(c)(2). MFDL funds will be awarded in a NOFA for the PWD set-aside only to the extent sufficient funds are available to award to at least one Application within a participating jurisdiction under §2306.111(c)(1).

(C) 9% Layered. The 9% Layered set-aside is reserved for applications meeting all MFDL requirements that are layered with 9% Housing Tax Credits and do not meet the definition of CHDO. Awards under this set-aside are dependent on the concurrent award of a 9% HTC allocation.

(D) Additional set-asides may be developed, subject to Board approval, to meet the requirements of specific funds sources, or to address Department priorities.

(b) Regional Allocation. All funds in the annual NOFA will be initially allocated to regions and potentially subregions based on a Regional Allocation Formula ("RAF") within the set-asides. The RAF methodology may differ by fund source. HOME funds will be allocated in accordance with Tex. Gov't Code Chapter 2306. The end date for the RAF will be identified in the NOFA, but in no instance shall it be less than 30 days from the date the NOFA is published in the *Texas Register.*

(1) After expiration of the RAF, funds collapse but may still be available within set-asides as identified in the NOFA but for an additional period not less than 15 days. All Applications received prior to these first two collapse period deadlines will continue to hold their priority unless they are withdrawn, terminated, or funded.

(2) Funds remaining after expiration of set-asides, which have not been requested in the form of a complete application, will be available statewide on a first-come first-served basis to Applications submitted after the collapse dates.

(3) In instances where the RAF would result in regional or subregional allocations insufficient to fund an application, the Department may use an alternative method of distribution, including an early collapse, revised formula or other methods as approved by the Board.

(c) Priorities for the Annual NOFA. Complete Applications received during the period of the RAF will be prioritized for review and

recommendation to the Board, to the extent that funds are available both in the region and in the set-aside under which the application is received. If insufficient funds are available in a region to fund all Applications then the oversubscribed Applications will be evaluated only after the RAF and/or set-aside collapse and in accordance with the additional priority levels below. If insufficient funds are available with a region or set-aside, the Applicant may request to be considered under another set-aside if they qualify, prior to the collapse. Applications will be reviewed and recommended to the Board to the extent funds are available in accordance with the order of prioritization described in (1) through (3) below.

(1) Priority 1: Applications not layered with 9% HTC that are received prior to the 9% HTC Application deadline as described in 10 TAC §11.2 Program Calendar for Competitive Housing Tax Credits. Priority 1 applications will be prioritized on a first come first served basis within their respective set-aside and region. If the RAF has collapsed, applications will be reviewed on a first-come first served basis within their set-aside.

(2) Priority 2: Applications layered with 9% HTC will be prioritized based on their recommendation status for an HTC allocation. All Priority 2 applications will be deemed received on the Market Analysis Delivery Date as described in 10 TAC §11.2 Program Calendar. In order for an MFDL application with layered with 9% HTC to be considered complete, Applications for both programs must be timely received. Priority 2 applications will be recommended for approval at the same meeting when the Board approves the 9% HTC allocations. Applications that will be recommended for 9% HTC and are tied for MFDL under the scoring criteria will be further prioritized for funding based upon the scoring, tiebreaker and award criteria in 10 TAC Chapter 11 (the "QAP").

(3) Priority 3: Applications that are received after the 9% HTC Application deadline on a first come first served basis for any remaining funds until the final deadline identified in the annual NOFA.

(d) Other Priorities. The Board may set additional priorities for the annual NOFA, and for one time or special purpose NOFAs.

§13.5. Award Process.

(a) Notice of Funding Availability ("NOFA"). All MFDL funds from the annual allocation will be distributed through a NOFA that provides the specific collapse dates and deadlines as well as set-aside and RAF amounts applicable to the MFDL program, along with Application information. Other funds may be distributed by NOFA or through other method approved by the Board. Set-aside, RAF, and total funding amounts may increase or decrease in accordance with the provisions herein without further Board action as long as the NOFA itself did not require Board action.

(b) Date of Receipt. Applications will be considered received on the business day of receipt. If an application is received after 5pm Austin local time, it will be determined to have been received on the following business day. Applications received on a non-business day will be considered received on the next day the Department is open. Applications will be considered complete at the time all required third party reports and application fee(s), in addition to the application, are received by the Department. Within certain set-asides, the date of receipt may be fixed, regardless of the earlier actual date a complete application is received. If multiple applications are received on the same date, in the same region, and within the same set-aside, then score, as described in §13.6 for MFDL or §11.9 for Applications layered with 9% HTC, will be used as the determining factor affecting the ranking of the application.

(c) Applications. MFDL Applicants must follow the applicable requirements in 10 TAC Chapter 10, Subchapter C, Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules for Applications. Failure to timely respond to any notice of Administrative Deficiency will result in a reestablishment of the date of receipt of the Application to the final date at which the cure to the notice was received by the Department. If the date of receipt of the Application is reestablished, an Application could be de-prioritized in favor of another application received prior to the new application submission date.

(d) Eligibility Criteria. The Department will evaluate the Application for eligibility and threshold at the time of full Application pursuant to the requirements of this Chapter and Chapter 10 of this title (relating to Uniform Multifamily Rules). If there are changes to the Application at any point prior to closing that have an adverse effect on the score and ranking order and that would have resulted in the application being ranked below another application in the ranking, the Department may terminate the Application.

(1) Applicants requesting MFDL as the only source of Department funds may meet the Experience Requirement under §10.204(6) of this Chapter by providing evidence of the successful development, and operation for at least 5 years, of at least twice as many affordability restricted units as requested in the Application.

(2) Applications for Developments previously awarded Department funds under any program, or where construction has already started, regardless of fund source and are not proposing acquisition and rehabilitation, except distressed Developments under §13.3(a), must be found eligible by the Board prior to the Department accepting the Application or providing the Applicant with an Application acceptance date. A finding of eligibility under this section does not guarantee an award.

(A) Requests for eligibility determinations under this paragraph must be received no later than 21 calendar days prior to the Board meeting in which the Applicant requests Board consideration, and will not be considered more than 30 calendar days prior to the first Application acceptance date published in the NOFA. Applications will be considered received on the date that the Board renders its decision or the first day of the Application acceptance period.

(B) Criteria for the Board to consider would include clauses (i) or (ii) and (iii).

(i) evidence of circumstances beyond the Applicant's control which could not have been prevented by timely start of construction;

(ii) Force Majeure events;

(iii) evidence that no further exceptional conditions exist that will delay or cause further cost increases.

§13.6. Scoring Criteria.

The criteria identified in paragraphs (1) - (6) of this section will be used in the evaluation and ranking of applications to the extent that other applications were received on the same date and within the same set-aside and prioritization. There is no rounding of numbers in this section, unless rounding is explicitly indicated for that particular calculation or criteria. The scoring items used to calculate the score for a 9% HTC layered application will be utilized for scoring for an MFDL Application, and evaluated in the same manner except as specified below. All scoring items derived from the QAP will have the same value for MFDL scoring:

(1) Applicants eligible for points under 10 TAC §11.9(c)(4) related to the Opportunity Index (7 points).

(2) Tenant Services. Applicants eligible for points under 10 TAC §11.9(c)(3)(A) related to Tenant Services (9 points) Applicants

eligible for points under 10 TAC §11.9(c)(3)(B) related to Tenant Services (1 point).

(3) Underserved Area. Applicants eligible for points under 10 TAC §11.9(c)(6) related to Underserved Area (up to 5 points).

(4) Subsidy per Unit. An application that caps the per unit subsidy limit (inclusive of match) for all Direct Loan units regardless of unit size at:

(A) $100,000 per MFDL unit (4 points).

(B) $80,000 per MFDL unit (8 points).

(C) $60,000 per MFDL unit (10 points).

(5) Rent Levels of Tenants. An Application may qualify to receive up to thirteen (13) points for placing the following rent and income restrictions on the proposed Development for the entire Affordability Period. These Units may not be restricted to 30 percent or less of AMGI by another fund source.

(A) At least 20 percent of all low-income Units at 30 percent or less of AMGI (13 points);

(B) At least 10 percent of all low-income Units at 30 percent or less of AMGI or, for a Development located in a Rural Area, 7.5 percent of all low-income Units at 30 percent or less of AMGI (12 points); or

(C) At least 5 percent of all low-income Units at 30 percent or less of AMGI (7 points).

(6) Tiebreaker. In the event that one or more applications receives the same number of points based on the scoring criteria above, staff will recommend for award the Application that proposes the greatest percentage of MFDL units available to households at 15% AMGI in the event of a tie in the Tiebreaker Certification.

§13.7. Maximum Funding Requests.

(a) The maximum funding request for all applications will be identified in the NOFA, and may vary by development type and/or set-aside.

(b) Maximum Per-Unit Subsidy Limits. The 234 Condo limits with the applicable high cost percentage adjustment in effect at the time of application are the maximum per-unit subsidy limits (inclusive of Match) that an applicant may use to determine the amount of MFDL funds or other federal funds that may subsidize a unit. Stricter per-unit subsidy limits are allowable and incentivized as point scoring items in §13.6 Scoring Criteria. Per-unit subsidy limits as well as subsidy layering analysis - ensuring that the amount of MFDL units as a percentage of total units is greater than the percentage of MFDL funds requested as a percentage of total development costs - will determine the amount of MFDL units required.

§13.8. Loan Structure and Underwriting Requirements.

(a) Except for awards made under the SR/SH set-aside, all Multifamily Direct Loans awarded will be structured as fully repayable (must pay) at not less than the primary credit Discount Rate published by the Federal Reserve plus 200 basis points and a 30 year amortization with a term that matches the term of any superior loans (within 6 months) at the time of application.

(b) Any material changes to the total development cost and/or other sources of funds from the publication of the initial Underwriting Report to the time of loan closing must be reevaluated by Real Estate Analysis staff and may cause changes to principal amount and/or repayment structure for the Multifamily Direct Loan such that the Department is able to mitigate any increased risk. Where such risk is not adequately mitigated, the award may be terminated or reconsidered as amended by the Board.

(c) Direct Loans through the Department must adhere to the following criteria as identified in paragraphs (1) - (7) of this subsection:

(1) The Applicant and/or controlling Principals must certify to their capacity to provide a letter of credit to support repayment of any direct loan that has an expectation of repayment. They must be able and willing to execute a repayment guarantee for the full amount of the direct loan, should they be required to do so as a condition of approval.

(2) The term for permanent loans shall be no less than fifteen (15) years and no greater than forty (40) years and the amortization schedule shall be thirty (30) years. The Department's loan must mature at the same time or within six (6) months of the shortest term of any senior debt so long as neither exceeds forty (40) years and six (6) months.

(3) Amortized loans shall be structured with a regular monthly payment beginning on the first day of the 25th full month following the actual date of loan closing and continuing for the loan term. If the first lien mortgage is a federally insured HUD or FHA mortgage or if a surplus cash flow structure is required for a loan from the SH/SR set-aside, the Department may approve a loan structure with annual payments payable from surplus cash flow provided that the debt coverage ratio, inclusive of the loan, continues to meet the requirements in this subchapter.

(4) Loans shall be secured with a deed of trust with a permanent lien position that is superior to any other sources for financing including hard repayment debt that is less than or equal to the Direct Loan amount and superior to any other sources that have soft repayment structures, non-amortizing balloon notes, have deferred forgivable provisions or in which the lender has an identity of interest with any member of the Development Team; and,

(5) If the Direct Loan amounts to more than 50 percent of the Total Housing Development Cost, except for Developments also financed through the USDA §515 program, the Application must include the documents as identified in subparagraphs (A) - (B) of this paragraph:

(A) a letter from a Third Party CPA verifying the capacity of the Applicant, Developer, or Development Owner to provide at least 10 percent of the Total Housing Development Cost as a short term loan for the Development; or

(B) evidence of a line of credit or equivalent tool equal to at least 10 percent of the Total Housing Development Cost from a financial institution that is available for use during the proposed Development activities.

(6) If the Direct Loan is the only source of Department funding for the Development, the Development Owner must provide equity in an amount not less than 20 percent of Total Housing Development Costs and must provide an "as completed" appraisal pursuant to 10 TAC 10.304 which results in total repayable loan to value of not greater than 80%.

(7) All Direct Loan applicants where other third-party financing entities are part of the sources of funding must submit a *proforma* and lender approval letter evidencing review of the Development and the Principals in accordance with 10 TAC §11.9(e)(1). Where no third-party financing exists, the Department reserves the right to procure a third-party evaluation which will be required to be prepaid by the applicant.

§13.9. Construction Standards.

All Developments financed with Direct Loans will be required to meet at a minimum all applicable state and local codes, ordinances, and standards; the 2012 International Existing Building Code ("IEBC") or International Building Code ("IBC") as applicable. Rehabilitation Developments must meet the requirements in paragraphs (1) - (5) of this section.

(1) recommendations made in the Environmental Assessment and any Physical Conditions Assessment with respect to health and safety issues, life expectancy of major systems (structural support; roofing; cladding and weatherproofing; plumbing; electrical; and heating, ventilation, and air conditioning) must be implemented;

(2) for properties originally constructed prior to 1978, the Physical Conditions Assessment and rehabilitation scope of work must be provided to the party conducting the lead-based paint or asbestos testing, and the rehabilitation must implement the mitigation recommendations of the testing report;

(3) all accessibility requirements pursuant to 10 TAC Subchapter B must be met;

(4) properties located in the designated catastrophe areas specified in 28 TAC §5.4008 must comply with 28 TAC §5.4011(relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After January 1, 2008); and

(5) should IEBC be more restrictive than local codes, or should local codes not exist, then the Development must meet the requirements imposed by IEBC.

§13.10. Development and Unit Requirements.

(a) The bedroom/bathroom/amenities and square footages for Direct Loan Units must be comparable to the bedroom/bathroom/amenities and square footages for the total number of Units in the Development based on the amount of Direct Loan funds requested, inclusive of Match, as a percentage of total Direct Loan eligible costs. As a result of this requirement, the Department will always use the Proration Method as the Cost Allocation Method in accordance with CPD Notice 16-15 except as described in subsection (b) of this section. Additionally, the amount of Direct Loan funds requested inclusive of Match cannot exceed the per-unit subsidy limit. For example, in a 20 Unit Development composed of six 1-bedroom, ten 2-bedroom, and four 3-bedroom units, where the Direct Loan funds requested is $1,000,000, the Match being provided is $100,000, and the total Direct Loan-eligible project costs are $4,400,000, 25 percent of each unit type must be a Direct Loan Unit ($1,100,000 Direct divided by $4,400,000). In the example below, the square footages are the same for each unit that has the same number of bedrooms and all fractional units are rounded up to require the next whole number of MFDL Units. In this example, even though the amount of Direct Loan funds (inclusive of Match) as a percentage of total Direct Loan-eligible costs (25 percent) would result in a minimum of 5 units if the percentage was applied on a total unit basis, the 25 percent must be applied to each unit type with partial Units rounded up to the next whole number, resulting in 2 additional units for a total of 7 Direct Loan Units. Please see CPD Notice 16-15 for further guidance.
Figure: 10 TAC §13.10(a)

(b) All Direct Loan Units must float throughout the Development unless the Development also contains public housing units that will receive Operating Fund or Capital Fund assistance under Section 9 of the 1937 Act as defined in 24 CFR 5.100. Floating Direct Loan units may only float among the Units as described in the Direct Loan Contract and Direct Loan LURA, or as specifically approved in writing by the Department.

(c) The minimum affordability period for all Direct Loan Units awarded under a NOFA will match the greater of the term of the loan or 30 years unless a lesser period is approved by the Board and when assisting distressed developments.

(d) If the Department is the only source of funding for the Development, all Units must be restricted.

§13.11. Post-Award Requirements.

(a) Direct Loan awardees must execute an Award Letter and Loan Term Sheet provided by the Department within thirty (30) days after receipt of the letter. The Award Letter and Loan Term Sheet will be conditional in nature and provide a basic outline of the terms and conditions currently being contemplated for the Development.

(b) If a Direct Loan award is returned after Board approval, or if the Applicant or Affiliates fail to meet federal commitment or expenditure requirements, penalties may apply under 10 TAC §11.9(f) (relating to Point Adjustments) or the Department may prohibit the Applicant and all Affiliates from applying for MFDL funds for a period of 2 years if they have returned their funds or have failed to take necessary action specified in one or more agreement with the Department where the failure resulted in the Department's failure to meet federal commitment and expenditure requirements.

(c) Direct Loan awardees must obtain environmental clearance (if applicable) and meet all requirements for commitment of funds within 180 days after award. Direct Loan awardees that commit any choice limiting activities prior to obtaining environmental clearance may lead to termination of the Direct Loan award.

(d) Direct Loan awardees must execute a Contract within nine (9) months of the Board approval date.

(e) Loan closing must occur and construction must begin no later than six (6) months from the effective date of a Contract.

(f) In addition to any other requirements as the result of any other Department funding sources, the Development Owner must submit a mid-construction development inspection request once the development has met or exceeded 25% construction completion as indicated on the G703 Continuation Sheet. Inspection staff will issue a mid-construction development inspection letter that confirms that work is being done in accordance with the applicable codes, the construction contract, and construction documents. Up to 50 percent of the Direct Loan award will be released prior to issuance of the mid-construction development inspection letter.

(g) Construction must be completed, as reflected by the development's certificate(s) of occupancy and Certificate of Substantial Completion (AIA Form G704), and a final development inspection request must be submitted to the Department within 18 months of the actual loan closing date, with the repayment period beginning on the first day of the 25th month following the actual date of loan closing. The final development inspection letter will verify committed amenities have been provided and confirm compliance with all applicable accessibility requirements.

(h) Receipt of a Closed Final Development Inspection Letter, indicating that all deficiencies identified in the Final Inspection Letter have been corrected, must occur within 24 months of the actual date of loan closing. The Final Development Inspection may be conducted concurrently with a Uniform Physical Condition Standards ("UPCS") inspection. However, any letters associated with a UPCS inspection will not satisfy the Closed Final Development Inspection Letter requirement.

(i) Extensions to any benchmarks may only be made for good cause and approved by the Department if construction is timely started.

(j) Initial occupancy of all MFDL assisted Units by eligible tenants shall occur within six (6) months of the final Direct Loan draw. Requests to extend the initial occupancy period must be accompanied by documentation of marketing efforts and a marketing plan. The marketing plan may be submitted to HUD for final approval, if required for the MFDL fund source.

(k) Repayment will be required on a per Unit basis for Units that have not been rented to eligible households within eighteen (18) months of the final Direct Loan draw.

(l) Termination of the Direct Loan award and repayment of all disbursed funds will be required for any Development that is not completed within four (4) years of the effective date of a Direct Loan Contract.

(m) Closing Deadline. Awards will be made subject to hard closing deadlines established at the time of award by the Department's Governing Board subject to the conditions in §13.8(a), which may only be extended by additional Board action on the basis of delays caused by circumstances outside the control of the applicant. An extension will not be available If an Applicant has:

(1) failed to timely begin or complete processes required to close; including

(A) finalizing all equity and debt financing; or

(B) the environmental review process; or

(2) made changes to the Development that require additional underwriting by the Department without sufficient time to complete the review.

(n) Loan Closing. In preparation for closing any Direct Loan, the Development Owner must submit the items described in paragraphs (1) - (8) of this subsection:

(1) Documentation of the prior closing or concurrent closing with all sources of funds necessary for the long-term financial feasibility of the Development;

(2) Due diligence determined by the Department to be prudent and necessary to meet the Department's rules and to secure the interests of the Department;

(3) Where the Department will have a first lien position and the Applicant provides personal guarantees from all principals and documentation that closing on other sources is reasonably expected to occur within three (3) months, the Executive Director or authorized designee may approve a closing to move forward without the closing on other sources. The Executive Director as the authorized designee of the Department must require a personal guarantee, in form and substance acceptable to the Department, from a Principal of the Development Owner for the interim period;

(4) When Department funds have a first lien position, assurance of completion of the Development in the form of payment and performance bonds in the full amount of the construction contract or equivalent guarantee in the sole determination of the Department is required. Such assurance of completion will run to the Department as obligee. Development Owners utilizing the USDA §515 program are exempt from this requirement but must meet the alternative requirements set forth by USDA;

(5) Documentation required for closing includes, but is not limited to:

(A) Draft Owner/General Contractor agreement and draft Owner/Architect agreement prior to closing with final executed copies required by the day of closing;

(B) survey of the Property that includes a certification to the Department, Development Owner, Title Company, and other lenders;

(C) plans and specifications for review by the Department's inspection staff. Inspection staff will issue a plan review letter that will assist in preparation for the development's final inspection;

(D) if layered with Housing Tax Credits, a fully executed limited partnership agreement between the General Partner and the tax credit investor entity (may be provided concurrent with closing);

(E) final Development information, including but not limited to a final development cost schedule, sources and uses, operating *proforma,* annual operating expenses, cost categories for the Direct Loan funds, updated written financial commitments or term sheets and any additional financing exhibits that have changed since the time of application;

(F) If the changes to the budget or sources of funds reflect material changes to the transaction approved by the Board, documentation to ensure that the Development continues to meet the requirements of this chapter must be provided and material changes to the application must be approved by the Board. Material changes include but are not limited to any increase in debt payment for superior liens and a greater than a 10 percent change in any of the following:

(i) Total Housing Development Costs;

(ii) deferred developer fee amount;

(iii) superior loan amount(s);

(6) if required by the fund source, prior to Contract Execution, the Development Owner must provide verification of:

(A) environmental clearance;

(B) Site and Neighborhood clearance;

(C) documentation necessary to show compliance with the Uniform Relocation Assistance and Property Act and any other relocation requirements that may apply; and

(D) any other documentation that is necessary or prudent to meet program requirements or state or federal law in the sole determination of the Department.

(7) The Direct Loan Contract as executed, which will be drafted by counsel for the Department. No changes proposed by the Developer or Developer's counsel will be accepted unless approved by the Department's Legal Division.

(o) Loan Documents. The Development Owner is required to execute all loan closing documents required by and in form and substance acceptable to the Department's Legal Division.

(1) Loan closing documents include but are not limited to a promissory note, deed of trust, construction loan agreement (if the proceeds of the loan are to be used for construction), LURA, Architect and/or licensed engineer certification of understanding to complete environmental mitigation if such mitigation is identified in HUD's environmental clearance and by the Real Estate Analysis Division (REA) and assignment and security instruments whereby the Developer, the Development Owner, and/or any Affiliates (if applicable) grants the Department their respective right, title, and interest in and to other collateral, including without limitation the Owner/Architect agreement and the Owner/General Contractor agreement, to secure the payment and performance of the Development Owner's obligations under the loan documents.

(2) Repayment provisions will require repayment on a per unit basis for units that have not been rented to eligible households within eighteen (18) months of the final Direct Loan draw; termination and repayment of the Direct Loan award in full will be required for any development that is not completed within four (4) years of the date of Direct Loan Contract execution.

(3) Loan terms and conditions may vary based on the type of Development, and the set-aside under which the award was made.

(p) Disbursement of Funds. The Borrower must comply with the requirements in paragraphs (1) - (9) of this subsection in order to receive a disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Borrower's compliance with these requirements may be required with a request for disbursement:

(1) All requests for disbursement must be submitted through the Department's Housing Contract System, using the MFDL draw workbook or such other format as the Department may require;

(2) Documentation of the total construction costs incurred and costs incurred since the last disbursement of funds must be submitted. Such documentation must be signed by the General Contractor and certified by the Development architect and is generally in the form of an AIA Form G702 or G703; (3) Disbursement requests must include a down-date endorsement to the Direct Loan (mortgagee) title policy or Nothing Further Certificate that includes a title search through the date of the Architect's signature on AIA form G702. For release of retainage the down-date endorsement to the Direct Loan title policy or Nothing Further Certificate must be dated at least thirty (30) calendar days after the date of the construction completion as certified on the Certificate of Substantial Completion (AIA Form G704) with $0 as the work remaining to be completed. Disbursement requests for acquisition and closing costs, or requests for soft costs only, are exempt from this requirement;

(3) At least fifty (50) percent of the funds will be withheld from the initial disbursement of loan funds to allow for periodic disbursements;

(4) The initial draw request for the development must be entered into the Department's Housing Contract System no later than ten business days prior to the one year anniversary of the effective date of the Direct Loan Contract;

(5) Up to 75 percent of Direct Loan funds may be drawn before providing evidence of Match. Thereafter, the Borrower must provide evidence of Match being credited to the Development prior to release of the final 25 percent of funds.

(6) Developer fee disbursement shall be conditioned upon:

(A) for Developments in which the loan is secured by a first lien deed of trust against the Property, 75 percent shall be disbursed in accordance with percent of construction completed. 75 percent of the total allowable fee will be multiplied by the percent completion, as documented by the construction contract and as may be verified by an inspection by the Department. The remaining 25 percent shall be disbursed at the time of release of retainage; or

(B) for Developments in which the loan is not secured by a first lien deed of trust or the Development is also utilizing Housing Tax Credits, developer fees will not be reimbursed by the Department except as follows. If all other lenders and syndicator in a Housing Tax Credit development (if applicable) provide written confirmation that they do not have an existing or planned agreement to govern the disbursement of developer fees and expect that Department funds shall be used to fund developer fees developer fees shall be reimbursed in the same manner as described in subparagraph (A) of this paragraph; and

(C) the Department may reasonably withhold any disbursement if it is determined that the Development is not progressing as necessary to meet the benchmarks for the timely completion of construction of the Development as set forth in the loan documents, or that cost overruns have put the Development Owner's ability to repay its Direct Loan or complete the construction at risk in accordance with the terms of the loan documents and within budget. If disbursement has been withheld under this subsection, the Development Owner must provide evidence to the satisfaction of the Department that the Development will be timely completed and occupied in order to continue receiving funds. If Disbursement is withheld for any reason, disbursement of any remaining developer fee will be made only after construction of the Development has been completed, and all requirements for expenditure and occupancy have been met;

(7) expenditures must be allowable and reasonable in accordance with federal and state rules and regulations. The Department shall determine the reasonableness of each expenditure requested. The Department may request the Development Owner make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of Department funds to Development Owner as may be necessary or advisable for compliance with all program requirements;

(8) table funding requests will not be considered unless the Direct Loan Contract has been executed and all necessary documentation has been completed and submitted to the Department at least ten (10) days prior to anticipated closing;

(9) Following fifty (50) percent construction completion, any funds will be released in accordance with the percentage of construction completion, not to exceed ninety (90) percent of award, at which point funds will be held as retainage until the final draw request. Retainage will be held until all of the items described in subparagraphs (A) - (G) of this paragraph are received:

(A) Certificate of Substantial Completion (AIA Form G704) with $0 as the cost estimate of work that is incomplete;

(B) A down date endorsement to the Direct Loan title policy or Nothing Further Certificate dated at least 30 calendar days after the date of completion as certified on the Certificate of Substantial Completion (AIA Form G704);

(C) For developments not layered with Housing Tax Credits, a Closed Final Development Inspection Letter from the Department;

(D) For developments subject to the Davis-Bacon Act, evidence from the Senior Labor Standards Specialist that the final wage compliance report was received and approved;

(E) Receipt of Certificates of Occupancy;

(F) Development completion reports which includes but is not limited to documentation of full compliance with the Uniform Relocation Act/104(d), Davis-Bacon Act, and Section 3 of the Housing and Urban Development Act of 1968, as applicable to the Development, and any other applicable requirement; and

(G) If applicable to the Development, certification from Architect or a licensed engineer that all HUD and REA environmental mitigation conditions have been met.

§13.12. Amendments to Direct Loan Terms.

The Executive Director or authorized designee may approve amendments to loan terms prior to closing as described in paragraphs (1) - (7) of this subsection. Board approval is necessary for any other changes prior to closing.

(1) extensions of up to 6 months to the loan closing date specified in §13.8(a)(4) of this Chapter. An Applicant must document good cause, which may include constraints in arranging a multiple-source closing;

(2) changes to the loan maturity date to accommodate the requirements of other lenders or to maintain parity of term;

(3) extensions of up to 12 months for the construction completion or loan conversion date based on documentation that the extension is necessary to complete construction and that there is good cause for the extension. Such a request will generally not be approved prior to initial loan closing;

(4) changes to the loan amortization or interest rate that cause the annual repayment amount to decrease less than twenty (20) percent or any changes to the amortization or interest rate that increases the annual repayment amount;

(5) decreases in the Direct Loan amount, provided the decrease does not jeopardize the financial viability of the Development. Increases will generally not be approved unless the Applicant competes for the additional funding under an open NOFA;

(6) changes to other loan terms or requirements as necessary to facilitate the loan closing without exposing the Department to undue financial risk; and

(7) An Applicant may request a change to the terms of a loan. Requests for changes to the loan post closing will be processed as loan modifications and may require additional approval by the Department's Asset Management Division. Post closing loan modifications requiring changes in the Department's loan terms, lien priority, or amounts (other than in the event of a payoff) will generally only be considered as part of a Department or Asset Management Division work out arrangement or other condition intended to mitigate financial risk and will not require additional Executive Director or Board approval except where the post closing change could have been anticipated prior to closing as determined by staff.

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 14, 2016.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3800

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CHAPTER 21. MINIMUM ENERGY EFFICIENCY REQUIREMENTS FOR SINGLE FAMILY CONSTRUCTION ACTIVITIES

10 TAC §§21.1 - 21.6

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of TAC Chapter 21, §§21.1 - 21.6, concerning Minimum Energy Efficiency Requirements for Single Family Construction Activities. The purpose of the repeal is to propose a new rule that clarifies definitions, corrects dates of applicability, updates citations referring to the International Residential Code requirements, and improves readability. The proposed new rule is published concurrently with this rulemaking.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that for each year of the first five years the rule is repealed, there are no foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that for each year of the first five years the rule is repealed, the public benefit anticipated will be clarity of construction requirements, adherence to state governing statute, and increased home affordability via reduced household utility costs. There will be minimal economic cost to entities and lower utility costs to households.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period for the proposed repeal will be from October 28, 2016, to November 28, 2016. Written comments may be mailed to the Texas Department of Housing and Community Affairs, Attention: Mark Leonard, Energy Efficiency Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; emailed to *htf@tdhca.state.tx.us;* or faxed to (512) 475-1162. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME, NOVEMBER 28, 2016.

STATUTORY AUTHORITY. The proposed repeal is pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules, and §2306.187, which authorizes the Department to develop and adopt rules relating to Minimum Energy Efficiency requirements for new construction, reconstruction, and rehabilitation activities for Single Family dwellings.

The proposed repeal affects no other code, article, or statute.

§21.1. Purpose.
§21.2. Applicability
§21.3. Definitions.
§21.4. General Requirements.
§21.5. New Construction, Reconstruction and Manufactured Housing Unit Activities.
§21.6. Rehabilitation Activities.

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 14, 2016.

TRD-201605301
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 936-7800

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10 TAC §§21.1 - 21.6

The Texas Department of Housing and Community Affairs (the "Department") proposes new TAC Chapter 21, §§21.1 - 21.6, concerning Minimum Energy Efficiency Requirements for Single Family Construction Activities. The purpose of the proposed new rule is to clarify definitions, correct dates of applicability, update citations referring to the International Residential Code requirements, and improve readability. The proposed repeal of existing Chapter 21 is published concurrently with this rulemaking.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that for each year of the first five years the new rules are in effect, enforcing or administering new sections do not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that for each year of the first five years the new rules are in effect, the public benefit anticipated as a result of the new sections will be clarity of construction requirements, adherence to state governing statute, and increased home affordability via reduced household utility costs. There will be minimal economic cost to entities complying with the new rules, and lower utility costs to households.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period for the proposed new rule will be from October 28, 2016, to November 28, 2016. Written comments may be mailed to the Texas Department of Housing and Community Affairs, Attention: Mark Leonard, Energy Efficiency Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941; emailed to *htf@tdhca.state.tx.us;* or faxed to (512) 475-1162. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. AUSTIN LOCAL TIME, NOVEMBER 28, 2016.

STATUTORY AUTHORITY. The new rules are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules, and §2306.187, which authorizes the Department to develop and adopt rules relating to Minimum Energy Efficiency requirements for new construction, reconstruction, and rehabilitation activities for Single Family dwellings.

The proposed new rules affect no other code, article, or statute.

§21.1. Purpose.

(a) Texas Government Code, §2306.187 requires that the Department develop and adopt rules relating to Minimum Energy Efficiency requirements for new construction, reconstruction, and rehabilitation activities in Single Family Programs.

(b) This chapter describes the Minimum Energy Efficiency Requirements for all single family construction activities, which includes the Department's HOME Investments Partnership Program (HOME), Housing Trust Fund (HTF), Neighborhood Stabilization Program (NSP), Office of Colonia Initiatives (OCI) Programs, and other single family programs as developed by the Department.

§21.2. General Requirements. Unless otherwise noted, this Chapter only applies to single family programs. Program rules may impose additional requirements related to any provision of this Chapter.

(a) Local residential building codes that exceed some or all parts of this Chapter shall take precedence.

(b) A final inspection conducted by Administrators confirming compliance with this Chapter shall be required for release of final payment from the Department.

§21.3. Definitions.

(a) Any capitalized terms that are defined in Texas Government Code, §2306, and Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), Chapter 20 of this title (relating to Single Family Programs Umbrella Rule), or other applicable Department program rules, have, when capitalized, the meanings ascribed to them therein.

(b) The following words and terms, when used in this chapter, shall have the following meanings unless the context or the Notice of Funding Availability (NOFA) indicates otherwise.

(1) ENERGY STAR Certified Appliances, Equipment, and Products--Labeled appliances, equipment, and products that are independently certified to save energy without sacrificing features or functionality, meeting the US EPA's specifications for energy efficiency and performance.

(2) ENERGY STAR Certified Home--A new home that has earned the ENERGY STAR label and has undergone a process of inspections, testing, and verification to meet requirements set forth by the US EPA.

(3) ENERGY STAR Certified Manufactured Housing Unit--A home that has been designed, produced and installed by the home manufacturer to meet ENERGY STAR requirements for energy efficiency.

(4) RESNET--Residential Energy Services Network. RESNET is an independent, nonprofit organization established in 1995 to help homeowners reduce the cost of their utility bills by making their homes more energy efficient. RESNET-certified Home Energy Systems Raters are required to inspect, test, and verify homes for ENERGY STAR certification.

(5) Start of Construction Date--The date of the first excavation into readied soil, or any construction work other than site clearance and site preparation.

(6) WaterSense Labeled Fixtures--Labeled products that are backed by independent, third-party testing and certification, meeting the US EPA's specifications for water efficiency and performance.

(7) US EPA--United States Environmental Protection Agency.

§21.4. New Construction and Reconstruction Activities.

(a) Single family residential dwellings, as defined in §388.002 of the Health and Safety Code, that are newly constructed or reconstructed shall comply with §388 of the Health and Safety Code (Texas Building Energy Performance Standards).

(b) Effective January 1, 2012, the Texas State Energy Conservation Office adopted the 2009 International Residential Code (Chapter 11) as the state-mandated energy code for all residential construction, one- and two-family residences of three stories or less above grade.

(c) For construction activities that have a Start of Construction Date on or after September 1, 2016, the Texas State Energy Conservation Office through Health and Safety Code, Chapter 388 has adopted Chapter 11 of the 2015 International Residential Code as the energy code in Texas for single family residential construction.

§21.5. Manufactured Housing Unit Activities.

Manufactured Housing Units installed on or after January 5, 2017, the date of adoption of this rule, as replacement for sub-standard housing shall be ENERGY STAR certified.

§21.6. Rehabilitation Activities.

(a) All Rehabilitation activities with a Start of Construction Date on or after January 5, 2017, the date of adoption of this rule, shall comply with this Chapter

(b) If the proposed scope of work or the awarded construction contract for the Rehabilitation of an existing single family residential unit includes an item described in paragraphs (1) - (9) of this section, the following requirements shall apply:

(1) Replacement or installation of central heating and cooling equipment and appliances shall be installed in accordance with the manufacturer's instructions and the requirements of Chapter 14 of the 2015 International Residential Code;

(2) Replacement or installation of duct systems serving heating, cooling and ventilation equipment shall be installed in accordance with the provisions of Chapter 16 of the 2015 International Residential Code;

(3) If central heating and cooling equipment is replaced or installed, attic insulation shall be installed or increased according to Chapter 11, Figure N1102.1.2 of the 2015 International Residential Code, including insulation covering the top plates of exterior walls. Eave baffles and access hatches shall be installed as specified in Chapter 11, Sections N1102.2.3 - N1102.2.4 of the 2015 International Residential Code.

(4) If ductless heating and cooling systems (also known as mini-split, multi-split or variable refrigerant flow (VRF) heat pump systems) are replaced or installed, they shall be ENERGY STAR certified;

(5) If exhaust fans are replaced or installed in bathrooms or kitchens, they shall be ENERGY STAR certified and installed in accordance with Chapter 15 of the 2015 International Residential Code;

(6) If windows are installed, they shall be ENERGY STAR certified windows, meeting the U-factor and Solar Heat Gain Coefficient for the climate zone of the dwelling as identified in Chapter 11, Table N1102.1.2 of the 2015 International Residential Code;

(7) Electrical fixtures, equipment and appliances that are replaced or installed, where applicable, shall be ENERGY STAR certified products;

(8) Plumbing fixtures that are replaced or installed, where applicable, shall be WaterSense labeled products;

(9) Domestic water heaters, storage and tankless, when replaced or installed, shall meet the Federal Energy Conservation Standards required by 10 CFR 430.32, as they may be revised from time to time.

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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Timothy K. Irvine
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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 84. DRIVER EDUCATION AND SAFETY

The Texas Department of Licensing and Regulation (Department) proposes the repeal of current rules at 16 Texas Administrative Code (TAC), Chapter 84, Subchapter A, §§84.100 - 84.119; Subchapter B, §§84.200 - 84.217; Subchapter C, 84.300 - 84.310; Subchapter D, §84.400; Subchapter E, §84.500; Subchapter F, §84.600 and §84.601; Subchapter G, §84.700 and §84.701, and proposes new rules Subchapter A, §84.1 and §84.2; Subchapter B, §§84.30 - 84.34; Subchapter C, §§84.40 - 84.47; Subchapter D, §§84.50 - 84.52; Subchapter E, §§84.60 - 84.64; Subchapter F, §§84.70 - 84.72; Subchapter G, §§84.80 - 84.84; Subchapter H, §84.90; Subchapter I, §§84.100 - 84.102; Subchapter J, §84.200; Subchapter K, §84.300 - 84.302; Subchapter L, §84.400 and §84.401; Subchapter M, §§84.500 - 84.506; and Subchapter N, §84.600 and §84.601 regarding the Driver Education and Safety program.

The Texas Legislature enacted House Bill 1786 (H.B. 1786), 84th Legislature, Regular Session (2015), that transferred the Driver Education and Safety program from the Texas Department of Public Safety and the Texas Education Agency to the Department. The Department transferred the rules from Title 19 and Title 37, on September 1, 2015, and the Department has been operating the program under the transferred rules since that date. The transferred rules were placed in 16 TAC, Chapter 84, and organized as Subchapters A-H. The rules had the same content as in their former Administrative Code locations. These proposed rules have reorganized 16 TAC Chapter 84 into additional Subchapters to facilitate ease of use, and now there are Subchapters A-M. These proposed rules are the first of two phases in the rulemaking for 16 TAC Chapter 84. Subchapters A-L that pertain to licensing and regulatory functions were reorganized and consolidated in this first phase of the rulemaking, and the second phase, pertaining to Subchapters M and N containing courses of instruction and alternative delivery methods, will be reorganized and clarified in a second phase, after additional Advisory Committee workgroup and Advisory Committee discussions. The public may comment on any of these proposed rules; however, comments specific to Subchapters M and N, may be addressed at the phase two rulemaking.

The proposed repeal and new rules are required to implement H.B. 1786 enabling the Department to regulate the Driver Education and Safety program, including licensing, compliance, course curriculum and enforcement, if necessary. The proposed rules are streamlined and reorganized. The proposed rules remove unnecessary duplications, consolidate licensing requirements, remove rules no longer required by statute, reduce certain impediments to business operations, clarify licensing requirements and correct agency references.

The proposed repeal of current Subchapter A, §§84.100 - 84.119 will allow the Department to consolidate, reorganize and clarify the requirements for driver education schools.

The proposed repeal of current Subchapter B, §§84.200 - 84.217 will allow the Department to consolidate, reorganize and clarify the requirements for driving safety schools and course providers.

The proposed repeal of current Subchapter C, §§84.300 - 84.310 will allow the Department to consolidate, reorganize and clarify the requirements of drug and alcohol awareness programs, including schools and course providers.

The proposed repeal of current Subchapter D, §84.400 will allow the Department to conduct contested case proceedings and hearings for the program at the State Office of Administrative Hearings (SOAH), and not before the commissioner of education.

The proposed repeal of current Subchapter E, §84.500 will allow the Department to reorganize parent taught driver education requirements.

The proposed repeal of current Subchapter F, §84.600 and §84.601 allows the Department to reorganize and clarify the process for parent taught driver education course approval.

The proposed repeal of current Subchapter G, §84.700 and §84.701 allows the Department to reorganize and clarify course requirements and procedures for student certification and transfers for driver education taught in public schools, education centers or colleges and universities.

The proposed new Subchapter A provides the General Provisions for the proposed new rules.

The proposed new §84.1 provides statutory authority for the Department to regulate the driver education and safety program.

The proposed new §84.2 creates the definitions to be used in the driver education and safety program.

The proposed new Subchapter B describes the Driver Training and Traffic Safety Advisory Committee.

The proposed new §84.30 details the membership of the advisory committee.

The proposed new §84.31 explains the duties of the advisory committee.

The proposed new §84.32 sets forth the term limits of the advisory committee, and filling vacancies on the committee.

The proposed new §84.33 provides for a presiding officer of the advisory committee.

The proposed new §84.34 sets forth when meetings of the advisory committee shall take place.

The proposed new Subchapter C relates to licensing and requirements of driver education schools and instructors.

The proposed new §84.40 details the driver education school licensure requirements.

The proposed new §84.41 details the driver education school responsibilities.

The proposed new §84.42 explains the motor vehicle requirements when used by a driver education school for in-car instruction.

The proposed new §84.43 explains the requirements for a driver education school to issue driver education certificates.

The proposed new §84.44 details the driver education instructor license requirements.

The proposed new §84.45 explains how to document student progress in driver education schools.

The proposed new §84.46 explains the attendance and makeup requirements for students attending a driver education school.

The proposed new §84.47 provides the statements required to be included in a student enrollment contract pertaining to student conduct, dismissal and reentry.

The proposed new Subchapter D relates to parent taught driver education.

The proposed new §84.50 details parent taught driver education requirements.

The proposed new §84.51 details how to submit a parent taught driver education course for the Department's approval.

The proposed new §84.52 explains the process for the Department to cancel a parent taught driver education course that was previously approved.

The proposed new Subchapter E relates to licensing and requirements of driving safety schools, course providers and instructors.

The proposed new §84.60 details the driving safety school licensure requirements.

The proposed new §84.61 details the driving safety school and course provider responsibilities.

The proposed new §84.62 details course provider license requirements.

The proposed new §84.63 explains the requirements for the handling, storage and issuance of the certificates of course completion for a driving safety or specialized driving safety course.

The proposed new §84.64 details requirements for the licensing of driving safety instructors.

The proposed new Subchapter F relates to drug and alcohol awareness programs and their instructors.

The proposed new §84.70 details the drug and alcohol awareness program school licensure requirements.

The proposed new §84.71 explains school and course provider responsibilities for drug and alcohol awareness programs.

The proposed new §84.72 details the instructor license requirements for drug and alcohol awareness programs.

The proposed new Subchapter G relates to general business practices and operations and administrative requirements for driver education schools, driving safety schools, course providers and drug and alcohol awareness schools.

The proposed new §84.80 explains name and advertising guidelines.

The proposed new §84.81 details recordkeeping requirements.

The proposed new §84.82 details student enrollment contracts.

The proposed new §84.83 explains the process for student complaints and a grievance procedure.

The proposed new §84.84 explains what documents must contain notification to the consumer or service recipients of the name and other contact information of the department for the purpose of directing complaints to the department in the Driver Education and Safety program.

The proposed new Subchapter H relates to facilities and equipment for driver education schools, driving safety schools and drug and alcohol driving awareness schools.

The proposed new §84.90 details the facilities and equipment requirements.

The proposed new Subchapter I relates to how and when the Department conducts inspections at the driver education schools.

The proposed new §84.100 provides general guidelines for inspections.

The proposed new §84.101 explains initial inspections of driver education schools before becoming operational.

The proposed new §84.102 explains periodic inspections.

The proposed new Subchapter J relates to driver education and driving safety school, and course provider cancellation and refund policies.

The proposed new §84.200 details the cancellation and refund policies.

The proposed new Subchapter K relates to licensing fees.

The proposed new §84.300 provides for fees relating to driver education.

The proposed new §84.301 provides for fees relating to driving safety.

The proposed new §84.302 provides for fees relating to the drug and alcohol awareness program.

The proposed new Subchapter L relates to complaints and enforcement provisions.

The proposed new §84.400 provides for administrative penalties and sanctions,

The proposed new §84.401 explains the Department's enforcement authority, and cites which laws authorize the Department to impose sanctions and administrative penalties.

The proposed new Subchapter M relates to curriculum and alternative methods of instruction (AMI) for driver education, including continuing education.

The proposed new §84.500 details the requirements for courses of instruction for driver education schools, including course content.

The proposed new §84.501 details the approval process and course content for driver education school online courses.

The proposed new §84.502 details the requirements for driving safety courses of instruction, including course content.

The proposed new §84.503 details the content for specialized driving safety courses of instruction, and continuing education.

The proposed new §84.504 details the approval process and course content for driving safety courses taught through an Alternative Delivery Method (ADM.)

The proposed new §84.505 details the program content for drug and alcohol driving awareness programs of instruction.

The proposed new §84.506 details the approval process and course content for drug and alcohol driving awareness courses delivered by an alternative delivery method.

The proposed new Subchapter N relates to the program of organized instruction (POI) for public schools, education service centers, and colleges or universities.

The proposed new §84.600 details the requirements of the program of organized instruction (POI.)

The proposed new §84.601 explains the procedures for student transfers, and the Department's delivery of the student certifications.

Brian E. Francis, Executive Director, has determined that for the first five-year period the proposed repealed rules and new rules are in effect there will be no direct cost to state or local government as a result of enforcing or administering the proposed new rules. There is no estimated increase or decrease in revenue to the state as a result of enforcing or administering the proposed new rules. The proposed new rules include a new $25 fee for the issuance of a duplicate license for the replacement of any license type, which would be paid only if a licensee requested a duplicate of their license. The proposed new rules do not contain a complaint investigation fee because pursuant to H.B. 1786, §1001.153, Education Code, was repealed.

Mr. Francis also has determined that for each year of the first five-year period the proposed repealed rules and new rules are in effect, the benefit to the public will be greater ability to find and understand the regulations and procedures to obtain driver education and driving safety courses due to their reorganization and clarification. Additionally, the proposed rules remove duplicate provisions within the rules, consolidate licensing requirements, remove rules no longer required by statute, reduce impediments to business operations, clarify licensing requirements and correct agency references.

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

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

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

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §84.1, §84.2

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.1. Authority.

This chapter is promulgated under Texas Occupations Code, Chapter 51, Texas Education Code, Chapter 1001, and 29; and Texas Transportation Code, Chapter 521.

§84.2. Definitions.

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

(1) ADE-1317--The driver education certificate of completion used for certifying completion of a driver education course exclusively for adults. This term encompasses all parts of a certificate of completion with the same control number issued for an approved driver education course. It is a government record.

(2) Advertising--Any affirmative act, whether written or oral, designed to call public attention to a school and/or course in order to evoke a desire to patronize that school or course. This includes Meta tags and search engines.

(3) Alternative method of instruction--A method of instruction for the minor and adult driver education course that does not require students to be present in a classroom.

(4) Branch school--A licensed driver education school that has the same ownership and name as a licensed primary driver education school.

(5) Certificate of program completion--serially numbered certificates that are printed, administered, and supplied by the course provider that have been approved by the department as part of the drug and alcohol awareness program.

(6) Change of ownership of a school or course provider--A change in the control of the school. The control of a school is considered to have changed:

(A) in the case of ownership by an individual, when more than 50% of the school or course provider has been sold or transferred;

(B) in the case of ownership by a partnership or a corporation, when more than 50% of the school or course provider, or of the owning partnership or corporation has been sold or transferred; or

(C) when the board of directors, officers, shareholders, or similar governing body has been changed to such an extent as to significantly alter the management and control of the school or course provider.

(7) Clock hour:

(A) Driver Education School Clock hour--55 minutes of instruction time in a 60-minute period for a driver education course. This includes classroom and in-car instruction time.

(B) Driving Safety School and Drug and Alcohol Awareness Program Clock Hour--50 minutes of instruction in a 60-minute period for a driving safety course.

(8) Code--Refers to Texas Education Code, Chapter 1001.

(9) Contract site--An accredited public or private secondary school approved as a location for a driver education course of a licensed school. A driver training school may conduct a driver training course at a public or private school for students of the public or private school as provided by an agreement with the public or private school. The course is subject to any law applicable to a course conducted at the main business location of the driver training school.

(10) Criminal history record information--In accordance with the Texas Government Code, §411.082(2), information collected about a person by the Texas Department of Public Safety, a law enforcement or a criminal justice agency, or a private entity governed by the Fair Credit Reporting Act (15 United States Code, §1681 et seq.) that consists of identifiable descriptions and notations of arrests, detentions, indictments, and other formal criminal charges and their dispositions.

(11) DE-964--The driver education certificate of completion used for certifying completion of an approved minor and adult driver education course. This term encompasses all parts of a certificate of completion with the same control number issued for an approved driver education course. It is a government record.

(12) Educational objectives--The goal to promote respect for and encourage observance of traffic laws and traffic safety responsibilities of driver education and citizens; reduce traffic violations; reduce traffic-related injuries, deaths, and economic losses; and motivate development of traffic-related competencies through education, including, but not limited to, Texas traffic laws, risk management, driver attitudes, courtesy skills, and evasive driving techniques.

(13) Good reputation--A person is considered to be of good reputation if the department determines that the person is eligible for licensure, based on the department's review of the application, any supporting documentation and analysis pursuant to any of the laws and rules that relate to the license requirements, including but not limited to this chapter; 16 Texas Administrative Code Chapter 60; Texas Education Code Chapter 1001; and Texas Occupations Code Chapters 51 and Chapter 53.

(14) Inactive course--a driving safety or specialized driving safety course for which no uniform certificates of completion or course completion certificate numbers have been purchased for 36 months or longer.

(15) Instructor trainer--A driving safety instructor trainer (DSIT) or specialized driving safety instructor trainer (SDSIT) who has been trained to prepare instructors to give instruction in a specified curriculum. A DSIT or SDSIT works with the student instructor trainee during their practice teaching sessions, overseeing their conduct of the course. The DSIT or SDSIT may provide feedback and guidance to the trainee, but would not do actual training of the trainee during the Instructor Development Course.

(16) National criminal history record information--Criminal history record information obtained from the Federal Bureau of Investigation under Texas Government Code, §411.087, based on fingerprint identification information.

(17) New Course--A driving safety or specialized driving safety course is considered new when it has not been approved by the department to be offered previously, or has been approved by the department and become inactive; or the content, lessons, or delivery of the course has been changed to a degree that a new application is requested and a complete review of the application and course presentation is necessary to determine compliance.

(18) Personal validation question--A question designed to establish the identity of the student by requiring an answer related to the student's personal information such as a driver's license number, address, date of birth, or other similar information that is unique to the student.

(19) Post program exam--an exam designed to measure the student's comprehension and knowledge of course material presented after the instruction is completed.

(20) Pre-program exam--an exam given during the program introduction using questions drawn from material to be covered in the course to determine the level of drug and alcohol knowledge possessed by the student prior to receiving instruction.

(21) Primary school--A licensed driver education main school that may have branch schools.

(22) Public or private school--an accredited public or nonpublic secondary school.

(23) Specialized driving safety course--a six-hour driving safety course that includes at least four hours of training intended to improve the student's knowledge, compliance with, and attitude toward the use of child passenger safety seats systems and the wearing of seat belt and other occupant restraint system.

(24) Teacher of record--A licensed supervising driver education teacher or licensed driver education teacher employed at the school who is directly responsible for the classroom instructional phase provided by a teaching assistant full or supervising teaching assistant full.

(25) Uniform certificate of course completion--A document with a serial number purchased from the department that is printed, administered and supplied by course providers or primary consignees for issuance to students who successfully complete an approved driving safety or specialized driving safety course and that meets the requirements of Texas Transportation Code, chapter 543, and Texas Code of Criminal Procedure, Article 45.051 or 45.0511. This term encompasses all parts of an original or duplicate uniform certificate of course completion.

(26) Validation question--A question designed to establish the student's participation in a course or program and comprehension of the materials by requiring the student to answer a question regarding a fact or concept taught in the course or program.

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 13, 2016.

TRD-201605241
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 463-8179

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SUBCHAPTER B. DRIVER TRAINING AND TRAFFIC SAFETY ADVISORY COMMITTEE

16 TAC §§84.30 - 84.34

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.30. Membership.

(a) The advisory committee consists of eleven members appointed for staggered six-year terms by the presiding officer of the commission, with the approval of the commission, as follows:

(1) one member representing a driver education school that offers a traditional classroom course and in-car training;

(2) one member representing a driver education school that offers a traditional classroom course, alternative methods of instruction, or in-car training;

(3) one member representing a driving safety school offering a traditional classroom course or providing an alternative method of instruction;

(4) one member representing a driving safety course provider approved for a traditional classroom course and for an alternative method of instruction;

(5) one member representing a driving safety course provider approved for a traditional classroom course or for an alternative method of instruction;

(6) one licensed instructor;

(7) one representative of the Department of Public Safety;

(8) one member representing a drug and alcohol driving awareness program course provider;

(9) one member representing a parent-taught course provider; and

(10) two members representing the public.

(b) Chapter 2110, Government Code, does not apply to the advisory committee.

§84.31. Duties.

The advisory committee shall provide advice and recommendations to the department on rules, educational and technical matters relevant to the administration of the Act and this chapter.

§84.32. Terms; Vacancies.

(a) A member may not serve two consecutive full terms.

(b) If a vacancy occurs during a term, the presiding officer of the commission, with the approval of the commission, shall appoint a replacement who meets the qualifications of the vacated position to serve for the remainder of the term.

(c) A member of the advisory committee may be removed from the advisory committee as provided by Texas Occupations Code §51.209.

(d) Members of the advisory committee may not receive compensation but are entitled to reimbursement for actual and necessary expenses incurred in performing the functions of the advisory committee, subject to the General Appropriations Act.

§84.33. Officers.

(a) The presiding officer of the commission shall appoint the presiding officer of the advisory committee.

(b) The presiding officer of the advisory committee may vote on any matter before the advisory committee.

§84.34. Meetings.

The committee shall meet at the call of the presiding officer of the commission.

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

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SUBCHAPTER C. DRIVER EDUCATION SCHOOLS AND INSTRUCTORS

16 TAC §§84.40 - 84.47

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.40. Driver Education School Licensure Requirements.

(a) Application. An application for a school license for a primary or branch driver education school shall be made on forms prescribed by the department. A license application is valid for one year from the date it is filed with the department.

(b) Bond requirements. In the case of an original or a change of owner application, an original bond or approved alternate form of security shall be provided. In the case of a renewal application, an original bond or approved alternate form of security or a continuation agreement for the approved bond currently on file or continuation of an approved alternate form of security shall be submitted. The bond or the continuation agreement shall be executed on the form provided by the department. Approved alternate forms of security shall adhere to the following guidelines.

(1) An irrevocable letter of credit. The letter shall be in the name of the owner of the school. The letter shall specify the amount of credit extended, which shall be equivalent to the coverage required for a corporate surety bond, and the purpose of the credit. The letter shall contain the signature of an appropriate bank representative. The bank and the letter shall be approved by the department.

(2) A cash deposit. An irrevocable account shall be established by the school owner in the name of the department to be drawn upon as needed to pay student refunds as needed if the school closes owing refunds. The account shall be equivalent to the coverage required for a corporate surety bond. The bank and the terms of the account shall be approved by the department. The department shall keep records of deposits and/or withdrawals on the account.

(c) Verification of ownership.

(1) In the case of an original or change of owner application for a primary school, the owner of the school must provide verification of ownership.

(2) In the case of an original or change of owner application for a branch school, the owner shall submit an application on forms prescribed by the department.

(d) Purchase of a driver education school.

(1) A person, partnership, or corporation, purchasing a licensed driver education school shall obtain an original license or branch school license as applicable.

(2) The purchaser shall assume all refund liabilities incurred by the seller or any former owner as well as the liabilities, duties, and obligations under the enrollment contracts between the students and the seller, or any former owner before the transfer of ownership.

(e) New location.

(1) The department must be notified in writing of any change of address at least fifteen (15) working days before the move.

(2) The school must submit the appropriate change of address fee prior to the actual move.

(3) If a student is not willing to change locations or is prevented from completing the training at the new location, a pro-rata refund (without deducting any administrative expense) must be made to the student.

(f) Renewal of driver education school license. A complete application for the renewal of a license for a primary or branch driver education school shall be submitted before the expiration of the license and shall include the following:

(1) completed application for renewal;

(2) renewal fee;

(3) a current list of instructors employed at the school if changes have occurred;

(4) executed bond or executed continuation agreement for the bond currently approved by, and on file with, the department or an approved alternate form of security;

(5) a current list of all motor vehicles used for instruction if changes have occurred; and

(6) documentation showing that all vehicles used for instruction are properly insured.

(g) Denial, revocation, or conditional license. The authority to operate a branch school ceases if a primary driver education school license is denied or revoked. The operation of a branch school license may be subject to any conditions placed on the continued operation of the primary driver education school. A driver education school license for a branch school may be denied, revoked, or conditioned separately from the license for the primary school.

(h) School closure.

(1) The school owner shall notify the department at least fifteen (15) business days before the anticipated school closure. In addition, the school owner shall provide written notice of the actual discontinuance of the operation the day of cessation of classes. A school shall make all records available for review to the department upon request.

(2) The department may declare a school to be closed:

(A) when the school does not have the facilities, vehicles, instructors, or equipment to provide training pursuant to this subchapter;

(B) when the school has stopped conducting classes and has failed to fulfill contractual obligations to its students; or

(C) when the school owner allows the school license to expire.

(3) If a branch school closes and a student is prevented from completing the training at the primary location, a pro-rata refund (without deducting any administrative expense) must be made to the student.

(i) Branch schools shall adopt, use, and conduct business with the same name as the primary school.

(j) A school shall not, by advertisement or otherwise, state or imply that a driver's license, permit, or DE-964 is guaranteed or assured to any student or individual who will take or complete any instruction or enroll or otherwise receive instruction in any driver education school.

(k) A school shall not advertise without including the school name or the school number exactly as it appears on the driver education school license.

(l) Contract site. A school shall receive approval from the department prior to conducting a class at a contract site, and approval may be granted by the department upon review of the agreement made between the licensed driver education school and the contract site. The course shall be subject to the same rules that apply at the licensed driver education school, including periodic inspections by department representatives. An on-site inspection is not required prior to approval of the site.

§84.41. Driver Education School Responsibility.

(a) Each driver education school must:

(1) Maintain a current mailing address, telephone number, and e-mail address (if applicable) with the department.

(2) ensure that each individual permitted to give classroom instruction or in-car instruction at the school or classroom location has a valid current driver education instructor's license with the proper endorsement issued by the department.

(3) provide instruction or allow instruction to be provided only in courses that are currently on the school's list of approved courses;

(4) complete, issue, or validate a DE-964 or ADE-1317 only to a person who has successfully completed the entire portion of the course for which the DE-964 or ADE-1317 is being issued;

(5) authorize, approve, or conduct instruction in a motor vehicle that meets the requirements stated in §84.42 (relating to Motor Vehicles); and

(6) ensure that no instructor provides more than 10 hours of behind-the-wheel instruction per day.

(b) Except as provided in subsection (a) of this section, an instructor-trainee may engage in practice teaching lessons necessary for the purpose of licensing in an approved location under the direction and in the presence of a licensed instructor.

(c) Each driver education school owner-operator or employee that purchases driver education certificate numbers from the department must:

(1) develop and maintain a means to ensure the security and integrity of student information, especially financial and personal information, in transit and at rest;

(2) develop and maintain a means to ensure the privacy of student data, including personal and financial data, and make the corporate privacy policy available to all course students;

(3) develop and maintain a department-approved method for printing and issuing original and duplicate driver education certificates that, to the greatest extent possible, prevents the unauthorized production or misuse of the certificates; and

(4) ensure that the front of each driver education certificate contains the department's complaint contact information and current department telephone number in a font that is visibly recognizable.

§84.42. Motor Vehicles.

All in-car instruction of students in driver education schools shall be conducted in motor vehicles owned or leased by the owner of the driver education school in the name of the driver education school. If the student is disabled, the school may use a motor vehicle that is owned by the student or student's parent that is equipped with special vehicle controls. All school motor vehicles and vehicles for students with physical disabilities that are used to demonstrate or practice driving lessons shall:

(1) be property registered and inspected by the Texas Department of Transportation;

(2) be equipped with dual control brake pedals so that there is a foot brake located within easy reach of the instructor that is capable of bringing the vehicle to a stop and otherwise be equipped in accordance with Texas motor vehicle laws;

(3) be equipped with an extra inside rearview mirror on the instructor's side and an outside rearview mirror on both sides. The visor mirror shall not substitute for the instructor's inside rearview mirror; and

(4) be insured by a company authorized to do business in Texas with a continuous liability business insurance policy in the amount specified in Transportation Code Chapter 601, and include coverage for uninsured or underinsured motorists.

§84.43. Driver Education Certificates.

(a) The DE-964 and ADE-1317 shall be issued only to primary driver education schools. The primary driver education school shall maintain a record reconciling all DE-964s and ADE-1317s that are distributed by the primary driver education school to branch driver education schools and contract sites.

(b) School owners shall be responsible for the DE-964 and ADE-1317 in accordance with this subsection.

(1) A licensed exempt driver education school or parent taught driver education course provider may request the serially numbered DE-964s and ADE-1317s by submitting an order form prescribed by the department stating the number of DE-964s and ADE-1317s to be purchased and include payment of all appropriate fees. A mailed or faxed order form shall have the signature of the driver education school owner or authorized representative. Signature is not required for orders placed through the online system.

(2) A driver education school or parent taught driver education course provider shall not transfer unassigned DE-964s and ADE-1317s to a school/provider other than the school/provider for which the certificates were ordered from the department without written approval from the department.

(3) The driver education school owner or authorized representative shall maintain effective protective measures to ensure that unissued DE-964s and ADE-1317s are secure. The driver education school owner or authorized representative shall report all unaccounted DE-964s and ADE-1317s to the department within fifteen (15) working days of the discovery of the incident. In addition, the driver education school shall be responsible for conducting an investigation to determine the circumstances surrounding the unaccounted DE-964s and

ADE-1317s. A report of the findings of the investigation, including preventative measures for recurrence, shall be submitted to the department within thirty (30) days of the discovery.

(4) The driver education school owner or their designee shall return unissued DE-964 and ADE-1317 certificates to the department within thirty (30) days from the date the school discontinues the driver education program, unless otherwise notified.

(c) If a driver education school or parent taught driver education course provider issues a duplicate DE-964 or ADE-1317, the duplicate shall indicate the control number of the original DE-964 or ADE-1317.

(d) A driver education school that purchases driver education certificate numbers shall provide for the following:

(1) The DE-964 and ADE-1317 driver education certificate numbers shall only be issued to primary driver education schools. The primary driver education school shall maintain a record reconciling all DE-964 and ADE-1317 driver education certificate numbers that are distributed to branch driver education schools and contract sites.

(2) The school shall implement and maintain a policy which effectively ensures protective measures are in use at all times for securing original and duplicate driver education certificates numbers. The records and unissued or unnumbered original and duplicate driver education certificates shall be readily available for review by representatives of the department.

(3) The school shall maintain electronic files with data pertaining to all driver education certificate numbers purchased from the department. The school shall make available to the department upon request an ascending numerical accounting record of the numbered driver education certificates issued. The school shall ensure security of the data.

(4) The school shall ensure that effective measures are taken to preclude lost data and that a system is in place to recreate electronic data for all driver education certificate numbers, whether used or not used, and all certificates that have been issued.

(5) Schools shall issue driver education certificates using a block of identifying serial numbers purchased from the department only to students who have successfully completed all elements of the school's approved driver education course taught by department licensed instructors in department approved locations as indicated on the student contract.

(6) Schools shall report all unaccounted original and duplicate driver education numbers or unissued or duplicate certificates to the department within five (5) working days of the discovery of the incident. In addition, the school shall be responsible for conducting an investigation to determine the circumstances surrounding the unaccounted items. A report of the findings of the investigation, including preventative measures for recurrence, shall be submitted for approval to the department within thirty (30) days of the discovery.

(7) Each unaccounted or missing original or duplicate course driver education completion certificate number or blank or unissued original or duplicate driver education certificate may be considered a separate violation. This may include lost, stolen, or otherwise unaccounted original or duplicate driver education certificate numbers or blanks or unissued original or duplicate driver education certificates.

(8) Schools shall not transfer driver education certificate numbers to another school.

(9) Schools shall sequentially number original driver education certificates from the block of numbers purchased from the department.

(10) When a duplicate driver education certificate is issued by a school, the duplicate certificate shall bear a serial number from the block of numbers purchased from the department by the school. The duplicate driver education certificate shall clearly indicate the number of both the duplicate and the original serial number of the certificate being replaced.

(11) The driver education school owner or their designee shall return unissued DE-964 and ADE-1317 certificate numbers to the department within thirty (30) days from the date the school discontinues the driver education program, unless otherwise notified.

§84.44. Driver Education Instructor License.

(a) Application for licensing as a driver education instructor must be made on forms prescribed by the department. A person applying for an original driver education instructor license must:

(1) have a high school diploma or equivalent;

(2) hold a valid class A, B, C, or CDL driver's license, other than a learner license or provisional license, for the preceding three years, that has not been revoked or suspended in the preceding three years.

(3) submit a completed application as prescribed by the department;

(4) submit the instructor licensing fees;

(5) submit a national criminal history record information review fee;

(6) submit documentation showing that all applicable educational requirements have been met; and

(7) provide fingerprints to the Texas Department of Public Safety (DPS) through the Fingerprint Application Service of Texas (FAST) or any other method required by the DPS.

(b) Driver education instructor license endorsement qualifications and responsibilities:

(1) Supervising driver education teacher:

(A) must have a current, valid Texas teacher's certificate and an official transcript indicating completion of 15 semester hours of driver and traffic safety education from an accredited college or university or evidence of completion of a department-approved instructor development course that is equivalent to 15 semester hours. Completion of course work in an approved alternative certification program may suffice for all or part of the 15 semester hours of driver and traffic safety education if the department determines that the course is equivalent;

(B) may perform instruction and administration of the classroom and in-car phases of driver education as prescribed in the Program of Organized instruction to minors and adults;

(C) may perform instruction of a department-approved driver education instructor development course;

(D) may serve as a teacher of record.

(2) Driver education teacher:

(A) must have a current, valid Texas teacher's certificate and an official transcript indicating completion of 9 semester hours of driver and traffic safety education from an accredited college or university or evidence of completion of a department-approved instructor

development course that is equivalent to 9 semester hours. Completion of course work in an approved alternative certification program may suffice for all or part of the 9 semester hours of driver and traffic safety education if the department determines that the course is equivalent;

(B) may perform instruction and administration of the classroom and in-car phases of driver education as prescribed in the Program of Organized instruction to minors and adults;

(C) may serve as a teacher of record.

(3) Teaching assistant:

(A) must have a valid teaching assistant license issued by the department that indicates approval for in-car instruction only;

(B) must have an official transcript indicating completion of 6 semester hours of driver and traffic safety education from an accredited college or university or evidence of completion of a department approved instructor development course that is equivalent to 6 semester hours. Completion of course work in an approved alternative certification program may suffice for all or part of the 6 semester hours of driver and traffic safety education if the department determines that the course is equivalent;

(C) may only perform in-car instruction.

(4) Teaching assistant-full:

(A) must have a valid teaching assistant license issued by the department that indicates approval for all phases of laboratory instruction and instructional assistance in the classroom;

(B) must have an official transcript indicating completion of 9 semester hours of driver and traffic safety education from an accredited college or university or evidence of completion of a department approved instructor development course that is equivalent to 9 semester hours. Completion of course work in an approved alternative certification program may suffice for all or part of the 9 semester hours of driver and traffic safety education if the department determines that the course is equivalent;

(C) may perform all phases of in-car instruction and may assist certified teachers in the classroom phase of minor and adult driver education. All classroom instruction provided by a teaching assistant-full shall be endorsed by the teacher of record. In emergency situations, the school owner may request prior approval from the department to endorse classroom instruction records provided by a teaching assistant-full.

(5) Supervising teaching assistant-full:

(A) must have a valid teaching assistant-full license issued by the department that indicates approval for all phases of laboratory instruction and instructional assistance in the classroom;

(B) must have an official transcript indicating completion of 15 semester hours of driver and traffic safety education from an accredited college or university or evidence of completion of a department -approved instructor development course that is equivalent to 15 semester hours. Completion of course work in an approved alternative certification program may suffice for all or part of the 15 semester hours of driver and traffic safety education if the department determines that the course is equivalent.

(C) may teach all phases of in-car instruction;

(D) may assist in the classroom phase of minor and adult driver education, however, any classroom instruction provided must be endorsed by the teacher of record

(E) may perform instruction in a department approved driver education instructor development course.

(6) Rehabilitative driver education in-car instructor.

(A) must have a valid driver education teaching assistant certificate issued by the department or evidence of completion of an approved driver education program for certification as a teaching assistant that is equivalent to at least 6 semester hours;

(B) must have evidence of employment from a specific hospital or approved community rehabilitation program.

(C) The endorsement will be valid while the instructor is employed by or under contract with the specified hospital or approved community rehabilitation program.

(c) An application for renewal of an instructor license shall be submitted on forms prescribed by the department and shall be postmarked or hand-delivered at least thirty (30) days before the date of expiration or a late instructor renewal fee shall be imposed. A complete application shall include the following:

(1) annual licensing fee; and

(2) evidence of completing continuing education during the individual license renewal period.

(d) Continuing education requirements include the following.

(1) Driver education instructors shall participate in and provide evidence of completion of at least one of the following to obtain credit for continuing education. Credit will be given only for courses that were completed during the appropriate licensing period.

(A) Instructors may participate in a department-approved driver education continuing education course. Evidence of completion of continuing education shall be provided for each instructor during the individual license renewal period on department forms or the equivalent. The instructor receiving instruction and the facilitator, presenter, or the school owner providing the instruction shall sign the form.

(B) Credit may also may be given for any of the following:

(i) successful completion of a postsecondary course that pertains to instruction techniques or instruction related to driver education as provided by an accredited college or university. Evidence of completion shall be a copy of official school documentation indicating a passing grade.

(ii) successful completion of national, state, or regionally sponsored in-service workshops, seminars, or conferences. These programs must pertain to subject matters that relate to the practice of driver education or teaching techniques.

(iii) successful completion of an approved six-hour driving safety, specialized, or drug and alcohol driving awareness course once every three years if the licensee is not endorsed or has not been endorsed as an instructor in that program for a period of one year previous to class attendance, or

(iv) successful completion of an approved continuing education course provided by a licensed driver education school.

(2) Carryover credit of continuing education hours is not permitted.

(3) A licensee may not receive credit for completing the same course more than once every three years.

(4) A licensed driver education instructor who teaches an approved driver education continuing education course may receive credit for attending continuing education.

(5) A licensed driver education instructor will not receive credit for driver education continuing education by completing or teaching a driving safety continuing education course approved for driving safety only or by completing a driver education course exclusively for adults.

(e) All driver education instructor license endorsement changes shall require the following:

(1) written documentation showing all applicable educational requirements have been met to justify endorsement changes; and

(2) the annual licensing fee.

(f) All other license change requests, including duplicate instructor licenses or name changes, shall be made in writing and shall include payment of the duplicate instructor license fee.

(g) An instructor must notify the department of a change of address in writing within thirty (30) days of the change. Address changes do not require a fee.

§84.45. Student Progress.

Appropriate standards shall be implemented to ascertain the progress of the students.

(1) Progress standards shall meet the requirements of the Program of Organized Instruction for Driver Education and Traffic Safety approved by the department.

(2) Each primary school shall submit to the department for approval procedures to ensure that each student who attends the primary school and all branch schools demonstrates an acceptable level of mastery of the Program of Organized Instruction for Driver Education and Traffic Safety. Mastery is not related to passing the written examination for a driver's license administered by the Texas Department of Public Safety. Successful completion and mastery are prerequisites to awarding a grade of 70% or above.

(3) One or more of the following methods shall determine evidence of successful completion and mastery:

(A) unit tests;

(B) written assignments;

(C) skills performance checklist; and

(D) comprehensive examinations of knowledge and skills.

(4) The instructor must certify that each student successfully mastered all course content before the student is awarded successful completion of a driver education program.

§84.46. Attendance and Makeup.

(a) Written or electronic records of student attendance shall be prepared daily to document the attendance and absence of the students. A student must make up any time missed. Electronic signatures shall comply with Texas Business and Commerce Code, Chapter 322.

(b) Schools are allowed five minutes of break per instructional hour.

(c) Driver education training provided by the school is limited to five hours per day. Classroom instruction shall not exceed two hours per day, excluding makeup work. In-car instruction provided by the school shall not exceed three hours per day as follows:

(1) three hours or less of in-car training; however, behind-the-wheel instruction is limited to one hour per day, except as provided in subsection (d) of this section; or

(2) three hours or less of simulation instruction; or

(3) three hours or less of multicar range instruction; or

(4) any combination of the methods delineated in this subsection that does not exceed three hours per day.

(d) A 2-hour increment of behind-the-wheel instruction may be offered once during the behind-the-wheel instruction for each student and shall include 10 minutes of instructional break after 55 minutes of instruction as identified in §84.500 (relating to Courses of Instruction for Driver Education Schools).

(e) A student must complete the hours of instruction for the required classroom and in-car phases of the minor and adult driver education course, including any makeup lessons, within the timeline specified in the original student enrollment contract.

(f) Schools shall submit a makeup policy to the department for approval. All absences are subject to the attendance policy regardless of whether the student attends makeup lessons. Students may be allowed to complete up to ten hours of classroom makeup work assignments outside of regularly scheduled classroom instruction. Schools shall not initiate nor encourage absences. Makeup policies shall adhere to the following requirements:

(1) For a policy that allows a student to attend a missed lesson on the same date or at a later date at a regularly scheduled class, the class shall be engaged in the same lesson the student missed previously.

(2) For a policy that allows a student to perform an individual makeup lesson, a sample of each makeup lesson, clearly labeled as "makeup for the driver education course," shall be available for review by the department at the school. Each lesson shall be clearly identified as a makeup lesson and identified as to the units of instruction to be covered. Evidence of makeup completed outside of regularly scheduled classroom instruction shall be placed in the student file.

(g) A school may allow a student to attend an alternative class on the same calendar day if the sequence of instruction will be maintained by the identical lesson being offered. The student instruction record shall reflect the time of day the alternative class was attended. A student selecting alternative scheduling shall not be considered absent.

(h) Except as provided in subsection (f) of this section, the enrollment of students who do not complete all required instructional hours within the timelines specified in the original student enrollment contract will be terminated.

(i) Variances to the timelines for completion of the driver education instruction stated in the original student enrollment contract may be made at the discretion of the school owner and must be agreed to in writing by the parent or guardian.

§84.47. Student Conduct Policy.

A statement regarding the following shall be provided to the parent or guardian signing the contract:

(1) conditions for dismissal; and

(2) conditions for reentry of students.

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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Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-8179

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SUBCHAPTER D. PARENT TAUGHT DRIVER EDUCATION

16 TAC §84.50 - §84.52

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.50. Parent Taught Driver Education Program Requirements.

(a) Prior to teaching a department-approved parent taught driver education course, a parent or other individual authorized under §1001.112 of the Code, must submit a completed Request for Parent Taught Driver Education Program Guide form with a non-refundable fee to the department.

(b) After receiving the Parent Taught Driver Education Program Guide, the instructor must obtain one of the department-approved parent taught driver education courses to fulfill program requirements.

(c) The parent taught driver education course provider will provide a control-numbered DE-964.

(d) The program includes both classroom and in-car instruction. Classroom instruction is limited to two hours per day and in-car instruction is limited to two hours per day.

(e) The parent or other individual authorized under §1001.112 of the Code, may teach both or utilize a licensed or public driver education school for either phase.

(f) The fourteen (14) hours of in-car instruction must be taught under one program; either parent taught or a licensed or public driver education school. All previous driver education hours must be repeated if the method of instruction changes prior to completion of either phase.

(g) The remaining hours of classroom following Module One: Traffic Laws, must be taught under one program, either parent taught or a licensed or public driver education school.

(h) The additional thirty (30) hours of behind-the-wheel practice must be completed in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2).

(i) A student may apply to the Department of Public Safety for a learner license after completion of the objectives found in Module One: Traffic Laws.

(j) Behind-the-wheel driver education instruction may be conducted in any vehicle that is legally operated with a Class C driver license on a Texas highway.

(k) Behind-the-wheel driver education instruction may begin after the student receives a learner license. The required curriculum that must be followed includes: minimum of 44 hours that includes: 7 hours behind the wheel instruction in the presence of a parent or other individual authorized under §1001.112 of the Code; 7 hours of in-car observation in the presence of a parent or other individual authorized under §1001.112 of the Code; and 30 hours of behind the wheel instruction, including at least 10 hours at night, in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2).

§84.51. Parent Taught Submission of Course for Department Approval.

(a) If the curriculum and all materials meet or exceed the minimum standards set forth in §1001.212 of the Code, the department will approve the course. No more than 640 minutes of the required hours of classroom instruction delivered via multimedia may be counted.

(b) Notification of approval or denial will be sent to the requesting entity. Deficiencies will be noted in cases of denial. Any substantive change in course curriculum or materials will require submission for approval according to subsection (a) of this section.

(c) A written request is required within thirty (30) days if there is any change relating to an approved course, including contact information, company name, and course titles. Updated information will be included as soon as practical.

(d) The department will retain submitted materials according to the department's retention schedule.

(e) The department has authority to require course re-approval due to changes in parent taught driver education curriculum requirements, state law, or administrative rules. The department will notify the parent taught driver education course provider when re-approval is required. The course provider will have ninety (90) days from the date of notification to submit the requested information. Failure to adequately respond within the required time will result in cancellation of the course approval. The department will review the course material and make a determination as to adoption in a timely manner.

(f) A parent taught driver education course submitted for department review may be denied upon finding:

(1) that the course does not meet the standards required under §1001.212 of the Code; or

(2) the materials used were not approved by the department.

(g) A notice of denial will be sent to requesting entity. The requesting entity will have ninety (90) days to correct the noted deficiencies. If the requesting entity fails to meet approval criteria, the course will be denied. If a course is denied by the department, the requesting entity must wait thirty (30) days before submitting a new parent taught driver education course for approval by the department.

§84.52. Cancellation of Department Approval.

(a) A department-approved parent taught driver education course may have its approval cancelled upon a finding:

(1) That the course does not meet the standards required under §1001.212 of the Code, or

(2) The materials used were not approved by the department.

(b) Prior to cancellation, the department will allow the parent taught driver education course provider ninety (90) days from the date of notification the opportunity to correct the noted deficiencies in the curriculum and remove the non-approved material.

(1) Failure to adequately respond within the required time will result in cancellation of the course.

(2) If the parent taught driver education course is cancelled by the department, all course information will be removed from the Parent Taught Driver Education Program Guide and the department's website immediately.

(3) If a parent taught driver education course is cancelled by the department, the entity must wait thirty (30) days before submitting a new Parent Taught Driver Education Course for approval by 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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SUBCHAPTER E. DRIVING SAFETY SCHOOLS, COURSE PROVIDERS AND INSTRUCTORS

16 TAC §§84.60 - 84.64

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.60. Driving Safety School Licensure Requirements.

(a) Application for a driving safety school. An application for a license for a driving safety school shall be made on forms prescribed by the department and submitted to the department. The application must:

(1) include individual requests for approval for each multiple classroom of the school. The applications shall be made on forms provided by the department. The driving safety school shall receive department approval for each location prior to advertising or offering a driving safety course at the location; and

(2) include verification from the licensed course provider that the school is authorized to provide the approved driving safety or specialized driving safety course and that the school will operate in compliance with all course provider policies and procedures.

(b) Verification of Ownership of a Driving Safety School. In the case of an original or change of owner application for a driving safety school, the owner of the school shall provide verification of ownership.

(c) Purchase of driving safety school.

(1) A person or persons purchasing a licensed driving safety school shall obtain an original license.

(2) The contract or any instrument transferring the ownership of the driving safety school shall include the following statements.

(A) The purchaser shall assume all refund liabilities incurred by the seller or any former owner before the transfer of ownership; and

(B) The purchaser shall assume the liabilities, duties, and obligations under the enrollment contracts between the students and the seller, or any former owner.

(d) New location.

(1) The owner of a driving safety school shall notify the department in writing of any change of address of a driving safety school at least fifteen (15) working days before the move.

(2) The owner of the school must submit the appropriate fee and all required documents. A driving safety school license may be issued after the required documents are approved.

(e) A complete application for the renewal of a license for a driving safety school must include the following:

(1) completed application form for renewal;

(2) current list of instructors;

(3) current list of classrooms;

(4) annual renewal fee, if applicable; and

(5) any other revision or evidence of which the school has been notified in writing that is necessary to bring the school's application for a renewal license to a current and accurate status.

(f) Denial, revocation, or conditional license. For schools approved to offer only one driving safety course, the authority to operate a driving safety school shall cease if the course provider license is denied or revoked or if the course provider removes all authorization to teach the course. The license of the driving safety school will remain valid for sixty (60) calendar days to allow the school owner to obtain approval to operate under a different course provider license. No instruction will be allowed until a new program has been secured to teach. At the end of the 60-day period, the school license shall be revoked unless the school will offer an approved course. A current driving safety school license shall not be renewed without an approved course.

(g) School closure.

(1) A school shall forward all records to the course provider responsible for the records within fifteen (15) business days of closure.

(2) The course provider shall provide the department with written notice of a school closure within five (5) business days after being notified of closure.

(3) The department may declare a school to be closed:

(A) as of the last day of attendance when written notification is received by the department from the school owner or course provider stating that the school will close;

(B) when department staff determine by means of an on-site inspection that the school facility has been vacated without prior notification of change of address and without approval of future plans to continue to operate;

(C) when the school owner allows the school license to expire; or

(D) when the school does not have the facilities and equipment to operate pursuant to this subchapter.

§84.61. Driving Safety School and Course Provider Responsibilities.

(a) Course providers must be located, or maintain a registered agent, in the State of Texas. All instruction in a driving safety or specialized driving safety course shall be performed in locations approved by the department and by department licensed instructors. However, a student instructor trainee may teach the 12 hours necessary for licensing in a department approved location under the direction and in the presence of a licensed driving safety or specialized driving safety instructor trainer who has been trained in the curriculum being instructed.

(b) Each course provider or employee shall:

(1) ensure that instruction of the course is provided in schools currently approved to offer the course, and in the manner in which the course was approved;

(2) maintain a current mailing address with the department;

(3) ensure that the course is provided by persons who have a valid current instructor license with the proper endorsement issued by the department, except as provided in subsection (a) of this section;

(4) ensure that schools and instructors are provided with the most recent approved course materials and relevant data and information pertaining to the course within sixty (60) days of approval. Instructor training may be required and shall be addressed in the approval notice;

(5) ensure that applications for licenses or approvals are forwarded to the department within ten (10) days of receipt at the course provider facilities;

(6) ensure that instructor performance is monitored. A written plan describing how instructor performance will be monitored and evaluated shall be provided to the schools. The plan shall identify the criteria upon which the instructors will be evaluated, the procedure for evaluation, the frequency of evaluation (a minimum of once a year), and the corrective action to be taken when instructors do not meet the criteria established by the course provider. The instructor evaluation forms must be kept on file either at the course provider or school location for a period of one year;

(7) develop and maintain a means to ensure the security and integrity of student information, especially financial and personal information, in transit and at rest;

(8) develop and maintain a means to ensure the privacy of student data, including personal and financial data, and make the corporate privacy policy available to all course students;

(9) develop and maintain a department-approved method for printing and issuing original and duplicate uniform certificates of course completion that, to the greatest extent possible, prevents the unauthorized production or misuse of the certificates;

(10) report original and duplicate certificate data, by secure electronic transmission, to the department within thirty (30) days of issue using guidelines established and provided by the department. The issue date indicated on the certificate shall be the date the course provider mails the certificate to the student; and

(11) ensure that the front of each uniform certificate of course completion contains the department complaint contact information and current department telephone number in a font that is visibly recognizable.

(c) Each driving safety school owner-operator or employee shall:

(1) ensure that each individual permitted to give instruction at the school or any classroom location has a valid current instructor's license with the proper endorsement issued by the department, except as provided in subsection (a) of this section;

(2) prohibit an instructor from giving instruction or prohibit a student from receiving instruction if that instructor or student exhibits any effects of being intoxicated or otherwise impaired;

(3) provide instruction or allow instruction to be provided only in courses that are currently on the school's list of approved courses;

(4) evaluate instructor performance in accordance with the course provider plan;

(5) develop and maintain a means to ensure the security and integrity of student information, especially financial and personal information, in transit and at rest;

(6) pay a fee to the course provider that is equal to the fee paid by the course provider to the department for course completion certificate numbers for original certificates provided for the students of that school within seven (7) calendar days of the date each student successfully completes the driving safety course.

§84.62. Course Provider License Requirements.

(a) Application for course provider. An application for a license for a course provider shall be made on forms prescribed by the department. An application from a course provider that is a primary consignee shall include evidence of permission from the course owner to operate as the primary consignee.

(b) Bond requirements for course provider. In the case of an original or a change of owner application, an original bond shall be provided in the amount of $25,000. In the case of a renewal application, an original bond or a continuation agreement for the approved bond currently on file shall be submitted. The bond or the continuation agreement shall be executed on the form prescribed by the department.

(c) Course provider license. The course provider license shall indicate the name of the driving safety course for which approval is granted exactly as stated in the application for the course approval.

(d) Verification of ownership for course provider. In the case of an original or change of owner application for a course provider, the owner of the course provider shall provide verification of ownership.

(e) Adequate educational and experience qualifications. The course provider shall provide as part of the application sufficient documentation to support adequate educational and experience qualifications. Verifiable education and/or experience in administration or supervision shall be required. Adequate educational and experience qualifications have been satisfied if the course provider meets one of the following.

(f) A new course provider shall submit evidence of a combined total of three years of driver and traffic safety education or experience and administrative/management experience; however, a minimum of six months in each shall be required.

(g) Purchase of course provider.

(1) A person or persons purchasing a licensed course provider shall obtain an original license. The application for a new course provider that is a primary consignee shall include evidence of permission from the course owner to operate as the primary consignee.

(2) The contract or any instrument transferring the ownership of the course provider shall include the following statements:

(A) The purchaser shall assume all refund liabilities incurred by the seller or any former owner before the transfer of ownership; and

(C) The purchaser shall assume the liabilities, duties, and obligations under the enrollment contracts between the students and the seller, or any former owner.

(h) New location. The department shall be notified in writing of any change of address of a course provider at least fifteen (15) working days before the move. The appropriate fee and all documents must also be submitted.

(i) Renewal of course provider license. A complete application for the renewal of a license for a course provider shall be submitted before the expiration of the license and shall include the following:

(1) completed application for renewal;

(2) annual renewal fee, if applicable;

(3) a new continuing education course; and

(4) executed bond or executed continuation agreement for the bond currently on file with the department.

(j) Course provider closure. A course provider owner shall notify the department of the closure date of the course provider at least fifteen (15) business days before the closure. A course provider shall make all records and all used and unused uniform certificates of course completion and course completion certificate numbers available for review by the department within thirty (30) days of the date the course provider ceases operation.

(k) Facility location. Course providers and all course provider facilities that process, deliver, or store curriculum materials, student records, or uniform certificates of course completion and certificate numbers to be used for Texas courses must be located within the United States.

§84.63. Uniform Certificate of Course Completion for Driving Safety or Specialized Driving Safety Course.

(a) Course provider responsibilities. Course providers shall be responsible for original and duplicate uniform certificates of course completion in accordance with this subsection.

(1) The course provider of a driving safety or specialized driving safety course shall ensure that each instructor completes the verification of course completion document approved by the department. The verification of course completion document shall contain a statement to be signed by the instructor that states: "Under penalty of law, I attest to the fact that the student whose name and signature appear on this document has successfully completed the number of hours as required under Texas Education Code, Chapter 1001, and that any false information on this document will be used as evidence in a court of law and/or administrative proceeding." This verification of course completion document shall be returned to the course provider upon completion of each driving safety class and maintained for no less than three years.

(2) The course provider shall implement and maintain a policy which effectively ensures protective measures are in use at all times for securing original and duplicate uniform certificates of course completion and course completion certificate numbers. The records and unissued or unnumbered original and duplicate uniform certificates of course completion shall be readily available for review by representatives of the department.

(3) The course provider shall maintain electronic files with data pertaining to all course completion certificate numbers purchased from the department. The course provider shall make available to the department upon request an ascending numerical accounting record of the numbered uniform certificates of completion issued. The course provider shall ensure security of the data.

(4) The course provider shall ensure that effective measures are taken to preclude lost data and that a system is in place to recreate electronic data for all certificate numbers, whether used or not used, and all certificates that have been issued.

(5) Course providers shall issue and mail uniform certificates of course completion only to students who have successfully completed all elements of the course provider's approved driving safety or specialized driving safety course taught by department-licensed instructors in department-approved locations as indicated on the verification of course completion document or student footprint.

(6) Course providers shall ensure that adequate training is provided regarding course provider policies and updates on course provider policies to all driving safety schools and instructors offering their approved driving safety or specialized driving safety course.

(7) Course providers shall report all unaccounted original and duplicate course completion certificate numbers or unissued certificates or duplicates to the department within five business days of the discovery of the incident. In addition, the course provider shall be responsible for conducting an investigation to determine the circumstances surrounding the unaccounted items. A report of the findings of the investigation, including preventative measures for recurrence, shall be submitted for approval to the department within thirty (30) days of the discovery.

(8) Each unaccounted or missing original or duplicate course completion certificate number or blank or unissued original or duplicate uniform certificate of completion may be considered a separate violation. This may include lost, stolen, or otherwise unaccounted original or duplicate course completion certificate number or blank or unissued original or duplicate uniform certificates of course completion.

(9) Course providers shall mail all original and duplicate uniform certificates of course completion using first-class or enhanced postage or an equivalent commercial delivery method.

(10) Course providers shall not transfer course completion certificate numbers to a course other than the course for which the certificates were ordered from the department.

(11) No course provider or employee shall complete, issue, or validate a uniform certificate of course completion to a person who has not successfully completed all elements of the entire course as verified by a department-licensed instructor.

(12) No course provider or employee shall issue, mail, transfer, or transmit an original or duplicate uniform certificate of course completion bearing the serial number of a certificate or duplicate previously issued.

(13) Course providers shall sequentially number original uniform certificates of course completion from the block of numbers purchased from the department.

(14) When a duplicate uniform certificate of course completion is issued by a course provider, the duplicate certificate shall bear a serial number from the block of numbers purchased from the department by the course provider. The duplicate certificate of course completion shall clearly indicate the number of both the duplicate and the original serial number of the certificate being replaced.

(15) Any item on a duplicate uniform certificate of course completion that has different data than that shown on the original certificate must clearly indicate both the original data and the replacement

data; for example, a change in the date of course completion must show the correct date and "changed from XX," where "XX" is the date shown on the original uniform certificate of course completion.

(16) The fee for a duplicate uniform certificate of course completion is $10. If the student requests a duplicate within thirty (30) days of the date of issue of the original certificate because the original was not received or was damaged so as to be unusable or was issued with errors due to no fault of the student, the course provider shall issue the duplicate at no cost to the student. Course providers shall ensure that schools endorsed to offer the approved course are aware of this rule and shall include this information in the student enrollment contract.

(17) Course providers shall implement and maintain methods for efficiently issuing and mailing original uniform certificates of course completion so that issuance of duplicate certificates is kept at a minimal rate. A ratio of duplicates to originals that would indicate to a reasonable and prudent person that the course provider has failed to minimize duplicates constitutes evidence that a violation of §1001.056(c-1) of the Code, exists and shall be sufficient to initiate proceedings to sanction or condition the license of the course provider in question.

(b) School owner responsibilities. In order to prevent misuse of uniform certificates of course completion, driving safety school owners shall ensure that:

(1) the course provider policies are followed and communicated to all instructors and employees of the school; and

(2) all records are returned to the course provider in a timely manner as set forth by the course provider.

(c) Instructor responsibilities. In order to prevent misuse of uniform certificates of course completion, driving safety and specialized driving safety instructors shall ensure that:

(1) all records are returned to the driving safety school to be forwarded to the course provider within the time allowed by course provider policy;

(2) the verification of course completion document provided by the course provider is signed by the instructor who conducted the class upon completion of the class;

(3) the entire course is completed prior to signing the verification of course completion document;

(4) the court information is obtained from each student taking the driving safety or specialized driving safety class for the purposes of Texas Code of Criminal Procedure, Article 45.051 and 45.0511; and

(5) the instructor adheres to the school and course provider policies.

§84.64. Driving Safety Instructor License Requirements.

(a) Application for licensing as a driving safety or specialized driving safety instructor shall be made on forms prescribed by the department. A person is qualified to apply for a driving safety or specialized driving safety instructor license who holds a valid Class A, B, C, or CDL driver's license, other than learner license or provisional license, for the preceding three years in the areas for which the individual is to teach, which has not been revoked or suspended in the preceding three years.

(b) A person applying for an original driving safety or specialized driving safety instructor's license must submit to the department the following:

(1) a complete application prescribed by the department;

(2) the required fees;

(3) documentation showing that all applicable educational requirements have been met; and

(4) a clear and legible photocopy of the current, valid driver's license issued to the applicant.

(c) A person applying for a driving safety or specialized driving safety instructor license may qualify for the following endorsements.

(1) Driving safety instructor. The application shall include evidence of completion of 16 hours of training covering techniques of instruction and in-depth familiarization with material contained in the driving safety curriculum in which the individual is being trained and 12 hours of practical teaching in the same driving safety course and a statement signed by the course provider recommending the applicant for licensing. Alternatively, a currently licensed instructor may submit a copy of a current driving safety instructor license, a specialized driving safety instructor license, or a current driver education instructor license and evidence of 6 hours of training and 6 hours of demonstrative presentation teaching or practical teaching in the curriculum to be licensed. The 6 hours of training shall cover techniques of instruction and in-depth familiarization with material contained in the driving safety curriculum. The 6 hours of demonstrative presentation or practical teaching shall be in the driving safety curriculum and under the direct supervision of a licensed driving safety instructor trainer endorsed in the same driving safety curriculum.

(2) Specialized driving safety instructor. The application shall include evidence of completion of 16 hours of training and 12 hours of practical teaching. The 16 hours of training shall cover techniques of instruction and in-depth familiarization with material contained in the specialized driving safety curriculum. The 12 hours of practical teaching shall be in the same specialized driving safety curriculum and shall be accompanied by a statement signed by the course provider recommending the applicant for licensing. Alternatively, the applicant may submit a copy of a current driving safety instructor license or current or past certification as a National Highway Traffic Safety Association Child Passenger Safety technician or instructor and 6 hours of training and 6 hours of demonstrative presentation or practical teaching. The 6 hours of training shall cover techniques of instruction and in-depth familiarization with material contained in the specialized driving safety curriculum. The 6 hours of demonstrative presentation or practical teaching shall be in the same specialized driving safety curriculum and under the direct supervision of a licensed specialized driving safety instructor trainer endorsed in the same specialized driving safety curriculum.

(3) Driving safety instructor trainer. The application shall include a statement signed by the driving safety course provider (if different than the applicant) recommending the instructor as an instructor trainer and evidence of one of the following:

(A) a Texas teaching certificate with driver education endorsement and 12 hours of experience, exclusive of the 36-hour instructor development course, in the same driving safety course for which the individual is to teach;

(B) a teaching assistant certificate and 12 hours of experience, exclusive of the 36-hour instructor development course, in the same driving safety course for which the individual is to teach;

(C) completion of all the requirements of a driving safety instructor and 60 hours of verifiable experience as a licensed driving safety instructor, of which the most recent 12 hours shall be in the same driving safety course for which the individual is to teach; or 6 clock hours in a teaching methodology course; or

(D) proof of authorship of an approved driving safety course. The applicant who will provide the initial instructor training for a newly approved course shall demonstrate to the department the ability to teach the course and instructor training course prior to being licensed.

(4) Specialized driving safety instructor trainer. The application shall include a statement signed by the driving safety course provider (if different than the applicant) recommending the instructor as an instructor trainer, a copy of current or past certification as a National Highway Traffic Safety Association Child Passenger Safety technician or instructor, and evidence of one of the following:

(A) a Texas teaching certificate with driver education endorsement and 12 hours of experience, exclusive of the 36-hour instructor development course, in the same specialized driving safety course for which the individual is to teach;

(B) a teaching assistant certificate and 12 hours of experience, exclusive of the 36-hour instructor development course, in the same specialized driving safety course for which the individual is to teach;

(C) completion of all the requirements for a specialized driving safety instructor license and 60 hours of verifiable experience as a licensed driving safety instructor, of which the most recent 12 hours shall be in the same specialized driving safety course for which the individual is to teach; or 6 clock hours in a teaching methodology course; or

(D) proof of authorship of an approved specialized driving safety course. The applicant who will provide the initial instructor training for a newly approved course shall demonstrate to the department the ability to teach the course and the instructor training course prior to being licensed.

(5) Instructor development course driving safety instructor trainer. The application shall include evidence of:

(A) completion of all the requirements for a driving safety instructor trainer plus an additional 30 hours of verifiable experience as a licensed driving safety instructor or driving safety instructor trainer in the same driving safety course for which the individual is to teach, or proof of authorship of an approved driving safety course. The applicant who will provide the initial instructor training for a newly approved course shall demonstrate to the department the ability to teach the course and the instructor training course prior to being licensed or 6 clock hours in a teaching methodology course; and

(B) a statement signed by the driving safety course provider, if different than the applicant, recommending the individual as an instructor development course instructor trainer in driving safety.

(6) Instructor development course specialized driving safety instructor trainer. The application shall include a copy of a current or past certification as a National Highway Traffic Safety Association Child Passenger Safety technician or instructor and evidence of:

(A) completion of all the requirements for a specialized driving safety instructor trainer plus an additional 30 hours of verifiable experience as a licensed specialized driving safety instructor or specialized driving safety instructor trainer in the same specialized driving safety course for which the individual is to teach, or proof of authorship of an approved specialized driving safety course. The applicant who will provide the initial instructor training for a newly approved course shall demonstrate to the department the ability to teach the course and the instructor training course or 6 clock hours in a teaching methodology course prior to being licensed; and

(B) a statement signed by the driving safety course provider, if different than the applicant, recommending the individual as an instructor development course instructor trainer in specialized driving safety.

(d) A renewal application for a driving safety or specialized driving safety instructor license must be prepared using the following procedures.

(1) Application for renewal of an instructor license shall be made on a form prescribed by the department and submitted by the course provider.

(2) The annual instructor licensing fee and evidence of continuing education shall accompany the application.

(e) Continuing education requirements include the following:

(1) Evidence of completion of continuing education shall be provided for each instructor during the individual license renewal period on forms approved by the department. A verification form indicating completion shall be provided to the department by the course provider on behalf of the instructors. The form shall be signed by the instructor receiving the training and the course provider or designee.

(2) Carryover credit of continuing education hours shall not be permitted.

(3) A licensee may not receive credit for attending the same course more than once during the same licensing period.

(4) A licensed individual who teaches an approved continuing education course may receive credit for attending continuing education.

(5) A driving safety or specialized driving safety continuing education course shall not be used for the continuing education requirement for a driver education instructor license.

(f) An instructor who has allowed a previous license to expire shall file an original application on a form provided by the department that is submitted by the course provider. The application shall include the processing and annual instructor licensing fees and evidence of continuing education completed within the last year. Evidence of educational experience may not be required to be resubmitted if the documentation is on file at the department.

(g) All driving safety and specialized driving safety instructor license endorsement changes shall require the following:

(1) written documentation showing all applicable educational requirements have been met to justify endorsement changes;

(2) the required fees; and

(3) completion of renewal requirements for current endorsements.

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

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SUBCHAPTER F. DRUG AND ALCOHOL AWARENESS PROGRAMS AND INSTRUCTORS

16 TAC §§84.70 - 84.72

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.70. Drug and Alcohol Driving Awareness Program School Licensure Requirements.

(a) Application for school. An application for a license for a Drug and Alcohol Driving Awareness Program school shall be made on forms prescribed by the department and shall include:

(1) individual requests for approval for each multiple classroom of the school. The applications shall be made on forms provided by the department. The school shall receive the department approval for each location prior to advertising or offering a program at the location; and

(2) verification from the course provider that the school is authorized to provide the approved drug and alcohol driving awareness program.

(b) Approval. The department shall approve the application of a drug and alcohol driving awareness school if the department finds that the school owner and employees are of good reputation and the school does not owe a civil penalty under Texas Education Code, Chapter 1001.

(c) Verification of ownership for drug and alcohol driving awareness school. In the case of an original or change of owner application for a school, the owner of the school shall provide verification of ownership.

(d) School name. A drug and alcohol driving awareness school license shall not contain more than one school name.

(e) Purchase of drug and alcohol driving awareness school.

(1) A person or persons purchasing a licensed school shall obtain an original license.

(2) The contract or any instrument transferring the ownership of the drug and alcohol driving awareness school shall include a statement that the purchaser shall assume the liabilities, duties, and obligations under the enrollment contracts between the students and the seller, or any former owner.

(f) New location.

(1) The owner of a drug and alcohol awareness school must notify the department in writing of any change of address of a drug and alcohol driving awareness school at least three working days before the move.

(2) The school must submit the appropriate fee and all documents designated by the department as being necessary.

(3) The school must maintain a current mailing address and telephone number with the department.

(g) Renewal of drug and alcohol driving awareness school license. A complete application for the renewal of a license for a drug and alcohol driving awareness school shall be submitted before the expiration of the license in accordance with Texas Education Code, Chapter 1001, and shall include the following:

(1) completed application for renewal;

(2) renewal fee, if applicable; and

(h) Denial, revocation, or conditional license. For schools approved to offer only one drug and alcohol driving awareness program, the authority to operate a school shall cease if the program approval is revoked or if the course provider removes all authorization to teach the program. The license of the school will remain valid for sixty (60) calendar days to allow the school owner to obtain approval to provide a different program. No instruction will be allowed until a new program has been secured to teach. At the end of the 60-day period, the school license will be revoked unless an approved program will be offered. The current school license shall not be renewed without an approved program.

(i) School closure.

(1) The school owner shall notify the department and the course provider at least fifteen (15) business days before the anticipated school closure. The school owner shall provide written notice to the department and the course provider of the actual discontinuance of the operation within five working days after the cessation of classes. A school shall forward all records to the course provider responsible for the records within five (5) days.

(2) The course provider shall provide the department with written notice of a school closure within five (5) working days after knowledge of cessation of classes.

(3) The department may declare a school to be closed:

(A) as of the last day of attendance when written notification is received by the department from the school or course provider stating that the school will close;

(B) when the department staff determine by means of an on-site visit that the school facility has been vacated without prior notification of change of address given to the department and without the department approval of future plans to continue to operate;

(C) when the school owner allows the school license to expire; or

(D) when the school does not have the appropriate facilities and equipment to operate.

§84.71. School and Course Provider Responsibilities.

(a) For purposes of this subsection, the term 'Course provider' means an enterprise that:

(1) maintains a place of business or solicits business in Texas;

(2) is operated by an individual, association, partnership, or corporation; and

(3) has received an approval for a drug and alcohol awareness program from the executive director or has been designated by a person who has received that approval to conduct business and represent the person in Texas.

(b) Course providers must be located, or maintain a registered agent, in the State of Texas. All instruction in a drug and alcohol driving awareness program shall be performed in locations approved by the department and by department-licensed instructors.

(c) Each course provider or employee shall:

(1) ensure that instruction of the program is provided in schools currently approved to offer the program, and in the manner in which the program was approved;

(2) ensure that the program is provided by persons who have a valid current instructor license with the proper endorsement issued by the department, except as provided in subsection (a) of this section;

(3) ensure that schools and instructors are provided with the most recent approved program materials and relevant data and information pertaining to the program within sixty (60) days of approval. Instructor training may be required and shall be addressed in the approval notice;

(4) develop and maintain a means to ensure the security and integrity of student information, especially financial and personal information, in transit and at rest;

(5) develop and maintain a means to ensure the privacy of student data, including personal and financial data, and make the corporate privacy policy available to all course students; and

(6) ensure that each certificate of program completion contains the department complaint contact information.

(d) Each drug and alcohol driving awareness school owner-operator or employee shall:

(1) ensure that each individual permitted to give instruction at the school or any classroom location has a valid current instructor license with the proper endorsement issued by the department, except as provided in subsection (a) of this section;

(2) prohibit an instructor from giving instruction or prohibit a student from receiving instruction if that instructor or student is using or exhibits any evidence or effect of an alcoholic beverage, controlled substance, drug, abusable glue, aerosol paint, or other volatile chemical as those terms are defined in the Alcoholic Beverage Code and the Health and Safety Code;

(3) provide instruction or allow instruction to be provided only in courses that are currently on the school's list of approved courses;

(4) complete, issue, or validate a certificate of program completion only for a person who has successfully completed the entire course;

(5) evaluate instructor performance in accordance with the course provider plan;

(6) develop and maintain a means to ensure the security and integrity of student information, especially financial and personal information, in transit and at rest; and

(7) develop and maintain a means to ensure the privacy of student data, including personal and financial data, and make the corporate privacy policy available to all course students.

(e) For the purposes of this subchapter, each person employed by or associated with any drug and alcohol driving awareness school shall be deemed an agent of the school, and the school may share the responsibility for all acts performed by the person which are within the scope of the employment and which occur during the course of the employment.

§84.72. Instructor License Requirements.

(a) Application for licensing as a drug and alcohol driving awareness program instructor shall be made on forms prescribed by the department.

(b) A person is qualified to apply for a drug and alcohol driving awareness program instructor license who holds a valid driver's license for the preceding five years which has not been suspended, revoked, or forfeited in the past three years for traffic-related violations or is knowledgeable in the areas of traffic safety and alcohol/drug use and abuse.

(c) A person applying for an original instructor license shall submit to the department the following:

(1) complete application as provided by the department;

(2) the required fees; and

(3) evidence of completion of instructor training and a statement signed by the course provider recommending the applicant for licensing. Original documentation shall be provided upon the request of the department Instructor training shall consist of 16 hours of training covering techniques of instruction and in-depth familiarization with material contained in the drug and alcohol driving awareness program curriculum in which the individual is being trained.

(4) Alternatively, the applicant may submit a copy of a current Texas Department of State Health Services Alcohol and Drug Offender Education Program Instructor license or current certification as a Texas Department of State Health Services Offender Education Counselor and 6 hours of training and 6 hours of demonstrative presentation or practical teaching. The 6 hours of training shall cover techniques of instruction and in-depth familiarization with material contained in the alcohol and drug education curriculum. The six hours of demonstrative presentation or practical teaching shall be in the same alcohol and drug education curriculum and under the direct supervision of a licensed alcohol and drug education instructor trainer endorsed in the same alcohol and drug education curriculum and shall be accompanied by a statement signed by the course provider recommending the applicant for licensing.

(d) A drug and alcohol driving awareness program instructor license shall be valid for two years.

(e) A renewal application for drug and alcohol driving awareness program instructor license must be prepared using the following procedures:

(1) A completed application for renewal of an instructor license; and

(2) renewal fee.

(f) An instructor who has allowed a previous license to expire twelve (12) or more months shall file an original application on a form prescribed by the department and remit application fees to the department.

(g) Drug and alcohol driving awareness program instructors who want to add a program endorsement to a license shall submit the following:

(1) written documentation showing all applicable educational requirements have been met to justify endorsement changes;

(2) fee; and

(3) evidence of two additional hours of training from the course provider of the drug and alcohol driving awareness program curriculum that the instructor will be licensed to teach.

(h) All other license change requests, including duplicate instructor licenses or name changes, shall be made in writing and shall include payment of the duplicate instructor license fee.

(i) The department shall be notified of an instructor's change of address in writing. Address changes shall not require payment of a fee.

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SUBCHAPTER G. GENERAL BUSINESS PRACTICES

16 TAC §§84.80 - 84.84

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.80. Names and Advertising.

(a) A licensed driver education school, driving safety school, course provider or drug and alcohol awareness school may not conduct business or advertise under a name that is deceptively similar to a name used by any other licensed driver education school, driving safety school, course provider or drug and alcohol awareness school, or tax-supported educational establishment in this state, unless specifically approved in writing by the executive director.

(b) Use of names other than the approved school name may constitute a violation of this section.

(c) Branch schools shall conduct business using the same name as the primary school.

(d) All advertisements of a multiple classroom location or alternative delivery method shall meet the requirements listed above.

§84.81. Recordkeeping Requirements.

(a) Driver Education Schools Recordkeeping Requirements.

(1) A driver education school shall accurately complete all school records and applications and furnish upon request any data pertaining to student enrollments and attendance, as well as records and necessary data required for licensure and to show compliance with the legal requirements for inspection by authorized representatives of the department. The records shall include timecards for instructors and schedules that reflect the duties and instruction times for instructors that correlate to the times that are shown on timecards.

(2) The schools shall retain all student records for at least three years. A school shall maintain the records of the students who completed driver education classes at the site of instruction for the most current twelve (12) months. The school owner shall maintain all other driver education records at a location accessible by the school owner after twelve (12) months. All records pertaining to each completed student must be kept at one location. Schools with no current enrollment may request approval from the department to transfer records to the primary school or another approved location.

(3) The school shall maintain a written or electronic daily record of attendance for all students enrolled at the instruction site. The record shall include the information specified in this subsection.

(A) Attendance records shall include legend entries. Each entry made on the legend must be made by using symbols, abbreviations, or other appropriate markings to indicate the following:

(i) absent;

(ii) makeup;

(iii) present;

(iv) date; and

(v) time.

(B) The individual student record form (classroom) for all students, including completed, terminated, or withdrawn, shall include the following:

(i) name and classroom address of the school;

(ii) full name, full address, telephone number of the student, and date of birth;

(iii) date instruction terminated, if applicable;

(iv) type and driver's license or permit number, if applicable, held by the student, including the expiration date and licensing state;

(v) month, day, year, and start and end time of instruction;

(vi) each unit of instruction;

(vii) grade earned for each unit;

(viii) instruction hours for classroom, simulators, behind-the-wheel, and observation;

(ix) initials of each instructor providing the classroom or in-car lesson. The instructor's signature and license number shall appear at least once on the form. The teacher of record shall sign all completed classroom instruction records;

(x) beginning and ending dates of the classroom phase; and

(xi) statement of assurance signed by student and instructor that the record is true and correct.

(C) The individual student record form (in-car instruction) shall contain the following entries:

(i) month, day, year, and start and end time of instruction;

(ii) each lesson of instruction;

(iii) score earned for each lesson;

(iv) name of student; and

(v) instructor's name and license number or instructor initials (if instructor's name and license number appears at least one time on the record).

(D) Each driver education school shall retain a copy of the DE-964 or ADE-1317 in the appropriate student files.

(E) Each driver education school shall, upon request, furnish each individually contracted student a duplicate of his or her instruction record when all of the courses contracted for are completed or the student otherwise ceases taking instruction at or with the school, providing all financial obligations have been met by the student.

(F) Driver education schools shall not release student records that identify the student by name or address, or may lead to such identification, except:

(i) to authorized representatives of the department;

(ii) to a peace officer;

(iii) under court order or subpoena; or

(iv) with written consent of both the student and at least one parent or legal guardian, if the student is under 18 years of age.

(b) Driving Safety Schools Recordkeeping Requirements.

(1) A driving safety school or course provider shall furnish upon request any data pertaining to student enrollments and attendance, as well as records and necessary data required for licensure and to show compliance with the legal requirements for inspection by authorized representatives of the department.

(2) The course provider shall retain all student records for at least three years. A course provider shall maintain the records of the students who completed driving safety or specialized driving safety classes for the most current twelve (12) months at the course provider location. The actual driving safety or specialized driving safety comprehension test does not have to be retained; however, the test score must be in the student's records. The division director may require a course provider to retain the actual test of each student for a designated period of time if deemed necessary by the division director to show compliance with the legal requirements.

(3) A course provider shall maintain a permanent record of instruction given to each student who received instruction to include students who withdrew or were terminated.

(4) A course provider shall not release student records that identify the student by name or address, or may lead to such identification, except:

(A) to authorized representatives of the department;

(B) to a peace officer;

(C) under court order or subpoena; or

(D) with written consent of both the student and at least one parent or legal guardian, if the student is under 18 years of age.

(c) Drug and Alcohol Awareness Schools Recordkeeping Requirements.

(1) A drug and alcohol driving awareness school or course provider shall furnish upon request any data pertaining to student enrollments and attendance, as well as records and necessary data required for licensure, and to show compliance with the legal requirements for inspection by authorized representatives of the department.

(2) The school shall retain all student records for at least three years. The actual pre- and post-program exams do not have to be retained; however, the exam scores must be in the student's records.

§84.82. Student Enrollment Contracts.

(a) Driver Education Schools Enrollment Contracts.

(1) A legal written or electronic student enrollment contract shall be executed prior to the school's receipt of any money. Electronic signatures shall comply with Texas Business and Commerce Code, Chapter 322.

(2) All driver education student enrollment contracts shall contain at least the following:

(A) the student's legal name;

(B) the student's address, including city, state, and zip code;

(C) the student's telephone number;

(D) the student's date of birth;

(E) the full legal name and license number of the primary school or the branch school;

(F) the specific course to be taught;

(G) the agreed total contract charges that itemize all tuition, fees, and other charges;

(H) the terms of payment;

(I) the number of classroom lessons;

(J) the length of each lesson and course;

(K) the school's cancellation, termination, and refund policy;

(L) a statement indicating the specific location, date, and time that classroom instruction is scheduled to begin; the date classroom instruction is scheduled to end; and the amount of time a student has to complete all classroom instruction, makeup assignments, and in-car instruction;

(M) the number of in-car lessons;

(N) the rate per classroom lesson;

(O) the rate per in-car lesson;

(P) the rates for use of a school car for a road test (if an extra charge is made);

(Q) a statement that the school maintains a business insurance policy for vehicles with coverage as required by Texas Transportation Code, Chapter 601, and uninsured or underinsured coverage;

(R) the signature of a school representative; and

(S) the student's signature or, if the driver education student is younger than 18, the signature of the parent or guardian. The signature of the parent or guardian is not required for an individual younger than 18 who is, or has been, married or whose disabilities of minority have been removed generally by law. Instead, such an individual shall:

(i) present a marriage certificate or a divorce decree (but not an annulment decree) or other satisfactory evidence of marriage or of having been married; or

(ii) present a court order showing removal of disabilities of minority; or

(iii) present a notarized parental authorization.

(3) In addition, all driver education student enrollment contracts shall contain statements substantially as follows.

(A) I have been furnished a copy of the school tuition schedule; cancellation and refund policy; and school regulations pertaining to absence, grading policy, progress, and rules of operation and conduct.

(B) The school is prohibited from issuing a DE-964 or ADE-1317 if the student has not met all of the requirements for course completion, and the student should not accept a DE-964 or ADE-1317 under such circumstances.

(C) This agreement constitutes the entire contract between the school and the student, and assurances or promises not contained herein shall not bind the school or the student.

(D) I further realize that any grievances not resolved by the school may be forwarded to Driver Education and Safety Austin, Texas 78701. The current telephone number of the department shall also be provided.

(4) A copy of the enrollment contract shall be delivered to:

(A) the student, if 18 years of age or older; or

(B) the parent or guardian that signed the contract.

(5) A copy of each enrollment contract shall be a part of the student files maintained by all driver education schools.

(6) Schools shall submit proposed or amended enrollment contracts to the department.

(7) Student enrollment contracts used at branch schools must be those approved for use at the primary school.

(8) Driver education courses exclusively for adults may use a group contract that includes more than one student's name.

(b) Driving Safety Schools Enrollment Contracts.

(1) No person shall be instructed, either theoretically or practically, or both, to operate or drive motor vehicles until after a written legal contract has been executed. A contract shall be executed prior to the school's receipt of any money.

(2) All driving safety and specialized driving safety contracts shall contain at least the following:

(A) the student's legal name and driver's license number;

(B) the student's address, including city, state, and zip code;

(C) the student's telephone number;

(D) the student's date of birth;

(E) the full legal name and license number of the driving safety school or approval number of the classroom location, as applicable;

(F) the specific name of the approved driving safety course to be taught;

(G) a statement indicating the agreed total contract charges that itemizes all tuition, fees, and other charges;

(H) the terms of payment;

(I) the number of classroom lessons;

(J) the number of behind-the-wheel lessons, if applicable;

(K) the length of each lesson or course;

(L) the course provider's cancellation and refund policy;

(M) a statement indicating the specific location, date, and time that instruction is scheduled to begin and the date classroom instruction is scheduled to end;

(N) the signature and license number of the instructor;

(O) the signature of the student or the approved equivalent for a driving safety course delivered by an alternative delivery method; and

(P) a statement that notifies the student of the course provider's security and privacy policy regarding student data, including personal and financial data.

(3) In addition, all driving safety school contracts shall contain statements substantially as follows.

(A) I have been furnished a copy of the school tuition schedule; cancellation and refund policy; and school regulations pertaining to absence, grading policy, progress, and rules of operation and conduct.

(B) The school and course provider are prohibited from issuing a uniform certificate of course completion if the student has not met all of the requirements for course completion, and the student should not accept a uniform certificate of course completion under such circumstances.

(C) This agreement constitutes the entire contract between the school and the student, and verbal assurances or promises not contained herein shall not bind the school or the student.

(D) I further realize that any grievances not resolved by the school may be forwarded to the course provider (identify name and address) and to Driver Education and Safety, Austin, Texas 78701. The current telephone number of the department shall also be provided.

(4) Driving safety or specialized driving safety may use a group contract that includes more than one student's name.

(5) A copy of each contract shall be a part of the student files maintained by the driving safety school and/or course provider.

(6) Course providers shall submit proposed or amended contracts to the division, and those documents shall be approved prior to use by schools.

(7) Contracts for group instruction must meet all legal requirements.

(8) Contracts executed in an electronic format shall be considered to contain original signatures for purposes of this section.

(c) Drug and Alcohol Awareness Schools Enrollment Contracts.

(1) No person shall be instructed in a drug and alcohol driving awareness program until after being enrolled.

(2) All drug and alcohol driving awareness enrollment forms shall provide students with the following information:

(A) Grievances not resolved by the school may be forwarded to Driver Education and Safety, Austin, Texas 78701. The current telephone number of the department shall also be provided.

(B) The school is prohibited from issuing a certificate of program completion if the student has not met all of the requirements

for program completion, and the student should not accept a certificate of program completion under such circumstances.

§84.83. Student Complaints.

(a) Primary schools and course providers shall have a written grievance procedure that is disclosed to all students. Branch schools shall follow the procedures approved for the primary school. Driving Safety schools shall follow the procedures approved for the course provider.

(b) Primary schools, driving safety schools and course providers shall make every effort to resolve disputes between students, including terminations and graduates, and the school.

(c) The front of each uniform certificate of course completion shall contain department complaint contact information and current department telephone number and email address in a font that is visibly recognizable.

§84.84. Notification of Public Interest Information and Participation.

Consumers and service recipients shall be notified of the name, mailing address, and telephone number of the department for the purpose of directing complaints to the department regarding the Driver Education and Safety Program. The notification must appear on at least one of the following:

(1) each registration form, application, or written contract for services of a person regulated under this chapter;

(2) a sign prominently displayed in the place of business of each person regulated under this chapter; or

(3) a bill for service provided by a person regulated under this chapter.

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SUBCHAPTER H. FACILITIES AND EQUIPMENT FOR DRIVER EDUCATION SCHOOL, DRIVING SAFETY SCHOOLS AND DRUG AND ALCOHOL AWARENESS SCHOOLS

16 TAC §84.90

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.90. Facilities and Equipment.

(a) Each driver education, driving safety, specialized driving safety, and drug and alcohol driving awareness school shall conduct the department approved course in a facility or facilities approved by the department.

(b) A school offering any phase of driver education shall maintain an office in a place other than a private residence; and no classroom facility for driver education programs shall be located in a private residence.

(c) The amount of classroom space for any driver education, driving safety, specialized driving safety, and drug and alcohol driving awareness school shall meet the use requirements of the maximum number of current students in class with appropriate seating and writing facilities as necessitated by the activity patterns of the course.

(d) The facilities shall meet any state and local ordinances governing housing and safety for the use designated.

(e) The classroom facilities, when used for instruction, shall contain at least the following:

(1) adequate seating facilities for all students being trained;

(2) adequate charts, diagrams, mock-ups, and pictures relating to the operation of motor vehicles (if applicable), traffic laws, physical forces, and correct driving procedures; and

(3) any materials that have been approved as a part of the course approval.

(f) Each driver education, driving safety, specialized driving safety, and drug and alcohol driving awareness school shall be provided in designated instructional areas that promote learning by ensuring that students are able to see and hear the instructor and audiovisual aids. Any facility that contains an adult-oriented business or a facility that is required to exclude patrons because of age will not be approved. Factors that will be considered in determining whether facilities promote learning include facility layout, visual and hearing distractions, and equipment functionality.

(g) A violation of the law or rules at any multiple classroom location constitutes a violation by the driving safety, specialized driving safety or drug and alcohol driving awareness school.

(h) All classroom and multiple classroom location approvals are contingent on the driving safety, specialized driving safety or drug and alcohol driving awareness school license and shall be subject to denial or revocation if such action is taken against the license of the school.

(i) The driving safety course provider location shall be the physical address as stated on the course provider license.

(j) No drug or alcohol awareness program may be taught in any location where alcohol is present.

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SUBCHAPTER I. INSPECTIONS

16 TAC §§84.100 - 84.102

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.100. Inspections--General.

(a) Driver Education schools shall be inspected periodically, or as a result of a complaint. These inspections will be performed to determine compliance with the requirements of the Code and this chapter.

(b) Inspections shall be performed during the normal operating hours of the driver education school. Except for initial inspections of driver education schools, the department may conduct inspections under the Act and this chapter without advance notice.

(c) The department inspector will contact the driver education school owner, manager, or their representative upon arrival at the school, and before proceeding with the inspection.

(d) The driver education school owner, manager, or representative shall cooperate with the inspector in the performance of the inspection.

(e) Driver education schools shall display a copy of the establishment's most recent inspection report issued by the department in a common area, lobby or hallway location within the building in which the school is located and accessible to the public without assistance or permission during all hours in which the school is in operation.

§84.101. Initial Inspections--Inspection of Driver Education Schools Before Operation.

(a) Any new or relocated driver education school must be inspected and approved by the department before it may operate. Additionally, a driver education school that has changed ownership must be inspected and approved by the department, but may continue to operate prior to inspection.

(b) The driver education school owner shall request an initial inspection from the department.

(c) Upon receipt of the owner's request, the department shall schedule the initial inspection date and notify the owner.

(d) Upon completion of the initial inspection, the owner shall be advised in writing of the results. The inspection report must indicate whether the driver education school meets or does not meet the minimum requirements of the Code and this chapter.

(e) For driver education schools that do not meet the minimum requirements, the report will reflect those minimum requirements that remain to be addressed and corrected by the owner, and a timeline for the corrections to be made.

(f) A driver education school that does not meet the minimum requirements on initial inspection must be re-inspected. The driver education school owner must submit the request for re-inspection before the department will perform the re-inspection.

§84.102. Periodic Inspections.

(a) Each driver education school shall be inspected at least one time in a calendar year.

(b) Upon completion of the inspection, the owner shall be advised in writing of the results. The inspection report will indicate whether the inspection was approved or not approved, and will describe any violations identified during the inspection.

(c) For inspections that are not approved, the inspection report will identify violations that must be corrected by the owner. The report will also indicate the corrective modifications required to address any violations. Additionally, the department may assess administrative penalties and/or administrative sanctions for violations, in accordance with the Code and this chapter.

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

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SUBCHAPTER J. DRIVER EDUCATION AND DRIVING SAFETY SCHOOL CANCELLATION AND REFUND

16 TAC §84.200

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.200. Cancellation and Refund Policy.

(a) Driver Education School, Driving Safety School and Course Provider cancellation and refund policies shall be in accordance with the Code and this chapter.

(b) Driving Safety Schools shall use the cancellation policy approved for the course provider.

(c) If a student withdraws or is terminated from the course, a refund must be issued that corresponds to the actual instructional hours not provided.

(d) Refunds for all driver education schools, driving safety schools and course providers shall be completed within thirty (30) days after the effective date of termination except as allowed under §84.46.

Proof of completion of refund shall be the refund document or copies of both sides of the canceled check and shall be on file within seventy-five (75) days of the effective date of termination. All refund checks shall identify the student to whom the refund is assigned. In cases where multiple refunds are made using one check, the check shall identify each individual student and the amount to be credited to that student's account.

(e) In reference to §1001.404 of the Code, the interest rate on unpaid refunds is set at 20%.

(f) In reference to §1001.404 of the Code, a driver education school, driving safety school or course provider is considered to have made a good faith effort to consummate a refund if the student file contains evidence of the following attempts:

(1) certified mail to the student's last known address;

(2) certified mail to the student's permanent address; and

(3) certified mail to the address of the student's parent, if different from the permanent address.

(g) If it is determined that the method used by the school to calculate refunds is in error or the school does not routinely pay refunds within the time required by §1001.402(b)(5) of the Code, the school shall submit a report of an audit which includes any interest due as set forth in §1001.404 of the Code, conducted by an independent certified public accountant or public accountant who is properly registered with the appropriate state board of accountancy, of the refunds due former students. The audit opinion letter shall be accompanied by a schedule of student refunds due which shall disclose the following information for the previous two years from the date of request by the department for each student:

(1) name, address, and driver's license number;

(2) last date of attendance or date of termination; and

(3) amount of refund with principal and interest separately stated, date and check number of payment if payment has been made, and any balance due.

(h) Any funds received from, or on behalf of, a student shall be recorded in a format that is readily accessible to representatives of the department.

(i) Branch schools shall use the policies approved for use at the primary school.

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SUBCHAPTER K. FEES

16 TAC §§84.300 - 84.302

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.300. Driver Education Fees.

(a) All fees paid to the department are nonrefundable.

(b) Driver Education School Fees:

(1) The initial application fee for a primary driver education school is $1,000.

(2) The initial application fee for a branch driver education school is $850.

(3) The renewal application fee for a primary driver education school is $200.

(4) The renewal application fee for a branch driver education school is $200.

(5) The fee for a change of address of a driver education primary school and branch is $180.

(6) The fee for a change of name of a driver education school or to change the name of an owner is $100.

(7) If a driver education school changes ownership as defined under §84.2(6), the fee paid by the new owner is $1,000 for a primary driver education school and $850 for a branch driver education school.

(c) Driver Education Instructor Fees:

(1) The initial application fee for a driver education instructor license is $50. The fee may not be collected for an applicant who is currently teaching a driver education course in a public school in this state.

(2) The annual renewal application fee for a driver education instructor license is $25.

(3) The national criminal history check fee - The fee in the amount set by and paid to the Texas Department of Public Safety for the cost of fingerprint processing and obtaining national criminal history record information from the Texas Department of Public Safety, its contractors, and the Federal Bureau of Investigation.

(d) Driver Education Course Fees:

(1) The application fee for approval of a traditional driver education course exclusively for adults is $500.

(2) The application fee for approval of an online driver education course exclusively for adults is $9,000.

(3) The application fee for each additional driver education course is $25.

(4) The application fee for approval of a 32-hour Alternative Method of Instruction (AMI) for driver education classroom is $15,000.

(5) The application fee for approval of part of a 32-hour AMI for driver education classroom is $500 per instructional hour.

(6) The fee for a DE-964 certificate of completion is $1.00.

(7) The fee for an ADE-1317 certificate of completion is $1.00.

(e) Other Fees:

(1) A duplicate/replacement fee for any license issued under this chapter is $25.

(2) Late renewal fees for licenses issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(3) A dishonored/returned check or payment fee is the fee prescribed under §60.82 of this title (relating to Dishonored Payment Device).

(4) The fee for a criminal history evaluation letter is the fee prescribed under §60.42 of this title (relating to Criminal History Evaluation Letters).

§84.301. Driving Safety Fees.

(a) All fees paid to the department are nonrefundable.

(b) Driving Safety School Fees:

(1) The initial application fee for a driving safety school is $150.

(2) The fee for a change of address of a driving safety school is $50.

(3) The fee for a change of name of a driving safety school or name of owner is $50.

(4) If a driving safety school changes ownership as defined under §84.2(6), the fee paid by the new owner is $150.

(c) Driving Safety Instructor Fees:

(1) The initial application fee for a driving safety instructor license is $50.

(2) The initial application fee for a specialized driving safety instructor license is $50.

(3) The annual renewal application fee for a driving safety instructor license is $25.

(4) The annual renewal application fee for a specialized driving safety instructor license is $25.

(d) Driving Safety Course Provider Fees:

(1) The initial application fee for a course provider is $2,000.

(2) The annual renewal application fee for a course provider is $200.

(3) The fee for a change of address of a course provider is $50.

(4) The fee for a change of name of a course provider or name of owner is $100.

(5) If a driving safety course provider changes ownership as defined under §84.2(6), the fee paid by the new owner is $2,000.

(e) Driving Safety Course Fees:

(1) The fee for a driving safety course approval is $9,000.

(2) The fee for a specialized driving safety course approval is $9,000.

(3) The application fee for each additional course for a driving safety school is $25.

(4) The fee for a course completion certificate number is $1.00.

(f) Other Fees:

(1) A duplicate/replacement fee for any license issued under this chapter is $25.

(2) Late renewal fees for licenses issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(3) A dishonored/returned check or payment fee is the fee prescribed under §60.82 of this title (relating to Dishonored Payment Device).

(4) The fee for a criminal history evaluation letter is the fee prescribed under §60.42 of this title (relating to Criminal History Evaluation Letters).

§84.302. Drug and Alcohol Driving Awareness Fees.

(a) All fees paid to the department are nonrefundable.

(b) Drug and Alcohol Driving Awareness Schools:

(1) The initial application fee for a drug and alcohol driving awareness school is $150.

(2) The fee for a change of address of a drug and alcohol driving awareness school is $50.

(3) The fee for a change of name of a drug and alcohol driving awareness school or name of owner is $50.

(4) If a drug and alcohol driving awareness school changes ownership as defined under §84.2(6), the fee paid by the new owner is $150.

(c) Drug and Alcohol Driving Awareness Programs:

(1) The fee for a drug and alcohol driving awareness program approval is $9,000.

(2) The fee for a drug and alcohol driving awareness program alternative delivery method approval is $9,000.

(3) The application fee for each additional program for a drug and alcohol driving awareness school is $25.

(d) Drug and Alcohol Driving Awareness Instructors:

(1) The initial application fee (including processing and licensing fees) for a drug and alcohol driving awareness instructor license is $75.

(2) The renewal application fee for a drug and alcohol driving awareness instructor license is $25.

(e) Other Fees:

(1) A duplicate/replacement fee for any license issued under this chapter is $25.

(2) Late renewal fees for licenses issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(3) A dishonored/returned check or payment fee is the fee prescribed under §60.82 of this title (relating to Dishonored Payment Device).

(4) The fee for a criminal history evaluation letter is the fee prescribed under §60.42 of this title (relating to Criminal History Evaluation Letters).

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SUBCHAPTER L. COMPLAINTS AND ENFORCEMENT PROVISIONS

16 TAC §84.400, §84.401

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.400. Administrative Penalties and Sanctions.
If a person or entity violates any provision of Texas Education Code, Chapter 1001, Texas Transportation Code, Chapter 521, this chapter, or any rule or order of the executive director or commission, proceedings may be instituted to impose administrative penalties, administrative sanctions, or both in accordance with the provisions of Texas Education Code, Chapter 1001, Texas Occupations Code, Chapter 51, and any associated rules.

§84.401. Enforcement Authority.
The enforcement authority granted under Texas Education Code, Chapter 1001, and Texas Occupations Code, Chapter 51 and any associated rules may be used to enforce Texas Education Code, 1001 and this chapter.

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SUBCHAPTER M. CURRICULUM AND ALTERNATIVE METHODS OF INSTRUCTION

16 TAC §§84.500 - 84.506

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.500. Courses of Instruction for Driver Education Schools.

(a) The educational objectives of driver training courses shall include, but not be limited to, promoting respect for and encouraging observance of traffic laws and traffic safety responsibilities of driver education and citizens; reducing traffic violations; reducing traffic-related injuries, deaths, and economic losses; and motivating development of traffic-related competencies through education, including, but not limited to, Texas traffic laws, risk management, driver attitudes, courtesy skills, and evasive driving techniques.

(b) This subsection contains requirements for driver education courses. All course content and instructional material shall include current statistical data, references to law, driving procedures, and traffic safety methodology. For each course, curriculum documents and materials may be requested as part of the application for approval.

(1) Minor and adult driver education course.

(A) The driver education classroom phase for students age 14 and over shall consist of:

(i) a minimum of 32 hours of classroom instruction. The in-car phase must consist of seven hours of behind-the-wheel instruction and seven hours of in-car observation in the presence of a person who holds a driver education instructor license; and

(ii) 30 hours of behind-the-wheel instruction, including at least 10 hours of nighttime instruction, in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2). The 30 hours of instruction must be endorsed by a parent or legal guardian if the student is a minor. Simulation hours shall not be substituted for these 30 hours of instruction. Driver education training endorsed by the parent is limited to one hour per day.

(B) Schools are allowed five minutes of break per instructional hour for all phases. No more than ten minutes of break time may be accumulated for each two hours of instruction.

(C) Driver education course curriculum content, minimum instruction requirements, and administrative guidelines for classroom instruction, in-car training (behind-the-wheel and observation), simulation, and multicar range shall include the educational objectives established by the commissioner of education in the Program of Organized Instruction in Driver Education and Traffic Safety (POI) and meet the requirements of this subchapter. In addition, the educational objectives that must be provided to every student enrolled in a minor and adult driver education course shall include information relating to litter prevention, anatomical gifts, leaving children in vehicles unattended, distractions, motorcycle awareness, alcohol awareness and the effect of alcohol on the effective operation of a motor vehicle, and recreational water safety.

(D) Driver education schools that desire to instruct students age 14 and over in a traditional classroom program shall provide the same beginning and ending dates for each student in the same class of 36 or less. No student shall be allowed to enroll and start the classroom phase after the seventh hour of classroom instruction has begun.

(E) Students shall proceed in the sequence identified by and approved for that school.

(F) Students shall receive classroom instruction from an instructor who is approved and licensed by the department. An instructor shall be in the classroom and available to students during the entire 32 hours of instruction, including self-study assignments. Instructors shall not have other teaching assignments or administrative duties during the 32 hours of classroom instruction.

(G) Videos, tape recordings, guest speakers, and other instructional media that present concepts required in the POI may be used as part of the required 32 hours of traditional classroom instruction. Instructors shall refrain from using any type of media for an extended period of time and should only use videos for no more than 640 minutes. PowerPoint slides or equivalent software solutions are considered to be approved teaching aids and does not fall into the restricted media aids.

(H) Self-study assignments occurring during regularly scheduled class periods shall not exceed 25% of the course and shall be presented to the entire class simultaneously.

(I) Each classroom student shall be provided a driver education textbook designated by the commissioner or access to instructional materials that are in compliance with the POI approved for the school. Instructional materials, including textbooks, must be in a condition that is legible and free of obscenities.

(J) A copy of the current edition of the "Texas Driver Handbook" or instructional materials that are equivalent shall be furnished to each student enrolled in the classroom phase of the driver education course.

(K) Each student, including makeup students, shall be provided their own seat and table or desk while receiving classroom instruction. A school shall not enroll more than thirty-six (36) students, excluding makeup students, and the number of students may not exceed the number of seats and tables or desks available at the school.

(L) When a student changes schools, the school must follow the current transfer policy developed by the department and Texas Department of Public Safety (DPS).

(M) All classroom phases of driver education, including makeup work, shall be completed within the timelines stated in the original student contract. This shall not circumvent the attendance and progress requirements.

(N) All in-car lessons shall consist of actual driving instruction. No school shall permit a ratio of more than four students per instructor or exceed the seating and occupant restraint capacity of the vehicle used for instruction. Schools that allow one-on-one instruction shall notify the parents in the contract.

(O) A student must have a valid driver's license or instruction permit in his or her possession during any behind-the-wheel instruction.

(P) All in-car instruction provided by the school shall begin no earlier than 5:00 a.m. and end no later than 11:00 p.m. The division may approve exceptions; however, the request shall be made in writing by the school owner or school director and include acknowledgment by all parents in the form of signatures.

(Q) A school may use multimedia systems, simulators, and multicar driving ranges for in-car instruction in a driver education program. Each simulator, including the filmed instructional programs, and each plan for a multicar driving range must meet state specification developed by DPS and the department. A licensed driver education instructor must be present during use of multimedia systems, simulators, and multicar driving ranges.

(R) Four periods of at least 55 minutes per hour of instruction in a simulator may be substituted for 1 hour of behind-the-wheel instruction and 1 hour of in-car observation. Two periods of at least 55 minutes per hour of multicar driving range instruction may be substituted for 1 hour of behind-the-wheel instruction and 1 hour of in-car observation relating to elementary or city driving lessons. However, a minimum of four hours must be devoted to actual behind-the-wheel instruction.

(S) In a minor and adult driver education program, a student may apply to the DPS for a learner license after completing the objectives found in Module One: Traffic Laws

(T) A student issued a DE-964 under the block and concurrent programs must subsequently complete the required classroom instruction. If a student does not subsequently complete the required class instruction, the instructor must complete DPS Form DL-42 and send it to the DPS division responsible for license and driver records. Form DL-42 should be prepared as soon as it is evident the student will not complete the required hours of instruction. The DPS may then revoke the student's instruction permit.

(U) Each school owner that teaches driver education courses shall collect adequate student data to enable the department to evaluate the overall effectiveness of the driver education course in reducing the number of violations and accidents of persons who successfully complete the course. The department may determine a level of effectiveness that serves the purposes of the Code.

(2) Driver education course exclusively for adults. Courses offered in a traditional classroom setting or online to persons who are age 18 to under 25 years of age for the education and examination requirements for the issuance of a driver's license under Texas Transportation Code, §521.222(c) and §521.1601, must be offered in accordance with the following guidelines.

(A) Traditional approval process. The department may approve a driver education course exclusively for adults to be offered traditionally if the course meets the following requirements.

(i) Application. The driver education school shall submit a completed application along with the appropriate fee.

(ii) Instructor license required. Students shall receive classroom instruction from a licensed supervising teacher, driver education teacher, supervising teaching assistant-full or teaching assistant-full.

(iii) Minimum course content. The driver education course exclusively for adults shall consist of six clock hours of classroom instruction that meets the following topics.

(I) Course introduction--ten minutes. Objective: The student recognizes the value of legal and responsible reduced-risk driving practices and accepts driving as a privilege with responsibilities, obligations, and potential consequences.

(II) Your license to drive--minimum of 20 minutes. Objective: The student reduces risk and accepts driving as a privilege by legally and responsibly possessing a driver's license, registering and having a current inspection on a motor vehicle, and obeying the Safety Responsibility Act.

(III) Right-of-way--minimum of 50 minutes. Objective: The student reduces risk by legally and responsibly accepting or yielding the right-of-way.

(IV) Traffic control devices--minimum of 40 minutes. Objective: The student reduces risk by legally and responsibly applying knowledge and understanding of traffic control devices.

(V) Controlling traffic flow--minimum of 40 minutes. Objective: The student reduces risk by legally and responsibly applying knowledge and understanding of laws and procedures for controlling traffic flow.

(VI) Alcohol and other drugs--minimum of 50 minutes. Objective: The student legally and responsibly performs reduced-risk driving practices by adopting zero-tolerance driving and lifestyle practices related to the use of alcohol and other drugs and applying knowledge and understanding of alcohol and other drug laws, regulations, penalties, and consequences.

(VII) Cooperating with other roadway users--minimum of 20 minutes. Objective: The student reduces risk by legally and responsibly cooperating with law enforcement and other roadway users, including vulnerable roadway users in emergency and potential emergency situations.

(VIII) Managing risk--minimum of 50 minutes. Objective: The student reduces and manages risk by legally and responsibly understanding the issues commonly associated with motor vehicle collisions, including poor decision making, risk taking, impaired driving, distractions, speed, failure to use a safety belt, driving at night, and using a wireless communications device while operating a vehicle.

(IX) Classroom progress assessment--25 minutes (this shall be the last unit of instruction). The remaining 25 minutes of instruction shall be allocated to the topics included in the minimum course content under subclauses (II)-(VIII) of this clause.

(iv) Course management. An approved adult driver education course shall be presented in compliance with the following guidelines.

(I) The instructor shall be physically present in appropriate proximity to the student for the type of instruction being given. The teacher of record shall sign all completed classroom instruction records provided by a supervising teaching assistant-full or teaching assistant-full.

(II) A copy of the current edition of the "Texas Driver Handbook" or study material that is equivalent shall be furnished to each student enrolled in the course.

(III) Self-study assignments, videos, tape recordings, guest speakers, and other instructional media that present topics required in the course shall not exceed 120 minutes of instruction. PowerPoint slides or equivalent software solutions are considered to be approved teaching aids and does not fall into the restricted media aids.

(IV) Each student, including makeup students, shall be provided their own seat and table or desk while receiving classroom instruction. A school shall not enroll more than 36 students, excluding makeup students, and the number of students may not exceed the number of seats and tables or desks available at the school.

(V) All classroom instruction, including makeup work, shall be completed within the timelines stated in the original student contract.

(VI) A minimum of 330 minutes of instruction is required.

(VII) The total length of the course shall consist of a minimum of 360 minutes.

(VIII) Thirty minutes of time, exclusive of the 330 minutes of instruction, shall be dedicated to break periods or to the topics included in the minimum course content.

(IX) Students shall not receive a driver education certificate of completion unless that student receives a grade of at least 70% on the highway signs examination and at least 70% on the traffic laws examination as required under Texas Transportation Code, §521.161.

(X) The driver education school shall make a material effort to establish the identity of the student.

(B) Online approval process. The department may approve a driver education course exclusively for adults to be offered online if the course meets the following requirements.

(i) Application. The driver education school shall submit a completed application along with the appropriate fee.

(ii) Request for approval. The request for approval must include a syllabus cross-reference, contract, and instructional records.

(iii) School license required. A person or entity offering an online driver education course exclusively for adults must hold a driver education school license.

(I) The driver education school shall be responsible for the operation of the online course.

(II) Students shall receive classroom instruction from a licensed supervising teacher, driver education teacher, or teaching assistant-full.

(iv) Course content. The online course must meet the requirements of the course identified in §1001.1015 of the Code.

(I) Course topics. The course requirements described in subparagraph (A)(iii) shall be met.

(II) Length of course. The course must be 6 hours in length, which is equal to 360 minutes. A minimum of 330 minutes of instruction must be provided. Thirty minutes of time, exclusive of the 330 minutes of instruction, shall be dedicated to break periods or to the topics included in the minimum course content. All break periods shall be provided after instruction has begun and before the comprehensive examination and summation.

(III) Required material. A copy of the current edition of the "Texas Driver Handbook" or study material that is equivalent shall be furnished to each student enrolled in the course.

(IV) Editing. The material presented in the online course shall be edited for grammar, punctuation, and spelling and be of such quality that it does not detract from the subject matter.

(V) Irrelevant material. Advertisement of goods and services shall not appear during the actual instructional times of the course. Distracting material that is not related to the topic being presented shall not appear during the actual instructional times of the course.

(VI) Minimum content. The online course shall present sufficient content so that it would take a student 360 minutes to complete the course. In order to demonstrate that the online course contains sufficient minutes of instruction, the online course shall use the following methods.

(-a-) Word count. For written material that is read by the student, the course shall contain the total number of words in the written sections of the course. This word count shall be divided by 180, the average number of words that a typical student reads per minute. The result is the time associated with the written material for the sections.

(-b-) Multimedia presentations. For multimedia presentation, the online course shall calculate the total amount of time it takes for all multimedia presentations to play, not to exceed 120 minutes.

(-c-) Charts and graphs. The online course may assign one minute for each chart or graph.

(-d-) Time allotment for questions. The online course may allocate up to 60 seconds for questions presented over the Internet and 60 seconds for questions presented by telephone.

(-e-) Total time calculation. If the sum of the time associated with the written course material, the total amount of time for all multimedia presentations, and the time associated with all charts and graphs equals or exceeds 330 minutes, the online course has demonstrated the required amount of minimum content.

(-f-) Alternate time calculation method. In lieu of the time calculation method, the online course may submit alternate methodology to demonstrate that the online course meets the 330-minute requirement.

(v) Personal validation. The online course shall maintain a method to validate the identity of the person taking the course. The personal validation system shall incorporate one of the following requirements.

(I) School-initiated method. Upon approval by the department, the online course may use a method that includes testing and security measures that validate the identity of the person taking the course. The method must meet the following criteria.

(-a-) Time to respond. The student must correctly answer a personal validation question within 60 seconds.

(-b-) Placement of questions. At least two personal validation questions shall appear randomly during each instructional hour, not including the final examination.

(-c-) Exclusion from the course. The online course shall exclude the student from the course after the student has incorrectly answered more than 30% of the personal validation questions.

(-d-) Correction of answer. The online course may correct an answer to a personal validation question for a student who inadvertently missed a personal validation question. In such a case, the student record shall include a record of both answers and an explanation of the reasons why the answer was corrected.

(II) Third party data method. The online course shall ask a minimum of twelve (12) personal validation questions randomly throughout the course from a bank of at least twenty (20) questions drawn from a third party data source. The method must meet the following criteria.

(-a-) Time to respond. The student must correctly answer a personal validation question within sixty (60) seconds.

(-b-) Placement of questions. At least two personal validation questions shall appear randomly during each instructional hour, not including the final examination.

(-c-) Exclusion from the course. The online course shall exclude the student from the course after the student has incorrectly answered more than 30% of the personal validation questions.

(-d-) Correction of answer. The online course may correct an answer to a personal validation question for a student who inadvertently missed a personal validation question. In such a case, the student record shall include a record of both answers and an explanation of the reasons why the answer was corrected.

(vi) Content validation. The online course shall incorporate a course content validation process that verifies student participation and comprehension of course material, including the following.

(I) Timers. The online course shall include built-in timers to ensure that 330 minutes of instruction have been attended and completed by the student.

(II) Testing the student's participation in multimedia presentations. The online course shall ask at least 1 course validation question following each multimedia clip of more than sixty (60) seconds.

(-a-) Test bank. For each multimedia presentation that exceeds sixty (60) seconds, the online course shall have a test bank of at least four (4) questions.

(-b-) Question difficulty. The question shall be short answer, multiple choice, essay, or a combination of these forms. The question shall be difficult enough that the answer may not be easily determined without having viewed the actual multimedia clip.

(-c-) Failure criteria. If the student fails to answer the question correctly, the online course must require the student to view the multimedia clip again. The online course shall then present a different question from its test bank for that multimedia clip. The online course may not repeat a question until it has asked all the questions from its test bank.

(-d-) Answer identification. The online course shall not identify the correct answer to the multimedia question.

(III) Course participation questions. The online course shall test the student's course participation by asking at least two questions from each of the seven topics listed in subparagraph (A)(v)(II)-(VIII).

(-a-) Test bank. The test bank for course participation questions shall include at least ten questions from each of the seven topics identified in subparagraph (A)(v)(II)-(VIII).

(-b-) Placement of questions. The course participation questions shall be asked at the end of the major unit or section in which the topic is covered.

(-c-) Question difficulty. Course participation questions shall be of such difficulty that the answer may not be easily determined without having participated in the actual instruction.

(IV) Comprehension of course content. The online course shall test the student's mastery of the course content by administering at least 30 questions covering the highway signs and traffic laws required under Texas Transportation Code, §521.161.

(-a-) Test banks (two). Separate test banks for course content mastery questions are required for the highway signs and traffic laws examination as required under Texas Transportation Code, §521.161, with examination questions drawn equally from each.

(-b-) Placement of questions. The mastery of course content questions shall be asked at the end of the course (comprehensive final examination).

(-c-) Question difficulty. Course content mastery questions shall be of such difficulty that the answer may not be easily determined without having participated in the actual instruction.

(vii) Retest the student. If the student misses more than 30% of the questions asked on an examination, the online course shall retest the student using different questions from its test bank. The student is not required to repeat the course, but may be allowed to review the course prior to retaking the examination. If the student fails the comprehensive final examination three times, the student shall fail the course.

(viii) Student records. The online course shall provide for the creation and maintenance of the records documenting stu-

dent enrollment, the verification of the student's identity, and the testing of the student's mastery of the course material. The school shall also ensure that the student record is readily, securely, and reliably available for inspection by a department representative. The student records shall contain the following information:

(I) the student's first, middle, and last name;

(II) the student's date of birth and gender;

(III) a record of all questions asked and the student's responses;

(IV) the name or identity number of the staff member entering comments, retesting, or revalidating the student;

(V) both answers and a reasonable explanation for the change if any answer to a question is changed by the school for a student who inadvertently missed a question; and

(VI) a record of the time the student spent in each unit and the total instructional time the student spent in the course.

(ix) Waiver of certain education and examination requirements. A licensed driver education instructor must determine that the student has successfully completed and passed a driver education course exclusively for adults prior to waiving the examination requirements of the highway sign and traffic law parts of the examination required under Texas Transportation Code, §521.161, and signing the ADE-1317 driver education completion certificate.

(x) Age requirement. A person must be at least 18 years of age to enroll in a driver education course exclusively for adults.

(xi) Issuance of certificate. Not later than the 15th working day after the course completion date, the school shall issue an ADE-1317 driver education certificate only to a person who successfully completes an approved online driver education course exclusively for adults.

(xii) Access to instructor. The school must establish hours that the student may access the instructor. With the exception of circumstances beyond the control of the school, the student shall have access to the instructor during the specified hours.

(xiii) Additional requirements for online courses.

(I) Reeentry into the course. An online course may allow the student reentry into the course by username and password authentication or other means that are as secure as username and password authentication.

(II) Navigation. The student shall be provided orientation training to ensure easy and logical navigation through the course. The student shall be allowed to freely browse previously completed material.

(III) Audio-visual standards. The video and audio shall be clear and, when applicable, the video and audio shall be synchronized.

(IV) Domain names. Each school offering an online course must offer that online course from a single domain. The online course may accept students that are redirected to the online course domain, as long as the school license number appears on the source that redirects the student to the online course domain. The student must be redirected to a webpage that clearly identifies the licensed school offering the online course before the student begins the registration process, supplies any information, or pays for the course.

(3) Compliance with Texas Transportation Code, §521.1601. Persons age 18 to under 25 years of age must successfully complete either a minor and adult driver education course or the driver education course exclusively for adults. Partial completion of either course does not satisfy the requirements of rule or law.

(4) Issuance of certificate. A licensed school or instructor may not issue an ADE-1317 adult driver education certificate to a person who is not at least 18 years of age.

(c) This subsection contains requirements for driver education instructor development courses. For each course, the following curriculum documents and materials are required to be submitted as part of the application for approval. If the course meets the minimum requirements set forth in this subchapter, the division may grant an approval. Schools desiring to provide driver education instructor development courses shall provide an application for approval that shall be in compliance with this section.

(1) Schools desiring to obtain approval for a driver education instructor development course shall request an application for approval from the department. All instructor development curricula submitted for approval shall meet or exceed the requirements set forth for approved programs offered at colleges, universities, school districts, or educational service centers and shall be specific to the area of specialization. Guidelines and criteria for the course shall be provided with the application packet, and the school shall meet or exceed the criteria outlined.

(A) Six-semester-hour instructor development course. The driver education instructor development program instructional objectives must be equivalent to 6 semester hours or 90 clock hours of driver and traffic safety education instructor training and shall include:

(i) Driver Education I--minimum of 45 clock hours. Instructional objectives: the trainee shall acquire the knowledge, skills, and understanding to instruct students in the reduced-risk driving practices in the Highway Transportation System (HTS) in accordance with the standards for minor and adult driver education and traffic safety. Instruction shall address the following topics:

(I) overview of Driver Education I;

(II) minor and adult driver education curriculum overview and course goals;

(III) school and instructor liability and responsibility;

(IV) student evaluation and assessment;

(V) instructor conduct, including professionalism and public relations;

(VI) rules, codes, and standards for driver education programs; and

(VII) classroom progress examination for Driver Education I.

(ii) Driver Education II--minimum of 45 clock hours. Instructional objectives: the trainee shall acquire the knowledge, skills, and understanding to instruct students in the reduced-risk driving practices in the HTS in accordance with the standards for minor and adult driver education and traffic safety for in-car instruction. Instruction shall address the following topics:

(I) overview of Driver Education II;

(II) minor and adult driver education in-car curriculum overview;

(III) commentary driving techniques;

(IV) factors that influence learning and habit formation;

(V) in-car lesson planning, including scheduling and designing;

(VI) vocabulary and communication;

(VII) risk management;

(VIII) general guidelines for conducting behind-the-wheel and in-car observation;

(IX) in-car debriefing techniques;

(X) proper record keeping and maintenance;

(XI) classroom progress examination for Driver Education II; and

(XII) in-car laboratory, including:

(-a-) initial assessment of trainee's driving skills by instructor trainer;

(-b-) observation of in-car teaching techniques as given by a licensed instructor;

(-c-) practice of instructor risk-management and emergency procedures, including taking control of the vehicle under the supervision and observation of a licensed instructor;

(-d-) in-car trainee student teaching under the supervision and observation of a licensed instructor; and

(-e-) trainee in-car student teaching final progress assessment under the supervision and observation of a licensed instructor.

(B) Nine-semester-hour instructor development course. The driver education instructor development program instructional objectives must be equivalent to 9 semester hours or 135 clock hours of driver and traffic safety education instructor training and shall include:

(i) all requirements set forth in subparagraph (A); and

(ii) Driver Education III--minimum of 45 clock hours. Instructional objectives: the trainee shall acquire the knowledge, skills, and understanding to instruct students in the reduced-risk driving practices in the HTS in accordance with the standards for minor and adult driver education and traffic safety for classroom instruction. Instruction shall address the following topics:

(I) overview of Driver Education III;

(II) classroom delivery, including the Code, rules, standards, and school administrative procedures;

(III) student learning styles;

(IV) classroom management and student discipline;

(V) classroom lesson planning and designing;

(VI) scheduling driver education programs;

(VII) proper record keeping and maintenance;

(VIII) simulation theory and multicar range instruction;

(IX) instructor professional growth;

(X) classroom progress examination for Driver Education III; and

(XI) classroom laboratory, including:

(-a-) observation of classroom teaching techniques as given by a licensed instructor; and

(-b-) classroom practice student teaching under the supervision and observation of a licensed instructor.

(C) Supervising instructor development course. The supervising driver education instructor development program instructional objectives must be equivalent to 6 semester hours or 90 clock hours of driver and traffic safety education instructor training and shall include:

(i) training in administering driver education programs and supervising and administering traffic safety education;

(ii) Supervising Instructor I--minimum of 45 clock hours. Instructional objectives: the instructor shall acquire the knowledge, skills, and understanding to instruct trainees in the reduced-risk driving practices in the HTS in accordance with the standards for minor and adult driver education and traffic safety. Instruction shall address the following topics:

(I) overview of Supervising Instructor I;

(II) minor and adult driver education curriculum overview and course goals;

(III) rules, codes, and standards for driver education programs;

(IV) learning styles;

(V) factors that influence learning and habit formation;

(VI) vocabulary and communication;

(VII) lesson plan development;

(VIII) classroom management and student discipline; and

(IX) classroom progress examination for Supervising Instructor I; and

(iii) Supervising Instructor II--minimum of 45 clock hours. Instructional objectives: the instructor shall acquire the knowledge, skills, and understanding to instruct trainees in the reduced-risk driving practices in the HTS in accordance with the standards for minor and adult driver education and traffic safety. Instruction shall address the following topics:

(I) overview of Supervising Instructor II;

(II) student evaluation and assessment;

(III) commentary driving techniques;

(IV) in-car debriefing techniques;

(V) scheduling driver education programs;

(VI) proper record keeping and maintenance;

(VII) school and instructor liability and responsibility;

(VIII) instructor conduct, including professionalism and public relations;

(IX) risk management;

(X) simulation theory and multicar range;

(XI) professional growth;

(XII) classroom progress examination for Supervising Instructor II; and

(XIII) classroom laboratory, including:

(-a-) observation of nine-semester-hour driver education instructor development course classroom teaching techniques as given by a licensed instructor; and

(-b-) classroom practice student teaching of a nine-semester-hour driver education instructor development course under the supervision and observation of a licensed instructor.

(2) Prior to enrolling a student in a driver education instructor development course, the school owner or representative must obtain proof that the student has a high school diploma or equivalent. A copy of the evidence must be placed on file with the school. Further, the school shall obtain and evaluate a current official driving record from the student prior to enrollment. The individual must not have accumulated 6 or more penalty points on a driving record during the preceding 36-month period. The school must use the standards for assessing penalty points for convictions of traffic law violations and accident involvements established under Texas Transportation Code, Chapter 708, Subchapter B.

(3) Instruction records shall be maintained by the school for each instructor trainee and shall be available for inspection by authorized division representatives at any time during the training period and/or for license investigation purposes. The instruction record shall include the trainee's name, address, driver's license number, and other pertinent data; name and instructor license number of the person conducting the training; and dates of instruction, lesson time, and subject taught during each instruction period. Each record shall also include grades or other means of indicating the trainee's aptitude and development. Upon satisfactory completion of the training course, the supervising teacher conducting the training will certify one copy of the instruction record for attachment to the trainee's application for licensing, and one copy will be maintained in a permanent file at the school.

(4) All student instruction records submitted for the approved instructor development courses shall be original documents.

(5) A properly licensed supervising driver education teacher or supervising teaching assistant-full shall teach the 6-semester-hour, 9-semester-hour, and supervising instructor development courses. The supervising teacher may allow a driver education teacher, teaching assistant-full, or teaching assistant to provide training under the direction of the supervising teacher in areas appropriate for their level of certification and/or licensure. The supervising teacher is responsible for certifying all instruction conducted by the driver education teacher, teaching assistant-full, or teaching assistant, including independent study and research assignments, which shall not exceed 25% of the total training program time.

(d) This subsection contains requirements for driver education continuing education courses.

(1) Driver education school owners may receive an approval for a four-hour continuing education course and provide the approved course to instructors to ensure that instructors meet the requirements for continuing education.

(2) The request for course approval shall contain the following:

(A) a description of the plan by which the course will be presented;

(B) the subject of each unit;

(C) the educational objectives of each unit;

(D) time to be dedicated to each unit;

(E) instructional resources for each unit, including names or titles of presenters and facilitators; and

(F) a plan by which the school owner will monitor and ensure attendance and completion of the course by the instructions within the guidelines set forth in the course.

(3) A continuing education course may be approved if the department determines that:

(A) the course constitutes an organized program of learning that enhances the instructional skills, methods, or knowledge of a licensed driver education instructor;

(B) the course pertains to subject matters that relate directly to the practice of driver education instruction, instruction techniques, or driver education-related subjects; and

(C) the entire course shall be taught by individuals with recognized experience or expertise in the area of driver education or related subjects. The division may request evidence of the individuals' experience or expertise.

(4) Driver education school owners may not offer the same continuing education course to instructors each year. In order to continue to offer a course, a new or revised continuing education course shall be submitted to the department for approval.

(5) Driver education school owners must notify the division of the scheduled dates, times, and locations of all continuing education courses at least ten days prior to teaching the course.

(e) A branch school may offer only a course that is approved for the primary school.

(f) Schools applying for approval of additional courses after the original approval has been granted shall submit the documents designated by the division with the appropriate fee. Courses shall be approved before soliciting students, advertising, or conducting classes. An approval for an additional course shall not be granted if the school's compliance is in question at the time of application.

(g) If an approved course is discontinued, the division shall be notified within five days of discontinuance and furnished with the names and addresses of any students who could not complete the course because it was discontinued. If the school does not make arrangements satisfactory to the students and the division for the completion of the courses, the full amount of all tuition and fees paid by the students are due and refundable. If arrangements are not made satisfactory to the students and the division, the refunds must be made no later than thirty (30) days after the course was discontinued. Any course discontinued shall be removed from the school's approval.

(h) If, upon review and consideration of an original, renewal, or amended application for course approval, the department determines that the applicant does not meet the legal requirements, the department shall notify the applicant, setting forth the reasons for denial in writing.

(i) The department may revoke approval of a school's courses under certain circumstances, including, but not limited to, the following.

(1) Information contained in the application for the course approval is found to be untrue.

(2) The school has failed to maintain the instructors, facilities, equipment, or courses of study on the basis of which approval was issued.

(3) The school offers a course which has not been approved or for which there are no instructors or equipment.

(4) The school has been found to be in violation of TEC, Chapter 1001, and/or this chapter.

§84.501. Driver Education Course Alternative Method of Instruction.

(a) Approval process. The department may approve an alternative method whereby a driver education school is approved to teach all or part of the classroom portion of an approved driver education course by an alternative method of instruction (AMI) that does not require students to be present in a classroom that meets the following requirements.

(1) Standards for approval. The department may approve a driver education school to teach all or part of the classroom portion of an approved driver education course by an AMI that does not require students to be present in a classroom only if:

(A) the AMI includes testing and security measures that the department determines are at least as secure as the measures available in the usual classroom setting;

(B) the course satisfies any other requirement applicable to a course in which the classroom portion is taught to students in the usual classroom setting;

(C) a student and instructor are in different locations for a majority of the student's instructional period;

(D) the AMI instructional activities are integral to the academic program; and

(E) extensive communication between a student and instructor and among students is emphasized.

(2) Application. The school shall submit a completed AMI application along with the appropriate fee. The application for AMI approval shall be treated the same as an application for the approval of a driver education traditional course, and the AMI must deliver the school's approved curriculum as aligned with the Program of Organized Instruction for Driver Education and Traffic Safety.

(3) School license required. A person or entity offering a classroom driver education course to Texas students by an AMI must hold a driver education school license. The driver education school is responsible for the operation of the AMI.

(b) Course content. The AMI must deliver the same topics, sequence, and course content as the school's approved traditional driver education course.

(1) Course topics. The time requirements for the course content described in §84.500 (a) and (b)(1)(C) (relating to Courses of Instruction) shall be met.

(2) Editing. The material presented in the AMI shall be edited for grammar, punctuation, and spelling and be of such quality that it does not detract from the subject matter.

(3) Irrelevant material. Advertisement of goods and services shall not appear during the actual instructional times of the course. Distracting material that is not related to the topic being presented shall not appear during the actual instructional times of the course.

(4) Student breaks. The AMI is allowed 5 minutes of break per instructional hour for all phases, for a total of 160 minutes of break time. No more than ten minutes of break time may be accumulated for each two hours of instruction.

(5) Minimum content. The AMI shall present sufficient instructional content so that it would take a student a minimum of 32 hours (1,920 minutes) to complete the course. A course that demonstrates that it contains 1,760 minutes of instructional content shall mandate that students take 160 minutes of break time or provide additional educational content for a total of 1,920 minutes (32 hours). In order to demonstrate that the AMI contains sufficient content, the AMI shall use the following methods.

(A) Word count. For written material that is read by the student, the total number of words in the written sections of the course shall be divided by 180. The result is the time associated with the written material for the sections.

(B) Multimedia presentations. There shall be a minimum of 120 minutes of multimedia presentation. The school owner shall calculate the total amount of time it takes for all multimedia presentations to play, not to exceed 640 minutes.

(C) Charts and graphs. The AMI may assign one minute for each chart or graph.

(D) Examinations. The school owner may allocate up to 60 seconds for questions presented over the Internet and 30 seconds for questions presented by telephone.

(E) Total time calculation. If the sum of the time associated with the written course material, the total amount of time for all multimedia presentations, and the time associated with all charts, graphs, and breaks equals or exceeds the minimum 1,920 minutes, the AMI has demonstrated the required amount of content.

(F) Alternate time calculation method. In lieu of the time calculation method, the AMI may submit alternate methodology to demonstrate that the AMI meets the minimum 32-hour requirement.

(6) Academic integrity. The academic integrity of the AMI for a classroom driver education course shall include:

(A) goals and objectives that are measurable and clearly state what the participants should know or be able to do at the end of the course;

(B) a clear, complete driver education classroom course overview and syllabus;

(C) content and assignments that are of sufficient rigor, depth, and breadth to teach the standards being addressed;

(D) literacy and communication skills that are incorporated and taught as an integral part of the AMI;

(E) sufficient learning resources and materials to increase student success available to students before the AMI begins;

(F) instruction requirements that are consistent with course goals, representative of the scope of the course, and clearly stated;

(G) communication processes that are provided to students, parents, and mentors on how to communicate with the school and instructor, including information on the process for these communications and for timely and frequent feedback about student progress;

(H) information addressing issues associated with the use of copyrighted materials; and

(I) if online, clearly stated academic integrity and netiquette (Internet etiquette) expectations regarding lesson activities, discussions, e-mail communications, and plagiarism.

(7) Instructional design. Instructional design of AMI for classroom driver education shall:

(A) include a clear understanding of student needs and incorporate varied ways to learn and multiple levels of mastery of the curriculum;

(B) ensure each lesson includes a lesson overview, objectives, resources, content and activities, assignments, and assessments to provide multiple learning opportunities for students to master the content;

(C) include concepts and skills that students will retain over time;

(D) include activities that engage students in active learning;

(E) include the instructor engaging students in learning activities that address a variety of learning styles and preferences to master course content;

(F) include instruction that provides opportunities for students to engage in higher-order thinking, critical-reasoning activities, and thinking in increasingly complex ways;

(G) include a statement that notifies the student of the school owner's security and privacy policy regarding student data, including personal and financial data; and

(H) include assessment and assignment answers and explanations.

(c) Personal validation. The AMI shall maintain a method to validate the identity of the person taking the course. The personal validation system shall incorporate one of the following requirements.

(1) School initiated method. Upon approval by the department, the AMI may use a method that includes testing and security measures that are at least as secure as the methods available in the traditional classroom setting.

(2) Third party data method. The online course shall ask a minimum of sixty (60) personal validation questions randomly throughout the course from a bank of at least 200 questions drawn from a third party data source.

(A) Time to respond. The student must correctly answer the personal validation question within sixty (60) seconds for questions presented over the Internet and 30 seconds for questions presented by telephone.

(B) Placement of questions. At least one personal validation question shall appear in each major unit or section, not including the final examination.

(C) Exclusion from the course. The AMI shall exclude the student from the course after the student has incorrectly answered more than 30% of the personal validation questions.

(D) Correction of answer. The school may correct an answer to a personal validation question for a student who inadvertently missed a personal validation question. In such a case, the student record shall include a record of both answers and an explanation of the reasons why the answer was corrected.

(d) Content validation. The AMI shall incorporate a course content validation process that verifies student participation and comprehension of course material, including the following.

(1) Timers. The AMI shall include built-in timers to ensure that 1,920 minutes of instruction have been attended and completed by the student.

(2) Testing the student's participation in multimedia presentations. The AMI shall ask at least 1 course validation question following each multimedia clip of more than 60 seconds.

(A) Test bank. For each multimedia presentation that exceeds 60 seconds, the AMI shall have a test bank of at least 4 questions.

(B) Question difficulty. The question shall be short answer, multiple choice, essay, or a combination of these forms. The question shall be difficult enough that the answer may not be easily determined without having viewed the actual multimedia clip.

(C) Failure criteria. If the student fails to answer the question correctly, the AMI shall either require the student to view the multimedia clip again or the AMI shall fail the student from the course. If the AMI requires the student to view the multimedia clip again, the AMI shall present a different question from its test bank for that multimedia clip. The AMI may not repeat a question until it has asked all the questions from its test bank.

(D) Answer identification. The AMI shall not identify the correct answer to the multimedia question.

(3) Mastery of course content. The AMI shall test the student's mastery of the course content by asking questions from each of the modules listed in the program of organized instruction for driver education and traffic safety.

(A) Test bank. The test bank for course content mastery questions shall include at least:

(i) 20 questions from each of modules 1, 8, and 12 listed in the program of organized instruction for driver education and traffic safety; and

(ii) 10 questions from each of the remaining modules.

(B) Placement of questions. The mastery of course content questions shall be asked at the end of each module.

(C) Question difficulty. Course content mastery questions shall be of such difficulty that the answer may not be easily determined without having participated in the actual instruction.

(4) Repeat and retest options. The AMI may use the following options for students who fail an examination to show mastery of course content.

(A) Repeat the failed module. If the student misses more than 30% of the questions asked on a module examination, the AMI shall require that the student take the module again. The correct answer to missed questions may not be disclosed to the student (except as part of course content). At the end of the module, the AMI shall again test the student's mastery of the material. The AMI shall present different questions from its test bank until all the applicable questions have been asked. The student may repeat this procedure an unlimited number of times.

(B) Retest the final examination. If the student misses more than 30% of the questions asked on the final examination, the AMI shall retest the student in the same manner as the failed examination, using different questions from its test bank. If the student fails the same unit examination or the comprehensive final examination three times, the student shall fail the course.

(e) Student records. The AMI shall provide for the creation and maintenance of the records documenting student enrollment, the verification of the student's identity, and the testing of the student's mastery of the course material. The school shall ensure that the student record is readily, securely, and reliably available for inspection by a department-authorized representative. The student records shall contain all information required in §84.81 (relating to Recordkeeping Requirements) and the following information.

(1) A record of all questions asked and the student's responses.

(2) The name or identity number of the staff member entering comments or revalidating the student.

(3) The name or identity number of the staff member retesting the student.

(4) If any answer to a question is changed by the school for a student who inadvertently missed a question, the school shall provide both answers and a reasonable explanation for the change.

(5) A record of the time the student spent in each unit of the AMI and the total instructional time the student spent in the course.

(f) Additional requirements for Internet courses. Courses delivered via the Internet or technology shall also comply with the following requirements.

(1) An AMI may allow the student reentry into the course by username and password authentication or other means that are equally secure.

(2) The student shall be provided orientation training to ensure easy and logical navigation through the course. The student shall be allowed to freely browse previously completed material.

(3) The video and audio shall be clear and, when applicable, the video and audio shall be synchronized.

(4) If the AMI presents transcripts of a video presentation, the transcript shall be delivered concurrently with the video stream so that the transcript cannot be displayed if the video does not display on the student's computer.

(5) Each school offering an AMI must offer that AMI from a single domain. The AMI may accept students that are redirected to the AMI's domain, as long as the school license number appears on the source that redirects the student to the AMI domain. The student must be redirected to a webpage that clearly identifies the licensed school offering the AMI before the student begins the registration process, supplies any information, or pays for the course.

(6) Hardware, web browser, and software requirements must be specified.

(7) Prerequisite skills in the use of technology must be identified.

(8) Appropriate content-specific tools and software must be used.

(9) Universal design principles that ensure access for all students must be used.

(10) Online textbooks and other instructional materials used in an AMI must meet state standards.

(11) The school must offer the course instructor, school director, and school owner assistance with technical support and course management.

(g) Additional requirements for video courses.

(1) Delivery of the material. For AMIs delivered by the use of videotape, digital video disc (DVD), film, or similar media, the equipment and course materials may only be made available through a process that is approved by the department.

(2) Video requirement. The video course shall include between 60 and 640 minutes of video that is relevant to the required topics such as video produced by other entities for training purposes, including public safety announcements and B roll footage. The remainder of the 1,760 minutes of required instruction shall be video material that is relevant to required course instruction content.

(A) A video AMI shall ask, at a minimum, at least 1 course validation question for each multimedia clip of more than 60 seconds.

(B) A video AMI shall devise and submit for approval a method for ensuring that a student correctly answers questions concerning the multimedia clips of more than sixty (60) seconds.

(h) Standards for AMIs using new technology. For AMIs delivered using technologies that have not been previously reviewed and approved by the department, the department may apply similar standards as appropriate and may also require additional standards. These standards shall be designed to ensure that the course can be taught by the alternative method and that the alternative method includes testing and security measures that are at least as secure as the methods available in the usual classroom setting.

(i) Modifications to the AMI. Except as provided by paragraph (1), a change to a previously approved AMI shall not be made without the prior approval of the department. The licensed school for the approved course on which the AMI is based shall ensure that any modification to the AMI is implemented by all schools endorsed to offer the AMI.

(1) A school may submit to the department a request for immediate implementation of a proposed change that is insignificant or that protects the interest of the consumer such that immediate implementation is warranted. The request shall include:

(A) a complete description of the proposed change;

(B) the reason for the change;

(C) the reason the requestor believes the proposed change is insignificant or protects the interest of the consumer such that immediate implementation is warranted; and

(D) an explanation of how the change will maintain the course or AMI in compliance with state law and the rules specified in this chapter.

(2) The department may request additional information regarding a proposed change from the school making a request under paragraph (1).

(3) The department will respond to any request made under paragraph (1), within five (5) working days of receipt.

(A) If the department determines that the proposed change is insignificant or protects the interest of the consumer such that immediate implementation is warranted, the requestor may immediately implement the change. The licensed school for the approved course on which the AMI is based shall ensure that the change is implemented.

(B) If the department determines that the proposed change is neither insignificant nor protects the interest of the consumer such that immediate implementation is warranted, the department shall notify the requestor of that determination and the change may not be made unless the department approves the change following a complete review.

(4) A determination by the department to allow immediate implementation under paragraph (1), does not constitute final approval by the department of the change. The department reserves the right to conduct further review after the change is implemented and to grant or deny final approval based on whether the change complies with state law and rules specified in this chapter.

(5) If, following further review, a change in an AMI that has been immediately implemented pursuant to paragraph (1), is determined not to be in compliance with state law and rules specified in this chapter, the department.

(A) shall notify the course provider affected by the change of:

(i) the specific provisions of state law or rules with which the AMI change is not in compliance; and

(ii) a reasonable date by which the AMI must be brought into compliance;

(B) shall not, for the period between the implementation of the change and the date specified under subparagraph (A)(ii):

(i) seek any penalty relating to the non-compliance;

(ii) take any action to revoke or deny renewal of a license of a school or course provider based on the change; or

(iii) withdraw approval of a course or AMI based on the change; and

(C) is not required to specify the method or manner by which the school alters the AMI to come into compliance with state law and the rules in this chapter.

(6) If the department allows immediate implementation pursuant to paragraph (1), and later determines that the description of the change or the request was misleading, materially inaccurate, not substantially complete, or not made in good faith, paragraph (5)(B) does not apply.

(7) A school who immediately implements a change pursuant to paragraph (1) and fails to bring the AMI into compliance prior to the date allowed under paragraph (5)(A)(ii) may be determined to be in violation of state law or the rules in this chapter after that date.

(8) A school that immediately implements a change under paragraph (1) assumes the risk of final approval being denied and of being required to come into compliance with state law and the rules in this chapter prior to the date allowed under paragraph (5)(A)(ii), including bearing the cost of reversing the change or otherwise modifying the AMI to come into compliance with state law and the rules in this chapter.

(j) Termination of the school's operation. Upon termination, schools shall deliver any missing student data to the department within five days of termination.

(k) Renewal of AMI approval. The AMI approval must be renewed and updated to ensure timeliness every two years. The renewal document due date shall be March 1, 2012, and every two years thereafter.

(1) For approval, the school shall:

(A) update all the statistical data, references to law, and traffic safety methodology with the latest available data; and

(B) submit a statement of assurance that the AMI has been updated to reflect the latest applicable laws and statistics.

(2) Failure to make necessary changes or to submit a statement of assurance documenting those changes shall be cause for revocation of the AMI approval.

(3) The department may alter the due date of the renewal documents by giving the approved AMI six months notice. The department may alter the due date in order to ensure that the AMI is updated six months after the effective date of new state laws passed by the Texas Legislature.

(l) Access to instructor. The school must establish hours that the student may access the instructor. With the exception of circumstances beyond the control of the school, the student shall have access to the instructor during the specified hours.

(m) Enrollment guidelines. The AMI for driver education classroom that desires to instruct students age 14 to under 25 years of age shall provide the same beginning and ending dates for each student in the same class of 36 or less. No student shall be allowed to enroll and start the classroom phase after the sixth hour of classroom instruction has been completed.

(n) Required training. The instructor must meet the professional teaching standard established by a state licensing agency or have academic credentials in the field in which he or she is teaching and must have been trained to teach the AMI classroom driver education course. Each instructor of an AMI classroom driver education course offered by a driver education school must:

(1) have a ST, DET, STA-F, or TA-F driver education license; and

(2) successfully complete the appropriate professional development course before teaching an AMI classroom driver education course.

§84.502. *Driving Safety Courses of Instruction.*

(a) This section contains requirements for driving safety, continuing education, and instructor development courses. For each course, the following curriculum documents and materials are required to be submitted as part of the application for approval. Except as provided by §84.504, relating to Driving Safety Course Alternative Delivery Method), all course content shall be delivered under the direct observation of a licensed instructor. Courses of instruction shall not be approved that contain language that a reasonable and prudent individual would consider inappropriate. Any changes and updates to a course shall be submitted by the course provider and approved prior to being offered. Approval will be revoked for any course that meets the definition of inactive as defined in §84.2(16) of this chapter.

(1) Driving safety courses.

(A) Educational objectives. The educational objectives of driving safety courses shall include, but not be limited to promoting respect for and encouraging observance of traffic laws and traffic safety responsibilities of drivers and citizens; reducing traffic violations; reducing traffic-related injuries, deaths, and economic losses; and motivating continuing development of traffic-related competencies.

(B) Driving safety course content guides. A course content guide is a description of the content of the course and the techniques of instruction that will be used to present the course. For courses offered in languages other than English, the course owner shall provide a copy of the student verification of course completion document and/or enrollment contract, student instructional materials, final examination, and evaluation in the proposed language accompanied by a statement from a translator with current credentials from the American Translators Association or the National Association of Judicial Interpreters and Translators that the materials are the same in both languages. In lieu of the specified credentials, a translator's credentials shall be presented to the department for approval with the final determination based solely on the department's interpretation. To be approved, each course owner shall submit as part of the application a course content guide that includes the following:

(i) a statement of the course's traffic safety goal and philosophy;

(ii) a statement of policies and administrative provisions related to instructor conduct, standards, and performance;

(iii) a statement of policies and administrative provisions related to student progress, attendance, makeup, and conduct. The policies and administrative provisions shall be used by each school that offers the course and include the following requirements:

(I) progress standards that meet the requirements of subparagraph (F);

(II) appropriate standards to ascertain the attendance of students. All schools approved to use the course must use the same standards for documenting attendance to include the hours scheduled each day and each hour not attended;

(III) if the student does not complete the entire course, including all makeup lessons, within the timeline specified by the court, no credit for instruction shall be granted;

(IV) any period of absence for any portion of instruction will require that the student complete that portion of instruction. All makeup lessons must be equivalent in length and content to the instruction missed and taught by a licensed instructor; and

(V) conditions for dismissal and conditions for reentry of those students dismissed for violating the conduct policy;

(iv) a statement of policy addressing entrance requirements and special conditions of students such as the inability to read, language barriers, and other disabilities;

(v) a list of relevant instructional resources such as textbooks, audio and visual media and other instructional materials, and equipment that will be used in the course and the furniture deemed necessary to accommodate the students in the course such as tables, chairs, and other furnishings. The course shall include a minimum of 60 minutes of audio/video materials relevant to the required topics; however, the audio/video materials shall not be used in excess of 150 minutes of the 300 minutes of instruction. The resources may be included in a single list or may appear at the end of each instructional unit;

(vi) written or printed materials to be provided for use by each student as a guide to the course. The division may make exceptions to this requirement on an individual basis;

(vii) instructional activities to be used to present the material (lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions, etc.). When small-group discussions are planned, the course content guide shall identify the questions that will be assigned to the groups;

(viii) instructional resources for each unit;

(ix) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the course guide. The evaluative technique may be used throughout the unit or at the end; and

(x) a completed form cross-referencing the instructional units to the topics identified in subparagraph (D). A form to cross-reference the instructional units to the required topics and topics unique to the course will be provided by the division.

(C) Course and time management. Approved driving safety courses shall be presented in compliance with the following guidelines and shall include statistical information drawn from data maintained by the Texas Department of Transportation or National Highway Traffic Safety Administration.

(i) A minimum of 300 minutes of instruction is required.

(ii) The total length of the course shall consist of a minimum of 360 minutes.

(iii) Sixty (60) minutes of time, exclusive of the 300 minutes of instruction, shall be dedicated to break periods or to the topics included in the minimum course content. All break periods shall be provided after instruction has begun and before the comprehensive examination and summation.

(iv) Administrative procedures such as enrollment shall not be included in the 300 minutes of the course.

(v) Courses conducted in a single day in a traditional classroom setting shall allow a minimum of 30 minutes for lunch.

(vi) Courses taught over a period longer than one day shall provide breaks on a schedule equitable to those prescribed for one-day courses. However, all breaks shall be provided after the course introduction and prior to the last unit of the instructional day or the comprehensive examination and summation, whichever is appropriate.

(vii) The order of topics shall be approved by the department as part of the course approval, and for each student, the course shall be taught in the order identified in the approved application.

(viii) Students shall not receive a uniform certificate of course completion unless that student receives a grade of at least 70% on the final examination.

(ix) In a traditional classroom setting, there must be sufficient seating for the number of students, arranged so that all students are able to view, hear, and comprehend all instructional aids and the class shall have no more than 50 students.

(x) The driving safety instructor or school shall make a material effort to establish the identity of the student.

(D) Minimum course content. Driving Safety course content, including video and multimedia, shall include current statistical data, references to law, driving procedures, and traffic safety methodology. A driving safety course shall include, as a minimum, materials adequate to assure the student masters the following.

(i) Course introduction--minimum of ten minutes (instructional objective--to orient students to the class). Instruction shall address the following topics:

(I) purpose and benefits of the course;

(II) course and facilities orientation;

(III) requirements for receiving course credit;

(IV) student course evaluation procedures; and

(V) Department-provided information on course content.

(ii) The traffic safety problem--minimum of 15 minutes (instructional objectives--to develop an understanding of the nature of the traffic safety problem and to instill in each student a sense of responsibility for its solution). Instruction shall address the following topics:

(I) identification of the overall traffic problem in the United States, Texas, and the locale where the course is being taught;

(II) death, injuries, and economic losses resulting from motor vehicle crashes in Texas; and

(III) the top five contributing factors of motor vehicle crashes in Texas as identified by the Texas Department of Transportation.

(iii) Factors influencing driver performance--minimum of 20 minutes (instructional objective--to identify the characteristics and behaviors of drivers and how they affect driving performance). Instruction shall address the following topics:

(I) attitudes, habits, feelings, and emotions (aggressive driving, etc.);

(II) alcohol and other drugs;

(III) physical condition (drowsy driving, etc.);

(IV) knowledge of driving laws and procedures; and

(V) understanding the driving task.

(iv) Traffic laws and procedures--minimum of 30 minutes (instructional objectives--to identify the requirements of, and the rationale for, applicable driving laws and procedures and to influence drivers to comply with the laws on a voluntary basis). Instruction shall address the following topics:

(I) passing;

(II) right-of-way;

(III) turns;

(IV) stops;

(V) speed limits;

(VI) railroad crossings safety, including statistics, causes, and evasive actions;

(VII) categories of traffic signs, signals, and highway markings;

(VIII) pedestrians;

(IX) improved shoulders;

(X) intersections;

(XI) occupant restraints;

(XII) anatomical gifts;

(XIII) litter prevention;

(XIV) law enforcement and emergency vehicles (this category will be temporary until the need is substantiated by documentation from the Department of Public Safety on the number of deaths or injuries involved because of improper procedures used by a citizen when stopped by a law enforcement officer); and

(XV) other laws as applicable (i.e., financial responsibility/compulsory insurance).

(v) Special skills for difficult driving environments--minimum of 20 minutes (instructional objectives--to identify how special conditions affect driver and vehicle performance and identify techniques for management of these conditions). Instruction shall address the following topics:

(I) inclement weather;

(II) traffic congestion;

(III) city, urban, rural, and expressway environments;

(IV) reduced visibility conditions--hills, fog, curves, light conditions (darkness, glare, etc.), etc.; and

(V) roadway conditions.

(vi) Physical forces that influence driver control--minimum of 15 minutes (instructional objective--to identify the physical forces that affect driver control and vehicle performance). Instruction shall address the following topics:

(I) speed control (acceleration, deceleration, etc.);

(II) traction (friction, hydroplaning, stopping distances, centrifugal force, etc.); and

(III) force of impact (momentum, kinetic energy, inertia, etc.).

(vii) Perceptual skills needed for driving--minimum of 20 minutes (instructional objective--to identify the factors of perception and how the factors affect driver performance). Instruction shall address the following topics:

(I) visual interpretations;

(II) hearing;

(III) touch;

(IV) smell;

(V) reaction abilities (simple and complex); and

(VI) judging speed and distance.

(viii) Defensive driving strategies--minimum of 40 minutes (instructional objective--to identify the concepts of defensive driving and demonstrate how they can be employed by drivers to reduce the likelihood of crashes, deaths, injuries, and economic losses). Instruction shall address the following topics:

(I) trip planning;

(II) evaluating the traffic environment;

(III) anticipating the actions of others;

(IV) decision making;

(V) implementing necessary maneuvers;

(VI) compensating for the mistakes of other drivers;

(VII) avoiding common driving errors;

(VIII) interaction with other road users (motorcycles, bicycles, trucks, pedestrians, etc.);

(IX) motorcycle awareness, including the dangers of failing to yield the right-of-way to a motorcyclist and the need to share the road with motorcyclist; and

(X) distractions relating to the effect of using a wireless communication device, including texting or engaging in other actions that may distract a driver from the safe or effective operation of a motor vehicle.

(ix) Driving emergencies--minimum of 40 minutes (instructional objective--to identify common driving emergencies and their countermeasures). Instruction shall address the following topics:

(I) collision traps (front, rear, and sides);

(II) off-road recovery, paths of least resistance; and

(III) mechanical malfunctions (tires, brakes, steering, power, lights, etc.).

(x) Occupant restraints and protective equipment--minimum of 15 minutes (instructional objective--to identify the rationale for having and using occupant restraints and protective equipment). Instruction shall address the following topics:

(I) legal aspects;

(II) vehicle control;

(III) crash protection;

(IV) operational principles (active and passive);

(V) helmets and other protective equipment; and

(VI) dangers involved in locking or leaving children in vehicles unattended.

(xi) Alcohol and traffic safety--minimum of 40 minutes (instructional objective--to identify the effects of alcohol on roadway users). Instruction shall not address methods to drink and drive but shall address the following topics related to the effects of alcohol on roadway users:

(I) physiological effects;

(II) psychological effects;

(III) legal aspects; and

(IV) synergistic effects.

(xii) Comprehensive examination--minimum of five minutes (this shall be the last unit of instruction).

(xiii) The remaining 30 minutes of instruction shall be allocated to the topics included in the minimum course content or to additional driving safety topics that satisfy the educational objectives of the course.

(E) Instructor training guides. An instructor training guide contains a description of the plan, training techniques, and curriculum to be used to train instructors to present the concepts of the approved driving safety course described in the applicant's driving safety course content guide. Each course provider shall submit as part of the application an instructor training guide that is bound or hole-punched and placed in a binder and that has a cover and a table of contents. The guide shall include the following:

(i) a statement of the philosophy and instructional goals of the training course;

(ii) a description of the plan to be followed in training instructors. The plan shall include, as a minimum, provisions for the following:

(I) instruction of the trainee in the course curriculum;

(II) training the trainee in the techniques of instruction that will be used in the course;

(III) training the trainee about administrative procedures and course provider policies;

(IV) demonstration of desirable techniques of instruction by the instructor trainer;

(V) a minimum of 15 minutes of instruction of the course curriculum by the trainee under the observation of the instructor trainer as part of the basic training course;

(VI) time to be dedicated to each training lesson; and

(VII) a minimum of 600 minutes of instruction of the course in a regular approved course under the observation of a licensed instructor trainer. The instructor trainee shall provide instruction for two full courses. It is not mandatory that the two courses be taught as two complete courses; however, every instructional unit shall be taught twice; and

(iii) instructional units sufficient to address the provisions identified in clause (ii)(I)-(VI). The total time of the units shall contain a minimum of 24 instructional hours. Each instructional unit shall include the following:

(I) the subject of the unit;

(II) the instructional objectives of the unit;

(III) time to be dedicated to the unit;

(IV) an outline of major concepts to be presented;

(V) instructional activities to be used to present the material (i.e., lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions). When small-group discussions are planned, the course guide shall identify the questions that will be assigned to the groups;

(VI) instructional resources for each unit; and

(VII) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the instructor training guide. The evaluative technique may be used throughout the unit or at the end.

(F) Examinations. Each course provider shall submit for approval, as part of the application, tests designed to measure the comprehension level of students at the completion of the driving safety course and the instructor training course. The comprehensive examination for each driving safety course must include at least 2 questions from the required units set forth in subparagraph (D)(ii)-(xi), for a total of at least 20 questions. The final examination questions shall be of such difficulty that the answer may not easily be determined without completing the actual instruction. Instructors shall not assist students in answering the final examination questions, but may facilitate alternative testing. Instructors may not be certified or students given credit for the driving safety course unless they score 70% or more on the final test. The course content guide shall identify alternative testing techniques to be used for students with reading, hearing, or learning disabilities and policies for retesting students who score less than 70% on the final examination. The applicant may choose not to provide alternative testing techniques; however, students shall be advised whether the course provides alternative testing prior to enrollment in the course. Test questions may be short answer, multiple choice, essay, or a combination of these forms.

(G) Student course evaluation. Each student in a driving safety course shall be given an opportunity to evaluate the course and the instructor on an official evaluation form. A master copy of the evaluation form will be provided to the department.

(H) State-level evaluation of driving safety courses. Each course provider shall collect adequate student data to enable the department to evaluate the overall effectiveness of a course in reducing the number of violations and accidents of persons who

successfully complete the course. The department may determine a level of effectiveness that serves the purposes of the Code.

(I) Requirements for authorship. The course materials shall be written by individuals or organizations with recognized experience in writing instructional materials.

(J) Renewal of course approval. The course approval must be renewed every two years. The renewal document due date shall be March 1 of every even numbered calendar year.

(i) For approval, the course owner shall update all the course content methodology, procedures, statistical data, and references to law with the latest available data.

(ii) The course owner shall submit a Statement of Assurance stating that the course has been updated to reflect the latest applicable laws and statistics.

(iii) Failure to make necessary changes or to submit a Statement of Assurance documenting those changes shall be cause for revocation of the course approval.

(iv) The commissioner may alter the due date of the renewal documents by giving the approved course six months' notice. The commissioner may alter the due date in order to ensure that the course is updated six months after the effective date of new state laws passed by the Texas Legislature.

(2) Instructor development courses.

(A) If the alternative instructor training in §84.64 (relating to Driving Safety Instructor License Requirements) is not applicable, driving safety instructors shall successfully complete 36 clock hours (50 minutes of instruction in a 60-minute period) in the approved instructor development course for the driving safety course to be taught, under the supervision of a driving safety instructor trainer. Supervision is considered to have occurred when the instructor trainer is present and personally provides the 36 clock hours of training for driving safety instructors, excluding those clock hours approved by department staff that may be presented by a guest speaker or using films and other media that pertain directly to the concepts being taught.

(B) Instruction records shall be maintained by the course provider and instructor trainer for each instructor trainee and shall be available for inspection by authorized division representatives at any time during the training period and/or for license investigation purposes. The instruction record shall include the trainee's name, address, driver's license number, and other pertinent data; the name and instructor license number of the person conducting the training; and the dates of instruction, lesson time, and subject taught during each instruction period. Each record shall also include grades or other means of indicating the trainee's aptitude and development. Upon satisfactory completion of the training course, the instructor trainer conducting the training will certify one copy of the instruction record for attachment to the trainee's application for licensing, and one copy will be maintained in a permanent file at the course provider location.

(C) All student instruction records submitted for the department-approved instructor development course shall be signed by the course provider. Original documents shall be submitted.

(D) Driving safety instructor development courses may be offered at approved classroom facilities of a licensed school which is approved to offer the driving safety course being taught. A properly licensed instructor trainer shall present the course.

(E) Applicants shall complete 36 hours of training in the driving safety curriculum that shall be taught. Of the 36 hours, 24 shall cover techniques of instruction and in-depth familiarization with materials contained in the driving safety curriculum. The additional 12 hours shall consist of practical teaching with students and shall occur after the first 24 hours have been completed.

(F) The driving safety course provider shall submit dates of instructor development course offerings for the 24-hour training that covers techniques of instruction and in-depth familiarization with the material contained in the driving safety curriculum, locations, class schedules, and scheduled instructor trainers' names and license numbers before the courses are offered. The 12-hour practical-teaching portion of the instructor development course shall be provided at properly licensed schools or classrooms approved to offer the course being provided.

(3) Continuing education courses.

(A) Continuing education requirements include the following.

(i) Each course provider will be responsible for receiving an approval for a minimum of a two-hour continuing education course. Each instructor currently endorsed to teach the course must attend the approved continuing education course conducted by the course provider.

(ii) The request for course approval shall contain the following:

(I) a description of the plan by which the course will be presented;

(II) the subject of each unit;

(III) the instructional objectives of each unit;

(IV) time to be dedicated to each unit;

(V) instructional resources for each unit, including names or titles of presenters and facilitators;

(VI) any information that the department mandates to promote the quality of the education being provided; and

(VII) a plan by which the course provider will monitor and ensure attendance and completion of the course by the instructions within the guidelines set forth in the course.

(iii) A continuing education course may be approved if the department determines that:

(I) the course is designed to enhance the instructional skills, methods, or knowledge of the driving safety instructor;

(II) the course pertains to subject matters that relate directly to driving safety instruction, instruction techniques, or driving safety-related subjects;

(III) the course has been designed, planned, and organized by the course provider. The course provider shall use licensed driving safety instructors to provide instruction or other individuals with recognized experience or expertise in the area of driving safety instruction or driving safety-related subject matters. Evidence of the individuals' experience or expertise may be requested by the division;

(IV) the course contains updates or approved revisions to the driving safety course curriculum, policies or procedures, and/or any changes to the course, that are affected by changes in traffic laws or statistical data; and

(V) any technology used to present a continuing education course meets reasonable standards for determining attendance, security, and testing.

(B) Course providers shall notify the division of the scheduled dates, times, and locations of all continuing education courses prior to the first day of class.

(b) Course providers shall submit documentation on behalf of schools applying for approval of additional courses after the original approval has been granted. The documents shall be designated by the division and include the appropriate fee. Courses shall be approved before soliciting students, advertising, or conducting classes. An approval for an additional course shall not be granted if the school's compliance is in question at the time of application.

(c) If an approved course is discontinued, the division shall be notified within five days of discontinuance and furnished with the names and addresses of any students who could not complete the course because it was discontinued. If the school does not make arrangements satisfactory to the students and the division for the completion of the courses, the full amount of all tuition and fees paid by the students are due and refundable. If arrangements are not made satisfactory to the students and the division, the refunds must be made no later than 30 days after the course was discontinued. Any course discontinued shall be removed from the list of approved courses.

(d) If, upon review and consideration of an original, renewal, or amended application for course approval, the department determines that the applicant does not meet the legal requirements, the commissioner shall notify the applicant, setting forth the reasons for denial in writing.

(e) The department may revoke approval of any course given to a course owner, provider, or school under any of the following circumstances.

(1) Any information contained in the application for the course approval is found to be untrue.

(2) The school has failed to maintain the faculty, facilities, equipment, or courses of study on the basis of which approval was issued.

(3) The school and/or course provider has been found to be in violation of the Code, and/or this chapter.

(4) The course has been found to be ineffective in meeting the educational objectives set forth in subsection (a)(1)(A) of this section.

§84.503. Specialized Driving Safety Courses of Instruction.

(a) This section contains requirements for specialized driving safety courses, instructor development courses, and continuing education. For each course, the following curriculum documents and materials are required to be submitted as part of the application for approval. Except as provided by §84.504 of this title (relating to Driving Safety Course Alternative Delivery Method), all course content shall be delivered under the direct observation of a specialized driving safety licensed instructor. Courses of instruction shall not be approved that contain language that a reasonable and prudent individual would consider inappropriate. Any changes and updates to a course shall be submitted and approved prior to being offered. Approval will be revoked for any course that meets the definition of inactive as defined in §84.2(14).

(1) Specialized driving safety courses.

(A) Educational objectives. The educational objectives of specialized driving safety courses shall include, but not be limited to improving the student's knowledge, compliance with, and attitude toward the use of child passenger safety seat systems and the wearing of seat belt and other occupant restraint systems.

(B) Specialized driving safety course content guides. A course content guide is a description of the content of the course and the techniques of instruction that will be used to present the course. For courses offered in languages other than English, the course owner shall provide a copy of the student verification of course completion document and/or contract, student instructional materials, final examination, and evaluation in the proposed language accompanied by a statement from a translator with current credentials from the American Translators Association or the National Association of Judicial Interpreters and Translators that the materials are the same in both languages. In lieu of the specified credentials, a translator's credentials may be presented to the department for approval with the final determination based solely on the department's interpretation. To be approved, each course owner shall submit as part of the application a course content guide that includes the following:

(i) a statement of the course's goal and philosophy relative to occupant protection;

(ii) a statement of policies and administrative provisions related to instructor conduct, standards, and performance;

(iii) a statement of policies and administrative provisions related to student progress, attendance, makeup, and conduct. The policies and administrative provisions shall be used by each school that offers the course and include the following requirements:

(I) progress standards that meet the requirements of subparagraph (F);

(II) appropriate standards to ascertain the attendance of students. All schools approved to use the course must use the same standards for documenting attendance to include the hours scheduled each day and each hour not attended;

(III) appropriate criteria to determine course completion. If the student does not complete the entire course, including all makeup lessons, within the timeline specified by the court, no credit for instruction shall be granted;

(IV) provisions for the completion of makeup work. Any period of absence for any portion of instruction will require that the student complete that portion of instruction. All makeup lessons must be equivalent in length and content to the instruction missed and taught by a licensed instructor; and

(V) conditions for dismissal and conditions for reentry of those students dismissed for violating the conduct policy;

(iv) a statement of policy addressing entrance requirements and special conditions of students such as the inability to read, language barriers, and other disabilities;

(v) a list of relevant instructional resources such as textbooks, audio and visual media and other instructional materials, and equipment that will be used in the course and the furniture deemed necessary to accommodate the students in the course such as tables, chairs, and other furnishings. The course shall include a minimum of 60 minutes of audio/video materials relevant to the required topics; however, the audio/video materials shall not be used in excess of 150 minutes of the 300 minutes of instruction. The resources may be included in a single list or may appear at the end of each instructional unit;

(vi) written or printed materials provided for use by each student as a guide to the course. The division may make exceptions to this requirement on an individual basis;

(vii) instructional activities to be used to present the material (lecture, films, other media, small-group discussions, work-

book activities, written and oral discussion questions, etc.). When small-group discussions are planned, the course content guide shall identify the questions that will be assigned to the groups;

(viii) instructional resources for each unit;

(ix) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the course guide. The evaluative technique may be used throughout the unit or at the end; and

(x) a completed form cross-referencing the instructional units to the topics identified in subparagraph (D). A form to cross-reference the instructional units to the required topics and topics unique to the course will be provided by the division.

(C) Course and time management. Approved specialized driving safety courses shall be presented in compliance with the following guidelines and shall include statistical information drawn from data maintained by the Texas Department of Transportation or National Highway Traffic Safety Administration.

(i) A minimum of 300 minutes of instruction is required of which at least 200 minutes shall address the use of child passenger safety seat systems and the wearing of seat belt and other occupant restraint systems.

(ii) The total length of the course shall consist of a minimum of 360 minutes.

(iii) Sixty (60) minutes of time, exclusive of the 300 minutes of instruction, shall be dedicated to break periods or to the topics included in the minimum course content. All break periods shall be provided after instruction has begun and before the comprehensive examination and summation.

(iv) Administrative procedures such as enrollment shall not be included in the 300 minutes of the course.

(v) Courses conducted in a single day in a traditional classroom setting shall allow a minimum of 30 minutes for lunch.

(vi) Courses taught over a period longer than one day shall provide breaks on a schedule equitable to those prescribed for one-day courses. However, all breaks shall be provided after the course introduction and prior to the last unit of the instructional day or the comprehensive examination and summation, whichever is appropriate.

(vii) The order of topics shall be approved by the department as part of the course approval, and for each student, the course shall be taught in the order identified in the approved application.

(viii) Students shall not receive a uniform certificate of course completion unless that student receives a grade of at least 70% on the final examination.

(ix) Specialized driving safety classrooms must have sufficient seating for the number of students, arranged so that all students are able to view, hear, and comprehend all instructional aids and the class shall have no more than 50 students.

(x) The specialized driving safety instructor or school shall make a material effort to establish the identity of the student.

(D) Minimum course content. A specialized driving safety course shall include, as a minimum, four hours of instruction that encourages the use of child passenger safety seat systems and the wearing of seat belts, etc., and materials adequate to assure the student masters the following.

(i) Course introduction--minimum of ten minutes (instructional objective--to orient students to the class). Instruction shall address the following topics:

(I) purpose and benefits of the course;

(II) course and facilities orientation;

(III) requirements for receiving course credit; and

(IV) student course evaluation procedures.

(ii) The occupant protection problem--minimum of 15 minutes (instructional objectives--to develop an understanding of Texas occupant protection laws and the national and state goals regarding occupant protection). Instruction shall address the following topics:

(I) identification of Texas Occupant Protection Laws;

(II) deaths, injuries, and economic losses related to improper use of occupant restraint systems; and

(III) national and state goals regarding occupant protection.

(iii) Factors influencing driver performance--(instructional objective--to identify the characteristics and behaviors of drivers and how they affect driving performance). Instruction shall address the following topics:

(I) attitudes, habits, feelings, and emotions;

(II) alcohol and other drugs;

(III) physical condition;

(IV) knowledge of driving laws and procedures; and

(V) understanding the driving task.

(iv) Physical forces that influence driver control--(instructional objective--to identify the physical forces that affect driver control and vehicle performance). Instruction shall address the following topics:

(I) speed control (acceleration, deceleration, etc.);

(II) traction (friction, hydroplaning, stopping distances, centrifugal force, etc.); and

(III) force of impact (momentum, kinetic energy, inertia, etc.).

(v) Perceptual skills needed for driving--(instructional objective--to identify the factors of perception and how the factors affect driver performance). Instruction shall address the following topics:

(I) visual interpretations;

(II) hearing;

(III) touch;

(IV) smell;

(V) reaction abilities (simple and complex); and

(VI) judging speed and distance.

(vi) Occupant protection equipment--minimum of 25 minutes (instructional objective--to identify the improvements

and technological advances in automotive design and construction). Instruction shall address the following topics:

(I) anti-lock brakes;

(II) traction control devices;

(III) suspension control devices;

(IV) electronic stability/active handling systems;

(V) crumple zones;

(VI) door latch improvements;

(VII) tempered or safety glass;

(VIII) headlights; and

(IX) visibility enhancements.

(vii) Occupant restraint systems--minimum of 40 minutes (instructional objective--to identify the rationale for having and using occupant restraints and protective equipment). Instruction shall address the following topics:

(I) safety belts, airbags, and other protective equipment;

(II) proper usage and necessary precautions;

(III) vehicle control and driver stability;

(IV) crash dynamics and protection; and

(V) operational principles (active versus passive).

(viii) Child passenger safety--minimum of 120 minutes (instructional objective--to understand the child passenger safety law in Texas; the importance of child safety seats; and the risks to children that are unrestrained or not properly restrained). Instruction shall address the following topics:

(I) misconceptions or mistaken ideas regarding child passenger safety;

(II) purpose of child safety seats;

(III) how to secure the child properly and factors to consider;

(IV) child safety seat types and parts;

(V) precautions regarding child safety seats;

(VI) correct installation of a child safety restraint system;

(VII) tips regarding child safety restraint systems; and

(VIII) dangers involved in locking or leaving children in vehicles unattended.

(ix) Comprehensive examination--minimum of five minutes (this shall be the last unit of instruction).

(x) The remaining 30 minutes of instruction shall be allocated to the topics included in the minimum course content or to additional occupant protection topics that satisfy the educational objectives of the course.

(E) Instructor training guides. An instructor training guide contains a description of the plan, training techniques, and curriculum to be used to train instructors to present the concepts of the approved specialized driving safety course described in the applicant's specialized driving safety course content guide. Each course provider shall submit as part of the application an instructor training guide that is bound or hole-punched and placed in a binder and that has a cover and a table of contents. The guide shall include the following:

(i) a statement of the philosophy and instructional goals of the training course;

(ii) a description of the plan to be followed in training instructors. The plan shall include, as a minimum, provisions for the following:

(I) instruction of the trainee in the course curriculum;

(II) training the trainee in the techniques of instruction that will be used in the course;

(III) training the trainee about administrative procedures and course provider policies;

(IV) demonstration of desirable techniques of instruction by the instructor trainer;

(V) a minimum of 15 minutes of instruction of the course curriculum by the trainee under the observation of the instructor trainer as part of the basic training course;

(VI) time to be dedicated to each training lesson; and

(VII) a minimum of 600 minutes of instruction of the course in a regular approved course under the observation of a licensed specialized driving safety instructor trainer. The instructor trainee shall provide instruction for two full courses. It is not mandatory that the two courses be taught as two complete courses; however, every instructional unit shall be taught twice; and

(iii) instructional units sufficient to address the provisions identified in clause (ii)(I)-(VI). The total time of the units shall contain a minimum of 24 instructional hours. Each instructional unit shall include the following:

(I) the subject of the unit;

(II) the instructional objectives of the unit;

(III) time to be dedicated to the unit;

(IV) an outline of major concepts to be presented;

(V) instructional activities to be used to present the material (i.e., lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions). When small-group discussions are planned, the course guide shall identify the questions that will be assigned to the groups;

(VI) instructional resources for each unit; and

(VII) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the instructor training guide. The evaluative technique may be used throughout the unit or at the end.

(F) Examinations. Each course provider shall submit for approval, as part of the application, tests designed to measure the comprehension level of students at the completion of the specialized driving safety course and the instructor training course. The comprehensive examination for each specialized driving safety course must include at least two questions from each unit, excluding the course introduction and comprehensive examination units. The final examination questions shall be of such difficulty that the answer may not easily be determined without completing the actual instruction. Instructors

shall not assist students in answering the final examination questions unless alternative testing is required. Instructors may not be certified or students given credit for the specialized driving safety course unless they score 70% or more on the final test. The course content guide shall identify alternative testing techniques to be used for students with reading, hearing, or learning disabilities and policies for retesting students who score less than 70% on the final examination. The applicant may choose not to provide alternative testing techniques; however, students shall be advised whether the course provides alternative testing prior to enrollment in the course. Test questions may be short answer, multiple choice, essay, or a combination of these forms.

(G) Student course evaluation. Each student in a specialized driving safety course shall be given an opportunity to evaluate the course and the instructor on an official evaluation form. A master copy of the evaluation form will be provided to the department.

(H) State-level evaluation of specialized driving safety courses. Each course provider shall collect adequate student data to enable the department to evaluate the overall effectiveness of a course in reducing the number of violations and accidents of persons who successfully complete the course. The department may determine a level of effectiveness that serves the purposes of the Code.

(I) Requirements for authorship. The course shall be authored by an individual who possesses a current or past National Highway Traffic Safety Association Child Passenger Safety technician or instructor certificate.

(2) Specialized driving safety instructor development courses.

(A) If the alternative instructor training in §84.64 of this chapter (relating to Driving Safety Instructor License Requirements) is not applicable, specialized driving safety instructors shall successfully complete 36 clock hours (50 minutes of instruction in a 60-minute period) in the approved instructor development course for the specialized driving safety course to be taught, under the supervision of a specialized driving safety instructor trainer. Supervision is considered to have occurred when the instructor trainer is present and personally provides the 36 clock hours of training for the instructors, excluding those clock hours approved by department staff that may be presented by a guest speaker or using films and other media that pertain directly to the concepts being taught.

(B) Instruction records shall be maintained by the course provider and instructor trainer for each instructor trainee and shall be available for inspection by authorized division representatives at any time during the training period and/or for license investigation purposes. The instruction record shall include the trainee's name, address, driver's license number, and other pertinent data; the name and instructor license number of the person conducting the training; and the dates of instruction, lesson time, and subject taught during each instruction period. Each record shall also include grades or other means of indicating the trainee's aptitude and development. Upon satisfactory completion of the training course the instructor trainer conducting the training will certify one copy of the instruction record for attachment to the trainee's application for licensing and one copy will be maintained in a permanent file at the course provider location.

(C) All student instruction records submitted for the department approved specialized driving safety instructor development course shall be signed by the course provider. Original documents shall be submitted.

(D) Specialized driving safety instructor development courses may be offered at approved classroom facilities of a licensed school which is approved to offer the specialized course being taught. A properly licensed instructor trainer shall present the course.

(E) Applicants shall complete 36 hours of training in the specialized driving safety curriculum that shall be taught. Of the 36 hours, 24 hours shall cover techniques of instruction and in-depth familiarization with materials contained in the specialized driving safety curriculum. The additional 12 hours shall consist of practical teaching with students and shall occur after the first 24 hours have been completed.

(F) The course provider shall submit dates of instructor development course offerings for the 24-hour training that covers techniques of instruction and in-depth familiarization with the material contained in the specialized driving safety curriculum, locations, class schedules, and scheduled instructor trainers' names and license numbers before the courses are offered. The 12-hour practical-teaching portion of the instructor development course shall be provided at properly licensed schools or classrooms approved to offer the course being provided.

(3) Continuing education courses.

(A) Continuing education requirements include the following.

(i) Each course provider will be responsible for receiving an approval for a minimum of a two-hour continuing education course. Each instructor currently endorsed to teach the course must attend the approved continuing education course conducted by the course provider.

(ii) The request for course approval shall contain the following:

(I) a description of the plan by which the course will be presented;

(II) the subject of each unit;

(III) the instructional objectives of each unit;

(IV) time to be dedicated to each unit;

(V) instructional resources for each unit, including names or titles of presenters and facilitators;

(VI) any information that the department mandates to ensure quality of the education being provided; and

(VII) a plan by which the course provider will monitor and ensure attendance and completion of the course by the instructions within the guidelines set forth in the course.

(iii) A continuing education course may be approved if the department determines that:

(I) the course constitutes an organized program of learning that enhances the instructional skills, methods, or knowledge of the specialized driving safety instructor;

(II) the course pertains to subject matters that relate directly to driving safety or specialized driving safety instruction, instruction techniques, or driving safety-related subjects;

(III) the entire course has been designed, planned, and organized by the course provider. The course provider shall use licensed driving safety or specialized driving safety instructors to provide instruction or other individuals with recognized experience or expertise in the area of driving safety or specialized driving safety instruction or driving safety-related subject matters. Evidence of the individuals' experience or expertise may be requested by the division;

(IV) the course contains updates or approved revisions to the specialized driving safety course curriculum, policies or procedures, and/or any changes to the course, that are affected by changes in traffic laws or statistical data; and

(V) the division determines that any technology used to present a continuing education course meets reasonable standards for determining attendance, security, and testing.

(B) Course providers shall notify the division of the scheduled dates, times, and locations of all continuing education courses prior to the first day of class.

(b) Course providers shall submit documentation on behalf of schools applying for approval of additional courses after the original approval has been granted. The documents shall be designated by the division and include the appropriate fee. Courses shall be approved before soliciting students, advertising, or conducting classes. An approval for an additional course shall not be granted if the school's compliance is in question at the time of application.

(c) If an approved course is discontinued, the division shall be notified within five days of discontinuance and furnished with the names and addresses of any students who could not complete the course because it was discontinued. If the school does not make arrangements satisfactory to the students and the division for the completion of the courses, the full amount of all tuition and fees paid by the students are due and refundable. If arrangements are not made satisfactory to the students and the division, the refunds must be made no later than thirty (30) days after the course was discontinued. Any course discontinued shall be removed from the list of approved courses.

(d) If, upon review and consideration of an original, renewal, or amended application for course approval, the department determines that the applicant does not meet the legal requirements, the commissioner shall notify the applicant, setting forth the reasons for denial in writing.

(e) The department may revoke approval of any course given to a course owner, provider, or school under any of the following circumstances.

(1) Any information contained in the application for the course approval is found to be untrue.

(2) The school has failed to maintain the faculty, facilities, equipment, or courses of study on the basis of which approval was issued.

(3) The school and/or course provider has been found to be in violation of the Code, and/or this chapter.

(4) The course has been found to be ineffective in meeting the educational objectives set forth in subsection (a)(1)(A) of this section.

§84.504. Driving Safety Course Alternative Delivery Method.

(a) Approval process. The department may approve an alternative delivery method (ADM) that delivers an approved driving safety course or an approved specialized driving course and meets the following requirements.

(1) Standards for approval. The commissioner may approve an ADM for an approved driving safety course or a specialized driving safety course and waive any rules to accomplish this approval if the ADM delivers an approved course in a manner that is at least as secure as a traditional classroom. ADMs that meet the requirements outlined in subsections (b)-(h), shall receive ADM approval.

(2) Application. The course provider shall submit a completed ADM application along with the appropriate fee. The application for ADM approval shall be treated the same as an application for the approval of a new course and the ADM must deliver the course provider's approved curriculum as delineated in the course content guide required by §84.502 (relating to Driving Safety Courses of Instruction) and §84.503 (relating to Specialized Driving Safety Courses of Instruction).

(3) Incomplete applications. An application that is incomplete may be returned to the applicant along with the application fee.

(4) School license required. A person or entity offering a driving safety course or a specialized driving course to Texas students by an alternative delivery method must hold a driving safety school license. The driving safety school is responsible for the operation of the ADM.

(5) Course provider endorsement required. The driving safety school must have an endorsement from a licensed course provider.

(b) Course content. The ADM must deliver the same topics and course content as the approved course.

(1) Course topics. The time requirements for each unit and the course as a whole described in §84.502(a)(1)(C) and (D) and §84.503(a)(1)(C) and (D) shall be met.

(2) Topic sequence. The ADM sequencing may be different from the approved traditional course as long as the sequencing does not detract from educational value of the course. The ADM owner shall provide a key showing the topic sequence of the traditional course and where the corresponding information appears in the ADM.

(3) Editing. The material presented in the ADM shall be edited for grammar, punctuation, and spelling and be of such quality that it does not detract from the subject matter.

(4) Irrelevant material. Advertisement of goods and services shall not appear during the actual instructional times of the course. Distracting material that is not related to the topic being presented shall not appear during the actual instructional times of the course.

(5) Minimum content. The ADM shall present sufficient content so that it would take a student 300 minutes to complete the course. In order to demonstrate that the ADM contains sufficient content, the ADM shall use the following methods.

(A) Word count. For written material that is read by the student, the course provider shall count the total number of words in the written sections of the course. This word count shall be divided by 180, the average number of words that a typical student reads per minute. The result is the time associated with the written material for the sections.

(B) Multimedia presentations. For multimedia presentation, the course provider shall calculate the total amount of time it takes for all multimedia presentations to play.

(C) Charts and graphs. The ADM may assign one minute for each chart or graph.

(D) Examinations. The course provider may allocate up to 90 seconds for questions presented over the Internet and 30 seconds for questions presented by telephone.

(E) Total time calculation. If the sum of the time associated with the written course material, the total amount of time for all multimedia presentations, and the time associated with all charts and graphs equals or exceeds 300 minutes, the ADM has demonstrated the required amount of content.

(F) Alternate time calculation method. In lieu of the time calculation method, the ADM may submit alternate methodology to demonstrate that the ADM meets the 300-minute requirement.

(6) Student breaks. A course that demonstrates that it contains 300 minutes of instructional content shall mandate that students take 60 minutes of break time or provide additional educational content for a total of 360 minutes.

(c) Personal validation. The ADM shall maintain a system to validate the identity of the person taking the course. The personal validation system shall incorporate the following requirements.

(1) Personal validation questions. The ADM shall ask a minimum of 10 personal validation questions throughout the course.

(2) Third party data sources. The personal validation questions shall be drawn equally from at least two different databases.

(3) Time to respond. The student must correctly answer the personal validation question within 90 seconds for questions presented over the Internet and 30 seconds for questions presented by telephone.

(4) Placement of questions. At least one personal validation question shall appear in each major unit or section, not including the final examination.

(5) Exclusion from the course. The ADM shall exclude the student from the course after the student has incorrectly answered more than 30 percent of the personal validation questions.

(6) Correction of answer. The school may correct an answer to a personal validation question for a student who inadvertently missed a personal validation question. In such a case, the student record shall include a record of both answers and an explanation of the reasons that the school corrected the answer.

(7) Student affidavits. A student for whom third-party database information is available from fewer than two databases (for example, a student with an out-of-state driver's license) may be issued a uniform certificate of completion upon presentation to the course provider of a notarized copy of the student's driver's license or equivalent type of photo identification and a statement from the student certifying that the individual attended and successfully completed the six-hour driving safety or specialized driving safety course for which the certificate is being issued and for which there exists a corresponding student record.

(8) Alternative methods. Upon approval by the department the ADM may use alternate methods that are at least as secure as the personal validation question method.

(d) Content validation. The ADM shall incorporate a course content validation process that verifies student participation and comprehension of course material, including the following.

(1) Timers. The ADM shall include built-in timers to ensure that 300 minutes of instruction have been attended and completed by the student.

(2) Testing the student's participation in multimedia presentations. The ADM shall ask at least 1 course validation question following each multimedia clip of more than 60 seconds.

(A) Test bank. For each multimedia presentation that exceeds 60 seconds, the ADM shall have a test bank of at least 4 questions.

(B) Question difficulty. The question shall be short answer, multiple choice, essay, or a combination of these forms. The question shall be difficult enough that the answer may not be easily determined without having viewed the actual multimedia clip.

(C) Failure criteria. If the student fails to answer the question correctly, the ADM shall either require the student view the multimedia clip again or the ADM shall fail the student from the course. If the ADM requires the student to view the multimedia clip again, the ADM shall present a different question from its test bank for that multimedia clip. The ADM may not repeat a question until it has asked all the questions from its test bank.

(D) Answer identification. The ADM shall not identify the correct answer to the multimedia question.

(3) Mastery of course content. The ADM shall test the student's mastery of the course content by asking at least two questions from each of the topics listed in §84.502(a)(1)(D)(ii)-(xi) and §84.503(a)(1)(D)(ii)-(viii).

(A) Test bank. The test bank for course content mastery questions shall include at least ten questions from each of the topics identified in §84.502(a)(1)(D)(ii)-(xi) and §84.503(a)(1)(D)(ii)-(viii).

(B) Placement of questions. The mastery of course content questions shall be asked either at the end of the major unit or section in which the topic identified in §84.502(a)(1)(D)(ii)-(xi) and §84.503(a)(1)(D)(ii)-(viii) is covered (unit examination) or at the end of the course (comprehensive final examination).

(C) Question difficulty. Course content mastery questions shall be short answer, multiple choice, essay, or a combination of these forms, and of such difficulty that the answer may not be easily determined without having participated in the actual instruction.

(4) Repeat and retest options. The ADM may use either of the following options for students who fail an examination to show mastery of course content, but may not use both in the same ADM.

(A) Repeat the failed unit. If the student misses more than 30% of the questions asked on an examination, the ADM shall require that the student take the unit again. All timers shall be reset. The correct answer to missed questions may not be disclosed to the student (except as part of course content). At the end of the unit, the ADM shall again test the student's mastery of the material. The ADM shall present different questions from its test bank until all the applicable questions have been asked. The student may repeat this procedure an unlimited number of times.

(B) Retest the student. If the student misses more than 30% of the questions asked on an examination, the ADM shall retest the student in the same manner as the failed examination, using different questions from its test bank. The student is not required to repeat the failed unit, but may be allowed to do so prior to retaking the examination. If the student fails the same unit examination or the comprehensive final examination three times, the student shall fail the course.

(e) Student records. The ADM shall provide for the creation and maintenance of the records documenting student enrollment, the verification of the student's identity, and the testing of the student's mastery of the course material. Each entry that verifies enrollment, identifies the question asked or the response given, documents retesting and/or revalidation, and documents any changes to the student's record shall include the date and time of the activity reported. The student records shall contain the following information.

(1) The student's name and driver's license number.

(2) A record of which personal validation questions were asked and the student's responses.

(3) A record of which multimedia participation questions were asked and the student's responses.

(4) The name or identity number of the staff member entering comments, retesting, or revalidating the student.

(5) If any answer to a question is changed by the school or course provider for a student who inadvertently missed a question, the school or course provider shall provide both answers and a reasonable explanation for the change.

(6) A record of the course content mastery questions asked and the answers given.

(7) A record of the time the student spent in each unit of the ADM and the total instructional time the student spent in the course.

(8) The school shall also ensure that the student record is readily, securely, and reliably available for inspection by the department.

(f) Additional requirements for Internet courses. Courses delivered via the Internet shall also comply with the following requirements.

(1) Reentry into the course. An ADM may allow the student reentry into the course by username and password authentication or other means that are as secure as username and password authentication.

(2) Navigation. The student shall be able to logically navigate through the course. The student shall be allowed to freely browse previously completed material.

(3) Audio-visual standards. The video and audio shall be clear and, when applicable, the video and audio shall be synchronized.

(4) Video transcripts. If the ADM presents transcripts of a video presentation, the transcript shall be delivered concurrently with the video stream so that the transcript cannot be displayed if the video does not display on the student's computer.

(5) Domain names. Each school offering an ADM must offer that ADM from a single domain. The ADM may accept students that are redirected to the ADM's domain, as long as the student is redirected to a webpage that clearly identifies the course provider and school offering the ADM before the student begins the registration process, supplies any information, or pays for the course. Subdomains of the ADM's single domain may also accept students as long as the subdomain is registered to and hosted by the ADM and clearly identifies the official course provider, school name, and department registration number.

(6) Course identification. All ADMs presented over the Internet shall display the school name and school number assigned by the department as well as the course provider name and course provider number assigned by the department in the top left-hand portion on the entity's homepage and the registration page used by the student to pay any monies, provide any personal information, and enroll.

(g) Additional requirements for video courses.

(1) Delivery of the material. For ADMs delivered by the use of videotape, digital video disc (DVD), film, or similar media, the equipment and course materials may only be made available through a process that is approved by the department.

(2) Video requirement. In order to meet the video requirement of §84.502(a)(1)(B)(v), the video course shall include between 60 and 150 minutes of video that is relevant to the required topics such as video produced by other entities for training purposes, including public safety announcements and B roll footage. The remainder of the 300 minutes of required instruction shall be video material that is relevant to 1 of the 11 required topics and produced by the ADM owner, course owner, or course provider specifically for the ADM.

(A) A video ADM shall ask, at a minimum, at least 1 course validation question for each multimedia clip of more than 60 seconds at the end of each major segment (chapter) of the ADM.

(B) A video ADM shall devise and submit for approval a method for ensuring that a student correctly answers questions concerning the multimedia clips of more than 60 seconds presented during the ADM.

(h) Standards for ADMs using new technology. For ADMs delivered using technologies that have not been previously reviewed and approved by the department, the department may apply similar standards as appropriate and may also require additional standards. These standards shall be designed to ensure that the course can be taught by the alternative method and that the alternative method includes testing and security measures that are at least as secure as the methods available in the traditional classroom setting.

(i) Modifications to the ADM. Except as provided by paragraph (1) of this subsection, a change to a previously approved ADM shall not be made without the prior approval of the department. The licensed course provider for the approved course on which the ADM is based shall ensure that any modification to the ADM is implemented by all schools endorsed to offer the ADM.

(1) A course provider may submit to the department a request for immediate implementation of a proposed change that is insignificant or that protects the interest of the consumer such that immediate implementation is warranted. The request shall include:

(A) a complete description of the proposed change;

(B) the reason for the change;

(C) the reason the requestor believes the proposed change is insignificant or protects the interest of the consumer such that immediate implementation is warranted; and

(D) an explanation of how the change will maintain the course or ADM in compliance with state law and the rules specified in this chapter.

(2) The department may request additional information regarding a proposed change from the course provider making a request under paragraph (1).

(3) The department will respond to any request made under paragraph (1), within five working days of receipt.

(A) If the department determines that the proposed change is insignificant or protects the interest of the consumer such that immediate implementation is warranted, the requestor may immediately implement the change. The licensed course provider for the approved course on which the ADM is based shall ensure that the change is implemented by all schools endorsed to offer the ADM.

(B) If the department determines that the proposed change is neither insignificant nor protects the interest of the consumer such that immediate implementation is warranted, the department shall notify the requestor of that determination and the change may not be made unless the department approves the change following a complete review.

(4) A determination by the department to allow immediate implementation under paragraph (1), does not constitute final approval by the department of the change. The department reserves the right to conduct further review after the change is implemented and to grant or

deny final approval based on whether the change complies with state law and rules specified in this chapter.

(5) If, following further review, a change in an ADM that has been immediately implemented pursuant to paragraph (1), is determined not to be in compliance with state law and rules specified in this chapter, the department:

(A) shall notify the course provider affected by the change of:

(i) the specific provisions of state law or rules with which the ADM change is not in compliance; and

(ii) a reasonable date by which the ADM must be brought into compliance;

(B) shall require the course provider to notify any school endorsed by the course provider of the finding;

(C) shall not, for the period between the implementation of the change and the date specified under subparagraph (A)(ii):

(i) seek any penalty relating to the non-compliance;

(ii) take any action to revoke or deny renewal of a license of a school or course provider based on the change; or

(iii) withdraw approval of a course or ADM based on the change; and

(D) is not required to specify the method or manner by which the course provider alters the ADM to come into compliance with state law and the rules in this chapter.

(6) If the department allows immediate implementation pursuant to paragraph (1) and later determines that the description of the change or the request was misleading, materially inaccurate, not substantially complete, or not made in good faith, paragraph (5)(C) does not apply.

(7) A course provider who immediately implements a change pursuant to paragraph (1) and fails to bring the ADM into compliance prior to the date allowed under paragraph (5)(A)(ii) may be determined to be in violation of state law or the rules in this chapter after that date.

(8) A course provider that immediately implements a change under paragraph (1), assumes the risk of final approval being denied and of being required to come into compliance with state law and the rules in this chapter prior to the date allowed under paragraph (5)(A)(ii), including bearing the cost of reversing the change or otherwise modifying the ADM to come into compliance with state law and the rules in this chapter.

(j) Termination of the school's operation. Upon termination, schools shall deliver any missing student data to the department within five days of termination.

(k) Renewal of ADM approval. The ADM approval must be renewed every two years. The renewal document due date shall be March 1 of every even numbered calendar year.

(1) For approval, the course provider shall:

(A) update all the statistical data and references to law with the latest available data; and

(B) submit a statement of assurance that the ADM has been updated to reflect the latest applicable laws and statistics.

(2) Failure to make necessary changes or to submit a statement of assurance documenting those changes shall be cause for revocation of the ADM approval.

(3) The commissioner may alter the due date of the renewal documents by giving the approved ADM six months' notice. The commissioner may alter the due date in order to ensure that the ADM is updated six months after the effective date of new state laws passed by the Texas Legislature.

(l) Access to instructor. With the exception of circumstances beyond the control of the school, the student shall have adequate access (on the average, within two minutes) to both a licensed instructor and telephonic technical assistance (help desk) throughout the course such that the flow of instructional information is not delayed.

§84.505. Drug and Alcohol Driving Awareness Programs of Instruction.

(a) This section contains requirements for drug and alcohol driving awareness programs and instructor development programs. For each program, the following curriculum documents and materials are required to be submitted as part of the application for approval. All program content shall be delivered under the direct observation of a licensed instructor. Programs of instruction shall not be approved which contain language that a reasonable person would consider inappropriate. Any changes and updates to a program shall be submitted and approved prior to being offered.

(1) Drug and alcohol driving awareness programs.

(A) Educational objectives. The educational objectives of drug and alcohol driving awareness programs shall include, but not be limited to: educating participants on the risks associated with alcohol or other drug use/abuse and problems associated with such use; providing information on the physiological and psychological effects of alcohol and drugs, legal aspects of alcohol and drug use; the effects of alcohol and drugs on the driving task; signs of abuse; and assisting participants in developing a plan to reduce the probability that they will be involved in alcohol/drugs and driving situations.

(B) Drug and alcohol driving awareness program content guides. A program content guide is a description of the content of the program and the techniques of instruction that will be used to present the program. For programs offered in languages other than English, the course provider shall provide, along with the documentation specified in clauses (i)-(ix), a copy of the student verification of course completion document and/or enrollment contract, student instructional materials, and post-program exam in the proposed language accompanied by a statement from a translator with current credentials from the American Translators Association or the National Association of Judicial Interpreters and Translators that the materials are the same in both English and the other language. In lieu of the credentials specified in this subparagraph, a translator's credentials shall be presented to the department for approval with the final determination based solely on the department's interpretation. To be approved, each course provider shall submit as part of the application a program content guide that includes the following:

(i) a statement of the program's drug and alcohol driving awareness program goal and philosophy. The program must not in any way promote Responsible Use, Harm Reduction, or Risk Reduction philosophies when being presented to minors;

(ii) a statement of policies and administrative provisions related to instructor conduct, standards, and performance;

(iii) a statement of policies and administrative provisions related to student progress, attendance, makeup, and conduct. The following policies and administrative provisions shall be used by each school that offers the program and include the following requirements:

(I) progress standards that meet the requirements of subsection (a)(1)(F) of this section;

(II) appropriate standards to ascertain the attendance of students. All schools approved to use the program must use the same standards for documenting attendance to include the hours scheduled each day and each hour not attended;

(III) any period of absence for any portion of instruction will require that the student complete that portion of instruction. All make-up lessons must be equivalent in length and content to the instruction missed and taught by a licensed instructor; and

(IV) conditions for dismissal and conditions for reentry of those students dismissed for violating the conduct policy;

(iv) a statement of policy addressing entrance requirements and special conditions of students, such as the inability to read, language barriers, and other disabilities;

(v) a list of relevant instructional resources, such as textbooks, audio and visual media and other instructional materials, and equipment that will be used in the program; and the furniture deemed necessary to accommodate the students in the program, such as tables, chairs, and other furnishings. The program shall include a minimum of 60 minutes of videos, including audio; however, the videos and other relevant instructional resources cannot be used in excess of 150 minutes of the 300 minutes of instruction. The resources may be included in a single list or may appear at the end of each instructional unit;

(vi) a clear identification of the order in which the units of instruction will be presented, and for each student, the program shall be taught in the order identified in the approved application;

(vii) written or printed materials that shall be provided for use by each student as a guide to the program. The division director may make exceptions to this requirement on an individual basis;

(viii) units of instruction sufficient to present the topics identified in subsection (a)(1)(B) of this section and any additional topics unique to the program. Each instructional unit shall include the following:

(I) the subject of the unit;

(II) the instructional objectives of the unit;

(III) time to be dedicated to the unit;

(IV) an outline of major concepts to be presented;

(V) instructional activities to be used to present the material (lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions, etc.). When small-group discussions are planned, the program guide shall identify the questions that will be assigned to the groups;

(VI) instructional resources for each unit; and

(VII) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the program content guide. The evaluative technique may be used throughout the unit or at the end; and

(ix) a document that identifies the instructional units and topics and the order in which they are provided.

(C) Program and time management. Approved drug and alcohol driving awareness programs shall be presented in compliance with the following guidelines.

(i) A minimum of 300 minutes of instruction is required.

(ii) The total length of the program shall consist of a minimum of 360 minutes.

(iii) Sixty (60) minutes of time, exclusive of the 300 minutes of instruction, shall be dedicated to break periods or to the topics included in the minimum program content. All break periods shall be provided after instruction has begun and before the post-program exam.

(iv) Programs conducted in a single day shall allow a minimum of 30 minutes for lunch.

(v) Programs taught over a period longer than one day shall provide breaks on a schedule equitable to those prescribed for one-day programs. However, all breaks shall be provided prior to the last unit of the instructional day or the post-program exam, whichever is appropriate.

(vi) The order of topics shall be approved by the department as part of the program approval, and for each student, the program shall be taught in the order identified in the approved application.

(vii) Students shall not receive a certificate of program completion unless that student received a grade of at least 70% on the post-program exam.

(viii) The program must not in any way promote Responsible Use, Harm Reduction, or Risk Reduction philosophies when provided to minors.

(ix) No more than 50 students per class are permitted in drug and alcohol driving awareness programs, unless the class size is limited by a restriction under another law or rule. In a traditional classroom setting, there must be sufficient seating for the number of students arranged so that all students are able to view, hear, and comprehend all instruction aids.

(x) The drug and alcohol driving awareness school shall make a material effort to establish the identity of the student.

(D) Minimum program content. A drug and alcohol driving awareness program shall include, as a minimum, materials adequate to address the following topics and instructional objectives and the program as a whole.

(i) Program administration. The objective is to enable the instructor to handle any basic in-class administrative details that are necessary prior to beginning instruction. This unit shall be limited to 15 minutes.

(ii) Program introduction, pre-program exam, and background. The objective is to present an overview of the program and to demonstrate the nature of the problem as it relates to the use of alcohol or other drugs.

(iii) Texas laws. The objective is to provide basic information about laws related to alcohol/drug use in Texas.

(iv) Physiological and psychological effects of alcohol/drugs. The objective is to provide basic information about the physiological and psychological effects of alcohol and other drugs on humans.

(v) Effects of alcohol/drugs on the driving task. The objective is to explain the relationship of alcohol and other drugs to driving task abilities.

(vi) Signs of a problem. The objective is to help participants recognize and understand the warning signs of a potential alcohol/drug problem.

(vii) Decision making. The objective is to help participants make quality decisions about alcohol/drug use that will prevent future problems.

(viii) Post-program exam.

(E) Instructor training guides. An instructor training guide contains a description of the plan, training techniques, and curriculum to be used to train instructors to present the concepts of the approved drug and alcohol driving awareness program described in the applicant's drug and alcohol driving awareness program guide. Each course provider shall submit as part of the application an instructor training guide. The guide shall include a table of contents and the following:

(i) a statement of the philosophy and instructional goals of the training program. The program must not in any way promote Responsible Use, Harm Reduction, or Risk Reduction philosophies when being presented to minors;

(ii) a description of the plan to be followed in training instructors. The plan shall include, as a minimum, provisions for the following:

(I) instruction of the trainee in the program curriculum;

(II) training the trainee in the techniques of instruction that will be used in the program;

(III) training the trainee about administrative procedures and course provider policies;

(IV) demonstration of desirable techniques of instruction by the instructor trainer;

(V) a minimum of 15 minutes of instruction of the program curriculum by the trainee under the observation of the instructor trainer as part of the basic training program; and

(VI) time to be dedicated to each training lesson; and

(iii) instructional units sufficient to address the provisions identified in clause (ii)(I)-(V). The total time of the units shall contain a minimum of 24 instructional hours. Each instructional unit shall include the following:

(I) the subject of the unit;

(II) the instructional objectives of the unit;

(III) time to be dedicated to the unit;

(IV) an outline of major concepts to be presented;

(V) instructional activities to be used to present the material (i.e., lecture, films, other media, small-group discussions, workbook activities, written and oral discussion questions). When small-group discussions are planned, the program guide shall identify the questions that will be assigned to the groups;

(VI) instructional resources for each unit; and

(VII) techniques for evaluating the comprehension level of the students relative to the instructional unit. If oral or written questions are to be used to measure student comprehension levels, they shall be included in the instructor training guide. The evaluative technique may be used throughout the unit or at the end.

(F) Exams. Each course provider shall submit for approval, as part of the application, pre- and post-program exams designed to measure the knowledge of students at the completion of the drug and alcohol driving awareness program. The post-program exam for each drug and alcohol driving awareness program must contain at least 20 questions. A minimum of 2 questions shall be drawn from the required units set forth in subparagraph (D)(iii)-(vii) of this paragraph. The post-program final exam questions shall be of such difficulty that the answer may not easily be determined without completing the actual instruction. Instructors shall not assist students in answering the post-program exam questions, but may facilitate alternative testing. Instructors may not certify or give students credit for the drug and alcohol driving awareness program unless they score 70% or more on the post-program exam. The program content guide shall identify alternative testing techniques to be used for students with reading, hearing, or learning disabilities and policies for retesting students who score less than 70% on the post-program exam. The course provider may choose not to provide alternative testing techniques; however, students shall be advised whether the course provides alternative testing prior to enrollment in the course. Exam questions may be short answer, multiple choice, essay, or a combination of these forms.

(2) Instructor development programs.

(A) Drug and alcohol driving awareness program instructors shall successfully complete 24 clock hours (50 minutes of instruction in a 60-minute period) in the approved instructor development program for the drug and alcohol driving awareness program to be taught, under the supervision of a licensed drug and alcohol driving awareness instructor who is designated by the course provider. Supervision is considered to have occurred when the licensed instructor is present and personally provides the 24 clock hours of training for drug and alcohol driving awareness instructors, excluding clock hours approved by the department that may be presented by a guest speaker or using films and other media that pertain directly to the concepts being taught.

(B) Instruction records shall be maintained by the course provider and licensed instructor for each instructor trainee and shall be available for inspection by authorized division representatives at any time during the training period and/or for license investigation purposes. The instruction record shall include the trainee's name, address, driver's license number, and other pertinent data; the name and instructor license number of the person conducting the training; and the dates of instruction, lesson time, and subject taught during each instruction period. Each record shall also include unit, pre- and post-program exam grades or other means of indicating the trainee's aptitude and development. Upon satisfactory completion of the training program, the instructor trainer conducting the training will certify a copy of the instruction record for attachment to the trainee's application for licensing.

(C) The course provider shall sign all student instruction records submitted for the department-approved instructor development program. Original documents shall be submitted.

(D) Instructor development programs may be offered at approved classroom facilities of a licensed school which is approved to offer the drug and alcohol driving awareness program being taught. A properly licensed instructor shall present the program.

(b) Schools applying for approval of additional drug and alcohol driving awareness programs after the original approval has been granted shall submit the documents designated by the division director with the appropriate fee. Programs shall be approved before soliciting students, advertising, or conducting classes. An approval for an ad-

ditional program shall not be granted if the school's compliance is in question at the time of application.

(c) If an approved program is discontinued, the division director shall be notified within five working days of discontinuance. Any program discontinued shall be removed from the list of approved programs.

(d) If, upon review and consideration of an original, renewal, or amended application for drug and alcohol driving awareness program approval, the department determines that the applicant does not meet the legal requirements, the commissioner shall notify the applicant, setting forth the reasons for denial in writing.

(e) The department may revoke approval of any drug and alcohol driving awareness program given to a course provider or school under any of the following circumstances.

(1) A statement contained in the application for the program approval is found to be untrue.

(2) The school has failed to maintain the faculty, facilities, equipment, or programs of study on the basis of which approval was issued.

(3) The school and/or course provider has been found to be in violation of the Code, and/or this subchapter.

(4) The program has been found to be ineffective in carrying out the purpose of the Code.

§84.506. Drug and Alcohol Driving Awareness Programs Alternative Delivery Method.

(a) Approval process. The department may approve an alternative delivery method (ADM) that delivers an approved drug and alcohol driving awareness program and meets the following requirements.

(1) Standards for approval. The department may approve an ADM for an approved drug and alcohol driving awareness program and waive any rules to accomplish this approval if the ADM delivers an approved program in a manner that is at least as secure as a traditional classroom. ADMs that meet the requirements outlined in subsections (b)-(h), shall receive ADM approval.

(2) Application. The course provider shall submit a completed ADM application along with the appropriate fee. The application for ADM approval shall be treated the same as an application for the approval of a new program, and the ADM must deliver the course provider's approved curriculum as delineated in the program content guide required by §84.505(a)(1)(B) (relating to Drug and Alcohol Driving Awareness Programs of Instruction).

(3) Incomplete applications. An application that is incomplete may be returned to the applicant along with the application fee.

(4) School license required. A person or entity offering a drug and alcohol driving awareness program to Texas students by an ADM must hold a drug and alcohol driving awareness school license.

(5) Course provider endorsement required. The drug and alcohol driving awareness school must have an endorsement from a licensed course provider.

(6) Course provider responsibility. The day-to-day operations of an ADM are the responsibility of the course provider that owns the curriculum. A course provider may offer an ADM through a school that is not owned and operated by the course provider only with approval of the division director. By accepting such approval, the course provider that offers the curriculum through a licensed drug and alcohol and driving awareness school also accepts responsibility for all compliance issues that arise as a result of the operation of the ADM.

(b) Program content. The ADM must deliver the same topics and program content as the approved course.

(1) Course topics. The time requirements for each unit and the program as a whole described in §84.505(a)(1)(B)(v), (C), and (D) shall be met.

(2) Topic sequence. The ADM sequencing may be different from the approved traditional program as long as the sequencing does not detract from educational value of the program. The ADM owner shall provide a key showing the topic sequence of the traditional program and where the corresponding information appears in the ADM.

(3) Editing. The material presented in the ADM shall be edited for grammar, punctuation, and spelling and be of such quality that it does not detract from the subject matter.

(4) Irrelevant material. Advertisement of goods and services shall not appear during the actual instructional times of the program. Distracting material that is not related to the topic being presented shall not appear during the actual instructional times of the program.

(5) Minimum content. The ADM shall present sufficient content so that it would take a student 300 minutes to complete the program. In order to demonstrate that the ADM contains sufficient content, the ADM shall use the following methods.

(A) Word count. For written material that is read by the student, the course provider shall count the total number of words in the written sections of the program. This word count shall be divided by 180, the average number of words that a typical student reads per minute. The result is the time associated with the written material for the sections.

(B) Multimedia presentations. For multimedia presentation, the course provider shall calculate the total amount of time it takes for all multimedia presentations to play.

(C) Charts and graphs. The ADM may assign one minute for each chart or graph.

(D) Exams. The course provider may allocate up to 45 seconds for questions presented over the Internet and 30 seconds for questions presented by telephone.

(E) Total time calculation. If the sum of the time associated with the written program material, the total amount of time for all multimedia presentations, and the time associated with all charts and graphs equals or exceeds 300 minutes, the ADM has demonstrated the required amount of content.

(F) Alternate time calculation method. In lieu of the time calculation method, the ADM may submit alternate methodology to demonstrate that the ADM meets the 300-minute requirement.

(6) Student breaks. A program that demonstrates that it contains 300 minutes of instructional content shall mandate that students take 60 minutes of break time or provide additional educational content for a total of 360 minutes.

(c) Personal validation. The ADM shall maintain a system to validate the identity of the person taking the program. The personal validation system shall incorporate the following requirements.

(1) Personal validation questions. The ADM shall ask a minimum of 10 personal validation questions throughout the program.

(2) Data sources. The personal validation questions shall be drawn equally from at least two different databases. Alternatively,

the data may be drawn from student-solicited question/answer pairs obtained during enrollment.

(3) Time to respond. The student must correctly answer the personal validation question within 45 seconds for questions presented over the Internet and 30 seconds for questions presented by telephone.

(4) Placement of questions. At least one personal validation question shall appear in each major unit or section, not including the post-program exam.

(5) Exclusion from the course. The ADM shall exclude the student from the program after the student has incorrectly answered more than 20 percent of the personal validation questions.

(6) Correction of answer. The school may correct an answer to a personal validation question for a student who inadvertently missed a personal validation question drawn from a third-party database. In such a case, the student record shall include a record of both answers and an explanation of the reasons that the school corrected the answer. A school or course provider shall not correct or change an answer for a student who enrolls in an ADM that uses student-solicited question/answer pairs for personal validation.

(7) Student affidavits. A student enrolled in a program that uses third-party database validation questions and for whom third-party database information is available from fewer than two databases (for example, a student with an out-of-state driver's license) may be issued a certificate of program completion upon presentation to the course provider of a notarized copy of the student's driver's license or equivalent type of photo identification and a statement from the student certifying that the individual attended and successfully completed the six-hour drug and alcohol driving awareness program for which the certificate is being issued and for which there exists a corresponding student record.

(8) Alternative methods. Upon approval by the department the ADM may use alternate methods that are at least as secure as the personal validation question method.

(d) Program validation. The ADM shall incorporate a program content validation process that verifies student participation and comprehension of program material, including the following.

(1) Timers. The ADM shall include built-in timers to ensure that 300 minutes of instruction have been attended and completed by the student.

(2) Testing the student's participation in multimedia presentations. The ADM shall ask at least one program validation question following each multimedia clip of more than 60 seconds.

(A) Test bank. For each multimedia presentation that exceeds 60 seconds, the ADM shall have a test bank of at least four questions.

(B) Question difficulty. The question shall be short answer, multiple choice, essay, or a combination of these forms. The question shall be difficult enough that the answer may not be easily determined without having viewed the actual multimedia clip.

(C) Failure criteria. If the student fails to answer the question correctly, the ADM shall either require the student view the multimedia clip again or the ADM shall fail the student from the program. If the ADM requires the student to view the multimedia clip again, the ADM shall present a different question from its test bank for that multimedia clip. The ADM may not repeat a question until it has asked all the questions from its test bank.

(D) Answer identification. The ADM shall not identify the correct answer to the multimedia question.

(3) Mastery of program content. The ADM shall test the student's mastery of the program content by asking at least two questions from each of the five substantive topics listed in §84.505(a)(1)(D)(iii)-(vii).

(A) Test bank. The test bank for program content mastery questions shall include at least two questions from each of the five substantive topics identified in §84.505(a)(1)(D)(iii)-(vii). For each question in a substantive topic, the test bank shall contain four alternative questions covering the same topic, for a total of at least 100 questions.

(B) Placement of questions. The mastery of program content questions shall be asked at the end of the program (post-program exam).

(C) Question difficulty. Program content mastery questions shall be short answer, multiple choice, essay, or a combination of these forms, and of such difficulty that the answer may not be easily determined without having participated in the actual instruction.

(D) Retest. If the student misses more than 30 percent of the questions asked on the post-program exam, the ADM shall retest the student in the same manner as the failed exam, using different questions from its test bank. The student is not required to repeat the failed program, but may be allowed to do so prior to retaking the exam. If the student fails the post-program exam three times, the student shall fail the program.

(e) Student records. The ADM shall provide for the creation and maintenance of the records documenting student enrollment, the verification of the student's identity, and the testing of the student's mastery of the program material. Each entry that verifies enrollment, identifies the question asked or the response given, documents retesting and/or revalidation, and documents any changes to the student's record shall include the date and time of the activity reported. The school and/or course provider shall also ensure that the student record is readily, securely, and reliably available for inspection by the department. The student records shall contain the following information:

(1) the student's name and driver's license number;

(2) a record of which personal validation questions were asked and the student's responses;

(3) a record of which multimedia participation questions were asked and the student's responses;

(4) the name or identity number of the staff member entering comments, retesting, or revalidating the student;

(5) if any answer to a question is changed by the school or course provider for a student who inadvertently missed a third-party database question, the school or course provider shall maintain both answers and a reasonable explanation for the change. A school or course provider shall not correct or change an answer for a student who enrolls in an ADM that uses student-solicited question/answer pairs for personal validation;

(6) a record of the program content mastery questions asked and the answers given; and

(7) a record of the time the student spent in each unit of the ADM and the total instructional time the student spent in the program.

(f) Additional requirements for Internet programs. Programs delivered via the Internet shall also comply with the following requirements.

(1) Reentry into the program. An ADM may allow the student reentry into the program by username and password authentication

or other means that are as secure as username and password authentication.

(2) Navigation. The student shall be able to logically navigate through the program. The student shall be allowed to freely browse previously completed material.

(3) Audio-visual standards. The video and audio shall be clear and, when applicable, the video and audio shall be synchronized.

(4) Video transcripts. If the ADM presents transcripts of a video presentation, the transcript shall be delivered concurrently with the video stream so that the transcript cannot be displayed if the video does not display on the student's computer.

(5) Domain names. Each school offering an ADM must offer that ADM from a single domain. The ADM may accept students that are redirected to the ADM's domain, as long as the student is redirected to a web page that clearly identifies the course provider and school offering the ADM before the student begins the registration process, supplies any information, or pays for the course. Subdomains of the ADM's single domain may also accept students as long as the subdomain is registered to and hosted by the ADM and clearly identifies the official course provider, school name, and the department registration number.

(6) ADM identification. All ADMs presented over the Internet shall display the school name and school number assigned by the department as well as the course provider name and course provider number assigned by the department on the homepage and the registration page of the entity to which the student pays any monies, provides any personal information, and in which the student enrolls.

(g) Additional requirements for video programs.

(1) Delivery of the material. For ADMs delivered by the use of videotape, digital video disc (DVD), film, or similar media, the equipment and program materials may only be made available through a process that is approved by the department.

(2) Video requirement. In order to meet the video requirement of §84.505(a)(1)(B)(v), the video course shall include between 60 and 150 minutes of video that is relevant to the required topics such as video produced by other entities for training purposes, including public safety announcements and B roll footage. The remainder of the 300 minutes of required instruction shall be video material that is relevant to one of the five substantive required topics and produced by the ADM owner, course owner, or course provider specifically for the ADM.

(A) A video ADM shall ask, at a minimum, at least one program validation question for each multimedia clip of more than 60 seconds at the end of each major segment (chapter) of the ADM.

(B) A video ADM shall devise and submit for approval a method for ensuring that a student correctly answers questions concerning the multimedia clips of more than 60 seconds presented during the ADM.

(h) Standards for ADMs using new technology. For ADMs delivered using technologies that have not been previously reviewed and approved by the department, the department may apply similar standards as appropriate and may also require additional standards. These standards shall be designed to ensure that the program can be taught by the alternative method and that the alternative method includes testing and security measures that are at least as secure as the methods available in the traditional classroom setting.

(i) Modifications to the ADM. Except as provided by paragraph (1), a change to a previously approved ADM shall not be made without the prior approval of the department. The licensed course provider for the approved program on which the ADM is based shall ensure that any modification to the ADM is implemented by all schools endorsed to offer the ADM.

(1) A course provider may submit to the department a request for immediate implementation of a proposed change that is insignificant or that protects the interest of the consumer such that immediate implementation is warranted. The request shall include:

(A) a complete description of the proposed change;

(B) the reason for the change;

(C) the reason the requestor believes the proposed change is insignificant or protects the interest of the consumer such that immediate implementation is warranted; and

(D) an explanation of how the change will maintain the program or ADM in compliance with state law and the rules specified in this chapter.

(2) The department may request additional information regarding a proposed change from the course provider making a request under paragraph (1).

(3) The department will respond to any request made under paragraph (1), within five working days of receipt.

(A) If the department determines that the proposed change is insignificant or protects the interest of the consumer such that immediate implementation is warranted the requestor may immediately implement the change. The licensed course provider for the approved program on which the ADM is based shall ensure that the change is implemented by all schools endorsed to offer the ADM.

(B) If the department determines that the proposed change is neither insignificant nor protects the interest of the consumer such that immediate implementation is warranted, the department shall notify the requestor of that determination and the change may not be made unless the department approves the change following a complete review.

(4) A determination by the department to allow immediate implementation under paragraph (1), does not constitute final approval by the department of the change. The department reserves the right to conduct further review after the change is implemented and to grant or deny final approval based on whether the change complies with state law and rules specified in this chapter.

(5) If, following further review, a change in an ADM that has been immediately implemented pursuant to paragraph (1), is determined not to be in compliance with state law and rules specified in this chapter, the department:

(A) shall notify the course provider affected by the change of:

(i) the specific provisions of state law or rules with which the ADM change is not in compliance; and

(ii) a reasonable date by which the ADM must be brought into compliance;

(B) shall require the course provider to notify any school endorsed by the course provider of the finding;

(C) shall not, for the period between the implementation of the change and the date specified under subparagraph (A)(ii):

(i) seek any penalty relating to the non-compliance;

(ii) take any action to revoke or deny renewal of a license of a school or course provider based on the change; or

(iii) withdraw approval of a program or ADM based on the change; and

(D) is not required to specify the method or manner by which the course provider alters the ADM to come into compliance with state law and the rules in this chapter.

(6) If the department allows immediate implementation pursuant to paragraph (1) and later determines that the description of the change or the request was misleading, materially inaccurate, not substantially complete, or not made in good faith, paragraph (5)(C) does not apply.

(7) A course provider who immediately implements a change pursuant to paragraph (1) and fails to bring the ADM into compliance prior to the date allowed under paragraph (5)(A)(ii), may be determined to be in violation of state law or the rules in this chapter after that date.

(8) A course provider that immediately implements a change under paragraph (1), assumes the risk of final approval being denied and of being required to come into compliance with state law and the rules in this chapter prior to the date allowed under paragraph (5)(A)(ii), including bearing the cost of reversing the change or otherwise modifying the ADM to come into compliance with state law and the rules in this chapter.

(j) Termination of the school's operation. Upon termination, a school shall deliver any missing student data to the department within five days of termination.

(k) Renewal of ADM approval. The ADM approval must be renewed every two years. The renewal document due date shall be March 1, 2012, and every two years thereafter.

(1) For approval, the course provider shall:

(A) update all the statistical data and references to law with the latest available data; and

(B) submit a statement of assurance saying that the ADM has been updated to reflect the latest applicable laws and statistics.

(2) Failure to make necessary changes or to submit a statement of assurance documenting those changes shall be cause for revocation of the ADM approval.

(3) The commissioner may alter the due date of the renewal documents by giving the approved ADM six months' notice. The commissioner may alter the due date in order to ensure that the ADM is updated six months after the effective date of new state laws passed by the Texas Legislature.

(l) Access to instructor. With the exception of circumstances beyond the control of the school, the student shall have adequate access (on the average, within two minutes) to both a licensed instructor and telephonic technical assistance (help desk) throughout the program such that the flow of instructional information is not delayed.

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

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SUBCHAPTER N. PROGRAM OF INSTRUCTION FOR PUBLIC SCHOOLS, EDUCATION SERVICE CENTERS, AND COLLEGES OR UNIVERSITIES COURSE REQUIREMENTS

16 TAC §84.600, §84.601

The new rules are proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.600. Program of Organized Instruction.

(a) To be approved under this subchapter, a driver education plan shall include one or more of the following course programs.

(1) Core program. This program shall consist of at least 32 hours of classroom instruction; 7 hours of behind-the-wheel instruction in the presence of a certified instructor; 7 hours of in-car observation in the presence of a certified instructor; and 30 hours of behind-the-wheel instruction, including at least 10 hours of instruction that takes place at night, verified by a parent or guardian in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2). Under this plan, a student may receive only local credit for the course.

(2) In-car only program. This program shall consist of at least 7 hours of behind-the-wheel instruction in the presence of a certified instructor; 7 hours of in-car observation in the presence of a certified instructor; and 30 hours of behind-the-wheel instruction, including at least 10 hours of instruction that takes place at night, verified by a parent or guardian in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2). Under this plan, a student may receive only local credit for the course.

(3) Classroom only program. This program shall consist of at least 32 hours of classroom instruction. Under this plan, a student may receive only local credit for the course.

(4) School day credit program. This program shall consist of at least one class period per scheduled day of school, for a semester (traditional, condensed, accelerated, block, etc.), covering the driver education classroom and in-car program of organized instruction or only the classroom program of organized instruction. This class traditionally consists of at least 56 hours of driver education classroom instruction and, if in-car instruction is provided, must include 7 hours of behind-the-wheel instruction in the presence of a certified instructor; 7 hours of in-car observation in the presence of a certified instructor; and 30 hours of behind-the-wheel instruction, including at least 10 hours of instruction that takes place at night, verified by a parent or guardian in the presence of an adult who meets the requirements of

Texas Transportation Code, §521.222(d)(2). Under this plan, a student may receive one-half unit of state credit toward graduation.

(5) Non-school day credit program. This program shall consist of at least 56 hours of driver education classroom instruction, and, if in-car instruction is provided, must include 7 hours of behind-the-wheel instruction in the presence of a certified instructor; 7 hours of in-car observation in the presence of a certified instructor; and 30 hours of behind-the-wheel instruction, including at least 10 hours of instruction that takes place at night, verified by a parent or guardian in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2). Under this plan, a student may receive one-half unit of state credit toward graduation.

(6) Multi-phase school day or non-school day credit program. This program shall consist of at least 40 hours of driver education classroom instruction; 4 hours of behind-the-wheel instruction in the presence of a certified instructor; 8 hours of in-car observation in the presence of a certified instructor; 12 hours of simulator instruction in the presence of a certified instructor; and 30 hours of behind-the-wheel instruction, including at least 10 hours of instruction that takes place at night, verified by a parent or guardian in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2). Under this plan, a student may receive one-half unit of state credit toward graduation.

(b) The minimum requirements of the driver education program must be met regardless of how the course is scheduled. The following applies to all minor and adult driver education programs.

(1) Driver education programs may be scheduled in block or concurrent form.

(A) Block form is when the classroom phase is taught as a separate, complete unit before the in-car phase begins.

(B) Concurrent form is when the classroom and the in-car phases are taught simultaneously or on alternating days.

(2) Instruction may be scheduled any day of the week, during regular school hours, before or after school, and during the summer.

(3) Instruction shall not be scheduled before 5:00 a.m. or after 11:00 p.m. The superintendent, college or university chief school official, or education service center (ESC) director may approve exceptions to the scheduled hours of instruction and must include acceptance in writing of the exception by the parents or legal guardians for each of the students involved.

(4) The driver education classroom phase must have uniform beginning and ending dates. Students shall proceed in a uniform sequence. Students shall be enrolled and in class before the 7th hour of classroom instruction in a 32-hour program and the 12th hour of classroom instruction in 56-hour or semester-length programs.

(5) Self-study assignments occurring during regularly scheduled class periods shall not exceed 25% of the course and shall be presented to the entire class simultaneously.

(6) The driver education course shall be completed within the timelines established by the superintendent, college or university chief school official, or ESC director. This shall not circumvent attendance or progress. Variances to the established timelines shall be determined by the superintendent, college or university chief school official, or ESC director and must be agreed to by the parent or legal guardian.

(7) Schools are allowed five minutes of break within each instructional hour in all phases of instruction. A break is an interruption in a course of instruction occurring after the lesson introduction and before the lesson summation. It is recommended that the five minutes of break be provided outside the time devoted to behind-the-wheel instruction so students receive a total of seven hours of instruction.

(8) A student shall not receive credit for more than four hours of driver education training at a school in one calendar day no matter what combination of training is provided, excluding makeup. Further, for each calendar day, a student shall be limited to a maximum of:

(A) two hours of classroom instruction;

(B) four hours of observation time;

(C) two hours of multicar range driving;

(D) three hours of simulation instruction; and

(E) one hour of behind-the-wheel instruction.

(9) Driver education training verified by the parent is limited to one hour per day.

(c) Course content, minimum instruction requirements, and administrative guidelines for each phase of driver education classroom instruction, in-car training (behind-the-wheel and observation), simulation, and multicar range shall include the instructional objectives established by the commissioner of education, as specified in this subsection, and meet the requirements of this subchapter. Sample instructional modules may be obtained from the department. Schools may use sample instructional modules developed by the department or develop their own instructional modules based on the approved instructional objectives. The instructional objectives are organized into the modules outlined in this subsection and include objectives for classroom and in-car training (behind-the-wheel and observation), simulation lessons, parental involvement activities, and evaluation techniques. In addition, the instructional objectives that must be provided to every student enrolled in a minor and adult driver education course include information relating to litter prevention; anatomical gifts; distractions, including the use of a wireless communication device that includes texting; motorcycle awareness; alcohol awareness and the effect of alcohol on the effective operation of a motor vehicle; and recreational water safety. A student may apply to the Texas Department of Public Safety (DPS) for an instruction permit after completing six hours of instruction as specified in Module One if the student is taking the course in a concurrent program. The minor and adult driver education program instructional objectives shall include:

(1) Module One: Traffic Laws. The student legally and responsibly performs reduced-risk driving practices in the Highway Transportation System (HTS) by:

(A) accepting driving as a privilege with responsibilities, obligations, and potential consequences; and

(B) applying knowledge and understanding of Texas traffic laws, including traffic control devices and right-of-way laws.

(2) Module Two: Driver Preparation. The student legally and responsibly performs reduced-risk driving practices in the HTS by:

(A) employing pre-drive tasks;

(B) using and requiring passengers to use occupant protection and restraint systems;

(C) using vehicle symbols and devices;

(D) employing starting tasks;

(E) performing vehicle operation and control tasks;

(F) employing post-drive tasks;

(G) using baseline and progress assessment tools to evaluate and improve behind-the-wheel skill level; and

(H) formulating a driving plan.

(3) Module Three: Vehicle Movements. The student legally and responsibly performs reduced-risk driving practices in the HTS by:

(A) sustaining visual attention and communication;

(B) using reference points;

(C) managing vehicle balance: and

(D) executing vehicle maneuvers.

(4) Module Four: Driver Readiness. The student legally and responsibly performs reduced-risk driving practices in the HTS by:

(A) employing legal and responsible driving practices; and

(B) limiting and managing fatigue and aggressive driving.

(5) Module Five: Risk Management. The student legally and responsibly performs reduced-risk driving practices in the HTS by:

(A) predicting, analyzing, and minimizing risk factors, including the dangers of failing to yield the right-of-way to a motorcyclist and the need to share the road with motorcycles; and

(B) employing a space management system.

(6) Module Six: Environmental Factors. The student legally and responsibly performs reduced-risk driving practices in the HTS by:

(A) identifying and analyzing driving environments; and

(B) minimizing environmental risk.

(7) Module Seven: Distractions. The student legally and responsibly performs reduced-risk driving practices in the HTS by limiting and managing distractions, including the use of a wireless communication device that includes texting, and multi-task performances.

(8) Module Eight: Alcohol and Other Drugs. The student legally and responsibly performs reduced-risk driving practices in the HTS by adopting zero-tolerance practices related to the use of alcohol and other drugs by applying knowledge and understanding of alcohol and other drug laws, regulations, penalties, and consequences to licensing, driving, and lifestyles.

(9) Module Nine: Adverse Conditions. The student legally and responsibly performs reduced-risk driving practices in the HTS by managing adverse conditions resulting from weather, reduced-visibility, traction loss, and emergencies.

(10) Module Ten: Vehicle Requirements. The student legally and responsibly performs reduced-risk driving practices in the HTS by:

(A) assessing and managing vehicle malfunctions;

(B) performing preventative maintenance; and

(C) planning trips.

(11) Module Eleven: Consumer Responsibilities. The student legally and responsibly performs reduced-risk driving practices in the HTS by:

(A) attending to the vehicle requirements by making wise consumer decisions regarding vehicle use and ownership;

(B) vehicle insurance;

(C) environmental protection and litter prevention;

(D) anatomical gifts; and

(E) recreational water safety.

(12) Module Twelve: Personal Responsibilities. The student legally and responsibly performs reduced-risk driving practices in the HTS by:

(A) using the knowledge, skills, and experiences of the Driver Education and Traffic Safety Program;

(B) obtaining and using a driver license; and

(C) continuing the lifelong learning process of reduced-risk driving practices.

(d) A school may use multimedia systems, simulators, and multicar driving ranges for instruction in a driver education program.

(e) Each simulator, including the filmed instructional programs, and each plan for a multicar driving range must meet state specifications developed by the DPS and the department. Simulators are electromechanical equipment that provides for teacher evaluation of perceptual, judgmental, and decision-making performance of individuals and groups. With simulation, group learning experiences permit students to operate vehicular controls in response to audiovisual depiction of traffic environments and driving emergencies. The specifications are available from the department.

(f) A minimum of 4 periods of at least 55 minutes per hour of instruction in a simulator may be substituted for 1 hour of behind-the-wheel and 1 hour observation instruction. A minimum of 2 periods of at least 55 minutes per hour of multicar driving range instruction may be substituted for 1 hour of behind-the-wheel and 1 hour observation instruction relating to elementary or city driving lessons. However, a minimum of four hours must be devoted to behind-the-wheel instruction and a minimum of four hours must be devoted to observation instruction.

(g) A school may not permit more than 36 students per driver education class, excluding makeup students.

(h) All behind-the-wheel lessons shall consist of actual driving instruction. Observation of the instructor, mechanical demonstrations, etc., shall not be counted for behind-the-wheel instruction. The instructor shall be in the vehicle with the student the entire time behind-the-wheel instruction is provided.

(i) Minor and adult driver education programs shall include the following components.

(1) Driver education instruction is limited to eligible students between the ages of 14 - 18 years of age, who are at least 14 years of age when the driver education classroom phase begins and who will be 15 years of age or older when the behind-the-wheel instruction begins. Students officially enrolled in school who are 18 - 21 years of age may attend a minor and adult driver education program.

(2) Motion picture films, slides, videos, tape recordings, and other media that present concepts outlined in the instructional objectives may be used as part of the required instructional hours of the classroom instruction. Units scheduled to be instructed may also be conducted by guest speakers as part of the required hours of instruction. Together, these shall not exceed 640 minutes of the total classroom phase.

(3) Each classroom student shall be provided a driver education textbook or driver education instructional materials approved by the department.

(4) A copy of the current edition of the "Texas Driver Handbook" published by DPS shall be furnished to each student enrolled in the classroom phase of the driver education course.

(5) No school should permit a ratio of less than two, or more than four, students per instructor for behind-the-wheel instruction, except behind-the-wheel instruction may be provided for only one student when it is not practical to instruct more than one student, for makeup lessons, or if a hardship would result if scheduled instruction is not provided. In each case when only one student is instructed:

(A) the school shall obtain a waiver signed and dated by the parent or legal guardian of the student and the chief school official stating that the parent or legal guardian understands that the student may be provided behind-the-wheel instruction on a one-on-one basis with only the instructor and student present in the vehicle during instruction;

(B) the waiver may be provided for any number of lessons; however, the waiver shall specify the exact number of lessons for which the parent is providing the waiver; and

(C) the waiver shall be signed before the first lesson in which the parent is granting permission for the student to receive one-on-one instruction.

(j) Courses offered to adult persons who are 18 years of age or older shall only be offered by colleges and universities. Colleges and universities that offer driver education to adults shall submit and receive written approval for the course from the department prior to implementation of the program. The request for approval must include a syllabus, list of instructors, samples of instructional records that will be used with the course, and information necessary for approval of the program.

§84.601. Procedures for Student Certification and Transfers.

(a) The department shall be responsible for providing the driver education certificate (Form DE-964E) to public schools, education service centers (ESCs), and colleges or universities exempt from Chapter 1101, Education Code. The department shall also provide the DE-964E certificate to the Texas Department of Public Safety (DPS) for driver education programs approved by DPS. On this form, the driver education instructor and the superintendent, college or university chief school official, ESC director, DPS director, or their designee must certify that the driver education course was conducted according to the department and DPS education standards for an approved course in driver education for Texas schools.

(1) For schools exempt from the Chapter 1001, Education Code, and programs approved by DPS, the DE-964E certificate shall consist of five parts to be designated as follows: Texas Department of Public Safety Copies (Instruction Permit and Driver's License), Insurance Copy, Texas Department of Licensing and Regulation Copy, and School Copy. The DE-964E certificate is used to certify completion of an approved driver education course and is a government record.

(2) The department shall charge a fee of $1.00 for each DE-964E certificate provided.

(3) The DE-964E certificates shall be issued to the superintendent, college or university chief school official, ESC director, or individuals designated by the superintendent, college or university chief school official, or ESC director to be responsible for managing the certificates for the school. This does not remove the superintendent, college or university chief school official, or ESC director from obligations pursuant to this subchapter to oversee the program. The DPS shall be responsible for the DE-964E certificates provided to DPS-approved driver education programs.

(4) Unused DE-964Es shall not be transferred to another school without written approval by the department.

(5) The DE-964E document is a government record as defined under Texas Penal Code, §37.01(2). Any misrepresentation by the applicant or person issuing the form as to the prerequisite set forth may result in suspension or revocation of instructor credentials or program approval and/or criminal prosecution.

(6) The superintendent, college or university chief school official, ESC director, or their designee may request to receive serially numbered DE-964E certificates for exempt schools and programs approved by DPS by submitting a completed order on the form provided by the department stating the number of certificates to be purchased and including payment of all appropriate fees. The department will accept purchase requisitions from school districts.

(7) The superintendent, college or university chief school official, ESC director, or their designee shall be responsible for accounting for each DE-964E certificate he or she has been issued. All DE-964E certificates and records of certificates shall be maintained in an orderly fashion.

(8) The DPS shall accept only the original signature of a certified driver education teacher. The signature of the chief school official or ESC director may be written, stamped, or omitted.

(9) All DE-964E certificates and records of certificates must be provided to the department or DPS upon request. The superintendent, college or university chief school official, ESC director, or their designee shall maintain the school copies of the certificates and submit the department copies of all issued certificates to the department no later than February 15, June 15, and September 15 of each year. The chief school official, ESC or DPS director, or their designee shall return unissued DE-964E certificates to the department within 30 days from the date the school discontinues the driver education program, unless otherwise notified.

(10) Each superintendent, college or university chief school official, ESC director, or their designee shall ensure that the policies concerning DE-964E certificates are followed by all individuals who have responsibility for the certificates.

(11) The superintendent, college or university chief school official, ESC director, or their designee shall maintain effective protective measures to ensure that unissued DE-964E certificates and records of certificates are secure.

(12) The superintendent, college or university chief school official, ESC director, or their designee shall report any incident of unaccounted DE-964E certificates to the department immediately upon discovering the incident. If such an incident occurs, the superintendent, college or university chief school official, ESC director, or their designee shall conduct an investigation to determine the circumstances of the unaccounted certificates. A report of the findings of the investigation, including measures taken to prevent the incident from recurring, shall be submitted to the department within 30 days of the discovery.

(13) The superintendent, college or university chief school official, or ESC director must insure that employees complete, issue, or validate a DE-964E only to a person who has successfully completed the entire portion of the course for which the DE-964E is being used. The DPS must insure that the participants of the home taught driver education programs complete, issue, or validate a DE-964E only to a person who has successfully completed the entire portion of the course

for which the DE-964E is being used. Issuance of the DE-964E is the assurance that the student has successfully achieved mastery of the course objectives.

(14) The right to receive DE-964E certificates may be immediately suspended for a period determined by the department if:

(A) a department investigation is in progress and the department has reasonable cause to believe the certificates have been misused or abused or that adequate security was not provided; or

(B) the superintendent, college or university chief school official, ESC director, or their designee fails to provide information on records requested by the department or DPS within the allotted time.

(15) The DPS copy of a DE-964E certificate must contain the original signature of the certified instructor. The name of the superintendent, college or university chief school official, ESC director, or their designee may be written, stamped, typed, or omitted.

(16) The superintendent, college or university chief school official, ESC director, or their designee may issue a duplicate DE-964E certificate to a student who completed a course under the responsibility of the superintendent, college or university chief school official, ESC director, or their designee. The duplicate shall indicate the control number of the original DE-964E certificate.

(b) An authorized DPS employee shall accept a DE-964E certificate when a certified driver education instructor certifies by signing the DE-964E that the driver education program was completed according to this subchapter and that the student has achieved the competencies specified in this subchapter. The school official shall make a copy of the teacher's certificate for driver education available to authorized department or DPS representatives when requested.

(c) The superintendent, college or university chief school official, or ESC director may designate one certified driver education teacher to sign the DE-964E certificates for that school. In a concurrent program, only one teacher shall be required to sign a DE-964E certificate, but each teacher giving instruction in the concurrent program must be a fully certified driver education teacher or state-approved teaching assistant and must initial for each lesson they instruct. In each case, the teacher signing the DE-964E certificate must compile all records and verify the student's successful completion.

(d) The department shall accept any part of the driver education instruction received by a student in another state; however, the student must complete all of the course requirements for a Texas driver education program. Driver education instruction completed in another state must be certified in writing by the chief official or course instructor of the school where the instruction was given and include the hours and minutes of instruction and a complete description of each lesson provided. The certification document must be attached to the student's individual record at the Texas school and be maintained with the record for seven years.

(e) Students who are licensed in another state and have completed that state's driver education program should contact the DPS for information on the licensing reciprocal agreement between that state and Texas.

(f) When it is impossible or inconvenient for the certified driver education instructor to sign the DE-964E (due to transfer, illness, or death, etc.), the superintendent, college or university chief school official, ESC director, or their designee may, by completing the driver education affidavit form on the reverse side of the DE-964E certificate, certify that official records show a particular student completed an approved driver education course as indicated on the DE-964E.

(g) All records of instruction shall be included as part of the student's final history when it is necessary to compile multiple records to verify that a student successfully completed a driver education course.

(h) A student may receive credit for course hours completed if there was a violation of this subchapter or before a teacher's endorsement was suspended provided the violation or suspension was not for an infraction that would conclusively establish the course as inadequate.

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

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SUBCHAPTER A. COMMISSIONER'S RULES ON MINIMUM STANDARDS FOR OPERATION OF LICENSED TEXAS DRIVER EDUCATION SCHOOLS

16 TAC §§84.100 - 84.119

The repeal is proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.100. Definitions.
§84.101. Exemptions.
§84.102. Driver Education School Licensure.
§84.103. Driver Education School Responsibility for Employees.
§84.104. School Directors, Assistant Directors, and Administrative Staff Members.
§84.105. Driver Education Instructor License.
§84.106. Courses of Instruction.
§84.107. Student Enrollment Contracts.
§84.108. Progress.
§84.109. Attendance and Makeup.
§84.110. Conduct Policy.
§84.111. Cancellation and Refund Policy.
§84.112. Facilities and Equipment.
§84.113. Motor Vehicles.
§84.114. Student Complaints.
§84.115. Records.
§84.116. Names and Advertising.

§84.117. Driver Education Certificates (DE-964 and ADE-1317).

§84.118. Alternative Method of Instruction for Driver Education Course.

§84.119. Application Fees and Other Charges.

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

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SUBCHAPTER B. COMMISSIONER'S RULES ON MINIMUM STANDARDS FOR OPERATION OF LICENSED TEXAS DRIVING SAFETY SCHOOLS AND COURSE PROVIDERS

16 TAC §§84.200 - 84.217

The repeal is proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.200. Definitions.

§84.201. Exemptions.

§84.202. Driving Safety School Licensure.

§84.203. Course Provider Licensure.

§84.204. Driving Safety School and Course Provider Responsibilities.

§84.205. Administrative Staff Members.

§84.206. Driving Safety Instructor License.

§84.207. Driving Safety Courses of Instruction.

§84.208. Specialized Driving Safety Courses of Instruction.

§84.209. Alternative Delivery Methods of Driving Safety Instruction.

§84.210. Student Enrollment Contracts.

§84.211. Cancellation and Refund Policy.

§84.212. Facilities and Equipment.

§84.213. Student Complaints.

§84.214. Records.

§84.215. Names and Advertising.

§84.216. Uniform Certificate of Course Completion for Driving Safety or Specialized Driving Safety Course.

§84.217. Application Fees and Other Charges.

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

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SUBCHAPTER C. COMMISSIONER'S RULES ON MINIMUM STANDARDS FOR OPERATION OF TEXAS DRUG AND ALCOHOL DRIVING AWARENESS PROGRAMS

16 TAC §§84.300 - 84.310

The repeal is proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.300. General Provision.

§84.301. Definitions.

§84.302. Drug and Alcohol Driving Awareness School Licensure.

§84.303. Drug and Alcohol Driving Awareness School and Course Provider Responsibilities.

§84.304. Drug and Alcohol Driving Awareness Program Instructor License.

§84.305. Drug and Alcohol Driving Awareness Programs of Instruction.

§84.306. Student Enrollment Forms.

§84.307. Facilities and Equipment.

§84.308. Records.

§84.309. Application Fees and Other Charges.

§84.310. Alternative Delivery Methods of Drug and Alcohol Driving Awareness Program Instruction.

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

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SUBCHAPTER D. COMMISSIONER'S RULES ON HEARINGS HELD UNDER THE TEXAS EDUCATION CODE, CHAPTER 1001

16 TAC §84.400

The repeal is proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.400. Rules of Procedure.

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

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SUBCHAPTER E. PARENT TAUGHT DRIVER EDUCATION

16 TAC §84.500

The repeal is proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.500. Parent Taught Driver Education.

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

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SUBCHAPTER F. DEPARTMENT APPROVED DRIVER EDUCATION COURSE

16 TAC §84.600, §84.601

The repeal is proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.600. Submission of Course for Department Approval.

§84.601. Cancellation of Department Approval.

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

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SUBCHAPTER G. COMMISSIONER'S RULES CONCERNING DRIVER EDUCATION STANDARDS OF OPERATION FOR PUBLIC SCHOOLS, EDUCATION SERVICE CENTERS, AND COLLEGES OR UNIVERSITIES

16 TAC §84.700, §84.701

The repeal is proposed under Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51 and Texas Education Code, Chapter 1001. No other statutes, articles, or codes are affected by the proposal.

§84.700. Course Requirements.

§84.701. Procedures for Student Certification and Transfers.

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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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER D. LOTTERY GAME RULES

16 TAC §401.317

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §401.317 "Powerball®" On-Line Game Rule. The purpose of the proposed amendments is to conform the Commission's rule to recent changes adopted by the Multi-State Lottery Association (MUSL) to clarify prize pool and reserve accounts, to update rule definitions, to clarify MUSL's use of the "MUSL Annuity Factor", and to clarify player remedies in the event of litigation arising out of a Powerball Play.

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments, as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of Lottery Operations, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefits anticipated are to enhance defined terms for the public related to the "Powerball®" On-Line Game Rule and to clarify recent prize pool and reserve account changes adopted by the Multi-State Lottery Association (MUSL).

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Deanne Rienstra, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at *legal.input@lottery.state.tx.us.* The Commission will hold a public hearing on this proposal on November 16, 2016, at 10:00 a.m., at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

These amendments are proposed under Texas Government Code §466.015(c), which authorizes the Commission to adopt rules governing the operation of the lottery, §466.451, which authorizes the Commission to adopt rules relating to a multi-jurisdiction lottery game, and §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code Chapter 466.

§401.317. "Powerball®" On-Line Game Rule.

(a) Powerball. Powerball is a Multi-State Lottery Association (MUSL) on-line game offered by all Lotteries that have agreed to MUSL's Powerball Group Rules. "Powerball" is authorized to be conducted by the executive director under the conditions of the MUSL rules, the laws of the State of Texas, this section, and under such further instructions, directives, and procedures as the executive director may issue in furtherance thereof. In this regard, the executive director is authorized to issue such further instructions and directives as may be necessary to conform the conduct and play of Powerball to the requirements of the MUSL rules if, in the opinion of the executive director, such instructions, directives, and procedures are in conformance with state law. If a conflict arises between this section and §401.304 of this chapter (relating to On-Line Game Rules (General)), this section shall have precedence. The purpose of the Powerball game is the generation of revenue for MUSL Party Lottery members and Mega Millions Party Lotteries participating under the Reciprocal Game Agreement, through the operation of a specially designed multi-jurisdiction lottery game that will award prizes to ticket holders matching specified combinations of numbers randomly selected in regularly scheduled drawings. In addition to other applicable rules contained in Chapter 401, this section and definitions apply unless the context requires a different meaning or is otherwise inconsistent with the intention of the rules adopted by the MUSL or the MUSL Powerball Group. To be clear, the authority to participate in the MUSL Powerball game is provided to the Texas Lottery by MUSL. The conduct and play of Powerball must conform to the MUSL Powerball game.

(b) Definitions.

(1) "Agent" or "retailer" means a person or entity authorized by the Texas Lottery Commission (TLC) to sell lottery Plays.

(2) A "Drawing" refers collectively to the formal draw event for randomly selecting the winning numbers which determine the number of winners for each prize level of the Powerball game and the Power Play multiplier.

(3) "Game board", "board", "panel", or "playboard" means that area of the playslip which contains two sets of numbered squares to be marked by the player.

(4) "Game ticket" or "ticket" means an acceptable evidence of Play, which is a ticket produced in a manner that meets the specifications defined in the MUSL rules or the rules of each member or participating Selling Lottery (Ticket Validation), and is a physical representation of the Play or Plays sold to the player.

(5) "MUSL" means the Multi-State Lottery Association, a government-benefit association wholly owned and operated by the MUSL Party Lotteries.

(6) "MUSL Board" means the governing body of the MUSL, which is comprised of the chief executive officer of each Party Lottery. "MUSL Finance and Audit Committee" shall mean the committee of that name established by the MUSL Board.

(7) "MUSL Annuity Factor" shall mean the annuity factor as determined by the MUSL central office through a method approved by the MUSL Finance and [&] Audit Committee and which is used as described in this rule.

(8) "Party Lottery" means a state lottery or lottery of a political subdivision or entity that has joined MUSL and is authorized to sell the Powerball game. "Licensee Lottery" shall mean a state lottery or lottery of a governmental unit, political subdivision, or entity thereof

that is not a Party Lottery but has agreed to comply with all applicable MUSL and Product Group requirements and has been authorized by the MUSL and by the Powerball Product Group to sell the Powerball game. "Selling Lottery" or "Participating Lottery" shall mean a lottery authorized by the Product Group to sell Powerball Plays, including Party Lotteries and Licensee Lotteries.

(9) "Play" means the six (6) numbers, the first five (5) from a field of sixty-nine (69) numbers and the last one (1) from a field of twenty-six (26) numbers, that appear on a ticket as a single lettered selection and are to be played by a player in the Powerball game.

(10) "Playslip" means an optically readable card issued by the Texas Lottery used by players of Powerball to select Plays and to elect all features. There shall be five playboards on each playslip. A playslip has no pecuniary value and shall not constitute evidence of ticket purchase or of numbers selected.

(11) "Powerball Group" or "Product Group" means the MUSL member group of lotteries which have joined together to offer the Powerball product pursuant to the terms of the Multi-State Lottery Agreement and the Powerball Group's rules, including the MUSL Powerball Drawing Procedures. In this rule, wherever either term is used it is referring to the MUSL Powerball Group.

(12) "Prize" means an amount paid to a person or entity holding a winning ticket. "Grand Prize" shall refer to the top prize in the Powerball game. "Advertised Grand Prize" shall mean the estimated annuitized Grand Prize amount as determined by the MUSL Central Office by use of the MUSL Annuity Factor and communicated through the Selling Lotteries prior to the Grand Prize Drawing. The "Advertised Grand Prize" is not a guaranteed prize amount and the actual Grand Prize amount may vary from the advertised amount.

(13) "Set Prize" or "low-tier prize" means all other prizes, except the Grand Prize, and, except in instances outlined in this section, will be equal to the prize amount established by the Product Group [~~MUSL Board~~] for the prize level.

(14) "Terminal" means a device authorized by a Selling Lottery to function in an on-line, interactive mode with the gaming computer system for the purpose of issuing lottery tickets and entering, receiving, and processing lottery transactions, including purchases, validating tickets, and transmitting reports.

(15) "Winning Numbers" means the numbers randomly selected during a Drawing event which shall be used to determine the winning Plays for the Powerball game contained on a game ticket.

(c) Game Description.

(1) Powerball is a five (5) out of sixty-nine (69) plus one (1) out of twenty-six (26) numbers [~~(26)~~] lottery game drawn every Wednesday and Saturday, as part of the Powerball Drawing event, which pays the Grand Prize, at the election of the player made in accordance with this rule, or by a default election made in accordance with this rule, either on an annuitized pari-mutuel basis or as a single [~~cash~~] lump sum payment of the total funding [~~cash~~] held in the Grand Prize Pool for the winning drawing [~~for this prize pool~~] on a pari-mutuel basis. Except as provided in this section, all other prizes are paid on a single payment [~~set cash~~] basis. Powerball Winning Numbers applicable to determine Powerball prizes will be determined in the Powerball Drawing event. To play Powerball, a player shall select five (5) different numbers, from one (1) through sixty-nine (69)[~~,~~] and one (1) additional number from one (1) through twenty-six (26), or request the retailer to generate a Quick Pick selection of numbers from the lottery terminal. The additional number may be the same as one of the first five numbers selected by the player. Plays can be purchased for two dollars (U.S. $2.00), including any specific statutorily-mandated tax of a Selling Lottery to be included in the price of a Play. Plays may be purchased from a Selling Lottery approved sales outlet in a manner as approved by the Selling Lottery and in accordance with MUSL Rules. The Drawing Procedures adopted by MUSL shall include procedures for randomly selecting the Powerball game Winning Numbers and the Power Play multiplier.

(2) Claims. A ticket shall be the only proof of a game Play or Plays and is subject to the validation requirements set forth in subsection (g) of this section. The submission of a winning ticket to the issuing Selling Lottery or its authorized agent shall be the sole method of claiming a prize or prizes. A playslip has no pecuniary or prize value and shall not constitute evidence of Play purchase or of numbers selected. A terminal-produced paper receipt has no pecuniary or prize value and shall not constitute evidence of Play purchase or of numbers selected.

(3) Cancellations Prohibited. A Play may not be voided or canceled by returning the ticket to the selling agent or to the lottery, including tickets that are printed in error. A Selling Lottery may develop an approved method of compensating retailers for Plays that are not transferred to a player for a reason acceptable to the Selling Lottery. No Play that is eligible for a prize can be returned to the lottery for credit. Plays accepted by retailers as returned Plays and which cannot be re-sold shall be deemed owned by the bearer thereof.

(4) Player Responsibility. It shall be the sole responsibility of the player to verify the accuracy of the game Play or Plays and other data printed on the ticket. The placing of Plays is done at the player's own risk through the licensed sales agent who is acting on behalf of the player in entering the Play or Plays.

(5) Entry of Plays. Plays may only be entered manually using the lottery retailer terminal touch screen or by means of a playslip provided by the Texas Lottery and hand-marked by the player or by such other means approved by the Texas Lottery. Retailers shall not permit the use of facsimiles of playslips, copies of playslips, or other materials that are inserted into the terminal's playslip reader that are not printed or approved by the Texas Lottery. Retailers shall not permit any device to be connected to a lottery terminal to enter Plays, except as approved by the Texas Lottery. A ticket generated using a selection method that is not approved by the Texas Lottery is not valid. A selection of numbers for a Play may be made only if the request is made in person. Acceptable methods of Play selection include:

(A) using a self-service terminal;

(B) using a playslip;

(C) using a previously-generated "Powerball" ticket provided by the player;

(D) requesting a retailer to use a Quick Pick to select numbers;

(E) requesting a retailer to manually enter numbers; or

(F) using a QR code generated through a Texas Lottery Mobile Application offered and approved by the Texas Lottery.

(6) Subscription sales. A subscription sales program may be offered, at the discretion of the executive director.

(d) Powerball Prize Pool.

(1) Powerball Prize Pool.

(A) The prize pool for all prize categories shall consist of fifty percent (50%) of each Drawing period's sales, inclusive of any specific statutorily-mandated tax of a Selling Lottery to be included

in the price of a Play, and including contributions to the prize pool accounts and prize reserve accounts.

(B) Powerball Prize Pool Accounts and Prize Reserve Accounts. The Product Group shall set the contribution rates to the prize pool and to one or more prize reserve or pool accounts established by the MUSL Powerball Group Rules.

(i) Prize Reserve Accounts. The Product Group has established the following prize reserve accounts for the Powerball game: the Powerball Prize Reserve Account (PRA), which is used to guarantee the payment of valid, but unanticipated, Grand Prize claims that may result from a system error or other reason; and the Powerball Set Prize Reserve Account (SPRA), which is used to fund deficiencies in low-tier Powerball prize payments, subject to the limitations of the MUSL rules.

(ii) Prize Pool Accounts. The Product Group has established the following prize pool accounts for the Powerball game: the Grand Prize Pool, which is used to fund the current Grand Prize; the Powerball Set Prize Pool, which is used to fund the Powerball Set Prizes; the Powerball Set-Aside Pool, which is used to fund the payment of the awarded minimum starting annuity Grand Prizes and minimum annuity Grand Prize increase, if necessary (subject to the limitations in the MUSL Powerball Group Rules), as may be set by the Product Group; and the Grand Prize Carry Forward Pool (GPCFP), which is used to fund the starting minimum annuity Grand Prize, as may be set by the Product Group, if such funds are available, and if sales do not fund the Grand Prize. The Power Play Prize Pool is [~~and Power Play Pool Account are~~] described in subsection (k)(4) of this section. The Powerball Set Prize Pool shall hold the temporary balances that may result from having fewer than expected winners in the Powerball Set Prize (aka low-tier prize) categories and the source of the Powerball Set Prize Pool is the Party Lottery's weekly prize contributions less actual Powerball Set Prize liability.

(iii) The above prize reserve accounts, the GPCFP and the Set-Aside Pool shall have maximum balance amounts or balance limiter triggers that are set by the Product Group and are detailed in the *Comments* to the MUSL Rule. The maximum balance amounts and balance limiter triggers are subject to review by the MUSL Board Finance and Audit Committee. The Finance and Audit Committee shall have two weeks to state objections, if any, to the approved maximum balance amounts or balance limiter triggers. Approved maximum balance amounts or balance limiter triggers shall become effective no sooner than two weeks after notice is given to the Finance and Audit Committee and no objection is stated or sooner if the Committee affirmatively approves the maximum balance amounts or balance limiter triggers. The Group may appeal the Committee's objections to the full Board. Group approved changes in the maximum balance amounts or balance limiter triggers set by the Product Group shall be effective only after the next Grand Prize win.

(iv) The maximum contribution rate to the Grand Prize Pool shall be 68.0131% of the prize pool (34.0066% of sales). An amount up to five percent (5%) of a Party Lottery's sales shall be deducted from a Party Lottery's Grand Prize Pool contribution and placed in trust in one or more prize pool accounts and prize reserve accounts held by the Product Group (hereinafter the "prize pool and reserve deduction") at any time that the prize pool accounts and Party Lottery's share of the prize reserve accounts is below the amounts designated by the Product Group. An additional amount up to twenty percent (20%) of a Party Lottery's sales shall be deducted from a Party Lottery's Grand Prize Pool contribution and placed in trust in the GPCFP to be held by the Product Group at a time as determined by the Product Group. [~~Contributions to the GPCFP will terminate after the drawing on August 2, 2017, unless the Group votes to continue contributions to the GPCFP; such vote to continue contributions to the GPCFP shall take place no later than January 31, 2017.~~]

(v) The Product Group may determine to expend all or a portion of the funds in the Powerball prize pool accounts (except the Powerball Grand Prize Pool account and the GPCFP) and the prize reserve accounts: (1) for the purpose of indemnifying the Selling Lotteries for the payment of prizes to be made by the Selling Lottery; and, (2) for the payment of prizes or special prizes in the game, limited to prize pool and prize reserve contributions from lotteries participating in the special prize promotion, subject to the approval of the Board's Finance and Audit Committee or that Committee's failure to object after given two weeks' notice of the planned action, which actions may be appealed to the full MUSL Board by the Product Group. The GPCFP may only be expended to fund the starting minimum annuity Grand Prize.

(vi) The prize reserve shares of a Party Lottery may be adjusted with refunds to the Party Lottery from the prize reserve account(s) as may be needed to maintain the approved maximum balance and sales percentage shares of the Party Lotteries.

(vii) [~~(vi)~~] A Party Lottery may contribute to its sales percentage share of prize reserve accounts over time, but in the event of a draw down from a prize [~~the~~] reserve account, a Party Lottery is responsible for its full sales percentage share of the prize reserve account, whether or not it has been paid in full.

(viii) [~~(vii)~~] Any amount remaining in the Powerball prize pool accounts or prize reserve accounts when the Product Group declares the end of this game shall be returned to the lotteries participating in the accounts after the end of all claim periods of all Selling Lotteries, carried forward to a replacement game or otherwise expended in a manner at the election of the individual Members of the Product Group in accordance with jurisdiction statute.

(2) Expected Powerball Prize Payout Percentages. The Grand Prize payout shall be determined on a pari-mutuel basis. Except as otherwise provided in this section, all other prizes awarded shall be paid as single payment set cash prizes. All prize payouts are made with the following expected prize payout percentages, although the prize payout percentage per draw may vary:
Figure: 16 TAC §401.317(d)(2) (No change.)

(A) The prize money allocated to the Powerball Grand Prize category shall be divided equally by the number of Plays winning the Powerball Grand Prize.

(B) Powerball Set Prize Pool Carried Forward. For Party Lotteries, the Powerball Set Prize Pool (for single payment cash prizes of $1,000,000 or less) shall be carried forward to subsequent draws if all or a portion of it is not needed to pay the Powerball Set Prizes awarded in the current draw.

(C) Pari-Mutuel Powerball Prize Determinations. Except as otherwise provided, if the total of the Powerball Set Prizes (as multiplied by the respective Power Play multiplier, if applicable) awarded in a Drawing exceeds the percentage of the prize pool allocated to the Powerball Set Prizes, then the amount needed to fund the Powerball Set Prizes, including Power Play prizes, awarded shall be drawn first from the amount available in the Powerball Set Prize Pool and the Power Play Prize Pool, if any; second from the SPRA, if available, not to exceed forty million dollars ($40,000,000.00) per Drawing; and, third from other amounts as agreed to by the Product Group in their sole discretion.

(D) If, after these sources are depleted, there are not sufficient funds to pay the Set Prizes awarded, including Power Play Prizes, then the highest Set Prize shall become a pari-mutuel prize. If

the amount of the highest Set Prize, when paid on a pari-mutuel basis, drops to or below the next highest Set Prize and there are still not sufficient funds to pay the remaining Set Prizes awarded, then the next highest Set Prize, including Power Play prizes, shall become a pari-mutuel prize. This procedure shall continue down through all Set Prize levels, if necessary, until all Set Prize levels become pari-mutuel prize levels. In that instance, the money available from the funding sources listed in this rule shall be divided among the winning Plays in proportion to their respective prize percentages. Powerball Set Prizes and Power Play Prizes will be reduced by the same percentage.

(E) By agreement, the Licensee Lotteries shall independently calculate their Set Prize pari-mutuel prize amounts. The Party Lotteries and the Licensee Lotteries shall then agree to set the pari-mutuel prize amounts for all lotteries selling the game at the lesser of the independently-calculated prize amounts.

(e) Probability of Powerball Winning Plays. The following table sets forth the probability of winning Plays and the probable distribution of winning Plays in and among each prize category, based upon the total number of possible combinations in Powerball. The Set Prize Amount shall be the prizes set for all Selling Lotteries unless prohibited or limited by a jurisdiction's statute or judicial requirements.
Figure: 16 TAC §401.317(e) (No change.)

(f) Powerball Prize Payment.

(1) Powerball Grand Prizes. The advertised Grand Prize in a Powerball game is not a guaranteed amount; it is an estimated amount, and all advertised prizes, even advertised Set Prizes, are estimated amounts. At the time of ticket purchase, a player must select a payment option of either a single cash value payment or annuitized payments of a share of the Grand Prize if the Play is a winning Play. If no selection is made, payment option will be as described in the chart below:
Figure: 16 TAC §401.317(f)(1) (No change.)

(A) A player's selection of the payment option at the time of purchase from the Texas Lottery is final and cannot be revoked, withdrawn, or otherwise changed.

(B) Shares of the Grand Prize shall be determined by dividing the cash available in the Grand Prize Pool equally among all winning Plays of the Grand Prize. A player(s) who elects a cash value option payment shall be paid his/her share(s) in a single cash payment. The annuitized option prize shall be determined by multiplying the winning Play's share of the Grand Prize Pool by the annuity factor established in accordance with Texas law and the rules of the Texas Comptroller of Public Accounts. The MUSL Annuity Factor will not be used for Texas Lottery players. Neither MUSL nor any Selling [~~Party~~] Lottery shall be responsible or liable for changes in the advertised or estimated annuity prize amount and the actual amount purchased after the prize payment method is actually known to MUSL.

(C) In certain instances announced by the Powerball Group, the Grand Prize shall be a guaranteed amount and shall be determined pursuant to paragraph (6) of this subsection.

(D) If individual shares of the Grand Prize Pool funds [~~cash~~] held to fund an annuity is less than $250,000.00, [~~$250,000,~~] the Powerball Group, in its sole discretion, may elect to pay the winners their share of the funds held in the Grand Prize Pool. All annuitized prizes shall be paid annually in thirty (30) payments with the initial payment being made in a single payment, [~~cash,~~] to be followed by twenty-nine (29) payments funded by the annuity.

(E) All annuitized prizes shall be paid annually in thirty (30) graduated payments, as provided by the MUSL rules, (increasing each year) at a rate as determined by the MUSL Product Group. Prize payments may be rounded down to the nearest one thousand dollars ($1,000).

(F) Funds for the initial payment of an annuitized prize or the lump sum cash value option payment [~~prize~~] shall be made available by MUSL for payment by the Selling Lottery no earlier than the fifteenth calendar day (or the next banking day if the fifteenth day is a holiday) following the Drawing. If necessary, when the due date for the payment of a prize occurs before the receipt of funds in the prize pool trust sufficient to pay the prize, the transfer of funds for the payment of the full lump sum cash value option payment amount may be delayed pending receipt of funds from the Selling Lotteries. [~~lotteries.~~] The identification of the securities to fund the annuitized prize shall be at the sole discretion of the State of Texas. If the State of Texas purchases the securities, or holds the prize payment annuity for a Powerball prize won in this state, the prize winner will have no recourse on the MUSL or any other Party Lottery for payment of that prize.

(2) Payment of Prize Payments upon the Death of a Prize Winner. In the event of the death of a prize winner, payments may be made in accordance with §401.310 of this chapter (relating to Payment of Prize Payments Upon Death of Prize Winner), otherwise, payment of prize payments will be made to the estate of a deceased prize winner in accordance with Texas Government Code §466.406.

(3) Powerball Prize Payments. All prizes shall be paid through the Selling Lottery that sold the winning Play(s). All low-tier cash prizes (all prizes except the Grand Prize) shall be paid in cash or warrants in accordance with Texas statutes and these rules. A Selling Lottery may begin paying low-tier cash prizes after receiving authorization to pay from the MUSL central office.

(4) Powerball Prizes Rounded. Annuitized payments of the Grand Prize or a share of the Grand Prize may be rounded to facilitate the purchase of an appropriate funding mechanism. Breakage on an annuitized Grand Prize win shall be added to the first cash payment to the winner or winners. Prizes other than the Grand Prize, which, under this section, may become single-payment, pari-mutuel prizes, may be rounded down so that prizes can be paid in multiples of whole dollars. Breakage resulting from rounding these prizes shall be carried forward to the prize pool for the next Drawing.

(5) Powerball Prize Rollover. If the Grand Prize is not won in a Drawing, the prize money allocated for the Grand Prize shall roll over and be added to the Grand Prize Pool for the following Drawing.

(6) Funding of Guaranteed Powerball Prizes. The Powerball Group may offer guaranteed minimum Grand Prize amounts or minimum increases in the Grand Prize amount between Drawings or make other changes in the allocation of prize money where the Powerball Group finds that it would be in the best interest of the game. If a minimum Grand Prize amount or a minimum increase in the Grand Prize amount between Drawings is offered by the Powerball Group, then the Grand Prize shares shall be determined as follows:

(A) If there are multiple Grand Prize winning Plays during a single Drawing, each selecting the annuitized option prize, then a winning Play's share of the guaranteed annuitized Grand Prize shall be determined by dividing the guaranteed annuitized Grand Prize by the number of winning Plays.

(B) If there are multiple Grand Prize winning Plays during a single Drawing and at least one of the Grand Prize ticket holders has elected the annuitized option prize, then the MUSL Annuity Factor may be utilized to determine the cash pool. The cost of the annuitized prize(s) will be determined at the time the annuity is purchased through a process as approved by the MUSL Board. If the annuitized option prize is selected by a Texas Lottery player, the amount shall be

determined by multiplying the winning Play's share of the Grand Prize Pool by the annuity factor established in accordance with Texas law and the rules of the Texas Comptroller of Public Accounts. The MUSL Annuity Factor will not be used for Texas Lottery players. [~~the best bid submitted by MUSL's pre-approved qualified brokers shall determine the cash pool needed to fund the guaranteed annuitized Grand Prize.~~]

(C) If there are multiple Grand Prize winning Plays during a single Drawing, and no claimant of the Grand Prize has elected the annuitized option prize, then the amount of cash in the Grand Prize Pool shall be an amount equal to the guaranteed annuitized amount divided by the MUSL Annuity Factor. [~~Changes in the allocation of prize money shall be designed to retain approximately the same prize allocation percentages, over a year's time, set out in the Powerball Group Rules.~~] Minimum guaranteed prizes or increases may be waived if the alternate funding mechanism set out in subsection (d)(2)(D) of this section becomes necessary.

(7) Limited to Highest Powerball Prize Won. The holder of a winning Play may win only one (1) prize per Play in connection with the Winning Numbers drawn, and shall be entitled only to the prize won by those numbers in the highest matching prize category. All liabilities for a Powerball prize are discharged upon payment of a prize claim.

(8) Powerball Prize Claim Period. Prizes must be claimed no later than 180 days after the draw date.

(g) Ticket Validation. To be a valid Play and eligible to receive a prize, a Play's ticket shall satisfy all the requirements established by the Texas Lottery for validation of winning tickets sold through its computer gaming system and any other validation requirements adopted by the Powerball Group, the MUSL Board, and published as the Confidential MUSL Minimum Game Security Standards. The MUSL and the Selling Lotteries shall not be responsible for tickets which are altered in any manner.

(h) Ticket Responsibility.

(1) Signature. Until such time as a signature is placed upon a ticket in the area designated for signature, a ticket shall be owned by the bearer of the ticket. When a signature is placed on the ticket in the place designated, the person whose signature appears in such area shall be the owner of the ticket and shall be entitled (subject to the validation requirements in subsection (g) of this section (Ticket Validation) and state or district law) to any prize attributable thereto.

(2) Multiple Claimants. The issue of multiple claimants shall be handled in accordance with Texas Government Code Chapter 466 and §401.304 of this chapter.

(3) Stolen Tickets. The Powerball Group, the MUSL and the Party Lotteries shall not be responsible for lost or stolen tickets.

(4) Prize Claims. Prize claim procedures shall be governed by the rules of the Commission as set out in §401.304 of this subchapter and any internal procedures used by the Texas Lottery. The MUSL and the Party Lotteries shall not be responsible for prizes that are not claimed following the proper procedures as determined by the Selling Lottery. [~~lottery.~~]

(i) Ineligible Players.

(1) A Play or share for a MUSL game issued by the MUSL or any of its Selling Lotteries shall not be purchased by, and a prize won by any such Play or share shall not be paid to:

(A) a MUSL employee, officer, or director;

(B) a contractor or consultant under agreement with the MUSL to review the MUSL audit and security procedures;

(C) an employee of an independent accounting firm under contract with MUSL to observe drawings or site operations and actually assigned to the MUSL account and all partners, shareholders, or owners in the local office of the firm; or

(D) an immediate family member (parent, stepparent, child, stepchild, spouse, or sibling) of an individual described in subparagraphs (A), (B), and (C) of this paragraph and residing in the same household.

(2) Those persons designated by a Selling Lottery's law as ineligible to play its games shall also be ineligible to Play the Powerball [~~MUSL~~] game in that Selling Lottery's jurisdiction.

(j) Applicable Law.

(1) In purchasing a Play, as evidenced by a ticket, or attempting to claim a prize, the purchasers and prize claimants agree [~~purchaser agrees~~] to comply with and abide by all applicable laws, rules, regulations, procedures, and decisions of the Selling Lottery where the ticket was purchased, and by directives and determinations of the director of that Party Lottery.

(2) A prize claimant agrees, as its sole and exclusive remedy, that claims arising out of a Powerball Play can only be pursued against the Selling Lottery which issued the Play. Litigation, if any, shall only be maintained within the jurisdiction in which the Powerball Play was purchased and only against the Selling Lottery that issued the Play. No claim shall be made against any other Participating Lottery or against the MUSL.

(3) Nothing in these Rules shall be construed as a waiver of any defense or claim the Selling Lottery which issued the Play, any other Participating Lottery or MUSL may have in any litigation, including in the event a player or prize claimant pursues litigation against the Selling Lottery, any other Participating Lottery or MUSL, or their respective officers, directors or employees.

(4) All decisions made by a Selling Lottery, including the declaration of prizes and the payment thereof and the interpretation of Powerball Rules, shall be final and binding on all Play purchasers and on every person making a prize claim in respect thereof, but only in the jurisdiction where the Powerball Play was issued.

(5) Unless the laws, rules, regulations, procedures, and decisions of the Lottery which issued the Play provide otherwise, no prize shall be paid upon a Play purchased, claimed or sold in violation of the MUSL Powerball Rules or the laws, rules, regulations, procedures, and decisions of that Selling Lottery; any such prize claimed but unpaid shall constitute an unclaimed prize under these Rules and the laws, rules, regulations, procedures, and decisions of that Selling Lottery.

(k) Powerball Special Game Rules: Powerball Power Play.

(1) Power Play Description. The Powerball Power Play is a limited extension of the Powerball game and is conducted in accordance with the Powerball game rules and other lottery rules applicable to the Powerball game except as may be amended herein. Power Play will begin at a time announced by the Selling Lottery and will continue until discontinued by the lottery. Power Play will offer to the owners of a qualifying Play a chance to increase the amount of any of the eight Low-Tier Set Prizes (the Low-Tier prizes normally paying $4 to $1,000,000) won in a Power Play Drawing. The Grand Prize is not a Set Prize and will not be increased.

(2) Qualifying Play. A qualifying Play is any single Powerball Play for which the player pays an extra dollar for the Power Play option Play and which is recorded at the Selling Lottery's computer gaming system as a qualifying Play.

(3) Prizes to be Increased. Except as provided in the MUSL Powerball game rules and this section, [these rules,] a qualifying Play which wins one of the seven lowest Set Prizes (excluding the Match 5 + 0) will be multiplied by the number drawn, either two (2), three (3), four (4), five (5), or sometimes ten (10), in a separate random Power Play Drawing announced during the official Powerball Drawing [drawing] show. The ten (10X) multiplier will be available for Drawings in which the initially advertised annuitized Grand Prize amount is one hundred fifty million dollars ($150,000,000.00) or less. The announced Match 5+0 prize, for players selecting the Power Play option, shall be paid two million dollars ($2,000,000.00) unless a higher limited promotional dollar amount is announced by the Powerball Group. Figure: 16 TAC §401.317(k)(3) (No change.)

(4) Prize Pool.

(A) Power Play Prize Pool. The Power Play Prize Pool is created to be used to fund Power Play Prizes and shall hold the temporary balances that may result from having fewer than expected winners in the Power Play. The source of the Power Play Prize Pool is the Party Lottery's weekly prize contributions less actual Power Play Prize liability. In total, fifty percent (50%) of each draw's sales shall be collected and placed in the Power Play Prize Pool for the payment of prizes. [combination with subsection (k)(4)(B) of this rule,]

(i) In [in] Drawings where the ten (10X) multiplier is available, the expected payout for all prize categories shall consist of up to forty-nine and nine hundred sixty-nine thousandths percent (49.969%) of each Drawing period's sales, including any specific statutorily mandated tax of a Selling Lottery to be included in the price of a lottery Play. In drawings where the ten (10X) multiplier is not available, the expected payout for all prize categories shall consist of up to forty-five and nine hundred thirty-four thousandths percent (45.934%) of each Drawing period's sales, including any specific statutorily mandated tax of a Selling Lottery to be included in the price of a lottery Play. [ticket.]

(ii) In drawings where the ten In drawings (10X) multiplier is available, an additional thirty-one thousandths percent (0.031%) of each drawing period's sales, including any specific statutorily mandated tax of a Selling Lottery to be included in the price of a lottery ticket, may be collected and placed in trust in the Power Play Prize Pool, for the purpose of paying Power Play prizes. In drawings where the ten (10X) multiplier is not available, an additional four and sixty-six thousandths percent (4.066%) of each drawing period's sales, including any specific statutorily mandated tax of a Selling Lottery to be included in the price of a lottery ticket, may be collected and placed in trust in the Power Play Prize Pool, for the purpose of paying Power Play Prizes.

(iii) The prize payout percentage per draw may vary. The Power Play Prize Pool shall be carried forward to subsequent draws if all or a portion of it is not needed to pay the Power Play Prizes [prizes] awarded in the current draw and held in the Power Play Prize Pool [Account].

[(B) Power Play Pool Account. In Drawings when the ten (10X) multiplier is available, an additional thirty-one thousandths of a percent (0.31%) of sales, including any specific statutorily mandated tax of a Selling Lottery to be included in the price of a lottery Play, may be collected and placed in trust in the Power Play Pool account, for the purpose of paying Power Play prizes. In drawing when the ten (10X) multiplier is not available, for and sixty-six hundredths percent (4.0066%) of sales, including any specific statutorily mandated tax of a Selling Lottery to be included in the price of a lottery Play, may be collected and placed in trust in the Power Play Pool account, for the purpose of paying Power Play prizes.]

(B) End of Game. Any amount remaining in the Power Play Prize Pool [account] when the Powerball Group declares the end of this game shall be returned to the lotteries participating in the account after the end of all claim periods of all Selling Lotteries, carried forward to a replacement game, or otherwise expended in a manner at the election of the individual Members of the Product Group in accordance with jurisdiction statute.

(C) Expected Prize Payout. Except as provided in this section, all prizes awarded shall be paid as single payment cash prizes. Instead of the Powerball Set Prize amounts, qualifying winning Plays of Power Play will pay the amounts shown in paragraph (3) of this subsection, above. In certain rare instances, the Powerball Set Prize amount may be less than the amount shown in Figure: 16 TAC §401.317(k)(3). [Figure: 16 TAC §401.317(d)(2).] In such case, the eight lowest Power Play Prizes [prizes] will be changed to an amount announced after the draw. For example, if the Match 4+1 Powerball Set Prize amount of $50,000 becomes $25,000 under the rules of the Powerball game, and a 5X Power Play Multiplier is drawn, then a Power Play winning Play prize amount would win $125,000.

(D) Probability of Power Play Numbers Being Drawn. The following table sets forth the probability of the various Power Play numbers being drawn during a single Powerball Power Play Drawing. The Powerball Group may elect to run limited promotions that may modify the multiplier features. Power Play does not apply to the Powerball Grand Prize. Except as provided in subparagraph (C) of this paragraph, a Power Play Match 5 + 0 prize is set at two million dollars ($2,000,000.00), regardless of the multiplier selected.
Figure: 16 TAC §401.317(k)(4)(D)
[Figure: 16 TAC §401.317(k)(4)(D)]

(5) Limitations on Payment of Power Play Prizes.

(A) Prize Pool Carried Forward. The prize pool percentage allocated to the Power Play Set Prizes shall be carried forward to subsequent draws if all or a portion of it is not needed to pay the Set Prizes awarded in the current draw.

(B) Pari-Mutuel Prizes--All Prize Amounts. If the total of the original Powerball Set Prizes and the Power Play Prizes awarded in a drawing exceeds the percentage of the prize pools allocated to the Set Prizes, then the amount needed to fund the Set Prizes (including the Power Play prize amounts) awarded shall first come from the amount available in the Set Prize Pool [allocated to the Set Prizes and carried forward from previous draws], if any, second from the Powerball Group's Set Prizes Reserve Account, if available, not to exceed forty million dollars ($40,000,000.00) per drawing, and third from other amounts as agreed to by the Powerball Group in their sole discretion.

(C) If, after these sources are depleted, there are not sufficient funds to pay the Set Prizes awarded (including Power Play prize amounts), then the highest Set Prize (including the Power Play prize amounts) shall become a pari-mutuel prize. If the amount of the highest Set Prize, when paid on a pari-mutuel basis, drops to or below the next highest Set Prize and there are still not sufficient funds to pay the remaining Set Prizes awarded, then the next highest Set Prize, including the Power Play prize amount, shall become a pari-mutuel prize. This procedure shall continue down through all Set Prizes levels, if necessary, until all Set Prize levels become pari-mutuel prize levels. In that instance, the money available from the funding sources listed in this section shall be divided among the winning Plays in proportion to their respective prize percentages. Powerball and Power Play prizes will be reduced by the same percentage. By agreement, the Licensee Lotteries shall independently calculate their set pari-mutuel prize amounts, including the Power Play prize amounts. The Party Lotteries and the Licensee Lotteries shall then agree to set the pari-mutuel prize amounts

for all lotteries selling the game at the lesser of the independently-calculated prize amounts.

(6) Prize Payment.

(A) Prize Payments. All Power Play prizes shall be paid in a single payment through the Selling Lottery that sold the winning Play(s). A Selling Lottery may begin paying Power Play prizes after receiving authorization to pay from the MUSL central office.

(B) Prizes Rounded. Prizes, which, under these rules, may become pari-mutuel prizes, may be rounded down so that prizes can be paid in multiples of whole dollars. Breakage resulting from rounding these prizes shall be carried forward to the prize pool for the next Drawing.

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-201605357
Bob Biard
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 344-5012

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TITLE 22. EXAMINING BOARDS

PART 34. TEXAS STATE BOARD OF SOCIAL WORKER EXAMINERS

CHAPTER 781. SOCIAL WORKER LICENSURE

The Texas State Board of Social Worker Examiners (board), proposes new §781.222 and an amendment to §781.419, concerning the licensure and regulation of social workers.

BACKGROUND AND PURPOSE

The proposed amendments to §781.419 implement Senate Bill (SB) 807 and SB 1307, 84th Legislature, Regular Session, 2015, which amended Occupations Code, Chapter 55, relating to occupational license application and examination fees and to licensing and renewal of certain military service members, military veterans, and military spouses.

The proposed new rule in §781.222 implements House Bill (HB) 1449, 84th Legislature, Regular Session, 2015, as it relates to child custody and adoption evaluations in certain suits affecting the parent-child relationship, by stipulating minimum qualifications for licensees who hold doctoral degrees to serve as a child custody evaluator and prohibiting a holder of a baccalaureate social worker license from conducting a child custody or adoption evaluation under amended Family Code, Chapter 107, unless the individual is otherwise qualified by law to conduct the evaluation.

SECTION-BY-SECTION SUMMARY

This summary considers only those sections which were substantially changed in language, meaning, or intent.

The amendments to §781.419 will remove existing language relating to Licensing of Military Service Members, Military Veterans, and Military Spouses in order to address corresponding, new, and amended requirements in compliance with Occupations Code, Chapter 55.

The amendment to §781.419 will implement Occupations Code, Chapter 55, including legislative changes to that chapter relating to the occupational license application and examination fees and to licensing and renewal of certain Military Service Members, Military Veterans, and Military Spouses. However, the rules do not include implementing language concerning the examination fee waiver, which does not apply to the social work licensure examination, since those examination fees are not paid to the state, but to the third party administrator of the examination.

New §781.222 will implement HB 1449 of the 84th Legislature, Regular Session, 2015, as it relates to licensed social workers and child custody and adoption evaluations. HB 1449 amended the Family Code, Chapter 107, relating to child custody and adoption evaluations conducted and provided in certain suits affecting the parent-child relationship. New §781.222 prohibits Licensed Baccalaureate Social Workers (LBSWs) from conducting those evaluations unless the individual is otherwise qualified by law to conduct the evaluation. New §781.222 also specifies certain standards of conduct for licensees performing child custody evaluations or adoption evaluations.

FISCAL NOTE

Alice Bradford, Executive Director, has determined that for each year of the first five years that the proposed new section and amendment will be in effect, there will be no anticipated cost or savings, nor effect on revenue, to local government as a result of the proposed rule changes. For new §781.222, there will be no anticipated cost or savings, nor effect on revenue, to state government as a result of the proposed rule changes. Concerning §781.419, there will be an anticipated fiscal cost to state government as a result of lost revenue from waiving certain initial application fees for military service members, military veterans, and military spouses, and renewal late fees for certain military service members. Since examination fees for the board are not paid to the state, the statutory waiver provision for such fees does not affect revenue for the board. Fees under current laws and rules for the board to which the waiver provisions would apply for qualified applicants and license holders are as follows:

As set forth in 22 TAC §781.316, $80 for initial application and licensure fee for LBSWs and Licensed Master Social Workers (LMSWs); $120 for initial application and licensure fee for Licensed Clinical Social Workers (LCSWs); $20 for late renewal fee within 90 days of expiration date and $40 late renewal fee for 91 days up to not more than one year of expiration date for an LBSW or an LMSW; and $25 for late renewal fee within 90 days of expiration date and $50 late renewal fee for 91 days up to not more than one year of expiration date for an LCSW.

In addition, a $5 Office of Patient Protection (OPP) fee under Occupations Code, §101.307 applies to initial social worker licensure applications. A $6 Texas.gov fee under Government Code, §2054.252 applies to initial social worker licensure applications.

In Fiscal Year 2016, the board received an average of 18 applications per month from initial social work license applicants identifying themselves as eligible for an initial license fee waiver. Given that the late fee waiver previously existed in statute, with the recent legislative amendments only broadening to some extent the scope of eligibility for active military service members,

the impact of the waiver provisions can be expected to be greater in relation to new applicants who may be eligible for the initial license application fee waiver.

Thus, an estimated loss of revenue per eligible applicant from fee waivers can be expected to be between $80 and $120, plus the OPP and Texas.gov surcharges, with only minimal impact from the new legislative amendments mandating waivers of late renewal fees for active-duty military service members.

Based upon the current rate of potentially eligible social worker license applicants of 18 per month; assuming some increase in the number of applications after the rules take effect and as they become better known; and allowing for occasional requests for late fee waivers, the board estimated rates of waiver requests at 20 per month for the first year, adding 2 per month to the estimate for each of the five years, to assume approximately 28 per month by the fifth year. The board further used the average initial application fee of $100, plus the applicable surcharges totaling a $111 initial application rate as the base rate, and rounded up to $120 as the multiplier to account for an occasional applicant eligible for a waiver other than those for which the board has received requests to date. These figures would result in an estimated $28,800 loss in revenue for year one; a $31,680 loss in revenue for year two; a $34,560 loss in revenue for year three; a $37,440 loss in revenue for year four; and an $40,320 loss in revenue for year five of the rules being in effect, for a total estimated loss of revenue for the board of approximately $172,800. However, the board does not anticipate an impact to its ability to meet the costs of administering the program through existing revenue under the current fee structure, even with this loss of revenue due to the new fee waivers.

MICRO-BUSINESSES AND SMALL BUSINESSES IMPACT ANALYSIS

Ms. Bradford has also determined that there will be no adverse economic effect on small businesses or micro-businesses. This determination was made because the proposed amendments do not impose any new requirements on businesses, and any new requirements in the new rule are minimal and will not require small business and micro-businesses to significantly alter their business practices.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are anticipated savings for those military service members, military veterans, and military spouses who are eligible applicants for a waiver of certain fees. There is no anticipated negative impact on local employment.

REGULATORY ANALYSIS

The board has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean "a rule, the specific intent to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state." The proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC BENEFIT

In addition, Ms. Bradford has determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the licensing and regulation of social workers, and to increase the availability of licensed social workers by facilitating the licensing of applicants with applicable military experience and of qualified military spouses.

PUBLIC COMMENT

Comments on the proposal may be submitted to Alice Bradford, Executive Director, Texas State Board of Social Worker Examiners, Department of State Health Services, Mail Code 1982, P.O. Box 149347, Austin, Texas 78714-9347, (512) 834-6628, or by email to *lsw@dshs.state.tx.us.* When submitting comments by email, please include "Comments on Proposed Rules" in the subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

SUBCHAPTER B. CODE OF CONDUCT AND PROFESSIONAL STANDARDS OF PRACTICE

22 TAC §781.222

STATUTORY AUTHORITY

The new rule is proposed under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The new rule affects Texas Occupations Code, Chapter 505.

§781.222. Child Custody Evaluations.

(a) Licensees shall comply with Texas Family Code, Chapter 107, Subchapters D, E, and F, concerning Child Custody Evaluation, Adoption Evaluation, and Evaluations in Contested Adoptions.

(b) A licensee who has completed a doctoral degree and at least 10 court-ordered child custody evaluations under the supervision of an individual qualified by the Texas Family Code, Chapter 107 to perform child custody evaluations is qualified to conduct child custody evaluations under Texas Family Code, Chapter 107. All other licensees must comply with the qualification requirements stipulated in Texas Family Code, Chapter 107.

(c) Any complaint relating to the outcome of a child custody evaluation or adoption evaluation conducted by a licensee must be reported to the court that ordered the evaluation. The board only reviews complaints regarding forensic evaluations addressing violation of specific board rules.

(d) Disclosure of confidential information in violation of Texas Family Code, §107.111 or §107.163 is grounds for disciplinary action, up to and including revocation of license, by the board.

(e) A licensee who provides services concerning a matter which the licensee knows or should know will be utilized in a legal proceeding, such as a divorce, child custody determination, disability claim, or criminal prosecution, must comply with all applicable board rules in this chapter regardless of whether the licensee is acting as a factual witness or an expert.

(f) A licensee may not provide therapy and any other type of service, including but not limited to a child custody evaluation or par-

enting facilitation, in the same case, whether such services are delivered sequentially or simultaneously.

(g) Licensees may not offer an expert opinion or recommendation relating to the conservatorship of or possession of or access to a child unless the licensee has conducted a child custody evaluation relating to the child under Texas Family Code, Chapter 107, Subchapter D.

(h) Licensees providing child custody evaluations or adoption evaluations shall, prior to beginning the evaluation, in writing inform the parties of:

(1) the limitations on confidentiality in the evaluation process; and

(2) the basis of fees and costs and the method of payment, including any fees associated with postponement, cancelation and/or nonappearance, and the parties' pro rata share of the fees and costs as determined by the court order or written agreement of the parties.

(i) A Licensed Baccalaureate Social Worker shall not conduct child custody evaluations or adoption evaluations unless qualified to provide such services by another professional license or otherwise by Texas Family Code, Chapter 107.

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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Timothy Martel Brown, LCSW
Chair
Texas State Board of Social Worker Examiners
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 776-6972

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SUBCHAPTER D. LICENSES AND LICENSING PROCESS

22 TAC §781.419

The amendment is proposed under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The amendment affects Texas Occupations Code, Chapter 505.

§781.419. Licensing of Military Service Members, Military Veterans, and Military Spouses.

(a) This section sets out licensing procedures for military service members, military veterans, and military spouses required under Texas Occupations Code, Chapter 55 (relating to Licensing of Military Service Members, Military Veterans, and Military Spouses). For purposes of this section:

(1) "Active duty" means current full-time military service in the armed forces of the United States or active duty military service as a member of the Texas military forces, as defined by Texas Government Code, §437.001 or similar military service of another state.

(2) "Armed forces of the United States" means the army, navy, air force, coast guard, or marine corps of the United States or a reserve unit of one of those branches of the armed forces.

(3) "License" means a license, certificate, registration, permit, or other form of authorization required by law or a state agency rule that must be obtained by an individual to engage in a particular business.

(4) "Military service member" means a person who is on active duty.

(5) "Military spouse" means a person who is married to a military service member.

(6) "Military veteran" means a person who has served on active duty and who was discharged or released from active duty.

[~~(1) "Military service member" means a person who is currently serving in the armed forces of the United States, in a reserve component of the armed forces of the United States, including the National Guard, or in the state military service of any state.~~]

[~~(2) "Military spouse" means a person who is married to a military service member who is currently on active duty.~~]

[~~(3) "Military veteran" means a person who has served in the army, navy, air force, marine corps, or coast guard of the United States, or in an auxiliary service of one of those branches of the armed forces.~~]

(b) - (e) (No Change.)

(f) An applicant who is a military service member, military veteran, or military spouse who holds a current, unrestricted, license issued by another jurisdiction that has substantially equivalent licensing requirements shall complete and submit an application form and a supplemental application form for military service member, veteran, or military spouse. As soon as practicable after a complete application under this subsection is filed, the board will process and issue a license to an applicant who holds such a license, satisfies the application and supplemental application requirements, and meets the requisite substantial equivalency requirements of the other state, if the applicant has no unresolved allegations or criminal background relevant to the license, and there are no other facts or circumstances providing grounds for denial of the license. The license will have the same term as the applicable license type otherwise issued under the Act and this subchapter. Renewal of the license shall be in accordance with subsection (i) of this section. [~~fee. The board shall issue a license to a qualified applicant who holds such a license as soon as practicable and the renewal of the license shall be in accordance with subsection (i) of this section.~~]

(g) In accordance with Texas Occupations Code, §55.004(c), the executive director may waive any prerequisite to obtaining a license after reviewing the applicant's credentials and determining that the applicant holds a license issued by another jurisdiction that has licensing requirements substantially equivalent to those of this state.

(h) An applicant who is a military service member, military veteran, or military spouse who held a registration in this state within the five years preceding the application date, and without restriction, shall complete and submit an application form and a supplemental application form for military service member, veteran, or military spouse. As soon as practicable after a complete application under this subsection is filed, the board will process and issue a registration to an applicant who held such a registration and who satisfies the application and supplemental application requirements, if there are no unresolved allegations against the applicant or criminal background relevant to the registration, or other facts or circumstances providing grounds for denial of the registration. Renewal of the registration shall be in accordance with subsection (i) of this section.

[~~(h) A military spouse who within the five years preceding the application date held the license in this state that expired while the ap-~~

~~plicant lived in another state for at least six months is qualified for licensure based on the previously held license, if there are no unresolved complaints against the applicant and if there is no other bar to licensure, such as criminal background or non-compliance with a board order.]~~

(i) If the board issues an initial license to an applicant who is a military service member, military veteran, or military spouse in accordance with subsection (f) of this section, the board shall assess whether the applicant has met all licensing requirements of this state by virtue of the current license issued by another jurisdiction. The board shall provide this assessment in writing to the applicant at the time the license is issued. If the applicant has not met all licensing requirements of this state, the applicant must provide proof of completion at the time of the first application for license renewal. A license shall not be renewed, shall be allowed to expire, and shall become ineffective if the applicant does not provide proof of completion at the time of the first application for licensure renewal.

(j) Notwithstanding any other law, the board will waive the license application fees paid to the state for an applicant described in paragraph (1) or (2) of this subsection. An applicant shall provide any proof requested by the board that the applicant is:

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

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

(k) For license renewal, the board will exempt an individual who holds a license issued by the board from any increased fee or other penalty imposed for failing to renew the license in a timely manner if the individual establishes to the satisfaction of the executive director that the individual failed to renew the license in a timely manner because the individual was serving as a military service member.

(l) A military service member who holds a license is entitled to two years of additional time beyond the expiration date of the license to complete:

(1) any continuing education requirements; and

(2) any other requirement related to the renewal of the military service member's licensure.

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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Timothy Martel Brown, LCSW
Chair
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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION

SUBCHAPTER E. NOTICE OF TOLL-FREE TELEPHONE NUMBERS AND PROCEDURES FOR OBTAINING INFORMATION AND FILING COMPLAINTS

28 TAC §1.603

The Texas Department of Insurance proposes amendments to 28 TAC §1.603 to establish the method of submitting policy count information for the purpose of complying with Insurance Code §521.052.

Texas Insurance Code §521.052 requires TDI to provide consumers with complaint ratios. The ratios must represent the number of "justified, verified as accurate, and documented as valid" complaints received against a company, "expressed as a percentage of the total number of insurance policies written by the insurer and in force on December 31 of the preceding year." To satisfy this mandate, TDI must collect policy count information of in-force coverage of Texas risks.

TDI has historically collected the policy count information required for the purposes of complying with Insurance Code §521.052 through an annual bulletin to "All Licensed Carriers, Eligible Surplus Lines Companies, and Health Maintenance Organizations Authorized or Eligible to do Business in Texas." The bulletin provides links to a form and instructions for making the filing. Making the requirement part of the annual report process and checklist will be more efficient for insurers and TDI than continuing with the bulletin based process.

The proposed policy count exhibit form and instructions are adopted by reference and are substantively the same as those used in prior years by TDI. Bracketed information in the policy count exhibit form and instructions, such as the current year, prior year, and contact information, is subject to change over time, but does not change the substantive requirement to submit the policy count information. Following adoption, the forms will be referenced in TDI's annual statement checklist.

The policy count exhibit form requires the submitting individual's name, title, telephone and fax numbers, and email address. The individual may elect to allow release of their email address in response to a public information request. In addition the policy count form requires the entity's name, address, and TDI license number and policy count information by individual and group coverage and line of coverage, including life; annuities; Medicare supplement/select; all other health and accident; personal motor vehicle; commercial motor vehicle; dwelling; workers' compensation; and other property, casualty, surety and/or title. The lines are defined on the instruction form. Because the number of outstanding title insurance policies is difficult to determine, TDI will continue to use the method of determining a policy count that was used in the bulletins and require the submitting carrier to enter the total number of policies written during the preceding five calendar years.

The proposed policy count exhibit form and instructions are available for inspection on TDI's website at www.tdi.texas.gov/rules/2016/index.html and in the Compliance Division of the Texas Department of Insurance, William P. Hobby Jr. State Office Building, Tower Number I, 333 Guadalupe, Austin, Texas.

The amendments to §1.603 also make nonsubstantive changes in the text to reflect TDI style guidelines.

FISCAL NOTE. Mark Einfalt, deputy commissioner of the Compliance Division, has determined that, for each of the first five years the amended section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administrating the amended sections, and there will be no effect on local employment or the local economy.

PUBLIC BENEFIT/COST NOTE. Mr. Einfalt also determined that for each of the first five years the amended sections are in effect, the public benefit of the amendments to §1.603 will be greater certainty and efficiency fulfilling the requirements to determine the complaint ratios under Insurance Code §521.052 and avoidance of the use of TDI's resources to engage in unnecessary issuing and tracking of compliance with the prior bulletin process.

Costs related to providing policy count information result from Insurance Code §521.052 and not this proposal. This is because the policy count information is necessary to complete the complaint ratio calculation, and it is not available from any other source. Further, the proposal does not substantively change the means by which insurers have been collecting and submitting policy count information under Insurance Code §521.052.

To the extent that additional costs result from preparing and submitting the policy count exhibit form under this proposal, TDI expects these costs to be minimal. The costs would result from personnel gathering the policy count information, preparing the form, and submitting the form. The costs would vary for many reasons, including size of the insurer and its administrative structure. While it is not feasible to determine the actual cost of preparing and submitting the policy count exhibit form for each insurer, TDI has provided factors that will generate costs under this proposal.

TDI estimates personnel costs would involve administrative and management personnel. The reporting insurer may choose to comply using its employees or third party contractors. It is not feasible for TDI to determine the actual employee costs for each reporting insurer. However, the United States Department of Labor, Bureau of Labor Statistics' May 2015, Occupational Employment Statistics report indicates that the hourly mean wages for the professions in Texas, as referenced in this cost analysis, are $26.59 for office and administrative workers (www.bls.gov/oes/CURRENT/oes431011.htm), and $61.99 for general and operations managers (www.bls.gov/oes/CURRENT/oes111021.htm). It is not feasible for TDI to estimate the cost for hiring contract labor to fulfill these roles. The method of compliance and ultimate cost of compliance is a business decision of the reporting insurer, not a requirement of this proposal.

TDI estimates that there are no measurable additional costs in the actual submission of the electronic form over the internet.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. Under Government Code §2006.002(c), before adopting a rule that may have an adverse economic effect on small or micro businesses, an agency is required to prepare, in addition to an economic impact statement, a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule.

Section 1.603(d) establishes a procedure to submit policy count information that is required to complete percentage complaint ratio Insurance Code §521.052(a)(1). TDI has determined the proposal may effect approximately 117 insurers and HMOs that are small or micro businesses required to comply with the proposed rules.

Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Government Code §2006.002(c-1) requires that the regulatory flexibility analysis, "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." An agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro-businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

Insurance Code §521.051 requires TDI to maintain a toll-free number for the purpose of providing the public with the information listed in Insurance Code §521.052 and to receive and aid in resolving complaints against insurers. TDI is required to calculate and provide the complaint ratio that must be provided to the public under Insurance Code §521.052. Other information required to be provided under Insurance Code §521.052 includes the rating of an insurer, if any, as published by a nationally recognized rating organization; the kinds of coverage available to a consumer through any insurer writing insurance in this state; an insurer 's admitted assets-to-liabilities ratio; and other appropriate information collected and maintained by TDI.

In enacting Insurance Code §521.051 and §521.052 the legislature has stated the public policy of the state of Texas and that the information is necessary to the public economic welfare involved in the purchase of insurance. These sections are not limited by the size of the insurer, but are to provide information for the benefit and the protection of the interests of all policyholders, enrollees, and members, and the public generally.

Reporting policy count information under §1.603(d) is necessary to calculate the complaint ratio that must be provided to the public under Insurance Code §521.052. Although, TDI has determined that the costs to gather and submit the policy count information under proposed §1.603(d) will have an adverse economic effect on the small or micro business carriers, this information is only available from the insurer and TDI is not aware of an alternative source of collecting the information.

TDI has determined, in accord with Government Code §2006.002(c-1), that because the purpose of §1.603(d) and the authorizing statutes of the Insurance Code is to protect the public's economic welfare, there are no feasible additional regulatory alternatives to the proposal that will sufficiently protect the economic interests of the public. Therefore, TDI is not required to consider alternative methods of achieving the purpose of these requirements in the proposed rule as required by Government Code §2006.002(c).

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

REQUEST FOR PUBLIC COMMENT. TDI invites the public and affected persons to comment on this proposal. Submit your written comments on the proposal no later than 5:00 p.m., Central Time, on November 28, 2016. Send written comments by mail to the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to *chiefclerk@tdi.texas.gov.* You must simultaneously submit an additional copy of the comments by mail to Valerie Brown, Director, Regulatory Projects, Consumer Protection, MC 111-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to *Valerie.Brown@tdi.texas.gov.* You must submit any request for a public hearing separately to the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to *chiefclerk@tdi.texas.gov* before the close of the public comment period. If a hearing is held, written comments and public testimony presented at the hearing will be considered.

STATUTORY AUTHORITY. TDI proposes the amendments pursuant to Insurance Code §§521.051, 521.052, and 36.001.

Section 521.051 requires TDI to maintain a toll-free telephone number to provide the information described by the Insurance Code §521.052.

Section 521.052 requires, in part, that TDI provide to the public through TDI's toll-free telephone number information collected or maintained by TDI relating to the number and disposition of complaints received against an insurer that are justified, verified as accurate, and documented as valid, expressed as a percentage of the total number of insurance policies written by the insurer and in force on December 31 of the preceding year.

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

CROSS REFERENCE TO STATUTE. The proposed amendments to §1.603 affect the following statutes: Insurance Code §521.051 and §521.052.

§1.603. Complaint Information Available through the Texas Department of Insurance's Toll-Free Telephone Number.

(a) The Texas Department of Insurance (TDI) [~~(department)~~] will provide to the public through its toll-free telephone number the information specified by the Insurance Code §521.052, including information collected or maintained by TDI [~~the department~~] relating to the number and disposition of complaints received against an insurer that are justified, verified as accurate, and documented as valid, expressed as a percentage of the total number of insurance policies written by the insurer and in force on December 31 of the preceding year.

(b) TDI [~~The department~~] considers a complaint justified if the complaint is a confirmed complaint.

(c) A "confirmed complaint" is a complaint for which TDI [~~the department~~] receives information indicating that:

(1) an insurer committed any violation of:

(A) an applicable state insurance law or regulation;

(B) a federal requirement TDI [~~the department~~] has authority to enforce; or

(C) the term or condition of an insurance policy or certificate; or

(2) the complaint and insurer's response, considered together, suggest that the insurer was in error or that the complainant had a valid reason for the complaint.

(d) To determine the percentage described in subsection (a) of this section and required by Insurance Code §521.052, policy count information must be:

(1) prepared in accordance with the Policy Count Exhibit Form and Instructions, which are adopted by reference; and

(2) submitted only to TDI electronically as instructed on the policy count exhibit form and Instructions as part of the insurer's annual statement under §7.68 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 October 14, 2016.

TRD-201605276
Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 676-6584

CHAPTER 26. SMALL EMPLOYER HEALTH INSURANCE REGULATIONS

The Texas Department of Insurance proposes the repeal of, amendments, and new sections in 28 TAC Chapter 26, concerning large- and small-employer health insurance regulations and health group cooperatives.

TDI proposes to revise the name of 28 TAC Chapter 26.

TDI proposes the repeal of §§26.1, 26.17, 26.21 - 26.24, 26.26, and 26.27 in 28 TAC Chapter 26, Subchapter A; §26.311 in 28 TAC Chapter 26, Subchapter C; and §26.404 and §26.413 in 28 TAC Chapter 26, Subchapter D.

TDI proposes amendments to §§26.3 - 26.16, 26.18 - 26.20, and 26.25 in 28 TAC Chapter 26, Subchapter A; §§26.301 - 26.310, 26.312, and 26.314 in 28 TAC, Chapter 26, Subchapter C; and §§26.401 - 26.403, and 26.405 - 26.411 in 28 TAC Chapter 26, Subchapter D.

TDI proposes new, §26.28 in 28 TAC Chapter 26, Subchapter A and §26.313 in 28 TAC Chapter 26, Subchapter C.

TDI proposes dividing 28 TAC Chapter 26, Subchapter D into 4 divisions.

TDI proposes new §26.400 in 28 TAC Chapter 26, Subchapter D, Division 1; new §§26.421 - 26.426 in 28 TAC Chapter 26, Subchapter D, Division 2; new §26.431 in 28 TAC Chapter 26, Subchapter D, Division 3; and new §26.441 and §26.442 in 28 TAC Subchapter D, Division 4.

The repeals, amendments, and new divisions and sections make the rules consistent with Texas statutes and clarify issues arising from of the enactment of federal laws. The proposal would also conform Chapter 26 to statutory changes made by SB 859, 82nd Legislature, Regular Session (2011) and SB 784, 84th Legislature, Regular Session (2015).

In addition, TDI reviewed all sections of Chapter 26 to assess whether the reasons for initially adopting the sections continue to exist, in accordance with the Texas Government Code §2001.039. The department determined that in most, but not all, cases, the reasons for initially adopting the sections continue to exist. In those cases the department is proposing to maintain those sections with any amendments necessary for the purposes addressed in this proposal. In some cases the department determined that the reasons for initially adopting the sections no longer exist, and is proposing to repeal those sections. These sections include §26.27 and §26.413.

EXPLANATION. The proposed amendments, new sections, and repeals modify the existing regulations by changing the title of the chapter to "Employer-Related Health Benefit Plan Regulations" because the chapter addresses more than small employer plans. The proposal amends the titles of subchapters and sections to more accurately reflect their contents. Proposed amendments include updates to language and format, changes to citations in statutes and other rules that have been recodified or redesignated, and nonsubstantive changes to conform to TDI's style and usage guidelines.

The changes also eliminate redundant language, improve readability, and clarify wording. The deletions remove language that is clear in statute. The amendments move some content to group relevant sections together.

The proposal amends the title of Subchapter A to more accurately specify the contents of the subchapter, which relates to definitions and severability for Subchapters A, C, and D, and small employer health regulations for the remainder of the subchapter.

The proposal repeals §26.1, relating to Statement of Purpose, because the chapter has grown to include the implementation of more than just Insurance Code Chapter 1501, the Health Insurance Portability and Availability Act. TDI has moved the information about the various purposes of the chapter to the applicable subchapters.

The proposed amendments to §26.3, relating to Severability, update language.

The proposed amendments to §26.4, relating to Definitions, clarify that the terms defined in the section apply to Subchapters A, C, and D. The amendments also redesignate some definitions to preserve alphabetical order, change some definitions to reference statutory definitions in order to minimize unnecessary duplication of statutory language, delete definitions of unused terms, and update citations and language. Definitions are moved from §26.312, relating to Point-of-Service Coverage, to Subchapter A. Definitions for the terms "eligible dependent," "gross premiums," and "TDI" are added to the section. The proposal changes the term "actuary" to "qualified actuary" and modifies the definition for greater accuracy.

The proposal changes definitions of the following words and phrases to conform them to statutory definitions for the terms: "affiliation period," "base premium rate," "case characteristics," "class of business," "creditable coverage," "dependent," "eligible employee," "employee, genetic information," "genetic test," "health benefit plan," "index rate," "large employer," "large employer health benefit plan," "new business premium rate," "participation criteria," "person," "point-of-service plan," "preexisting condition provision," "premium," "rating period," "risk-assuming carrier," "small employer," "small employer health benefit plan," and "waiting period." The amendments also eliminate some definitions by combining terminology. The proposal amends the definition of "child" to include any other child considered a dependent under an employer's health benefit plan. The proposal deletes references to the Texas Health Insurance Risk Pool because it no longer exists.

The proposed amendments to §26.5, relating to Applicability and Scope, clarify that the remainder of Subchapter A governs small employers. The proposal deletes outdated references to documents that were "delivered, issued for delivery, renewed, or not renewed on or after July 1, 1997," and any required notice associated with those documents. New §26.5(g) provides that a Texas-licensed carrier that issues a certificate of insurance covering a Texas resident is responsible for ensuring that the certificate complies with applicable Texas insurance laws and rules, including mandated benefits, regardless of whether the group policy underlying the certificate was issued outside the state. Insurance Code Article 21.42, concerning Texas Laws Govern Policies, says that any contract of insurance payable to any citizen or inhabitant of Texas by a company doing business within Texas will be held to be a contract made and entered into under and governed by Texas law despite whether execution of the contract or payment of the premiums are made outside of the state. The substance of §26.5(k) is updated and moved to subsection (h).

The proposed amendments to §26.6, relating to Status of Health Carriers as Small Employer Carriers, amend the section title by removing "and Geographic Service Area." SB 784 removed the requirement for geographic service information to be filed with TDI because that information is collected by TDI in another manner. Section 26.6(a) removes the annual March filing deadline regarding status of health carriers and instead requires only an original filing and a filing of change in status. The proposed amendments prescribe the elements of the filing, and provide a web address for a form that fulfills the requirements. The proposal removes the requirement for small employer carrier status information regarding "health benefit plans issued before July 1, 1997," because it is unnecessary. Section 26.6(c) eliminates the requirement for the health carrier to file Form Number 1212 CERT GEOG (also known as Figure 44) regarding the establishment of geographic service areas, to comply with the elimination of that requirement by SB 784. Section 26.6(e) is deleted to remove the ineligibility for participation in the Texas Health Reinsurance System, since the ineligibility no longer exists.

The proposal deletes §26.7(f) because it is a duplicate of Insurance Code §1501.155(d). Redesignated §26.7(i) clarifies when waiting periods apply. The proposal also deletes §26.7(m) and (n) because they no longer apply due to guaranteed enrollment.

The proposed amendments to §26.8(b), specify that an "eligible employee" does not include an employee within the waiting period or affiliation period for percentage of participation requirement purposes because the employee does not have the opportunity to participate in the insurance. Section 26.8(c) is deleted because the substance of the contribution information is clear in Insurance Code §1501.153, and the termination information is clear in §§1501.108 - 1501.110. The proposal amends §26.8(d) and deletes §26.8(e) and (f) because the minimum percentage participation requirements are in Insurance Code §1501.154 and §1501.155.

The proposed amendments to §26.9, relating to Exclusions, Limitations, Waiting Periods, Affiliation Periods and Preexisting Conditions and Restrictive Riders, clarify that a small employer may not exclude any eligible employee or dependent who would oth-

erwise be covered under a small employer's health benefit plan, except to the extent permitted by statute. The amendments clarify when waiting periods or affiliation periods apply and update the examples.

To clarify wording, and update citations and formatting, TDI proposes nonsubstantive amendments to §26.10, relating to Establishment of Classes of Business; §26.11, relating to Restrictions Relating to Premium Rates; and §26.12, relating to Disclosure.

The proposed amendments to §26.13, relating to Fair Marketing, clarify that an agent authorized by a small employer carrier to market consumer choice health benefit plans must also be authorized to market fully-mandated health benefit plans to ensure that the consumer is offered both consumer choice health benefit plans and state-mandated plans. The carrier or agent must offer all plans to the small employer for which it qualifies. Section 26.13(d) is deleted because Insurance Code Chapter 1501 does not required a written affirmation that the small employer carrier offered the small employer a consumer choice health benefit plan.

The proposal amends §26.14, relating to Coverage, by deleting subsections (a), (b), and (f) because it is not necessary to state that a small employer carrier should comply with the statutes. The proposal adds catchlines to these subsections for clarity. The proposal adds new §26.14(d), regarding point-of-service (POS) coverage, which allows an HMO issuing small employer HMO coverage to also offer POS coverage as long as it meets the requirements set forth in Insurance Code Chapter 843, concerning Health Maintenance Organizations; 28 TAC Chapter 11, Subchapter Z, relating to Point-of-Service Riders; and 28 TAC Chapter 21, Subchapter U, relating to Arrangements Between Indemnity Carriers and HMOs for Point-of-Service Coverage, which allow the enrollee to access out-of-plan coverage at the option of the enrollee. Texas Insurance Code Chapter 1273 also allows an HMO issuing small employer HMO coverage to offer POS coverage. The new section is not a change in law or practice for HMOs.

The proposed amendments to §26.15, relating to Renewability of Coverage and Cancellation, remove dates in subsections (a)(2) and (b) regarding "intentional misrepresentation of a material fact on or after September 1, 1995," because that date has passed. Section 26.15(a)(3) clarifies that the participation requirement is the minimum percentage. The specific reference to HMOs is deleted from §26.15(a)(4) so that it reads, "the small employer has no enrollee, in connection with the plan, who resides or works in the service area of the small employer carrier or in the area where the small employer carrier is authorized to do business," in accordance with Insurance Code §1501.108(4), which does not restrict this provision to HMOs.

The proposed amendments to §26.16, relating to Refusal to Renew and Application to Reenter Small Employer Market, update citations and wording. Part of aubsection (a) and all of subsections (b) and (c) are deleted to remove references to geographic service areas in accordance with changes to the Insurance Code made by SB 784. Section §26.16(f) is deleted because there is no need to remind anyone that all laws must be followed.

The proposal repeals §26.17, relating to Notice to Covered Persons, because the notice requirements are clear in Insurance Code §§1501.108 - 1501.110.

The proposed amendments to §26.18, relating to Election and Application to be a Risk-Assuming or Reinsured Carrier, list the existing requirements that must be submitted in a risk-assuming carrier application and provides a web address carriers can use to access a form that meets the requirements. The proposed amendments to §26.18(a)(1) require a risk-assuming carrier's initial application to include a history of rating and underwriting; description of the carrier's commitment to fairly market to small employers, including sample marketing materials and marketing plan; description of experience in managing risk; description of plans to manage the risk; list of affiliated carriers; and signature of the chief executive officer, attorney for the named health carrier, or actuary. Proposed amendments to §26.18(a)(2) require that a reinsured carrier's notification must include a statement of the carrier's election to operate as a reinsured carrier, and signature of the chief executive officer, attorney for the named health carrier, or actuary.

The proposal amends §26.18(b)(1) to provide that if a carrier is a risk-assuming carrier seeking to change its status, its filing must include the same information supplied in §26.18(a) and information demonstrating good cause for the request to change status and a signature of the chief executive officer, attorney for the named health carrier, or actuary.

The proposed amendments to §26.19(a) provide a web address for carriers to use to access a form that fulfills the requirements of the subsection. The proposed amendments delete Form Number 1212 CERT GEOG (also known as Figure 44) in §26.19(b) due to the elimination of that requirement by SB 784 and because similar information is collected by TDI in another manner.

Proposed amendments to §26.20, relating to Reporting Requirements, add new subsection (b) to provide a web address for carriers to access Form Number 1212 ACTUARIAL. The amendments to renumbered subsection (c) provide a web address for carriers to access Form Number 1212 CERT DATA, clarify that the information provided in the form relates to the previous calendar year, and delete the requirement in §26.20(c)(3) to provide a physical copy of the certificate of coverage for each of the carrier's three most frequently issued consumer choice health benefit plans because TDI no longer uses this information. The definition of gross premiums in subsection §26.20(b)(8) has been moved to §26.4, relating to Definitions.

The proposal repeals §26.21, relating to Cost Containment, because the requirements of the section are clearly addressed in Insurance Code §1501.257.

The proposal repeals §26.22, relating to Private Purchasing Cooperatives, and §26.23, relating to Powers and Duties of Texas Health Benefits Purchasing Cooperative and Private Purchasing Cooperatives, and moves their substance to Subchapter D.

The proposal repeals §26.24, relating to Procedure for Obtaining the Approval of Commissioner and Filing with the Commissioner, because the delegation is considered a routine matter under 28 TAC Chapter 1, Subchapter F.

The proposal amends and updates citations in §26.25, relating to Unfair Competition and Unfair Practices.

The proposal repeals §26.26, relating to Administrative Violations and Penalties, and §26.27, relating to Forms, because the requirements of §26.26 are clearly addressed in Insurance Code §1501.357, and because §26.27 is no longer needed due to amendments in other sections pointing to where particular forms can be found on TDI's website.

The proposal adds new §26.28, relating to Territorial Exclusions, which imposes limitations on the ability of a small employer health benefit plan to exclude health care services, supplies,

or drugs provided for medical emergencies outside the plan service area, including outside the United States.

The proposal amends the title of Subchapter C to include health insurance regulations for large employers because the subchapter encompasses more than the Health Insurance Portability and Availability Act regulations.

The proposal amends §26.301, relating to Applicability, Definitions, and Scope, to incorporate the terms defined in §26.4. Section 26.301(b) is added to clarify that Insurance Code Chapter 1501 and 28 TAC Chapter 26, Subchapter C, regulate all health benefit plans sold to large employers. Existing §26.301(c) and (d) are deleted to eliminate references to documents that were "delivered, issued for delivery, renewed, or not renewed to large employers and their employees on or after July 1, 1997," because that time period is no longer relevant. The proposal replaces and simplifies language in §26.301(d) and (g). Proposed new §26.301(h) provides that if a large employer has employees in more than one state, the provisions of Insurance Code Chapter 1501 and 28 TAC Chapter 26, Subchapter C, apply to its health benefit plan if the majority of employees are employed in this state on the issue date or renewal date, or the primary business location is in this state on the issue date or renewal date and no state contains a majority of the employees. The language in §26.301(h) tracks similar language provided for small employers in §26.5(f). New §26.301(i) requires a carrier licensed in this state that issues a certificate of insurance covering a Texas resident to ensure that the certificate complies with applicable Texas insurance laws and rules, including mandated benefits. Insurance Code Article 21.42 allows for any contract of insurance payable to any citizen or inhabitant of this state by a company doing business within Texas to be held to be a contract made and entered into under and governed by Texas law despite execution of the contract or payment of the premiums made outside of the state.

The title of §26.302, relating to Status of Health Carriers as Large Employer Carriers, is amended to delete a reference to geographic service areas. Section 26.302(a) removes the annual March filing deadline regarding status of health carriers and instead requires only an original filing and a filing of change in status. The proposal deletes the unnecessary requirement for large employer carrier status information regarding health benefit plans issued before July 1, 1997. New §26.302(c) points to a link on TDI's website for the form carriers can use to fulfill the requirements of §26.302(a) and (b). References to Form Number 1212 LEHC GEOG (also known as Figure 51) and geographic services areas are deleted in §26.302(c) and (d) due to the elimination of that requirement by SB 784, and because similar information is collected by TDI in another manner.

The proposal deletes §26.303(a), (d), (f), and (h) because they are repetitive of Insurance Code Chapter 1501, Subchapter M. A sentence is added to subsection (e) to clarify that an "eligible employee" does not include an employee within the waiting period or affiliation period for percentage of participation requirement purposes because the employee does not have the opportunity to participate in the insurance.

The proposed amendments to subsection (b) of §26.304, relating to Requirement to Insure Entire Groups, clarify wording. Section 26.304(g) and (h) are deleted because they are no longer necessary.

The proposed amendments to §26.305, relating to Enrollment, delete subsection (l) as repetitive of Insurance Code §1503.003; subsection (m) as repetitive of the annual prostate exam required by Insurance Code §1362.003; and subsection (n) as repetitive of obstetrical or gynecological care required by Insurance Code Chapter 1451, Subchapter F and 28 TAC Chapter 11.

The proposed amendments to §26.306, relating to Exclusions, Limitations, Waiting Periods, Affiliation Periods and Preexisting Conditions, and Restrictive Riders, clarify language relating to waiting periods and affiliation periods, update citations, and update the example dates.

The proposal adds new §26.307(h), relating to Fair Marketing, which clarifies the requirement that if a large employer carrier issues coverage under a consumer choice benefit plan, it must also comply with requirements for consumer choice health benefit plans under 28 TAC Chapter 21, Subchapter AA.

The proposal updates language and citations in §26.308, relating to Renewability of Coverage and Cancellation.

The proposal deletes the obligation of a large employer carrier to notify the commissioner of geographic information in §26.309(a), relating to Refusal to Renew and Application to Reenter Large Employer Market, due to the deletion of language referring to Form Number 1212 LEHC GEOG in §26.302. The amendments to this section also update citations and delete unnecessary language.

The proposal amends the section title and citations in §26.310, relating to Unfair Competition and Unfair Practices.

The proposal repeals §26.311, relating to Administrative Violations and Penalties, as unnecessary in light of similar Insurance Code provisions.

The definitions in §26.312, relating to Point-of-Service Coverage, are moved from this section to §26.4 because they apply to small and large group health benefit plans.

Proposed new §26.313, relating to Filing Requirements, does not impose any additional duties on large employer carriers. Section 26.313 is modeled after §26.19, relating to Filing Requirements, as that section now relates to small employer carriers. The requirements of the new section are existing requirements under Insurance Code Chapters 1271, 1273, and 1501, and in other chapters of Title 28 of the Texas Administrative Code. The new section requires each large employer carrier, other than an HMO, to use a policy shell format for any group or individual health benefit plan form. The new section requires filings to be submitted, as applicable, in the following order: a policy face page; the group certificate page or individual data page; the toll-free number and complaint notice page; the table of contents; insert pages for the general provisions; insert pages for the required provisions and optional provisions; an insert page for the benefits section of the health benefit plan; insert pages for any amendments, applications, enrollment forms, or other form filings that comprise part of the contract; insert pages for any required outline of coverage for individual products; any additional form filings and documentation; the information required under this section; and the rate schedule. Each HMO must submit health benefit plan forms for use in the large employer market that include the agreement; alternate pages to the agreement or the schedule of benefits and any alternate schedules of benefit; and additional riders, amendments, applications, enrollment forms, or other forms and required documentation. The filing must include any applicable requirements of 28 TAC Chapter 11, Subchapters D and F, except for continuation and conversion of coverage, which must

meet the requirements of Insurance Code Chapter 1271, and 28 TAC Chapter 26, Subchapter G. The filing must include any rider forms.

Proposed new §26.314, related to Territorial Exclusions, imposes limitations on the ability of a large employer health benefit plan to exclude health care services, supplies, or drugs provided for medical emergencies outside the plan service area, including outside the United States.

The proposal amends the title of Subchapter D to include all cooperatives as provided by Insurance Code Chapter 1501. The proposal creates four divisions within the subchapter. Division 1 relates to Nonprofit Health Group Cooperatives. SB 859, which amended provisions for small and large employer health group cooperatives, requires that a health group cooperative making an election must file evidence of the election as prescribed by rule. In addition, SB 859 requires the commissioner to adopt rules under which a health group cooperative, for good cause, may rescind an election and rules governing the eligibility of a single-employee business to participate in a health group cooperative.

Proposed new §26.400, relating to Definitions and Filing, incorporates the terms defined in §26.4, updates the address for filing information under Subchapter D, and clarifies that all references to health group cooperatives in the subchapter refer only to nonprofit health group cooperatives.

Proposed amendments to §26.401, relating to Establishment of Health Group Cooperatives, clarify wording, and subsection (d) is amended to delete the reference to the Filings Intake Division because the address for filing information required by Subchapter D is relocated to new §26.400(d). The proposed amendment to §26.401(e) would prohibit a health group cooperative from admitting an eligible single-employee business if it restricts its membership to 50 eligible employees under Insurance Code §1501.0581. The proposal also amends §26.401(f) to reference single-employee businesses and to delete the reference to Form Number HGC-1.

The proposed amendments to §26.402(a), relating to Membership of Health Group Cooperatives, adds that the membership of a health group cooperative may also consist of small employers and eligible single-employee businesses; large employers and eligible single-employee businesses; and small employers, large employers, and eligible single-employee businesses as provided by Insurance Code §1501.0581. In order to give reasonable notice of nonrenewal, §26.402(b) requires a health group cooperative that does not have at least 10 participating employers to notify those employers of the potential for nonrenewal.

The proposal makes nonsubstantive grammatical changes to §26.403, relating to Marketing Activities of Health Group Cooperatives.

The proposal repeals §26.404, relating to Health Group Cooperative's Status as Employer, because the content is duplicative of requirements in Insurance Code §1501.063.

The proposed amendment to §26.405, relating to Premium Tax Exemption for Previously Uninsured, updates wording.

The proposal amends §26.406, relating to Standard Prevention Form, to provide the relevant Insurance Code and Texas Administrative Code citations for brevity.

Proposed amendments update wording in §26.407, relating to Health Carrier Filing Prior to Issuance of Coverage to a Health Group Cooperative, and in §26.408, relating to Issuance of Coverage to Health Group Cooperatives. The reference to the Filings Intake Division in §26.407(a) is proposed to be deleted because the address for filing information required by this subchapter is included in new §26.400(d).

Amendments to the state mandate exceptions in subsection (a) of §26.409, relating to Health Benefit Plans Offered Through Health Group Cooperatives, more accurately reflect current statutory mandates. Continuation of coverage for certain drugs under a drug formulary, as required by Insurance Code §1369.055; coverage of off-label drugs, as required by Insurance Code §§1369.001 - 1369.005; and the limitations or restrictions on copayments and deductibles imposed by 28 TAC §11.506(2)(A) and (B) are deleted from §26.409(a) because the exemption from state law requirements found in Insurance Code §1501.0581(i) does not apply to them. The following state coverage mandates are proposed to be added to the current list of exemptions in §26.409(a): transplant donor coverage, as established by 28 TAC §3.3040(h); coverage for certain tests for detection of human papillomavirus, ovarian cancer, and cervical cancer as required by Insurance Code Chapter 1370; certain tests for detection of cardiovascular disease as required by Insurance Code Chapter 1376; certain amino acid-based elemental formulas as required by Insurance Code Chapter 1377; prosthetic devices, orthotic devices, and related services as required by Insurance Code Chapter 1371; and orally-administered anticancer medications as required by Insurance Code Chapter 1369.

Proposed amendments update citations and wording in §26.410, related to Expedited Approval for Plans Offered Through a Health Group Cooperative. Section 26.411(b) and (c), related to Service Areas for Health Carriers Offering Coverage Through a Health Group Cooperative, are amended to delete the references to the Filings Intake Division because the address for filing information required by Subchapter D is included in new §26.400(d).

The proposed repeal of §26.413, relating to Health Carrier Reporting Requirements, eliminates the requirement for cooperatives and coalitions to file an annual statement of amounts collected and expenses incurred, in accordance with amendments to the Insurance Code made by SB 784.

The rule proposal establishes Division 2 as Single-Employee Business Participation in Health Group Cooperatives.

Proposed new §26.421, relating to Election to Permit Single-Employee Businesses to Participate in a Health Group Cooperative, requires a health group cooperative that elects to admit eligible single-employee businesses to file an election with TDI at least 90 days before the date coverage becomes effective for single-employee business members. The election filing must contain the election date, the election results, affirmation that the cooperative has a written agreement with a small or large employer health benefit plan issuer, and a signature by an authorized officer of the cooperative.

Proposed new §26.422, relating to Condition Precedent to Filing Election to Admit Single-Employee Businesses as Members, permits a health group cooperative to admit eligible single-employee businesses if a small or large employer health benefit plan issuer has agreed in writing to offer to issue coverage to the cooperative based on its membership.

Proposed new §26.423, relating to Initial and Annual Enrollment Periods, requires a health group cooperative that elects to ad-

mit eligible single-employee businesses to permit participation and enrollment in the cooperative's health benefit plan coverage during the initial and annual open enrollment periods. It also requires such a health group cooperative to apply the provisions of Insurance Code §1501.0581(a-1) to eligible single-employee businesses.

Proposed new §26.424, relating to Membership Eligibility Requirements for Single-Employee Businesses, establishes that a single-employee business is eligible to join a health group cooperative if it is owned and operated by a sole proprietor, is engaged in commercial activity for livelihood or profit, is not operated solely to obtain health benefit plan coverage, and employs fewer than two employees on business days during the preceding calendar year.

Proposed new §26.425, relating to Plan Issuance, Rating Requirements, and Mandated Benefits, applies the provisions of Insurance Code Chapter 1501 relating to guaranteed issuance of plans, rating requirements, and mandated benefits to eligible single-employee businesses that are members of the health group cooperative.

Proposed new §26.426, relating to Rescission of Election, allows a health group cooperative to rescind its election to admit eligible single-employee business members if the election has been effective for at least two years, the cooperative files notice of the rescission, and the cooperative provides written notice of termination of coverage. The proposed section also provides that a cooperative may rescind its election to admit eligible single-employee business members before the second anniversary by showing good cause in writing to TDI. A cooperative that rescinds its election may choose to permit existing single-employee business members to maintain their membership and coverage. A cooperative that has rescinded an election may not re-elect to accept eligible single-employee businesses for five years.

The proposal establishes Division 3 as Health Group Cooperative Election to Treat Members as Separate Employers for Rating Purposes.

Proposed new §26.431, relating to Election to Treat Members as Separate Employers for Rating Purposes, allows a health group cooperative to treat each member as a separate employer for purposes of rating health benefit plans. It requires an existing health group cooperative to file its election with TDI no later than the 90th day before the election becomes effective, and to provide all members written notice at least 90 days before the election becomes effective. When a prospective member applies to join a health group cooperative, the cooperative must provide written notice to the applicant that the cooperative has elected to treat each member as a separate employer for the purpose of rating health plans. An election is effective on the earliest date after the election when the plan is next issued or renewed. The election remains in effect for no less than 12 months.

The proposal creates Division 4, relating to Private Purchasing Cooperatives, which derives substantially from repealed §26.22 and §26.23.

Proposed new §26.441, relating to Private Purchasing Cooperatives, allows two or more employers to form a cooperative for the purchase of health benefit plans. It requires that a Texas cooperative be organized under the Business Organizations Code Chapter 22, concerning Nonprofit Corporations, and file with the commissioner notification of the receipt of its certificate and a copy of its organizational documents. It requires that a private purchasing cooperative health benefit plan issued to a small employer must be a small employer health benefit plan, one issued to a large employer must be a large employer health benefit plan, and one issued to a school district electing to be treated as a small employer must be a small employer health benefit plan.

Proposed new §26.442, relating to Powers and Duties of Texas Health Benefits Purchasing Cooperative and Private Purchasing Cooperatives, requires a cooperative to arrange for health benefit plan coverage for employer groups that participate in the cooperative by contracting with small or large employer carriers, to: collect premiums, contract to market coverage, establish administrative and accounting procedures, establish grievance procedures, contract with a carrier or third-party administrator to provide administrative services, contract with carriers for the provision of services to small or large employers covered through the cooperative, develop and implement a plan to maintain public awareness of the cooperative, negotiate premiums, and offer other ancillary products and services to its members that are customarily offered in conjunction with health benefit plans. Section 26.442(b) would allow a cooperative to contract only with small or large employer carriers who demonstrate that they are licensed and in good standing with TDI; have the capacity to administer the health benefit plans; have the ability to monitor and evaluate the quality and cost effectiveness; have the ability to conduct utilization management; have the ability to ensure enrollees adequate access to health care providers; have a satisfactory grievance procedure and the ability to respond to enrollees' calls, questions, and complaints; and have financial capacity. A cooperative may not self-insure or self-fund.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Doug Danzeiser, director, Life and Health Lines Office, Regulatory Policy Division, has determined that for each year of the first five years the proposed repeal, amendments, and new sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rule proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Mr. Danzeiser has determined that for each year of the first five years the repeals, amendments, and new sections are in effect, the public benefits anticipated as a result of the repeals, amendments, and new sections will be a clearer understanding of requirements and health benefits for consumers, small and large employers, small and large employer health benefit plan carriers, and cooperatives. TDI has drafted this proposal to maximize public benefits, consistent with the authorizing statutes, while mitigating costs.

In the informal draft of the rule text posted on TDI's website in October 2015, TDI invited stakeholders and the public to comment regarding any new anticipated costs that could result from the draft rules. TDI received no comments regarding costs.

TDI has determined that the proposed amendments, repeals, and new sections may have an adverse economic effect; however, some carriers and employers may experience savings due to some of the changes.

Proposed new subsection §26.301(h), which requires that a plan issued to an employer having employees in more than one state comply with the provisions of Insurance Code Chapter 1501 and 28 TAC Chapter 26, Subchapter C, if the majority of employees are employed in this state on the issue date or renewal date, or the primary business location is in this state on the issue date

or renewal date, and no state contains a majority of the employees, does not impose new costs on carriers because it is a clarification of existing requirements including Insurance Code Article 21.42. The new subsection clarifies that the existing requirement in §26.5(f) for small employer plans is also required of large employer plans. Any associated costs are attributable to existing requirements rather than the new subsection. Further, TDI cannot quantify the cost resulting from the requirements. Carriers are in the best position to estimate these costs, and TDI received no comments on costs in response to the informal posting.

Similarly, proposed new §26.5(g) and §26.301(i), which require a carrier licensed in this state that issues a certificate of insurance covering a Texas resident to be responsible for ensuring that the certificate complies with applicable Texas insurance laws and rules, impose no new costs on carriers because these are a clarification of existing requirements, including requirements in Insurance Code Article 21.42. TDI already requires that certificates issued to Texas residents by Texas-licensed carriers comply with applicable Texas laws and rules. Any costs are attributable to existing requirements rather than these new subsections. Similar to new §26.301(h), TDI cannot quantify the cost resulting from the requirements. Carriers are in the best position to estimate these costs, and TDI received no comments on costs in response to the informal posting.

The deletion of the annual March filing of the Small Employer Carrier Status Certification (Figure 40) form, and the Large Employer Carrier Status Certification (Figure 50) form in §26.6 and §26.302, respectively, would save carriers the time and costs involved in filling out the form. Under the proposed text, carriers would only file the forms as an initial filing, and again when there are changes in status. There is no filing fee for this form. Further, SB 784's repeal of the carrier requirement to file geographic information, proposed to be implemented in §26.6 and §26.19(a) and (b) for small employer carriers and in §26.302(c) and (d), and §26.309(a) for large employer carriers, saves small employer carriers the time and costs associated with filling out Form 1212 CERT GEOG (Figure 44) and saves large employer carriers time and costs associated with filling out Form 1212 LEHC GEOG (Figure 51).

The clarification that "eligible employees" who are within their waiting period or affiliation period are not included in the count for percentage participation purposes will cost carriers only if they choose to add this clarification to their forms. Adding this type of clarification language is a business choice. Filing an amended form with TDI costs $100. However, if the carrier is already otherwise submitting an amended form to TDI, then only one $100 filing fee is charged.

Amendments to §26.20(b)(3) delete the requirement that physical certificates be attached to Form Number 1212 CERT DATA (Figure 48). Removing this requirement would save carriers time and money.

Carriers may incur some costs regarding the emergency extraterritorial requirements in proposed new §26.28 and §26.314. These sections prohibit small and large employer health plans from excluding health services, supplies, or drugs provided for medical emergencies outside the plan service area, including outside the United States. To TDI's knowledge, all issuers currently comply with this practice, and, presumably, the cost of emergency care is already built into the premiums--except that some carriers limit their coverage to Canada, Mexico, and the United States. There is no way for TDI to know what percentage of plans limit coverage to these three countries or the number of enrollees in those particular plans who travel outside of these three countries. Again, TDI received no estimate of anticipated costs in response to the posting of the informal draft of the rule text.

Subchapter D, Division 2, Single-Employee Business Participation in Health Group Cooperatives, is a new division created to implement SB 859. Costs associated with the new division would be the cost to a health group cooperative to elect to admit eligible single-employee businesses and, if applicable, to rescind the election. The commissioner is required to adopt rules for these functions under Insurance Code §1501.081(q) and (v). TDI estimates that the time to create an election or rescind an election would be approximately two hours each. The cost of the two hours per procedure would depend on the employee who performs the work within the cooperative. These procedures may include computer programming.

Carriers may calculate the total cost of labor for each category by multiplying the number of estimated hours for each cost component by the median hourly wage for each category of labor. The Texas statewide median hourly wage for each category is published online by the Texas Workforce Commission at www.texaswages.com as follows:

(a) a computer programmer: $75,539 per year, divided by 2080 hours per year equals $36.32;

(b) an administrative assistant: $30,477 per year, divided by 2080 hours per year equals $14.65;

(c) an administrative services manager: $97,900 per year, divided by 2080 hours per year equals $47.07; and

(d) a chief executive: $190,000 per year, divided by 2080 hours per year equals $91.35.

The probable cost components for compliance include the cost of printing, copying, and mailing selection or rescission information. TDI estimates the average price of a standard business-size envelope is between $.07 and $.17, and a business catalog-size envelope is between $.31 and $.40. TDI further estimates that the cost of printing or copying is between $.08 and $.12 per page.

According to the United States Postal Service, the current price to mail a domestic first class letter (one ounce) is $.47. The price of each additional ounce is $.21. It is not feasible for TDI to estimate the total increased printing, copying, and mailing costs attributable to compliance with the proposed new division because it is unknown at this time how many members each cooperative has and would be required to notice.

SB 784 eliminates the requirements for cooperatives and coalitions to file an annual statement of amounts collected and expenses incurred, so this requirement is deleted with the deletion of §26.413. There should be a minimal savings to cooperatives and coalitions.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by Government Code §2006.002(c), TDI has determined that the repeals, amendments, and new sections may have an adverse economic effect on small or micro business carriers. TDI estimates that approximately one to nine insurers and HMOs collect less than $6 million in group premium per year. TDI does not collect information on the number of individuals employed by licensed carriers, but TDI believes that one or more of these entities may be a small or micro business under Government Code §2006.002(c). However, there will not be a dispropor-

tionate economic impact on small or micro businesses because the cost of compliance with these proposed rules will not vary between large businesses and small or micro businesses. TDI's cost analysis and resulting estimated costs in the Public Benefit and Cost Note portion of this proposal are equally applicable to large businesses and small or micro businesses.

Government Code §2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small or micro businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Government Code §2006.002(c)(1) requires that the analysis consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses.

Many of the changes will save employers and carriers time and expenses. The costs related to jurisdictional requirements of proposed new §26.301(h) and (i) and §26.5(g) are attributable to existing requirements rather than the proposed amendments. Amending a form to clarify minimum participation requirements so that employees within waiting periods or affiliation periods are not counted as eligible employees, adding emergency extraterritorial requirements, and requiring cooperatives to make elections or rescind elections could create costs.

In compliance with Government Code §2006.002, TDI considered the following three regulatory alternatives: (i) not proposing the new requirements; (ii) proposing different requirements for small and micro businesses; and (iii) exempting small and micro businesses. For the following reasons, TDI rejected each of these alternatives.

Not proposing the new requirements.

First, TDI considered the option of not proposing the new requirements.

Not proposing the jurisdictional requirements of new §26.301(h) and (i), and §26.5(g), would not lessen any adverse effect on small or micro businesses because the costs are attributable to existing requirements rather than the rule.

Not proposing that "eligible employees" within waiting periods or affiliation periods are not required to be counted toward the percentage participation would eliminate changes to forms. However, these form changes are optional and will only require a filing fee if not filed with other changes. In addition, the advantage of not counting ineligible employees in the percentage count outweighs the disadvantage of counting employees who do not qualify, because the resulting reduction in percentage does not help the employer or the employees.

Requiring emergency extraterritorial requirements protects consumers, so not proposing these requirements would mean that this protection might not be available. In addition, most carriers already include this coverage, and there has been no indication that expanding beyond the countries of the United States, Mexico, and Canada would significantly increase costs to the carrier or in the premium.

SB 859 requires cooperatives to have the ability to make elections or rescind elections. The commissioner is required to adopt rules concerning the elections. If these provisions were not proposed, potential cooperatives would not have a procedure to follow.

For these reasons, TDI has rejected this option.

Proposing different requirements for small and micro businesses.

TDI also considered the option of proposing different requirements for small and micro businesses.

A purpose of the proposal is to provide consistency and clarity. To propose different requirements for small and micro businesses would hinder their competitive standing in the marketplace because they would not offer the same coverage as large businesses.

Amending forms to clarify the percentage participation calculation is optional, and there is no indication that offering the emergency extraterritorial requirements adds significant costs. As the proposal relates to jurisdiction, existing requirements do not exempt small and micro businesses. Further, consumers are entitled to the same benefits regardless of the size of the business from which they purchase coverage.

To have no rules regarding cooperative elections or rescinding elections hurts small and micro businesses because they could not join the single-employee business participation in health group cooperatives.

For these reasons, TDI has rejected this option.

Exempting small and micro businesses.

Finally, TDI considered the option of not requiring small and micro businesses to comply with the rules.

A purpose of the proposal is to provide consistency and clarity. To exempt small and micro businesses would hinder their competitive standing in the marketplace because they would not offer the same coverage as large businesses. Amending forms to clarify the percentage participation calculation is optional, and there is no indication that offering the emergency extraterritorial requirements adds significant costs. As the proposal relates to jurisdiction, existing requirements do not exempt small and micro businesses. Further, consumers are entitled to the same benefits regardless of the size of the business from which they purchase coverage. Joining a cooperative is optional, so exemption of small or micro businesses from the cooperative rules is not relevant.

For these reasons, TDI has rejected this option.

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

REQUEST FOR PUBLIC COMMENT. Submit any written comments on the proposal no later than 5 p.m., Central time, on November 28, 2016. TDI requires two copies of your comments. Send one copy either by mail to the Texas Department of Insurance, Office of the Chief Clerk, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104; or by email to *chiefclerk@tdi.texas.gov.* Send the other copy either by mail to Doug Danzeiser, Director, Life and Health Lines Office, Mail Code 106-1D, P.O. Box 149104, Austin, Texas 78714-9104; or by email to *LHLComments@tdi.texas.gov.*

The commissioner will consider written comments and testimony presented in a public hearing under Docket Number 2793,

scheduled for 1:30 p.m., Central time, on November 18, 2016, in Room 100 of the William P. Hobby, Jr. state office building, 333 Guadalupe Street, Austin, Texas.

SUBCHAPTER A. SMALL EMPLOYER HEALTH INSURANCE PORTABILITY AND AVAILABILITY ACT REGULATIONS

28 TAC §§26.1, 26.17, 26.21 - 26.24, 26.26, 26.27

STATUTORY AUTHORITY. The repeal of §§26.1, 26.17, 26.21 - 26.24, 26.26 and 26.27, is proposed under Insurance Code §§1251.008, 1501.010, 1501.256, and 36.001.

Section 1251.008 authorizes the commissioner to adopt rules as necessary to administer Chapter 1251, concerning Group and Blanket Health Insurance.

Section 1501.010 authorizes the commissioner to adopt rules necessary to implement Chapter 1501, concerning the Health Insurance Portability and Availability Act, and to meet the minimum requirements of federal law.

Section 1501.256 authorizes the commissioner to adopt rules modifying a small employer health benefit plan or adopting a substitute for the plan using the Texas Health Benefits Purchasing Cooperative, to the extent required to comply with applicable federal law.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI.

CROSS-REFERENCE TO STATUTE. The repeal of §§26.1, 26.17, 26.21 - 26.24, and 26.26 - 26.27 implements Insurance Code §36.001, §1251.008, and Chapter 1501.

§26.1. Statement of Purpose.

§26.17. Notice to Covered Persons.

§26.21. Cost Containment.

§26.22. Private Purchasing Cooperatives.

§26.23. Powers and Duties of Texas Health Benefits Purchasing Cooperative and Private Purchasing Cooperative.

§26.24. Procedure for Obtaining the Approval of Commissioner and Filing with the Commissioner.

§26.26. Administrative Violations and Penalties.

§26.27. Forms.

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 13, 2016.

TRD-201605256
Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 676-6584

SUBCHAPTER C. LARGE EMPLOYER HEALTH INSURANCE PORTABILITY AND AVAILABILITY ACT REGULATION

28 TAC §26.311

STATUTORY AUTHORITY. The repeal of §26.311 is proposed under Insurance Code: §§1251.008, 1501.010, and 36.001.

Section 1251.008 authorizes the commissioner to adopt rules as necessary to administer Chapter 1251.

Section 1501.010 authorizes the commissioner to adopt rules necessary to implement Chapter 1501 and to meet the minimum requirements of federal law.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI.

CROSS-REFERENCE TO STATUTE. The repeal of §26.311 implements Insurance Code §36.001 and §1251.008, and Chapter 1501.

§26.311. Administrative Violations and Penalties.

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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Norma Garcia
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6584

SUBCHAPTER D. HEALTH GROUP COOPERATIVES

28 TAC §26.404

STATUTORY AUTHORITY. The repeal of 28 TAC §26.404 is proposed under Insurance Code §§1501.063, 1501.010, and 36.001.

Section 1501.063 addresses a health group cooperative's status as an employer.

Section 1501.010 authorizes the commissioner to adopt rules necessary to implement Chapter 1501 and to meet the minimum requirements of federal law.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI.

CROSS-REFERENCE TO STATUTE. The repeal of 28 TAC §26.404 implements Insurance Code §36.001 and Chapter 1501.

§26.404. Health Group Cooperative's Status as Employer.

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 13, 2016.

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Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 676-6584

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28 TAC §26.413

STATUTORY AUTHORITY. The repeal of 28 TAC §26.413 is proposed under SB 784 and Insurance Code §1501.010 and §36.001.

SB 784 repealed Insurance Code §1501.056(c).

Section 1501.010 authorizes the commissioner to adopt rules necessary to implement Chapter 1501 and to meet the minimum requirements of federal law.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI.

CROSS-REFERENCE TO STATUTE. The repeal of 28 TAC §26.413 implements Insurance Code §36.001 and Chapter 1501.

§26.413. Health Carrier Reporting Requirements.

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 14, 2016.

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Norma Garcia
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6584

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SUBCHAPTER A. DEFINITIONS, SEVERABILITY, AND SMALL EMPLOYER HEALTH REGULATIONS

28 TAC §§26.3 - 26.16, 26.18 - 26.20, 26.25, 26.28

STATUTORY AUTHORITY. The amendments to §§26.3 - 26.16, 26.18 - 26.20, and 26.25, and new §26.28 are proposed under Insurance Code Article 21.42 and Insurance Code §§1251.008, 1501.010, 1501.256, 1251.154, 1201.062, 1503.003, and 36.001.

Article 21.42 provides that any insurance payable to any citizen or inhabitant of this state by a company doing business within this state to be held to be a contract made and entered into and governed by Texas insurance law despite execution of the contract or payment of the premiums made outside of this state.

Section 1251.008 authorizes the commissioner to adopt rules as necessary to administer Chapter 1251, concerning Group and Blanket Health Insurance.

Section 1501.010 authorizes the commissioner to adopt rules necessary to implement Chapter 1501, concerning the Health Insurance Portability and Availability Act, and to meet the minimum requirements of federal law.

Section 1501.256 authorizes the commissioner to adopt rules modifying a small employer health benefit plan or adopting a substitute for the plan using the Texas Health Benefits Purchasing Cooperative, to the extent required to comply with applicable federal law.

Section 1251.154 and §1201.062 mandate coverage for certain children, including adopted children.

Section 1503.003 mandates coverage of certain students.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI.

CROSS-REFERENCE TO STATUTE. The amendments to §§26.3 - 26.16, 26.18 - 26.20, and 26.25, and new §26.28 implement Insurance Code Article 21.42, §36.001, §1201.062, §1251.008, §1251.154, and §1503.003, and Chapter 1501.

§26.3. Severability.

If any provision of this chapter or its [~~the~~] application [~~thereof~~] to any person or circumstance [~~circumstances~~] is for any reason held to be invalid, the invalidity does not affect the remainder of the chapter and the application of its provisions to any persons under other circumstances [~~shall not be affected thereby~~].

§26.4. Definitions.

The following [~~words and~~] terms, when used in Subchapters A, C, and D of this chapter, [~~shall~~] have the following meanings [~~,~~] unless the context clearly indicates otherwise.

(1) [~~Actuary--A qualified actuary who is a member in good standing of the American Academy of Actuaries.~~]

[~~(2)~~] Affiliation period--As defined in Insurance Code §1501.104 (concerning Affiliation Period). [~~A period of time that under the terms of the coverage offered by an HMO, must expire before the coverage becomes effective. During an affiliation period an HMO is not required to provide health care services or benefits to the participant or beneficiary and a premium may not be charged to the participant or beneficiary.~~]

(2) [~~(3)~~] Agent--A person who may act as an agent for the sale of a health benefit plan under a license issued by TDI. [~~under Insurance Code, Chapter 21.~~]

(3) [~~(4)~~] Base premium rate--As defined in Insurance Code §1501.201 (concerning Definitions). [~~For each class of business and for a specific rating period, the lowest premium rate that is charged or that could be charged under a rating system for that class of business by the small employer carrier to small employers with similar case characteristics for small employer health benefit plans with the same or similar coverage.~~]

(4) [~~(5)~~] Case characteristics--As defined in Insurance Code §1501.201. [~~With respect to a small employer, the geographic area in which that employer's employees reside, the age and gender of the individual employees and their dependents, the appropriate industry classification as determined by the small employer carrier, the number of employees and dependents, and other objective criteria as established by the small employer carrier that are considered by the small employer carrier in setting premium rates for that small employer. The term does not include health status related factors, duration of coverage since the date of issuance of a health benefit plan, or whether a covered person is or may become pregnant.~~]

(5) [~~(6)~~] Child--An:

(A) unmarried natural child of the employee, including a newborn child;

(B) unmarried adopted child, including a child about whom the insured employee [as to whom an insured] is a party in a suit seeking the adoption of the child;

(C) unmarried natural child or adopted child of the employee's spouse including a child about whom the spouse is a party in a suit seeking the adoption of the child; and

(D) any other child included as an eligible dependent under an employer's benefit plan.

(6) [(7)] Class of business--As defined in Insurance Code §1501.201. [All small employers or a separate grouping of small employers established under the Insurance Code, Chapter 26, Subchapters A-G.]

(7) [(8)] Commissioner--The commissioner of insurance.

(8) [(9)] Consumer choice health benefit plan--A health benefit plan authorized by Insurance Code Chapter 1507 (concerning Consumer Choice of Benefits Plans). [Article 3.80 or Article 20A.09N.]

(9) [(10)] Creditable coverage--As defined in Insurance Code §1205.004 (concerning Creditable Coverage).

[(A) An individual's coverage is creditable for purposes of this chapter if the coverage is provided under:]

[(i) a self-funded or self-insured employee welfare benefit plan that provides health benefits and that is established in accordance with the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.);]

[(ii) a group health benefit plan provided by a health insurance carrier or an HMO;]

[(iii) an individual health insurance policy or evidence of coverage;]

[(iv) Part A or Part B of Title XVIII of the Social Security Act (42 U.S.C. Section 1395c et seq.);]

[(v) Title XIX of the Social Security Act (42 U.S.C. Section 1396 et seq., Grants to States for Medical Assistance Programs), other than coverage consisting solely of benefits under Section 1928 of that Act (42 U.S.C. Section 1396s, Program for Distribution of Pediatric Vaccines);]

[(vi) Chapter 55 of Title 10, United States Code (10 U.S.C. Section 1071 et seq.);]

[(vii) a medical care program of the Indian Health Service or of a tribal organization;]

[(viii) a state or political subdivision health benefits risk pool;]

[(ix) a health plan offered under Chapter 89 of Title 5, United States Code (5 U.S.C. Section 8901 et seq.);]

[(x) a public health plan as defined in this section;]

[(xi) a health benefit plan under Section 5(e) of the Peace Corps Act (22 U.S.C. Section 2504(e)); and]

[(xii) short-term limited duration insurance as defined in this section.]

[(B) Creditable coverage does not include:]

[(i) accident-only, disability income insurance, or a combination of accident-only and disability income insurance;]

[(ii) coverage issued as a supplement to liability insurance;]

[(iii) liability insurance, including general liability insurance and automobile liability insurance;]

[(iv) workers' compensation or similar insurance;]

[(v) automobile medical payment insurance;]

[(vi) credit only insurance;]

[(vii) coverage for onsite medical clinics;]

[(viii) other coverage that is similar to the coverage described in this subsection under which benefits for medical care are secondary or incidental to other insurance benefits and specified in federal regulations;]

[(ix) if offered separately, coverage that provides limited scope dental or vision benefits;]

[(x) if offered separately, long-term care coverage or benefits, nursing home care coverage or benefits, home health care coverage or benefits, community based care coverage or benefits, or any combination of those coverages or benefits;]

[(xi) if offered separately, coverage for limited benefits specified by federal regulation;]

[(xii) if offered as independent, noncoordinated benefits, coverage for specified disease or illness;]

[(xiii) if offered as independent, noncoordinated benefits, hospital indemnity or other fixed indemnity insurance; or]

[(xiv) Medicare supplemental health insurance as defined under Section 1882(g)(1), Social Security Act (42 U.S.C. Section 1395ss), coverage supplemental to the coverage provided under Chapter 55 of Title 10, United States Code (10 U.S.C. Section 1071 et seq.), and similar supplemental coverage provided under a group plan, but only if such insurance or coverages are provided under a separate policy, certificate, or contract of insurance.]

[(11) Department--The Texas Department of Insurance.]

(10) [(12)] Dependent--As defined in Insurance Code §1501.002 (concerning Definitions). [A spouse; newborn child; child under the age of 25 years; child of any age who is medically certified as disabled and dependent on the parent; any person who must be covered under Insurance Code Article 3.51-6, §3D or §3E, or the Insurance Code Article 3.70-2(L); and any other child included as an eligible dependent under an employer's benefit plan, including a child who is a full-time student as required by Insurance Code Article 21.24-2 and §11.506(19) of this title (relating to Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate).]

[(13) DNA--Deoxyribonucleic acid.]

(11) [(14)] Effective date--The first day of coverage under a health benefit plan[,] or, if there is a waiting period, the first day of the waiting period.

(12) Eligible dependent--A dependent who meets the requirements for coverage under a small or large employer health benefit plan.

(13) [(15)] Eligible employee--As defined in Insurance Code §1501.002. [An employee who works on a full-time basis and who usually works at least 30 hours a week. The term also includes

~~a sole proprietor, a partner, and an independent contractor, if the sole proprietor, partner, or independent contractor is included as an employee under a health benefit plan of a small or large employer, regardless of the number of hours the sole proprietor, partner, or independent contractor works weekly, but only if the plan includes at least two other eligible employees who work on a fulltime basis and who usually work at least 30 hours a week. The term does not include:~~]

[~~(A) an employee who works on a part-time, temporary, seasonal or substitute basis; or~~]

[~~(B) an employee who is covered under:~~]

~~*f(i)* another health benefit plan;~~]

~~*f(ii)* a self-funded or self-insured employee welfare benefit plan that provides health benefits and that is established in accordance with the Employee Retirement Income Security Act of 1974 (29 United States Code, §§1001, et seq.);~~]

~~*f(iii)* the Medicaid program if the employee elects not to be covered;~~]

~~*f(iv)* another federal program, including the TRICARE program or Medicare program, if the employee elects not to be covered; or~~]

~~*f(v)* a benefit plan established in another country if the employee elects not to be covered.~~]

(14) [~~(16)~~] Employee--As defined in Insurance Code §1501.002. [~~Any individual employed by an employer.~~]

(15) [~~(17)~~] Franchise insurance policy--An individual health benefit plan under which a number of individual policies are offered to a selected group of a small or large employer. The rates for the [~~such a~~] policy may differ from the rate applicable to individually solicited policies of the same type and may differ from the rate applicable to individuals of essentially the same class.

(16) [~~(18)~~] Genetic information--As defined in Insurance Code §546.001 (concerning Definitions). [~~Information derived from the results of a genetic test or from family history.~~]

(17) [~~(19)~~] Genetic test--As defined in Insurance Code §546.001. [~~A laboratory test of an individual's DNA, RNA, proteins, or chromosomes to identify by analysis of the DNA, RNA, proteins, or chromosomes the genetic mutations or alterations in the DNA, RNA, proteins, or chromosomes that are associated with a predisposition for a clinically recognized disease or disorder. The term does not include:~~]

[~~(A) a routine physical examination or a routine test performed as a part of a physical examination;~~]

[~~(B) a chemical, blood or urine analysis;~~]

[~~(C) a test to determine drug use; or~~]

[~~(D) a test for the presence of the human immunodeficiency virus.~~]

(18) Gross premiums--The total amount of money collected by the health carrier for health benefit plans during the applicable calendar year or the applicable calendar quarter, including premiums collected:

(A) for individual and group health benefit plans issued to employers or their employees; and

(B) under certificates issued or delivered to Texas employees of employers, regardless of where the policy is issued or delivered.

(19) [~~(20)~~] HMO--Any person governed by the Texas Health Maintenance Organization Act, Insurance Code Chapter [~~, Chapters 20A and~~] 843 (concerning Health Maintenance Organizations), including:

(A) a person defined as a health maintenance organization under the Texas Health Maintenance Organization Act;

(B) an approved nonprofit health corporation that is certified under [~~§162.001 Texas~~] Occupations Code §162.001 (concerning Certification by Board), and that holds a certificate of authority issued by the commissioner under Insurance Code Chapter 844 (concerning Certification of Certain Nonprofit Health Corporations) [~~Article 21.52F~~];

(C) a statewide rural health care system under Insurance Code[~~,~~] Chapter 845 (concerning Statewide Rural Health Care System) that holds a certificate of authority issued by the commissioner [~~under Insurance Code, Chapter 843~~]; or

(D) a nonprofit corporation created and operated by a community center under [~~Chapter 534, Subchapter C,~~] Health and Safety Code Chapter 534, Subchapter C (concerning Health Maintenance Organizations).

(20) [~~(21)~~] Health benefit plan--As defined in Insurance Code §1501.002. [~~A group, blanket, or franchise insurance policy, a certificate issued under a group policy, a group hospital service contract, or a group subscriber contract or evidence of coverage issued by a health maintenance organization that provides benefits for health care services. The term does not include the following plans of coverage:~~]

[~~(A) accident-only or disability income insurance or a combination of accident-only and disability income insurance;~~]

[~~(B) credit-only insurance;~~]

[~~(C) disability insurance coverage;~~]

[~~(D) coverage for a specified disease or illness;~~]

[~~(E) Medicare services under a federal contract;~~]

[~~(F) Medicare supplement and Medicare Select policies regulated in accordance with federal law;~~]

[~~(G) long-term care coverage or benefits, nursing home care coverage or benefits, home health care coverage or benefits, community-based care coverage or benefits, or any combination of those coverages or benefits;~~]

[~~(H) coverage that provides limited-scope dental or vision benefits;~~]

[~~(I) coverage provided by a single-service health maintenance organization;~~]

[~~(J) coverage issued as a supplement to liability insurance;~~]

[~~(K) insurance coverage arising out of a workers? compensation or similar insurance;~~]

[~~(L) automobile medical payment insurance coverage;~~]

[~~(M) jointly managed trusts authorized under 29 United States Code §§141 et seq. that contain a plan of benefits for employees that is negotiated in a collective bargaining agreement governing wages, hours, and working conditions of the employees that is authorized under 29 United States Code §157;~~]

[~~(N) hospital indemnity or other fixed indemnity insurance;~~]

[~~(O) reinsurance contracts issued on a stop-loss, quota-share, or similar basis;~~]

[~~(P) short-term limited duration insurance as defined in this section;~~]

[~~(Q) liability insurance, including general liability insurance and automobile liability insurance;~~]

[~~(R) coverage for onsite medical clinics; or~~]

[~~(S) coverage that provides other limited benefits specified by federal regulations; or~~]

[~~(T) other coverage that is:~~]

~~*f(i)* similar to the coverage described in subparagraphs (A) - (S) of this paragraph under which benefits for medical care are secondary or incidental to other insurance benefits; and~~]

~~*f(ii)* specified in federal regulations.~~]

(21) [~~(22)~~] Health carrier--Any entity authorized under the Insurance Code or another insurance law of this state that provides health insurance or health benefits in this state including an insurance company, a group hospital service corporation under Insurance Code[~~,~~] Chapter 842 (concerning Group Hospital Service Corporations), an HMO under Insurance Code Chapter 843, or [~~and~~] a stipulated premium company under Insurance Code[~~,~~] Chapter 884 [844] (concerning Stipulated Premium Insurance Companies).

(22) [~~(23)~~] Health insurance coverage--Benefits consisting of medical care (provided directly, through insurance or reimbursement, or otherwise) under any hospital or medical service policy or certificate, hospital or medical service plan contract, or HMO contract.

(23) [~~(24)~~] Health-status-related [~~Health status related~~] factor--Health status; medical condition, including both physical and mental illnesses; claims experience; receipt of health care; medical history; genetic information; disability; and evidence of insurability, including conditions arising out of acts of domestic violence and tobacco use [~~; and disability~~].

(24) [~~(25)~~] Index rate--As defined in Insurance Code §1501.201. [~~For each class of business as to a rating period for small employers with similar case characteristics, the arithmetic average of the applicable base premium rate and corresponding highest premium rate.~~]

(25) [~~(26)~~] Large employer--As defined in Insurance Code §1501.002. [~~An employer who employed an average of at least 51 eligible employees on business days during the preceding calendar year and who employs at least two employees on the first day of the policy year. For purposes of this definition, a partnership is the employer of a partner.~~]

(26) [~~(27)~~] Large employer carrier--A health carrier, to the extent that carrier is offering, delivering, issuing for delivery, or renewing health benefit plans subject to Insurance Code[~~,~~] Chapter 1501 (concerning Health Insurance Portability and Availability Act) [~~26, Subchapters A and H~~].

(27) [~~(28)~~] Large employer health benefit plan--As defined in Insurance Code §1501.002. [~~A health benefit plan offered to a large employer.~~]

(28) [~~(29)~~] Late enrollee--

(A) Any employee or dependent eligible for enrollment who:

(i) requests enrollment in a small or large employer's health benefit plan after the expiration of the initial enrollment period established under the terms of the first plan for which that employee or dependent was eligible through the small or large employer, or after the expiration of an open enrollment period under Insurance Code §1501.156(a) (concerning Employee Enrollment; Waiting Period) and §1501.606(a) (concerning Employee Enrollment; Waiting Period);

(ii) [~~Article 26.21(h) or 26.83(f), who~~] does not fall within the exceptions listed in subparagraph (B) of this paragraph; [~~below,~~] and

(iii) [~~who~~] is accepted for enrollment and not excluded until the next open enrollment period.

(B) An employee or dependent eligible for and requesting enrollment cannot be excluded until the next open enrollment period and, when enrolled, is not a late enrollee, in the following special circumstances:

(i) [~~(A)~~] the individual:

(I) [~~(i)~~] was covered under another health benefit plan or self-funded employer health benefit plan at the time the individual was eligible to enroll;

(II) [~~(ii)~~] declines in writing, at the time of initial eligibility, stating that coverage under another health benefit plan or self-funded employer health benefit plan was the reason for declining enrollment;

(III) [~~(iii)~~] has lost coverage under another health benefit plan or self-funded employer health benefit plan as a result of [~~the~~] termination of employment, [~~the~~] reduction in the number of hours of employment, [~~the~~] termination of the other plan's coverage, [~~the~~] termination of contributions toward the premium made by the employer, [~~; or the~~] death of a spouse, or divorce; and

(IV) [~~(iv)~~] requests enrollment not later than the 31st day after the date on which coverage under the other health benefit plan or self-funded employer health benefit plan terminates;

(ii) [~~(B)~~] the individual is employed by an employer who offers multiple health benefit plans and the individual elects a different health benefit plan during an open enrollment period;

(iii) [~~(C)~~] a court has ordered coverage to be provided for a spouse under a covered employee's plan and the request for enrollment is made not later than the 31st day after the date on which the court order is issued;

(iv) [~~(D)~~] a court has ordered coverage to be provided for a child under an insured's [~~a covered employee's~~] plan and the request for enrollment is made not later than the 31st day after the date on which the employer receives the court order or notification of the court order;

(v) [~~(E)~~] the individual is a child of an insured [~~a covered employee~~] and has lost coverage under [~~Chapter 62,~~] Health and Safety Code Chapter 62 [~~,~~] (concerning Child Health Plan for Certain Low-Income Children) or Title XIX of the Social Security Act (42 U.S.C. §§1396, et seq., concerning Medicaid and CHIP Payment and Access Commission [~~Grants to States for Medical Assistance Programs~~]), other than coverage consisting solely of benefits under Section 1928 of that Act (42 U.S.C. §1396s, concerning Program for Distribution of Pediatric Vaccines);

(vi) [~~(F)~~] the individual has a change in family composition due to marriage, birth of a child, adoption of a child, or because an insured becomes a party in a suit for the adoption of a child;

(vii) [~~(G)~~] an individual becomes a dependent due to marriage, birth of a newborn child, adoption of a child, or because an insured becomes a party in a suit for the adoption of a child; and

(viii) [~~(H)~~] the individual described in clauses (v) - (vii) [~~subparagraphs (E), (F) and (G)~~] of this subparagraph [~~paragraph~~] requests enrollment no later than the 31st day after the date of the marriage, birth, adoption of the child, loss of the child's coverage, or within 31 days of the date an insured becomes a party in a suit for the adoption of a child.

(29) [~~(30)~~] Limited scope dental or vision benefits--Dental or vision benefits that are sold under a separate policy or rider and that are limited in scope to a narrow range or type of benefits that are generally excluded from hospital, medical, or surgical benefits contracts.

(30) [~~(31)~~] Medical care--Amounts paid for:

(A) the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body;

(B) transportation primarily for and essential to the medical care described in subparagraph (A) of this paragraph; or

(C) insurance covering medical care described in either subparagraph (A) or (B) of this paragraph.

(31) [~~(32)~~] Medical condition--Any physical or mental condition including, but not limited to, any condition resulting from illness, injury (whether or not the injury is accidental), pregnancy, or congenital malformation. Genetic information does [~~in the absence of a diagnosis of the condition related to such information shall~~] not constitute a medical condition in the absence of a diagnosis of a condition related to the information.

(32) [~~(33)~~] New business premium rate--As defined in Insurance Code §1501.201. [~~For each class of business as to a rating period, the lowest premium rate that is charged or offered or that could be charged or offered by the small employer carrier to small employers with similar case characteristics for newly issued small employer health benefit plans that provide the same or similar coverage.~~]

(33) [~~(34)~~] New entrant--An eligible employee, or the dependent of an eligible employee, who becomes [~~part of or~~] eligible for coverage in an [~~a small or large~~] employer group after the initial period for enrollment in a health benefit plan. After the initial enrollment period, this includes any employee or dependent who becomes eligible for coverage and who is not a late enrollee.

(34) [~~(35)~~] Participation criteria--As defined in Insurance Code §1501.601 (concerning Participation Criteria). [~~Any criteria or rules established by a large employer to determine the employees who are eligible for enrollment, including continued enrollment, under the terms of a health benefit plan. Such criteria or rules may not be based on health status related factors.~~]

(35) [~~(36)~~] Person--As defined in Insurance Code §1501.002. [~~An individual, corporation, partnership, or other legal entity.~~]

[~~(37) Point-of-service coverage (POS coverage)--Coverage provided under a POS plan as described in §21.2901 of this title (relating to Definitions) and as permitted by Article 26.48, Insurance Code.~~]

(36) [~~(38)~~] Plan year--For purposes of [~~the~~] Insurance Code[~~,~~] Chapter 1501 [~~26,~~] and this chapter, a 365-day period that begins on the plan or policy's effective date or a period of one full calendar year, under a health benefit plan providing coverage to small or large employers and their employees, as defined in the plan or policy. Health [~~Small or large employer~~] carriers must use the same definition of plan year in all small or large employer health benefit plans.

(37) Point-of-service coverage--Coverage provided under a point-of-service plan as described in §21.2901 of this title (relating to Definitions) and as permitted by Insurance Code §1501.255 (concerning Health Maintenance Organization Plans).

(38) Point-of-service option--Coverage that complies with the out-of-plan coverage set forth in either Chapter 11, Subchapter Z of this title (relating to Point-of-Service Riders), or Chapter 21, Subchapter U of this title (relating to Arrangements Between Indemnity Carriers and HMOs for Point-of-Service Coverage), and that allows the enrollee to access out-of-plan coverage at the option of the enrollee.

(39) Point-of-service plan--As defined in Insurance Code §1273.051 (concerning Definitions).

(40) [~~(39)~~] Postmark--A date stamp by the U.S. Postal Service or other delivery entity, including any electronic delivery available.

(41) [~~(40)~~] Preexisting condition provision--As defined in Insurance Code §1501.002. [~~A provision that denies, excludes, or limits coverage as to a disease or condition for a specified period after the effective date of coverage.~~]

(42) [~~(41)~~] Premium--As defined in Insurance Code §1501.002. [~~All amounts payable by a small or large employer and eligible employees as a condition of receiving coverage from a small or large employer carrier, including any fees or other contributions associated with a health benefit plan.~~]

(43) [~~(42)~~] Premium rate quote--A statement of the premium a health [~~small or large employer~~] carrier offers and will accept to make coverage effective for a small or large employer.

(44) [~~(43)~~] Public health plan--Any plan established or maintained by a state [~~State~~], county, or other political subdivision of a state [~~State~~] that provides health insurance coverage to individuals [~~who are enrolled in the plan~~].

(45) Qualified actuary--An actuary who is a member:

(A) of the Society of Actuaries; and

(B) in good standing of the American Academy of Actuaries.

(46) [~~(44)~~] Rating period--As defined in Insurance Code §1501.201. [~~A calendar period for which premium rates established by a small employer carrier are assumed to be in effect.~~]

(47) [~~(45)~~] Reinsured carrier--A small employer carrier participating in the Texas Health Reinsurance System.

(48) [~~(46)~~] Renewal date--For each small or large employer's health benefit plan, the earlier of the date, [~~(~~] if any, [~~)~~] specified in the [~~such~~] plan [~~(contract)~~] for renewal; the policy anniversary date; or the date [~~on which~~] the small or large employer's plan is changed. To determine the renewal date for employer association or multiple employer trust group health benefit plans, health [~~small or large employer~~] carriers may use the date specified for renewal, or the policy anniversary date, of either the master contract or the contract or certificate of coverage of each small or large employer in the association or trust. Health [~~Small or large employer~~] carriers must use the same method of determining renewal dates for all small or large employer health benefit plans. A change in the premium rate is not considered a renewal if the change is due solely:

(A) to the addition or deletion of an employee or dependent if the deletion is due to a request by the employee, death or retirement of the employee or dependent, termination of employment of the employee, or because a dependent is no longer eligible; or

(B) to fraud or intentional misrepresentation of a material fact by a small or large employer or an eligible employee or dependent.

(49) [~~(47)~~] Risk-assuming carrier--A risk-assuming health benefit plan issuer as defined in Insurance Code §1501.301 (concerning Definitions) [~~A small employer carrier that elects not to participate in the Texas Health Reinsurance System, as approved by the department~~].

(50) [~~(48)~~] Risk characteristic--The health-status-related [~~health status related~~] factors, duration of coverage, or any similar characteristic, except genetic information, related to the health status or experience of a small employer group or of any member of that [~~a small employer~~] group.

(51) [~~(49)~~] Risk load--The percentage above the applicable base premium rate that is charged by a small employer carrier to a small employer to reflect the risk characteristics of that [~~the small employer~~] group. A small employer carrier may not use genetic information to alter or otherwise affect risk load.

[~~(50) Risk pool--The Texas Health Insurance Risk Pool established under Insurance Code Article 3.77, or other similar arrangements in other states.~~]

[~~(51) RNA--Ribonucleic acid.~~]

(52) Short-term limited duration insurance--Health insurance coverage provided under a contract with an issuer that:

(A) has an expiration date specified in the contract, [~~(~~] taking into account any extensions that may be elected by the policyholder without the issuer's consent; and [~~)~~]

(B) [~~that~~] is within 12 months of the date the contract becomes effective.

(53) Significant break in coverage--A period of 63 consecutive days during [~~all of~~] which the individual does not have [~~any~~] creditable coverage. Neither a waiting period nor an affiliation period is counted in determining a significant break in coverage.

(54) Small employer--As defined in Insurance Code §1501.002. [~~An employer that employed an average of at least two employees but not more than 50 eligible employees on business days during the preceding calendar year and who employs at least two employees on the first day of the policy year. For purposes of this definition, a partnership is the employer of a partner.~~] A small employer includes an independent school district that elects to participate in the small employer market [~~as provided~~] under Insurance Code §1501.009 (concerning School District Election) [~~Article 26.036~~].

(55) Small employer carrier--A health carrier, to the extent that health carrier is offering, delivering, issuing for delivery, or renewing, under Insurance Code §1501.003 (concerning Applicability: Small Employer Health Benefit Plans) [~~Article 26.06(a)~~], health benefit plans subject to Insurance Code Chapter 1501 [~~Subchapters A-G of the Insurance Code, Chapter 26~~].

(56) Small employer health benefit plan--As defined in Insurance Code §1501.002. [~~A health benefit plan offered to a small employer under the Insurance Code, Chapter 26, Subchapter E.~~]

(57) State-mandated health benefits--As defined in §21.3502 of this title (relating to Definitions).

(58) TDI--The Texas Department of Insurance.

(59) [~~(58)~~] Waiting period--As defined in Insurance Code §1501.002. [~~A period of time established by an employer that must pass before an individual who is a potential enrollee in a health benefit plan is eligible to be covered for benefits.~~] If an employee or dependent enrolls as a late enrollee, under special circumstances that except the employee or dependent from the definition of late enrollee, or during an open enrollment period, any period of eligibility before the effective date of [~~such~~] enrollment is not a waiting period.

§26.5. Applicability and Scope.

(a) Insurance Code Chapter 1501 (concerning Health Insurance Portability and Availability Act) and this subchapter regulate all health benefit plans sold to small employers, whether sold directly or through associations or other groupings of small employers.

(b) Except as otherwise provided, [~~Subchapter A of~~] this subchapter applies [~~chapter shall apply~~] to any health benefit plan providing health care benefits covering two or more [~~eligible~~] employees of a small employer, whether provided on a group or individual franchise insurance policy basis, regardless of whether the policy was issued in this state, if the plan meets one of the following conditions:

(1) a portion of the premium or benefits is paid by a small employer;

(2) the health benefit plan is treated by the employer or by a covered individual as part of a plan or program for the purposes of the United States Internal Revenue Code of 1986, 26 U.S.C. [~~United States Code~~] §106 (concerning Contributions by Employer to Accident and Health Plans) or §162 (concerning Trade or Business Expenses);

(3) the health benefit plan is a group policy issued to a small employer; or

(4) the health benefit plan is an employee welfare benefit plan under 29 C.F.R. [~~CFR~~] §2510.3-1(j) (concerning Employee Welfare Benefit Plan).

[~~(b) Except as provided by Insurance Code Article 26.06(a), or subsection (a) of this section, this subchapter does not apply to an individual health insurance policy that is subject to individual underwriting, even if the premium is remitted through a payroll deduction method.~~]

(c) For an employer that [~~who~~] was not in existence the previous calendar year [~~throughout the calendar year preceding the year in which the determination of whether the employer is a small employer is made~~], the determination of whether the employer is a small employer is based on the average number of employees the employer reasonably expects to employ on business days in the calendar year in which the determination is made.

[~~(d) An insurance policy, evidence of coverage, contract, or other document that is delivered, issued for delivery, or renewed to small employers and their employees on or after July 1, 1997 shall comply with all provisions of the Insurance Code, Chapter 26, Subchapters A - G and with this subchapter].~~

[~~(e) An insurance policy, evidence of coverage, contract or other document establishing coverage under a health benefit plan for small employers and their employees that is delivered, issued for delivery or renewed before July 1, 1997, is governed by the law and this chapter as it existed before that date until the first renewal date of that policy, evidence of coverage, contract or other document establishing coverage on or after July 1, 1997.~~]

[~~(f) If a health carrier continues to provide coverage to small employers and their employees under health benefit plans delivered or issued for delivery before July 1, 1997, and elects not to continue to offer, deliver, or issue for delivery health benefit plans to small em-~~

ployers and their employees, the health carrier will only be considered a small employer carrier for purposes of renewing such existing plans. In this case, the health carrier shall notify the small employer of certain information. The notice shall be provided at least 30 days prior to the first renewal date occurring on or after July 1, 1997. The notice shall:]

[(1) state that the health carrier (the current health carrier of the small employer's employee health benefit plans) has elected not to continue to offer new health benefit plans in the small employer market;]

[(2) offer the small employer the option of continuing the existing health benefit plan or plans, with amendments to comply with Insurance Code, Chapter 26, Subchapters A - G and this subchapter; and]

[(3) state that other health benefit plans may be available to the small employer through other small employer carriers and that such other plans should be compared against existing plans to determine which plan is more beneficial.]

[(g) If a health carrier continues to provide coverage to small employers and their employees under health benefit plans delivered or issued for delivery before July 1, 1997, and elects to continue to offer, issue, and issue for delivery health benefit plans to small employers and their employees, the health carrier shall notify the small employer of certain information. The notice shall be provided at least 30 days prior to the first renewal date occurring on or after July 1, 1997. The notice shall:]

[(1) offer the small employer the option of continuing the existing health benefit plan or plans, with amendments to comply with Chapter 26, or purchasing new small employer benefit plans in accordance with the Insurance Code, Chapter 26, Subchapters A - G, and this subchapter; and]

[(2) provide notice that such other plans should be compared against existing plans to determine which plan is more beneficial.]

(d) [(h)] The provisions of [the] Insurance Code[,] Chapter 1501 [26, Subchapters A-G,] and this subchapter [shall] apply to a health benefit plan provided to a small employer or to the employees of a small employer without regard to whether the health benefit plan is offered under or provided through a group policy or trust arrangement of any size sponsored by an association or discretionary group.

(e) [(i)] If a small employer or the employees of a small employer are issued a health benefit plan under the provisions of Insurance Code[,] Chapter 1501 [26, Subchapters A-G,] and this subchapter, and the small employer, due to an increase or decrease in the number of employees, ceases to meet the definition of a small employer [subsequently employs more than 50 eligible employees or less than two eligible employees], the provisions of Insurance Code[,] Chapter 1501 [26,] and this subchapter [shall] continue to apply to that particular health plan, subject to the provisions of §26.15 of this title [chapter] (relating to Renewability of Coverage and Cancellation). A health carrier providing coverage to [such] an employer must [shall], within 60 days of becoming aware that the employer no longer meets the definition of small employer [has more than 50 eligible employees or less than two eligible employees], but not later than the first renewal date occurring after the small employer has ceased to be a small employer [qualifying for coverage under Insurance Code Article 26.06(a) and this subchapter], notify the employer of its change in status. The carrier must also notify the employer that the protections provided to small employers under Insurance Code[,] Chapter 1501 [26, Subchapters A-G], and this subchapter will [shall] cease to apply to the employer[,] if the [such] employer fails to renew its current health benefit plan; fails to comply with the contribution, minimum group size [(as set forth in subsection (a) of this section)], or minimum participation requirements of this subchapter; or elects to enroll in a different health benefit plan. The notice requirement of this subsection does not apply to a health carrier electing [, pursuant to this subchapter,] to issue coverage to a group consisting of one [eligible] employee.

(f) [(j)] If a small employer has employees in more than one state, the provisions of [the] Insurance Code Chapter 1501 and this subchapter applicable to small employer plans, including provisions regarding marketing and rates, [Chapter 26, Subchapters A-G, and this subchapter shall] apply to a health benefit plan issued to the small employer if:

(1) the majority of [eligible] employees [of such small employer] are employed in this state on the issue date or renewal date; or

(2) the primary business location [of the small employer] is in this state on the issue date or renewal date and no state contains a majority of the [eligible] employees [of the small employer].

(g) A carrier licensed in this state that issues a certificate of insurance covering a Texas resident is responsible for ensuring that the certificate complies with applicable Texas insurance laws and rules, including mandated benefits, regardless of whether the group policy underlying the certificate was issued outside the state.

(h) A small employer nonfederal governmental employee health benefit plan that is not self-funded is subject to the Insurance Code and this title, as applicable, including Chapter 1501 and this chapter.

[(k) A governmental entity's health benefit plan (subject to Insurance Code Articles 3.51-1, 3.51-2, 3.51-4, 3.51-5, 3.51-5A, or Chapter 1578) that is provided through health insurance coverage and that otherwise meets the requirements of being a small employer is subject to the provisions of Insurance Code, Chapter 26, Subchapters A - G and this subchapter. The portion of a non-federal governmental entity's health benefit plan that is self-insured may elect not to comply with §2721 of the Public Health Services Act as added by the Health Insurance Portability and Accountability Act of 1996.]

§26.6. Status of Health Carriers as Small Employer Carriers [and Geographic Service Area].

(a) With the original filing to enter the small employer market or when notifying TDI of a change in status [No later than March 1 annually], each health carrier providing health benefit plans in this state must file [shall make a filing] with the commissioner a statement indicating whether the health carrier will or will not offer, renew, issue, or issue for delivery health benefit plans to small employers in this state [as defined in the Insurance Code, Chapter 26, Subchapters A-G, and this subchapter]. The [required] filing must [shall] include a [the] certification, signed by an officer of the company, that the carrier intends to operate in accordance with the status certification unless or until changed in accordance with this section, [provided in the current Form Number1212 CERT SEHC STATUS, completed according to the carrier's status] and [shall at least] provide a statement to the effect of one of the following statements:

(1) the health carrier intends to offer, renew, issue, and issue for delivery health benefit plans to small employers in Texas [and their employees] and [therefore] will operate in accordance with [the] Insurance Code[,] Chapter 1501 (concerning Health Insurance Portability and Availability Act) [26, Subchapters A-G] and this subchapter; [or]

(2) the health carrier does not intend to offer, issue, or issue for delivery health benefit plans to small employers in Texas, but [and their employees; however,] the health carrier intends to renew existing

health benefit plans [~~issued prior to July 1, 1997, and comply with the Insurance Code, Chapter 26, Subchapters A-G, and this subchapter~~];

(3) the health carrier does not intend to offer, issue, or issue for delivery health benefit plans to small employers [~~and their employees~~] in [~~the State of~~] Texas; [~~and~~] intends to nonrenew all health benefit plans issued to small employers in Texas; and will provide notice to the commissioner and employers in accordance with §26.16 of this title (relating to Refusal to Renew and Application to Reenter Small Employer Market) and Insurance Code §1501.110 (concerning Notice to Covered Persons); or

(4) the health carrier has no health benefit plans issued to small employers or to employees of a small employer [~~which are in force on or after July 1, 1997,~~] and [~~the health carrier~~] does not intend to offer, issue, or issue for delivery health benefit plans to small employers.

(b) If a health carrier chooses to change its election or the date of implementing its election under subsection (a)(1), (2), or (4) of this section, the health carrier must [~~shall~~] notify the commissioner of its new election at least 30 days before [~~prior to~~] the date the health carrier intends to begin operations under the new election as required in subsection (a) of this section. [~~This notification shall be made on Form Number 1212 CERT SEHC STATUS.~~]

(c) A form fulfilling the requirements of subsections (a) and (b) of this section is available online at www.tdi.texas.gov/forms/form10smgroup at the link for Small Employer Carrier Status Certification.

[~~(c) Upon election to become a small employer carrier, the health carrier shall establish geographic service areas within which the health carrier reasonably anticipates it will have the capacity to deliver services adequately to small employers in each established geographic service area. Small employer carriers shall comply with the following:~~]

[~~(1) The carrier shall define geographic service areas in terms of counties or ZIP codes, to the extent possible.~~]

[~~(2) If the service area cannot be defined by counties or ZIP code, the carrier shall submit a map which clearly shows the geographic service areas.~~]

[~~(3) If the geographic service area of the carrier is the entire state, the carrier shall define the service area as the State of Texas and no other documentation is necessary.~~]

[~~(4) Service areas by zip code shall be defined in a non-discriminatory manner and in compliance with the Insurance Code Articles 21.21-6 and 21.21-8].~~

[~~(5) HMO small employer carriers shall establish networks in accordance with Insurance Code, Chapters 20A and 843 and Chapter 11 of this title (relating to Health Maintenance Organizations)].~~

[~~(6) Small employer carriers shall, no later than the initial filing of a small employer health benefit plan, utilize Form Number 1212 CERT GEOG to submit this information, as required by §26.19(b) of this chapter (relating to Filing Requirements).~~]

[~~(7) If a small employer carrier elects to alter its geographic service area, the small employer carrier shall notify the department of its intent at least 30 days prior to the date the health carrier intends to effect the change. The small employer carrier shall utilize Form Number 1212 CERT GEOG to submit this information.~~]

(d) Health carriers providing coverage under any health benefit plans issued to small employers and [~~and/or~~] their employees, whether on a group or franchise insurance policy basis, will [~~shall~~] be considered small employer carriers for purposes of those [~~such~~] plans, and must [~~shall~~] comply with all provisions of Insurance Code[~~,~~] Chapter 1501 [~~26, Subchapters A-G,~~] and this subchapter, as applicable.

[~~(e) A health carrier that continues to provide coverage pursuant to subsection (a)(2) of this section shall not be eligible to participate in the reinsurance program established under Insurance Code, Chapter 26, Subchapter F.~~]

(e) [~~(f)~~] The small employer carrier must also comply with [~~This subsection does not exempt a health carrier from~~] any other applicable legal requirements, including [~~such as~~] those for withdrawal from the market under Chapter 7, Subchapter R [~~§§7.1801, et seq.~~] of this title (relating to Withdrawal Plan Requirements and Procedures).

§26.7. Requirement to Insure Entire Groups.

(a) A small employer carrier that offers coverage to a small employer and its employees must [~~shall~~] offer [~~to provide~~] coverage to each eligible employee and to each dependent of an eligible employee. Except as provided in subsection (b) of this section, the small employer carrier must [~~shall~~] provide the same health benefit plan to each [~~such~~] employee or [~~and~~] dependent eligible for coverage.

(b) If elected by the small employer, a small employer carrier may offer [~~the eligible employees of a small employer the option of choosing among~~] one or more health benefit plans, provided that each eligible employee may choose any of the plans offered. Except as provided in [~~the~~] Insurance Code Chapter 1501 (concerning Health Insurance Portability and Availability Act) [~~, Article 26.21 and Article 26.49 (~~] with respect to an affiliation period or exclusions for preexisting conditions [~~pre-existing)~~], the choice among benefit plans may not be limited, restricted, or conditioned based on [~~upon~~] the risk characteristics of each employee or dependent eligible for coverage [~~the eligible employees or their dependents~~].

(c) A small employer carrier may require each small employer that applies for coverage, as part of the application process, to provide a complete list of employees, eligible employees, and dependents of eligible employees [~~as defined in Insurance Code Article 26.02~~]. The small employer carrier may also require the small employer to provide reasonable and appropriate supporting documentation to verify the information required under this subsection, and [~~as well as~~] to confirm the applicant's status as a small employer. The small employer carrier must [~~shall~~] make a determination of eligibility within five business days of receipt of any requested documentation. A small employer carrier may not condition the issuance of coverage on an employer's production of a particular document, where the employer can otherwise provide the information required by this section. Similarly, if a particular document an employer produces does not reasonably evidence the employer's compliance with this subsection, the employer must produce other documentation to satisfy the requirements. Examples of the types of reasonable and appropriate supporting documentation that [~~which~~] a small employer carrier may request [~~, as reasonable and appropriate,~~] from an employer as needed to fulfill the purposes of this subsection are:

(1) a W-2 Summary Wage and Tax Form or other federal or state tax records;

(2) a loan agreement;

(3) an invoice;

(4) a business check;

(5) a sales tax license;

(6) articles of incorporation or other business entity filings with the secretary of state [~~Secretary of State~~];

(7) assumed name filings;

(8) professional licenses; and

(9) reports required by the Texas Workforce Commission.

(d) A small employer carrier may [~~shall~~] not deny two individuals who are married the status of eligible employee solely on the basis that the two individuals are married. The small employer carrier must [~~shall~~] provide a reasonable opportunity for the individuals to submit evidence as provided in subsection (c) of this section to establish each individual's status as an eligible employee.

(1) A small employer carrier must [~~shall~~] provide married eligible employees of the same employer the option to [~~elect to~~] have one spouse be treated under a small employer health benefit plan as an employee, and the other spouse treated as an employee or alternatively as the dependent of the other employee.

(2) A child of either of the two individuals may only be covered under the same small employer health benefit plan as a dependent by one of the two individuals.

(3) An election by a spouse to be treated as a dependent under [~~pursuant to~~] this subsection does not impact the individual's status as an eligible employee for any other purpose under [~~the~~] Insurance Code[~~,~~] Chapter 1501, except that the [~~such~~] individual may be treated as a dependent for purposes of employer premium contributions.

(e) A small employer carrier must [~~shall~~] secure a waiver with respect to each eligible employee and each dependent of the [~~such an~~] eligible employee who declines an offer of coverage under a health benefit plan provided to a small employer. If a small employer elects to offer coverage through more than one small employer carrier, waivers are only required to be signed if the [~~eligible~~] individual is declining all offered [~~small employer health benefit~~] plans. The [~~offered and the~~] small employer carriers may enter into an agreement designating [~~under~~] which [~~one~~] small employer carrier will receive and retain the waiver. Waivers must [~~shall~~] be maintained by the small employer carrier for a period of six years. The waiver must [~~shall~~] be signed by the [~~eligible~~] employee (on behalf of the [~~such~~] employee or [~~the~~] dependent [~~of such employee~~]) and must [~~shall~~] certify that the individual who declined coverage was informed of the availability of coverage under the health benefit plan. Receipt by the small employer carrier of a facsimile transmission of the waiver is permissible, provided that the transmission includes a representation from the small employer that the employer will maintain the original waiver on file for a period of six years from the date of the facsimile transmission. The waiver form must [~~shall~~]:

(1) require that the reason for declining coverage be stated on the form;

(2) include a written warning of the penalties imposed on late enrollees; and

(3) include a statement that the [~~eligible~~] employee and dependents were not induced or pressured by the small employer, agent, or health carrier into declining coverage, but elected of their own accord to decline the [~~such~~] coverage.

[~~(f) A small employer carrier may not provide coverage to a small employer or the employees of such employer if the health carrier, or an agent for such health carrier, has knowledge that the small employer has induced or pressured an eligible employee (or dependent of an eligible employee) to decline coverage due to the individual's risk characteristics.~~]

(f) [~~(g)~~] An agent must [~~shall~~] notify a small employer carrier, before [~~prior to~~] submitting an application for coverage with the health carrier on behalf of a small employer or employee of a small employer, of any circumstances that would indicate that the small employer has induced or pressured the employee or dependent [~~an eligible employee (or dependent of an eligible employee)~~] to decline coverage due to the individual's risk characteristics.

(g) [~~(h)~~] New entrants in a health benefit plan issued to a small employer group must [~~shall~~] be offered an opportunity to enroll in the health benefit plan currently held by the [~~such~~] employer group or [~~shall~~] be offered an opportunity to enroll in the health benefit plan if the plan is provided through an individual franchise insurance policy, or if more than one plan is available. If a small employer carrier has offered more than one health benefit plan to eligible employees of a small employer group under [~~pursuant to~~] subsection (b) of this section, the new entrant must [~~shall~~] be offered the same choice of health benefit plans as the other employees (members) in the group. A new entrant who [~~that~~] does not exercise the opportunity to enroll in the health benefit plan within the period provided by the small employer carrier may be treated as a late enrollee by the health carrier, provided that the period provided to enroll in the health benefit plan complies with subsection (h) [~~(i)~~] of this section.

(h) [~~(i)~~] Periods provided for enrollment in and application for any health benefit plan provided to a small employer group must [~~shall~~] comply with the following:

(1) the initial enrollment period must [~~shall~~] extend at least 31 consecutive days after the date the new entrant begins employment or, if the waiting period exceeds 31 days, at least 31 consecutive days after the date the new entrant completes the waiting period for coverage;

(2) the new entrant must [~~shall~~] be notified of his or her opportunity to enroll at least 31 days in advance of the last date enrollment is permitted;

(3) the new entrant's application for coverage will [~~shall~~] be considered timely if [~~he or she submits~~] the application is submitted within the initial enrollment period:

(A) in person;

(B) by mail,[~~. Submits, for purposes of this paragraph, means that the item(s) must be~~] postmarked by the end of the specified [~~time~~] period; or

(C) [~~. At the discretion of the small employer carrier,~~] in an alternative method normally accepted by the small employer carrier, including [~~methods of submission, such as~~], facsimile transmission (fax), email, or web-based application [~~, may be acceptable~~]; and

(4) the small employer carrier must [~~shall~~] provide an open enrollment period of at least 31 consecutive days on an annual basis.

(i) [~~(j)~~] A [~~Any waiting period shall be established by the~~] small employer may establish a waiting period in accordance with Insurance Code §1501.156 (concerning Employee Enrollment: Waiting Period) that must [~~and shall~~] not exceed 90 days. A small employer carrier may [~~shall~~] not apply a waiting period, elimination period, or other similar limitation of coverage (other than an exclusion for preexisting [~~pre-existing~~] medical conditions or [~~impose an~~] affiliation period consistent with Insurance Code §1501.102 (concerning Preexisting Condition Provision) and §1501.104 (concerning Affiliation Period) [~~, Article 26.21 and Article 26.49~~]), with respect to a new entrant, that is longer than the waiting period established by the small employer.

(j) [~~(k)~~] New entrants in a health plan issued to a small employer group must [~~shall~~] be accepted for coverage by the small employer carrier without any restrictions or limitations on coverage related to the risk characteristics of the employees or their dependents,

except that a health carrier may exclude coverage for preexisting [~~pre-existing~~] medical conditions or impose an affiliation period, to the extent allowed under [~~the~~] Insurance Code Chapter 1501 [~~, Article 26.21 and Article 26.49~~].

(k) [~~(l)~~] A small employer carrier may assess a risk load to the premium rate associated with a new entrant, consistent with the requirements of [~~the~~] Insurance Code[~~,~~] Chapter 1501, Subchapter E (concerning Underwriting and Rating of Small Employer Health Benefit Plans) [~~26, Subchapter D,~~] and this chapter. The risk load must [~~shall~~] be the same risk load charged to the small employer group immediately before [~~prior to~~] acceptance of the new entrant into the group.

[~~(m) In the case of an eligible employee (or dependent of an eligible employee) who was excluded from coverage, not eligible for coverage, or denied coverage by a small employer carrier, in the process of providing a health benefit plan to an eligible small employer (as defined in the Insurance Code, Chapter 26, and this chapter), the small employer carrier shall provide an opportunity for the eligible employee (or dependent(s) of such eligible employee) to enroll in the health benefit plan issued to the small employer or the employees of the small employer on the earlier of the first renewal date occurring on or after July 1, 1997, or the first open enrollment period occurring on or after July 1, 1997. The opportunity to enroll shall meet the following requirements.~~]

[~~(1) The opportunity to enroll under this subsection shall comply with subsection (i) of this section.~~]

[~~(2) Eligible employees and dependents of eligible employees who are provided an opportunity to enroll pursuant to this subsection shall be treated as new entrants. Premium rates related to such individuals shall be set in accordance with subsection (l) of this section.~~]

[~~(3) The terms of coverage offered to an individual described in this subsection may exclude coverage for preexisting medical conditions or impose an affiliation period only if the health benefit plan currently held by the small employer contains such an exclusion or an affiliation period.~~]

[~~(4) A small employer carrier shall provide written notice at least 45 days prior to the opportunity to enroll provided in this subsection or if less than 45 days are available, within five working days after determination that subsections (h)- (m) of this section apply to each small employer insured under a health benefit plan offered by such health carrier. A small employer carrier may provide the notice to the employer if the carrier has entered into an agreement with the employer to provide the notice to the employees. The notice shall clearly describe the rights granted under subsections (h) - (m) of this section to employees and dependents who were previously excluded from, not eligible for, or denied coverage and the process for enrollment of such individuals in the employer's health benefit plan.~~]

[~~(n) A small employer carrier may require an individual who requests enrollment under subsection (m) of this section to sign a statement indicating that such individual sought coverage under the group contract or franchise policy (other than as a late enrollee) and that the coverage was not offered or provided to the individual.~~]

§26.8. Guaranteed Issue,[~~:~~] Contribution, and Participation Requirements.

(a) A small employer carrier must [~~shall~~] issue a health benefit plan to any small employer that elects to be covered under the plan and agrees to satisfy other requirements of the plan[~~. A small employer carrier shall provide health benefit plans to small employers~~] without regard to health-status-related [~~health status related~~] factors.

(b) Health carriers may require small employers to answer questions designed to determine the level of contribution by the small employer, the number of employees and eligible employees of the small employer, and the percentage of participation of eligible employees of the small employer. In this section, an "eligible employee" does not include employees within their waiting or affiliation period for percentage of participation requirement purposes.

[~~(c) A health carrier may require an employer premium contribution for the plan selected by the employer for each eligible employee in accordance with the carrier's usual and customary practices for all employer group health insurance plans in the state.~~]

[~~(1) The same premium contribution level shall be applied to each small employer offered or issued coverage by the small employer carrier, except that a small employer carrier may simultaneously offer to each small employer an additional plan that requires the small employer to contribute 100 percent of the premium paid for each eligible participating employee.~~]

[~~(2) If two or more small employer carriers participate in a purchasing cooperative established under Insurance Code §1501.056, the carrier may use the contribution requirement established by the purchasing cooperative for policies marketed by the cooperative.~~]

[~~(3) A health carrier shall treat all similarly situated small employer groups in a consistent and uniform manner when terminating health benefit plans due to failure of the small employer to meet a contribution requirement.~~]

[~~(4) If a small employer fails to meet a contribution requirement for a small employer health benefit plan, the health carrier may terminate coverage as provided under the plan in accordance with the terms and conditions of the plan requiring contribution and in accordance with Insurance Code §§1501.108, 1501.109, and 1501.110.~~]

(c) [~~(d)~~] Availability of coverage [~~Coverage~~] under a small employer health benefit plan is subject to the minimum participation requirements of Insurance Code §1501.154 (concerning Minimum Participation Requirement) and §1501.155 (concerning Exception to Minimum Participation Requirement) [~~available if at least 75 percent of the eligible employees of a small employer elect to be covered, as provided in Insurance Code §1501.154. This 75 percent requirement shall not apply to a small employer that has only two eligible employees~~]. A small employer that has only two eligible employees will [~~shall~~] be subject to a 100 percent participation requirement.

[~~(1) If a small employer makes available multiple health benefit plans to its employees, the collective enrollment of all of those plans must be at least 75 percent of the small employer's eligible employees or, if applicable, the lower participation level offered by the small employer carrier under subsection (e) of this section.~~]

[~~(2) A small employer carrier may elect not to offer health benefit plans to a small employer who offers multiple health benefit plans if such plans are to be provided by more than one carrier and the carrier would have less than 75 percent of the small employer's eligible employees enrolled in the carrier's health benefit plan unless the coverage is provided through a purchasing cooperative.~~]

[~~(e) A small employer carrier may offer small employer health benefit plans to a small employer even if less than 75 percent of the eligible employees of that employer elect to be covered if the small employer carrier permits the same percentage of participation as a qualifying percentage for each small employer benefit plan offered by that carrier in the state.~~]

[~~(f) A small employer carrier may offer small employer health benefit plans to a small employer even if the employer's percentage of~~

~~participation is less than the small employer carrier's qualifying participation level established under subsection (e) of this section if the small employer carrier.]~~

~~[(1) obtains the written waiver required by §26.7(e) of this subchapter (relating to Requirement to Insure Entire Groups); and]~~

~~[(2) accepts or rejects the entire group of eligible employees that choose to participate and excludes only those employees that have declined coverage. A carrier may not provide coverage under this subsection if the circumstances set out in §26.7(f) of this subchapter apply and may not use this subsection to circumvent the guaranteed issue and other requirements of Insurance Code Chapter 1501 or this subchapter.]~~

(d) [~~(g)~~] A health carrier must [~~shall~~] treat all similarly situated small employer groups in a consistent and uniform manner when terminating health benefit plans due to a participation level of less than the qualifying participation level or group size.

(e) [~~(h)~~] If a small employer fails to meet the qualifying minimum participation requirement for a small employer health benefit plan[~~,~~] for [~~a period of at least~~] six consecutive months, the health carrier may terminate coverage under the plan on [~~upon~~] the first renewal date following that period. The [~~the end of the six-month consecutive period during which the qualifying participation requirement was not met, provided that the~~] termination must conform to [~~shall be in accordance with~~] the terms and conditions of the plan concerning termination for failure to meet the qualifying minimum participation requirement and in accordance with Insurance Code §§1501.108 - 1501.111 (concerning Renewability of Coverage; Cancellation; Refusal to Renew; Discontinuation of Coverage; Notice to Covered Persons; and Written Statement of Denial, Cancellation, or Refusal to Renew Required) [~~, 1501.109, and 1501.110~~] and §26.15 of this title [~~subchapter~~] (relating to Renewability of Coverage and Cancellation).

(f) [~~(i)~~] In determining whether an employer has the required percentage of participation of eligible employees, if the percentage of eligible employees is not a whole number, the result of applying the percentage to the number of eligible employees must [~~shall~~] be rounded down to the nearest whole number. For example: 75 percent of five [~~5~~] employees is 3.75, so 3.75 would be rounded down to three [~~3~~], and 75 percent participation by a five employee group will be achieved if three of the eligible employees participate.

(g) [~~(j)~~] If a small employer fails to meet, for [~~a period of at least~~] six consecutive months, the qualifying minimum group size requirement set forth in Insurance Code Chapter 1501 (concerning Health Insurance Portability and Availability Act) [~~§26.5(a) of this subchapter (relating to Applicability and Scope)~~] for a small employer health benefit plan, the health carrier may terminate coverage under the plan no earlier than the first day of the next month following the end of that period. The [~~the six-month consecutive period during which the small employer did not meet the qualifying minimum group size requirement, provided that the~~] termination must conform to [~~shall be in accordance with~~] the terms and conditions of the plan concerning termination for failure to meet the qualifying minimum group size requirement and in accordance with Insurance Code §§1501.108 - 1501.111 [~~, 1501.109, and 1501.110~~] and §26.15 of this title [~~subchapter~~].

§26.9. Exclusions, Limitations, Waiting Periods, Affiliation Periods, [~~and~~] Preexisting Conditions, and Restrictive Riders.

(a) All health benefit plans that provide coverage for small employers and their employees must [~~as defined in Insurance Code Article 26.02(29) and §26.4 of this chapter (relating to Definitions) shall~~] comply with the following requirements.

(1) A small employer carrier may [~~shall~~] not exclude any eligible employee or dependent (including a late enrollee [~~,~~] who would otherwise be covered under a small employer health benefit plan), except to the extent permitted under [~~the~~] Insurance Code§1501.156 (concerning Employee Enrollment: Waiting Period) [~~, Article 26.21(k)~~].

(2) A small employer carrier may [~~shall~~] not limit or exclude (by use of rider, amendment, or other provision of the plan, applicable to a specific individual) coverage by type of illness, treatment, medical condition, or accident, except for preexisting conditions or diseases or an affiliation period, as permitted under [~~the~~] Insurance Code Chapter 1501 (concerning Health Insurance Portability and Availability Act)[~~, Article 26.49~~].

(3) A preexisting condition provision in a small employer health benefit plan may not apply to expenses incurred on or after the expiration of the 12 months following the effective date of coverage of the enrollee or late enrollee, except as authorized by paragraph (9)(B) of this subsection.

(4) A small employer health benefit plan may not limit or exclude initial coverage of a newborn child of a covered employee. Any coverage of a newborn child of an employee under this subsection terminates on the 32nd day after the date of the birth of the child unless notification of the birth and any required additional premium are received by the small employer carrier not later than the 31st day after the date of birth. A small employer carrier must [~~shall~~] not terminate coverage of a newborn child if the [~~such~~] carrier's billing cycle does not coincide with this 31-day premium payment requirement, until the next billing cycle has occurred and there has been nonpayment of the additional required premium, within 30 days of the due date of the [~~such~~] premium.

(5) A small employer health benefit plan may not limit or exclude initial coverage of an adopted child of an insured. [~~A child is considered to be the child of an insured if the insured is a party in a suit seeking the adoption of the child.~~] An [~~The~~] adopted child of an insured may be enrolled, at the option of the insured, within either:

(A) 31 days after the insured is a party in a suit for adoption; or

(B) [~~within~~] 31 days of the date the adoption is final.

(6) Coverage of an adopted child of an insured under paragraph (5) [~~(4)~~] of this subsection terminates unless notification of the adoption and any required additional premium are received by the small employer carrier not later than either:

(A) the 31st day after the insured becomes a party in a suit in which the adoption of the child by the insured is sought; or

(B) the 31st day after the date of the adoption. A small employer carrier may [~~shall~~] not terminate coverage of an adopted child if the [~~such~~] carrier's billing cycle does not coincide with this 31-day premium payment requirement, until the next billing cycle has occurred and there has been nonpayment of the additional required premium, within 30 days of the due date of the [~~such~~] premium.

(7) For purposes of paragraphs (4) and (6) of this subsection, received by the small employer within [~~by~~] a specified [~~time~~] period means that the item(s) must be either received or postmarked by the specified [~~time~~] period.

(8) If a newborn or adopted child is enrolled in a health benefit plan or other creditable coverage within the [~~time~~] periods specified in paragraph (4) or (5) of this subsection, [~~respectively,~~] and subsequently enrolls in another health benefit plan without a significant break in coverage, the other plan may not impose any preexisting condition

exclusion or affiliation period with regard to the child. If a newborn or adopted child is not enrolled within the [~~time~~] periods specified in paragraph (4) or (5) of this subsection, [~~respectively,~~] then in accordance with paragraph (9) of this subsection, the newborn or adopted child may be considered a late enrollee or excluded from coverage until the next open enrollment period.

(9) A small employer carrier must [~~shall~~] choose one of the methods set forth in subparagraph (A) or (B) of this paragraph for handling requests for enrollment as a late enrollee in any health benefit plan subject to this subchapter. The small employer carrier must use the same method in regard [~~regards~~] to all small employer [~~such~~] health benefit plans.

(A) The eligible employee or dependent may be excluded from coverage and any application for coverage rejected until the next annual open enrollment period and, once enrolled [~~upon enrollment~~], may be subject to a 12-month preexisting condition provision[~~,~~] or, in the case of an HMO, may be subject to a 60-day affiliation provision, as [~~such provisions are~~] described by [~~the~~] Insurance Code §§1501.102 - 1501.104 (concerning Preexisting Condition Provision; Treatment of Certain Conditions as Preexisting Prohibited; and Affiliation Period) [~~, Article 26.49~~].

(B) The eligible [~~the~~] employee or dependent's application may be accepted immediately and the employee or dependent enrolled as a late enrollee during the plan year. If so enrolled, [~~in which case~~] the preexisting condition provision imposed for a late enrollee may not exceed 18 months or, in the case of an HMO, the affiliation period may not exceed 90 days[~~,~~] from the date of the late enrollee's application for coverage.

(C) The provisions of subparagraphs (A) and (B) of this paragraph do not apply to eligible employees or dependents under the special circumstances listed as exceptions under the definition of late enrollee in §26.4 of this title (relating to Definitions) [~~chapter~~].

(D) Examples for applying subparagraphs (A) and (B) of this paragraph, in the case of both insurers and HMOs: Individual A requests coverage on October 1, 2014 [~~1997~~], after the enrollment period of July 1, 2014 [~~1997~~], through July 31, 2014, [~~1997~~] has ended. The next annual open enrollment period is July 1, 2015 [~~1998~~], through July 31, 2015 [~~1998~~]. The effective date of coverage for persons enrolling during an open enrollment period is the beginning of the plan year, which is September 1 of each year.

(i) If the carrier is an insurer and has elected to exclude all applicants requesting late enrollment [~~under health benefit plans subject to this subchapter~~] until the next open enrollment period, Individual A must reapply for coverage in July 2015 [~~1998~~] and the carrier may apply up to a 12-month preexisting condition period from the effective date of coverage, and as with any other enrollee, the preexisting condition period would begin on September 1, 2015 [~~1998~~], and expire [~~expires~~] on September 1, 2016 [~~1999~~].

(ii) If the carrier is an insurer and has elected to accept applications for late enrollment [~~under health benefit plans subject to this subchapter~~] immediately and enroll the applicant during the plan year, [~~then~~] the carrier may apply up to an 18-month preexisting condition period from the date of application. If Individual A applied for coverage on October 1, 2014 [~~1997~~], the preexisting condition period would begin on that date and [~~would~~] expire on April 1, 2016 [~~1999~~].

(iii) If the carrier is an HMO and has elected to exclude all applicants requesting late enrollment [~~under health benefit plans subject to this subchapter~~] until the next open enrollment period, Individual A must reapply for coverage in July 2015, [~~1998~~] and the carrier may apply up to a 60-day affiliation period, as with any other enrollee.

(iv) If the carrier is an HMO and has elected to accept applications for late enrollment [~~under health benefit plans subject to this subchapter~~] immediately and enroll the applicant during the plan year, [~~then~~] the carrier may apply up to a 90-day affiliation period from the day Individual A applied for coverage.

(10) A preexisting condition provision in a small employer health benefit plan may not apply to coverage for a disease or condition other than a disease or condition for which medical advice, diagnosis, care, or treatment was recommended or received from an individual licensed to provide the [~~such~~] services under state law and operating within the scope of practice authorized by state law during the six months before the effective date of coverage.

(11) A small employer carrier may [~~shall~~] not treat genetic information as a preexisting condition described by Insurance Code §1501.002 (concerning Definitions)[~~, Article 26.49(b)~~] in the absence of a diagnosis of the condition related to the information.

(12) A small employer carrier may [~~shall~~] not treat a pregnancy as a preexisting condition described in Insurance Code §1501.002 [~~Article 26.49(b), Insurance Code~~].

(13) A preexisting condition provision in a small employer health benefit plan does [~~shall~~] not apply to an individual who was continuously covered for an aggregate period of 12 months under creditable coverage that was in effect up to a date not more than 63 days before the effective date of coverage under the small employer health benefit plan, excluding any waiting period under the previous coverage. For example, Individual A has coverage under an individual policy for six months beginning on May 1, 2014 [~~1997~~], through October 31, 2014 [~~1997~~], followed by a gap in coverage of 61 days until December 31, 2014 [~~1997~~]. Individual A is covered under an individual health plan beginning on January 1, 2015 [~~1998~~], for six months through June 30, 2015 [~~1998~~], followed by a gap in coverage of 62 days until August 31, 2015 [~~1998~~]. Individual A's effective date of coverage under a small employer health benefit plan is September 1, 2015 [~~1998~~]. Individual A has 12 months of creditable coverage and would not be subject to a preexisting condition exclusion under the small employer health benefit plan.

(14) In determining whether a preexisting condition provision applies to an individual covered by a small employer health benefit plan, the small employer carrier must [~~shall~~] credit the time the individual was covered under creditable coverage if the previous coverage was in effect at any time during the 12 months preceding the effective date of coverage under a small employer health benefit plan. Any waiting period that applied before that coverage became effective also must [~~shall~~] be credited against the preexisting condition provision period. For instance, Individual B is covered under an individual health insurance policy for 18 months beginning May 1, 2014 [~~1995~~], through November 30, 2015 [~~1996~~], followed by a four-month [~~four month~~] gap in coverage from December 1, 2015 [~~1996~~], to March 31, 2016 [~~1997~~]. On April 1, 2016 [~~1997~~], Individual B is covered under a group health plan for three months through June 30, 2016 [~~1997~~], followed by a two-month [~~two month~~] gap in coverage until August 31, 2016 [~~1997~~]. Individual B's coverage became effective on September 1, 2016 [~~1997~~]. Under this example, since there was a significant break in coverage, to determine the length of creditable coverage, the small employer carrier counts the creditable coverage the individual had for the 12-month period preceding the effective date of the individual's coverage under the small employer health benefit plan. Individual B has creditable coverage of six months and the issuer of the small employer health benefit

plan may impose a preexisting condition limitation for six months on Individual B.

(15) A small employer may establish a waiting period in accordance with Insurance Code §1501.156. On [~~that cannot exceed 90 days from the first day of employment during which a new employee is not eligible for coverage. Upon~~] completion of the waiting period and enrollment within the time frame allowed by §26.7(h) [~~(i)~~] of this title [~~chapter~~] (relating to Requirement to Insure Entire Groups), coverage must be effective no later than the next premium due date. Coverage may be effective at an earlier date as agreed between [~~upon by~~] the small employer and the small employer carrier.

(16) An [~~A~~] HMO [~~health maintenance organization~~] may impose an affiliation period in accordance with Insurance Code §1501.104, if the period is applied uniformly without regard to any health-status-related [~~health status related~~] factor. The affiliation period may [~~shall~~] not exceed two months for an enrollee, other than a late enrollee, and may [~~shall~~] not exceed 90 days for a late enrollee. An affiliation period under a plan must [~~shall~~] run concurrently with any applicable waiting period under the plan. An HMO may [~~shall~~] not impose any preexisting condition limitation, except for an affiliation period.

(17) The imposition of an affiliation period by an HMO [~~carrier of an affiliation period~~] does not preclude application of any applicable waiting period [~~applicable~~] as determined by the employer for [~~to~~] all new entrants under a health benefit plan.

(18) An affiliation period provision in a small employer health benefit plan does [~~shall~~] not apply to an individual who would not be subject to a preexisting condition limitation in accordance with paragraphs (12) and (13) of this subsection.

(b) To determine if preexisting conditions [~~as defined in Insurance Code Article 26.02,~~] exist, a small employer carrier must [~~shall~~] ascertain the source of previous or existing coverage of each eligible employee or [~~and each~~] dependent [~~of an eligible employee~~] at the time the [~~such~~] employee or dependent initially enrolls into the health benefit plan provided by the small employer carrier. The small employer carrier has [~~shall have~~] the responsibility to contact the source of the [~~such~~] previous or existing coverage to resolve any questions about the benefits or limitations related to that [~~such previous or existing~~] coverage in the absence of a creditable coverage certification form.

§26.10. Establishment of Classes of Business.

(a) A small employer carrier that establishes more than one class of business in accordance with [~~pursuant to~~] the provisions of [~~the~~] Insurance Code §1501.202 (concerning Establishment of Classes of Business) and §1501.203 (concerning Establishment of Classes of Business on Certain Bases Prohibited) must[~~, Article 26.31, shall~~] maintain on file for inspection by the commissioner the following information with respect to each class of business so established:

(1) a description of each criterion employed by the health carrier (or any of its agents) for determining membership in the class of business;

(2) a statement describing the justification for establishing the class as a separate class of business and documentation that the establishment of the class of business is intended to reflect substantial differences in expected claims experience or administrative costs related to the reasons set forth in [~~the~~] Insurance Code[~~,~~] Chapter 1501 (concerning Health Insurance Portability and Availability Act) [~~26, Subchapter D~~]; and

(3) a statement disclosing which, if any, health benefit plans are currently available for purchase in the class and any significant limitations related to the purchase of the [~~such~~] plans.

(b) A health carrier may not directly or indirectly use the number of employees and dependents of a small employer [~~or, except as provided in Insurance Code Article 26.31(a)~~], the trade or occupation of the employees of a small employer, or the industry or type of business of the small employer as criteria for establishing eligibility for a health benefit plan or for a class of business, except as provided in Insurance Code §1501.202 and §1501.203.

(c) A health carrier may not establish a separate class of business based on minimum participation requirements or whether the coverage provided to a small employer group is provided on a guaranteed issue basis or is subject to underwriting or proof of insurability.

§26.11. Restrictions Relating to Premium Rates.

(a) A small employer carrier must [~~shall~~] develop a separate rate manual for each class of business. Base premium rates and new business premium rates charged to small employers by the small employer carrier must [~~shall~~] be computed solely from the applicable rate manual developed under [~~pursuant to~~] this subsection. To the extent that a portion of the premium rates charged by a small employer carrier are [~~is~~] based on objective criteria established by the small employer carrier consistent with the criteria set out in [~~the~~] Insurance Code Chapter 1501 (concerning Health Insurance Portability and Availability Act)[~~, Article 26.02(5) and Article 26.36~~], the manual must [~~shall~~] specify the criteria and factors considered by the health carrier in exercising this [~~such~~] discretion.

(b) A small employer carrier must [~~shall~~] file with TDI [~~the department~~], at least 60 days before [~~prior to~~] the proposed date of the change, any proposed change to the rating method used in the rate manual for a class of business. The small employer carrier must [~~shall~~] ensure that the rating method used is actuarially sound and appropriate to ensure [~~assure~~] compliance with Insurance Code[~~,~~] Chapter 1501 [~~26,~~] and this chapter, and that differences in rates charged for each small employer health benefit plan are reasonable and reflect objective differences in plan design. The commissioner may disapprove a change to the rating method that does not meet the requirements of this chapter. At the expiration of 60 days from the filing of the form with TDI, [~~the department~~] the proposed change will [~~shall~~] be deemed compliant unless [~~prior to thereto~~] the commissioner has disapproved it by written order.

(1) The filing must [~~shall~~] contain at least the following information:

(A) the reasons the change in rating method is being requested;

(B) a complete description of each of the proposed modifications to the rating method;

(C) a description of how the change in rating method would affect the premium rates currently charged to small employers in the class of business, including an estimate from a qualified actuary of the number of groups or individuals and a description of the types of groups or individuals whose premium rates may change by more than 10 percent [%] due to the proposed change in rating method (not including general increases in premium rates applicable to all small employers in a health benefit plan);

(D) a certification from a qualified actuary that the new rating method would be based on objective and credible data and would be actuarially sound and appropriate; and

(E) a certification from a qualified actuary that the proposed change in rating method would not produce premium rates for small employers that would be in violation of [~~the~~] Insurance Code[~~,~~] Chapter 1501 [~~26, Subchapter D~~].

(2) For the purpose of this section, a change in rating method means [~~shall mean~~]:

(A) a change in the number of case characteristics used by a small employer carrier to determine premium rates for health benefit plans in a class of business;

(B) a change in the manner or procedures by which insureds are assigned into categories for the purpose of applying a case characteristic to determine premium rates for health benefit plans in a class of business;

(C) a change in the method of allocating expenses among health benefit plans in a class of business; or

(D) a change in a rating factor with respect to any case characteristic if the change would produce a change in premium for any small employer that exceeds 10 percent [%]. For the purpose of this paragraph, a change in a rating factor means [~~shall mean~~] the cumulative change with respect to the [~~such~~] factor considered over a 12-month period. If a small employer carrier changes rating factors with respect to more than one case characteristic in a 12-month period, the health carrier must [~~shall~~] consider the cumulative effect of all the [~~such~~] changes in applying the 10 percent [%] test under this paragraph.

(c) Each rate manual developed under [~~pursuant to~~] subsection (a) of this section must [~~shall~~] specify the case characteristics and rate factors to be applied by the small employer carrier in establishing premium rates for the class of business.

(1) A small employer may not use case characteristics other than those specified in [~~the~~] Insurance Code §1501.210 (concerning Premium Rates: Nondiscrimination) [~~, Article 26.36(c)~~], without the prior approval of the commissioner. A small employer carrier seeking [~~such an~~] approval must file [~~shall make a filing with the commissioner~~] for a change in rating method under subsection (b) of this section with the commissioner.

(2) A small employer carrier must [~~shall~~] use the same case characteristics in establishing premium rates for each health benefit plan in a class of business and must [~~shall~~] apply them in the same manner in establishing premium rates for each [~~such~~] health benefit plan. Case characteristics may include the employer's industry classification consistent with [~~the~~] Insurance Code §1501.208 (concerning Premium Rates: Industry Classification) [~~, Article 26.33(c)~~]. Case characteristics must [~~shall~~] be applied without regard to the risk characteristics of a small employer.

(3) The rate manual developed under [~~pursuant to~~] subsection (a) of this section must [~~shall~~] clearly illustrate the relationship among the base premium rates charged for each health benefit plan in the class of business. If the new business premium rate is different than the base premium rate for a health benefit plan, the rate manual must [~~shall~~] illustrate the difference.

(4) Differences among base premium rates for health benefit plans must [~~shall~~] be based solely on the reasonable and objective differences in the design and benefits of the health benefit plans and may [~~shall~~] not be based in any way on the actual or expected health-status-related [~~health status related~~] factors of the small employer groups that choose or are expected to choose a particular health benefit plan. A small employer carrier must [~~shall~~] apply case characteristics and rate factors within a class of business in a manner that ensures [~~assures~~] that premium differences among health benefit plans for identical small employer groups vary only due to reasonable and objective differences in the design and benefits of the health benefit plans and are not due to the actual or expected health-status-related [~~health status related~~] factors of the small employer groups that choose or are expected to choose a particular health benefit plan.

(5) Each rate manual developed under [~~pursuant to~~] subsection (a) of this section must [~~shall~~] provide for premium rates to be developed in a two-step process. In the first step, the small employer carrier must [~~shall~~] develop a base premium rate for the small employer group without regard to any risk characteristics of the group. In the second step, the small employer carrier may adjust the resulting base premium rate by the risk load of the group, subject to the provisions of Insurance Code[~~,~~] Chapter 1501 [~~26, Subchapter D~~], to reflect the risk characteristics of the group.

(6) Except as provided in this subsection, a premium charged to a small employer for a health benefit plan may [~~shall~~] not include a separate application fee, underwriting fee, or any other separate fee or charge. A small employer carrier may charge a separate fee with respect to a health benefit plan (but only one fee with respect to each [~~such~~] plan), provided the fee is no more than $5 [~~$5.00~~] per month per covered employee and that the fee is applied in a uniform manner to each health benefit plan in a class of business.

(7) A small employer carrier must [~~shall~~] allocate administrative expenses to the small employer health benefit plans on no less favorable [~~of~~] a basis than expenses are allocated to other health benefit plans in the class of business. The rate manual developed under [~~pursuant to~~] subsection (a) of this section must [~~shall~~] describe the method of allocating administrative expenses to the health benefit plans in the class of business for which the manual was developed.

(8) The health carrier must [~~shall~~] retain each rate manual developed under [~~pursuant to~~] subsection (a) of this section for a period of six years, including [~~. The health carrier shall maintain~~] all updates and changes [~~with the manual~~].

(9) Each rate manual and the rating practices of a small employer carrier must [~~shall~~] comply with any applicable rules.

(d) If a small employer carrier uses the number of employees and dependents of a small employer as a case characteristic, the highest rate factor associated with a classification based on the number of employees and dependents of a small employer may [~~shall~~] not exceed the lowest rate factor associated with the [~~such a~~] classification by more than 20 percent [%].

(e) The restrictions related to changes in premium rates in [~~the~~] Insurance Code Chapter 1501 must [~~, Article 26.33 and Article 26.34, shall~~] be applied as follows.

(1) A small employer carrier must [~~shall~~] revise its rate manuals each rating period to reflect changes in base premium rates and changes in new business premium rates.

(2) If, for any health benefit plan with respect to any rating period, the percentage change in the new business premium rate is less than or the same as the percentage change in the base premium rate, the change in the new business premium rate will [~~shall~~] be deemed to be the change in the base premium rate for the purposes of [~~the~~] Insurance Code Chapter 1501[~~, Article 26.33 and Article 26.34~~].

(3) If, for any health benefit plan with respect to any rating period, the percentage change in the new business premium rate exceeds the percentage change in the base premium rate, the health benefit plan will [~~shall~~] be considered a health benefit plan into which the small employer carrier is no longer enrolling new small employers for the purposes of [~~the~~] Insurance Code Chapter 1501[~~, Article 26.33 and Article 26.34~~].

(4) If, for any rating period, the change in the new business premium rate for a health benefit plan differs from the change in the new business premium rate for any other health benefit plan in the same class of business by more than 20 percent, [%] the health

carrier must [~~shall~~] make a filing with the commissioner containing a complete explanation of how the respective changes in new business premium rates were established and the reason for the difference. The filing must [~~shall~~] be made at least 60 days before [~~prior to~~] the beginning of the rating period during which [~~when~~] the change is [~~when the change would be~~] applicable. The filing allows [~~is for the purpose of allowing~~] the commissioner to determine whether the methodology [~~used~~] is actuarially sound and appropriate to ensure [~~insure~~] compliance with [~~the~~] Insurance Code[~~,~~] Chapter 1501 [~~26~~].

(5) A small employer carrier must [~~shall~~] keep [~~on file for a period of at least six years~~] the calculations used to determine the change in base premium rates and new business premium rates for each health benefit plan for each rating period for six years.

(f) Changes in premium rates and revised premium rates must [~~shall~~] comply with the following.

(1) Except as provided in subsection (e) of this section, a change in premium rate for a small employer must [~~shall~~] produce a revised premium rate that is no more than the base premium rate for the small employer (as shown in the rate manual as revised for the rating period), multiplied by one plus the sum of:

(A) the risk load applicable to the small employer during the previous rating period; and

(B) 15 percent [%] (prorated for periods of less than one year).

(2) In the case of a health benefit plan into which a small employer carrier is no longer enrolling new small employers, a change in premium rate for a small employer must [~~shall~~] produce a revised premium rate that is no more than the base premium rate for the small employer (given its present composition and as shown in the rate manual in effect for the small employer at the beginning of the previous rating period), multiplied by one plus the lesser of:

(A) the change in the base rate; or

(B) the percentage change in the new business premium for the most similar health benefit plan into which the small employer carrier is enrolling new small employers, multiplied by one plus the sum of:

(i) the risk load applicable to the small employer during the previous rating period; and

(ii) 15 percent [%] (prorated for periods of less than one year).

(3) In the case of a health benefit plan described in [~~the~~] Insurance Code §1501.208[~~, Article 26.33(e)~~], if the current premium rate for the health benefit plan exceeds the ranges set forth in [~~the~~] Insurance Code §1501.204 (concerning Index Rates) [~~, Article 26.32(b)~~], the formulae set forth in paragraphs (1) and (2) of this subsection will be applied as if the 15 percent [%] adjustment provided in paragraphs (1)(B)[~~(ii)~~] and (2)(B) [~~(C)~~](ii) of this subsection were a 0 percent [%] adjustment.

(4) Notwithstanding the provisions of paragraphs (1) and (2) of this subsection, a change in premium rate for a small employer may [~~shall~~] not produce a revised premium rate that would exceed the limitations on rates provided in [~~the~~] Insurance Code §1501.204[~~, Article 26.32(c)~~].

(g) An HMO offering any state-approved [~~state approved~~], federally qualified plan described in Insurance Code §1501.255 (concerning Health Maintenance Organization Plans) [~~Article 26.48~~] and §26.14 of this title [~~chapter~~] (relating to Coverage) must [~~shall~~] establish premium rates for those plans in accordance with formulae or schedules of charges filed with TDI [~~the department~~] under the procedures set forth in Insurance Code Chapter 1271 (concerning Benefits Provided by Health Maintenance Organizations; Evidence of Coverage; Charges) [~~Article 20A.09(b),~~] and Chapter 11, Subchapter H of this title (relating to Schedule of Charges). An HMO must [~~shall~~] follow the rating requirements set out in this section for any plan it offers that is not federally qualified.

(h) An HMO participating in a purchasing cooperative that provides employees of small employers a choice of benefit plans, which [~~that~~] has established a separate class of business as provided by [~~the~~] Insurance Code §1501.202 (concerning Establishment of Classes of Business) and §1501.203 (concerning Establishment of Classes of Business on Certain Bases Prohibited) [~~,Article 26.31~~], and [~~that has established~~] a separate line of business as provided under [~~the~~] Insurance Code §1501.255 [~~, Article 26.48(a),~~] and 42 U.S.C. [~~United States Code~~] §§300e et seq. (concerning Health Maintenance Organizations), may use rating methods in accordance with this subchapter that are used by other small employer carriers participating in the same purchasing cooperative, including rating by age and gender. [~~This subsection applies to all employer health benefit plans offered, issued or delivered for issue to small employers and their employees on or after September 1, 1995.~~]

(i) When seeking to obtain information relating to a small employer group, including the risk characteristics of the small employer group, a small employer carrier must [~~shall~~] comply with §26.13(l) [~~(m)~~] of this title [~~chapter~~] (relating to [~~Rules Relating to~~] Fair Marketing).

§26.12. Disclosure.

In connection with the offering for sale of any small employer health benefit plan, each small employer carrier and each agent must [~~shall~~] make a reasonable disclosure, as part of its solicitation and sales material, of:

(1) the extent to which premium rates for a specific small employer are established or adjusted based on the actual or expected variation in claim costs or the actual or expected variation in health status of the employees of the small employer and their dependents;

(2) provisions concerning the small employer carrier's right to change premium rates and the factors other than claim experience that affect changes in premium rates;

(3) provisions relating to renewability of policies and contracts; and

(4) any preexisting [~~pre-existing~~] condition provision or affiliation period.

§26.13. [~~Rules Related to~~] Fair Marketing.

(a) A small employer carrier must [~~shall~~] market each of its small employer health benefit plans to small employers in this state. A small employer carrier may not suspend the marketing or issuance of the small employer benefit plans unless the health carrier has good cause and has received [~~the~~] prior approval from [~~of~~] the commissioner or the commissioner's designee. In marketing consumer choice health benefit plans to small employers, a small employer carrier must [~~shall~~] use at least the same sources and methods of distribution that it uses to market other small employer health benefit plans [~~to small employers~~]. Any agent authorized by a small employer carrier to market consumer choice health benefit plans to small employers in this state must [~~shall~~] also be authorized to market [~~the~~] small employer health benefit plans that contain state-mandated health benefits.

(b) Before issuing coverage to a [~~To each~~] small employer [~~who inquires about purchasing a small employer health benefit plan~~],

a small employer carrier must [~~shall~~] offer the employer a choice of all health benefit plans that the small employer carrier offers and for which the small employer qualifies [~~as required by §26.14 of this chapter (relating to Coverage)~~]. The small employer carrier may provide the offer directly to the small employer or deliver it through an agent, but in either case must [~~shall~~] offer each required plan contemporaneously with the offer of any other small employer health benefit plan. The offer must [~~shall~~] be in writing and [~~shall~~] include at least the following:

(1) information describing how the small employer may enroll in the plan or plans;

(2) information set out in Insurance Code §1501.354 (concerning Required Disclosures) [~~Article 26.40~~] and §26.12 of this title [~~chapter~~] (relating to Disclosure); and

(3) a written disclosure, as required by Chapter 21, Subchapter AA of this title (relating to Consumer Choice Health Benefit Plans) [~~§21.3530 of this title (relating to Health Carrier Disclosure)~~].

(c) On [~~Upon~~] request, a small employer carrier must explain its health benefit plans [~~shall explain~~] to a small employer each of the small employer health benefit plans it offers.

(d) [~~As required by §21.3542(a) of this title (relating to Offer of State-Mandated Plan), a small employer carrier shall obtain from each small employer to which it issues coverage, at or before the time of application, a written affirmation that the small employer carrier offered the small employer a consumer choice health benefit plan and a comparable policy or plan as required by Insurance Code Articles 3.80, §8 and 20A.9N(k)~~].

[~~(e)~~] A small employer carrier must [~~shall~~] comply with this subsection when providing a premium rate quote to a small employer.

(1) A small employer carrier must [~~shall~~] provide a premium rate quote to a small employer, directly or through an authorized agent, within 15 business days of receiving the small employer's completed application for coverage and individual enrollment forms.

(2) A small employer carrier may request, directly or through an authorized agent, any additional information, using the applicable rate manual and associated underwriting guidelines developed under [~~pursuant to~~] §26.11 of this title [~~chapter~~] (relating to Restrictions Relating to Premium Rates), necessary to provide the premium rate quote. If the carrier requests this additional information before [~~prior to~~] the end of the 15-day period described in paragraph (1) of this subsection, the request for additional information tolls the running of the 15-day period until the small employer carrier receives the requested additional information.

(3) A small employer carrier may give a small employer an estimated cost of coverage before the [~~prior to~~] end of the 15-day period described in paragraph (1) of this subsection, so long as the carrier makes clear that the estimate is not a premium rate quote.

(4) A small employer carrier may [~~shall~~] not impose any additional conditions to its provision of a premium rate quote.

(e) [~~(f)~~] A small employer carrier may [~~shall~~] not apply more stringent or detailed requirements related to the application process for, or otherwise discriminate in the offer of, any small employer health benefit plan than are applied for other health benefit plans offered by the health carrier to small employers.

(f) [~~(g)~~] If a small employer carrier denies coverage under a health benefit plan to a small employer on any basis, the denial must [~~shall~~] be in writing and specifically [~~shall~~] state [~~with specificity~~] the reasons for the denial (subject to any restrictions related to confidentiality of medical information).

(g) [~~(h)~~] A small employer carrier must [~~shall~~] establish and maintain a means to provide information to small employers who request information on the availability of small employer health benefit plans in this state. The information provided to small employers must [~~shall~~] include information about how to apply for coverage from the health carrier and may include the names and phone numbers of agents located geographically proximate to the caller or [~~such~~] other information that is reasonably designed to assist the caller in locating [~~to locate~~] an authorized agent or applying [~~to otherwise apply~~] for coverage.

(h) [~~(i)~~] The small employer carrier may [~~shall~~] not require a small employer to join or contribute to any association or group as a condition of being accepted for coverage by the small employer carrier, except that, if membership in an association or other group is a requirement for accepting a small employer into a particular health benefit plan, a small employer carrier may apply that [~~such~~] requirement, subject to the requirements of Insurance Code[~~,~~] Chapter 1501 (concerning Health Insurance Portability and Availability Act) [~~26, Subchapters A-G~~].

(i) [~~(j)~~] A small employer carrier may not require, as a condition to the offer or sale of a health benefit plan to a small employer, that the small employer purchase or qualify for any other insurance product or service.

(j) [~~(k)~~] Health carriers offering individual and group health benefit plans in this state must determine [~~shall be responsible for determining~~] whether the plans are subject to the requirements of Insurance Code[~~,~~] Chapter 1501 [~~26, Subchapters A-G,~~] and this subchapter. Health carriers must obtain [~~shall elicit~~] the following information from applicants for those [~~such~~] plans at the time of application:

(1) whether any portion of the premium will be paid by a small employer;

(2) whether the prospective policyholder, certificate holder, or any prospective covered individual intends to treat the health benefit plan as part of a plan or program under [~~§162 or §106 of~~] the United States Internal Revenue Code of 1986, [~~(~~]26 U.S.C. [~~United States Code~~] §106 (concerning Contributions by Employer to Accident and Health Plans), or §162 (concerning Trade or Business Expenses);

(3) whether the health benefit plan is an employee welfare benefit plan under 29 C.F.R. §2510.3-1 (concerning Employee Welfare Benefit Plan) [~~§2510.3-1(j)~~]; or

(4) whether the applicant is a small employer.

(k) [~~(l)~~] If a health carrier fails to comply with subsection (j) [~~(k)~~] of this section, the health carrier will [~~shall~~] be deemed to be on notice of any information that could reasonably have been attained if the health carrier had complied with subsection (j) [~~(k)~~] of this section.

(l) [~~(m)~~] A small employer carrier may not discriminate between small employer groups when obtaining information relating to a small employer, including information related to the risk characteristics of the small employer group or other aspects of the application or application process.

(m) [~~(n)~~] A small employer carrier may not terminate, fail to renew, limit its contract or agreement of representation with, or take any other negative action against an agent for the agent's request that the carrier issue or renew a health benefit plan to a small employer.

§26.14. Coverage.

[~~(a) Every small employer carrier other than an HMO shall, as a condition of transacting business in this state with small employers, offer plans in compliance with Insurance Code Articles 26.42 and~~

~~3.80, and Chapter 21, Subchapter AA of this title (relating to Consumer Choice Health Benefit Plans).]~~

~~[(b) An HMO small employer carrier, shall, as a condition of transacting business in this state with small employers, offer plans in compliance with Insurance Code Articles 26.42, 26.48 and 20A.09N, and Chapter 21, Subchapter AA of this title.]~~

(a) [~~(c)~~] Continuation and conversion. All small employer health benefit plans must [~~shall~~] provide for continuation and may provide an option for conversion that [~~which~~] complies with Insurance Code Chapters 1251 (concerning Group and Blanket Health Insurance) and 1271 (concerning Benefits Provided by Health Maintenance Organizations; Evidence of Coverage; Charges) [~~Articles 3.51-6, Sec. 1(d)(3) and 20A.09(k)~~] and rules adopted under those statutes [~~thereunder~~]. A state-approved [~~state approved~~] health benefit plan that complies with the requirements of Title XIII, Public Health Service Act (42 U.S.C. §§300e, et seq., concerning Health Maintenance Organizations) must [~~shall~~] provide coverage for continuation that [~~which~~] complies with the requirements of Insurance Code Chapter 1271 [~~Article 20A.09(k)~~]) and must offer conversion in compliance with 42 C.F.R. §417.124(e) (concerning Administration and Management) and applicable federal law.

(b) [~~(d)~~] Plain language. Each health benefit plan, certificate, policy, rider, or application used by health carriers to provide coverage to small employers and their employees must [~~shall~~] comply with Insurance Code §1501.258 (concerning Forms) and §1501.260 (concerning Plain Language Required) [~~Article 26.43~~], be written in plain language, and meet the requirements of Chapter 3, Subchapter G of this title (relating to Plain Language Requirements for Health Benefit Policies). Requirements for use of plain language are not applicable to a health benefit plan group master policy or a policy application or enrollment form for a health benefit plan group master policy.

(c) [~~(e)~~] Dependent coverage. Every small employer carrier providing health benefit plans to small employers is required to offer dependent coverage to each eligible employee. Dependent coverage may be paid for by the employer, the employee, or both.

~~[(f) Every small employer carrier providing a health benefit plan to a small employer shall comply, as applicable, with Insurance Code Articles 3.51-14, 3.51-5A, and 3.50-3, Section 4C.]~~

(d) Point-of-service coverage. An HMO issuing small employer HMO coverage may also offer point-of-service coverage that complies, as applicable, with the requirements set forth in Insurance Code Chapter 843 (concerning Health Maintenance Organizations); Chapter 11, Subchapter Z of this title (relating to Point-of-Service Riders); and Chapter 21, Subchapter U of this title (relating to Arrangements Between Indemnity Carriers and HMOs for Point-of-Service Coverage) that allow the enrollee to access out-of-plan coverage at the option of the enrollee.

§26.15. Renewability of Coverage and Cancellation.

(a) Except as provided by Insurance Code §1501.109 (concerning Refusal to Renew; Discontinuation of Coverage) [~~Article 26.24~~], a small employer carrier must [~~shall~~] renew any small employer health benefit plan [~~for any covered small employer~~] at the option of the small employer, unless:

(1) the premium has not been paid as required by the terms of the plan;

(2) the small employer has committed fraud or intentional misrepresentation of a material fact. An [~~On or after September 1, 1995, an~~] intentional misrepresentation of a material fact does [~~shall~~] not include any misrepresentation related to health status;

(3) the small employer has not complied with a material provision of the health benefit plan relating to premium contribution, group size, or minimum participation requirements;

(4) the small employer has no enrollee, in connection with the plan, who resides or works in the service area of the [~~HMO~~] small employer carrier or in the area where [~~for which~~] the small employer carrier is authorized to do business; or

(5) membership of an employer in an association terminates, but only if coverage is terminated uniformly without regard to a health-status-related [~~health status related~~] factor of a covered individual.

(b) A small employer carrier may refuse to renew the coverage of an eligible employee or dependent for fraud or intentional misrepresentation of a material fact by that individual and with respect to an eligible employee or dependent who is a subscriber or enrollee in an HMO, for the reasons specified in §11.506 of this title (relating to Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate). The coverage is also subject to any policy or contractual provisions relating to incontestability or time limits on certain defenses. An [~~On or after September 1, 1995, an~~] intentional misrepresentation of a material fact does [~~shall~~] not include any misrepresentation related to health status.

(c) A small employer carrier may not cancel a small employer health benefit plan except for the reasons specified for refusal to renew under [~~the~~] Insurance Code §1501.108 (concerning Renewability of Coverage: Cancellation) [~~, Article 26.23~~], and subsections (a) and (b) of this section. A small employer carrier may not cancel the coverage of an eligible employee or dependent except for the reasons specified for refusal to renew under [~~the~~] Insurance Code §1501.108 [~~, Article 26.23,~~] and subsections (a) and (b) of this section.

(d) A carrier is not prevented [~~precluded~~] from seeking any legal remedies against a person who fraudulently misrepresents health status during the initial application for coverage. Legal remedies available to a carrier do not include cancellation or nonrenewal.

(e) Other small employer health benefit plans, provided through individual policies, must [~~shall~~] be guaranteed renewable for life or until maximum benefits have been paid, or may be guaranteed renewable with the only reasons for termination being those set out in Insurance Code §1501.108 and §1501.109 [~~Article 26.23 and Article 26.24,~~] and this subchapter. All other health benefit plans issued to small employers must [~~shall~~] be renewed at the option of the small employer, but may provide for termination in accordance with Insurance Code[~~,~~] Chapter 1501 (concerning Health Insurance Portability and Availability Act) [~~26~~], and this subchapter.

§26.16. Refusal to Renew and Application to Reenter Small Employer Market.

(a) A small employer carrier may elect to refuse to renew all small employer health benefit plans delivered or issued for delivery by the small employer carrier in this state or in a geographic service area. The small employer carrier must notify the commissioner and each affected covered small employer of the election as provided in [~~approved under the Insurance Code, Article 26.22. The small employer carrier shall notify the commissioner of the election not later than the 180th day before the date coverage under the first small employer health benefit plan terminates under the~~] Insurance Code §1501.109 (concerning Refusal to Renew; Discontinuation of Coverage)[~~, Article 26.24(a)~~].

~~[(b) The small employer carrier must notify each affected covered small employer not later than the 180th day before the date on which coverage terminates for that small employer.]~~

[~~(c) A small employer carrier that elects under the Insurance Code, Article 26.24(a) to refuse to renew all small employer health benefit plans in this state or in an approved geographic service area may not write a new small employer health benefit plan in this state or in the geographic service area, as applicable, before the fifth anniversary of the date of notice to the commissioner under the Insurance Code, Article 26.24(a)].~~

(b) [~~(d)~~] The small employer carrier may not write a new small employer health benefit plan in this state or in the geographic service area, as applicable, for five years after notice to the commissioner of the election to refuse to renew. A small employer carrier that elects not to renew [~~under the Insurance Code, Article 26.24, and this section~~] may not resume offering health benefit plans to small employers in this state or in the geographic area for which the election was made until it has filed a petition with the commissioner to be reinstated as a small employer carrier and the petition has been approved [~~by the commissioner or the commissioner's designee~~]. In reviewing the petition, the commissioner may ask for [~~such~~] information and assurances as the commissioner finds reasonable and appropriate.

(c) [~~(e)~~] A small employer carrier may elect to discontinue a particular type of small employer coverage only if the small employer carrier:

(1) before the 90th day preceding the date of the discontinuation of the coverage:

(A) provides notice of the discontinuation to each employer and the department; and

(B) offers to each employer the option to purchase other small employer coverage offered by the small employer carrier at the time of the discontinuation; and

(2) acts uniformly without regard to the claims experience of the employer or any health-status-related [~~health status related~~] factors of employees or dependents or new employees or dependents who may become eligible for the coverage.

[~~(f) This section does not exempt a health carrier from any other legal requirements, such as those contained in Insurance Code Article 21.49-2C, §26.14(a) of this chapter (relating to Coverage) and §§7.1801, et seq. of this title (relating to Withdrawal Plan Requirements and Procedures), or requirements for discontinuation of certain plans under this chapter.~~]

§26.18. Election and Application to be Risk-Assuming or Reinsured Carrier.

(a) Each small employer carrier must [~~shall~~] file with the commissioner, no later than with the first filing of a small employer health benefit plan, notification of whether the carrier elects to operate as a risk-assuming or reinsured carrier.

(1) A small employer carrier's operation as a risk-assuming carrier is subject to approval by the commissioner, and each small employer carrier electing to operate as a risk-assuming carrier must [~~shall~~] file an application with the commissioner contemporaneously with its election to operate as a risk-assuming carrier. A risk-assuming carrier's application, in addition to the financial information already on file with TDI, must include a: [~~A small employer carrier shall use Form Number 1212 RISK for these purposes.~~]

(A) history of rating and underwriting small employer groups, including a description of underwriting experience to identify high risks and the percentage of aggregate rate increases for the past three years for small employer groups for Texas and nationwide;

(B) description of the carrier's commitment to fairly market to all small employers in Texas or in the small employer carrier's established geographic service areas, including sample material used, or planned to be used, to market to small employers;

(C) description of experience in managing the risk of small groups, including;

(i) the number of years, volume of business, results, etc.;

(ii) a list of other states with guaranteed issue requirements where the carrier provides small employer group coverage;

(iii) the total number of lives currently covered under those guaranteed issue plans; and

(iv) a list of other states where the carrier voluntarily participates in reinsurance programs;

(D) description of plans to manage the risk of guaranteed issue as a risk-assuming carrier;

(E) list of affiliated small employer carriers and whether they have been approved as either a risk-assuming or reinsured carrier;

(F) list of any other affiliated small employer carrier applicants, indicating their requested designation as either a risk-assuming or reinsured carrier; and

(G) the name, title, and signature of the chief executive officer, attorney, or actuary for the named health carrier.

(2) A reinsured carrier's notification must include a:

(A) statement of the carrier's election to operate as a reinsured carrier; and

(B) the name, title, and signature of the chief executive officer, attorney, or actuary of the named health carrier.

(b) A small employer carrier seeking to change its status as a risk-assuming or reinsured carrier must [~~shall~~] file an application with the commissioner. If the carrier is requesting a change to be a: [~~The required filing shall include a completed certification Form Number 1212 Risk and shall provide information demonstrating good cause why the carrier should be allowed to change its status.~~]

(1) risk-assuming carrier, the filing must include:

(A) the information requested in subsection (a) of this section;

(B) information demonstrating good cause for the request to change status; and

(C) the name, title, and signature of the chief executive officer, attorney, or actuary for the named health carrier; or

(2) reinsured carrier, the filing must include:

(A) information demonstrating good cause for the request to change status; and

(B) the name, title, and signature of the chief executive officer, attorney, or actuary for the named health carrier.

(c) A small employer carrier's election is effective until the fifth anniversary of the election. A [~~, and a~~] small employer carrier seeking to maintain its status after that date must file with the commissioner, at least 90 days before the fifth anniversary of its election, the same information required by subsection (a)(1) and (2) of this section.[~~:~~]

[~~(1) as a reinsured carrier must file with the commissioner, at least 90 days prior to the fifth anniversary of its election, Form Number 1212 RISK to renew that election;~~]

[~~(2) as a risk-assuming carrier must file with the commissioner, at least 90 days prior to the fifth anniversary of its election, Form Number 122 RISK to reapply for the commissioner's approval of that election.~~]

(d) A form fulfilling the requirements of this section is available at www.tdi.texas.gov/forms/form10smgroup at the link for Election and Application to be a Risk-Assuming or Reinsured Carrier.

§26.19. Filing Requirements.

(a) Each small employer carrier must [~~shall~~] file each form, including, but not limited to, each policy, contract, certificate, agreement, evidence of coverage, endorsement, amendment, enrollment form, and application that will be used to provide a health benefit plan in the small employer market, [~~with the department~~] in accordance with Insurance Code Chapter 1701 (concerning Policy Forms) [~~Article 3.42~~], and Chapter 3, Subchapter A of this title (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings), or Insurance Code Chapter 1271 (concerning Benefits Provided by Health Maintenance Organizations; Evidence of Coverage; Charges) [~~Article 20A.09~~], and §11.301 of this title (relating to Filing Requirements) or §11.302 of this title (relating to Service Area Expansion or Reduction Applications), as applicable.[~~, except as provided in subsection (b) of this section.~~] A small employer carrier desiring to use existing forms to provide a health benefit plan in the small employer market must [~~shall~~] file a certification stating which previously approved forms the health carrier intends to use in that market, provided that the [~~such~~] forms have been amended to comply with applicable laws. A form fulfilling this requirement is available at www.tdi.texas.gov/forms/form10smgroup at the link for Form Number 1212 CERT ANN LIST-OTHER/SEHBP [~~shall be used for this purpose. The certification shall be forwarded to the department as soon as reasonably possible after January 1, 1994, and for newly elected small employer carriers no later than with the first filing of a small employer health benefit plan~~].

[~~(b) Each small employer carrier shall submit a geographic service area certification form, provided in Form Number 1212 CERT GEOG, prior to offering any small employer health benefit plan and subsequent to such filing only if the small employer carrier changes the elections it made in the certification. The certification form shall define the geographic service areas within which the small employer carrier will operate as a small employer carrier.~~]

[~~(1) Each small employer carrier shall submit this certification form no later than with the initial filing of a small employer health benefit plan.~~]

[~~(2) If a small employer carrier elects to alter its geographic service areas, the small employer carrier shall notify the department of its intent at least 30 days prior to the date the small employer carrier intends to effect the change. The small employer carrier shall utilize Form Number 1212 CERT GEOG to submit this information. This subsection does not exempt a health carrier from any other legal requirements, such as those for withdrawal from the market under §§7.1801, et seq. of this title (relating to Withdrawal Plan Requirements and Procedures.~~]

(b) [~~(c)~~] Each small employer carrier, other than an HMO, must [~~shall~~] use a policy shell format for any group or individual health benefit plan form used to provide a health benefit plan in the small employer market. To expedite the review and approval process, all group and individual health benefit plan form filings (excluding HMO filings that [~~which~~] are covered in subsection (c) [~~(d)~~] of this section) must [~~shall~~] be submitted in the following order [~~as follows~~]:

(1) a group policy face page or individual policy face page, as applicable;

(2) the group certificate page or individual data page, as applicable;

(3) as applicable under Chapter 3, Subchapter A of this title (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings), the toll-free number and complaint notice page, as required by Chapter 1, Subchapter E of this title (relating to Notice of Toll-Free Telephone Numbers and Procedures for Obtaining Information and Filing Complaints);

(4) the table of contents;

(5) insert pages for the general provisions;

(6) insert pages for the required provisions and any optional provisions, if elected and as applicable;

(7) for small employer health benefit plans, an insert page for the benefits section of the health benefit plan, including, but not limited to[~~,~~] schedule of benefits;[~~,~~] definitions;[~~,~~] benefits provided;[~~,~~] exclusions and limitations;[~~,~~] continuation provisions;[~~,~~] and if applicable, alternative [~~alternate~~] cost containment, preferred provider, conversion and coordination of benefits provisions, and riders;

(8) insert pages for any amendments, applications, enrollment forms, or other form filings that [~~which~~] comprise part of the contract;

(9) insert pages for any required outline of coverage for individual products;

(10) any additional form filings and documentation as outlined in Chapter 3, Subchapter A of this title and Chapter 3, Subchapter G of this title (relating to Plain Language Requirements for Health Benefit Policies);

(11) the certifications required under this section and any other rating information required under §26.10 of this title [~~chapter~~] (relating to Establishment of Classes of Business) and §26.11 of this title [~~chapter~~] (relating to Restrictions Relating to Premium Rates); and

(12) the rate schedule applicable to any individual health benefit plan, as required by Chapter 3, Subchapter A of this title.

(c) [~~(d)~~] In addition to subsection [~~subsections~~] (a) [~~and (b)~~] of this section, the following provisions apply to each [~~health carrier that is an~~] HMO. The HMO must [~~shall~~] submit health benefit plan forms for use in the small employer market that include [~~in accordance with~~] the following.

(1) Any HMO group or individual agreement must [~~shall~~] address and include all required provisions of [~~the~~] Insurance Code[~~,~~] Chapter 1501 (concerning Health Insurance Portability and Availability Act) [~~26~~]. The [~~Such~~] agreement must [~~shall~~] be in compliance with any other applicable provisions of the Insurance Code. In addition, the agreement must [~~shall~~] comply with the provisions of Chapter 11, Subchapter F of this title (relating to Evidence of Coverage) where those provisions are not in conflict with [~~the~~] Insurance Code[~~,~~] Chapter 1501 [~~26~~].

(2) The filing must [~~shall~~] include any alternative pages [~~alternate page(s)~~] to the agreement or the schedule of benefits and any alternative schedules [~~alternate schedule(s)~~] of benefit.

(3) The filing must [~~shall~~] include any additional riders, amendments, applications, enrollment forms, or other forms and any other required documentation outlined in Chapter 11, Subchapter F of this title [~~(relating to Evidence of Coverage)~~].

(4) The filing must [~~shall~~] include any applicable requirements of Chapter 11, Subchapter D, of this title (relating to Regulatory Requirements for an HMO Subsequent to Issuance of a Certificate of

Authority), and Chapter 11, Subchapter F of this title [(relating to Evidence of Coverage)], except for:

(A) continuation and conversion of coverage, [Continuation/Conversion of Coverage which shall be] in accordance with Insurance Code Chapter 1271 [, Article 20A.09(k)] and this title;[,], and

(B) cancellation, [Cancellation which shall be] in accordance with §26.15 of this title (relating to Renewability of Coverage and Cancellation).

(5) The filing must [shall] include any rider forms that will be used with health benefit plans offered to small employers. The rider forms, if developed subsequent to approval of the agreement, must [shall] be submitted with an explanation of the market in which the forms will be used. All rider forms must [shall] comply with [the] Insurance Code Chapter 1271 [, Articles 20A.09], and applicable provisions of Chapter 11, Subchapters [Subchapter] D [of this title (relating to Regulatory Requirements for an HMO Subsequent to Issuance of a Certificate of Authority)] and [Chapter 11, Subchapter] F of this title [(relating to Evidence of Coverage)].

§26.20. Reporting Requirements.

(a) Small employer health carriers offering a small employer health benefit plan must [shall] file annually, not later than March 1 of each year, an actuarial certification Form Number 1212 CERT ACTUARIAL, Annual Small Employer Health Benefit Plan Actuarial Certification, Rev. 08/16, signed by a qualified actuary stating that the underwriting and rating methods of the small employer carrier:

(1) comply with accepted actuarial practices;

(2) are uniformly applied to each small employer health benefit plan covering a small employer; and

(3) comply with the provisions of [the] Insurance Code[,] Chapter 1501 (concerning Health Insurance Portability and Availability Act) [26, Subchapters A-G,] and this chapter.

(b) Form Number 1212 CERT ACTUARIAL is available at www.tdi.texas.gov/forms/forms10smgroup at the link for Form Number 1212 CERT ACTUARIAL Annual Small Employer Health Benefit Plan Actuarial Certification.

(c) [(b)] Not later than March 1 of each calendar year, a small employer carrier must [shall] complete and file with the commissioner Form Number 1212 CERT DATA Annual Small Employer Health Benefit Plan Report, Rev. 08/16, available at www.tdi.texas.gov/forms/forms10smgroup. This annual filing must [shall] include the following information related to the previous calendar year for health benefit plans issued by the small employer carrier to small employers in this state:

(1) the number of small employers that were issued and the number of lives that were covered under health benefit plans in the previous calendar year (separated, if applicable, as to newly issued plans and renewals);

(2) the number of small employers that were issued and the number of lives that were covered under consumer choice health benefit plans;[,] plans offering all state-mandated health benefits;[,] HMO consumer choice health benefit plans and HMO plans, including all state-mandated health benefits in the previous calendar year (as applicable, separated as to newly issued plans and renewals and by groups based on the following covered-employee size ranges: 2 - 9, 10 - 20, 21 - 35, [and] 36 - 50, and more than 50);

[(3) a copy of the certificate of coverage for each of the carrier's three (if applicable) most frequently issued consumer choice health benefit plans. Each certificate must illustrate the selected benefits and plan features without variability;]

(3) [(4)] the number of small employer health benefit plans in force and the number of lives covered under those plans,[. This information should be] broken down by the ZIP [zip] code of the small employers' principal place of business in [the state of] Texas;

(4) [(5)] the number of small employer health benefit plans [that were] voluntarily not renewed by small employers in the previous calendar year;

(5) [(6)] the number of small employer health benefit plans [that were] terminated or nonrenewed (for reasons other than nonpayment of premium) by the health carrier in the previous calendar year;

(6) [(7)] the number of small employer health benefit plans [that were] issued to small employers that were uninsured for at least the two months before [prior to] issue;

(7) [(8)] the health carrier's gross premiums derived from health benefit plans delivered, issued for delivery, or renewed to small employers in the previous calendar year[. For purposes of this subsection, gross premiums shall be the total amount of monies collected by the health carrier for health benefit plans during the applicable calendar year or the applicable calendar quarter. Gross premiums shall include premiums collected for individual and group health benefit plans issued to small employers or their employees. Gross premiums shall also include premiums collected under certificates issued or delivered to employees (in this state) of small employers, regardless of where the policy is issued or delivered];

(8) [(9)] the name and license information [if applicable, information] regarding any other small employer carrier whose health benefit plans the health carrier [small employer health benefit plans] assumed [from another small employer carrier]; and

(9) [(10)] the number of small employers and the number of lives that were covered under plans issued to small employer health coalitions and cooperatives in the previous calendar year (as applicable, separated as to newly issued plans and renewals).

§26.25. Unfair Competition and Unfair Practices [under the Insurance Code, Article21.21].

A misrepresentation about the effects of [the] Insurance Code[,] Chapter 1501 (concerning Health Insurance Portability and Availability Act) or [26, Subchapters A-G, and/or] this subchapter in marketing small employer health plans or in the marketing, renewing, or canceling of other health insurance products will be considered a violation of [the] Insurance Code Chapter 541 (concerning Unfair Methods of Competition and Unfair or Deceptive Acts or Practices) and §543.001 (concerning Misrepresentation Prohibited) [, Articles 21.20 and Articles 21.21].

§26.28. Territorial Exclusions.

Subject to the provisions of Chapter 3 of this title (relating to Life, Accident, and Health Insurance and Annuities) and Chapter 11 of this title (relating to Health Maintenance Organizations), a small employer health benefit plan may not exclude health care services, supplies, or drugs provided for medical emergencies outside the plan service area, including outside the United States.

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 13, 2016.

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Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 676-6584

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SUBCHAPTER C. LARGE EMPLOYER HEALTH INSURANCE PORTABILITY AND AVAILABILITY ACT REGULATION

28 TAC §§26.301 - 26.310, 26.312 - 26.314

STATUTORY AUTHORITY. The amendments to 28 TAC §§26.301 - 26.310, 26.312, and new §26.313 and §26.314 are proposed under the following sections of the Insurance Code:

Article 21.42 provides that any insurance payable to any citizen or inhabitant of this state by a company doing business within this state to be held to be a contract made and entered into and governed by Texas insurance law despite execution of the contract or payment of the premiums made outside of this state.

Section 1251.008 authorizes the commissioner to adopt rules as necessary to administer Chapter 1251.

Section 1501.010 authorizes the commissioner to adopt rules necessary to implement Chapter 1501 and to meet the minimum requirements of federal law.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI.

CROSS-REFERENCE TO STATUTE.

Insurance Code Article 21.42, §36.001 and §1251.008, and Chapter 1501.

§26.301. Applicability, Definitions, and Scope.

(a) The applicable terms defined in §26.4 of this title (relating to Definitions) are incorporated into this subchapter.

(b) Insurance Code Chapter 1501 (concerning the Health Insurance Portability and Availability Act) and this subchapter regulate all health benefit plans sold to large employers, whether the plans are sold directly or through associations or other groupings of large employers.

(c) [~~(a)~~] Except as otherwise provided, this subchapter applies [~~shall apply~~] to any health benefit plan providing health care benefits covering 51 or more [~~eligible~~] employees of a large employer, whether provided on a group or individual franchise insurance policy basis, regardless of whether the policy was issued in this state, if it provides coverage to any citizen or inhabitant of this state and if the plan meets one of the following conditions:

(1) a portion of the premium or benefits is paid by a large employer;

(2) the health benefit plan is treated by the employer or by a covered individual as part of a plan or program for the purposes of the United States Internal Revenue Code of 1986 (26 U.S.C. [~~United States Code~~] §106, concerning Contributions by Employer to Accident and Health Plans, or §162, concerning Trade or Business Expenses);

(3) the health benefit plan is a group policy issued to a large employer; or

(4) the health benefit plan is an employee welfare benefit plan under 29 C.F.R. 2510.3-1 (concerning Employee Welfare Benefit Plan) [~~2510.3-1(i)~~].

(d) [~~(b)~~] For an employer that [~~who~~] was not in existence the previous calendar year [~~throughout the calendar year preceding the year in which the determination of whether the employer is a large employer is made~~], the determination is based on the average number of employees the employer reasonably expects to employ on business days in the calendar year in which the determination is made.

[~~(c) An insurance policy, evidence of coverage, contract, or other document that is delivered, issued for delivery, or renewed to large employers and their employees on or after July 1, 1997, shall comply with all provisions of the Insurance Code, Chapter 26, Subchapters A and H and with this subchapter].~~

[~~(d) An insurance policy, evidence of coverage, contract or other document establishing coverage under a health benefit plan for large employers and their employees that is delivered, issued for delivery or renewed before July 1, 1997 is governed by the law as it existed before that date, until the first renewal date of that policy, evidence of coverage, contract or other document establishing coverage on or after July 1, 1997.]~~

(e) If a large employer or the employees of a large employer are issued a health benefit plan under the provisions of [~~the~~] Insurance Code Chapter 1501[~~, 26, Subchapters A and H,~~] and this subchapter, and the large employer subsequently employs fewer [~~less~~] than 51 [~~eligible~~] employees, the provisions of [~~the~~] Insurance Code[~~,~~] Chapter 1501 [~~26, Subchapters A and H~~] and this subchapter [~~shall~~] continue to apply to that particular health plan if the employer elects to renew the large employer health benefit plan subject to the provisions of §26.308 of this title [~~chapter~~] (relating to Renewability of Coverage and Cancellation). A health carrier providing coverage to [~~such~~] an employer must [~~shall~~], within 60 days of becoming aware that the employer has fewer [~~less~~] than 51 [~~eligible~~] employees, but not later than the first renewal date occurring after the employer ceases to be a large employer, notify the employer of the following:

(1) The employer may renew the large employer policy.

(2) If the employer does not renew the large employer health benefit plan, the employer will be subject to the requirements of [~~the~~] Insurance Code[~~,~~] Chapter 1501 that apply to [~~26, Subchapters A-G concerning~~] small employers, and Chapter 26, Subchapter A of this title [~~chapter~~] (relating to Definitions, Severability, and Small Employer Health [~~Insurance Portability and Availability~~] Regulations), including:

(A) guaranteed issue;[~~,~~]

(B) rating protections;[~~,~~] and

(C) minimum participation, [~~/~~] contribution, and [~~/~~] minimum group size requirements.

(3) The employer has the option to purchase a small employer health benefit plan from the employer's current health carrier, if the carrier is offering small employer [~~such~~] coverage, or from any small employer carrier currently offering small employer coverage in this state.

(4) If the employer fails to comply with the qualifying minimum participation, contribution, or group size requirements[~~,~~] of §26.303 of this title [~~chapter~~] (relating to Coverage Requirements) and Insurance Code §1501.605 (concerning Minimum Contribution or

Participation Requirements), the health carrier may terminate coverage under the plan, provided that the termination complies with [~~shall be in accordance with~~] the terms and conditions of the plan concerning termination for failure to meet the qualifying minimum participation, contribution, or minimum group size requirement and in accordance with Insurance Code §§1501.108 - 1501.111 (concerning Renewability of Coverage: Cancellation; Refusal to Renew; Discontinuation of Coverage; Notice to Covered Persons; Written Statement of Denial, Cancellation, or Refusal to Renew Required, respectively) [~~Articles 26.86, 26.87, 26.88~~] and §26.308 [~~§26.303~~] of this title [~~chapter~~].

(f) If a health benefit plan is issued [~~on or after July 1, 1997,~~] to an employer that is not a large employer [~~as defined in the Insurance Code. Chapter 26~~], but subsequently the employer becomes a large employer, the provisions of [~~the~~] Insurance Code[~~,~~] Chapter 1501 [~~26, Subchapter H~~] and this subchapter [~~shall~~] apply to the health benefit plan on the first renewal date, unless the employer was a small employer and renews its current health benefit plan [~~plans~~] as provided under §26.5(e) [~~§26.5(i)~~] of this title (relating to Applicability and Scope).

(g) A large employer non-federal governmental employee health benefit plan that is not self-funded is subject to the Insurance Code and this title, as applicable, including Chapter 1501 and this chapter.

(h) If a large employer has employees in more than one state, the provisions of Insurance Code Chapter 1501 and this subchapter apply to a health benefit plan issued to the large employer if the:

(1) majority of employees are employed in this state on the issue date or renewal date; or

(2) primary business location is in this state on the issue date or renewal date and no state contains a majority of the employees.

(i) A carrier licensed in this state that issues a certificate of insurance covering a Texas resident is responsible for ensuring that the certificate complies with applicable Texas insurance laws and rules, including mandated benefits, regardless of whether the group policy underlying the certificate was issued outside the state.

[~~(g) A governmental entities' health benefit plan (subject to Insurance Code, Articles 3.51-1, 3.51-2, 3.51-3, 3.51-4, 3.51-5, or 3.51-5A) that is provided through health insurance coverage and that otherwise meets the requirements of being a large employer is subject to the provisions of Chapter 26, Insurance Code, Subchapters A and H and this subchapter. The portion of a non-federal governmental entity's health benefit plan that is self-insured may elect not to comply with §2721 of the Public Health and Services Act as added by the Health Insurance Portability and Availability Act of 1996.~~]

§26.302. Status of Health Carriers as Large Employer Carriers [~~and Geographic Service Area~~].

(a) With the original filing to enter the large employer market or when notifying TDI of a change in status [~~Not later than March 1 annually~~], each health carrier providing health benefit plans in this state must file [~~shall make a filing~~] with the commissioner a statement indicating whether the health carrier will or will not offer, renew, issue, or issue for delivery health benefit plans to large employers in this state [~~as defined in the Insurance Code, Chapter 26, Subchapters A and H, and this subchapter~~]. The [~~required~~] filing must [~~shall~~] include a [~~the~~] certification, signed by an officer of the company, that the carrier intends to operate in accordance with the status certification unless or until changed in accordance with this section, [~~form Form Number 1212 CERT LEHC STATUS, completed according to the carrier's status,~~] and [~~shall at least~~] provide a statement that [~~to the effect of one of the following~~]:

(1) the health carrier intends to offer, renew, issue, and issue for delivery health benefit plans to large employers in Texas, [~~and their employees~~] and [~~therefore~~] will operate in accordance with Insurance Code[~~,~~] Chapter 1501 (concerning Health Insurance Portability and Availability Act) [~~26, Subchapters A and H~~] and this subchapter;

(2) the health carrier does not intend to offer, issue, or issue for delivery health benefit plans to large employers in Texas, but [~~and their employees; however,~~] the health carrier intends to renew existing health benefit plans [~~issued prior to July 1, 1997 and comply with the Insurance Code, Chapter 26, Subchapters A and H, and this subchapter~~];

(3) the health carrier does not intend to offer, issue, or issue for delivery health benefit plans to large employers [~~and their employees~~] in [~~the State of~~] Texas; [~~and~~] intends to nonrenew all health benefit plans issued to large employers in Texas; and will provide notice to the commissioner and employers in accordance with §26.309 of this title (relating to Refusal to Renew and Application to Reenter Large Employer Market) and Insurance Code §1501.110 (concerning Notice to Covered Persons); or

(4) the health carrier has no health benefit plans issued to large employers or to employees of a large employer [~~which are in force on or after July 1, 1997,~~] and [~~the health carrier~~] does not intend to offer, issue, or issue for delivery health benefit plans to large employers.

(b) If a health carrier chooses to change its election or the date of implementing its election under subsection (a)(1), (2), or (4) of this section, the health carrier must [~~shall~~] notify the commissioner of its new election at least 30 days before [~~prior to~~] the date the health carrier intends to begin operations under the new election. [~~This notification shall made on Form Number 1212 CERT LEHC STATUS.~~]

(c) A form fulfilling the requirements of subsections (a) and (b) of this section is available online at www.tdi.texas.gov/forms/form10smgroup at the link for Large Employer Carrier Status Certification. [~~Upon election to become a large employer carrier, the health carrier shall establish geographic service areas within which the health carrier reasonably anticipates it will have the capacity to deliver services to large employers in each established geographic service area. Large employer carriers shall comply with the following:~~]

[~~(1) The health carrier shall define and submit the geographic service areas in terms of counties or ZIP codes, to the extent possible.~~]

[~~(2) If the health carrier cannot define the service area by counties or ZIP code, the health carrier shall submit a map which clearly shows the geographic service areas.~~]

[~~(3) If the geographic service area of the carrier is the entire state, the carrier shall define the service area as the State of Texas and no other documentation is necessary.~~]

[~~(4) Service areas by zip code shall be defined in a non-discriminatory manner and in compliance with the Insurance Code, Articles 21.21-6 and 21.21-8~~].

[~~(5) Networks of HMO large employer carriers shall be established in accordance with Chapter 20A, Insurance Code and Chapter 11 of this title (relating to Health Maintenance Organizations)~~].

[~~(6) Large employer carriers shall, no later than the initial filing of a large employer health benefit plan, utilize Form Number 1212 LEHC GEOG to submit this information.~~]

[~~(d) If a large employer carrier elects to alter its geographic service area, the large employer carrier shall notify the department of its~~

intent at least 30 days prior to the date the health carrier intends to effect the change. The large employer carrier shall utilize Form Number 1212 LEHC GEOG to submit this information.]

(d) [(e)] The [This section does not exempt a] large employer carrier must also comply with [from] any other applicable legal requirements, including [such as] those for withdrawal from the market under Chapter 7, Subchapter R [§§7.1801, et seq.] of this title (relating to Withdrawal Plan Requirements and Procedures).

§26.303. Coverage Requirements.

[(a) A large employer carrier may refuse to provide coverage to a large employer in accordance with the carrier's underwriting standards and criteria. However, on issuance to a large employer, each large employer carrier shall provide coverage to the eligible employees meeting the participation criteria established by the large employer without regard to an individual's health status related factors. The participation criteria may not be based on health status related factors. A large employer's participation criteria may not require an employee to maintain an actively at work status, unless the actively at work status is wholly unrelated to health status related factors, such as time off for a sabbatical leave or vacation.]

(a) [(b)] The large employer carrier must [shall] accept or reject the entire group of individuals who meet the participation criteria established by the employer and who choose coverage, and may exclude only those eligible employees or dependents[, if applicable,] who have declined coverage. The carrier may charge premiums in accordance with Insurance Code §1501.107 (concerning Discounts, Rebates, and Reductions) and §1501.610 (concerning Premium Rates: Adjustments) [Article 26.89] to the group of employees or dependents[, if applicable,] who meet the participation criteria established by the employer and who do not decline coverage.

(b) [(c)] A large employer carrier must [shall] secure a written waiver for each eligible employee who meets the participation criteria and each dependent, if dependent coverage is offered to enrollees under a large employer health benefit plan, who declines an offer of coverage under a health benefit plan provided to a large employer. If a large employer elects to offer coverage through more than one large employer carrier, waivers are only required to be signed if the [eligible] individual is declining all offered plans [large employer health benefit plans offered]. The large employer carriers may enter into an agreement designating which large employer carrier will receive and retain the waiver. Waivers must [shall] be maintained by the large employer carrier for a period of six years. The waiver must ensure that the employee was not induced or pressured into declining coverage because of the employee's health-status-related [health status related] factors. The waiver must [shall] be signed by the employee (on behalf of the [such] employee or the dependent, if applicable[, of such employee]) and must [shall] certify that the individual who declined coverage was informed of the availability of coverage under the health benefit plan. Receipt by the large employer carrier of a facsimile transmission of the waiver is permissible, provided [that] the transmission includes a representation from the large employer that the employer will maintain the original waiver on file for a period of six years from the date of the facsimile transmission. The waiver form must [shall]:

(1) require that the reason for declining coverage be stated on the form;

(2) include a written warning of the penalties imposed on late enrollees; and

(3) include a statement that the following individuals were not induced or pressured by the large employer, agent, or health carrier into declining coverage, but elected to decline coverage:

(A) an eligible employee who meets the large employer's participation criteria; and

(B) the employee's dependents, if dependent coverage is offered to enrollees under a large employer health benefit plan[, were not induced or pressured by the large employer, agent, or health carrier into declining coverage, but elected of their own accord to decline such coverage].

[(d) A large employer carrier may not provide coverage to a large employer or the employees of a large employer if the carrier or an agent for the carrier knows that the large employer has induced or pressured an employee who meets the participation criteria or a dependent of the employee to decline coverage because of that individual's health status related factors.]

(c) [(e)] An agent must [shall] notify a large employer carrier, before [prior to] submitting an application for coverage with the health carrier on behalf of a large employer or its employees [employee of a large employer], of any circumstances that would indicate that the large employer has induced or pressured an eligible employee [eligible employee] who meets the large employer's participation criteria or a dependent [of the employee] to decline coverage due to the individual's health-status-related [health status related] factors.

[(f) A large employer carrier may require a large employer to meet minimum premium contribution requirements as a condition of issuance and renewal in accordance with the carrier's usual and customary practices for all employer health benefit plans in this state. A health carrier shall treat all similarly situated large employer groups in a consistent and uniform manner when terminating health benefit plans due to failure of the large employer to meet a contribution requirement. If a large employer fails to meet a contribution requirement for a large employer health benefit plan, the health carrier may terminate coverage as provided under the plan in accordance with the terms and conditions of the plan requiring such contribution and in accordance with Insurance Code Articles 26.86, 26.87, and 26.88 and §26.308 of this chapter (relating to Renewability of Coverage and Cancellation).]

(d) [(g)] Health carriers may require large employers to answer questions designed to determine the level of premium contribution by the large employer and the percentage of participation of eligible employees [of the large employer].

[(h) A large employer carrier may require a large employer to meet minimum participation requirements as a condition of issuance and renewal in accordance with the carrier's usual and customary practices for all employer health benefit plans in this state. The minimum participation requirements may determine the percentage of individuals that must be enrolled in the plan in accordance with participation criteria established by the employer. These minimum participation requirements must be stated in the contract and must be applied uniformly to each large employer offered or issued coverage by the large employer carrier in this state. A large employer health carrier shall accept or reject the entire group of eligible employees meeting the participation criteria and minimum participation requirements that choose to participate and exclude only those employees and dependents, if applicable, that have declined coverage.]

(e) [(i)] In this section, an "eligible employee" does not include employees who are within their waiting or affiliation period for percentage of participation requirement purposes. In determining whether an employer has the required percentage of participation of eligible employees who meet the large employer's participation criteria, if the percentage of eligible employees is not a whole number, the result of applying the percentage to the number of eligible employees must [shall] be rounded down to the nearest whole number. For example: if a large employer health carrier uses a minimum participation requirement of

75 percent [%] of the eligible employees meeting the large employer's participation criteria, 75 percent [%] of 55 employees is 41.25. Round [, so] 41.25 [would be rounded] down to 41; so, [therefore,] 75 percent [%] participation by a 55-employee [55 employee] group would [will] be achieved if 41 of the eligible employees who meet [meeting] the large employer's participation criteria participate.

(f) [(j)] If a large employer fails to meet the qualifying minimum participation requirement [for a large employer health benefit plan,] for [a period of at least] six consecutive months, the large employer health carrier may terminate coverage under the plan on [upon] the first renewal date following that period. The [the end of the six-month consecutive period during which the qualifying minimum participation requirement was not met, provided that the] termination must comply [shall be in accordance] with the terms and conditions of the plan concerning termination for failure to meet the qualifying minimum participation percentage [requirement] and in accordance with Insurance Code §§1501.108 - 1501.111 (concerning Renewability of Coverage: Cancellation; Refusal to Renew; Discontinuation of Coverage; Notice to Covered Persons; and Written Statement of Denial, Cancellation, or Refusal to Renew Required, respectively) [Articles 26.86, 26.87, 26.88] and §26.308 of this title (relating to Renewability of Coverage and Cancellation) [chapter]. A large employer health carrier must [shall] treat all similarly situated large employer groups in a consistent and uniform manner when terminating health benefit plans due to a participation level of less than the qualifying participation level.

(g) [(k)] A large employer must continue to meet the qualifying minimum group size requirement of §26.301(c) [§26.5(a)] of this title [chapter] (relating to Applicability, Definitions, and Scope) to be entitled to elect to renew coverage under [pursuant to] §26.301(e) of this title [chapter (relating to Applicability and Scope)]. If a large employer fails to meet, for [a period of at least] six consecutive months, the minimum group size requirement of §26.301(c) [§26.5(a)] of this title [chapter], the health carrier may terminate coverage under the plan on [upon] the first renewal date following that period. The [the later of the end of the six-month consecutive period during which the large employer did not meet the qualifying minimum group size requirement, provided that the] termination must comply [shall be in accordance] with the terms and conditions of the plan concerning termination for failure to meet the minimum group size requirements in §26.301(c) [of §26.5(a)] of this title [chapter], and in accordance with [the] Insurance Code §§1501.108 - 1501.111 [Articles 26.86, 26.87, 26.88] and §26.308 of this title. [chapter.]

§26.304. Requirement to Insure Entire Groups.

(a) A large employer carrier that offers coverage to a large employer and its employees must [shall] offer [to provide] coverage to each eligible employee who meets the large employer's participation criteria. If dependent coverage is offered to enrollees under a large employer health benefit plan, [then] a large employer carrier must [shall] offer [to provide] coverage to each eligible dependent. Except as provided in subsection (b) of this section, the large employer carrier must [shall] provide the same health benefit plan to each [such] employee and dependent.

(b) If elected by the large employer, a large employer carrier may offer [the eligible employees of a large employer, who meet the participation criteria, the option of choosing among] one or more health benefit plans, provided that each eligible employee who meets the participation criteria may choose any of the plans offered [to the employee]. Except as provided in [the] Insurance Code §1501.104 (concerning Affiliation Period) and §1501.106 (concerning Certain Limitations or Exclusions of Coverage Prohibited), [Articles 26.83 and 26.90 (] with respect to an affiliation period or exclusions for preexisting conditions[)], the choice among benefit plans may not be limited, restricted, or conditioned based on [upon] the health-status-related [health status related] factors of the [eligible] employees or [their] dependents, if applicable.

(c) A large employer carrier may require each large employer that applies for coverage, as part of the application process, to provide a complete list of employees, eligible employees, and if dependent coverage is offered to enrollees under a large employer health benefit plan, a complete list of dependents of eligible employees [as defined in Insurance Code Article 26.02]. The large employer carrier may also require the large employer to provide reasonable and appropriate supporting documentation to verify the information required under this subsection, and [as well as] to confirm the applicant's status as a large employer. The large employer carrier must [shall] make a determination of eligibility within five business days of receipt of any requested documentation. A large employer carrier may not condition the issuance of coverage on an employer's production of a particular document, where the employer can otherwise provide the information required by this section. Similarly, if a particular document an employer produces does not reasonably evidence the employer's compliance with this subsection, the employer must produce other documentation to satisfy the requirements. Examples [Following are examples] of the types of reasonable and appropriate supporting documentation that [which] a large employer carrier may request [, as reasonable and appropriate,] from an employer as needed to fulfill the purposes of this subsection are:[.]

(1) a W-2 Summary Wage and Tax Form or other federal or state tax records;

(2) a loan agreement;

(3) an invoice;

(4) a business check;

(5) a sales tax license;

(6) articles of incorporation or other business entity filings with the secretary of state [Secretary of State];

(7) assumed name filings;

(8) professional licenses; and

(9) reports required by the Texas Workforce Commission.

(d) A large employer carrier may [shall] not deny two individuals who are married the status of eligible employee solely on the basis that the two individuals are married. The large employer carrier must [shall] provide a reasonable opportunity for the individuals to submit evidence as provided in subsection (c) of this section to establish each individual's status as an eligible employee.

(1) A large employer carrier must [shall] provide married eligible employees of the same employer the option to [elect to] have one spouse be treated under a large employer health benefit plan as an employee, and the other spouse treated as an employee or alternatively as the dependent of the other employee.

(2) A child of either of the two individuals may only be covered under the large employer health benefit plan as a dependent by one of the two individuals.

(3) An election by a spouse to be treated as a dependent under [pursuant to] this subsection does not impact the individual's status as an eligible employee for any other purpose under [the] Insurance Code[,] Chapter 1501 (concerning Health Insurance Portability and Availability Act), except that the [such] individual may be treated as a dependent for purposes of employer premium contributions.

(e) New entrants who meet the large employer's participation criteria in a health benefit plan issued to a large employer group must [shall] be offered an opportunity to enroll in the health benefit plan currently held by the [such] employer group or [shall] be offered an opportunity to enroll in the health benefit plan if the plan is provided through an individual franchise insurance policy or more than one plan is available. If a large employer carrier has offered more than one health benefit plan to eligible employees of a large employer group under [pursuant to] subsection (b) of this section, the new entrant must [shall] be offered the same choice of health benefit plans as the other employees (members) in the group. A new entrant who [that] does not exercise the opportunity to enroll in the health benefit plan within the period provided by the large employer carrier may be treated as a late enrollee by the health carrier, provided that the period provided to enroll in the health benefit plan complies with §26.305(a) of this title (relating to Enrollment).

(f) New entrants meeting the participation criteria in a health benefit plan issued to a large employer group must [shall] be accepted for coverage by the large employer carrier without any restrictions or limitations on coverage related to the health-status-related [health status related] factors of the employee or dependent [employees or their dependents, if applicable], except that a health carrier may exclude coverage for preexisting [pre-existing] medical conditions or impose an affiliation period, to the extent allowed under Insurance Code Chapter 1501[, Articles 26.83 and 26.90].

[(g) In the case of an eligible employee that meets the participation criteria (or dependent of an eligible employee, if applicable) who was excluded from coverage, not eligible for coverage, denied coverage by a large employer carrier, or in the process of providing a health benefit plan to an eligible large employer, the large employer carrier shall provide an opportunity for the eligible employee that meets the participation criteria (or dependent(s) of such eligible employee) to enroll in the health benefit plan issued to the large employer or the employees of the large employer on the earlier of the first renewal date occurring on or after July 1, 1997, or the first open enrollment period occurring on or after July 1, 1997. The opportunity to enroll shall meet the following requirements:]

[(1) The opportunity to enroll under this subsection shall comply with §26.305(a) of this title.]

[(2) Eligible employees that meet the large employer's participation criteria and dependents of eligible employees who are provided an opportunity to enroll pursuant to this subsection shall be treated as new entrants.]

[(3) The terms of coverage offered to an individual described in this subsection may exclude coverage for preexisting conditions or impose an affiliation period only if the health benefit plan currently held by the large employer contains such an exclusion or affiliation period.]

[(4) A large employer carrier shall provide written notice at least 45 days prior to the opportunity to enroll provided in this subsection or if less than 45 days are available, within five working days after determination that subsections (e) - (g) of this section apply to each large employer insured under a health benefit plan offered by such health carrier. A large employer carrier may provide the notice to the employer if the carrier has entered into an agreement with the employer to provide the notice to the employees. The notice shall clearly describe the rights granted under subsections (e) - (g) of this section to employees or dependents who were previously excluded from, not eligible for, or denied coverage and the process for enrollment of such individuals in the employer's health benefit plan.]

[(h) A large employer carrier may require an individual who requests enrollment under subsection (g) of this section to sign a statement indicating that such individual sought coverage under the group contract or franchise policy (other than as a late enrollee) and that the coverage was not offered or provided to the individual.]

§26.305. Enrollment.

(a) Periods provided for enrollment in and application for any health benefit plan provided to a large employer group must [shall] comply with the following:

(1) the initial enrollment period for the employees meeting the large employer's participation criteria must [shall] extend at least 31 consecutive days after the employee's initial date of employment, or if the waiting period exceeds 31 days, at least 31 consecutive days after the date the new entrant completes the waiting period for coverage;

(2) the new entrant who meets the large employer's participation criteria must [shall] be notified of his or her opportunity to enroll at least 31 days in advance of the last date enrollment is permitted;

(3) a new entrant's application for coverage is [shall be] timely if he or she submits the application within [a period of at least] 31 consecutive days following the initial date of employment, or following the date the new entrant is eligible for coverage:[.]

(A) in person;

(B) by mail, [For purposes of this paragraph, "submits" means that the item(s) must be] postmarked by the end of the specified [time] period; or[.]

(C) in an [At the discretion of the large employer carrier,] alternative method normally accepted by the large employer carrier, including [methods of submission, such as] facsimile transmission (fax), email, or web-based application [may be acceptable]; and

(4) the large employer carrier must [shall] provide an annual open enrollment period of at least 31 consecutive days.

(b) If dependent coverage is offered to enrollees under a large employer health benefit plan, the initial enrollment period for the dependents must be at least 31 consecutive days, with a 31-consecutive-day [31 consecutive day] annual open enrollment period.

(c) A new employee who meets the participation criteria of a covered large employer may not be denied coverage if the application for coverage is received by the large employer carrier not later than the 31st day after the later of:

(1) the date on which the employment begins; or

(2) the date on which the waiting period established under Insurance Code §1501.606 (concerning Employee Enrollment; Waiting Period) [Article 26.83(h)] expires.

(d) If dependent coverage is offered to the enrollees under a large employer health benefit plan, a dependent of a new employee who meets the participation criteria established by the large employer may not be denied coverage if the application for coverage is received by the large employer carrier not later than the 31st day after the later of:

(1) the date on which the employment begins;

(2) the date on which the waiting period established under Insurance Code §1501.606[, Article 26.83(h)] expires; or

(3) the date on which the dependent becomes eligible for enrollment.

(e) A large employer carrier may not exclude any eligible employee who meets the participation criteria or an eligible dependent, in-

cluding a late enrollee, who would otherwise be covered under a large employer group.

(f) A large employer health benefit plan may not limit or exclude initial coverage of a newborn child of a covered employee. Any coverage of a newborn child of an insured [~~a covered employee~~] under this subsection terminates on the 32nd day after the date of the birth of the child unless:

(1) dependent children are eligible for coverage under the large employer health benefit plan; and

(2) notification of the birth and any required additional premium are received by the large employer not later than the 31st day after the date of birth. A large employer carrier may [~~shall~~] not terminate coverage of a newborn child if the [~~such~~] carrier's billing cycle does not coincide with this 31-day premium payment requirement, until the next billing cycle has occurred and there has been nonpayment of the additional required premium, within 30 days of the due date of the [~~such~~] premium.

(g) If dependent children are eligible for coverage under the large employer health benefit plan, a large employer health benefit plan may not limit or exclude initial coverage of an adopted child of an insured. [~~A child is considered to be the child of an insured if the insured is a party in a suit in which the adoption of the child by the insured is sought.~~]

(h) If dependent children are eligible for coverage under the large employer health benefit plan, an adopted child of an insured may be enrolled, at the option of the insured, within either:

(1) 31 days after the an insured is a party in a suit for adoption; or

(2) 31 days of the date the adoption is final.

(i) Coverage of an adopted child of an employee terminates unless notification of the adoption and any required additional premiums are received by the large employer not later than either:

(1) the 31st day after the insured becomes a party in a suit in which the adoption of the child by the insured is sought; or

(2) the 31st day after the date of the adoption. A large employer carrier may [~~shall~~] not terminate coverage of an adopted child if the [~~such~~] carrier's billing cycle does not coincide with this [~~his~~] 31-day premium payment requirement, until the next billing cycle has occurred and there has been nonpayment of the additional required premium within 30 days of the date of the [~~such~~] premium.

(j) For purposes of [~~subsections (c), (d), (g), and (j) of~~] this section, "received by the large employer" within [~~by~~] a specified [~~time~~] period means that the item(s) must be postmarked by the specified [~~time~~] period.

(k) If a newborn or adopted child is enrolled in a health benefit plan or other creditable coverage within the [~~time~~] periods specified in [~~subsections (g) or (j) of~~] this section, [~~respectively,~~] and subsequently enrolls in another health benefit plan without a significant break in coverage, the other plan may not impose any preexisting condition exclusion with regard to the child. If a newborn or adopted child is not enrolled within the [~~time~~] periods specified in [~~subsections (g) or (j) of~~] this section, [~~respectively,~~] then in accordance with §26.306(h) of this title (relating to Exclusions, Limitations, Waiting Periods, Affiliation Periods, [~~and~~] Preexisting Conditions, and Restrictive Riders), the newborn or adopted child may be considered a late enrollee or excluded from coverage until the next open enrollment period.

[~~(l) If dependent coverage is offered to enrollees under a large employer health benefit plan, and the plan conditions dependent coverage for a child 21 years of age or older on the child's being a full-time student at an educational institution, the plan shall provide coverage for the child in accordance with Insurance Code Article 21.24-2.~~]

[~~(m) If benefits for diagnostic medical procedures are included under a large employer health benefit plan, then the plan shall provide coverage for each male enrolled in the plan for expenses incurred in conducting an annual medically recognized diagnostic examination for the detection of prostate cancer in accordance with Insurance Code Article 21.53F.~~]

[~~(n) An HMO issuing coverage to a large employer whose health benefit plan requires an enrollee to obtain certain specialty health care services through a referral made by a primary care physician or other gatekeeper, shall permit female enrollees access to obstetrical or gynecological care in accordance with Insurance Code Article 21.53D and Chapter 11 of this title (relating to Health Maintenance Organizations).~~]

§26.306. Exclusions, Limitations, Waiting Periods, Affiliation Periods, [~~and~~] Preexisting Conditions, and Restrictive Riders.

(a) A large employer carrier may not exclude any eligible employee who meets the participation criteria or an eligible dependent, if dependent coverage is offered to enrollees under a large employer health benefit plan (including a late enrollee, who would otherwise be covered under a large employer's health benefit plan), except to the extent permitted under Insurance Code §§1501.102 - 1501.106 (concerning Preexisting Condition Provision, Treatment of Certain Conditions as Preexisting Prohibited, Affiliation Period, Waiting Period Permitted, and Certain Limitations or Exclusions of Coverage Prohibited) and 1501.601 - 1501.609 (concerning Participation Criteria, Coverage Requirements, Exclusion of Eligible Employee or Dependent Prohibited, Declining Coverage, Minimum Contribution or Participation Requirements, Employee Enrollment; Waiting Period, Coverage for Newborn Children, Coverage for Adopted Children, and Coverage for Unmarried Children). [~~Articles 26.83 and 26.90.~~]

(b) A preexisting condition provision in a large employer health benefit plan may not apply to expenses incurred on or after the expiration of the 12 months following the effective date of coverage of the enrollee or late enrollee, except as authorized by subsection (h)(2) of this section.

(c) A preexisting condition provision in a large employer health benefit plan may not apply to coverage for a disease or condition other than a disease or condition for which medical advice, diagnosis, care, or treatment was recommended or received from an individual licensed to provide those [~~such~~] services under state law and operating within the scope of practice authorized by state law during the six months before the effective date of coverage.

(d) A large employer carrier may [~~shall~~] not treat genetic information as a preexisting condition described by Insurance Code §1501.102[~~, Article 26.90(b)~~] in the absence of a diagnosis of the condition related to the information.

(e) A large employer carrier may [~~shall~~] not treat a pregnancy as a preexisting condition described by Insurance Code §1501.102[~~, Article 26.90(b)~~].

(f) A preexisting condition provision in a large employer health benefit plan may [~~shall~~] not apply to an individual who was continuously covered for an aggregate period of 12 months under creditable coverage that was in effect up to a date not more than 63 days before the effective date of coverage under the large employer health benefit plan, excluding any waiting or affiliation period. For

example, Individual A has coverage under an individual policy for six [~~6~~] months beginning on May 1, 2014 [~~1997~~], through October 31, 2014 [~~1997~~], followed by a gap in coverage of 61 days until December 31, 2014 [~~1997~~]. Individual A is covered under an individual health plan beginning on January 1, 2015 [~~1998~~], for six [~~6~~] months through June 30, 2015 [~~1998~~], followed by a gap in coverage of 62 days until August 31, 2015 [~~1998~~]. The effective date of Individual A's coverage under a large employer health benefit plan is September 1, 2015 [~~1998~~]. Individual A has 12 months of creditable coverage and would not be subject to a preexisting condition exclusion under the large employer health benefit plan.

(g) In determining whether a preexisting condition provision applies to an individual covered by a large employer benefit plan, the large employer carrier must [~~shall~~] credit the time the individual was covered under previous creditable coverage if the previous coverage was in effect at any time during the 12 months preceding the effective date of coverage under a large employer health benefit plan. If the previous coverage was issued under a health benefit plan, any waiting or affiliation period that applied before that coverage became effective also must [~~shall~~] be credited against the preexisting condition provision period. For instance, Individual B is covered under an individual health insurance policy for 18 months beginning May 1, 2014 [~~1995~~], through November 30, 2015 [~~1996~~], followed by a four-month [~~four month~~] gap in coverage from December 1, 2015 [~~1996~~], to March 31, 2016 [~~1997~~]. On April 1, 2016 [~~1997~~], Individual B is covered under a group health plan for three months through June 30, 2016 [~~1997~~], followed by a two-month [~~two month~~] gap in coverage until August 31, 2016 [~~1997~~]. The effective date of Individual B's coverage under a large employer health insurance policy is September 1, 2016 [~~1997~~]. Under this example, since there was a significant break in coverage, to determine the length of creditable coverage, the large employer carrier counts the creditable coverage the individual had for the 12-month [~~12 month~~] period preceding the effective date of the individual's coverage under the large employer plan. Individual B has creditable coverage of six months and the issuer of the large employer health benefit plan may impose a preexisting condition limitation for six months on Individual B.

(h) A large employer carrier must [~~shall~~] choose one of the methods set forth in paragraph (1) or (2) of this subsection for handling requests for enrollment from a late applicant in any health benefit plan subject to this subchapter. The large employer carrier must use the same method in regard [~~regards~~] to all [~~such~~] health benefit plans.

(1) The employee or dependent may be excluded from coverage and any application for coverage rejected until the next annual open enrollment period and, on [~~upon~~] enrollment, may be subject to a 12-month preexisting condition provision[~~,~~] or, in the case of an HMO, may be subject to a 60-day affiliation provision, as [~~such provisions are~~] described by Insurance Code §§1501.102 - 1501.104 [~~Article 26.90~~].

(2) The employee or dependent's application may be accepted immediately and the employee or dependent enrolled as a late enrollee during the plan year, in which case the preexisting condition provision imposed for a late enrollee may not exceed 18 months or, in the case of an HMO, the affiliation period may not exceed 90 days, from the date of the late enrollee's application for coverage.

(3) The provisions of paragraphs (1) and (2) of this subsection do not apply to employees or dependents under the special circumstances listed as exceptions under the definition of late enrollee in §26.4 of this title [~~chapter~~] (relating to Definitions).

(4) Examples for applying subparagraphs (A) and (B) of this paragraph, in the case of both insurers and HMOs: Individual A requests coverage on October 1, 2014 [~~1997~~], after the enrollment period of July 1, 2014 [~~1997~~], through July 31, 2014, [~~1997~~] has ended. The next annual open enrollment period is July 1, 2015 [~~1998~~], through July 31, 2015 [~~1998~~]. The effective date of coverage for persons enrolling during an open enrollment period is the beginning of the plan year, which is September 1 of each year.

(A) If the carrier is an insurer and has elected to exclude all applicants requesting late enrollment under health benefit plans subject to this subchapter until the next open enrollment period, Individual A must reapply for coverage in July 2015, [~~1998~~] and the carrier may apply up to a 12-month preexisting condition period from the effective date of coverage and, [~~,~~] as with any other enrollee, the preexisting condition period would begin on September 1, 2015 [~~1998~~], and expire [~~expires~~] on September 1, 2016 [~~1999~~].

(B) If the carrier is an insurer and has elected to immediately accept applications for late enrollment under health benefit plans subject to this subchapter [~~immediately~~] and enroll the applicant during the plan year, [~~then~~] the carrier may apply up to an 18-month preexisting condition period from the date of application. If Individual A applied for coverage on October 1, 2014 [~~1997~~], the preexisting condition period would begin on that date and would expire on April 1, 2016 [~~1999~~].

(C) If the carrier is an HMO and has elected to exclude all applicants requesting late enrollment under health benefit plans subject to this subchapter until the next open enrollment period, Individual A must reapply for coverage in July 2015, [~~1998~~] and the carrier may apply up to a 60-day affiliation period, as with any other enrollee.

(D) If the carrier is an HMO and has elected to immediately accept applications for late enrollment under health benefit plans subject to this subchapter [~~immediately~~] and enroll the applicant during the plan year, [~~then~~] the carrier may apply up to a 90-day affiliation period from the day Individual A applied for coverage.

(i) An HMO [~~A health maintenance organization~~] may impose an affiliation period if the period is applied uniformly to each enrollee without regard to any health-status-related [~~health status related~~] factor. The affiliation period may [~~shall~~] not exceed two months for an enrollee, other than a late enrollee, and may [~~shall~~] not exceed 90 days for a late enrollee. An affiliation period under a plan must [~~shall~~] run concurrently with any applicable waiting period under the plan. An HMO may [~~shall~~] not impose any preexisting condition limitation, except for an affiliation period.

(j) A large employer may establish a waiting period under Insurance Code §1501.606(b) applicable to all new entrants under the health benefit plan during which a new employee is not eligible for coverage. The large employer must [~~shall~~] determine the duration of the waiting period. A large employer carrier may [~~shall~~] not apply a waiting period [~~elimination period, or~~] or other similar limitation of coverage (other than an exclusion for preexisting medical conditions or [~~impose~~] an affiliation period consistent with Insurance Code §§1501.102 - 1501.106 and 1501.601 - 1501.609 [~~Articles 26.83 and 26.90~~]), with respect to a new entrant, that is longer than the waiting period established by the large employer for all other employees. On [~~Upon~~] completion of the waiting period and enrollment within the time frame allowed by §26.305(a) of this title [~~chapter~~] (relating to Enrollment), coverage must be effective no later than the next premium due date. Coverage may be effective at an earlier date, as agreed on [~~upon~~] by the large employer and the large employer carrier.

(k) A large employer health benefit plan may not, by use of a rider or amendment applicable to a specific individual, limit or exclude coverage by type of illness, treatment, medical condition, or accident, except for a preexisting condition or affiliation period permitted under

Insurance Code §§1501.102 - 1501.106 and 1501.601 - 1501.609[, Articles 26.83 and 26.90].

(l) To determine if preexisting conditions [as defined in Insurance Code Article 26.02(23)] exist, a carrier must determine [shall ascertain] the source of previous or existing coverage of each eligible employee meeting the participation criteria [and each dependent of an eligible employee] at the time the employee or dependent initially enrolls into the health benefit plan provided by the large employer carrier. The large employer carrier has [shall have] the responsibility to contact the source of [such] previous or existing coverage to resolve any questions about the benefits or limitations related to any [such] previous or existing coverage in the absence of a creditable coverage certification form.

§26.307. Fair Marketing.

(a) On [Upon] request, a [each] large employer carrier must provide to the large employer [purchasing health benefit plans shall be given] a summary of all health benefit plans offered by the large employer carrier for which the large employer qualifies [is eligible].

(b) Denial by a large employer carrier of an application for coverage or cancellation, or refusal to renew, must be in writing and must state with specificity the reasons for the denial, cancellation, or refusal to renew (subject to any restrictions related to confidentiality of medical information). The large employer carrier must [shall] notify the large employer in accordance with Insurance Code §1501.109 (concerning Refusal to Renew; Discontinuation of Coverage) and §1501.110 (concerning Notice to Covered Persons)[, Articles 26.87 and 26.88].

(c) A large employer carrier may not require, as a condition to the offer or sale of a health benefit plan to a large employer, that the large employer purchase or qualify for any other insurance product or service.

(d) The large employer carrier may [shall] not require a large employer to join or contribute to any association or group as a condition of being accepted for coverage by the large employer carrier, except that, if membership in an association or other group is a requirement for accepting a large employer into a particular health benefit plan, a large employer carrier may apply that [such] requirement, subject to the requirements of [the] Insurance Code[,] Chapter 1501 (concerning Health Insurance Portability and Availability Act) [26, Subchapters A and H].

(e) Health carriers offering individual and group health benefit plans in this state are [shall be] responsible for determining whether the plans are subject to the requirements of [the] Insurance Code[,] Chapter 1501 [26, Subchapters A and H,] and this subchapter. At the time of application, health [Health] carriers must obtain [shall elicit] the following information from applicants for those [such] plans [at the time of application]:

(1) whether any portion of the premium will be paid by a large employer;

(2) whether the prospective policyholder, certificate holder, or any prospective insured [individual] intends to treat the health benefit plan as part of a plan or program under the United States Internal Revenue Code of 1986 (26 U.S.C. [United States Code] §106, concerning Contributions by Employer to Accident and Health Plans, or §162, concerning Trade or Business Expenses);

(3) whether the health plan is an employee welfare benefit plan under 29 C.F.R. §2510.3-1 [§2510.3-1-i] (concerning Employee Welfare Benefit Plan); or

(4) whether the applicant is a large employer.

(f) If a health carrier fails to comply with subsection (e) of this section, the health carrier is [shall be] deemed to be on notice of any information that could reasonably have been attained if the health carrier had complied with subsection (e) of this section.

(g) A large employer carrier may not terminate, fail to renew, limit its contract or agreement of representation with, or take any other negative action against an agent for any reason related to the agent's request that the carrier issue or renew a health benefit plan to a large employer.

(h) If a large employer carrier issues coverage under Insurance Code Chapter 1507 (concerning Consumer Choice of Benefits Plans) to a large employer, it must comply with Chapter 21, Subchapter AA of this title (relating to Consumer Choice Health Benefit Plans).

§26.308. Renewability of Coverage and Cancellation.

(a) Except as provided by Insurance Code §1501.109 (concerning Refusal to Renew; Discontinuation of Coverage) [Article 26.87], a large employer carrier must [shall] renew any large employer health benefit plan [for any covered large employer] at the option of the large employer, unless:

(1) the premium has not been paid as required by the terms of the plan;

(2) the large employer has committed fraud or intentional misrepresentation of a material fact;

(3) the large employer has not complied with a material provision of the health benefit plan relating to premium contribution, group size, or minimum participation requirements;

(4) the large employer has no enrollee, in connection with the plan, who resides or works in the service area of the [HMO] large employer carrier or in the area where [for which] the large employer carrier is authorized to do business; or

(5) membership of an employer in an association terminates, but only if coverage is terminated uniformly without regard to a health-status-related [health status related] factor of a covered individual.

(b) A large employer carrier may refuse to renew the coverage of an eligible employee or dependent[, if applicable,] for fraud or intentional misrepresentation of a material fact by that individual and, with respect to an eligible employee or dependent who is a subscriber or enrollee in an HMO, for the reasons specified in §11.506 [§11.506(3)] of this title (relating to Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate). The coverage is also subject to any policy or contractual provisions relating to incontestability or time limits on certain defenses.

§26.309. Refusal to Renew and Application to Reenter Large Employer Market.

(a) A large employer carrier may elect to refuse to renew all large employer health benefit plans delivered or issued for delivery by the large employer carrier in this state or in a geographic service area. The large employer carrier must notify the commissioner and each affected covered large employer of the election as provided in Insurance Code §1501.109 (concerning Refusal to Renew; Discontinuation of Coverage). [approved under Insurance Code Article 26.85(d). The large employer carrier shall notify the commissioner of the election not later than the 180th day before the date coverage under the first large employer health benefit plan terminates under Insurance Code Article 26.87(a) and shall comply with the notification requirements set forth in §26.302(c) and (d)(2) of this chapter (relating to Status of Health Carriers as Large Employer Carriers and Geographic Service Area).

~~This subsection does not exempt a health carrier from any other legal requirements, including such as those for withdrawal from the market under Chapter 7, Subchapter R §§7.1801, et seq. of this title (relating to Withdrawal Plan Requirements and Procedures).~~]

[~~(b) The large employer carrier shall notify each affected covered large employer not later than the 180th day before the date on which coverage terminates for that large employer.~~]

[~~(c) A large employer carrier that elects under the Insurance Code, Article 26.87(a), to refuse to renew all large employer health benefit plans in this state or in an approved geographic service area may not write a new large employer health benefit plan in this state or in the geographic service area, as applicable, before the fifth anniversary of the date on which notice is delivered to the commissioner under the Insurance Code, Article 26.87(a).~~]

(b) [~~(d)~~] The large employer carrier may not write a new large employer health benefit plan in this state or in the geographic service area, as applicable, for five years after notice to the commissioner of the election to refuse to renew. A large employer carrier that elects not to renew all large employer health benefit plans under [~~the~~] Insurance Code §1501.109[, ~~Article 26.87(a),~~] and this section may not resume offering health benefit plans to large employers in this state or in the geographic area for which the election was made until it has filed a petition with the commissioner to be reinstated as a large employer carrier and the petition has been approved [~~by the commissioner or the commissioner's designee~~]. In reviewing the petition, the commissioner may ask for [~~such~~] information and assurances as the commissioner finds reasonable and appropriate.

(c) [~~(e)~~] A large employer carrier may elect to discontinue a particular type of large employer coverage, only if the large employer carrier:

(1) before the 90th day preceding the date of the discontinuation of the coverage:

(A) provides notice of the discontinuation to each employer and TDI [~~the department~~]; and

(B) offers to each employer the option to purchase other large employer coverage offered by the large employer carrier at the time of the discontinuation; and

(2) acts uniformly without regard to the claims experience of the employer or any health-status-related [~~health status related~~] factors of employees or dependents [~~or new employees or dependents~~] who are or may become eligible for the coverage.

§26.310. Unfair Competition and Unfair Practices [~~under the Insurance Code, Article21.21~~].

A misrepresentation about the effects of [~~the~~] Insurance Code[~~,~~] Chapter 1501 (concerning Health Insurance Portability and Availability Act) or [~~26, Subchapters A and H, and/ or~~] this subchapter in marketing large employer health plans or in the marketing, renewing, or canceling of other health insurance products will be considered a violation of [~~the~~] Insurance Code Chapter 541 (concerning Unfair Methods of Competition and Unfair or Deceptive Acts or Practices) and §543.001 (concerning Misrepresentation Prohibited).[~~, Articles 21.20 and Articles 21.21.~~]

§26.312. Point-of-Service [~~Point-of-service~~] Coverage.

[~~(a) Definitions. The following words and terms when used in this section shall have the following meanings, unless the context clearly indicated otherwise.~~]

[~~(1) In-plan covered services--Health care services, benefits, and supplies to which an enrollee is entitled under an evidence of coverage issued by an HMO, including emergency services, approved out-of-network services and other authorized referrals.~~]

[~~(2) Nonparticipating physicians and providers--Physicians and providers that are not part of an HMO delivery network.~~]

[~~(3) Out-of-plan covered benefits--All covered health care services, benefits, and supplies that are not in-plan covered services. Out-of-plan covered benefits include health care for services, benefits and supplies obtained from participating physicians and providers under circumstances in which the enrollee fails to comply with the HMO's requirements for obtaining in-plan covered services.~~]

[~~(4) Participating physicians and providers--Physicians and providers that are part of an enrollee's HMO delivery network.~~]

[~~(5) Point-of-service (POS) option--Coverage that complies with the out-of-plan coverage set forth in either Chapter 11, Subchapter Z of this title (relating to Point-of-Service Riders) or Chapter 21, Subchapter U of this title (relating to Arrangements between Indemnity Carriers and HMOs for Point-of-Service Coverage) and that allows the enrollee to access out-of-plan coverage at the option of the enrollee.~~]

[~~(6)] Point-of-service (POS) plan--As defined in Insurance Code Article 26.09(a)(2).~~]

(a) [~~(b)~~] A large employer carrier that offers point-of-service [~~POS~~] coverage must [~~shall~~] comply, as applicable, with the requirements set forth in either Chapter 11, Subchapter Z of this title (relating to Point-of-Service Riders) or Chapter 21, Subchapter U of this title (relating to Arrangements Between Indemnity Carriers and HMOs for Point-of-Service Coverage).

(b) [~~(c)~~] If an HMO issues coverage to a large employer and eligible employees have access only to in-plan coverage [~~covered services~~] through one or more HMOs, each of the HMOs issuing [~~such~~] coverage must offer the eligible employees the option of obtaining coverage that complies with the out-of-plan coverage set forth in either Chapter 11, Subchapter Z of this title or Chapter 21, Subchapter U of this title, and that allows the enrollee to access out-of-plan coverage at the option of the enrollee in compliance with Insurance Code §1273.052 (concerning Offer of Coverage Through Non-Network Plan Required).

(c) [~~(d)~~] All HMOs offering coverage to eligible employees of a large employer may enter into a written agreement designating one or more of the HMOs to offer the point-of-service [~~POS~~] option required under this section.

(1) A copy of the agreement must be retained on file by each of the HMOs participating in the agreement and be made available to TDI on [~~the department upon~~] request.

(2) If an HMO participating in the agreement ceases to offer coverage to the large employer, a new agreement that complies with all of the requirements of this section must be entered into by all remaining HMOs offering coverage to employees of the large employer.

(3) If for any reason, an agreement is not in existence that ensures that all eligible employees have the option of selecting out-of-plan coverage [~~covered benefits~~] under this section from at least one of the HMOs offering coverage to the eligible employees, each HMO must offer the eligible employees the option of selecting out-of-plan coverage as required by this section.

(d) [~~(e)~~] Except as otherwise agreed to by the employer, an [~~An~~] eligible employee who [~~that~~] selects a point-of-service [~~POS~~] option is responsible for paying all costs, including premiums, coinsurance, copayments, deductibles, and any other cost-sharing [~~cost shar-~~

~~ing~~] provisions imposed by the point-of-service [~~POS~~] option, including any administrative costs imposed by a large employer as permitted by Insurance Code §1273.055 (concerning Cost-Sharing Provisions) [~~Article 26.09(e) of the Code~~].

(e) [~~(f)~~] The premium for coverage required to be offered under this section must [~~shall~~] be based on the actuarial value of that coverage and may be different than the premium for the in-plan coverage [~~covered services~~] provided by the HMO through the enrollee's evidence of coverage.

§26.313. Filing Requirements.

(a) Each large employer carrier, other than an HMO, must use a policy shell format for any group or individual health-benefit-plan form used to provide a health benefit plan in the large employer market. To expedite the review and approval process, all group and individual health-benefit-plan form filings (excluding HMO filings covered in subsection (b) of this section) must be submitted in the following order:

(1) a group policy face page or individual policy face page, as applicable;

(2) the group certificate page or individual data page, as applicable;

(3) as applicable under Chapter 3, Subchapter A of this title (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings), the toll-free number and complaint notice page, as required by Chapter 1, Subchapter E of this title (relating to Notice of Toll-Free Telephone Numbers and Procedures for Obtaining Information and Filing Complaints);

(4) the table of contents;

(5) insert pages for the general provisions;

(6) insert pages for the required provisions and any optional provisions, if elected and as applicable;

(7) for large employer health benefit plans, an insert page for the benefits section of the health benefit plan including, but not limited to, schedule of benefits, definitions, benefits provided, exclusions and limitations, continuation provisions, and if applicable, alternative cost containment, preferred provider, conversion and coordination-of-benefits provisions, and riders;

(8) insert pages for any amendments, applications, enrollment forms, or other form filings that comprise part of the contract;

(9) insert pages for any required outline of coverage for individual products;

(10) any additional form filings and documentation as outlined in Chapter 3, Subchapter A of this title and Subchapter G of this title (relating to Plain Language Requirements for Health Benefit Policies);

(11) the information required under this section; and

(12) the rate schedule applicable to any individual health benefit plan, as required by Chapter 3, Subchapter A of this title.

(b) In addition to subsection (a) of this section, the following provisions apply to each HMO. The HMO must submit health-benefit-plan forms for use in the large employer market that include the following:

(1) Any HMO group or individual agreement must address and include all required provisions of Insurance Code Chapter 1501 (concerning Health Insurance Portability and Availability Act). The agreement must comply with any other applicable provisions of the Insurance Code. In addition, the agreement must comply with the provisions of Chapter 11, Subchapter F of this title (relating to Evidence of Coverage) where those provisions are not in conflict with Insurance Code Chapter 1501.

(2) The filing must include any alternative pages to the agreement or the schedule of benefits and any alternative schedules of benefit.

(3) The filing must include any additional riders, amendments, applications, enrollment forms, or other forms and any other required documentation outlined in Chapter 11, Subchapter F of this title.

(4) The filing must include any applicable requirements of Chapter 11, Subchapter D (relating to Regulatory Requirements for an HMO Subsequent to Issuance of a Certificate of Authority) and Chapter 11, Subchapter F of this title, except for:

(A) continuation and conversion of coverage, in accordance with Insurance Code Chapter 1271 (concerning Benefits Provided by Health Maintenance Organizations; Evidence of Coverage; Charges), and this title; and

(B) cancellation, in accordance with §26.308 of this title (relating to Renewability of Coverage and Cancellation).

(5) The filing must include any rider forms that will be used with health benefit plans offered to large employers. The rider forms, if developed subsequent to approval of the agreement, must be submitted with an explanation of the market in which the forms will be used. All rider forms must comply with Insurance Code Chapter 1271, and applicable provisions of Chapter 11, Subchapter D of this title.

§26.314. Territorial Exclusions.

Subject to the provisions of Chapter 3 of this title (relating to Life, Accident and Health Insurance and Annuities) and Chapter 11 of this title (relating to Health Maintenance Organizations), a large employer health benefit plan may not exclude health care services, supplies, or drugs provided for medical emergencies outside the plan service area, including outside the United States.

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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Norma Garcia
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6584

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SUBCHAPTER D. COOPERATIVES
DIVISION 1. NONPROFIT HEALTH GROUP COOPERATIVES

28 TAC §§26.400 - 26.403, 26.405 - 26.411

STATUTORY AUTHORITY. The amendments to 28 TAC §§26.401 - 26.403 and 26.405 - 26.411 and new §26.400 are proposed under Insurance Code §§1251.008, 1501.010, 1501.058(c)(1), 1501.0581, 1501.067, 1501.256, and 36.001.

Section 1251.008 authorizes the commissioner to adopt rules as necessary to administer Chapter 1251.

Section 1501.010 authorizes the commissioner to adopt rules necessary to implement Chapter 1501 and to meet the minimum requirements of federal law.

Section 1501.058(c)(1) authorizes the commissioner to adopt rules relating to a cooperative's compliance with federal laws applicable to cooperatives and health benefit plans issued through cooperatives.

Section 1501.0581 provides that the commissioner must adopt rules to implement the exemption of certain required coverage from health benefit plans offered through cooperatives, and that give a cooperative the option to rescind its election to permit eligible single-employee businesses for good cause.

Section 1501.067 directs the commissioner to adopt rules governing the eligibility of a single-employee business to participate in a health group cooperative under Chapter 1501, Subchapter B, including provisions to ensure that each eligible single-employee business has a business purpose and was not formed solely to obtain health benefit plan coverage under the subchapter.

Section 1501.256 authorizes the commissioner to adopt rules modifying a small employer health benefit plan or adopting a substitute for the plan using the Texas Health Benefits Purchasing Cooperative, to the extent required to comply with applicable federal law.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI.

CROSS-REFERENCE TO STATUTE. The amendments to 28 TAC §§26.401 - 26.403 and 26.405 - 26.411 and new §26.400 implement Insurance Code §36.001 and §1251.008, and Chapter 1501.

§26.400. Definitions and Filing.

(a) The terms defined in §26.4 of this title (relating to Definitions) are incorporated into this subchapter.

(b) The following terms have the meanings assigned in Insurance Code §1501.051:

(1) board of directors;

(2) board of trustees;

(3) cooperative;

(4) eligible single-employee business; and

(5) expanded service area.

(c) All references to health group cooperatives in this subchapter refer only to nonprofit health group cooperatives.

(d) Information required by this subchapter must be filed with the Life and Health Lines Office Filings Intake, Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

§26.401. Establishment of Health Group Cooperatives.

(a) Under [~~Subject to the requirements of~~] the Insurance Code and this subchapter, a person may form a health group cooperative for the purchase of employer health benefit plans.

(b) A health carrier may not form, or be a member of, a health group cooperative. A health carrier may associate with a sponsoring entity of a health group cooperative, such as a business association, chamber of commerce, or other organization representing employers or serving an analogous function, to assist the sponsoring entity in forming a health group cooperative.

(c) A health group cooperative must be incorporated [~~organized~~] as a nonprofit organization [~~corporation~~] and be authorized to transact business in Texas, as required by the Business Organizations Code [~~has the rights and duties provided by the Texas Non-profit Corporation Act, Texas Civil Statutes, Articles 1396-1.01, et seq~~].

(d) A [~~On receipt of a certificate of incorporation or certificate of authority from the secretary of state, the~~] health group cooperative must file with TDI its organizational documents and, if applicable, authorization to transact business in Texas [~~shall comply with Insurance Code §1501.056 by filing notification of the receipt of the certificate and a copy of the health group cooperative's organizational documents with the Filings Intake Division, Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104~~]. The organizational documents must [~~shall~~] demonstrate the health group cooperative's compliance with Insurance Code §§1501.058 (concerning Powers and Duties of Cooperatives), 1501.059 (concerning Self-Insured or Self-funded Plan Prohibited), and 1501.061 (concerning Requirements Applicable to Heath Benefit Plan Issuers with Which Cooperative May Contract).

(e) A health group cooperative consisting only of small employers that elects [~~electing~~] to restrict its membership to 50 eligible employees in accordance with [~~pursuant to~~] Insurance Code §1501.0581(o) (concerning Special Provisions Relating to Health Group Cooperatives) must include that election in the organizational documents filed under [~~pursuant to~~] subsection (d) of this section. A health group cooperative making this election may not admit an eligible single-employee business, as defined in Insurance Code §1501.051 (concerning Definitions).

(f) A health group cooperative may elect to admit eligible single-employee businesses as members of the cooperative and allow single-employee business members to enroll in health-benefit-plan coverage as specified in Chapter 26, Subchapter D, Division 2 of this title (relating to Single-employee Business Participation in Health Group Cooperatives). [~~The board of directors shall, by March 1 of each year, file with the department a statement of all amounts collected and expenses incurred for each of the preceding three calendar years. The board shall make the annual filing on Form Number HGC-1, which can be obtained from the Texas Department of Insurance, Filings Intake Division, MC 106-1E, P.O. Box 149104, Austin, Texas 78714-9104, as well as from the department's internet web site at www.tdi.state.tx.us. The board shall file Form Number HGC-1 with the Filings Intake Division, Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.~~]

(g) The provisions of this subchapter do not [~~shall not be construed to~~] limit or restrict an employer's access to health benefit plans under this chapter or Insurance Code Chapter 1501 (concerning Health Insurance Portability and Availability Act).

§26.402. Membership of Health Group Cooperatives.

(a) The membership of a health group cooperative may consist of:

(1) only small employers;

(2) [~~,~~] only large employers;

(3) [~~, or both~~] small and large employers;

(4) small employers and eligible single-employee businesses;

(5) large employers and eligible single-employee businesses; or

(6) small employers, large employers, and eligible single-employee businesses.

(b) To be eligible to arrange for coverage in accordance with [~~pursuant to~~] Insurance Code §1501.058 (concerning Powers and Duties of Cooperatives), [~~§1501.058(a)(1)~~] a health group cooperative must, at the end of its initial open enrollment period, have at least 10 [~~ten~~] participating employers. A [~~Thereafter, if the~~] health group cooperative must maintain [~~does not, at any time have~~] at least 10 [~~ten~~] participating employers[~~,~~] to continue [~~maintain~~] eligibility for coverage. If the health group cooperative drops below 10 participating employers, it must add additional participating employers [~~members~~] by the end of the next open enrollment period [~~to maintain at least ten participating employers~~]. If the health group cooperative does not have at least 10 participating employers by the beginning of the next open enrollment period, the health group cooperative must immediately notify the participating employers of the potential for nonrenewal under this section. If[~~, by the end of the next open enrollment period~~] the health group cooperative does not have at least 10 [~~ten~~] participating employers by the end of the next open enrollment period, the health carrier may elect to immediately cease providing coverage to the health group cooperative.

(c) Subject to the requirements of Insurance Code §1501.101 (concerning Geographic Service Areas), and the limitations identified under [~~pursuant to~~] subsections (d) and (e) of this section, a health group cooperative:

(1) must [~~shall~~] allow any small employer to join the cooperative [~~a health group cooperative that consists of only small employers or both small and large employers~~] and enroll in health benefit plan coverage[~~,~~] during the initial and annual open enrollment periods unless the cooperative consists of only large employers;[~~, enroll in health benefit plan coverage; and~~]

(2) may allow eligible single-employee businesses [~~a large employer~~] to join the cooperative [~~the health group cooperative~~] and enroll in health-benefit-plan coverage[~~,~~] during the initial and annual open enrollment periods, if it has made the election in compliance with Chapter 26, Subchapter D, Division 2 of this title (relating to Single-employee Business Participation in Health Group Cooperatives); and

(3) may allow a large employer to join the cooperative and enroll in health benefit plan coverage during the initial enrollment and annual open enrollment periods [~~enroll in health benefit plan coverage~~].

(d) A health group cooperative that has elected to limit membership to 50 eligible employees and has filed the election [~~notification~~] with TDI [~~the department~~] as required by §26.401(e) of this title [~~subchapter~~] (relating to Establishment of Health Group Cooperatives) may decline to allow a small employer to join the cooperative if, after the small employer has joined the cooperative, the total number of eligible employees employed on business days during the preceding calendar year by all small employers participating in the cooperative would exceed 50.

(e) A health group cooperative may restrict its membership to small and large employers within a single industry grouping as defined by the most recent edition of the United States Census Bureau's North American Industry Classification System.

(f) A health group cooperative may not use risk characteristics of an employer or employee to restrict or qualify membership in the health group cooperative.

(g) An employer's participation in a health group cooperative is voluntary, but an employer electing to participate in a health group cooperative must, through a contract with the health group cooperative, commit to purchasing coverage through the health group cooperative for two years, except as provided for in subsection (h) of this section.

(h) A contract between an employer and a health group cooperative must allow an employer to terminate without penalty its health benefit plan coverage with a health group cooperative before the end of the two-year [~~two year~~] minimum contractual period required by subsection (g) of this section if it can demonstrate to the health group cooperative that continuing to purchase coverage through the cooperative would be a financial hardship in accordance with subsection (i) of this section.

(i) The contract between an employer and a health group cooperative may define what constitutes a financial hardship for the purposes of subsection (h) of this section. If the contract does not define the term, an employer may demonstrate financial hardship if it can show that at the end of the immediately preceding fiscal quarter, or on [~~upon~~] receipt of notice of a rate increase, the premium cost to the employer, as a percentage of the employer's gross receipts, increased by a factor of at least .50.

§26.403. Marketing Activities of Health Group Cooperatives.

(a) A health group cooperative may engage in marketing activities related and restricted to membership in the cooperative, including general availability of health coverage, and is not required to maintain an agent's license for soliciting membership in the cooperative. All health coverage issued through the cooperative must be issued through a licensed agent that is employed by or contracted with the cooperative.

(b) A sponsoring entity of a health group cooperative may inform its members regarding the health group cooperative and the general availability of coverage through the health group cooperative. All coverage issued through the cooperative must be issued through a licensed agent.

(c) A licensed agent that is used and compensated by a health group cooperative is not required to be appointed by a health carrier offering coverage through the health group cooperative. This exemption does not allow an agent to market other products and services not offered through the health group cooperative without an appointment from the health carrier.

(d) A health group cooperative or a member of the board of directors, the executive director, [~~or~~] an employee, or an agent of a health group cooperative is not liable for failure to arrange for coverage of any particular illness, disease, or health condition in arranging for coverage through the cooperative.

(e) A health group cooperative may offer other ancillary products and services to its members that are customarily offered in conjunction with health benefit plans.

§26.405. Premium Tax Exemption for Previously Uninsured.

(a) In accordance with Insurance Code §1501.0581(g)(4) (concerning Special Provisions Relating to Health Group Cooperatives), a health carrier providing coverage through a health group cooperative is exempt from premium tax and retaliatory tax for two years for premiums received for a previously uninsured employee or dependent. The two-year period for the exemption begins on [~~upon~~] the first date of coverage for the previously uninsured employee or dependent.

(b) For the purposes of this section and Insurance Code §1501.0581(g)(4), a previously uninsured employee or dependent is an

employee or the dependent of an employee of an employer member of a health group cooperative who [that] did not have creditable coverage for the 63 days preceding the effective date of coverage purchased through the health group cooperative.

(c) A health carrier must [shall] maintain [four years] documentation for four years for each insured that demonstrates that coverage of the insured or enrollee qualifies the health carrier for a tax exemption under [pursuant to] subsection (b) of this section. The documentation must [shall] comply with any applicable rules or procedures adopted by the Comptroller of Public Accounts related to the tax exemption.

§26.406. Standard Presentation Form.

(a) A health carrier offering coverage through a health group cooperative must [shall] use a standard presentation form for employer members of the health group cooperative that includes the information listed in subsection (b) of this section. A standard presentation form may include additional information.

(b) A standard presentation form must [shall] include, at a minimum:

(1) an explanation that the coverage is being offered through a health group cooperative;

(2) the name of the health group cooperative;

(3) an explanation of small employers' eligibility to join the health group cooperative and purchase coverage without regard for membership in any other organization or the health status or claims experience of the employer and employees;

(4) an explanation of any fees or charges associated with membership in the health group cooperative;

(5) a statement that coverage is available to a small employer on a guaranteed-issue [guaranteed issue] basis from any health carrier offering coverage in the small employer [small employer] market with no requirement of joining a health group cooperative;

(6) for [if] multiple plans that are offered through the health group cooperative, an explanation that the employer [and employees] may select any of the plans without limitation due to health status or claims experience;

(7) a description of the plans offered through the health group cooperative by the health carrier; and

(8) if coverage is offered under Insurance Code Chapter 1507 (concerning Consumer Choice of Benefits Plans), a written disclosure in compliance with Chapter 21, Subchapter AA (relating to Consumer Choice Health Benefit Plans). [the employer or employee is considering or purchasing a health benefit plan that does not contain all state-mandated health benefits, a written disclosure statement that:]

[(A) explains that the health benefit plan being offered or purchased does not provide some or all state-mandated health benefits;]

[(B) lists those state-mandated health benefits not included under the health benefit plan;]

[(C) contains a general description of the benefits offered by the health benefit plan;]

[(D) provides a notice that purchase of the plan may limit future coverage options in the event the policyholder's or certificate holder's health changes and needed benefits are not covered under the health benefit plan.]

§26.407. Health Carrier Filing Before [Prior to] Issuance of Coverage to a Health Group Cooperative.

(a) A health carrier that intends to issue coverage to a health group cooperative must [shall] file with TDI [the commissioner, not later than 30 days prior to the initial open enrollment period for the cooperative,] information concerning the health carrier's offer of coverage no later than 30 days before the cooperative's initial enrollment period. [to the cooperative. The health carrier shall submit this filing to the Filings Intake Division, Mail Code 106-1E, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas, 78701.]

(b) A filing required by subsection (a) of this section must [shall] include:

(1) the name of the health carrier;

(2) the name, address, and telephone number or other contact information of the health group cooperative to which the health carrier intends to offer coverage;

(3) the county or expanded service area in which the health carrier intends to offer coverage to the health group cooperative;

(4) any limitations concerning the number of participating employers or employees in a health group cooperative that the health carrier is capable of administering; and

(5) the health benefit plan filed for use by the health carrier as a product available to health group cooperatives, or when appropriate under [pursuant to] subsection (c) of this section, reference to a previously approved form, including the form number and date of approval. [; and]

[(6) any other information requested by the department.]

(c) The form filing required by subsection (b)(5) of this section must [shall] comply, as appropriate, with all applicable filing requirements under Chapter 3 of this title (relating to Life, Accident and Health Insurance and Annuities) or Chapter 11 of this title (relating to Health Maintenance Organizations).

§26.408. Issuance of Coverage to Health Group Cooperatives.

(a) Subject to the limitations identified in §26.411 of this title [subchapter] (relating to Service Areas for Health Carriers Offering Coverage Through a Health Group Cooperative), a health carrier may elect to not offer or issue coverage to health group cooperatives or may elect to offer or issue coverage to one or more health group cooperatives of its choosing.

(b) Notwithstanding subsection (a) of this section, a health carrier must comply with the guaranteed issuance requirements of Insurance Code Chapter 1501 (concerning Health Insurance Portability and Availability Act) and this chapter with respect to offering and issuing coverage to a health group cooperative that:

(1) consists of only small employers;

(2) has elected to restrict membership in the cooperative to 50 employees; and

(3) has notified TDI [the department] consistent with §26.401(e) of this title [subchapter] (relating to Establishment of Health Group Cooperatives).

§26.409. Health Benefit Plans Offered Through Health Group Cooperatives.

(a) A health benefit plan issued by a health carrier through a health group cooperative is not subject to the following provisions of the Insurance Code or this title [state mandates]:

(1) the offer of in vitro fertilization coverage as required by Insurance Code Chapter 1366, Subchapter A (Coverage for In Vitro Fertilization Procedures) [§§1366.001 and 1366.003];

(2) coverage of HIV, AIDS, or HIV-related illnesses as required by Insurance Code Chapter 1364, Subchapter A (concerning Exclusion from or Denial of Coverage Prohibited) [§§1364.001 and 1364.003];

(3) coverage of chemical dependency and stays in a chemical dependency treatment facility as required by Insurance Code Chapter 1368 (concerning Availability of Chemical Dependency Coverage);

(4) coverage or offer of coverage of serious mental illness as required by Insurance Code §§1355.001 - 1355.007 (concerning Definitions, Applicability of Subchapter, Exception, Required Coverage for Serious Mental Illness, Managed Care Plan Authorized, Coverage for Certain Conditions Related to Controlled Substance or Marihuana Not Required, Small Employer Coverage);

(5) the offer of mental or emotional illness coverage as required by Insurance Code §1355.106 (concerning Offer of Coverage Required; Alternative Benefits);

(6) coverage of inpatient mental health and stays in a psychiatric day treatment facility as required by Insurance Code Chapter 1355, Subchapter C (concerning Psychiatric Day Treatment Facilities) [§1355.104];

(7) the offer of speech and hearing coverage as required by Insurance Code Chapter 1365 (concerning Loss or Impairment of Speech or Hearing);

(8) coverage of mammography screening for the presence of occult breast cancer as required by Insurance Code §1356.005 (concerning Coverage Required);

(9) standards for proof of Alzheimer's disease as required by Insurance Code §1354.002 (concerning Proof of Organic Disease);

(10) coverage of stays in a crisis stabilization unit or [and/or] residential treatment center for children and adolescents as required by Insurance Code [§]§1355.055 (concerning Determinations for Treatment in a Residential Treatment Center for Children and Adolescents) and §1355.056 (concerning Determinations for Treatment by a Crisis Stabilization Unit);

[(11) continuation of coverage of certain drugs under a drug formulary as required by Insurance Code §1369.055;]

[(12) coverage of off-label drugs as required by Insurance Code §§1369.001 - 1369.005;]

(11) [(13)] coverage for formulas necessary for the treatment of phenylketonuria as required by Insurance Code Chapter 1359 (concerning Formulas for Individuals with Phenylketonuria or Other Heritable Diseases);

(12) [(14)] coverage of contraceptive drugs and devices as required by Insurance Code Chapter 1369, Subchapter C (concerning Coverage of Prescription Contraceptive Drugs and Devices and Related Services) [§§1369.101 - 1369.109] and §21.404(3) of this title (relating to Underwriting);

(13) [(15)] coverage of diagnosis and treatment affecting temporomandibular joint and treatment for a person unable to undergo dental treatment in an office setting or under local anesthesia as required by Insurance Code Chapter 1360 (concerning Diagnosis and Treatment Affecting Temporomandibular Joint);

(14) [(16)] coverage of bone mass measurement for osteoporosis as required by Insurance Code Chapter 1361 (concerning Detection and Prevention of Osteoporosis) [§1361.003];

(15) [(17)] coverage of diabetes care as required by Insurance Code Chapter 1358 (concerning Diabetes);

(16) [(18)] coverage of childhood immunizations as required by Insurance Code Chapter 1367, Subchapter B (concerning Childhood Immunizations) [§§1367.051 - 1367.055 and 1367.053];

(17) [(19)] coverage for screening tests for hearing loss in children and related diagnostic follow-up care as required by Insurance Code Chapter 1367 Subchapter C (concerning Hearing Test) [§§1367.101 - 1367.105];

(18) [(20)] offer of coverage for therapies for children with developmental delays as required by Insurance Code Chapter 1367, Subchapter E (concerning Developmental Delays);

(19) [(21)] coverage of certain tests for detection of prostate cancer as required by Insurance Code Chapter 1362 (concerning Certain Tests for Detection of Prostate Cancer);

(20) [(22)] coverage of acquired brain injury treatment and services [treatment/services] as required by Insurance Code Chapter 1352 (concerning Brain Injury);

(21) [(23)] coverage of certain tests for detection of colorectal cancer as required by Insurance Code Chapter 1363 (concerning Certain Tests for Detection of Colorectal Cancer);

(22) [(24)] coverage for reconstructive surgery for craniofacial abnormalities in a child as required by Insurance Code Chapter 1367, Subchapter D (concerning Childhood Craniofacial Abnormalities) [§§1367.151 - 1367.154];

(23) [(25)] coverage of rehabilitation therapies as required by Insurance Code §1271.156 (concerning Benefits for Rehabilitation Services and Therapies);

(24) [(26)] limitations on the treatment of complications in pregnancy established by §21.405 of this title (relating to Policy Terms and Conditions);

(25) [(27)] coverage for services related to immunizations and vaccinations under managed care plans as required by Insurance Code Chapter 1353 (concerning Immunization or Vaccination Protocols under Managed Care Plans);

[(28) limitations or restrictions on copayments and deductibles imposed by §11.506(2)(A) and (B) of this title (relating to Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate);]

(26) [(29)] coverage of a minimum stay for maternity as required by Insurance Code Chapter 1355, Subchapter B (concerning Minimum Inpatient Stay Following Birth of Child and Postdelivery Care) [§§1366.051 - 1366.059];

(27) [(30)] coverage of reconstructive surgery incident to mastectomy as required by Insurance Code Chapter 1357, Subchapter A (concerning Reconstructive Surgery Following Mastectomy) [§§1357.001 - 1357.007];

(28) [(31)] coverage of a minimum stay for mastectomy treatment and services [treatment/services] as required by Insurance Code Chapter 1357, Subchapter B (concerning Hospital Stay Following Mastectomy and Certain Related Procedures) [§§1357.051 - 1357.057];

(29) [~~(32)~~] coverage of autism spectrum disorder as required by the Insurance Code §1355.015 (concerning Required Coverage for Certain Enrollees) [~~Chapter 1355, Subchapter A~~];

(30) transplant donor coverage, as established by 28 TAC §3.3040(h) of this title (relating to Prohibited Policy Provisions);

(31) coverage for certain tests for detection of human papillomavirus, ovarian cancer, and cervical cancer as required by Insurance Code Chapter 1370 (concerning Certain Tests for Detection of Human Papillomavirus, Ovarian Cancer, and Cervical Cancer);

(32) coverage of certain tests for detection of cardiovascular disease as required by Insurance Code Chapter 1376 (concerning Certain Tests for Early Detection of Cardiovascular Disease);

(33) coverage of certain amino acid-based elemental formulas as required by Insurance Code Chapter 1377 (concerning Coverage for Certain Amino Acid-Based Elemental Formulas);

(34) coverage of prosthetic devices, orthotic devices, and related services as required by Insurance Code Chapter 1371 (concerning Coverage for Certain Prosthetic Devices, Orthotic Devices, and Related Services); and

(35) coverage of orally-administered anticancer medications as required by Insurance Code Chapter 1369 (concerning Benefits Related to Prescription Drugs and Devices and Related Services).

(b) A health benefit plan issued by an HMO through a health group cooperative must provide for the basic health care services as provided in §11.508 or §11.509 of this title (relating to Mandatory Benefit Standards: Group, Individual and Conversion Agreements; and Additional Mandatory Benefit Standards: Group Agreement Only).

(c) A health benefit plan offered by an insurer through a health group cooperative is not subject to §3.3704(a)(6) of this title (relating to Freedom of Choice;[~~:~~] Availability of Preferred Providers).

§26.410. Expedited Approval for Plans Offered Through a Health Group Cooperative.

(a) Unless a health carrier has identified a previously approved health benefit plan in the filing required by §26.407 [~~§26.407(b)(7)~~] of this title (relating to Health Carrier Filing Before [~~Prior to~~] Issuance of Coverage to a Health Group Cooperative), the health carrier must file each health benefit plan that will be offered to a health group cooperative for approval [~~a health benefit plan that will be offered to a health group cooperative~~] and must [~~shall~~] clearly indicate in the filing that the health benefit plan is to be offered to a health group cooperative and is subject to review under this section.

(b) A health benefit plan subject to review under this section [~~and filed with the department by an insurer~~] may be filed as a file-and-use [~~file and use~~] form consistent with Insurance Code Chapter 1701, Subchapter B (concerning Filing Requirement) [~~§§1701.051 - 1701.059~~] and Subchapter C (concerning Sanctions; Applicability of Other Laws) [~~1701.101 - 1701.103~~], and §3.5(a)(2) of this title (relating to Filing Authorities and Categories).

(c) An insurer that does not elect to file for approval under subsection (b) of this section must [~~shall~~] file [~~the form~~] for approval consistent with Insurance Code §1701.051 (concerning Filing Required), [~~§§1701.051~~] and §1701.054 (concerning Approval of Form), [~~1701.054~~] and §3.5(a)(1) of this title. TDI will [~~The department shall~~] approve or disapprove the filing within 40 calendar days of receipt of the complete filing.

(d) An HMO must file for approval an HMO evidence of coverage that is to be offered solely to a health group cooperative and must [~~shall~~] indicate that review of the evidence of coverage is subject to the expedited process available under this section. The HMO must [~~shall~~] file the evidence of coverage as required by Chapter 11 of this title (relating to Health Maintenance Organizations), [~~consistent with the requirements of Subchapter F of Chapter 11 of this title (relating to Evidence of Coverage)~~] and TDI will [~~the department shall~~] approve or disapprove the evidence of coverage within 20 calendar days of receipt of a complete filing.

§26.411. Service Areas for Health Carriers Offering Coverage Through a Health Group Cooperative.

(a) A health carrier may provide coverage to only one health group cooperative in any county, except that a health carrier may provide coverage to additional health group cooperatives if it is providing coverage in an expanded service area.

(b) A health carrier may provide health group cooperative coverage to an expanded service area that includes the entire state on [~~upon~~] providing certification to TDI [~~the department~~], signed by an officer of the health carrier, that the health carrier intends to provide health group cooperative coverage to an expanded service area that includes the entire state. [~~The health carrier must send the certification to the Filings Intake Division, Mail Code 106-1E, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas, 78701.~~]

(c) A health carrier may apply for an expanded service area that includes less than the entire state by submitting an application for approval to TDI [~~the Filings Intake Team Filings Intake Division, Mail Code 106-1E, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas, 78701~~]. The health carrier may begin using the expanded service area on [~~upon~~] approval or 60 days after the day the application is received by TDI [~~the department~~], unless the application is disapproved by TDI [~~the department~~] within that time. The application must include, in a nondiscriminatory manner and in compliance with Insurance Code Chapter 544 (concerning Prohibited Discrimination):

(1) the geographic service areas, defined in terms of counties or ZIP codes, [~~Codes,~~] to the extent possible; and

(2) if the service area cannot be defined by counties or ZIP codes [~~Code~~], a map which clearly shows the geographic service areas [~~must be submitted in conjunction with the application;~~]

[~~(3) service areas by ZIP Code shall be defined in a non-discriminatory manner and in compliance with the Insurance Code §§544.001 - 544.004 and 544.051 - 544.054; and;~~]

[~~(4) any other information requested by the department~~].

(d) A filing under this section does not affect any [~~HMO~~] service areas that have been established in accordance with Insurance Code Chapter 843 (concerning Health Maintenance Organizations) or Chapter 1301 (concerning Preferred Provider Benefit Plans) [~~of the Insurance Code~~]. A health carrier [~~An HMO~~] may not issue coverage to a health group cooperative in a service area that is not also contained entirely within the health carrier's [~~HMO's~~] service area [~~that has been~~] established under Insurance Code [~~pursuant to~~] Chapter 843 or 1301 [~~of the Insurance Code~~].

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

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DIVISION 2. SINGLE-EMPLOYEE BUSINESS PARTICIPATION IN HEALTH GROUP COOPERATIVES

28 TAC §§26.421 - 26.426

STATUTORY AUTHORITY. New §§26.421 - 26.426 are proposed under Insurance Code §§1251.008, 1501.010, 1501.058(c)(1), 1501.0581, 1501.067, 1501.256, and 36.001.

Section 1251.008 authorizes the commissioner to adopt rules as necessary to administer Chapter 1251.

Section 1501.010 authorizes the commissioner to adopt rules necessary to implement Chapter 1501 and to meet the minimum requirements of federal law.

Section 1501.058(c)(1) authorizes the commissioner to adopt rules relating to a cooperative's compliance with federal laws applicable to cooperatives and health benefit plans issued through cooperatives.

Section 1501.0581 provides that the commissioner must adopt rules to implement the exemption of certain required coverage from health benefit plans offered through cooperatives, and that give a cooperative the option to rescind its election to permit eligible single-employee businesses for good cause.

Section 1501.067 directs the commissioner to adopt rules governing the eligibility of a single-employee business to participate in a health group cooperative under Chapter 1501, Subchapter B, including provisions to ensure that each eligible single-employee business has a business purpose and was not formed solely to obtain health benefit plan coverage under the subchapter.

Section 1501.256 authorizes the commissioner to adopt rules modifying a small employer health benefit plan or adopting a substitute for the plan using the Texas Health Benefits Purchasing Cooperative, to the extent required to comply with applicable federal law.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI.

CROSS-REFERENCE TO STATUTE. New §§26.421 - 26.426 implement Insurance Code §36.001 and §1251.008, and Chapter 1501.

§26.421. Election to Permit Single-Employee Businesses to Participate in a Health Group Cooperative.

A health group cooperative that elects to admit eligible single-employee businesses must file an election with TDI at least 90 days before the date coverage becomes effective for single-employee business members. The election filing must contain:

(1) the election date;

(2) the results of the election;

(3) that the cooperative has a written agreement with a small or large employer health benefit plan issuer; and

(4) a signature by an authorized officer of the cooperative.

§26.422. Condition Precedent to Filing Election to Admit Single-Employee Businesses as Members.

A health group cooperative may elect to admit eligible single-employee businesses only if a small or large employer health-benefit-plan issuer has agreed in writing to offer to issue coverage to the cooperative based on its membership once the election becomes effective.

§26.423. Initial and Annual Enrollment Periods.

(a) A health group cooperative that elects to admit eligible single-employee businesses must permit participation and enrollment in the cooperative's health-benefit-plan coverage during the initial and annual open enrollment periods.

(b) For purposes of this section, the provisions of Insurance Code §1501.0581(a-1) (concerning Special Provisions Relating to Health Group Cooperatives) apply to eligible single-employee businesses.

§26.424. Membership Eligibility Requirements for Single-Employee Businesses.

A single-employee business is eligible to join a health care cooperative if it:

(1) is owned and operated by a sole proprietor;

(2) is engaged in commercial activity for the purpose of the sole proprietor's livelihood or profit;

(3) is not operated solely to obtain health benefit plan coverage under Insurance Code Chapter 1501 (concerning Health Insurance Portability and Availability Act); and

(4) employed fewer than two employees on business days during the preceding calendar year.

§26.425. Plan Issuance, Rating Requirements, and Mandated Benefits.

On the date an election under this division becomes effective and until the election is rescinded, the provisions of Insurance Code Chapter 1501 (concerning Health Insurance Portability and Availability Act) relating to guaranteed issuance of plans, rating requirements, and mandated benefits that are applicable to small employers apply to eligible single-employee businesses that are members of the health group cooperative.

§26.426. Rescission of Election.

(a) A health group cooperative may rescind its election to admit eligible single-employee business members only if the:

(1) election has been effective for at least two years, except as provided by subsection (b) of this section;

(2) health group cooperative files notice of the rescission with the commissioner not later than the 180th day before the effective date of the rescission; and

(3) health group cooperative provides written notice of termination of coverage to all eligible single-employee business members of the cooperative not later than the 180th day before the effective date of the termination.

(b) A health group cooperative may rescind its election to admit eligible single-employee business members before the second anniversary of the effective date of the election by showing good cause in a written request to TDI that includes the:

(1) description of the specific circumstance requiring early rescission of the election, supported by any evidence of the cooperative's undue financial or operational hardship;

(2) geographical area in which the cooperative operates;

(3) total number of lives covered through the cooperative and the number of lives covered by enrollment of single-employer business members that will be affected by the rescission; and

(4) a signature by an authorized officer of the cooperative.

(c) A health group cooperative that rescinds its election under this division may choose to permit existing single-employee business members to maintain their membership and coverage but only if all single-employee business members are provided the same opportunity.

(d) A health group cooperative that has rescinded an election under this division may not re-elect to accept eligible single-employee businesses to join the cooperative before the fifth anniversary of the effective date of the rescission.

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DIVISION 3. HEALTH GROUP COOPERATIVE ELECTION TO TREAT MEMBERS AS SEPARATE EMPLOYERS FOR RATING PURPOSES

28 TAC §26.431

STATUTORY AUTHORITY. New §26.431 is proposed under Insurance Code §§1251.008, 1501.010, 1501.058(c)(1), 1501.0581, 1501.067, 1501.256, and 36.001.

Section 1251.008 authorizes the commissioner to adopt rules as necessary to administer Chapter 1251.

Section 1501.010 authorizes the commissioner to adopt rules necessary to implement Chapter 1501 and to meet the minimum requirements of federal law.

Section 1501.058(c)(1) authorizes the commissioner to adopt rules relating to a cooperative's compliance with federal laws applicable to cooperatives and health benefit plans issued through cooperatives.

Section 1501.0581 provides that the commissioner must adopt rules to implement the exemption of certain required coverage from health benefit plans offered through cooperatives, and that give a cooperative the option to rescind its election to permit eligible single-employee businesses for good cause.

Section 1501.067 directs the commissioner to adopt rules governing the eligibility of a single-employee business to participate in a health group cooperative under Chapter 1501, Subchapter B, including provisions to ensure that each eligible single-employee business has a business purpose and was not formed solely to obtain health benefit plan coverage under the subchapter.

Section 1501.256 authorizes the commissioner to adopt rules modifying a small employer health benefit plan or adopting a substitute for the plan using the Texas Health Benefits Purchasing Cooperative, to the extent required to comply with applicable federal law.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI.

CROSS-REFERENCE TO STATUTE. New §26.431 implements Insurance Code §36.001 and §1251.008, and Chapter 1501.

§26.431. Election to Treat Members as Separate Employers for Rating Purposes.

(a) A health group cooperative may elect to treat each member as a separate employer for purposes of rating small and large employer health benefit plans subject to the rating requirements Insurance Code Chapter 843 (concerning Health Maintenance Organizations), as applicable.

(b) An existing health group cooperative must file its election with TDI not later than the 90th day before the date on which the election is to become effective. The election filing must include:

(1) the election date;

(2) the effective date of the election; and

(3) a signature by an authorized officer of the cooperative.

(c) When applicable, a health group cooperative must provide all members written notice at least 90 days before the effective date of the election. The notice must include statements:

(1) that the cooperative is electing to treat each member as a separate employer for the purpose of rating small and large employer health benefit plans; and

(2) specifying each employer's applicable premium rate as of the date the plan is renewed.

(d) When a prospective member applies to join a health group cooperative, the cooperative must provide written notice to the applicant that the cooperative has elected to treat each member as a separate employer for the purpose of rating small and large employer health benefit plans.

(e) Subject to the notice requirements in subsection (c) of this section, an election under this section is effective on the earliest date after the election when the plan is next issued or renewed. The election may not become effective before full compliance with this section's requirements. Once effective, the election remains in effect for not less than 12 months after the effective date.

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DIVISION 4. PRIVATE PURCHASING COOPERATIVES

28 TAC §26.441, §26.442

STATUTORY AUTHORITY. New §26.441 and §26.442 are proposed under Insurance Code §§1251.008, 1501.010, 1501.058(c)(1), 1501.0581, 1501.067, 1501.256, and 36.001.

Section 1251.008 authorizes the commissioner to adopt rules as necessary to administer Chapter 1251.

Section 1501.010 authorizes the commissioner to adopt rules necessary to implement Chapter 1501 and to meet the minimum requirements of federal law.

Section 1501.058(c)(1) authorizes the commissioner to adopt rules relating to a cooperative's compliance with federal laws applicable to cooperatives and health benefit plans issued through cooperatives.

Section 1501.0581 provides that the commissioner must adopt rules to implement the exemption of certain required coverage from health benefit plans offered through cooperatives, and that give a cooperative the option to rescind its election to permit eligible single-employee businesses for good cause.

Section 1501.067 directs the commissioner to adopt rules governing the eligibility of a single-employee business to participate in a health group cooperative under Chapter 1501, Subchapter B, including provisions to ensure that each eligible single-employee business has a business purpose and was not formed solely to obtain health benefit plan coverage under the subchapter.

Section 1501.256 authorizes the commissioner to adopt rules modifying a small employer health benefit plan or adopting a substitute for the plan using the Texas Health Benefits Purchasing Cooperative, to the extent required to comply with applicable federal law.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI.

CROSS-REFERENCE TO STATUTE. New §26.441 and §26.442 implement Insurance Code §36.001 and §1251.008, and Chapter 1501.

§26.441. Private Purchasing Cooperatives.

(a) Two or more small or large employers may form a private purchasing cooperative for the purchase of small or large employer health benefit plans. A private purchasing cooperative must be organized as a nonprofit corporation and has the rights and duties provided by the Texas Nonprofit Corporation Act, Business Organizations Code Chapter 22.

(b) On receipt of a certificate of incorporation or certificate of authority from the secretary of state, the private purchasing cooperative must file notification of the receipt of the certificate and a copy of the cooperative's organizational documents with the commissioner.

(c) When a private purchasing cooperative or the Texas Health Benefits Purchasing Cooperative arranges for coverage under a health benefit plan for a small or large employer, the health benefit plan issued to a:

(1) small employer must be a small employer health benefit plan;

(2) large employer must be a large employer health benefit plan; and

(3) school district electing to be treated as a small employer under Insurance Code §1501.009 (concerning School District Election), must be a small employer health benefit plan.

§26.442. Powers and Duties of Texas Health Benefits Purchasing Cooperative and Private Purchasing Cooperatives.

(a) A private purchasing cooperative described in this section and the Texas Health Benefits Purchasing Cooperative described in Insurance Code Chapter 1501:

(1) must arrange for small or large employer health benefit plan coverage for small or large employer groups that participate in the cooperative by contracting with small or large employer carriers that meet the criteria established in Insurance Code §1501.061 (concerning Requirements Applicable to Health Benefit Plan Issuers with Which Cooperative May Contract) and subsection (b) of this section;

(2) must collect premiums to cover the cost of:

(A) small or large employer health benefit plan coverage purchased through the cooperative; and

(B) the cooperative's administrative expenses;

(3) may contract with agents to market coverage issued through the cooperative;

(4) must establish administrative and accounting procedures for the operation of the cooperative;

(5) must establish procedures under which an applicant for or participant in coverage issued through the cooperative may have a grievance reviewed by an impartial person;

(6) may contract with a small or large employer carrier or third-party administrator to provide administrative services to the cooperative;

(7) must contract with small or large employer carriers for the provision of services to small or large employers covered through the cooperative;

(8) must develop and implement a plan to maintain public awareness of the cooperative and publicize the eligibility requirements for, and the procedures for enrollment in coverage through the cooperative;

(9) may negotiate the premiums paid by its members; and

(10) may offer other ancillary products and services to its members that are customarily offered in conjunction with health benefit plans.

(b) A cooperative may contract only with small or large employer carriers that desire to offer coverage through the cooperative and that demonstrate:

(1) the carrier is a health carrier or HMO licensed and in good standing with TDI;

(2) the capacity to administer the health benefit plans;

(3) the ability to monitor and evaluate the quality and cost effectiveness of care and applicable procedures;

(4) the ability to conduct utilization management and applicable procedures and policies;

(5) the ability to ensure enrollees adequate access to health care providers, including adequate numbers and types of providers;

(6) a satisfactory grievance procedure and the ability to respond to enrollees' calls, questions, and complaints; and

(7) financial capacity, either through financial solvency standards as applied by the commissioner or through appropriate reinsurance or other risk-sharing mechanisms.

(c) A cooperative may not self-insure or self-fund any health benefit plan or portion of a plan.

(d) A cooperative must comply with federal laws applicable to cooperatives and health benefit plans issued through cooperatives.

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

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CHAPTER 34. STATE FIRE MARSHAL

INTRODUCTION. The Texas Department of Insurance proposes amendments to 28 TAC §34.303, relating to Adopted Standards for Inspections, and §34.832, relating to Specific Requirements for Retail Fireworks Sites Other Than Stands.

EXPLANATION.

Adopted Standards for State Fire Marshal Inspections.

Government Code §417.008 authorizes the state fire marshal, on the complaint of any person, to enter any building or premises in the state at any reasonable time to examine the structure for certain dangerous conditions. Government Code §417.008 also authorizes the commissioner to adopt by rule any appropriate standard developed by a nationally recognized standards-making association under which the state fire marshal may enforce §417.008. The standards adopted by rule do not apply in a geographic area under the jurisdiction of a local government that has adopted fire protection ordinances that apply in the geographic area.

Section 34.303, which adopts by reference certain standards and recommendations of the National Fire Protection Association (NFPA), is proposed to be amended to adopt the 2015 NFPA 1 Fire Code (NFPA 1) and the 2015 NFPA Life Safety Code 101 (NFPA 101). The NFPA is a nationally recognized standards-making association. The adoption of 2015 NFPA 1 and 2015 NFPA 101 is necessary to provide State Fire Marshal's Office inspectors with an update to the currently adopted standard in §34.303. The 2015 editions reflect revised provisions to best protect property and lives. Adoption of the current standard is a best practices and alleviates problems created when other agencies adopt new companion codes, such as the NFPA 70E Standard for Electrical Safety in the Workplace. For example, failure to adopt the newer code creates discrepancies between construction practices of state universities, which have already adopted the newer code, and fire marshal inspections conducted on university campuses.

NFPA 1 references other NFPA standards to facilitate broad, comprehensive references to other standards that provide more detail to the standards in the NFPA 1 Fire Code. NFPA 1 is similar to the International Fire Code that most municipalities in Texas use. NFPA 1 allows for review of all the systems and components in the building to ensure compliance with best practices to prevent a fire. If a fire occurs, NFPA 1 requirements for extinguishing, confining, egress of occupants, and code requirements that minimize risk exposure for people in the structure and in the surrounding community. This standard allows a fire inspector to inspect the sufficiency of fire sprinklers, egress of occupants, compliance with electrical standards, need for fire extinguishers, and the storage of products that cause increased fire hazards.

2015 NFPA 1 Fire Code

The NFPA revised the fire alarm system requirements in order to coordinate with the NFPA 101. Approximately 100 pages of the 650-page NFPA 1 are excerpted from NFPA 101. The NFPA revised mandatory fire hydrant locations and water supply requirements. The NFPA also created a comprehensive set of provisions relating to the placement and number of water supply fixtures in new construction. The 2015 revision includes changes to Chapter 60 of the NFPA 1 that mirror NFPA 400 Hazardous Materials code, although §34.303 specifically excludes application of that chapter to laboratories and laboratories in health care occupancies. Another Chapter 60 change specifies size and locations of alcohol based hand stations. Note that this would not be applicable to laboratories and laboratories in health care occupancies.

NFPA 1 also adds a new requirement to address the dangers of combustible dusts. One of the changes the NFPA made that is applicable to existing buildings gives an authority having jurisdiction the ability to permit the removal of existing occupant-use fire hose. NFPA 1 also further elaborates on its instruction for cleaning and purging of gas lines. NFPA 1 also offers new provisions for cooking oil storage tank systems in commercial kitchens, and expanded ammonia refrigeration system maintenance and testing requirements.

2015 NFPA Life Safety Code 101

The 2015 revisions to NFPA 101 include a variety of changes that may affect buildings inspected by the State Fire Marshal's Office. For example, NFPA 101 adds a new requirement for required real-time video monitoring of high rise stairwells in buildings with more than 4,000 occupants. A new procedural requirement is an annual inspection of door openings, and related documentation for the inspection, testing and maintenance internals.

The 2015 edition includes new provisions in detailing the application of a code requirements hierarchy where a provision in one chapter conflicts with a provision in another chapter. NFPA 101 revised or added guidance on means of egress provisions relative to rooms opening directly onto an exit enclosure, door opening threshold height for spaces not normally occupied, door encroachment on egress width, existing door frames without labels, security access turnstiles, handrail orientation on flaring-width

stairs, horizontal exit stacking, horizontal exit exterior wall extensions, elevators in towers, occupant evacuation elevators, and occupant load factors for ambulatory health care and concentrated business use. NFPA 101 now permits atrium walls to serve as part of the separation for creating separated occupancies on a story-by-story basis.

The 2015 edition provides for revised the inspection instructions for door assemblies to address both fire-rated doors and nonrated egress doors. NFPA 101 expands the table addressing minimum fire protection ratings for opening protectives. The NFPA added provisions for alcohol-based hand-rub dispensers and now references these provisions by occupancy chapters. The NFPA expanded provisions on high-rise buildings to include remote video monitoring of exit stair enclosures, as were the assembly occupancy life safety evaluation provisions. NFPA 101 contains revised daycare and residential board-and-care occupancy provisions to permit consideration of more than one floor level for egress.

The NFPA further revised the health care occupancy provisions to permit facilities to be more home-like, including a reduction in the allowable width of nursing home minimum corridors and the clarification of permitted smoke alarm placement for kitchens that are open to the corridor. The revisions permit health care occupancy doors that are subject to locking in specialty treatment units, such as units for patients with dementia, to be disguised with murals. NFPA 101 allows smoke barriers permitted to be omitted on a non-health care floor below a health care floor. And the NFPA revised the ambulatory health care occupancy chapters so they are self-contained, removing the need to reference the business occupancy chapters.

As previously stated, the proposal does not create a statewide building code. The proposal does not authorize the state fire marshal to assess fines, require building plan review, or grant permits. The commissioner has routinely adopted revised fire protection standards for use by the State Fire Marshal's Office, as those standards are updated.

Copies of the NFPA 1 and NFPA 101 standards are available for public inspection in the State Fire Marshal's Office. The NFPA also makes available the published standards for read-only inspection online through its website at www.nfpa.org. To view NFPA standards on the NFPA website, users must create a free account and agree to certain terms and conditions. A video summarizing the changes to NFPA 1 is available online at www.youtube.com/watch?v=8vyiFxJKmec.

Specific Requirements for Retail Fireworks Sites Other Than Stands

The proposed amendment to §34.832(5) deletes the requirement for sales display areas to include a continuous durable restraint around displayed fireworks separating the customers from all merchandise. Retail fireworks sites other than stands may continue to operate with a continuous durable restraint around displayed fireworks. This section was added in 2002 as a response to the increased presence of nonstand retail fireworks sales. In practice, the existence of the continuous durable restraint only marginally reduces the handling of fireworks by consumers. Industry stakeholders have suggested that the continuous durable restraint itself may be a hazard during the emergency egress of the building.

Even after the proposed amendment, §34.832(5) would still require that fireworks sales display areas must be sufficiently designed to prevent customers from handling fireworks, unless an attendant is directly assisting the customer. Insufficient staffing and unmonitored costumer handling would constitute a violation of §34.832(5). Even with the proposed change, the requirement in §34.832(5) will still provide for the necessary protection, safety, and preservation of life and property.

The proposed amendment also includes nonsubstantive changes for purposes of matching agency style, consistency, and to improve readability. None of these nonsubstantive changes alter the meaning of the rules.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Ernest McCloud, director, State Fire Marshal's Office, has determined that, for each year of the first five years the proposed section is in effect, there may be measurable fiscal impact to state and local governments as a result of the enforcement or administration of this proposal. The cost analysis in the Public Benefit And Cost Note part of this proposal is applicable to these local and state governments should the state fire marshal conduct an examination and order the correction of a dangerous condition identified as a result of enforcing the proposed NFPA standards. Mr. McCloud does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. Mr. McCloud also determined that for each year of the first five years the proposal is in effect, the anticipated public benefit as a result of the proposal is the use of thorough and recent fire standards for the inspection of buildings. The proposed updated fire protection standards will be applied to examine whether conditions exist that are dangerous or are likely to cause or promote fire or create danger for firefighters, occupants, or buildings or structures. This means that examinations conducted by the state fire marshal applying these most recent nationally recognized standards for detection of potential fire dangers will result in better protection of individual citizens, firefighters, and buildings and structures. In order to properly protect life and property, it is necessary that the current nationally recognized standards for inspection of buildings and premises be used. This is consistent with Government Code §417.008(e), which authorizes the adoption of "any appropriate standard developed by a nationally recognized standards-making association." As stated previously, the standards adopted by the state fire marshal do not apply in a geographic area under the jurisdiction of a local government that has adopted fire protection ordinances.

Cost of purchasing NFPA standards. There will be nominal costs to persons and entities wanting to purchase the updated standards. The estimated cost to purchase the proposed updated NFPA 1 Fire Code is approximately $96.50, and NFPA 101 Life Safety Code is $98.00. The cost for both codes will be the same for all persons and entities. NFPA 1 Fire Code refers to other NFPA codes, so persons and entities may want to acquire copies of related NFPA codes. An interested person or entity can purchase an NFPA all-access online subscription plan for $1,450.00 for one year. NFPA also makes available standards for read-only inspection online through their website at www.nfpa.org.

Cost of remediating dangerous conditions. Businesses and individuals may face higher costs to meet the updated code standards. Costs for compliance with the updated standards is the result of Government Code §417.008, which grants authority to the state fire marshal to enter and examine buildings and premises in the state to examine whether conditions exist that are dangerous or are liable to cause or promote fire or create danger for firefighters, occupants, or buildings or structures.

The application of the new standards will provide inspectors with additional technical knowledge to identify dangerous conditions that may not be identified when only applying past editions of NFPA 1 and NFPA 101. Not every violation of an adopted code is a sufficient public safety hazard to allow the state fire marshal to order correction of the condition. The adoption of new standards does not create new standards of dangerous conditions. To the extent that using additional standards will assist the state fire marshal's identification of dangerous conditions, some buildings and premises may be more likely to receive an order to remediate dangerous conditions. These costs will vary based on the individual circumstances of each dangerous condition. Some dangerous conditions can be remedied with negligible costs, including revising operations, storage of certain materials in other places, testing safety devices, and unlocking barriers to egress. Other dangerous conditions may cost tens of thousands of dollars or more to comply with a state fire marshal order. It is possible, but not likely, that adoption of this new version will identify a dangerous condition that requires expensive repairs.

Cost of proposed amendment to §34.832 Specific Requirements for Retail Fireworks Sites Other Than Stands. The amendment to §34.832(5) deletes the requirement for sales display areas to include a continuous durable restraint around displayed fireworks separating the customers from all merchandise. Retail fireworks sites other than stands may continue to operate with a continuous durable restraint around displayed fireworks. The amendment will allow for the flexibility of not including a continuous durable restraint, and regulated entities will not incur a cost.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The department has determined that the adoption of new standards may have an adverse economic effect or a disproportionate economic impact on small or micro businesses.

This proposal specifies code standards for life safety protection and fire hazard management. All small or micro businesses in Texas will be required to comply with the proposed requirement. The cost analysis in the Public Benefit and Cost Note part of this proposal is also applicable to these small and micro businesses. The estimated cost for the purchase of new editions of NFPA 1 and NFPA 101 from the NFPA is $194.50. Any other costs that result from small and micro businesses' compliance with the updated standards are the result of Government Code §417.008, which grants authority to the state fire marshal to enter and examine buildings and premises in the state to determine whether conditions exist that are dangerous or likely to cause or promote fire or create danger for firefighters, occupants, or buildings or structures.

In the event that the proposal does have an adverse economic effect on small businesses or micro businesses that are required to comply with the proposal, the proposal does not require the statutorily mandated regulatory flexibility analysis specified by Government Code §2006.002(c)(2). Section 2006.002(c)(2) requires that a state agency, before adopting a rule that may have an adverse economic effect on small businesses, prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Government Code §2006.002(c-1) requires that the regulatory flexibility analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses" An agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

The purpose of Government Code §417.008 is to ensure compliance with the most recent standards of safety for fire and related hazards for the purpose of protecting life and property in this state. The proposed amendment establishes the 2015 NFPA 1 and NFPA 101 as minimum standards for fire hazard management.

The purpose of this proposal is to protect the health and safety of the firefighters, individual citizens, and buildings and structures of Texas through the adoption of safety standards. In order to protect life and property in this state, it is necessary that all businesses, regardless of size, comply with the minimum safety requirements. The requirements in this proposal are consistent with Government Code §417.008, which specifies that on the complaint of any person, the state fire marshal is entitled to enter any building or premises in Texas at any reasonable time for the purpose of examination for dangerous conditions.

The department has determined, in accordance with Government Code §2006.002(c-1), that because the purpose of this proposal and the authorizing statute is to protect the safety of life and property in this state, there are no regulatory alternatives to the requirements in this proposal that will sufficiently protect the safety of people, buildings, and structures in this state.

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

REQUEST FOR PUBLIC COMMENT. The department invites the public and affected persons to comment on this proposal. Submit your written comments on the proposal no later than 5 p.m., Central time, on November 28, 2016. Send written comments by mail to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to *chiefclerk@tdi.texas.gov.* You must simultaneously submit an additional copy of the comments by mail to Ernest McCloud, Assistant State Fire Marshal, Mail Code 112-FM, P.O. Box 149104, Austin, Texas 78714-9104; or by email to *ernest.mccloud@tdi.texas.gov.* You must submit any request for a public hearing separately to the Office of the Chief Clerk, MC 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714- 9104, or by email to *chiefclerk@tdi.texas.gov* before the close of the public comment period. If a hearing is held, written comments and public testimony presented at the hearing will be considered.

SUBCHAPTER C. STANDARDS AND FEES FOR STATE FIRE MARSHAL INSPECTIONS

DIVISION 1. GENERAL PROVISIONS

28 TAC §34.303

STATUTORY AUTHORITY. The amendment is proposed under Government Code §417.005 and §417.008, Occupations Code §2154.051 and §2154.052, and Insurance Code §36.001.

Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules neces-

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

Occupations Code §2154.051 states the commissioner shall determine reasonable criteria and qualifications for licenses and permits pertaining to the regulation of fireworks and fireworks displays. Section 2154.052 states that the commissioner shall adopt and the state fire marshal must administer rules the commissioner considers necessary for the protection, safety, and preservation of life and property.

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

CROSS-REFERENCE TO STATUTE. Government Code §417.008 is implemented by this §34.303 and Occupations Code §2154.051 and §2154.052 is implanted by §34.832.

§34.303. Adopted Standards.

(a) The commissioner adopts by reference:

(1) NFPA 1-2015 [~~1-2012~~] Fire Code, except for

(A) Chapter 1 Administration, to the extent that subsections 1.6 Enforcement, 1.7 Authority, 1.8 Duties and Powers of the Incident Commander, 1.9 Liability, 1.10 Fire Code Board of Appeals, 1.11 Records and Reports, 1.12 Permits and Approvals, 1.13 Certificates of Fitness, 1.14 Plan Review, and 1.16 Notice of Violations and Penalties do not apply to State Fire Marshal inspections;

(B) Chapter 30 Motor Fuel Dispensing Facilities and Repair Garages, to the extent it conflicts with standards adopted in Subchapter A of this chapter and Health and Safety Code Chapter 753;

(C) Chapter 60 Hazardous Materials, to the extent it will not be applied to laboratories and laboratories in health care occupancies; and

(D) Chapter 65 Explosives, Fireworks, and Model Rocketry, to the extent it conflicts with subchapter H of this chapter and Occupations Code Chapter 2154;

(2) NFPA Life Safety Code 101-2015 [~~101-2012~~];

(b) These copyrighted standards and recommendations are adopted for inspections performed under Government Code §417.008, except to the extent they are in conflict with sections of this chapter or any Texas statutes or federal law. The standards are published by and are available from the National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269, or by calling 1-800-344-3555. A copy of the standards is available for public inspection in the State Fire Marshal'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 October 12, 2016.

TRD-201605222

Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 676-6584

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SUBCHAPTER H. STORAGE AND SALE OF FIREWORKS

28 TAC §34.832

STATUTORY AUTHORITY. The amendment is proposed under Government Code §417.005, Occupations Code §2154.051 and §2154.052, and Insurance Code §36.001.

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

Occupations Code §2154.051 states the commissioner shall determine reasonable criteria and qualifications for licenses and permits pertaining to the regulation of fireworks and fireworks displays. Section 2154.052 states that the commissioner shall adopt and the state fire marshal must administer rules the commissioner considers necessary for the protection, safety, and preservation of life and property.

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

CROSS-REFERENCE TO STATUTE. Occupations Code §2154.051 and §2154.052 are implemented §34.832.

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

Indoor retail fireworks sites must comply with the following requirements:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) the address or location of the site;

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

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

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

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

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

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

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

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

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

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

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

(19) An indoor retail fireworks site must comply with the mercantile occupancy requirements of the standards adopted in §34.303 of this title (relating to Applicability of Rules). This standard, NFPA 101 Life Safety Code, is published by and is available from the National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts, 02269, or 1-800-344-3555.

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

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 12, 2016.

TRD-201605223

Norma Garcia
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6584

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER Y. CONTROLLED SUBSTANCES TAX

34 TAC §3.682

The Comptroller of Public Accounts proposes the repeal of §3.682, concerning tax payment certificates. The proposed repeal implements House Bill 1905, 84th Legislative Session, 2015. Section 36 of House Bill 1905 repealed Tax Code, Chapter 159 (Controlled Substances Tax), effective September 1, 2015.

Tom Currah, Chief Revenue Estimator, has determined that repeal of the rule will not result in any fiscal implications to the state or to units of local government.

Mr. Currah also has determined the repeal would benefit the public by removing from the Texas Administrative Code rules relating to a tax that has been repealed. There would be no anticipated significant economic cost to the public. This repeal is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the repeal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The repeal is proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2 (State Taxation).

§3.682. Tax Payment Certificates.

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 17, 2016.

TRD-201605380
Lita Gonzalez
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.683

The Comptroller of Public Accounts proposes the repeal of §3.683, concerning jeopardy determinations. The proposed repeal implements House Bill 1905, 84th Legislative Session, 2015. Section 36 of House Bill 1905 repealed Tax Code, Chapter 159 (Controlled Substances Tax), effective September 1, 2015.

Tom Currah, Chief Revenue Estimator, has determined that repeal of the rule will not result in any fiscal implications to the state or to units of local government.

Mr. Currah also has determined the repeal would benefit the public by removing from the Texas Administrative Code rules relating to a tax that has been repealed. There would be no anticipated significant economic cost to the public. This repeal is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the repeal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The repeal is proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2 (State Taxation).

§3.683. Jeopardy Determinations.

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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Lita Gonzalez
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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SUBCHAPTER CC. SEXUALLY ORIENTED BUSINESS FEE

34 TAC §3.722

The Comptroller of Public Accounts proposes amendments to §3.722, concerning sexually oriented business fee, to include a definition of clothing that conforms to the commonly understood meaning of the term, to memorialize the comptroller's existing interpretation of what constitutes clothing, and to provide examples of evidence that the comptroller will consider in determining whether a business is a sexually oriented business. The amendments will facilitate uniform enforcement of the Sexually Oriented Business Fee statute.

Subsection (a) is amended to define a term. New paragraph (1) is added to define the term "clothing," which appears in Business and Commerce Code, §102.051 (Definitions), but is not defined therein. The term is given its commonly-understood meaning. The definition also includes examples of items that are not clothing. Subsequent paragraphs are renumbered accordingly.

New subsection (b) is added to describe the clothing that is required for entertainers and performers to be considered non-nude.

Subsequent subsections are relettered.

Relettered subsection (c) is revised to correct the citation to the Business and Commerce Code.

Relettered subsection (d)(3) is amended to state the rebuttable presumption that the comptroller will use to determine whether a business is subject to the sexually oriented business fee. Existing language in paragraph (3) is deleted.

Relettered subsection (i)(4) is amended to implement Senate Bill 1, 82nd Legislature, First Called Session, 2011 which amended Tax Code, §111.0041 (Records; Burden to Produce and Substantiate Claims) to require taxpayers to keep records for a minimum of four years and throughout any period in which any tax, penalty, or interest may be assessed, collected, or refunded by the comptroller, or in which an administrative hearing or judicial proceeding is pending.

Relettered subsection (j) is amended to add a reference that the comptroller may obtain business information from franchise tax reports.

Tom Currah, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by clarifying current tax policy. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendment is proposed under Business and Commerce Code, §102.056 (Administration, Collection, and Enforcement), and Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Business and Commerce Code, Chapter 102, Subchapter B (Fee Imposed on Certain Sexually Oriented Businesses).

The section implements Business and Commerce Code, Chapter 102, Subchapter B.

§3.722. Sexually Oriented Business Fee.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Clothing--A garment used to cover the body, or a part of the body, typically consisting of cloth or a cloth-like material. Paint, latex, wax, gel, foam, film, coatings, and other substances applied to the body in a liquid or semi-liquid state are not clothing.

(2) [~~(1)~~] Customer--Any person on the premises of a sexually oriented business except:

(A) an owner, operator, independent contractor of the business or an employee of that sexually oriented business; or

(B) a person who is on the premises exclusively for repair or maintenance of the premises or for the delivery of goods to the premises.

(3) [~~(2)~~] Nude--To be entirely unclothed, or clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts, if the person is female, or any portion of the genitals or buttocks.

(4) [~~(3)~~] Sexually oriented business--A nightclub, bar, restaurant, or similar commercial enterprise that:

(A) provides for an audience of two or more individuals live nude entertainment or live nude performances; and

(B) authorizes on-premises consumption of alcoholic beverages, regardless of whether the consumption of alcoholic beverages is under a license or permit issued under the Alcoholic Beverage Code.

(b) An entertainer or performer will be considered "nude" for purposes of this section unless the entertainer or performer wears fully opaque clothing that covers all portions of the genitals and buttocks, and if the entertainer or performer is a female, the entertainer or performer must also wear fully opaque clothing that covers the portions of the breasts below the top of the areola of the breasts.

(c) [~~(b)~~] Questionnaire. A sexually oriented business, as defined in this section, is required to complete and submit a Texas sexually oriented business fee questionnaire on a form prescribed by the comptroller to file the report and remit the fee imposed under Business and Commerce Code, Chapter 102 [~~47~~].

(d) [~~(c)~~] Imposition and Calculation of Fee.

(1) A $5.00 fee is imposed on a sexually oriented business for each entry by each customer admitted to the business. In determining the amount of fee due by a sexually oriented business for more than one entry by the same customer on the same business day at the same location, it shall be presumed to have been one entry by the customer and the fee amount due from the business for the entry is $5.00. A business day begins when the business opens and continues until the close of business.

(2) A sexually oriented business has the discretion to determine how it will derive the money to pay the fee. All door and cover charges, including reimbursement of the sexually oriented business fee from its customers, are subject to sales tax as provided by Tax Code, Chapter 151. A sexually oriented business that chooses to recover the fee from its customer by including a separately stated charge for the fee on the customer check or invoice must clearly identify the charge as a reimbursement. A charge not clearly identified as reimbursement of the fee is considered a tax collected from the customer and these amounts must be remitted to the comptroller in addition to the $5.00 entry fee.

(3) The comptroller will presume that a business is a sexually oriented business if the business holds itself out as a sexually oriented business. Evidence that the comptroller may consider includes

signage, advertising, social media, publication of images, inspections, investigations, and the reputation of the business. The business may rebut the presumption by proving the instances in which the business did not operate as a sexually oriented business. [~~A business that holds occasional events described in subsection (a)(3) of this section, but does not habitually engage in the activity described in subsection (a)(3) of this section is liable for the sexually oriented business fee for those occasional events. For example, a nightclub that hosts a wet t-shirt contest is liable for the fee based upon attendance during the event.~~]

(e) [~~(d)~~] Report forms. The sexually oriented business fee must be reported on a form as prescribed by the comptroller. The fact that the sexually oriented business does not receive the form or does not receive the correct form from the comptroller for the filing of the return does not relieve the business of the responsibility of filing a return and remitting the fee.

(f) [~~(e)~~] Due date of report and payment.

(1) The sexually oriented business fee report and payment are due no later than the 20th day of the month following the calendar quarter month in which the liability for the fee is incurred.

(2) A sexually oriented business must file a quarterly report even if there is no fee to report.

(g) [~~(f)~~] Penalty. Penalties due on delinquent fees and reports shall be imposed as provided by Tax Code, §111.061.

(h) [~~(g)~~] Interest. Interest due on delinquent fees shall be imposed as provided by Tax Code, §111.060.

(i) [~~(h)~~] Records required.

(1) A sexually oriented business is required to maintain records, statements, books, or accounts necessary to determine the amount of fee for which the business is liable to pay.

(2) A sexually oriented business shall record daily the number of customers admitted to the business. The manner in which a sexually oriented business maintains records of the number of customers admitted to the business may be written, stored on data processing equipment, or may be in any form that the comptroller may readily examine.

(3) The comptroller or an authorized representative has the right to examine any records or equipment of any person liable for the fee in order to verify the accuracy of any report made or to determine the fee liability in the event no return is filed.

(4) Records required by the comptroller must be kept for at least four years after the date on which the records are prepared, and throughout any period in which any tax, fee, penalty, or interest may be assessed, collected, or refunded by the comptroller or in which an administrative hearing or judicial proceedings is pending, unless the comptroller authorizes in writing a shorter retention period. A business must make records available for inspection and audit on request by the comptroller.

(j) [~~(i)~~] Failure to keep accurate records. If a sexually oriented business fails to keep accurate records of the number of customers admitted to the business the comptroller may estimate the amount of fee liability based on any available information that includes, but is not limited to, any reports required to be filed per Tax Code, Chapter 151, Chapter 171, or Chapter 183.

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 17, 2016.

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Lita Gonzalez
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 475-0387

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CHAPTER 18. TOBACCO SETTLEMENT PERMANENT TRUST ACCOUNT

34 TAC §18.1, §18.2

The Comptroller of Public Accounts proposes amendments to §18.1, concerning purpose and definitions and §18.2, concerning trust account distributions.

The amendment to §18.1 corrects the format of the definitions to make them consistent with the format of other definitions in this title and adds a definition of "investment policy statement." The investment policy statement will be posted on the Texas Treasury Safekeeping Trust Company's website.

The amendment to §18.2 clarifies the formula for calculating the actual distribution amount in order to provide for predictable, stable, and sustainable distributions over time while maintaining the inflation adjusted value of the corpus.

Tom Currah, Chief Revenue Estimator, has determined that for the first five-year period the rules will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Currah also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be by clarifying the formula used to calculate trust account distributions. The proposed amendments would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rules.

Comments on the proposals may be submitted to Marianne Dwight, General Counsel, Texas Treasury Safekeeping Trust Company, 208 E. 10th Street, Fourth Floor, Austin, Texas 78701. If a person wants to ensure that the comptroller considers and responds to a comment made about this proposal, then the person must ensure that the comptroller receives the comment not later than the 30th day after the issue date of the *Texas Register* in which this proposal appears.

The amendments are proposed under Government Code, §403.1041(h), which authorizes the comptroller to adopt rules related to the management and implementation of the trust account.

The amendments implement Government Code, §403.1041(h).

§18.1. Purpose and Definitions.

(a) Purpose. The comptroller is required by Government Code, §403.1041, to administer the Tobacco Settlement Permanent Trust Account (trust account) and manage the assets of the trust account with the advice of and in consultation with the Tobacco Settlement Permanent Trust Account Investment Advisory Committee (investment advisory committee). The comptroller is also required to adopt rules necessary to implement the comptroller's duties under

Government Code, §403.1041, including rules distinguishing the net earnings of the trust account that may be distributed from earnings used for investment expenses and from the money and assets that are the corpus of the trust account. A rule adopted by the comptroller under this subsection must be submitted to the investment advisory committee and may not become effective before the investment advisory committee approves the rule. If the investment advisory committee disapproves a proposed rule, the investment advisory committee is required to provide the comptroller the specific reasons that the rule was disapproved.

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

(1) Actual distribution amount--The [the] amount determined pursuant to §18.2 of this title (relating to Trust Account Distributions).[;]

(2) Adjusted [adjusted] current earnings--Current [current] earnings less investment expenses.[;]

(3) Average [average] market value of the trust account--Calculated [calculated] using the most recent twenty (20) calendar quarter end market values.[;]

(4) Corpus [corpus]--The [the] cumulative value of all contributions to the trust account.[; plus, all inflation adjustments;]

(5) Current [current] earnings--The [the] sum of interest and dividend income, income from real estate and private equity investments, and total returns produced by investments designated by the governing investment policy as substitutes for fixed income earned by the trust account during the calendar year.[;]

[(6) distribution stabilization account--a separate account consisting of the amounts transferred pursuant to §18.2 of this title (relating to Trust Account Distributions). These amounts are accounted for separately from the corpus and will not be part of the corpus;]

[(7) inflation adjustment--for any calendar year, the dollar amount achieved by multiplying the inflation adjustment factor by the value of the corpus as of the beginning of such year;]

[(8) inflation adjustment factor--the average annual percentage change in the United States Consumer Price Index for All Urban Consumers (CPI-U) for the most recent 12 quarters as published by the United States Bureau of Labor Statistics;]

(6) [(9)] Investment [investment] advisory committee--The [the] Tobacco Settlement Permanent Trust Account Investment Advisory Committee as defined by Government Code, §403.1041.[;]

(7) [(10)] Investment [investment] expenses--Investment [investment] related expenses, not to exceed amounts established by the Texas Legislature, including, but not limited to, custodial fees, and fees for investment management, administration, investment consultants, or auditors.[;]

(8) Investment Policy Statement--The Investment Policy Statement - Texas Endowment Funds adopted by the Comptroller of Public Accounts for endowments managed by the Texas Treasury Safekeeping Trust Company.

(9) [(11)] Net [net] earnings--All appreciation and income generated by the trust account. [the year-end market value of the trust account less the corpus value and the distribution stabilization account balance;]

(10) [(12)] Political [political] subdivision--The [the] meaning assigned by Government Code, §403.1041.[; and]

(11) [(13)] Trust [trust] account--The [the] Tobacco Settlement Permanent Trust Account as defined by Government Code, §403.1041.

§18.2. Trust Account Distributions.

(a) The trust account shall balance the present needs and interests of the political subdivisions with those of the future. The trust account distribution objectives shall be to:

(1) provide a predictable, stable stream of distributions over time;

(2) ensure that the inflation-adjusted value of distributions is maintained over the long-term; and

(3) ensure that the inflation-adjusted value of the corpus after distributions is maintained over the long-term.

(b) Subject to subsection (c) of this section, the actual distribution amount shall be determined as set forth in the Investment Policy Statement [5.0% of the average market value of the trust account calculated as of the end of the calendar year immediately preceding the distribution. No more than 4.5% shall be distributed to the political subdivisions and the remainder shall be distributed to the distribution stabilization account when the distribution stabilization account balance is less than the maximum balance, which shall be equal to three times the amount actually distributed in the preceding year from the trust account to the political subdivisions. When the distribution stabilization account balance equals the maximum balance, this portion of the actual distribution amount shall not be distributed from the trust account].

(c) If the calendar year-end market value of the trust account is equal to or less than the corpus value, the actual distribution amount shall be limited to no more than adjusted current earnings. [If the net earnings of the trust account are less than the calculated actual distribution amount in subsection (b) of this section, the actual distribution amount shall not exceed the lesser of: 4.5% of the average market value or 4.5% of the year-end market value. The distribution shall be funded from the sources, until exhausted, in the order provided as follows:]

[(1) adjusted current earnings;]

[(2) positive net earnings; then]

[(3) up to 50% of the balance of the distribution stabilization account.]

[(d) Any or all positive net earnings, not otherwise distributed as provided in subsection (c) of this section, may be distributed to the distribution stabilization account.]

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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Lita Gonzalez
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Comptroller of Public Accounts
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PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 23. ADMINISTRATIVE PROCEDURES

34 TAC §23.7, §23.8

The Teacher Retirement System of Texas (TRS or "system") proposes amendments to 34 TAC §23.7 and §23.8, concerning TRS' Code of Ethics for Contractors (the "Code") and related materials.

Section 825.212 of the Government Code requires the TRS Board of Trustees to adopt a code of ethics, including standards of ethical conduct and disclosure requirements, applicable to certain TRS contractors. Section 825.212(c) also requires TRS by rule or policy to adopt procedures for disclosing and curing violations of the common law of conflict of interests and any such rule or policy may specify time periods in which disclosures and cures must be completed. In compliance with §825.212, the board has adopted the Code.

Section 23.7 of TRS' rules of the TRS Board of Trustees adopts the Code of Ethics by reference. In June 2016, the board adopted a revised Code. The proposed rule amendments update §23.7 to reflect the current version of the Code.

Section 23.8 of TRS' rules adopts by reference the Expenditure Reporting Memorandum (reporting memorandum) and Expenditure Reporting Form for Contractors (reporting form) and requires Contractors to report expenditures made on behalf of any one TRS trustee or employee of the system. Section 2263.004 of the Government Code requires the board by rule to require certain contractors, financial advisors and service providers to the retirement system to meet specified standards of conduct. Pursuant to this section, the Code requires that certain contractors, financial advisors and service providers file with the system a report detailing any expenditure of more than $50 made on behalf of a trustee or employee of the system. The board adopts the form used by contractors to report such expenditures. The executive director provides an explanatory memorandum addressed to contractors to accompany the reporting form. In February 2016, the executive director approved a revised reporting memorandum. In June 2016, the board adopted a revised reporting form. The proposed amendments to §23.8 would adopt by reference the latest versions of the executive director's reporting memorandum and the reporting form under the Code.

Brian K. Guthrie, TRS Executive Director, estimates that, for each year of the first five years that the proposed amendments to §23.7 and §23.8 will be in effect, there will be no fiscal implications to state or local governments as a result of administering the proposed amended rules.

For each year of the first five years that the proposed amended rules will be in effect, Mr. Guthrie has determined that the public benefit will be to provide through the updated rules the latest versions of the Code of Ethics and related materials.

Mr. Guthrie has determined that there is no economic cost to entities or persons required to comply with the proposed rules. The proposed rules do not impose additional reporting or other requirements that would increase the cost of compliance. Mr. Guthrie has determined that there will be no effect on a local economy because of the proposed rule, and therefore no local employment impact statement is required under §2001.022 of the Government Code. Mr. Guthrie has also determined that there will be no direct adverse economic effect on small businesses or micro-businesses within TRS' regulatory authority as a result of the proposed amended rule; therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Brian K. Guthrie, Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the *Texas Register.*

Statutory Authority: The amendments are proposed under §825.102 of the Government Code, which authorizes the board to adopt rules for the administration of the funds of the retirement system and for the transaction of the business of the board.

The proposed rules affect §825.212 of the Government Code, concerning the adoption of a code of ethics for contractors and related reporting requirements, and §2263.004 of the Government Code, concerning ethics requirements for outside financial advisors or service providers.

§23.7. Code of Ethics for Contractors.

The Code of Ethics for Contractors (the Code) sets forth the ethical responsibilities and requirements of Contractors, as that term is defined in the Code, in performing services for the Teacher Retirement System of Texas (TRS). The Board of Trustees of TRS adopts by reference the Code as most recently revised and adopted to be effective June 16, 2016 [~~April 20, 2012~~]. A copy of the most recently revised Code has been filed with the Office of the Secretary of State in Austin. Copies of the Code are available from TRS at 1000 Red River Street, Austin, Texas 78701-2698, (512) 542-6400. Also, a copy of the Code can be found on and printed from the TRS website, www.trs.texas.gov [~~www.trs.state.tx.us~~], in the information regarding TRS Ethics.

§23.8. Expenditure Reporting by Certain Contractors.

Under §23.7 of this title (relating to Code of Ethics for Contractors) and the Code of Ethics for Contractors (the Code) adopted by the Board of Trustees of the Teacher Retirement System of Texas (TRS), each Contractor, as that term is defined in the Code, must annually file an expenditure report on the prescribed TRS form. The Contractor must include in the report itemized, reasonably detailed lists of expenditures of more than $50 per day made by or on behalf of the Contractor with respect to or for the benefit of each TRS Trustee or Employee. Each Contractor must comply with TRS rules governing the filing of and requirements for the expenditure reporting form promulgated by TRS, including the Code, Expenditure Reporting Memorandum (reporting memorandum), and Expenditure Reporting Form for Contractors (reporting form) as promulgated and applicable under the Code and revised from time to time. TRS adopts by reference the reporting memorandum as most recently revised February 10, 2016 [~~December 15, 2012~~] and the reporting form as most recently revised June 16, 2016 [~~September 17, 2010~~]. Capitalized words appearing in this section have the same meaning assigned to them in the Code, as revised from time to time. Copies of the most recently revised reporting memorandum and reporting form have been filed with the Office of the Secretary of State in Austin. Copies of the reporting memorandum and the reporting form are available from TRS at 1000 Red River Street, Austin, Texas 78701-2698, (512) 542-6400. Also, copies of the reporting memorandum and the reporting form can be found on and printed from the TRS website, www.trs.texas.gov [~~www.trs.state.tx.us~~], in the information regarding TRS Ethics.

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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Brian Guthrie
Executive Director
Teacher Retirement System of Texas
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For further information, please call: (512) 542-6513

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CHAPTER 25. MEMBERSHIP CREDIT

The Teacher Retirement System of Texas (TRS) proposes amendments to 34 TAC §25.24, relating to Performance Pay; §25.31, relating to Percentage Limits on Compensation Increases; and §25.303 relating to Calculation of Actuarial Cost for Purchase of Compensation Credit.

The proposed changes to §25.24 regard the crediting of performance pay that was earned prior to the 2011-2012 school year but paid in the 2011-2012 school year. The changes are needed to clarify that performance pay earned prior to the 2011-2012 school year but paid in the 2011-2012 school year will be credited in the school year in which the standards establishing the right to the performance pay are met or in which the service occurred, whichever is earlier. Although the current language indicates that beginning with the 2011-2012 school year, performance pay will be credited in the school year in which it is paid, it does not clearly address how amounts earned prior to that school year will be credited. The proposed amendments are consistent with staff's interpretation and application of the rule since it was amended in April 2011.

The proposed changes to §25.31 regard the application of the percentage limit on compensation increases in the last school years prior to retirement. Currently, the rule limits increases in compensation in the final three or five school years prior to retirement, depending on the member's grandfathered status. The increases are limited to the greater of $10,000 or 10 percent of the allowed compensation for the previous year.

Under the current rule, for members who are grandfathered to use a three year salary average when calculating retirement benefits, the base line amount used to determine the amount of allowable compensation in the third school year prior to retirement is the greater of either the amount of the compensation for the fourth or the fifth school year prior to retirement. If there is no compensation in the fourth or fifth school year prior to retirement, the base amount is the earliest salary credited in the three school years prior to retirement. If the member does not have compensation credited in at least three of the last five school years prior to retirement, the limit on increases does not apply. For members who are not grandfathered to use a three year salary average but must use a five year salary average when calculating retirement benefits, the base line amount currently used to determine the amount of allowable compensation in the fifth school year prior to retirement is the greater of either the amount of the compensation for the sixth or the seventh school year prior to retirement. If there is no compensation in the sixth or seventh school year prior to retirement, the base amount is the earliest salary credited in the five school years prior to retirement. If the member does not have compensation credited in at least five of the last seven school years prior to retirement, the limit on increases does not apply to these members.

Staff proposes changes to §25.31 to address the harsh cut-back suffered by some members whose pay in the base year does not reflect a full school year of pay or even a school year in which service credit was given. The proposed amendments require that the base year must be a school year in which service credit was given. This change will minimize the cut-back in compensation experienced by a member who received only a month or two of compensation in the base year and did not receive service credit for that year. Also, the proposed amendments require that a grandfathered member must have service credit rather than simply compensation credit in at least three of the last five school years in order for the compensation limit to apply. This change eliminates the compensation limit for members who did not receive service credit in at least three of the last five school years. Similarly, a member who is not grandfathered must have received service credit in at least five of the last seven school years prior to retirement in order for the compensation limit to apply.

The changes proposed by staff to §25.303 regard how the actuarial cost of compensation credit is calculated. The content of §25.303 was moved from §25.302, which relates to the calculation of the actuarial cost for service credit, during the most recent rule review of Chapter 25 to separate the requirements for calculating the cost of service credit from those for calculating the cost of compensation credit. However, after working with the rule relating to the purchase of compensation credit, staff identified an ambiguity in the wording of subsection (b). Although staff has consistently applied the correct formula, the proposed changes make it clear that the cost of the increased compensation credit is determined by dividing the increased compensation by three or five (depending on the member's grandfathered status) and then dividing that quotient by 1,000. The resulting quotient is then multiplied by the appropriate cost factor from the table to determine the cost of the compensation credit.

Staff also recommends proposed changes in subsection (a) of §25.303 to provide that a member's age and years of service credit used to determine the appropriate cost factor will be based on the member's age and years of service credit on September 1 of the year the cost is established. The proposed amendment regarding the member's age and years of service credit on September 1 of the year the cost is established is consistent with language in §25.302 regarding the calculation of the cost to purchase service credit and results in consistency in the cost of compensation credit and in administrative efficiencies

Brian K. Guthrie, TRS Executive Director, estimates that, for each year of the first five years that the proposed amendments to §§25.24, 25.31, and 25.303 will be in effect, there will be no fiscal implications to state or local governments as a result of administering the proposed amended rules.

For each year of the first five years that proposed amended rules will be in effect, Mr. Guthrie has determined that the public benefit will be as follows: amended §25.24 will more clearly articulate how TRS credits performance pay that was paid in the 2011-2012 school year; amended §25.31 will more fairly address the intent of the Legislature to protect the trust fund from spikes in a member's salary in the final years before retirement by requiring that the base salary used to determine if spiking has occurred be a year in which service credit is awarded; and amended §25.303 will clarify how TRS calculates the cost of purchasing compensation credit.

Mr. Guthrie has determined that there is no economic cost to entities or persons required to comply with the proposed rules.

The proposed rules do not impose additional reporting or other requirements that would increase the cost of compliance. There is an increased cost to TRS to comply with the proposed amendments to §25.31, but it is a de minimis amount that is offset by savings in administrative costs and efficiencies in implementing the clarified and improved proposed rules. Mr. Guthrie has determined that there will be no effect on a local economy because of the proposed rule, and therefore no local employment impact statement is required under §2001.022 of the Government Code. Mr. Guthrie has also determined that there will be no direct adverse economic effect on small businesses or micro-businesses within TRS' regulatory authority as a result of the proposed amended rule; therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Brian K. Guthrie, Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the *Texas Register.*

SUBCHAPTER B. COMPENSATION

34 TAC §25.24, §25.31

The amendments are proposed under the following sections of the Government Code: §825.102, which authorizes the TRS Board of Trustees (board) to adopt rules for eligibility for membership, the administration of the funds of the system, and the transaction of business of the board and §825.110, which requires the board to adopt rules that include a percentage limit on increases in annual compensation

The proposed amendments affect the following sections of the Government Code: §821.001(4), which defines "annual compensation"; §824.203, which provides the method of computing standard service retirement benefits and §825.403, which provides for collection of member contributions and requiring the payment of actuarial cost to establish unreported service or compensation credit; and §825.105, which authorizes the board to adopt actuarial tables.

§25.24. Performance Pay.

(a) Annual compensation includes performance pay earned under a total compensation plan specifically approved by vote of the governing board of an employer. Such approval must be reflected in the minutes of the governing board. Any employer reporting to the retirement system is considered a school district for the purposes of this section.

(b) For purposes of including performance pay as a part of annual compensation under this rule, a total compensation plan must describe all elements of compensation received by all employees of the employer.

(c) Performance pay is compensation for service as an employee in a Texas public educational institution that is paid under a valid employment agreement based upon a performance standard published in written documents adopted by the employer. The performance standard may be based on evaluations or goal achievement of the individual employee or of the group in which the individual belongs. Beginning on the first day of the 2011-2012 school year and thereafter, specific amounts of performance pay will be credited to the year in which the performance pay is paid. For school years prior to the 2011-2012 school year, specific amounts of performance pay will be credited to the year in which the standards establishing the right to the performance pay are met or in which the service occurred, whichever is earlier. Performance pay paid in the 2011-2012 school year that is based on service rendered prior to the 2011-2012 school year will be credited to the school year in which the standards establishing the right to the performance pay are met or the school year in which the service occurred, whichever is earlier.

(d) An employer shall certify each year to the retirement system, by a date specified by the system on a form prescribed by TRS, whether it is providing performance pay under this section. A district that has properly made this certification shall report all qualifying performance pay as compensation and make appropriate deductions for member contributions unless the retirement system advises the employer that such pay does not qualify as performance pay under this rule. Employer shall maintain records that show it provides such pay for a period not less than 7 years after such pay is reported to the retirement system.

(e) Beginning on the first day of the 2011-2012 school year and thereafter, performance pay earned during the school year in which the member retires or any previous school year and paid after the member has begun receiving retirement benefits is not creditable by TRS and will not be used in any benefit calculation. For school years prior to the 2011-2012 school year, if performance pay earned during the school year in which the member retires is paid after the member has begun receiving retirement benefits, any benefit adjustment needed will be made effective the month following the month in which TRS receives the deposits for the performance pay, subject to any applicable limits under 26 United States Code §415.

§25.31 Percentage Limits on Compensation Increases.

(a) For members who on or before August 31, 2005 had attained the age of 50, had at least 25 years of service credit, or whose combined age and service credit equals 70 or greater, the amount of compensation credited by TRS in each of the last three school years prior to retirement may not exceed the amount of compensation allowed for the preceding school year by more than 10% or $10,000, whichever is greater.

(b) For members who on or before August 31, 2005 did not meet requirements of subsection (a) of this section, the amount of compensation credited by TRS in each of the last five school years prior to retirement may not exceed the amount of compensation allowed for the preceding school year by more than 10% or $10,000, whichever is greater.

(c) For members meeting the requirements of subsection (a) of this section, the base line amount used to determine the amount of allowable compensation in the third school year prior to retirement is the greater of either the amount of compensation for the fourth school year prior to retirement or the amount of compensation for the fifth school year prior to retirement, provided the member received service credit in the base year. If the member did not receive service credit in [~~there is no compensation for~~] either the fourth or fifth school year prior to retirement, the base amount is the earliest salary credited in the three school years prior to retirement, provided the member received service credit in the base year. If the member does not have service credit [~~credited compensation~~] in at least three school years during the last five school years prior to retirement, the limit in subsection (a) of this section does not apply.

(d) For members who do not meet the requirements of subsection (a) of this section and who are subject to the restriction in subsection (b) of this section, the base line amount used to determine the amount of allowable compensation in the fifth school year prior to retirement is the greater of either the amount of compensation for the sixth school year prior to retirement or the amount of compensation for the seventh school year prior to retirement, provided the member received service credit in the base year. If the member did not receive

service credit in [~~there is no compensation for~~] either the sixth or seventh school year prior to retirement, the base amount is the earliest salary credited in the five school years prior to retirement, provided the member received service credit in the base year. If the member does not have service credit [~~credited compensation~~] in at least five school years during the last seven school years prior to retirement, the limit in subsection (b) of this section does not apply.

(e) The amount of allowable compensation is the greater of 110% of the base line amount or the amount of compensation in the base year plus $10,000. The amount of allowable compensation for each subsequent year is the greater of 110% of the allowable amount for the previous year or the allowable amount for the previous year plus $10,000.

(f) For school years prior to the 2011-2012 school year, increases in compensation due to a change in employers, a change in duties, additional duties or work, legislation, or federal or state law are not subject to the limits in subsections (a) and (b) of this section and the allowable amount of compensation for the remaining years prior to retirement is calculated using the increased amount.

(g) Beginning on the first day of the 2011-2012 school year and thereafter, all increases in compensation without regard to the reason for the increase, are subject to the limits in subsections (a) and (b) of this section.

(h) Only compensation earned after the 2005-2006 school or contract year will be subject to the limit on increases described in this section. Salaries earned during the 2005-2006 school year and after will be used in the calculation of the base amount.

(i) TRS will adjust a member's annual compensation at the time of retirement to comply with the limit on creditable compensation in subsections (a) or (b) of this section and refund the member contributions on the amount that exceeds the limits described in this section. The refund will be made after the date on which TRS makes the first annuity payment.

(j) No adjustment in compensation will be made if the limit on compensation increases would not affect the calculation of the member's retirement benefit.

(k) If compensation is adjusted under this section, the member may provide additional information in the form of written documentation to demonstrate that the compensation should be allowed. TRS makes the final determination regarding whether compensation is allowed in the member's benefit calculation.

(l) Upon the request of TRS, the employer shall provide documents or records evidencing the amount and nature of the increased compensation reported to TRS.

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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Brian Guthrie
Executive Director
Teacher Retirement System of Texas
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For further information, please call: (512) 542-6513

SUBCHAPTER P. CALCULATION OF FEES AND COSTS

34 TAC §25.303

The amendments are proposed under the following sections of the Government Code: §825.102, which authorizes the TRS Board of Trustees (board) to adopt rules for eligibility for membership, the administration of the funds of the system, and the transaction of business of the board and §825.110, which requires the board to adopt rules that include a percentage limit on increases in annual compensation

The proposed amendments affect the following sections of the Government Code: §821.001(4), which defines "annual compensation"; §824.203, which provides the method of computing standard service retirement benefits and §825.403, which provides for collection of member contributions and requiring the payment of actuarial cost to establish unreported service or compensation credit; and §825.105, which authorizes the board to adopt actuarial tables.

§25.303. Calculation of Actuarial Cost for Purchase of Compensation Credit.

(a) When a member is purchasing TRS compensation credit for which the law requires that the actuarial cost or actuarial present value be deposited and for which the method in this section is referenced by another section of this title, TRS will calculate the cost using the cost factors obtained from the Actuarial Cost Tables adopted and the method described in this section. For purchases in which the cost is established and the purchase is initiated in the 2016-17 school year or after, TRS will use the age of the member and the service credit established by the member on September 1 of the school year in which the cost of the purchase is established.

(b) Each of the tables cross-references the member's age in rows with years of credited service in columns. The intersection of the participant's age and service is the cost factor that shall be applied in determining the cost of the additional compensation credit as described in this subsection [~~to the additional final average salary that may result from the purchase~~]. TRS will calculate the cost to purchase compensation credit under this section by dividing the additional compensation by three or five years, as determined by the standard annuity calculation applicable to the member, and dividing that quotient by 1,000 and multiplying the resulting quotient by the appropriate cost factor obtained from the table. The eligibility of additional compensation credit available for purchase is determined by the laws and rules applicable to the type of compensation sought to be credited.

(c) For individuals whose membership was established before September 1, 2007 and who have five years of service credit on August 31, 2014 and maintain membership in TRS until the time of purchase, the methodology described in subsection (b) of this section shall be used to determine cost of additional compensation credit, but TRS shall use the factors in the tables adopted as part of this subsection.
Figure: 34 TAC §25.303(c) (No change.)

(d) For individuals whose membership was established on or after September 1, 2007 and who have five years of service credit on August 31, 2014 and maintain membership in TRS until the time of purchase, the methodology described in subsection (b) of this section shall be used to determine cost of additional compensation credit, but TRS shall use the factors in the tables adopted as part of this subsection.
Figure: 34 TAC §25.303(d) (No change.)

(e) Effective September 1, 2014, for members who do not have five years of service credit on August 31, 2014 or whose current membership began after August 31, 2014, the methodology described in

subsection (b) of this section shall be used to determine the cost of additional compensation credit, but TRS shall use the factors in the tables adopted as a part of this subsection.
Figure: 34 TAC §25.303(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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Brian Guthrie
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CHAPTER 29. BENEFITS
SUBCHAPTER G. PROPORTIONATE RETIREMENT

34 TAC §29.83

The Teacher Retirement System of Texas (TRS or system) proposes new rule 34 TAC §29.83, relating to Calculation of Amount of Retirement Benefit.

The proposed new rule concerns how service credit maintained in another retirement system participating in the Proportionate Retirement Program will be used in determining the early age reduction applied to a member's service retirement benefit. Although the statutes establishing the Proportionate Retirement Program provide that combined service credit must be considered in determining eligibility for service retirement, the statutes do not distinguish between normal age and early age retirement. The law, however, provides that with regard to "length-of-service" requirements for service retirement, the combined service credit is to be considered as if it were all credited in one system.

There are currently six tiers of TRS membership with different eligibility requirements for normal age retirement and different reduction factors and percentage reductions for early age retirement. However, length of service (amount of service credit) is used in determining eligibility for normal age and the reductions for early age service retirement in each tier. The calculation of a normal age service retirement annuity using combined service credit is addressed in 34 TAC §29.80, which authorizes the calculation of an unreduced benefit once eligibility for normal age retirement is established using the combined service credit. Using the combined service credit as proposed in the new rule to determine the applicable reduction for an early age service retirement annuity is consistent with §29.80, statutory requirements, and the intent of the law. By using the combined service credit to determine the applicable early age reduction, the amount of the reduction for early age retirement will be less.

Brian K. Guthrie, TRS Executive Director, estimates that, for each year of the first five years that the proposed new rule §29.83 will be in effect, there will be no fiscal implications to state or local governments as a result of administering the proposed new rule.

For each year of the first five years that the proposed new rule will be in effect, Mr. Guthrie has determined that the public benefit will be to clarify how TRS will use combined service credit under the Proportionate Service Program in applying length-of-service requirements related to early age retirement.

Mr. Guthrie has determined that there is no economic cost to entities or persons required to comply with the proposed rule. There is an increased cost to TRS to comply with proposed new §29.83, but it is a de minimis amount that is offset by savings in administrative costs and efficiencies in implementing the clarified and improved proposed rule. Mr. Guthrie has determined that there will be no effect on a local economy because of the proposed rule, and therefore no local employment impact statement is required under §2001.022 of the Government Code. Mr. Guthrie has also determined that there will be no direct adverse economic effect on small businesses or micro-businesses within TRS' regulatory authority as a result of the proposed new rule; therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Brian K. Guthrie, Executive Director, 1000 Red River Street, Austin, Texas 78701-2698. Written comments must be received by TRS no later than 30 days after publication of this notice in the *Texas Register.*

The new rule is proposed under §803.401(a) of the Government Code, which authorizes the TRS Board of Trustees (board) to adopt rules it finds necessary to implement the Proportionate Retirement Program provided by Chapter 803 of the Government Code, and §825.102 of the Government Code, which authorizes the board to adopt rules for the administration of the funds of the retirement system and for the transaction of the business of the board.

The proposed amendments affect §§803.201, 803.301 and 824.202 of the Government Code.

§29.83. Calculation of Amount of Retirement Benefit.

For retirements after September 1, 2016, when a member is eligible to retire from TRS under the Proportionate Retirement Program but has fewer years of combined service credit than is required for normal age retirement, the years of combined service credit shall be used in determining the applicable reduction for an early age service retirement annuity that is calculated using only actual TRS service credit.

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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Brian Guthrie
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Teacher Retirement System of Texas
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For further information, please call: (512) 542-6513

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 12. COMPASSIONATE-USE/LOW-THC CANNABIS PROGRAM

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §§12.1 - 12.4, 12.7 - 12.9

The Texas Department of Public Safety (the department) proposes amendments to §§12.1 - 12.4, 12.7, 12.8, and proposes new §12.9, concerning General Provisions. These amendments are necessary to clarify and enhance certain safety and security requirements and to provide a requirement that dispensers obtain certain levels of commercial liability insurance coverage. Proposed new §12.9 provides more specific product testing and waste disposal requirements.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the proposed amendments to §§12.1, 12.3, 12.4, 12.6, 12.8, and 12.9. There is no anticipated economic cost to businesses required to comply with these rules as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has also determined that §12.2 and §12.7 may have adverse economic effects on small businesses required to comply with these rules as proposed. The department estimates there will be three licensees, all of which will be small businesses. These estimates are based on an analysis of other states' compassionate-use programs, the number of patients in Texas with intractable epilepsy, and Texas Health and Safety Code Chapter 487's requirements that the department issue at least three licenses to ensure reasonable statewide access to low-THC cannabis for patients for whom low-THC cannabis is prescribed under Chapter 169, Occupations Code. The department estimates the projected impact of these rules will be increased costs of compliance associated with liability insurance coverage and production related safety standards. Specifically, the department estimates §12.2's requirement that dispensers obtain commercial liability insurance coverage will likely cost $4,000 to $5,000 per year. Its requirement that dispensers have a fire alarm and fire extinguishing system will impose costs, depending on the size and complexity of dispenser's structures. The department estimates a basic fire alarm system with smoke and heat detectors, and alarms with both visual and audio alerts, will cost $1 to $2 per square foot. More complex systems in large buildings may cost $3 to $6 per square foot. A sprinkler or other extinguishing system may cost $3 to $12 per square foot, not including installation. Monitoring fees may cost $50 to $60 per month.

Section 12.7's requirement of a ventilation system with the capability to detect and signal problematic exhaust levels for the extraction room, are estimated to cost approximately $5,000 for those dispensers using CO2 systems and $15,000 for butane based systems. The requirement of an emergency power backup system will vary considerably with the size of the facility, but the department would estimate a backup generator to cost $3,000 to $15,000.

In preparing these rules the department considered the alternatives of granting exemptions or grace periods from the requirements for small and micro businesses. However, these rules are intended to implement Texas Health and Safety Code, Chapter 487's requirements that licensees possess the technical and technological ability to cultivate and produce low-THC cannabis; the ability to secure the necessary resources, personnel, and facilities; the ability to maintain accountability for the raw materials, the finished product, and any by-products used or produced in the cultivation or production of low-THC cannabis to prevent unlawful access to or unlawful diversion or possession of those materials, products, or by-products; and the financial ability to maintain operations for not less than two years. The department's proposals reflect the minimum standards necessary to ensure the health, safety, and the environmental and economic welfare of the state. The department is not authorized to create grace periods or other exemptions from the statutory requirements, reflected in Texas Health and Safety Code, §487.102. Moreover, an exemption or grace period would be inconsistent with the health, safety, or environmental and economic welfare of the state. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be greater protection of the public against potentially unsafe production methods or negative environmental impacts, and reduction in the potential for diversion of marijuana or related products.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at *https://www.dps.texas.gov/rsd/contact/default.aspx.* Select "Compassionate Use Program." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §487.052, which requires the department adopt rules necessary for the administration and enforcement of Texas Health and Safety Code, Chapter 487.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §487.052 are affected by this proposal.

§12.1. Definitions.

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

(1) Act--Texas Health and Safety Code, Chapter 487.

(2) Application--Includes an original application for a registration or license, or an application to renew a registration or license, issued under the Act.

(3) Department--The Texas Department of Public Safety.

(4) Director--An individual[, ~~including any owner,~~] involved in decisions governing the operation or daily functions of the licensed dispensing organization, and any owner, partner, or shareholder of the business.

(5) Dispensing organization--An organization licensed to perform the regulated functions of cultivation, processing, and dispensing of low-THC cannabis.

(6) Employee--An individual engaged by or contracting with a licensee to assist with any regulated function, whether or not compensated by salary or wage.

(7) Licensee--An organization licensed under the Act.

(8) Manager--An individual employed or otherwise engaged by a dispensing organization to supervise others in any portion of the regulated functions and processes.

(9) Prescription--An entry in the compassionate-use registry that meets the requirements of Texas Occupations Code, Chapter 169.

(10) Product--Any form of low-THC cannabis that is cultivated, handled, transported, processed, or dispensed, or raw materials used in or by-products created by the production or cultivation of low-THC cannabis.

(11) Registrant--An individual registered with the department as a director, manager, or employee of a licensee; this term does not include a physician registered as a prescriber of low-THC cannabis.

(12) Regulated premises--The physical areas under the control of a licensee, in which low-THC cannabis, or production related raw materials or by-products, are [~~is~~] cultivated, handled, transported, processed, or dispensed.

(13) SOAH--State Office of Administrative Hearings.

§12.2. Requirements and Standards.

(a) A licensee [~~Licensees~~] may only perform [~~provide~~] regulated functions [~~services~~] at a [~~the~~] department approved location [~~locations~~]. Any change in location must be approved by the department prior to operation in a regulated capacity.

(b) Licensees shall notify the department within five (5) business days of a registrant's termination of employment.

(c) All licensees shall display in a conspicuous location [~~in the principal place of business and in any branch location~~] a copy of the department issued license and information on how to submit a complaint to the department.

(d) Licensees must establish and implement a drug-free workplace policy consistent with the Texas Workforce Commission's "Drug-Free Workplace Policy," and shall maintain in each registrant's file a copy of the company's policy signed or otherwise acknowledged by the registrant.

(e) Licensees and registrants must cooperate fully with any inspection or investigation conducted by the department, or by a state fire marshal, or local designee of the state fire marshal, including but not limited to the provision of any laboratory test results, employee records, [~~or~~] inventory and destruction records, or other records required under the Act or this chapter, and the compliance with any subpoena issued by the State of Texas [~~department~~].

(f) Licensees and registrants may not cultivate, process, or dispense low-THC cannabis or possess any raw material used in or by-product created by the production or cultivation of low-THC cannabis if the respective license or registration has expired, or has been suspended or revoked.

(g) Licensees and registrants may not dispense to an individual other than a [~~qualified~~] patient for whom low-THC cannabis is prescribed under Chapter 169, Occupations Code, or the [~~a qualified~~] patient's legal guardian [~~representative~~].

(h) Licensees and registrants may not permit or fail to prevent the diversion of any controlled substance.

(i) Those registered with the department as directors, managers, or employees of a licensed dispensing organization may only perform functions [~~services~~] regulated under the Act for the licensee(s) [~~licensee~~] with whom they are registered.

(j) If arrested, charged, or indicted for a criminal offense above the level of Class C misdemeanor, a registrant shall within seventy-two (72) hours notify the employing licensee. [~~,~~] When [~~and the employer when~~] notified by the registrant [~~employee~~] or otherwise informed, the licensee shall notify the department in writing (including by email) within seventy-two (72) hours of notification. The notification shall include the name of the arresting agency, the offense, court, and cause number of the charge or indictment. The registrant and licensee must supplement their respective notifications as further information becomes available.

(k) Registrants must carry on their person or otherwise display their department issued registration card while performing any functions [~~services~~] regulated under the Act involving contact with or exposure to patients or the general public, including the dispensing of low-THC cannabis to patients and the transportation of low-THC cannabis on behalf of a licensee.

(l) All advertisements for functions [~~services~~] regulated under the Act must contain the dispensing organization's license number in a font of the same size as the primary text of the advertisement.

(m) Licensees must comply with all applicable local, state and federal regulations and permitting requirements relating to air and environmental quality, advertising, business and occupancy, building, plumbing, electrical, fire safety, [~~and~~] noise, and odor or other nuisances. This section does not require compliance with a regulation that conflicts with the Act or this chapter.

[~~(n) Destruction of any waste products related to the cultivation or processing of low-THC cannabis must involve the rendering of the product indistinguishable from other non-cannabis related plant material. The waste product must be stored in a locked container prior to disposal.~~]

(n) [~~(o)~~] Licensees must use applicable best practices to limit contamination of the product including but not limited to residual solvents, metals, mold, fungus, bacterial diseases, rot, pests, pesticides, mildew, and any other contaminant identified as posing potential harm. [~~The licensee shall maintain quality history records showing any laboratory testing results conducted on the licensee's products.~~]

(o) [~~(p)~~] Licensees must have a plan for establishing a recall of their products in the event a product is shown by testing or other means to be, or potentially to be, defective or have a reasonable probability that their use or exposure to will cause [~~serious~~] adverse health

consequences. At a minimum, the plan should include the method of identification of the products involved; notification to the processing or dispensing organization or others to whom the products were sold or otherwise distributed; and how the products will be disposed of if returned to or retrieved by the licensee.

(p) Licensees shall retain the registration card of all terminated registrants for one year after termination, unless the card is seized or destroyed by department personnel.

(q) Licensees shall maintain commercial general liability insurance coverage, as described in §12.11 of this title (relating to Application for License), and maintain current proof of such insurance on file with the department.

(r) Licensees' regulated premises must annually pass an inspection conducted by the state fire marshal or local designee of the state fire marshal. Proof of the passing inspection must be submitted to the department on a form approved by the department.

(s) Licensees' regulated premises shall be protected by a fire alarm and sprinkler system that complies with local ordinances and applicable Texas Department of Insurance administrative rules, 28 TAC Chapter 34, concerning State Fire Marshal.

(t) Licensees shall install an exterior wall-mounted building key safe at the main entrance to any processing facility, to enable emergency access for fire departments and emergency medical services.

(u) To the extent there is a conflict between the requirements of this chapter, or a conflict between this chapter and the Act, the more restrictive requirement governs. To the extent any requirement of this chapter or the Act conflicts with a regulation incorporated herein, this chapter or the Act shall govern.

(v) Research or development beyond that which is necessary for the cultivation or production of low-THC cannabis is prohibited.

(w) Cultivation of plants other than marijuana plants to be processed for low-THC cannabis is prohibited.

(x) Only low-THC cannabis may be dispensed or sold. By-products must be destroyed.

(y) Any interstate transportation of low-THC cannabis or raw materials used in or by-products created by the production of low-THC cannabis must comply with federal law.

(z) Registrants must be at least twenty-one (21) years of age at the time of application.

§12.3. Criminal History Disqualifiers.

(a) Registration as a director, manager or employee of a licensed dispensing organization provides these individuals access to sensitive medical information, drugs, and the equipment and raw materials needed to produce drugs. Registration provides those predisposed to commit fraud, theft and drug related crimes with greater opportunities to engage in such conduct and escape detection or prosecution. Therefore, the department has determined that offenses of the types detailed in subsection (b) of this section directly relate to the duties and responsibilities of those who are registered under the Act. Such offenses include crimes under the laws of another state or the United States, if the offense contains elements that are substantially similar to the elements of an offense under the laws of this state. Such offenses also include those "aggravated" or otherwise enhanced versions of the listed offenses.

(b) The list of offenses in this subsection is intended to provide guidance only and is not exhaustive of either the offenses that may relate to the regulated occupation or of those independently disqualifying under Texas Occupations Code, §53.021(a)(2) - (4). The listed offenses are general categories that include all specific offenses within the corresponding chapter of the Texas Penal Code and Texas Health and Safety Code. In addition, after due consideration of the circumstances of the criminal act and its relationship to the position of trust involved in the particular licensed occupation, the department may find that an offense not described in this subsection also renders an individual unfit to hold a registration. In particular, an offense that is committed in one's capacity as a registrant under the Act, or an offense that is facilitated by one's registration under the Act, will be considered related to the regulated occupation and may render the individual unfit to hold the registration.

(1) Bribery--Any offense under the Texas Penal Code, Chapter 36.

(2) Burglary and criminal trespass--Any offense under the Texas Penal Code, Chapter 30.

(3) Fraud--Any offense under the Texas Penal Code, Chapter 32.

(4) Perjury--Any offense under the Texas Penal Code, Chapter 37.

(5) Robbery--Any offense under the Texas Penal Code, Chapter 29.

(6) Theft--Any offense under the Texas Penal Code, Chapter 31.

(7) Organized Crime--Any offense under the [,] Texas Penal Code, Chapter 71.

(8) Any offense under Texas Health and Safety Code, Chapters 481, 482, or 483.

(9) In addition:

(A) An attempt to commit a crime listed in this subsection;

(B) Aiding and abetting in the commission of a crime listed in this subsection; and

(C) Being an accessory before or after the fact to a crime listed in this subsection.

(c) A felony conviction for an offense listed in subsection (b) of this section is disqualifying for ten (10) years from the date of the conviction.

(d) A Class A or B misdemeanor conviction for an offense listed in subsection (b) of this section is disqualifying for five (5) years from the date of conviction.

(e) Conviction for a felony or Class A offense that does not relate to the occupation for which registration is sought is disqualifying for five (5) years from the date of commission, pursuant to Texas Occupations Code, §53.021(a)(2).

(f) Independently of whether the offense is otherwise described or listed in subsection (b) of this section, a conviction for an offense listed in Texas Code of Criminal Procedure, Article 42.12, §3g or Article 42A.054, or that is a sexually violent offense as defined by Texas Code of Criminal Procedure, Article 62.001, is permanently disqualifying subject to the requirements of Texas Occupations Code, Chapter 53.

(g) Any unlisted offense that is substantially similar in elements to an offense listed in subsection (b) of this section is disqualifying in the same manner as the corresponding listed offense.

(h) A pending Class B misdemeanor charged by information for an offense listed in subsection (b) of this section is grounds for suspension.

(i) Any pending Class A misdemeanor charged by information or pending felony charged by indictment is grounds for suspension.

(j) In determining the fitness to perform the duties and discharge the responsibilities of the regulated occupation of an individual against whom disqualifying charges have been filed or who has been convicted of a disqualifying offense, the department may consider evidence of:

(1) The extent and nature of the individual's past criminal activity;

(2) The age of the individual when the crime was committed;

(3) The amount of time that has elapsed since the individual's last criminal activity;

(4) The conduct and work activity of the individual before and after the criminal activity;

(5) Evidence of the individual's rehabilitation or rehabilitative effort while incarcerated or after release;

(6) The date the individual will no longer be disqualified under the provisions of this section; and

(7) Any other evidence of the individual's fitness, including letters of recommendation from:

(A) Prosecutors or law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the individual; or

(B) The sheriff or chief of police in the community where the individual resides.

(k) In addition to the documentation listed in subsection (j) of this section, the applicant or registrant shall, in conjunction with any request for hearing on a criminal history based denial, suspension or revocation, furnish proof in the form required by the department that the individual has:

(1) Maintained a record of steady employment;

(2) Supported the individual's dependents;

(3) Maintained a record of good conduct; and

(4) Paid all outstanding court costs, supervision fees, fines and restitution ordered in any criminal case in which the individual has been charged or convicted.

(l) The information listed in subsection (j) and subsection (k) of this section must be submitted in conjunction with the request for hearing, following notification of the proposed action and prior to the deadline for submission of the request for hearing.

§12.4. Records.

(a) Records required under the Act or this chapter must be maintained and made available for inspection or copying for a period of two (2) years. Records may be maintained in digital form so long as a hard copy may be produced upon request of department personnel.

(b) In addition to any records otherwise required to be maintained under the Act or this chapter, licensees must specifically retain [~~The records detailed in this subsection must be maintained by all licensees for two (2) years, unless otherwise provided~~]:

(1) Copies of all [~~All~~] application materials submitted to the department or relied on in making any representation or affirmation in conjunction with the application process;

(2) Purchase, sale, and inventory records, including records reflecting the sources of all seeds and plants [~~of destruction~~];

(3) Shipping invoices, log books, records of duty status if applicable, delivery records and manifests reflecting the recipient's acknowledgment and establishing the chain of custody, relating to the transportation of:

(A) Low-THC cannabis and any cannabis sativa plants intended for use in the processing of low-THC cannabis;

(B) Raw materials used in or by-products created by the production or cultivation of low-THC cannabis; [~~or~~]

(C) Drug paraphernalia used in the production, cultivation or delivery of low-THC cannabis; or [~~.~~]

(D) Waste material resulting from cultivation, processing, or dispensing of low-THC cannabis.

(4) Security records, including building access and visitor logs, [~~and~~] video recordings, and transportation trip plans;

(5) The licensee's drug-free workplace policy;

(6) Records on all registered directors, managers, and employees, including a color photograph of the individual, a copy of the registration issued by the department, records reflecting the individual's position, assigned duties, and work schedule, and a copy of the company's drug-free workplace policy signed by the individual. These records must be maintained for two (2) years from the date employment is terminated.

(7) Records of any disposal or destruction of waste materials resulting from cultivating, processing, or dispensing low-THC cannabis;

(8) Records of any local or state regulatory inspections, including state or local fire marshal inspections; and

(9) Records of all tests conducted in compliance with §12.7 of this title (relating to Testing, Production, and Packaging).

§12.7. Testing, Production, and Packaging.

(a) Licensees must comply with all applicable provisions of the Texas Agriculture Code and the Texas Department of Agriculture's administrative rules, Title 4, Part 1.

(b) Representative samples of all [~~Licensees must test all~~] processed products must be tested for the levels of tetrahydrocannabinol and cannabidiol, and for residual solvents, pesticides, fungicides, fertilizers, mold, and heavy metals, in accordance with applicable provisions of the Texas Agriculture Code and Texas Department of Agriculture's administrative rules, Title 4, Part 1, and Code of Federal Regulations, Title 16, Part 1107.

(c) Only pesticides of minimum risk exempted under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 USC §136, may be used on cannabis. The pesticide's active ingredients may only be those listed in 40 CFR §152.25(f)(1). The pesticide's inert ingredients may only be those that listed in 40 CFR §152.25(f)(2); commonly consumed food commodities, animal feed items, and edible fats and oils as provided in 40 CFR §180.950(a),(b) and (c); and chemical substances listed in 40 CFR §180.950(e). All pesticide ingredients (both active and inert) must be listed on the pesticide container's label. The active ingredient(s) must be listed by label display name and percentage by weight. Each inert ingredient must be listed by label display name. The product may not bear claims to control or mitigate organisms that pose

a threat to human health, or insects or rodents carrying specific diseases. The name of the producer or the company for whom the product was produced and the company's contact information must be displayed prominently on the product label. The label cannot include any false or misleading statements. The label must comply with the Texas Department of Agriculture's administrative rule, 4 TAC §7.11, relating to Label Requirements.

(d) All facilities must be inspected and approved for their use by a local fire code official, or by the state fire marshal or local designee of the state fire marshal, and must meet any required fire, safety, and building code requirements specified in:

(1) National Fire Protection Association (NFPA) standards;

(2) International Building Code (IBC);

(3) International Fire Code (IFC);

(4) Texas Department of Insurance administrative rules, 28 TAC Chapter 34, concerning State Fire Marshal; and

(5) Other applicable standards including following all applicable fire, safety, and building codes in processing and the handling and storage of the solvent or gas.

(e) Licensees must provide certification by a Texas licensed professional engineer that the extraction system to be used to produce low-THC cannabis products was commercially manufactured, safe for its intended use, and built to codes of recognized and generally accepted good engineering practices, such as:

(1) The American Society of Mechanical Engineers (ASME);

(2) American National Standards Institute (ANSI);

(3) Underwriters Laboratories (UL); or

(4) The American Society for Testing and Materials (ASTM).

(f) The extraction process must be continuously staffed during operations by a registered employee trained in the extraction process, the transfer of LP-gas where applicable, and all emergency procedures. All staff training records shall be maintained on-site and made available upon request by the department or local law enforcement or regulatory official.

(g) The installation, operation, repair and maintenance of electrical systems, devices, and components shall conform to the National Electrical Code, NFPA 70 as adopted by the Texas Department of Licensing and Regulation. All electrical components within the extraction room shall be interlocked with the hazardous exhaust system and when provided, the gas detection system. When the hazardous exhaust system is not operational, or the gas detection system is activated, light switches and electrical outlets shall be disabled while leaving lights on that are necessary for evacuation. The electrical systems shall include:

(1) Extraction room lighting;

(2) Extraction room ventilation system;

(3) Solvent gas detection system;

(4) Emergency alarm systems;

(5) Automatic fire extinguishing systems;

(6) Vent failure alarm system; and

(7) Emergency power backup system.

(h) For extraction processes utilizing gaseous hydrocarbon-based solvents, a continuous gas detection system shall be provided. The gas detection threshold shall be no greater than 10% of the LEL/LFL limit of the materials.

(i) Signs shall be posted at the entrance to each production area using or storing carbon dioxide, indicating the hazard. Signs shall be durable and permanent in nature and not less than 7 inches wide by 10 inches tall. Signs shall bear the "skull and crossbones" emblem with the warning "DANGER! POTENTIAL OXYGEN DEFICIENT ATMOSPHERE". NFPA 704 signage shall be provided at the building main entry and the rooms where the carbon dioxide is used and stored. The main entrance to the facility and any door to a room where storage, transfer or use of hazardous materials is conducted shall be appropriately posted with markings in accordance with NFPA 704, Standard System for the Identification of the Hazards of Materials for Emergency Response.

(j) Mechanical ventilation within an extraction or processing facility shall be in accordance with the applicable local ordinances or the appropriate NFPA standard as adopted by the State Fire Marshal's Office if no applicable local ordinance exists, and shall have:

(1) Mechanical ventilation in the room or area of rate of not less than 1 cubic foot per minute per square foot;

(2) Exhaust system intake from a point within 12 inches of the floor; and

(3) Ventilation operating at a negative pressure in relation to the surrounding area.

(k) Any liquid extraction process using flammable and combustible liquids in which the liquid is boiled, distilled, or evaporated must operate in compliance with this section and NFPA 30 as adopted by the State Fire Marshal's Office.

(l) Any processing equipment using a flammable or combustible vapor or liquid must meet the requirements of NFPA 30 and NRPA 70. Such equipment shall be located within a hazardous exhaust fume hood, rated for exhausting flammable vapors. Electrical equipment used within the hazardous exhaust fume hood shall be rated for use in flammable atmospheres. Heating of flammable or combustible liquids over an open flame is prohibited, with the exception that the use of a heating element not rated for flammable atmospheres may be used where documentation from the manufacturer or a nationally recognized testing laboratory indicates it is rated for heating of flammable liquids.

(m) Product extraction processes may use only potable water in compliance with Code of Federal Regulations, Title 40, Part 141.

(n) All regulated premises shall be located at least 1000 feet from any private or public school or day care center that existed prior to the date of initial license application, measured from the closest points on the respective property lines.

(o) All final packaging for patient consumption must be in child-resistant packaging designed or constructed to be significantly difficult for children under five years of age to open and not difficult for normal adults to use properly as defined by the most current version of the Code of Federal Regulations, Title 16, Part 1700 and Title 40, Part 157.2 and American Society for Testing and Materials (ASTM) D3475-15, Standard Classification of Child-Resistant Packages, ASTM International, West Conshohocken, PA, 2015.

(p) All final packaging labels must include:

(1) Physician's name;

(2) Patient's name;

(3) Dispensing organization's name, state license number, telephone number, and mailing address;

(4) Dosage prescribed and means of administration;

(5) Date the dispensing organization packaged the contents;

(6) Batch number, sequential serial number, and bar code when used, to identify the batch associated with manufacturing and processing;

(7) Potency of the low-THC cannabis product contained in the package, including the levels of tetrahydrocannabinol and cannabidiol;

(8) Statement that the product has been tested for contaminants with specific indications of all findings, and the date of testing in accordance with Code of Federal Regulations, Title 16, Part 1107; and

(9) Statement that the product is for medical use only and is intended for the exclusive use of the patient to whom it is prescribed. This statement should be in bold print.

(q) The dispensed product may contain no more than 0.5% by weight of tetrahydrocannabinols and not less than 10% by weight of cannabidiol.

(r) The storage, transfer, and use of LP- Gas shall conform to the regulations of the Texas Railroad Commission, including but not limited to NFPA 58, LP Gas Code (as amended) and the adopted standards of the State Fire Marshal's Office.

(s) The storage, use and handling of liquid carbon dioxide shall be in accordance with Chapter 13 of NFPA 55.

[~~(c) All final packaging for patient consumption must be in child-resistant packaging designed or constructed to be significantly difficult for children under five years of age to open and not difficult for normal adults to use properly as defined by the most current version of the Code of Federal Regulations, Title 16, Part 1700 and Title 40, Part 157.2 and American Society for Testing and Materials (ASTM) D3475-15, Standard Classification of Child-Resistant Packages, ASTM International, West Conshohocken, PA, 2015.~~]

[~~(d) All final packaging labels must include:~~]

[~~(1) Physician's name;~~]

[~~(2) Patient's name;~~]

[~~(3) Dispensing organization's name, state license number, telephone number, and mailing address;~~]

[~~(4) Dosage prescribed and means of administration;~~]

[~~(5) Date the dispensing organization packaged the contents;~~]

[~~(6) Batch number, sequential serial number, and bar code when used, to identify the batch associated with manufacturing and processing;~~]

[~~(7) Potency of the low-THC cannabis contained in the package, including the levels of tetrahydrocannabinol and cannabidiol;~~]

[~~(8) Statement that the product has been tested for contaminants with specific indications of all findings, and the date of testing in accordance with Code of Federal Regulations, Title 16, Part 1107; and~~]

[~~(9) Statement that the product is for medical use only and is intended for the exclusive use of the patient to whom it is prescribed. This statement should be in bold print.~~]

[~~(e) The dispensed product may contain no more than 0.5% by weight of tetrahydrocannabinols and not less than 10% by weight of cannabidiol.~~]

§12.8. Inventory Control System.

(a) A licensed dispensing organization shall use a perpetual inventory control system that identifies and tracks the licensee's stock of low-THC cannabis from the time the seeds are acquired or it is propagated from seed or cutting, to the time it is delivered to either another licensee or [~~a qualifying~~] patient or legal guardian.

(b) The inventory control system shall be capable of tracking low-THC cannabis from a [~~qualified~~] patient back to the source of the low-THC cannabis in the event of a serious adverse event.

(c) The inventory control system shall be designed to promptly identify a discrepancy and interact with the department's centralized registry system.

(d) Upon receipt of raw material for cultivation, a licensee shall record in the inventory control system:

(1) The source and the date delivered; and

(2) The number of clones or seeds delivered or the weight of the seeds for each variety in the shipment.

(e) For each plant, including any clippings to be used for propagation, a licensee shall:

(1) Create a unique identifier;

(2) Assign a batch number;

(3) Enter appropriate plant identifying information into the inventory control system;

(4) Create an indelible and tamper resistant tag made of temperature and moisture resistance material, with a unique identifier and batch number;

(5) Securely attach the tag to a container in which a plant is grown until a plant is large enough to securely hold a tag;

(f) Upon curing or drying of each batch, a licensee shall weigh the batch and enter the weight into the [~~low-THC cannabis to update~~] inventory control system database [~~for the batch~~].

(g) At least monthly, a licensee shall conduct a physical inventory of the stock and compare the physical inventory of stock with inventory control system data.

(h) If a licensee discerns a discrepancy between the inventory of stock and inventory control system data outside of normal weight loss due to moisture loss and handling, a licensee shall begin [~~commence~~] an audit of the discrepancy.

(i) Within fifteen (15) business days of discovering a discrepancy, the licensee shall:

(1) Complete an audit;

(2) Amend the licensee's standard operating procedures, if necessary; and

(3) Send an audit report to the department.

(j) If a licensee finds evidence of theft or diversion, the licensee shall immediately report the theft or diversion to the department.

§12.9. Sanitation; Waste Disposal.

(a) Licensees must maintain regulated premises in a clean and sanitary condition, and shall take all reasonable measures to ensure:

(1) Litter and waste are routinely removed and waste disposal systems are routinely inspected in accordance with applicable local, state, or federal law, rule, regulation or ordinance;

(2) Fixtures, floors, walls, ceilings, buildings or other facilities are kept in good repair;

(3) Regulated premises are adequately screened and otherwise protected against the entry of pests;

(4) Refuse disposal is conducted in a manner to minimize the development of odor and the potential for breeding of pests;

(5) Contact surfaces, including utensils and equipment used for the cultivation, drying, trimming, or storage of product, are cleaned and sanitized in a manner to protect against contamination;

(6) Potentially toxic chemicals used within the cultivation facility are identified, stored, and disposed of in a manner to protect against contamination of the product, in compliance with all applicable local, state, or federal laws, rules, regulations or ordinances;

(7) Storage and transportation of product is under conditions that protect against physical, chemical, and microbial contamination;

(8) Safes, vaults, and storage rooms are in good working order, with climate control systems sufficient to prevent spoilage;

(9) Processing site is free of contamination and suitable for the safe and sanitary preparation of the product, including ensuring all equipment, counters and surfaces used for processing are food-grade and nonreactive with any solvent being used, with easily cleanable surface areas constructed in a manner to reduce the potential for development of mold or fungus;

(10) Hand-washing facilities provide effective hand-cleaning and sanitizing materials, with sanitary towel service or hand drying devices, and hot and cold running water;

(11) All persons working in direct contact with product conform to hygienic practices while on duty, including but not limited to:

(A) Maintaining adequate personal cleanliness, including washing hands thoroughly before handling product and as often as necessary to remove soil and contamination and to prevent cross-contamination when changing tasks;

(B) Refraining from direct contact with product if the person has or may have an illness, open lesion, including boils, sores, or infected wounds, or any other abnormal source of microbial contamination, until such condition is corrected;

(C) Keeping fingernails trimmed and filed so that the edges and surfaces are cleanable;

(D) Unless wearing intact gloves in good repair, having no fingernail polish or artificial fingernails on the employee's fingernails;

(E) Wearing clean clothing appropriate to assigned tasks or protective apparel such as coats, aprons, gowns, or gloves to prevent contamination; and

(F) Reporting to the employer's director or manager any health condition experienced by the employee that may adversely affect the safety or quality of product with which the employee may come into contact;

(12) Prohibiting any employee with a health condition that may adversely affect the safety or quality of the product from having direct contact with any product or equipment or materials for processing low-THC cannabis, or from performing any task that reasonably might contaminate or adversely affect any product.

(b) Destruction and disposal of waste materials resulting from the cultivation or processing of low-THC cannabis must be conducted in compliance with applicable state and local laws and regulations, and Code of Federal Regulations, Title 21, Part 1317, Subpart C. Any waste materials containing low-THC cannabis or raw materials used in or by-products created by the production or cultivation of low-THC cannabis must be rendered irretrievable, as defined in Code of Federal Regulations, Title 21, Part 1300. Waste water generated during production and processing must be disposed of in compliance with applicable state and local laws.

(c) Licensees are responsible for determining whether specific waste materials or waste water constitute hazardous waste under applicable federal or state regulations and for ensuring disposal of any such waste complies with applicable disposal regulations.

(d) All waste materials must be stored on the licensee's premises prior to destruction and disposal.

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 14, 2016.

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D. Phillip Adkins
General Counsel
Texas Department of Public Safety
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SUBCHAPTER B. APPLICATION AND RENEWAL

37 TAC §§12.11, 12.14, 12.15

The Texas Department of Public Safety (the department) proposes amendments to §§12.11, 12.14, and 12.15, concerning Application and Renewal. The proposed amendments to §12.11, concerning Application for License, requires that licensed dispensers of low-THC cannabis obtain commercial liability insurance within certain coverage limits, to ensure licensees can appropriately compensate third parties injured or otherwise harmed by the product or activities of the licensee. The proposed amendments to §12.14, concerning Applications Fees and Method of Payment, increase application and renewal fees to accurately reflect the costs of administering the program. The proposed amendments to §12.15, concerning Denial of Application for License, amend a cross reference necessitated by the proposed amendments to §12.11, and amend the bases for which the department may deny the application for a license in order to accurately reflect the requirements of Texas Health and Safety Code §487.104(a)(2).

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect

there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the proposed amendments to §12.15. There is no anticipated economic cost to businesses required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has also determined that the proposed amendment to §12.11 may have adverse economic effects on small businesses required to comply with this rule as proposed. The department estimates there will be three licensees, all of which will be small businesses. These estimates are based on an analysis of other states' compassionate-use programs, the number of patients in Texas with intractable epilepsy, and Texas Health and Safety Code Chapter 487's requirements that the department issue at least three licenses to ensure reasonable statewide access to low-THC cannabis for patients for whom low-THC cannabis is prescribed under Chapter 169, Occupations Code. The department estimates the projected impact of this rule will be increased costs of compliance associated with obtaining commercial liability insurance coverage. Specifically, the department estimates §12.11's requirement that dispensers obtain commercial liability insurance coverage will likely cost each licensee $4,000 to $5,000 per year.

In preparing these rules the department considered the alternatives of granting exemptions or grace periods from the requirements for small businesses. However, these rules are intended to implement Texas Health and Safety Code 487's requirements that, among other things, licensees possess the financial ability to maintain operations for not less than two years. The department's proposals also ensure licensees are financially capable of appropriately compensating third parties injured or otherwise harmed by the product or activities of the licensee. An exemption or grace period would be inconsistent with these purposes. There is no anticipated negative impact on local employment.

Ms. Whittenton has also determined that proposed rule §12.14, relating to application fees and method of payment, may have an adverse economic effect on small businesses required to comply with these rules as proposed. The department estimates there will be three licensees, with an average of thirty-seven registered employees per organization, and that all of these licensees will be small businesses. These estimates are based on an analysis of other states' compassionate-use programs, the number of patients in Texas with intractable epilepsy, and the Texas Health and Safety Code 487's requirements that the department issue at least three licenses and that issuance of the license be necessary to ensure reasonable statewide access to, and the availability of low-THC cannabis for patients for whom low-THC cannabis is prescribed under Chapter 169, Occupations Code. In calculating the costs of administering the statute, the department considered the type of employees to be involved with processing applications and inspecting facilities. A percentage of salary, fuels, consumables, and other operating costs are included. Also included are estimated costs for license cards; increased oversight of security; and FBI and state background checks. The estimated fee is $1,300,000 per organization and $4,820 per registrant, for initial licensure, and $975,000 and $2,875 respectively, for renewals. Because the proposed fees are based on the cost of administering the program, they are consistent with the statutory requirements. No alternative fees were considered because any variance would be inconsistent with the health, safety, and environmental and economic welfare of the state.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be greater protection of the public against harm or damages arising from licensees' industrial accidents or defective products.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Compassionate Use Program." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

These rules are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §487.052, which requires the department adopt rules necessary for the administration and enforcement of Texas Health and Safety Code, Chapter 487.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §487.052 are affected by this proposal.

§12.11. Application for License.

(a) Application for license as a dispensing organization may only be made through the department's online application process.

(b) A complete application must include the items detailed in this subsection, in a manner determined by the department:

(1) Proof of ownership and current status in the manner required by the department, including but not limited to a current Certificate of Existence or Certificate of Authority from the Texas Office of the Secretary of State and a Certificate of Good Standing from the Texas Comptroller of Public Accounts;

(2) All fees required under §12.14 of this title (relating to Application Fees and Method of Payment);

(3) Names, dates of birth, addresses, and all other information required by the department necessary to verify the identity of all directors, managers, and employees of the applicant;

(4) Criminal history disclosure of all convictions and deferred adjudications for each individual listed on the application as directors, managers, and employees of the dispensing organization;

(5) Complete registration applications for all directors, managers and employees submitted in the manner approved by the

department and in compliance with §12.12 of this title (relating to Application for Registration);

(6) Proof of commercial general liability insurance coverage against claims of liability for damage to property of third parties and for personal injuries to third parties, including bodily injury, property damage, and product liability, with limits of:

(A) $1,000,000 each occurrence;

(B) $2,000,000 General Aggregate limit; and

(C) $1,000,000 Product Liability.

(7) [~~(6)~~] Evidence of the qualifications detailed in this paragraph as determined at the time of the required onsite inspection, in the manner determined by the department:

(A) The technical and technological ability to cultivate, process, and/or dispense low-THC cannabis, evidenced by experience in the areas of:

(i) Cultivation, analytical organic chemistry and micro-biology; and analytical laboratory methods; and

(ii) Patient education and interaction, and the handling of confidential information including familiarity with the requirements of the Health Insurance Portability and Accountability Act (HIPAA).

(B) The ability to secure the premises, resources, and employees [~~personnel~~] necessary to operate as a dispensing organization, evidenced by:

(i) Descriptions of all properties applicant proposes to utilize to cultivate, process, and dispense low-THC cannabis, including ownership information for the properties;

(ii) Descriptions of the methods proposed for the cultivation, processing, and dispensing of low-THC cannabis;

(iii) Descriptions of the types and locations of worker safety equipment and plans and procedures for complying with federal Occupational Safety and Health Administration (OSHA) regulations for workplace safety;

(iv) A list of current and proposed staff, including, position, duties and responsibilities, and an organizational chart illustrating the supervisory structure of the dispensing organization;

(v) Description of the applicant's proposed testing laboratory, and description of the proposed [~~cannabis~~] testing protocols and methods; [~~and~~]

(vi) A proposal establishing the ability to secure premises reasonably located to allow patient access through existing infrastructure; and [~~.~~]

(vii) Identification of the proposed source(s) for seeds or plants to be used in the cultivation of low-THC cannabis and of the manufacturers of all equipment to be used in the processing of low-THC cannabis.

(C) The ability to maintain accountability of all raw materials, finished products, and any by-products to prevent diversion or unlawful access to or possession of these substances, evidenced by:

(i) Floor plan of each facility or proposed floor plans for proposed facilities, including:

(I) Locking options for all means of ingress and egress consistent with life safety requirements;

(II) Alarm systems;

(III) Video surveillance;

(IV) Name, layout and function of each room; and

(V) Storage, including safes and vaults.

(ii) Diversion prevention procedures;

(iii) Emergency management plan;

(iv) System for tracking [~~low-THC~~] source seed and plant material throughout cultivation, processing, and dispensing;

(v) Inventory control system [~~for low-THC cannabis~~] as required by §12.8 of this title (relating to Inventory Control System);

(vi) Policies and procedures for recordkeeping;

(vii) Electronic vehicle tracking systems;

(viii) Vehicle security systems;

(ix) Methods of screening and monitoring employees;

(x) Employee [~~Personnel~~] qualifications and experience with chain of custody or other tracking mechanisms;

(xi) Waste disposal plan;

(xii) Recall procedures for any product that has a reasonable probability of causing adverse health consequences based on a testing result, patient reaction, or other reason; and

(xiii) Access to specialized resources or expertise regarding data collection, security, and tracking.

(D) Infrastructure reasonably located to dispense low-THC cannabis to registered patients, evidenced by:

(i) Map showing the location of the applicant's proposed dispensing facilities with streets; property lines; buildings; parking areas; outdoor areas, if applicable; fences; security features; fire hydrants, if applicable; and access to water and sanitation systems;

(ii) Floor plan of the actual or proposed building or buildings where dispensing activities will occur showing areas designed to protect patient privacy and areas designed for retail sales, with proposed hours of operation;

(iii) HIPAA compliant computer network utilized by all facilities;

(iv) Identifying descriptions of any vehicles to be used to transport product; and

(v) Description of all communication systems.

(E) The financial ability to maintain operations for two (2) years from the date of application, evidenced by:

(i) Applicant's business organization, and corporate structure if applicable;

(ii) List of all owners of any non-corporate [~~the~~] applicant, or all [~~including any~~] shareholders [~~owning 10% or more~~] of a corporate applicant;

(iii) All individuals and entities with control over the applicant;

(iv) Projected two (2) year budget; and

(v) Description of available assets sufficient to support the dispensing organization activities.

(c) Subsequent to the submission of all information and documentation required by subsection (b)(1) - (6) [~~(5)~~] of this section, and prior to approval of the application, the department will conduct an onsite inspection to confirm applicant's compliance with the requirements of subsection (b)(7) [~~(b)(6)~~] of this section and of this chapter generally. The applicant must pass the inspection prior to licensure. Failure to pass the inspection will result in notification of the basis for the failure. Failure to address the basis for the failure within ninety (90) days of notice may result in the denial of the application, pursuant to §12.15 of this title (relating to Denial of Application for License). Upon request of the applicant, the department may extend the period to address the basis for the failure for one (1) additional ninety (90) day period.

(d) Failure of an applicant to submit all information and documentation required by subsection (b)(1) - (6) [~~(5)~~] of this section will result in notification of the deficiency. Applicant will have ninety (90) days from the date of notice to address the deficiency. Upon request of the applicant, the department may extend the period to address the deficiency for one (1) additional ninety (90) day period. If an applicant fails to provide all required application materials, or fails to respond to a request by the department for additional information necessary to process the application, the application will be terminated. Following the termination of an application, a new application, including a new application fee, must be submitted.

§12.14. Application Fees and Method of Payment.

(a) The application fee for a dispensing organization license is $1,300,000 [~~$6,000~~].

(b) The fee for the biennial renewal of the dispensing organization license is $975,000 [~~$6,000~~].

(c) The [~~registration~~] application fee for a registrant is $4,820 and the fee for the [~~and~~] biennial renewal is $2,875 [~~fees are $150~~].

(d) Payment of all fees must be made electronically in the manner determined by the department.

(e) If payment is dishonored or reversed prior to issuance of the license or registration, the application will be rejected as incomplete. If the license or registration has been issued prior to the payment being dishonored or reversed, revocation proceedings will be initiated pursuant to §12.23 of this title (relating to Revocation). The department may dismiss a pending revocation proceeding upon receipt of payment of the full amount due, including any additional processing fees.

§12.15. Denial of Application for License.

(a) The department may deny the application for a license as a dispensing organization if the applicant fails to pass the onsite inspection, based on the failure to satisfy the requirements reflected in subsection (b)(7) [~~(b)(6)~~] of §12.11 of this title (relating to Application for License), and has either failed to address the basis for the failure within ninety (90) days of notice of the failure, or has failed to request an additional ninety (90) days to address the basis for the failure.

(b) The department may [~~also~~] deny the application for a license if the applicant is found to have violated any provision of the Act or this chapter, or §§481.120, 481.121, 481.122, or 481.125 of the Texas Health and Safety Code prior to licensure or renewal.

(c) The department may also deny the application for a license from an otherwise qualified applicant if the department determines issuance of the license is not necessary to ensure reasonable statewide access to, and the availability of low-THC cannabis for patients registered in the compassionate-use registry and for whom low-THC cannabis is prescribed under Chapter 169, Occupations Code. Such determination may be based on the department's analysis of such factors as population distribution, the number of patients with intractable epilepsy, any geographical disparities in the availability and cost of low-THC cannabis products, and the ability of the applicant to address such disparities or other observed deficiencies in access or availability.

(d) [~~(c)~~] Following the notice of denial the applicant will be provided thirty (30) days to request a hearing by submitting a request through the department's website.

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

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SUBCHAPTER C. COMPLIANCE AND ENFORCEMENT

37 TAC §12.21, §12.23

The Texas Department of Public Safety (the department) proposes amendments to §12.21 and §12.23, concerning Compliance and Enforcement. The amendments to §12.21, concerning Inspections, are necessary to clarify the authority of certain state and local regulatory agencies to inspect a licensee's premises, and to update a cross reference necessitated by the amendment to another section. The amendments to §12.23, concerning Revocation, are necessary to clarify the process by which a license may be revoked based on a dishonored or reversed payment.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be greater clarity and consistency with statute and legislative policy.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Compassionate Use Program." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

These rules are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §487.052, which requires the department adopt rules necessary for the administration and enforcement of Texas Health and Safety Code, Chapter 487.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §487.052 are affected by this proposal.

§12.21. Inspections.

(a) Submission of an application for a license as a dispensing organization constitutes permission for entry by the department to the regulated premises of the dispensing organization at any time during regular business hours.

(b) While conducting an inspection or engaging in activity reasonably related to the inspection, the department may be assisted by a peace officer, [~~or~~] a representative of the State Fire Marshal's Office or another [~~an~~] appropriate state or local regulatory agency.

(c) Within thirty (30) calendar days of the date of receipt of the written notice of violation, the dispensing organization shall provide the department with notification of all corrective actions taken and the dates of the corrections.

(d) Onsite inspections may include but are not limited to review of:

(1) All requirements provided in §12.11(b) of this title (relating to Application for License);

(2) Security equipment and protocols as provided in Subchapter D [~~§12.31 and §12.32~~] of this title (relating to Security [~~of Facilities and Security of Vehicles, respectively~~]);

(3) Records as provided in §12.4 of this title (relating to Records).

(e) Failure to cooperate with an inspection by department or other authorized personnel may result in suspension or revocation of the individual's registration and the license of the dispensing organization.

§12.23. Revocation.

(a) The department may revoke a license or registration if the licensee or registrant:

(1) Is found to have performed a regulated function prior to issuance of the license or registration;

(2) Misrepresents a material fact in any application to the department or any other information filed pursuant to the Act or this chapter;

(3) Prepares or submits to the department false, incorrect, incomplete or misleading forms or reports on multiple occasions;

(4) Performs a regulated function while suspended;

(5) Exhibits a pattern of misconduct evidenced by previous violations for which previous suspensions have been inadequate to affect compliance;

(6) Is convicted of a disqualifying felony or misdemeanor offense pursuant to §12.3 of this title (relating to Criminal History Disqualifiers);

(7) Violates §§481.120, 481.121, 481.122, or 481.125 of the Texas Health and Safety Code; or

(8) Submits to the department a payment that is dishonored, reversed, or otherwise insufficient or invalid.

(b) Following notification of the violation, the licensee will be provided with thirty (30) days to address the violation or request a hearing by submitting the request electronically through the department's website or as otherwise determined by the department. If a hearing is requested, the department will schedule a hearing before SOAH.

(c) Except as provided in subsection (b) of this section, an individual whose certificate of registration has been revoked may not be relicensed or reregistered earlier than two (2) years from the date of revocation.

(d) An individual whose registration has been revoked for a dishonored or reversed payment, as provided under subsection (a)(8) of this section may reapply at any time. Approval of the application is contingent upon receipt of payment of the full amount due, including any additional processing fees resulting from the prior dishonored or reversed payment. The department may dismiss a pending revocation proceeding based on a dishonored or reversed payment upon receipt of payment of the full amount due, including any additional processing fees resulting from the prior dishonored or reversed payment.

(e) Other than as provided in subsection (d) of this section, an individual whose license or registration has been revoked [~~for a dishonored or reversed payment~~] must follow the applicable procedures pursuant to §12.11 or §12.12 of this title (relating to Application for License and Application for Registration, respectively) for new applications.

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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D. Phillip Adkins
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SUBCHAPTER D. SECURITY

37 TAC §§12.31 - 12.34

The Texas Department of Public Safety (the department) proposes amendments to §§12.31 - 12.34, concerning Security. The amendments to §12.31, concerning Security of Facilities, are necessary to clarify the security requirements relating to access by unauthorized individuals or the general public, to provide specific performance standards for security alarm

systems, and to generally clarify the security standards for licensee's facilities. The amendments to §12.32, relating to Security of Vehicles, are necessary to add the requirement of a trip plan reflecting certain required details of the route, product to be transported, and name of responsible registrant. The amendments to §12.33, Response to Security Breach, are necessary to provide an express 24 hour deadline for licensees to notify the department of a security breach. The amendments to §12.34, Reporting of Discrepancy, Loss or Theft, adds "fire on the regulated premises" and "theft or loss of raw materials or by-products" to the events a licensee must report; and adds the requirement to report the circumstances believed to have contributed to the loss, theft, or fire.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the proposed amendments to §§12.32, 12.33, or 12.34. There is no anticipated economic cost to businesses required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has also determined that the proposed amendment to §12.31 may have adverse economic effects on small businesses or micro-businesses required to comply with this rule as proposed. The department estimates there will be three licensees, all of which will be small businesses. These estimates are based on an analysis of other states' compassionate-use programs, the number of patients in Texas with intractable epilepsy, and Texas Health and Safety Code Chapter 487's requirements that the department issue at least three licenses to ensure reasonable statewide access to low-THC cannabis for patients for whom low-THC cannabis is prescribed under Chapter 169, Occupations Code. The department estimates the projected impact of this rule will be increased costs of compliance associated with the purchase of the required security equipment. Specifically, §12.31's requirement that dispensers purchase a burglar alarm system, including video surveillance, is likely to cost $1700 to $2000, assuming 12-16 cameras, and monitoring can range from $50-$250 per month. The proposed requirement of steel security doors for certain areas may cost approximately $1,200, assuming three doors at $400 each. A locking safe or metal locking container may cost approximately $2,000.

In preparing these rules the department considered the alternatives of granting exemptions or grace periods from the requirements for small and micro businesses. However, these rules are intended to implement Texas Health and Safety Code, Chapter 487's requirements that, among other things, licensees have the ability to maintain accountability for the raw materials, the finished product, and any by-products used or produced in the cultivation or production of low-THC cannabis to prevent unlawful access to or unlawful diversion or possession of those materials, products, or by-products. The department is not authorized to create grace periods or other exemptions from the statutory requirements, reflected in Texas Health and Safety Code, §487.102. Moreover, an exemption or grace period would be inconsistent with the health, safety, or environmental and economic welfare of the state. The department believes the proposed requirements are the minimum necessary requirements to protect these interests. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be reduction in the potential for diversion of marijuana or related products.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Compassionate Use Program." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

These rules are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §487.052, which requires the department adopt rules necessary for the administration and enforcement of Texas Health and Safety Code, Chapter 487.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §487.052 are affected by this proposal.

§12.31. Security of Facilities.

(a) A licensee or applicant for licensure must maintain effective controls and procedures in order to prevent unauthorized access, theft, or diversion of the low-THC cannabis and any derivative products. The standards provided in this subchapter are minimum standards only.

(b) During the regular course of business activities, and except as provided by subsection (d) of this section, a licensee may not allow access to the facility's cultivation, processing, or product storage areas by unauthorized individuals or to the public. All cultivation of low-THC cannabis shall take place in an enclosed, secured [~~During the regular course of business activities, a dispensing organization licensed under the Act may not allow access to the facility's low-THC cannabis area to unauthorized personnel or to the public. The licensee must establish and maintain~~ a] building, or an enclosure within a building[~~, or an enclosed yard~~] that provides reasonably adequate protection [~~security~~] against the diversion of low-THC cannabis or raw materials used in or by-products created by the production or cultivation of low-THC cannabis; limit access to each area to the minimum number of individuals or employees necessary for the licensee's activities; and designate an individual or a limited number of individuals with responsibility for each area where a controlled item is cultivated, processed, dispensed, produced, or stored; and authority to enter or control entry

into the area. Access to the enclosed, locked area is limited to a licensee, director, manager or registered employee when acting in his or her official capacity.

(c) Access to the licensee's cultivation, processing, or product storage areas [~~regulated premises~~] by authorized employees [~~personnel~~] shall at a minimum be restricted by a physical barrier with a mechanical locking device compliant with life safety requirements that must be kept closed and locked at all times when not immediately being used to enter or exit the area. These areas [~~The area~~] shall be clearly and conspicuously marked at all access points with signage indicating access is restricted to individuals registered with the Texas Department of Public Safety under Chapter 487 of the Texas Health and Safety Code, in contrasting block letters at least one inch in height.

(d) When unregistered individuals, whether employees [~~personnel~~] or contractors, business guests or visitors, or maintenance or other service providers not regulated under the Act, are to be present in or are to pass through regulated premises, the unregistered individuals must be continuously escorted by a registrant. Unregistered individuals must be provided a visitor's badge reflecting the individual's name and the date of issuance. All ingress and egress by unregistered individuals must be recorded in a daily log. The log must include the full name of each unregistered individual entering the regulated premises, the time of arrival, the time of departure, and the purpose of the visit. The requirements of this subsection do not apply to representatives of the department or other law enforcement agencies of this state who tour the facility as part of their official duties.

(e) Licensees must have an alarm system capable of continuously monitoring the regulated premises for fire and intrusion by means of camera recording, door switches, motion sensors, and fire and smoke detectors. The system must have the capability of immediately alerting local law enforcement of a fire at any time, of a security breach during non-business hours, and of being manually activated by staff during business hours. The camera monitoring system must be capable of recording at least 90 days of footage to an external hard drive at a minimum resolution of 720 x 350, with camera coverage of all regulated areas, including all ingress or egress areas, and the building exterior. Point of sale areas, if applicable, must have a camera placed in a manner to provide visual identification of any patient or legal guardian seeking to fill a prescription for low-THC cannabis. Exterior lighting must be sufficient to support camera monitoring. The system must comply with local city or county alarm permitting requirements. The system must be capable of continuous function upon total power loss for a minimum period of five (5) minutes.

(f) Access to the licensee's cultivation, processing, or product storage areas must be through a metal security door on a metal frame with hinges that are protected from ingress. The metal door must have secure locking capability. The door, door frame, and locking mechanism must be compliant with life safety requirements. If the door utilizes magnetic locks, the lock must work independently without exterior power. Post-cultivation low-THC cannabis products must be stored in a locking safe or metal locking container, in compliance with Title 21 Code of Federal Regulations, §1301.72.

(g) The licensee's cultivation, processing, production, or raw material storage areas should have no windows unless the windows are shatter resistant or burglar proof, or are reinforced with metal bars or grates to prevent entry.

(h) In the event the licensee's facility shares space, or has an adjacent building, the facility must ensure no mutual access points exist, including ceiling or roof areas which would enable unauthorized access from the adjacent structure.

(i) Final low-THC cannabis products and raw materials, including plants in any stages of growth, may not be visible from the exterior of the building during non-business hours.

§12.32. Security of Vehicles.

(a) Any vehicle used by a dispensing organization for the transportation of low-THC cannabis must have a vehicle security system and a securely attached and locked container within the vehicle. It is the responsibility of the licensee to ensure that only authorized registered employees [~~personnel~~] have access to the locked secure container within the vehicle.

(b) Prior to transportation of any product, licensee shall complete a trip plan that includes:

(1) The name of the registrant responsible for the transportation;

(2) The date and start time of the trip;

(3) The anticipated route of transportation and destination; and

(4) A detailed invoice or log of the specific type of product and amount to be transported.

(c) Promptly following transportation, the licensee shall enter the end time of the trip and any changes to the trip plan, including any changes to the amount of product delivered to the location.

§12.33. Response to Security Breach.

(a) The licensee must immediately report any unauthorized intrusion or other security breach of the regulated premises to both the local law enforcement agency with primary response jurisdiction and within twenty four (24) hours to the department.

(b) Following any security breach the licensee shall review existing security procedures for any deficiencies that may have contributed to the breach. The licensee shall remedy the deficiency and report the remedial measures to the department.

(c) The licensee must rekey or change the combinations of any locks opened in the breach, and change any passwords that may have been used in the breach.

§12.34. Reporting of Discrepancy, Loss or Theft.

(a) A licensee or registrant must report to the department not later than the second day following the date the licensee or registrant learns of:

(1) A notable inventory discrepancy;

(2) An inventory loss or theft; or

(3) A fire on the regulated premises; or

(4) [~~(3)~~] A loss or theft during transport.

(b) The report required by subsection (a) of this section must reflect the name and registration or license number of the individual preparing the report, the date of the report, and the details listed in this subsection, as applicable:

(1) Date of discovery;

(2) Amount of low-THC cannabis, raw materials, or by-products involved, including amounts transported and received;

(3) Physical location at issue;

(4) Date transported, name of registered [~~carrier or~~] employee involved in the transport; or

(5) Description of any suspected criminal activity, or [.]

(6) Circumstances believed to have contributed to the loss, theft, or fire.

(c) A fire on the regulated premises which must be reported immediately to the State Fire Marshal'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.

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D. Phillip Adkins
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SUBCHAPTER E. COMPASSIONATE-USE REGISTRY

37 TAC §12.41, §12.42

The Texas Department of Public Safety (the department) proposes amendments to §12.41 and §12.42, concerning Compassionate-Use Registry. The amendments to §12.41, concerning Access to Compassionate-Use Registry, are intended to clarify the purposes for which dispensing organizations and law enforcement agencies may request access to the Compassionate-Use Registry. The amendments to §12.42, Verification of Patient Registration, are intended to clarify that it is the patient's prescription and not the registration that is to be verified, and to clarify the information to be verified.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be greater clarity and consistency with statute.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at https://www.dps.texas.gov/rsd/contact/default.aspx. Select "Compassionate Use Program." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

These rules are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Health and Safety Code, §487.052, which requires the department adopt rules necessary for the administration and enforcement of Texas Health and Safety Code, Chapter 487.

Texas Government Code, §411.004(3) and Texas Health and Safety Code, §487.052 are affected by this proposal.

§12.41. Access to Compassionate-Use Registry.

(a) Qualified physicians registered as prescribers of low-THC cannabis under Texas Occupations Code, Chapter 169 may access the Compassionate-Use Registry using the department's secure web portal.

(b) Dispensing organizations and law enforcement agencies may request access to the Compassionate-Use Registry for purposes [~~the purpose~~] of the Act and this chapter, including verifying whether a patient is one for whom low-THC cannabis is prescribed and whether the patient's prescriptions have been filled.

§12.42. Verification of Patient Prescription [~~Registration~~].

(a) Before dispensing any low-THC cannabis to a registered patient or the patient's legal guardian, the dispensing organization must verify the identity of the patient or guardian, verify the guardian's status, if applicable, and otherwise comply with the requirements of §487.107 of the Act [~~confirm the patient has an active registration, the order has been entered in the registry by the physician, and the order has not already been dispensed~~].

(b) Upon dispensing the low-THC cannabis, the [~~The~~] dispensing organization shall immediately enter [~~a dispensing action~~] into the registry the form and quantity of low-THC cannabis dispensed, the amount charged for the low-THC cannabis dispensed, and the date and time of dispensation [~~immediately upon dispensing the low-THC cannabis to the registered patient or the patient's legal guardian~~].

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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D. Phillip Adkins
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CHAPTER 15. DRIVER LICENSE RULES

SUBCHAPTER A. LICENSING REQUIREMENTS

37 TAC §15.7

The Texas Department of Public Safety (the department) proposes the repeal of §15.7, concerning Occupational License (Essential Need). The repeal of §15.7 is filed simultaneously with proposed new §15.7. This repeal and the proposal of new §15.7 are necessary to clarify the procedures for obtaining an occupational license.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be a better understanding of the requirements for obtaining an occupational license and an increase in highway safety.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to *DLDrulecomments@dps.texas.gov.* Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is repealed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3), and Texas Transportation Code, §521.005, are affected by this proposal.

§15.7. Occupational License (Essential Need).

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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37 TAC §15.7

The Texas Department of Public Safety (the department) proposes new §15.7, concerning Occupational License (Essential Need). Proposed new §15.7 is filed simultaneously with the repeal of current §15.7. This proposal and the repeal of current §15.7 are necessary to clarify the procedures for obtaining an occupational license.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule are in effect, the public benefit anticipated as a result of enforcing the rule will be a better understanding of the requirements for obtaining an occupational license and an increase in highway safety.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to *DLDrulecomments@dps.texas.gov.* Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This rule is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3), and Texas Transportation Code, §521.005, are affected by this proposal.

§15.7. Occupational License (Essential Need).

(a) An occupational license is a restricted driver license that permits the operation of a non-commercial motor vehicle when a license has been suspended or revoked. An occupational license cannot be issued if the applicant is revoked for medical reasons or suspended for failure to pay child support.

(b) If there are eligibility issues that would prevent the issuance of a driver license other than the suspension or revocation of the privilege to operate a motor vehicle, those issues must be rectified before the department can issue an occupational license. For example, if an applicant has never held a driver license or the applicant's driver license has been expired for more than two years, the applicant must take and pass all examinations prior to the issuance of an occupational license.

(c) In order for the department to issue an occupational license, the applicant must submit the items detailed in this section to the department's headquarters in Austin:

(1) a certified copy of the petition and a certified copy of the court order granting the occupational license issued by a justice, county or district court;

(2) an SR-22 (certificate of insurance);

(3) payment of all required reinstatement fees; and

(4) payment of the appropriate issuance fee.

(d) The fee is $10 for one year or less. If the suspension or revocation is more than one year and permitted by the court order, the applicant may apply for a two year occupational license and submit an additional $10 fee for the second year.

(e) The department will notify the license holder if the occupational license has been revoked by the court that issued the order for the occupational license. Any application for a subsequent occupational license will require the submission of a new petition and court order.

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

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SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

37 TAC §15.30

The Texas Department of Public Safety (the department) proposes amendments to §15.30, concerning Identification Certificates. The proposed amendments are necessary to implement the provisions of Texas Transportation Code, §521.101(f)(1) and (2) as amended by SB 1934, 84th Legislative Session and to clarify the procedures for the renewal of an expired identification certificate.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule are in effect, the public benefit anticipated as a result of enforcing the rule will be a better understanding of the requirements for obtaining an identification certificate.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to *DLDrulecomments@dps.texas.gov.* Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This rule is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code and §521.101(d) and(f)(1) and (2).

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 and §521.101(d) and (f)(1) and (2), are affected by this proposal.

§15.30. Identification Certificates.

(a) Identification certificates issued to a citizen, national, lawful permanent resident, refugee, or asylee are dated to expire on the next birth date of the holder occurring six years after date of application [~~, except that a certificate that is issued to a person 60 years of age or older does not expire~~].

(b) Identification certificates issued to applicants not described by subsection (a) are dated to expire as provided by Transportation Code, §521.101(f)(2)(A)(ii) or (B).

(c) [~~(b)~~] All original applicants for identification certificate must present proof of identity as required in §15.24 of this title (relating to Identification of Applicants).

(d) Any person whose identification certificate has been expired over two years must apply as an original applicant.

(e) [~~(c)~~] There are no age limits and testing is not required.

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

Filed with the Office of the Secretary of State on October 14, 2016.

TRD-201605329
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 424-5848

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37 TAC §15.36

The Texas Department of Public Safety (the department) proposes amendments to §15.36, concerning Applications for Duplicates and Corrections. Proposed amendments are necessary to implement the provisions of Transportation Code, §521.183 as added by SB 1934, 84th Legislative Session and to clarify the department's procedure for issuing duplicate driver licenses and identification certificates.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule are in effect, the public benefit anticipated as a result of enforcing the rule will be increased clarity in the process related to the issuance of duplicate driver licenses and identification certificates.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to *DLDrulecomments@dps.texas.gov.* Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This rule is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code and §521.183.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 and §521.183 are affected by this proposal.

§15.36. Applications for Duplicates and Corrections.

(a) If the holder of a Texas driver license or identification certificate has changed their name or address, they are [~~A licensee is~~] required to notify the department of this [~~any~~] change [~~of name or address~~] within 30 days and apply for a duplicate driver license or identification certificate. [~~when such change occurs. If the licensee holds a Texas driver license and Texas Identification card, they will be required to update both cards or surrender the card with obsolete information.~~]

(b) An application for a duplicate license or identification certificate will be accepted in any of the [~~following~~] cases detailed in this subsection:

(1) when a Texas driver license or identification certificate, including an occupational driver license or learner license, has been lost, destroyed, marred, or mutilated;

(2) when an out-of-state, no-photo licensee returns to Texas[~~, before or after the expiration of 45 days~~]; or

(3) when there has been a change in any other pertinent information.

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

Filed with the Office of the Secretary of State on October 14, 2016.

TRD-201605330
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 424-5848

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SUBCHAPTER C. EXAMINATION REQUIREMENTS

37 TAC §15.59

The Texas Department of Public Safety (the department) proposes the repeal of §15.59, concerning Alternate Methods For Driver License Transactions. The repeal of §15.59 is filed simultaneously with proposed new §15.59. This repeal and the proposal of new §15.59 are necessary to clarify and update the procedures for using alternative methods to renew and obtain duplicate driver licenses and identification certificates.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be clarification of the procedures for using alternative methods to renew and obtain duplicate driver licenses and identification certificates.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to *DLDrulecomments@dps.texas.gov.* Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is repealed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code and §§521.104, 521.146, and 521.274.

Texas Government Code, §411.004(3), and Texas Transportation Code, §521.005, 521.104, 521.146, and 521.274, are affected by this proposal.

§15.59. Alternate Methods For Driver License Transactions.

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 14, 2016.

TRD-201605331

D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 424-5848

37 TAC §15.59

The Texas Department of Public Safety (the department) proposes new §15.59, concerning Alternative Methods For Driver License Transactions. Proposed new §15.59 is filed simultaneously with the repeal of current §15.59. This proposal and the repeal of current §15.59 are necessary to clarify and update the procedures for using alternative methods to renew and obtain duplicate driver licenses and identification certificates.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule are in effect, the public benefit anticipated as a result of enforcing the rule will be clarification of the procedures for using alternative methods to renew and obtain duplicate driver licenses and identification certificates.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Janie Sawatsky, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to *DLDrulecomments@dps.texas.gov.* Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This rule is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code and §§521.104, 521.146, and 521.274.

Texas Government Code, §411.004(3), and Texas Transportation Code, §521.005, 521.104, 521.146, and 521.274, are affected by this proposal.

§15.59. Alternative Methods for Driver License Transactions.

(a) If eligible, driver license or identification certificate holders may utilize alternative methods to renew or obtain a duplicate of their Texas driver license or identification certificate.

(b) Applicants must apply in the manner provided by the department and pay the applicable fee.

(c) Alternative renewal cannot be used for any two consecutive renewal periods for the purpose of updating the digital images.

(d) Commercial driver license applicants are not eligible to renew their driver license by alternative methods.

(e) The applicants, listed in this subsection, are not eligible to renew or apply for a duplicate of their driver license or identification certificate by alternative methods:

(1) any holder of a learner, provisional, occupational, or commercial driver license;

(2) any driver license holder who has an administrative or card status that requires review by the department, including but not limited to, a medical or physical condition that may affect the driver license holder's ability to safely operate a motor vehicle;

(3) any driver license holder applying for renewal that will be 79 years of age or older on the expiration of their current license;

(4) any driver license or identification certificate holder subject to the registration requirements of Code of Criminal Procedure, Chapter 62;

(5) any driver license or identification certificate holder who is suspended, canceled, revoked, or denied renewal;

(6) any driver license or identification certificate holder who does not have a verified social security number on file with the department;

(7) any driver license or identification certificate holder who does not have a digital image (e.g. photograph or signature) on file with the department; or

(8) any applicant whose lawful presence needs to be verified.

(f) The department may reject an application for an alternative transaction and require the personal appearance of the applicant at a driver license office if it has information concerning the eligibility of the applicant, including but not limited to, medical and vision conditions.

(g) Applicants who are eligible for alternative renewal may elect to renew at any local driver license office. A vision test will be conducted on all applicants renewing a driver license at a local driver license office, in addition to any other tests required by the department.

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

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TRD-201605332

D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 424-5848

CHAPTER 23. VEHICLE INSPECTION
SUBCHAPTER A. VEHICLE INSPECTION STATION AND VEHICLE INSPECTOR CERTIFICATION

37 TAC §23.5

The Texas Department of Public Safety (the department) proposes amendments to §23.5, concerning Vehicle Inspection Station and Vehicle Inspector Disqualifying Criminal Offenses. This amendment is necessary to correct an error in a statutory reference contained in §23.5(c).

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be current and updated.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246, or by email at *https://www.dps.texas.gov/rsd/contact/default.aspx.* Select "Vehicle Inspection". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This rule is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §548.002,

which authorizes the department to adopt rules to administer and enforce Chapter 548.

Texas Government Code, §411.004(3), and Texas Transportation Code, §548.002 are affected by this proposal.

§23.5. Vehicle Inspection Station and Vehicle Inspector Disqualifying Criminal Offenses.

(a) Vehicle inspection stations and vehicle inspectors are entrusted with ensuring the safety and fitness of vehicles traveling on the roads of Texas. Vehicle inspection stations and vehicle inspectors have constant access to and are responsible for the lawful disposition of government documents. For these reasons, the department has determined that the offenses contained within this section relate directly to the duties and responsibilities of vehicle inspection stations and vehicle inspectors certified under Texas Transportation Code, Chapter 548. The types of offenses listed in this section are general categories that include all specific offenses within the corresponding chapter of the Texas Penal Code and any such offenses regardless of the code in which they appear.

(b) The offenses listed in paragraphs (1) - (9) of this subsection are intended to provide guidance only, and are not exhaustive of either the types of offenses that may relate to vehicle inspections or the operation of a vehicle inspection station or those that are independently disqualifying under Texas Occupations Code, §53.021(a)(2) - (4). The disqualifying offenses also include those crimes under the laws of another state or the United States, if the offense contains elements that are substantially similar to the elements of a disqualifying offense under the laws of this state. Such offenses also include the "aggravated" or otherwise heightened versions of the offenses listed in paragraphs (1) - (9) of this subsection. In addition, after due consideration of the circumstances of the criminal act and its relationship to the position of trust involved in vehicle inspections or the operation of a vehicle inspection station, the department may find that a conviction not described in this section also renders a person unfit to hold a certificate as a vehicle inspector or vehicle inspection station owner. In particular, an offense that is committed in one's capacity as a vehicle inspection station owner or vehicle inspector, or an offense that is facilitated by licensure as an owner or inspector, will be considered related to the occupation and will render the person unfit to hold the certification.

(1) Arson, Criminal Mischief, and Other Property Damage or Destruction (Texas Penal Code, Chapter 28).

(2) Robbery (Texas Penal Code, Chapter 29).

(3) Burglary and Criminal Trespass (Texas Penal Code, Chapter 30).

(4) Theft (Texas Penal Code, Chapter 31).

(5) Fraud (Texas Penal Code, Chapter 32).

(6) Bribery and Corrupt Influence (Texas Penal Code, Chapter 36).

(7) Perjury and Other Falsification (Texas Penal Code, Chapter 37).

(8) Criminal Homicide (Texas Penal Code, Chapter 19).

(9) Driving Related Intoxication Offenses (Texas Penal Code, Chapter 49).

(c) A felony conviction for any such offense is disqualifying for ten years from the date of conviction, unless the offense was committed in one's capacity as a vehicle inspection station owner or vehicle inspector, or was facilitated by licensure as an owner or inspector, in which case it is permanently disqualifying. Conviction for a sexually violent offense as defined by Texas Code of Criminal Procedure, Article 62.001, or an offense listed in Texas Code of Criminal Procedure, Article 42.12 §3g [~~§3(g)~~] or Article 42A.054, is permanently disqualifying.

(d) A felony conviction for an offense not listed or described in this section that does not relate to the occupation is disqualifying for five years from the date of conviction, pursuant to Texas Occupations Code, §53.021(a)(2).

(e) A Class A misdemeanor conviction for an offense listed in this section and any other offense determined by the department to directly relate to the duties and responsibilities of vehicle inspection stations or vehicle inspectors, including any unlisted offense committed in one's capacity as a vehicle inspection station owner or vehicle inspector or that was facilitated by licensure as an owner or inspector, is disqualifying for five years from the date of conviction.

(f) A Class B misdemeanor conviction for an offense listed in this section and any other offense determined by the department to directly relate to the duties and responsibilities of vehicle inspection stations or vehicle inspectors, including any unlisted offense committed in one's capacity as a vehicle inspection station owner or vehicle inspector or that was facilitated by licensure as an owner or inspector, is disqualifying for two years from the date of conviction.

(g) For purposes of this section, a person is convicted of an offense when an adjudication of guilt or an order of deferred adjudication for the offense is entered against the person by a court of competent jurisdiction.

(h) A person who is otherwise disqualified pursuant to the criteria in this section may submit documentation as detailed in paragraphs (1) - (8) of this subsection as evidence of his or her fitness to perform the duties and discharge the responsibilities of a vehicle inspection station certificate holder or vehicle inspector:

(1) The extent and nature of the person's past criminal activity.

(2) The age of the person when the crime was committed.

(3) The amount of time that has elapsed since the person's last criminal activity.

(4) The conduct and work activity of the person before and after the criminal activity.

(5) Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release.

(6) Letters of recommendation from:

(A) prosecutors, law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;

(B) the sheriff or chief of police in the community where the person resides; or

(C) any other person in contact with the convicted person.

(7) Evidence the applicant has:

(A) maintained a record of steady employment;

(B) supported the applicant's dependents;

(C) maintained a record of good conduct; and

(D) paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant has been convicted.

(8) Any other evidence relevant to the person's fitness for the certification sought.

(i) The failure to provide the required documentation in a timely manner may result in the proposed action being taken against the application or license.

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

Filed with the Office of the Secretary of State on October 14, 2016.

TRD-201605333
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 424-5848

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 18. NURSING FACILITY ADMINISTRATORS

SUBCHAPTER D. REFERRALS, COMPLAINT PROCEDURES, AND SANCTIONS

40 TAC §§18.52 - 18.54

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§18.52 - 18.54, in Chapter 18, Nursing Facility Administrators.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments is to clarify that DADS gives a nursing facility administrator an opportunity to request an informal review before DADS initiates proceedings to revoke or suspend the administrator's license or to deny renewal of such a license. The amendments also change the timeframe for a nursing facility administrator to request a formal hearing from 15 days to 20 days to be consistent with Texas Health and Safety Code (THSC) §242.067(f) and add crimes of moral turpitude to the list of violations that lead to sanctions to be consistent with THSC §242.313.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §18.52 clarifies that DADS will allow a licensee an opportunity to request an informal review before DADS initiates proceedings to revoke or suspend a license or deny a license renewal. The amendment also states that DADS gives a licensee the option to request an informal review or to accept the sanction.

The proposed amendment to §18.53 clarifies information that is included in the formal hearing notice issued to a licensee by DADS. The amendment changes the timeframe a licensee has to request a formal hearing notice from 15 days to 20 days after receiving a notice from DADS to be consistent with the timeframe for hearings for administrative penalties in THSC §242.067(f). The amendment adds a reference to Title 40, Chapter 91 regarding the governance of a formal hearing. Editorial changes were also made to improve the readability of the section.

The proposed amendment to §18.54 clarifies violations that may lead to sanctions against a licensee, to be consistent with THSC §242.313. Specifically, conviction of a crime of moral turpitude has been added to the list of violations.

FISCAL NOTE

David Cook, Deputy Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because the amendments do not impose any economic requirements on small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Mary T. Henderson, DADS Associate Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is clearer rules regarding the timeframe for requesting a formal hearing and clarity regarding the violations that can result in sanctions imposed against a nursing facility administrator.

Ms. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sharon Wallace at (210) 619-8292 in DADS Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, HHSC Policy and Performance-16R03, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 16R03" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §242.302, which authorizes the HHSC executive commissioner to adopt rules relating to the licensure of nursing facility administrators.

The amendments implement Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.302.

§18.52. Informal Reviews.

(a) Before DADS initiates proceedings to revoke a license, suspend a license, or deny a license renewal [~~for a sanction~~], DADS gives a licensee:

(1) a description of the alleged rule violation [~~violation(s)~~] warranting the proposed sanction; and

(2) the option to:

(A) request an informal review to demonstrate that the licensee did not commit the alleged violation; or

(B) accept the sanction.

[~~(2) an opportunity to demonstrate compliance with all requirements of the law for retention of the license; and~~]

[~~(3) the option to accept the sanction.~~]

(b) A licensee's request for an informal review must:

(1) be received by DADS within 10 calendar days after the licensee receives the [~~DADS'~~] notice letter from DADS; and

(2) contain documentation that refutes the allegations.

(c) DADS conducts the informal review:

(1) by telephone;

(2) in person; or

(3) by reviewing the licensee's written response and supporting evidence.

(d) DADS provides the licensee with official notice of the outcome of the informal review.

§18.53. Formal Hearings.

(a) DADS gives a licensee a formal hearing notice if:

(1) [~~when~~] DADS proposes a sanction; or [~~and~~]

(2) [~~when~~] DADS upholds or modifies a proposed sanction after an informal review, in accordance with §18.52 of this subchapter [~~chapter~~] (relating to Informal Reviews).

(b) The formal hearing notice to the licensee includes:

(1) a description of the alleged rule violations warranting the proposed sanction;

(2) [~~(1)~~] DADS [~~DADS'~~] decision to uphold or modify the sanction if the notice is issued after an informal review; and [~~continue with sanctions;~~]

(3) [~~(2)~~] the option for the licensee to: [~~accept the sanction as proposed; and~~]

(A) accept the sanction; or

(B) request a formal hearing no later than 20 days after receiving the formal hearing notice from DADS.

[~~(3) the option to request a formal hearing no later than 15 days after receiving DADS' notice letter.~~]

(c) DADS imposes a sanction [~~sanctions~~] against a licensee if [~~when~~]:

(1) the licensee accepts the [~~DADS'~~] decision from DADS to impose the sanction;

(2) the administrative law judge upholds the [~~DADS'~~] proposed sanction from DADS after the formal hearing; or

(3) the licensee does not request a hearing within 20 days after receiving the [~~respond to DADS'~~] formal hearing notice from DADS.

(d) A hearing is governed by 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) and Chapter 91 of this title (relating to Hearings Under the Administrative Procedure Act).

§18.54. Rule or Statutory Violations.

DADS may impose sanctions listed in §18.57 of this subchapter (relating to Schedule of Sanctions) against a licensee for the following [~~statutory~~] violations:

(1) the licensee willfully or repeatedly violated a provision of Texas Health and Safety Code, Chapter 242, or a rule in this chapter;

(2) the licensee willfully or repeatedly acted in a manner inconsistent with the health and safety of the residents of a nursing facility of which the licensee is an administrator;

(3) the licensee obtained or attempted to obtain a license through misrepresentation or deceit or by making a material misstatement of fact on a license application;

(4) the licensee's use of alcohol or drugs creates a hazard to the residents of a facility;

(5) a judgment of a court of competent jurisdiction finds that the licensee is mentally incapacitated;

(6) the licensee has been convicted in a court of competent jurisdiction of a misdemeanor or felony involving moral turpitude; [~~criminal offense listed in §18.41(c) of this chapter (relating to Licensure of Persons with Criminal Backgrounds); or~~]

(7) the licensee has been convicted in a court of competent jurisdiction of an offense listed in §18.41(c) of this chapter (relating to Licensure of Persons with Criminal Backgrounds), including an offense listed in Texas Health and Safety Code, §250.006; or

(8) [~~(7)~~] the licensee has been negligent or incompetent in the licensee's duties as a nursing facility administrator.

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

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TRD-201605277
Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 27, 2016
For further information, please call: (210) 619-8292

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §19.101, in Subchapter B, Definitions, and new §19.2113, in Subchapter V, Enforcement, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

The proposed amendment and new section are in response to Senate Bill 304, 84th Legislature, Regular Session, 2015, which amended Texas Health and Safety Code §242.061. Senate Bill 304 requires the HHSC executive commissioner to establish criteria by which the executive commissioner may stay a proposed nursing facility license revocation resulting from a license holder committing three or more violations that constitute an immediate threat to a resident's health and safety within a 24-month period.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §19.101 adds definitions of "stay agreement," "substandard quality of care violation," and "widespread" to define terms that are used in the proposed new §19.2113. The amendment also adds a definition of "quality measure report" to define a term used in proposed §19.2107, published elsewhere in this issue of the *Texas Register.*

The proposed new §19.2113 establishes the criteria by which the HHSC executive commissioner may stay a proposed nursing facility license revocation. The proposed new section sets forth the requirements for a license holder to submit a written request to stay a license revocation. Additionally, the proposed new section requires the license holder to enter into a stay agreement if a request to stay a license revocation is granted. The proposed new section describes the process for lifting a stay and rescinding a license revocation when a license holder successfully completes the requirements of a stay agreement. The proposed new section also describes the process for lifting a stay and revoking a facility license if a license holder does not successfully complete the requirements of the stay agreement.

FISCAL NOTE

David Cook, Deputy Chief Financial Officer, has determined that, for the first five years the proposed amendment and new section are in effect, enforcing or administering the amendment and new section does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment and new section will not have an adverse economic effect on small businesses or micro-businesses, because there are no costs associated with the proposed amendment and new section.

PUBLIC BENEFIT AND COSTS

Mary T. Henderson, DADS Associate Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendment and new section are in effect, the public benefit expected as a result of enforcing the amendment and new section is the additional protection of the health and safety of nursing facility residents.

Ms. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the amendment and new section. The amendment and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Kim Lammons at (512) 438-2470 in DADS Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, HHSC Policy and Performance-16R10, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or emailed to *rulescomments@hhsc.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or emailed by midnight on the last day of the comment period. When faxing or emailing comments, please indicate "Comments on Proposed Rule 16R10" in the subject line.

SUBCHAPTER B. DEFINITIONS

40 TAC §19.101

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The amendment implements Texas Government Code, §531.0055, and Texas Health and Safety Code, Chapter 242.

§19.101. Definitions.

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

(1) Abuse--Negligent or willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical or emotional harm or pain to a resident; or sexual abuse, including involuntary or nonconsensual sexual conduct that would constitute an offense under Penal Code §21.08 (indecent exposure) or Penal Code Chapter 22 (assaultive offenses), sexual harassment, sexual coercion, or sexual assault.

(2) Act--Chapter 242 of the Texas Health and Safety Code.

(3) Activities assessment--See Comprehensive Assessment and Comprehensive Care Plan.

(4) Activities director--The qualified individual appointed by the facility to direct the activities program as described in §19.702 of this chapter (relating to Activities).

(5) Addition--The addition of floor space to an institution.

(6) Administrator--Licensed nursing facility administrator.

(7) Admission MDS assessment--An MDS assessment that determines a recipient's initial determination of eligibility for medical necessity for admission into the Texas Medicaid Nursing Facility Program.

(8) Advanced practice registered nurse--A person licensed by the Texas Board of Nursing as an advanced practice registered nurse.

(9) Affiliate--With respect to a:

(A) partnership, each partner thereof;

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

(C) natural person, which includes each:

(i) person's spouse;

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

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

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

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

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

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

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

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

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

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

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

(19) CFR--Code of Federal Regulations.

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

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

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

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

(24) Comprehensive care plan--A plan of care prepared by an interdisciplinary team that includes measurable short-term and long-term objectives and timetables to meet the resident's needs developed for each resident after admission. The plan addresses at least the following needs: medical, nursing, rehabilitative, psychosocial, dietary, activity, and resident's rights. The plan includes strategies developed by the team, as described in §19.802(b)(2) of this chapter (relating to Comprehensive Care Plans), consistent with the physician's prescribed plan of care, to assist the resident in eliminating, managing, or alleviating health or psychosocial problems identified through assessment. Planning includes:

(A) goal setting;

(B) establishing priorities for management of care;

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

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

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

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

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

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

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

(D) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of a nursing facility, is in a position of actual control or authority with respect to the nursing facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility.

(27) Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and DADS have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(28) DADS--The Department of Aging and Disability Services or its successor agency.

(29) Dangerous drugs--Any drug as defined in the Texas Health and Safety Code, Chapter 483.

(30) Dentist--A practitioner licensed by the Texas State Board of Dental Examiners.

(31) Department--Department of Aging and Disability Services.

(32) DHS--This term referred to the Texas Department of Human Services; it now refers to DADS, unless the context concerns an administrative hearing. Administrative hearings were formerly the responsibility of DHS; they now are the responsibility of the Texas Health and Human Services Commission (HHSC).

(33) Dietitian--A qualified dietitian is one who is qualified based upon either:

(A) registration by the Commission on Dietetic Registration of the Academy of Nutrition and Dietetics; or

(B) licensure, or provisional licensure, by the Texas State Board of Examiners of Dietitians. These individuals must have one year of supervisory experience in dietetic service of a health care facility.

(34) Direct care by licensed nurses--Direct care consonant with the physician's planned regimen of total resident care includes:

(A) assessment of the resident's health care status;

(B) planning for the resident's care;

(C) assignment of duties to achieve the resident's care;

(D) nursing intervention; and

(E) evaluation and change of approaches as necessary.

(35) Distinct part--That portion of a facility certified to participate in the Medicaid Nursing Facility program.

(36) Drug (also referred to as medication)--Any of the following:

(A) any substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

(B) any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man;

(C) any substance (other than food) intended to affect the structure or any function of the body of man; and

(D) any substance intended for use as a component of any substance specified in subparagraphs (A) - (C) of this paragraph. It does not include devices or their components, parts, or accessories.

(37) Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(38) Emergency--A sudden change in a resident's condition requiring immediate medical intervention.

(39) Executive Commissioner--The executive commissioner of the Health and Human Services Commission.

(40) Exploitation--The illegal or improper act or process of a caregiver, family member, or other individual who has an ongoing relationship with a resident using the resources of the resident for monetary or personal benefit, profit, or gain without the informed consent of the resident.

(41) Exposure (infections)--The direct contact of blood or other potentially infectious materials of one person with the skin or mucous membranes of another person. Other potentially infectious materials include the following human body fluids: semen, vaginal secretions, cerebrospinal fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, and body fluid that is visibly contaminated with blood and all body fluids when it is difficult or impossible to differentiate between body fluids.

(42) Facility--Unless otherwise indicated, a facility is an institution that provides organized and structured nursing care and service and is subject to licensure under Texas Health and Safety Code, Chapter 242.

(A) For Medicaid, a facility is a nursing facility which meets the requirements of §1919(a) - (d) of the Social Security Act. A facility may not include any institution that is for the care and treatment of mental diseases except for services furnished to individuals age 65 and over and who are eligible as defined in Chapter 17 of this title (relating to Preadmission Screening and Resident Review (PASRR).

(B) For Medicare and Medicaid purposes (including eligibility, coverage, certification, and payment), the "facility" is always the entity which participates in the program, whether that entity is comprised of all of, or a distinct part of, a larger institution.

(C) "Facility" is also referred to as a nursing home or nursing facility. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care of the resident; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.

(43) Family council--A group of family members, friends, or legal guardians of residents, who organize and meet privately or openly.

(44) Family representative--An individual appointed by the resident to represent the resident and other family members, by formal or informal arrangement.

(45) Fiduciary agent--An individual who holds in trust another's monies.

(46) Free choice--Unrestricted right to choose a qualified provider of services.

(47) Goals--Long-term: general statements of desired outcomes. Short-term: measurable time-limited, expected results that provide the means to evaluate the resident's progress toward achieving long-term goals.

(48) Governmental unit--A state or a political subdivision of the state, including a county or municipality.

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

(50) Health care provider--An individual, including a physician, or facility licensed, certified, or otherwise authorized to administer health care, in the ordinary course of business or professional practice.

(51) Hearing--A contested case hearing held in accordance with the Administrative Procedure Act, Texas Government Code,

Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) and Chapter 91 of this title (relating to Hearings Under the Administrative Procedure Act).

(52) HIV--Human Immunodeficiency Virus.

(53) Incident--An abnormal event, including accidents or injury to staff or residents, which is documented in facility reports. An occurrence in which a resident may have been subject to abuse, neglect, or exploitation must also be reported to DADS.

(54) Infection control--A program designed to prevent the transmission of disease and infection in order to provide a safe and sanitary environment.

(55) Inspection--Any on-site visit to or survey of an institution by DADS for the purpose of licensing, monitoring, complaint investigation, architectural review, or similar purpose.

(56) Interdisciplinary care plan--See the definition of "comprehensive care plan."

(57) Involuntary seclusion--Separation of a resident from others or from the resident's room or confinement to the resident's room, against the resident's will or the will of a person who is legally authorized to act on behalf of the resident. Monitored separation from other residents is not involuntary seclusion if the separation is a therapeutic intervention that uses the least restrictive approach for the minimum amount of time, not exceed to 24 hours, until professional staff can develop a plan of care to meet the resident's needs.

(58) IV--Intravenous.

(59) Legend drug or prescription drug--Any drug that requires a written or telephonic order of a practitioner before it may be dispensed by a pharmacist, or that may be delivered to a particular resident by a practitioner in the course of the practitioner's practice.

(60) Licensed health professional--A physician; physician assistant; advanced practice registered nurse; physical, speech, or occupational therapist; pharmacist; physical or occupational therapy assistant; registered professional nurse; licensed vocational nurse; licensed dietitian; or licensed social worker.

(61) Licensed nursing home (facility) administrator--A person currently licensed by DADS in accordance with Chapter 18 of this title (relating to Nursing Facility Administrators).

(62) Licensed vocational nurse (LVN)--A nurse who is currently licensed by the Texas Board of Nursing as a licensed vocational nurse.

(63) Life Safety Code (also referred to as the Code or NFPA 101)--The Code for Safety to Life from Fire in Buildings and Structures, Standard 101, of the National Fire Protection Association (NFPA).

(64) Life safety features--Fire safety components required by the Life Safety Code, including, but not limited to, building construction, fire alarm systems, smoke detection systems, interior finishes, sizes and thicknesses of doors, exits, emergency electrical systems, and sprinkler systems.

(65) Life support--Use of any technique, therapy, or device to assist in sustaining life. (See §19.419 of this chapter (relating to Advance Directives)).

(66) Local authorities--Persons, including, but not limited to, local health authority, fire marshal, and building inspector, who may be authorized by state law, county order, or municipal ordinance to perform certain inspections or certifications.

(67) Local health authority--The physician appointed by the governing body of a municipality or the commissioner's court of the county to administer state and local laws relating to public health in the municipality's or county's jurisdiction as defined in Texas Health and Safety Code, §121.021.

(68) Long-term care-regulatory--DADS Regulatory Services Division, which is responsible for surveying nursing facilities to determine compliance with regulations for licensure and certification for Title XIX participation.

(69) Manager--A person, other than a licensed nursing home administrator, having a contractual relationship to provide management services to a facility.

(70) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, or food service.

(71) MDS--Minimum data set. See Resident Assessment Instrument (RAI).

(72) MDS nurse reviewer--A registered nurse employed by HHSC to monitor the accuracy of the MDS assessment submitted by a Medicaid-certified nursing facility.

(73) Medicaid applicant--A person who requests the determination of eligibility to become a Medicaid recipient.

(74) Medicaid nursing facility vendor payment system--Electronic billing and payment system for reimbursement to nursing facilities for services provided to eligible Medicaid recipients.

(75) Medicaid recipient--A person who meets the eligibility requirements of the Title XIX Medicaid program, is eligible for nursing facility services, and resides in a Medicaid-participating facility.

(76) Medical director--A physician licensed by the Texas Medical Board, who is engaged by the nursing home to assist in and advise regarding the provision of nursing and health care.

(77) Medical necessity (MN)--The determination that a recipient requires the services of licensed nurses in an institutional setting to carry out the physician's planned regimen for total care. A recipient's need for custodial care in a 24-hour institutional setting does not constitute a medical need. A group of health care professionals employed or contracted by the state Medicaid claims administrator contracted with HHSC makes individual determinations of medical necessity regarding nursing facility care. These health care professionals consist of physicians and registered nurses.

(78) Medical power of attorney--The legal document that designates an agent to make treatment decisions if the individual designator becomes incapable.

(79) Medical-social care plan--See Interdisciplinary Care Plan.

(80) Medically related condition--An organic, debilitating disease or health disorder that requires services provided in a nursing facility, under the supervision of licensed nurses.

(81) Medication aide--A person who holds a current permit issued under the Medication Aide Training Program as described in Chapter 95 of this title (relating to Medication Aides--Program Requirements) and acts under the authority of a person who holds a current license under state law which authorizes the licensee to administer medication.

(82) Misappropriation of funds--The taking, secretion, misapplication, deprivation, transfer, or attempted transfer to any person not entitled to receive any property, real or personal, or anything of value belonging to or under the legal control of a resident without the effective consent of the resident or other appropriate legal authority, or the taking of any action contrary to any duty imposed by federal or state law prescribing conduct relating to the custody or disposition of property of a resident.

(83) Neglect--The failure to provide goods or services, including medical services that are necessary to avoid physical or emotional harm, pain, or mental illness.

(84) NHIC--This term referred to the National Heritage Insurance Corporation. It now refers to the state Medicaid claims administrator.

(85) Nonnursing personnel--Persons not assigned to give direct personal care to residents; including administrators, secretaries, activities directors, bookkeepers, cooks, janitors, maids, laundry workers, and yard maintenance workers.

(86) Nurse aide--An individual who provides nursing or nursing-related services to residents in a facility under the supervision of a licensed nurse. This definition does not include an individual who is a licensed health professional, a registered dietitian, or someone who volunteers such services without pay. A nurse aide is not authorized to provide nursing or nursing-related services for which a license or registration is required under state law. Nurse aides do not include those individuals who furnish services to residents only as paid feeding assistants.

(87) Nurse aide trainee--An individual who is attending a program teaching nurse aide skills.

(88) Nurse practitioner--An advanced practice registered nurse.

(89) Nursing assessment--See definition of "comprehensive assessment" and "comprehensive care plan."

(90) Nursing care--Services provided by nursing personnel which include, but are not limited to, observation; promotion and maintenance of health; prevention of illness and disability; management of health care during acute and chronic phases of illness; guidance and counseling of individuals and families; and referral to physicians, other health care providers, and community resources when appropriate.

(91) Nursing facility/home--An institution that provides organized and structured nursing care and service, and is subject to licensure under Texas Health and Safety Code, Chapter 242. The nursing facility may also be certified to participate in the Medicaid Title XIX program. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care to the residents; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.

(92) Nursing facility/home administrator--See the definition of "licensed nursing home (facility) administrator."

(93) Nursing personnel--Persons assigned to give direct personal and nursing services to residents, including registered nurses, licensed vocational nurses, nurse aides, and medication aides. Unlicensed personnel function under the authority of licensed personnel.

(94) Objectives--See definition of "goals."

(95) OBRA--Omnibus Budget Reconciliation Act of 1987, which includes provisions relating to nursing home reform, as amended.

(96) Ombudsman--An advocate who is a certified representative, staff member, or volunteer of the DADS Office of the State Long Term Care Ombudsman.

(97) Optometrist--An individual with the profession of examining the eyes for defects of refraction and prescribing lenses for correction who is licensed by the Texas Optometry Board.

(98) Paid feeding assistant--An individual who meets the requirements of §19.1113 of this chapter (relating to Paid Feeding Assistants) and who is paid to feed residents by a facility or who is used under an arrangement with another agency or organization.

(99) PASARR or PASRR--Preadmission Screening and Resident Review.

(100) Palliative Plan of Care--Appropriate medical and nursing care for residents with advanced and progressive diseases for whom the focus of care is controlling pain and symptoms while maintaining optimum quality of life.

(101) Patient care-related electrical appliance--An electrical appliance that is intended to be used for diagnostic, therapeutic, or monitoring purposes in a patient care area, as defined in Standard 99 of the National Fire Protection Association.

(102) Person--An individual, firm, partnership, corporation, association, joint stock company, limited partnership, limited liability company, or any other legal entity, including a legal successor of those entities.

(103) Person with a disclosable interest--A person with a disclosable interest is any person who owns at least a 5.0 percent interest in any corporation, partnership, or other business entity that is required to be licensed under Texas Health and Safety Code, Chapter 242. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company, unless these entities participate in the management of the facility.

(104) Pharmacist--An individual, licensed by the Texas State Board of Pharmacy to practice pharmacy, who prepares and dispenses medications prescribed by a practitioner.

(105) Physical restraint--See Restraints (physical).

(106) Physician--A doctor of medicine or osteopathy currently licensed by the Texas Medical Board.

(107) Physician assistant (PA)--

(A) A graduate of a physician assistant training program who is accredited by the Committee on Allied Health Education and Accreditation of the Council on Medical Education of the American Medical Association;

(B) A person who has passed the examination given by the National Commission on Certification of Physician Assistants. According to federal requirements (42 CFR §491.2) a physician assistant is a person who meets the applicable state requirements governing the qualifications for assistant to primary care physicians, and who meets at least one of the following conditions:

(i) is currently certified by the National Commission on Certification of Physician Assistants to assist primary care physicians; or

(ii) has satisfactorily completed a program for preparing physician assistants that:

(I) was at least one academic year in length;

(II) consisted of supervised clinical practice and at least four months (in the aggregate) of classroom instruction directed toward preparing students to deliver health care; and

(III) was accredited by the American Medical Association's Committee on Allied Health Education and Accreditation; or

(C) A person who has satisfactorily completed a formal educational program for preparing physician assistants who does not meet the requirements of paragraph (d)(2), 42 CFR §491.2, and has been assisting primary care physicians for a total of 12 months during the 18-month period immediately preceding July 14, 1978.

(108) Podiatrist--A practitioner whose profession encompasses the care and treatment of feet who is licensed by the Texas State Board of Podiatric Medical Examiners.

(109) Poison--Any substance that federal or state regulations require the manufacturer to label as a poison and is to be used externally by the consumer from the original manufacturer's container. Drugs to be taken internally that contain the manufacturer's poison label, but are dispensed by a pharmacist only by or on the prescription order of a practitioner, are not considered a poison, unless regulations specifically require poison labeling by the pharmacist.

(110) Practitioner--A physician, podiatrist, dentist, or an advanced practice registered nurse or physician assistant to whom a physician has delegated authority to sign a prescription order, when relating to pharmacy services.

(111) PRN (pro re nata)--As needed.

(112) Provider--The individual or legal business entity that is contractually responsible for providing Medicaid services under an agreement with DADS.

(113) Psychoactive drugs--Drugs prescribed to control mood, mental status, or behavior.

(114) Qualified surveyor--An employee of DADS who has completed state and federal training on the survey process and passed a federal standardized exam.

(115) Quality assessment and assurance committee--A group of health care professionals in a facility who develop and implement appropriate action to identify and rectify substandard care and deficient facility practice.

(116) Quality-of-care monitor--A registered nurse, pharmacist, or dietitian employed by DADS who is trained and experienced in long-term care facility regulation, standards of practice in long-term care, and evaluation of resident care, and functions independently of DADS Regulatory Services Division.

(117) Quality measure report--A report that provides information derived from an MDS that provides a numeric value to quality indicators. This data is available to the public as part of the Nursing Home Quality Initiative (NHQI), and is intended to provide objective measures for consumers to make informed decisions about the quality of care in a nursing facility.

(118) [~~(117)~~] Recipient--Any individual residing in a Medicaid certified facility or a Medicaid certified distinct part of a facility whose daily vendor rate is paid by Medicaid.

(119) [~~(118)~~] Registered nurse (RN)--An individual currently licensed by the Texas Board of Nursing as a Registered Nurse in the State of Texas.

(120) [~~(119)~~] Reimbursement methodology--The method by which HHSC determines nursing facility per diem rates.

(121) [~~(120)~~] Remodeling--The construction, removal, or relocation of walls and partitions, the construction of foundations, floors, or ceiling-roof assemblies, the expanding or altering of safety systems (including, but not limited to, sprinkler, fire alarm, and emergency systems) or the conversion of space in a facility to a different use.

(122) [~~(121)~~] Renovation--The restoration to a former better state by cleaning, repairing, or rebuilding, including, but not limited to, routine maintenance, repairs, equipment replacement, painting.

(123) [~~(122)~~] Representative payee--A person designated by the Social Security Administration to receive and disburse benefits, act in the best interest of the beneficiary, and ensure that benefits will be used according to the beneficiary's needs.

(124) [~~(123)~~] Resident--Any individual residing in a nursing facility.

(125) [~~(124)~~] Resident assessment instrument (RAI)--An assessment tool used to conduct comprehensive, accurate, standardized, and reproducible assessments of each resident's functional capacity as specified by the Secretary of the U.S. Department of Health and Human Services. At a minimum, this instrument must consist of the Minimum Data Set (MDS) core elements as specified by the Centers for Medicare & Medicaid Services (CMS); utilization guidelines; and Care Area Assessment (CAA) process.

(126) [~~(125)~~] Resident group--A group or council of residents who meet regularly to:

(A) discuss and offer suggestions about the facility policies and procedures affecting residents' care, treatment, and quality of life;

(B) plan resident activities;

(C) participate in educational activities; or

(D) for any other purpose.

(127) [~~(126)~~] Responsible party--An individual authorized by the resident to act for him as an official delegate or agent. Responsible party is usually a family member or relative, but may be a legal guardian or other individual. Authorization may be in writing or may be given orally.

(128) [~~(127)~~] Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(129) [~~(128)~~] Restraints (chemical)--Psychoactive drugs administered for the purposes of discipline, or convenience, and not required to treat the resident's medical symptoms.

(130) [~~(129)~~] Restraints (physical)--Any manual method, or physical or mechanical device, material or equipment attached, or adjacent to the resident's body, that the individual cannot remove easily which restricts freedom of movement or normal access to one's body. The term includes a restraint hold.

(131) [~~(130)~~] RN assessment coordinator--A registered nurse who signs and certifies a comprehensive assessment of a res-

ident's needs, using the RAI, including the MDS, as specified by DADS.

(132) [~~(131)~~] RUG--Resource Utilization Group. A categorization method, consisting of 34 categories based on the MDS, that is used to determine a recipient's service and care requirements and to determine the daily rate DADS pays a nursing facility for services provided to the recipient.

(133) [~~(132)~~] Secretary--Secretary of the U.S. Department of Health and Human Services.

(134) [~~(133)~~] Services required on a regular basis--Services which are provided at fixed or recurring intervals and are needed so frequently that it would be impractical to provide the services in a home or family setting. Services required on a regular basis include continuous or periodic nursing observation, assessment, and intervention in all areas of resident care.

(135) [~~(134)~~] SNF--A skilled nursing facility or distinct part of a facility that participates in the Medicare program. SNF requirements apply when a certified facility is billing Medicare for a resident's per diem rate.

(136) [~~(135)~~] Social Security Administration--Federal agency for administration of social security benefits. Local social security administration offices take applications for Medicare, assist beneficiaries file claims, and provide information about the Medicare program.

(137) [~~(136)~~] Social worker--A qualified social worker is an individual who is licensed, or provisionally licensed, by the Texas State Board of Social Work Examiners as prescribed by the Texas Occupations Code, Chapter 505, and who has at least:

(A) a bachelor's degree in social work; or

(B) similar professional qualifications, which include a minimum educational requirement of a bachelor's degree and one year experience met by employment providing social services in a health care setting.

(138) [~~(137)~~] Standards--The minimum conditions, requirements, and criteria established in this chapter with which an institution must comply to be licensed under this chapter.

(139) [~~(138)~~] State Medicaid claims administrator--The entity under contract with HHSC to process Medicaid claims in Texas.

(140) [~~(139)~~] State plan--A formal plan for the medical assistance program, submitted to CMS, in which the State of Texas agrees to administer the program in accordance with the provisions of the State Plan, the requirements of Titles XVIII and XIX, and all applicable federal regulations and other official issuances of the U.S. Department of Health and Human Services.

(141) [~~(140)~~] State survey agency--DADS is the agency, which through contractual agreement with CMS is responsible for Title XIX (Medicaid) survey and certification of nursing facilities.

(142) Stay agreement--An agreement between a license holder and the executive commissioner that sets forth all requirements necessary to lift a stay and rescind a license revocation proposed under §19.2107 of this chapter (relating to Revocation of a License by the Executive Commissioner).

(143) Substandard quality of care violation--One or more violations of §19.601 of this chapter (relating to Resident Behavior and Facility Practices), §19.701 of this chapter (relating to Quality of Life), or §19.901 of this chapter (relating to Quality of Care) that constitute:

(A) an immediate threat to resident health or safety;

(B) a pattern of or actual harm that is not an immediate threat; or

(C) a widespread potential for more than minimal harm, but less than an immediate threat, with no actual harm.

(144) [~~(141)~~] Supervising physician--A physician who assumes responsibility and legal liability for services rendered by a physician assistant (PA) and has been approved by the Texas Medical Board to supervise services rendered by specific PAs. A supervising physician may also be a physician who provides general supervision of an advanced practice registered nurse providing services in a nursing facility.

(145) [~~(142)~~] Supervision--General supervision, unless otherwise identified.

(146) [~~(143)~~] Supervision (direct)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence. If the person being supervised does not meet assistant-level qualifications specified in this chapter and in federal regulations, the supervisor must be on the premises and directly supervising.

(147) [~~(144)~~] Supervision (general)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence. The person being supervised must have access to the qualified person providing the supervision.

(148) [~~(145)~~] Supervision (intermittent)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence, with initial direction and periodic inspection of the actual act of accomplishing the function or activity. The person being supervised must have access to the qualified person providing the supervision.

(149) [~~(146)~~] *Texas Register*--A publication of the Texas Register Publications Section of the Office of the Secretary of State that contains emergency, proposed, withdrawn, and adopted rules issued by Texas state agencies. The *Texas Register* was established by the Administrative Procedure and Texas Register Act of 1975.

(150) [~~(147)~~] Therapeutic diet--A diet ordered by a physician as part of treatment for a disease or clinical condition, in order to eliminate, decrease, or increase certain substances in the diet or to provide food which has been altered to make it easier for the resident to eat.

(151) [~~(148)~~] Therapy week--A seven-day period beginning the first day rehabilitation therapy or restorative nursing care is given. All subsequent therapy weeks for a particular individual will begin on that day of the week.

(152) [~~(149)~~] Threatened violation--A situation that, unless immediate steps are taken to correct, may cause injury or harm to a resident's health and safety.

(153) [~~(150)~~] Title II--Federal Old-Age, Survivors, and Disability Insurance Benefits of the Social Security Act.

(154) [~~(151)~~] Title XVI--Supplemental Security Income (SSI) of the Social Security Act.

(155) [~~(152)~~] Title XVIII--Medicare provisions of the Social Security Act.

(156) [~~(153)~~] Title XIX--Medicaid provisions of the Social Security Act.

(157) [~~(154)~~] Total health status--Includes functional status, medical care, nursing care, nutritional status, rehabilitation and

restorative potential, activities potential, cognitive status, oral health status, psychosocial status, and sensory and physical impairments.

(158) [~~(155)~~] UAR--HHSC's Utilization and Assessment Review Section.

(159) [~~(156)~~] Uniform data set--See Resident Assessment Instrument (RAI).

(160) [~~(157)~~] Universal precautions--The use of barrier and other precautions to prevent the spread of blood-borne diseases.

(161) [~~(158)~~] Unreasonable confinement--Involuntary seclusion.

(162) [~~(159)~~] Vaccine preventable diseases--The diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

(163) [~~(160)~~] Vendor payment--Payment made by DADS on a daily-rate basis for services delivered to recipients in Medicaid-certified nursing facilities. Vendor payment is based on the nursing facility's approved-to-pay claim processed by the state Medicaid claims administrator. The Nursing Facility Billing Statement, subject to adjustments and corrections, is prepared from information submitted by the nursing facility, which is currently on file in the computer system as of the billing date. Vendor payment is made at periodic intervals, but not less than once per month for services rendered during the previous billing cycle.

(164) Widespread--When the problem causing a violation is pervasive in a facility or represents systemic failure that affected or has the potential to affect a large portion or all of a facility's residents.

(165) [~~(161)~~] Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

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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Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-2470

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SUBCHAPTER V. ENFORCEMENT
DIVISION 2. LICENSING REMEDIES

40 TAC §19.2113

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The new section implements Texas Government Code, §531.0055, and Texas Health and Safety Code, Chapter 242.

§19.2113. Criteria for the Executive Commissioner to Stay a License Revocation.

(a) A license holder may request that the executive commissioner stay a license revocation imposed in accordance with §19.2107 of this chapter (relating to Revocation of a License by the Executive Commissioner). The request must:

(1) be in writing;

(2) be submitted to the department within 10 working days after the license holder receives written notification of the revocation;

(3) explain how the license holder meets the applicable criteria described in subsection (b) of this section;

(4) describe any potential negative impact to residents that may occur if the request for stay is denied;

(5) include any documentation supporting the request; and

(6) be signed by an authorized representative of the license holder.

(b) The executive commissioner grants or denies a request to stay a license revocation imposed in accordance with §19.2107 of this chapter if the license holder requests a stay in accordance with subsection (a) of this section. The executive commissioner may grant the request if, based on a review of the request and any other relevant documentation, the executive commissioner determines that:

(1) the stay would not jeopardize the health and safety of the residents or place the residents at risk of abuse or neglect based on the following criteria;

(A) no more than one of the violations that resulted in the proposed revocation was widespread in scope;

(B) the facility's regulatory record, other than the three violations that resulted in the proposed revocation, encompassing five years preceding the date of the stay request, does not reflect a history of substandard quality of care violations;

(C) if the license holder requesting the stay holds licenses for other facilities, the license holder's overall performance does not reflect a history of substandard quality of care violations related to abuse or neglect; and

(D) there are no other factors that will jeopardize the health and safety of the residents or place the residents at risk of abuse or neglect;

(2) the request submitted by the license holder demonstrates that:

(A) the license holder has explained why:

(i) the violations that resulted in the proposed revocation are not indicative of the overall quality of care provided at the facility; and

(ii) granting the stay will not jeopardize the health and safety of the residents or place the residents at risk of abuse or neglect and is likely to result in future compliance with licensure requirements;

(B) the license holder has conducted a system-wide analysis of the facility that identifies all underlying problems that led to or contributed to the violations that resulted in the proposed revocation and has developed a plan to address those problems; and

(C) the license holder has initiated action to implement the plan;

(3) the license holder meets one of the following criteria:

(A) a rapid response team determines that the facility has cooperated with the team and has demonstrated improvement in quality of care as described in §19.911 of this chapter (relating to Rapid Response Team); or

(B) for a "veteran's home," as defined in Texas Natural Resources Code §164.002, the Texas Veterans Land Board contracts with a different entity to operate the home than the entity that operated the home during the period in which the violations described by §19.2107 of this chapter occurred; and

(4) the license holder has entered into a stay agreement acceptable to the executive commissioner that, at a minimum, includes:

(A) a requirement that the license holder complete actions to address the underlying causes that resulted in the violations that led to the proposed revocation in accordance with a schedule;

(B) a requirement that the license holder not receive a violation that constitutes an immediate threat to health and safety or that results in actual harm to a resident for a period of time after the effective date of the stay agreement as determined by the executive commissioner, but no less than 12 months; and

(C) a waiver of the license holder's right to request a hearing if the stay is lifted and the revocation is imposed in accordance with subsection (d)(2) of this section.

(c) For purposes of subsection (b)(4)(B) of this section, a facility has received a violation that constitutes an immediate threat to health and safety or that results in actual harm to a resident if the violation is cited and upheld in informal dispute resolution, if requested.

(d) If the executive commissioner grants a license holder's request for a stay in accordance with this section:

(1) the stay is lifted and the revocation is rescinded if the executive commissioner determines the license holder has successfully completed all requirements of the stay agreement described in subsection (b)(4) of this section in accordance with the schedule described in subsection (b)(4)(A) of this section; or

(2) the stay is lifted and the revocation is imposed if the executive commissioner determines the license holder has not successfully completed all requirements of the stay agreement described in subsection (b)(4) of this section in accordance with the schedule described in subsection (b)(4)(A) of this section.

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

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §19.910 and §19.911, and new §19.2107, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement Senate Bill 304, 84th Legislature, Regular Session, 2015, which amended Texas Health and Safety Code (THSC) §242.061. The proposed new section provides that, subject to certain exceptions, the HHSC executive commissioner revokes a nursing facility license if DADS finds that the license holder has committed three or more violations constituting an immediate threat to health and safety related to the abuse or neglect of a resident within a 24-month period at the same facility.

The proposed amendments add that quality-of-care monitors may visit a facility that is identified through the HHSC early warning system as a medium risk or that requests a visit. The proposal states that a quality-of-care monitor conducts a follow-up visit within 45 days after an initial visit. The proposal also provides that a rapid response team visits a nursing facility that is identified as high risk through the early warning system or that has committed three violations that require license revocation under THSC §242.061.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §19.910 allows a quality-of-care monitor from HHSC to visit a facility that has been identified through the early warning system as medium risk or that requests a visit. The proposed amendment specifies that a quality-of-care monitor assesses conditions in a facility identified through the facility's quality measure report and conducts a follow-up visit within 45 days of the initial visit. The amendment also includes editorial changes to improve readability.

The proposed amendment to §19.911 provides that a rapid response team visits a facility that is either identified through the early warning system as high risk or has committed three or more violations within a 24-month period constituting an immediate threat to health and safety related to abuse or neglect of a resident. The proposed amendment also includes certain actions a facility must take to cooperate with a rapid response team to improve the quality of care at the facility.

The proposed new §19.2107 provides that the HHSC executive commissioner revokes a nursing facility license if DADS finds that the license holder has committed three or more violations constituting an immediate threat to health and safety related to abuse or neglect of a resident within a 24-month period. The new section defines "immediate threat to health and safety" and describes some exceptions to license revocation under the section. The new section states that DADS notifies a license holder if the executive commissioner revokes a license. The new section also provides that a license holder may request a stay of a license revocation or request a hearing to appeal a revocation.

FISCAL NOTE

David Cook, Deputy Chief Financial Officer, has determined that, for the first five years the proposed amendments and new section are in effect, enforcing or administering the amendments and new section does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new section will not have an adverse economic effect on small businesses or micro-businesses because the amendments and new section do not impose requirements that result in a cost to a nursing facility.

PUBLIC BENEFIT AND COSTS

Mary T. Henderson, DADS Associate Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments and new section are in effect, the public benefit expected as a result of enforcing the amendments and new section is increased enforcement of regulations and oversight of Texas nursing facilities to ensure the health and safety of facility residents.

Ms. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the amendments and new section. The amendments and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Kim Lammons at (512) 438-2470 in DADS Regulatory Services. Written comments on the proposal may be submitted to Texas Register Liaison, HHSC Policy and Performance - 15R10, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or emailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or emailed by midnight on the last day of the comment period. When faxing or emailing comments, please indicate "Comments on Proposed Rule 15R10" in the subject line.

SUBCHAPTER J. QUALITY OF CARE

40 TAC §19.910, §19.911

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The amendment implements Texas Government Code, §531.0055, and Texas Health and Safety Code, Chapter 242.

§19.910. Quality Assurance Early Warning System.

The Health and Human Services Commission (HHSC) [~~Department of Aging and Disability Services (DADS)~~] uses an early warning system to detect conditions that could be detrimental to the health, safety, and welfare of residents.

(1) Quality-of-care monitors conduct [~~are based in regional offices and monitor long-term care (LTC) facilities on~~] visits that may be announced or unannounced and may occur on any day and at any time, including nights, weekends, and holidays.

(2) Quality-of-care monitors may visit a facility:

(A) with a history of resident care deficiencies;

(B) that is identified as a medium risk through the early warning system; or

(C) that requests a visit.

[~~(2) Priority for monitoring visits is given to LTC facilities with a history of resident care deficiencies.~~]

(3) Quality-of-care monitors assess:

(A) the overall quality of life in the facility; and

(B) specific conditions in the facility directly related to resident care, including conditions identified through the facility's quality measure reports based on MDS assessments.

(4) A [~~The~~] quality-of-care monitor assessment visit includes [~~visits include~~]:

(A) observation of the care and services provided to a resident [~~rendered to residents~~]; and

(B) formal and informal interviews with residents, family members, facility staff, resident guests, volunteers, other regular staff, and resident representatives and advocates.

(5) HHSC does not disclose the identity of a resident or family member of a resident interviewed by a quality-of-care monitor unless required by law to do so.

[~~(5) The identity of a resident or a family member of a resident interviewed by a quality-of-care monitor is confidential and may not be disclosed.~~]

(6) A quality-of-care monitor provides the [~~The~~] findings of a monitoring visit, both positive and negative, [~~will be provided~~] orally and in writing to the facility administrator or, in the absence of the facility administrator, to the administrator on duty or the director of nursing.

(7) A [~~The~~] quality-of-care monitor may recommend to the facility administrator procedural and policy changes and staff training to improve the care or quality of life of residents.

(8) A quality-of-care monitor conducts a follow-up visit within 45 days after the date of an initial visit.

(9) [~~(8)~~] A quality-of-care monitor who observes conditions [~~Conditions observed by the quality-of-care monitor~~] that may constitute an immediate threat to the health or safety of a resident immediately reports the conditions [~~will be immediately reported~~] to the facility administrator, the monitor's regional office supervisor for appropriate action and, as appropriate [~~or as required by law~~], to law enforcement, adult protective services, other divisions of HHSC [~~DADS~~], and [~~or~~] other [~~responsible~~] agencies.

§19.911. Rapid Response Teams.

(a) A rapid [~~Rapid~~] response team is [~~teams are~~] comprised of one or more Health and Human Services Commission (HHSC) quality-of-care monitors and visits a facility that: [~~who can visit long-term care (LTC) facilities identified through the Department of Aging and Disability Services' (DADS') early warning system.~~]

(1) is identified as high risk through the early warning system described in §19.910 of this subchapter (relating to Quality Assurance Early Warning System); or

(2) has committed three violations that constitute an immediate threat to health and safety relating to abuse or neglect of a resident as described in §19.2107 of this chapter (relating to Revocation of a License by the HHSC Executive Commissioner).

(b) A facility must cooperate with a rapid response team to improve the quality of care provided at the facility by:

(1) providing immediate access to all the parts of the building;

(2) providing immediate access to residents, staff, contractors and reasonable access to volunteers;

(3) providing access to all documents maintained by or on behalf of the facility upon request from the rapid response team;

(4) allowing the rapid response team to copy documents, photograph residents, and use any other available recording devices in accordance with §19.2002(h) of this chapter (relating to Procedural Requirements--Licensure Inspections and Surveys); and

(5) not interfering with the work of the rapid response team during a visit.

(c) In determining whether a facility has demonstrated improvement in the quality of care, the rapid response team may consider factors such as implementation of the team's recommendation or guidance.

(d) [~~(b)~~] A rapid response team [~~Rapid response teams~~] may visit a facility [~~facilities~~] that requests [~~request DADS'~~] assistance from HHSC. A visit under this subsection may not occur until at least 60 days [~~before the 60th day~~] after the date of an exit interview following an [~~annual or follow-up survey or~~] inspection.

(e) [~~(c)~~] A rapid response team [~~Rapid response teams~~] may not be deployed for the purpose of helping a [~~an LTC~~] facility prepare for an [~~a regular~~] inspection or survey [~~conducted under the Health and Safety Code, Chapters 242, 247, or 252, or in accordance with the Human Resources Code, Chapter 32~~].

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

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SUBCHAPTER V. ENFORCEMENT
DIVISION 2. LICENSING REMEDIES

40 TAC §19.2107

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The new section implements Texas Government Code, §531.0055, and Texas Health and Safety Code, Chapter 242.

§19.2107. Revocation of a License by the HHSC Executive Commissioner.

(a) In this section, "immediate threat to health and safety," is defined as a condition in which immediate corrective action is necessary because the facility's noncompliance with one or more requirements has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

(b) Except as provided by subsection (d) of this section, the executive commissioner revokes a license if DADS finds that:

(1) the license holder has committed three violations in §19.601 (b) or (c) of this chapter (relating to Resident Behavior and Facility Practice) that constitute an immediate threat to health and safety related to abuse or neglect of a resident within a 24-month period at the same facility; and

(2) each of the violations is reported in connection with a separate survey, inspection, or investigation visit that occurred on separate entrance and exit dates.

(c) For purposes of calculating the 24-month period described in subsection (b)(1) of this section, the date a violation occurs is the date of the initial exit conference for the survey, inspection, or investigation visit in which the violation was cited.

(d) The executive commissioner does not revoke a license under subsection (b) of this section if:

(1) the violation and the determination of an immediate threat to health and safety are not included on the written list of violations for a survey, inspection, or investigation left with the facility at the time of the initial exit conference described in §19.2004 of this chapter (relating to Determinations and Actions Pursuant to Inspections);

(2) the violation is not included on the final statement of violations described in §19.2004 of this chapter; or

(3) the violation has been reviewed under the informal dispute resolution process described in Title 1, Texas Administrative Code, Chapter 393 (relating to Informal Dispute Resolution and Informal Reconsideration), and the Texas Health and Human Services Commission determines that:

(A) the violation should be removed from the license holder's record; or

(B) the violation should be reduced in severity so that the violation is no longer cited as an immediate threat to health and safety related to abuse or neglect of a resident.

(e) DADS notifies a license holder as provided in §19.2106(d) of this division (relating to Revocation of a License) if the executive commissioner revokes the license holder's license in accordance with this section.

(f) A license holder may request, in accordance with §19.2113 of this division (relating to Criteria for the Executive Commissioner to Stay a License Revocation), that the executive commissioner stay a revocation imposed in accordance with this section.

(g) A license holder may request a hearing to appeal a revocation imposed in accordance with this section if the license holder does not request a stay of the revocation or if the executive commissioner

denies the license holder's request for a stay of the revocation. The request for a hearing must be made in accordance with §19.2106(d) of this division.

(h) If a license is revoked in accordance with this section, to ensure the health and safety of residents of the facility, DADS may:

(1) request the appointment of a trustee to operate the facility in accordance with §19.2116 of this division (relating to Involuntary Appointment of a Trustee);

(2) assist with obtaining a new operator for the facility; or

(3) assist with the relocation of residents to another facility.

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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Department of Aging and Disability Services
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CHAPTER 60. CONTRACTING TO PROVIDE PROGRAMS OF ALL-INCLUSIVE CARE FOR THE ELDERLY (PACE)

40 TAC §60.6, §60.10

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §60.6, the repeal of §60.10, and new §60.10, in Chapter 60, Contracting to Provide Programs of All-Inclusive Care for the Elderly (PACE).

BACKGROUND AND PURPOSE

The proposed rules implement Senate Bill (S.B.) 169, 84th Legislature, Regular Session, 2015, which added Texas Government Code, §531.0931 regarding certain military members and their family members on interest lists. The proposed rules require a PACE provider agency to keep the name of a military family member who resides out of state on an interest list while the military member is on active duty or for up to one year after a former military member's active duty ends. The proposed rules describe how a PACE provider agency maintains an interest list and offers services to an individual. The proposed rules also allow the Department of Aging and Disability Services or its successor agency to remove an individual from the interest list if the individual or legally authorized representative fails to respond to a PACE vacancy offer within 30 days.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §60.6 adds definitions of "former military member," "individual," "LAR" (legally authorized representative), "military family member," and "military member," because these are terms used in proposed new §60.10 related to implementation of S.B. 169. The proposed amendment also adds a definition of "nursing facility" because that term is used in Chapter 60 but is not defined. The proposed amendment deletes the definition of "SAA" (state administering agency) because the term is not used in Chapter 60.

The proposed repeal of §60.10 removes the outdated rule regarding an inquiry log, which contains information about individuals requesting PACE services. The proposed new §60.10 makes the inquiry log unnecessary.

The proposed new §60.10 requires a provider agency to maintain an interest list with names and contact information of applicants interested in receiving PACE services. The proposed new rule describes the process a PACE provider agency follows to add an individual's name to the PACE interest list and the conditions under which an individual's name may be removed from the PACE interest list. The process implements S.B. 169 by addressing military family members on PACE interest lists.

FISCAL NOTE

David Cook, Deputy Chief Financial Officer, has determined that, for the first five years the proposed amendment, repeal, and new section are in effect, enforcing or administering the amendment, repeal, and new section does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

HHSC has determined that the proposed amendment, repeal, and new section will not have an adverse economic effect on small businesses or micro-businesses. The proposed amendment, repeal, and new section do not impose new requirements on any persons regulated by the rules.

PUBLIC BENEFIT AND COSTS

Gary Jessee, Deputy Executive Commissioner for Medical and Social Services, has determined that, for each year of the first five years the amendment, repeal, and new section are in effect, the public benefit expected is that the rules more clearly address an individual's placement on the PACE interest list and the timeframes for an individual on the interest list to enroll in PACE before the individual's name is removed from the interest list and an offer is made to another individual.

Mr. Jessee anticipates that there will not be an economic cost to persons who are required to comply with the amendment, repeal, and new section. The amendment, repeal, and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Schnina Reed at (512) 438-2973 in HHSC Medical and Social Services. Written comments on the proposal may be submitted to Texas Register Liaison, HHSC Policy and Performance-15R20, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@hhsc.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment

period; (2) hand-delivered to HHSC before 5:00 p.m. on HHSC last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 15R20" in the subject line.

STATUTORY AUTHORITY

The amendment and new section are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment and new section affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §32.021.

§60.6. Definitions.

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

(1) Capitation--The uniform per client monthly amount that DADS pays to a provider agency.

(2) CFR--The Code of Federal Regulations.

(3) CMS--The Centers for Medicare and Medicaid Services.

(4) DADS--The Department of Aging and Disability Services or its successor agency.

(5) Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, or Coast Guard:

(A) who declared and maintained Texas as the person's state of legal residence in the manner provided by the applicable military branch while on active duty; and

(B) who was killed in action or died while in service, or whose active duty otherwise ended.

(6) Individual--A person seeking to enroll or who is enrolled in PACE services.

(7) [~~(5)~~] Interdisciplinary Team (IDT)--The IDT is a team of persons who interact and collaborate to assess clients and plan for their care. The IDT must include the client's primary care physician, registered nurse, Programs of All-Inclusive Care for the Elderly (PACE) center director, social worker, physical therapist, occupational therapist, activities director, dietician, home care coordinator, personal care attendant or his or her representative, and driver or his or her representative.

(8) LAR--Legally authorized representative. A person authorized by law to act on behalf of an individual with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(9) Military family member--A person who is the spouse or child (regardless of age) of:

(A) a military member; or

(B) a former military member.

(10) Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, or Coast Guard on active duty who has declared and maintains Texas as the member's state of legal residence in the manner provided by the applicable military branch.

(11) Nursing facility--A facility required to be licensed under Texas Health and Safety Code, Chapter 242.

(12) [~~(6)~~] PACE--Programs of All-Inclusive Care for the Elderly.

(13) [~~(7)~~] PACE contract--A written agreement between DADS and the provider agency to provide PACE services for one year.

(14) [~~(8)~~] Program agreement--A three-party agreement between the provider agency, CMS, and DADS.

(15) [~~(9)~~] Provider agency--An entity that delivers required PACE services under a PACE contract and a program agreement.

(16) [~~(10)~~] Respite services--Services provided to an individual unable to care for himself or herself, because of the absence or need for relief of those persons normally providing the care.

(17) [~~(11)~~] Service area--The geographic area served by a provider agency according to its program agreement and PACE contract.

[~~(12) SAA--State administering agency. The Department of Aging and Disability Services.~~]

§60.10. Interest List.

(a) A provider agency must maintain an up-to-date interest list of individuals who are interested in receiving PACE services and reside in the provider agency's service area.

(b) A person may request an individual's name be added to the PACE interest list maintained by the provider agency serving the service area in which the individual resides by submitting a request in person, by phone, or in writing, and providing the following information:

(1) the name of the individual;

(2) the date of the request for PACE services;

(3) the individual's physical and mailing addresses;

(4) the individual's birth date;

(5) the individual's contact phone number;

(6) the name and phone number of the LAR, if applicable; and

(7) the name and phone number of the person requesting services on behalf of the individual, if different from the LAR.

(c) When a PACE vacancy occurs, a provider agency offers the vacancy to the individual whose name is first on the PACE provider agency's interest list.

(d) A provider agency removes an individual's name from the PACE interest list if:

(1) the individual accepts a PACE vacancy;

(2) the individual or LAR requests in writing that the individual's name be removed from the interest list;

(3) the individual moves out of the service area, unless the individual is a military family member living outside of Texas:

(A) while the military member is on active duty; or

(B) for less than one year after the former military member's active duty ends;

(4) the individual or LAR declines the offer of PACE services, unless the individual is a military family member living outside of Texas:

(A) while the military member is on active duty; or

(B) for less than one year after the former military member's active duty ends;

(5) the individual is a military family member living outside of Texas for more than one year after the former military member's active duty ends;

(6) the individual or LAR fails to respond to a PACE vacancy offer within 30 days after receiving the offer; or

(7) the individual is deceased.

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 14, 2016.

TRD-201605282
Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 27, 2016
For further information, please call: (512) 438-2973

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40 TAC §60.10

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The repeal affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §32.021.

§§60.10. Inquiry Log.

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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Lawrence Hornsby
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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), new §92.22 and amendments to §92.51 and §92.551, in Chapter 92, Licensing Standards for Assisted Living Facilities.

BACKGROUND AND PURPOSE

The purpose of the proposal is to set forth requirements for an applicant for an initial assisted living facility (facility) license to obtain Alzheimer's certification for the facility or a distinct unit of the facility. The proposal allows an applicant in good standing to request that DADS issue Alzheimer's certification for the facility or unit before DADS conducts an on-site health inspection. The proposal sets forth the criteria for good standing. The proposal requires an applicant, or a controlling person of the applicant, to have operated a certified facility or a facility with a certified unit in Texas for six consecutive years preceding the request for certification. In addition, each licensed facility operated by the applicant or controlling person must not have a history of certain licensure violations or sanctions imposed as specified in the proposal. Before issuing certification, the applicant must submit for approval policies and procedures, verification of employee background checks, and employee credentials. DADS will conduct a health inspection that includes observation of resident care not later than 90 days after the date DADS certifies the facility or unit. The proposal allows DADS to impose an administrative penalty if a facility fails to disclose to residents and prospective residents that it has not met the requirements of an on-site health inspection. The proposal also clarifies the process for a license holder of a Type B facility to obtain Alzheimer's certification for the facility or a unit of the facility.

SECTION-BY-SECTION SUMMARY

The proposed new §92.22 allows an applicant for an initial license for a Type B facility to request that DADS issue an Alzheimer's certification for the facility or a distinct unit of the facility before DADS conducts an on-site health inspection. The proposed new section allows DADS to determine if an applicant is in good standing to obtain the certification. If DADS determines the applicant is in good standing, the applicant is not required to admit a resident to the facility or unit, or have an on-site health inspection before DADS issues the certification. The proposed new section also sets forth the criteria for good standing and requires an applicant to submit information to DADS for approval before Alzheimer's certification is issued. If DADS issues Alzheimer's certification under the proposed new section, DADS conducts an on-site health inspection within 90 days after issuing the certification. Until a facility or unit that is issued Alzheimer's certification meets the requirements of an on-site health inspection, the facility must disclose, in writing, to residents and prospective residents that the facility or unit has not yet met the requirements of an on-site health inspection.

The proposed amendment to §92.51 clarifies the process for a license holder of a Type B facility to obtain Alzheimer's certification, and makes editorial changes for clarity and consistency. The amendments clarify that a facility or a unit of a facility must meet the requirements of a Life Safety Code (LSC) inspection within 120 days after DADS conducts an initial LSC inspection, and that the facility or unit must meet the requirements of an

on-site health inspection during which DADS must observe the facility's or unit's provision of care to at least one resident who has been admitted to the facility or unit.

The proposed amendment to §92.551 allows DADS to impose an administrative penalty of $500 - $800 if a facility or unit that has obtained Alzheimer's certification before having an on-site health inspection does not disclose that the facility or unit has not yet met the requirements of such an inspection.

FISCAL NOTE

David Cook, Deputy Chief Financial Officer, has determined that, for the first five years the proposed new section and amendments are in effect, enforcing or administering the new section and amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed new section and amendments will not have an adverse economic effect on small businesses or micro-businesses because the new section and amendments, which allow DADS to issue certification more quickly to an applicant with a history of compliance with assisted living facility rules, do not impose any new obligations on small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Mary T. Henderson, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the new section and amendments are in effect, the public benefit expected as a result of enforcing the new section and amendments is a facility or unit of a facility will be certified more quickly, thereby providing more options for an individual seeking services from a facility.

Ms. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the new section and amendments. The new section and amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Lorraine Brady at (512) 438-2235 in DADS Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, HHSC Policy and Performance-16R09, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or emailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or emailed by midnight on the last day of the comment period. When faxing or emailing comments, please indicate "Comments on Proposed Rule 16R09" in the subject line.

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §92.22

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §247.029, which provides that the HHSC executive commissioner shall adopt rules that govern facilities that provide personal care services to residents who have Alzheimer's disease or related disorders.

The new section implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §247.029.

§92.22. Alzheimer's Certification of a Type B Facility for an Initial License Applicant in Good Standing.

(a) An applicant may request that DADS, before conducting an on-site health inspection, issue an initial license for a Type B facility and an Alzheimer's certification for the facility or a distinct unit of the facility. The applicant must meet the requirements of §92.21 of this subchapter (relating to Initial License for a Type A or Type B Facility for an Applicant in Good Standing) for the initial license and the requirements of this section for certification of the facility or unit.

(b) An applicant must request certification by submitting forms prescribed by and made available from DADS and include the fee described in §92.4 of this chapter (relating to Licensing Fees).

(c) An applicant that makes a request in accordance with subsection (a) of this section is not required to admit a resident to the facility or unit or have the on-site health inspection described in §92.14(f) of this subchapter (relating to Initial License Application Process and Requirements) before DADS certifies the facility or unit if DADS determines that the applicant is in good standing:

(1) for the issuance of an initial license of the facility in accordance with §92.21(c) of this chapter; and

(2) for certification of the facility or unit in accordance with subsection (d) of this section.

(d) An applicant is in good standing to obtain certification of a facility or unit if:

(1) for at least six consecutive years before applying for certification:

(A) the applicant has been:

(i) the license holder for an Alzheimer's certified facility or a facility that has an Alzheimer's certified unit; or

(ii) a controlling person of the license holder for an Alzheimer's certified facility or a facility that has an Alzheimer's certified unit; or

(B) a controlling person of the applicant has been:

(i) the license holder for an Alzheimer's certified facility or a facility that has an Alzheimer's certified unit; or

(ii) a controlling person of the license holder for an Alzheimer's certified facility or a facility that has an Alzheimer's certified unit;

(2) each licensed facility operated by the applicant or the controlling person has not had a violation or sanction described in §92.21(c)(2) of this subchapter; and

(3) each licensed facility operated by the applicant or the controlling person has had no more than two violations listed in §92.125(a) of this chapter (relating to Resident's Bill of Rights and Provider Bill of Rights) during the six-year period immediately before the applicant applied for certification.

(e) For purposes of subsection (d)(3) of this section, a facility has a violation if:

(1) the applicant or controlling person operating the facility did not challenge the violation;

(2) a final determination on the violation is pending; or

(3) the violation was upheld.

(f) An applicant that makes a request in accordance with subsection (a) of this section must submit to DADS for approval:

(1) the applicant's policies and procedures required by §92.53 of this chapter (related to Standards for Certified Alzheimer's Assisted Living Facilities), including documentation that demonstrates compliance with the staffing, hiring and training standards; and

(2) documentation that the applicant's employees have the credentials described in §92.53(a) and (i)(3)(B) of this chapter.

(g) DADS certifies a facility or unit after an applicant makes a request in accordance with subsection (a) of this section if DADS determines that the applicant:

(1) meets the good standing requirements described in §92.21(c) of this subchapter and subsection (d) of this section;

(2) has submitted information in accordance with subsection (f) of this section; and

(3) is in compliance with:

(A) §92.51 of this chapter (relating to Certification of a Facility or Unit for Persons with Alzheimer's Disease and Related Disorders); and

(B) §92.53(i) of this chapter.

(h) DADS conducts an on-site health inspection to determine if the facility or unit meets the requirements of §92.53(a) - (h) of this chapter within 90 days after the date DADS certifies a facility or unit in accordance with subsection (g) of this section. During the on-site health inspection, DADS must observe the provision of care to at least one resident who has been admitted to the facility or unit.

(i) Until a facility or unit that is issued a certification under this section meets the requirements of the on-site health inspection described in subsection (h) of this section, the facility must attach a written addendum to the disclosure statement required by §92.53(d) of this chapter to notify a resident or a prospective resident that the facility or unit has not met the requirements of the on-site health inspection. At a minimum, the addendum must state that:

(1) the facility or unit has not met the requirements of an initial on-site health inspection for Alzheimer's certification; and

(2) DADS will conduct an on-site health inspection for Alzheimer's certification within 90 days after the date of certification.

(j) To obtain certification of a unit in a Type B facility that is already licensed, a license holder must comply with §92.51 of this chapter (relating to Certification of a Facility or Unit for Persons with Alzheimer's disease and Related Disorders).

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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Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-2235

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SUBCHAPTER C. STANDARDS FOR LICENSURE

40 TAC §92.51

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §247.029, which provides that the HHSC executive commissioner shall adopt rules that govern facilities that provide personal care services to residents who have Alzheimer's disease or related disorders.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §247.029.

§92.51. Certification [~~Licensure~~] of a Facility or Unit [~~Facilities~~] for Persons with Alzheimer's Disease and Related Disorders.

(a) A [~~Any~~] facility that advertises, markets, or otherwise promotes that the facility or a distinct unit [~~part~~] of the facility provides specialized care for persons with Alzheimer's disease or related disorders must be certified or have the unit certified under subsection (d) of this section or §92.22 of this chapter (relating to Alzheimer's Certification of a Type B Facility for an Initial License Applicant in Good Standing) [~~subchapter~~]. Certification under this section is not required for a facility to use [~~Use of~~] advertising terms such as "medication reminders or assistance," "meal and activity reminders," "escort service," or "short-term memory loss, confusion, or forgetfulness." [~~will not trigger a requirement for certification as an Alzheimer's facility.~~]

(b) To be certified under subsection (d) of this section, a [~~The~~] facility must be licensed as a Type B facility.

(c) A license holder must request [~~Application for~~] certification of a facility or unit under subsection (d) of this section by using [~~must be made on~~] forms prescribed by DADS and [~~must~~] include the fee [~~as~~] described in §92.4(c) of this chapter (relating to Licensing Fees).

(d) After DADS receives a request for certification in accordance with subsection (c) of this section, DADS certifies a licensed Type B facility as a certified Alzheimer's facility or a unit of a licensed Type B facility as a certified Alzheimer's unit, if DADS determines:

(1) that the facility or unit is in compliance with §92.53(i) of this subchapter (relating to Standards for Certified Alzheimer's Assisted Living Facilities) and Subchapter D of this chapter (relating to Facility Construction), including meeting the requirements of a Life Safety Code (LSC) inspection within 120 days after the date DADS conducts an initial LSC inspection; and

(2) that the facility or unit meets the requirements of §92.53(a) - (h) of this subchapter based on an on-site health inspection, during which DADS must observe the facility's or unit's provision of

care to at least one resident who has been admitted to the Alzheimer's facility or unit.

(e) [~~(d)~~] A [~~The~~] facility or unit must not exceed the maximum number of residents specified on the Alzheimer's certificate issued to the facility by DADS.

(f) [~~(e)~~] A facility must post the facility's or unit's Alzheimer's certificate [~~must be posted~~] in a prominent location for public view.

(g) [~~(f)~~] An Alzheimer's [~~A~~] certificate is valid for two years from the effective date of approval by DADS.

(h) DADS cancels an Alzheimer's certificate if:

(1) a certified facility, or the facility in which a certified unit is located, undergoes a change of ownership; or

(2) DADS determines that a certified facility or unit is not in compliance with applicable laws and rules.

(i) [~~(g) A certificate will be cancelled upon change of ownership and if DADS finds that the certified unit or facility is not in compliance with applicable laws and rules.~~] A facility must remove a cancelled certificate from display and advertising, and surrender the certificate [~~must be surrendered~~] to DADS [~~upon 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.

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Lawrence Hornsby
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Department of Aging and Disability Services
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SUBCHAPTER H. ENFORCEMENT
DIVISION 9. ADMINISTRATIVE PENALTIES

40 TAC §92.551

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §247.029, which provides that the HHSC executive commissioner shall adopt rules that govern facilities that provide personal care services to residents who have Alzheimer's disease or related disorders.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §247.029.

§92.551. Administrative Penalties.

(a) Assessment of an administrative penalty. DADS may assess an administrative penalty if a license holder:

(1) violates:

(A) Texas Health and Safety Code, Chapter 247;

(B) a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247; or

(C) a term of a license issued under Texas Health and Safety Code, Chapter 247;

(2) makes a false statement of material fact that the license holder knows or should know is false:

(A) on an application for issuance or renewal of a license;

(B) in an attachment to the application; or

(C) with respect to a matter under investigation by DADS;

(3) refuses to allow a DADS representative to inspect:

(A) a book, record, or file that a facility must maintain; or

(B) any portion of the premises of a facility;

(4) willfully interferes with the work of a DADS representative or the enforcement of this chapter;

(5) willfully interferes with a DADS representative preserving evidence of a violation of Texas Health and Safety Code, Chapter 247; a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247; or a term of a license issued under Texas Health and Safety Code, Chapter 247;

(6) fails to pay an administrative penalty not later than the 30th calendar day after the penalty assessment becomes final; or

(7) fails to notify DADS of a change of ownership before the effective date of the change of ownership.

(b) Criteria for assessing an administrative penalty. DADS considers the following in determining the amount of an administrative penalty:

(1) the gradations of penalties established in subsection (d) of this section;

(2) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the situation, and the hazard or potential hazard created by the situation to the health or safety of the public;

(3) the history of previous violations;

(4) deterrence of future violations;

(5) the license holder's efforts to correct the violation;

(6) the size of the facility and of the business entity that owns the facility; and

(7) any other matter that justice may require.

(c) Late payment of an administrative penalty. A license holder must pay an administrative penalty within 30 calendar days after the penalty assessment becomes final. If a license holder fails to timely pay the administrative penalty, DADS may assess an administrative penalty under subsection (a)(6) of this section, which is in addition to the penalty that was previously assessed and not timely paid.

(d) Administrative penalty schedule. DADS uses the schedule of appropriate and graduated administrative penalties in this subsection to determine which violations warrant an administrative penalty.
Figure: 40 TAC §92.551(d)

(e) Administrative penalty assessed against a resident. DADS does not assess an administrative penalty against a resident, unless the resident is also an employee of the facility or a controlling person.

(f) Proposal of administrative penalties.

(1) DADS issues a preliminary report stating the facts on which DADS concludes that a violation has occurred after DADS has:

(A) examined the possible violation and facts surrounding the possible violation; and

(B) concluded that a violation has occurred.

(2) DADS may recommend in the preliminary report the assessment of an administrative penalty for each violation and the amount of the administrative penalty.

(3) DADS provides a written notice of the preliminary report to the license holder not later than 10 calendar days after the date on which the preliminary report is issued. The written notice includes:

(A) a brief summary of the violation;

(B) the amount of the recommended administrative penalty;

(C) a statement of whether the violation is subject to correction in accordance with subsection (g) of this section and, if the violation is subject to correction, a statement of:

(i) the date on which the license holder must file with DADS a plan of correction for approval by DADS; and

(ii) the date on which the license holder must complete the plan of correction to avoid assessment of the administrative penalty; and

(D) a statement that the license holder has a right to an administrative hearing on the occurrence of the violation, the amount of the penalty, or both.

(4) Not later than 20 calendar days after the date on which a license holder receives a written notice of the preliminary report, the license holder may:

(A) give DADS written consent to the preliminary report, including the recommended administrative penalty; or

(B) make a written request to the Texas Health and Human Services Commission (HHSC) for an administrative hearing.

(5) If a violation is subject to correction under subsection (g) of this section, the license holder must submit a plan of correction to DADS for approval not later than 10 calendar days after the date on which the license holder receives the written notice described in paragraph (3) of this subsection.

(6) If a violation is subject to correction under subsection (g) of this section, and after the license holder reports to DADS that the violation has been corrected, DADS inspects the correction or takes any other step necessary to confirm the correction and notifies the facility that:

(A) the correction is satisfactory and DADS will not assess an administrative penalty; or

(B) the correction is not satisfactory and a penalty is recommended.

(7) Not later than 20 calendar days after the date on which a license holder receives a notice under paragraph (6)(B) of this subsection (notice that the correction is not satisfactory and recommendation of a penalty), the license holder may:

(A) give DADS written consent to DADS [~~DADS'~~] report, including the recommended administrative penalty; or

(B) make a written request to HHSC for an administrative hearing.

(8) If a license holder consents to the recommended administrative penalty or does not timely respond to a notice sent under paragraph (3) of this subsection (written notice of the preliminary report) or paragraph (6)(B) of this subsection (notice that the correction is not satisfactory and recommendation of a penalty):

(A) the commissioner or the commissioner's designee assesses the recommended administrative penalty;

(B) DADS gives written notice of the decision to the license holder; and

(C) the license holder must pay the penalty not later than 30 calendar days after the written notice given in subparagraph (B) of this paragraph.

(g) Opportunity to correct.

(1) A license holder has an opportunity to correct a violation, except a violation described in paragraph (2) of this subsection, and to avoid paying an administrative penalty, if the license holder corrects the violation not later than 45 calendar days after the date the facility receives the written notice described in subsection (f)(3) of this section.

(2) A license holder does not have an opportunity to correct a violation:

(A) that DADS determines results in serious harm to or death of a resident;

(B) described by subsection (a)(2) - (7) of this section;

(C) related to advance directives as described in §92.41(g);

(D) that is the second or subsequent violation of:

(i) a right of the same resident under §92.125 of this chapter (relating to Advance Directives); or

(ii) the same right of all residents under §92.125 of this chapter; or

(E) a violation that is written because of an inappropriately placed resident, except as described in §92.41(f) of this chapter (relating to Inappropriate Placement).

(3) Maintenance of violation correction.

(A) A license holder that corrects a violation must maintain the correction. If the license holder fails to maintain the correction until at least the first anniversary of the date the correction was made, DADS may assess and collect an administrative penalty for the subsequent violation.

(B) An administrative penalty assessed under this paragraph is equal to three times the amount of the original administrative penalty that was assessed but not collected.

(C) DADS is not required to offer the license holder an opportunity to correct the subsequent violation.

(h) Hearing on an administrative penalty. If a license holder timely requests an administrative hearing as described in subsection (f)(3) or (f)(7) of this section, the administrative hearing is held in accordance with HHSC rules at 1 TAC Chapter 357, Subchapter I (relating to Hearings under the Administrative Procedure Act).

(i) DADS may charge interest on an administrative penalty. The interest begins the day after the date the penalty becomes due and

ends on the date the penalty is paid in accordance with Texas Health and Safety Code, §247.0455(e).

(j) Amelioration of a violation.

(1) In lieu of demanding payment of an administrative penalty, the commissioner may allow a license holder to use, under DADS [~~DADS'~~] supervision, any portion of the administrative penalty to ameliorate the violation or to improve services, other than administrative services, in the facility affected by the violation. Amelioration is an alternate form of payment of an administrative penalty, not an appeal, and does not remove a violation or an assessed administrative penalty from a facility's history.

(2) A license holder cannot ameliorate a violation that DADS determines constitutes immediate jeopardy to the health or safety of a resident.

(3) DADS offers amelioration to a license holder not later than 10 calendar days after the date a license holder receives a final notification of the recommended assessment of an administrative penalty that is sent to the license holder after an informal dispute resolution process but before an administrative hearing.

(4) A license holder to whom amelioration has been offered must:

(A) submit a plan for amelioration not later than 45 calendar days after the date the license holder receives the offer of amelioration from DADS; and

(B) agree to waive the license holder's right to an administrative hearing if DADS approves the plan for amelioration.

(5) A license holder's plan for amelioration must:

(A) propose changes to the management or operation of the facility that will improve services to or quality of care of residents;

(B) identify, through measurable outcomes, the ways in which and the extent to which the proposed changes will improve services to or quality of care of residents;

(C) establish clear goals to be achieved through the proposed changes;

(D) establish a time line for implementing the proposed changes; and

(E) identify specific actions the license holder will take to implement the proposed changes.

(6) A license holder's plan for amelioration may include proposed changes to:

(A) improve staff recruitment and retention;

(B) offer or improve dental services for residents; and

(C) improve the overall quality of life for residents.

(7) DADS may require that an amelioration plan propose changes that would result in conditions that exceed the requirements of this chapter.

(8) DADS approves or denies a license holder's amelioration plan not later than 45 calendar days after the date DADS receives the plan. If DADS approves the amelioration plan, any pending request the license holder has submitted for an administrative hearing must be withdrawn by the license holder.

(9) DADS does not offer amelioration to a license holder:

(A) more than three times in a two-year period; or

(B) more than one time in a two-year period for the same or a similar violation.

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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Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
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PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 744. MINIMUM STANDARDS FOR SCHOOL-AGE AND BEFORE OR AFTER-SCHOOL PROGRAMS

PROPOSED PREAMBLE

The Texas Health and Human Services Commission, on behalf of the Department of Family and Protective Services (DFPS), proposes amendments to §§744.101, 744.201, 744.301, 744.303, 744.305, 744.401, 744.405, 744.501, 744.503, 744.505, 744.603, 744.605, 744.613, 744.623, 744.627, 744.705, 744.801, 744.803, 744.909, 744.1001, 744.1003, 744.1015, 744.1017, 744.1023, 744.1035, 744.1037, 744.1051, 744.1053, 744.1055, 744.1103, 744.1105, 744.1107, 744.1203, 744.1315, 744.1317, 744.1319, 744.1321, 744.1325, 744.2001, 744.2005, 744.2103, 744.2105, 744.2207, 744.2211, 744.2409, 744.2411, 744.2413, 744.2501, 744.2505, 744.2515, 744.2519, 744.2551, 744.2571, 744.2573, 744.2577, 744.2601, 744.2603, 744.2607, 744.2609, 744.2651, 744.2701, 744.2905, 744.2907, 744.3003, 744.3007, 744.3051, 744.3101, 744.3107, 744.3111, 744.3209, 744.3251, 744.3255, 744.3351, 744.3413, 744.3505, 744.3561, 744.3605, 744.3607, 744.3619, 744.3757, 744.3801, 744.3805, 744.3807, 744.3817, and 744.3821; the repeal of §§744.103, 744.105, 744.107, 744.109, 744.507, 744.615, 744.617, 744.619, 744.621, 744.703, 744.903, 744.905, 744.1019, 744.1029, 744.1031, 744.1033, 744.1039, 744.1041, 744.1101, 744.1111, 744.1301, 744.1327, 744.1401, 744.1403, 744.2101, 744.2111, 744.2113, 744.2115, 744.2305, 744.2509, 744.2511, 744.3109, and 744.3409; and new §§744.111, 744.113, 744.121, 744.123, 744.615, 744.1029, 744.1301, 744.1401, 744.2520, 744.2576, and 744.3109 in Chapter 744, concerning Minimum Standards for School-Age and Before or After-School Programs. The purpose of the amendments, repeals, and new sections is to implement Texas Human Resources Code (HRC) §42.042(b), which requires CCL to conduct a comprehensive review of all rules and minimum standards every six years. The proposed changes are a result of the comprehensive review of all minimum standards located in Chapter 744.

BACKGROUND AND JUSTIFICATION

During this review of standards, CCL's goal was to review the concerns of child advocacy groups, operations, children, and parents and to formulate standards that balance children's health and safety with affordability and availability of care.

In preparation for the review of minimum standards, CCL conducted a web-based survey open to permit holders, caregivers, advocates, parents, CCL staff, and anyone in the general public interested in commenting on the standards. The survey was available for public input from late August through December 2014. The next step in the review was to hold a series of 31 stakeholder forums throughout the state between September and November 2015 to solicit additional input from the public about proposed changes to the minimum standards.

Between the web-based survey and the stakeholder forums, CCL received more than 1,200 comments relating to Chapters 745 (Licensing), 744, 746 (Minimum Standards for Child-Care Centers), and 747 (Minimum Standards for Child-Care Homes) from stakeholders for consideration in the review. These comments, along with a line-by-line review of all minimum standards conducted by both regional and State Office Licensing staff, formed the basis of the first round of recommendations that were then presented to a temporary workgroup. The temporary workgroup was comprised of approximately 15 participants, including providers from child-care centers, a provider from a school-age and before- and after-school program, a parent, representatives from Licensing, and a representative from the Texas Workforce Commission. The workgroup had an introductory meeting on March 22, 2016, and subsequently met twice on April 5, 2016, and May 16, 2016, to review and provide comments regarding the recommended changes to Chapter 744 (and Chapters 746 and 747).

In response to the comments received, DFPS is recommending amending/repealing/ adding over 125 minimum standards in Chapter 744. In addition to responding to comments, three other primary goals of this comprehensive review were to (1) make the language of the rules consistent throughout the chapter, (2) delete minimum standards or portions of minimum standards that are duplicative or redundant, and (3) combine minimum standards when appropriate. The last two goals resulted in the deletion of approximately 20 minimum standards. Below is a broad overview of some of the different areas and types of changes that DFPS is recommending: (1) repealing, adding, moving, and modifying definitions. One example is the repeal of §744.2509 and §744.2511 which defined "sanitizing" and "disinfecting solution" and combining, modifying, and updating these definitions into one definition for "sanitize" and adding it the new §744.123(46); (2) reorganizing Subchapter A by creating three new Divisions: Purpose, Scope, and Definitions. The focus of the reorganization is to provide better clarity and continuity; (3) updating or deleting outdated rules or language in the rules, including: (a) deleting outdated grandfather clauses (§§744.1019 and 744.3255) and outdated wording ("coin operated pay phone" in §744.3051 and "message pagers" in §744.3821); (b) updating the immunization minimum standards to be consistent with the current Department of State Health Services rules (§§744.613, 744.615, 744.617, 744.619, 744.621 and 744.623); and (c) deleting the use of rectal thermometers and allowing the use of tympanic (ear) thermometers (§744.2571); (4) clarifying confusing concepts by: (a) adding a new rule §744.1401 by deleting, combining, and modifying previous §744.1401 and §744.1403 to explain when substitutes, volunteers, and contractors must comply with the minimum standards that apply to employees and caregivers; and (b) adding a rule that a sick child may return to care when there is a doctor's statement that the child no longer has the excludable condition, or the child is free of symptoms for 24 hours (§744.2576); (5) strengthening the minimum standards when it is necessary for the safety of children, for example: (a) requiring a written oversight plan until a site director meets the required education qualifications (§744.107(c)(2)); (b) requiring televisions to be anchored, so they cannot tip over (§744.2601); and (c) banning the use of e-cigarettes and any type of vapors (§744.2603); and (6) allowing more discretion by providers while still ensuring the safety of children, for example: (a) allowing first aid (but not CPR) to be obtained through self-instructional training (§744.1315); and (b) allowing the use of hand sanitizers (§744.2520).

SECTION-BY-SECTION SUMMARY

Subchapter A, Purpose and Definitions is being amended and Subchapter A is being renamed "Purpose, Scope, and Definitions" for clarity and better continuity.

Proposed new division is being added to Subchapter A: Division 1, Purpose. The only rule in this division is current §744.101. The new division is being added for clarity and better continuity.

Proposed amendment to §744.101 is correcting a cite to the HRC.

Proposed repeal of §744.103 deletes a rule regarding the definitions of pronouns, is being incorporated into new §744.121.

Proposed repeal of §744.105 deletes a rule regarding definitions, is being incorporated into new §744.123. Many substantive changes are being made to this rule, including the deletion, addition, and modification of many definitions.

Proposed repeal of §744.107 deletes a rule regarding types of operations and scope, is being incorporated into new §744.111. However, the language in the rule regarding grandfather clauses for former licensed child-care centers exclusively providing before-school and after-school program services or school-age program services has been deleted because these operations were previously required to amend their permit to reflect they are subject to these minimum standards.

Proposed repeal of §744.109 deletes a rule regarding permit holders and scope, is being incorporated into new §744.113.

Proposed new division is being added to Subchapter A: Division 2, Scope. The new division is being added for clarity and better continuity.

Proposed new §744.111 includes the content from §744.107, which is being deleted, with the following substantive changes: (1) the language in §744.107 regarding grandfather clauses is being deleted because it is no longer relevant; and (2) language is being added to clarify that the minimum standards in this chapter also apply to any unlicensed operation that requires a license per HRC, Chapter 42, because the operation provides before or after-school program services or school-age program services.

Proposed new §744.113 includes the content from §744.109, which is being deleted, with the addition of subsection (b) to clarify that the operation's director, owner, or person overseeing the operation or other controlling person who has the ability to influence or direct the operation's management, expenditures, or policies must ensure compliance with the minimum standards in this chapter.

Proposed new division is being added to Subchapter A: Division 3, Definitions. The new division is being added for clarity and better continuity.

Proposed new §744.121 includes the content from §744.103, which is being deleted.

Proposed new §744.123 includes the content from §744.105, which is being deleted, with the following substantive changes: (1) several terms from §744.105 are not being incorporated into new §744.123 because the content of the terms are being incorporated into the only rule where the term is used in this chapter, including "caregiver-initiated activities", "child-initiated activities", and "single-use area"; (2) several terms are being deleted because these words are not used in this chapter, are already defined in some other section, or are not needed, including "child passenger safety-seat system" (already defined at §744.3807), "creative activities", "critical illness", "group activities", "frequent", "operation location", and "pre-service training"; (3) several terms are being deleted from other rules and are being incorporated into this definition rule, including "CEUs", "clock hours", "instructor-led training", "sanitize" (with substantive changes), and "self-instructional training"; (4) several terms are being added, including "employee", "governing body", "nighttime care", "owner", "permit holder", "permit is no longer valid", and "premises"; (5) "state and local sanitation official" is being changed to "local sanitation official" because there are no longer any state sanitation officials for day care purposes; and (6) the definitions to several terms are being modified, including "administrative and clerical duties", "age-appropriate", "caregiver" (this definition has been substantively changed), "Certified Child-Care Professional Credential", "Child Development Associate Credential", "inflatable", "instructor-led training", "janitorial duties", "regular", "multi-site operations", "self-instructional training", "special care needs", and "water activities".

Proposed amendment to §744.201 clarifies that the permit holder is responsible for ensuring that the number of children in care never exceeds the licensed capacity of the operation, even when the children are away from the operation (e.g. field trip). This is currently required in §744.1507(6).

Proposed amendment to §744.301 adds: (1) the content of the "operation location" definition, which is being deleted; and (2) Licensing notification requirements before an operation offers nighttime care services, or changes ownership (which is being incorporated from current §744.303(1)).

Proposed amendment to §744.303 deletes the requirement to notify Licensing before an operation sells or transfers ownership of the operation, which is being incorporated into §744.301(10); clarifies the language of the rule; and clarifies that the designee for a sole proprietorship is the sole proprietor.

Proposed amendment to §744.305 deletes broad examples of occurrences that that may render and operation unsafe or unsanitary, because more specific examples are already included in a Helpful Information box located on the DFPS Public Website version of the minimum standards.

Proposed amendment to §744.401 clarifies that activity plans for each group of children (if required by §744.2005) must be posted at the operation at all times. This requirement is being incorporated from deleted §744.2005(d), so all the posting requirements will be in one rule.

Proposed amendment to §744.405 deletes the requirement to post the address of the nearest Licensing office, because the workers are now mobile workers and not at a particular office; and clarifies the wording of the rule for accuracy.

Proposed amendment to §744.501: (1) clarifies the language of the rule; (2) adds requirements for new operational policies for the suspension and expulsion of children, and procedures for using insect repellant and sunscreen; and (3) clarifies that the discipline and guidance policy must be consistent with Subchapter G, or Subchapter G may be used as the discipline and guidance policy (unless the operation uses discipline and training measures specific to a skills-based program). This change is being incorporated from §744.2111, which is being deleted.

Proposed amendment to §744.503 clarifies that a parent's signature for the enrollment agreement and the operational policies may be a signature on one document or several documents (this came from §744.2113(b), which is being deleted).

Proposed amendment to §744.505 clarifies that employees must be notified of any changes to the operational policies (this came from §744.2115, which is being deleted) and child-care enrollment agreement; and clarifies the language of the rule.

Proposed repeal of §744.507 is deleted because at §744.901(6) it is already clear that operational policies must be shared with employees.

Proposed amendment to §744.603 clarifies several paragraphs by stating: (1) admission information is that information required in §744.605; (2) TB screening is only needed if required by DSHS or a local health authority; and (3) documentation from a health-care professional that allows a deviation from minimum standards must be maintained in the child's record.

Proposed amendment to §744.605 clarifies that permission for transportation includes authorization for pick-up and drop-off locations. This change is being incorporated from a vague version of this requirement, which is being deleted from §744.3801.

Proposed amendment to §744.613 clarifies: (1) that current immunization records must be maintained, including records of any exemptions or exceptions; and (2) the situations where immunizations are not required by the date of admission, including exemptions, exceptions, and provisional enrollment for up to 30 days for homeless children or children in foster care.

Proposed repeal of §744.615 is being deleted and replaced by new propose §744.615. This rule incorporates the language from the repealed rule and further explains the immunization exemptions and exceptions that are allowed by the DSHS rules.

Proposed repeal of §744.617 is being deleted and the content of this rule will be added to and expounded upon in a Helpful Information box located on the DFPS public website version of the minimum standards.

Proposed repeal of §744.619 is being deleted and the content of this rule is being incorporated into §744.613(c).

Proposed repeal of §744.621 is being deleted and the content of the rule is being incorporated into §744.613(c)(2).

Proposed amendment to §744.623 clarifies the documentation requirements that are acceptable for an immunization record, including: (1) an immunization record generated from a state or local health authority, a record received from school officials, or a health passport for a child in the conservatorship of the de-

partment; and (2) an immunization record from a doctor's office, which also requires a signature of a health-care professional.

Proposed amendment to §744.627 clarifies the language of the rule for ease of understanding; and the requirement to keep tracking information for three months is being deleted because it is already required by §744.801(17) and §744.803(a).

Proposed repeal of §744.703 is being deleted and the content of this rule is being added to a Helpful Information box after §744.701 that is located on the DFPS public website version of the minimum standards.

Proposed amendment to §744.705 clarifies how the Incident/Illness Report form must be completed.

Proposed amendment to §744.801 clarifies what records must be kept at the operation, including: (1) requiring attendance records or time sheets listing all days and hours worked for each employee. This content came from §744.905, which is being deleted; (2) deleting several paragraphs because the items are already required to be posted in §744.401, such as group activity plans, daily menus, and the most recent licensing inspection report; (3) deleting the requirement of proof of background checks because it is already required in §744.901; and (4) adding a requirement to keep a child tracking system at the operation. The system must be consistent with the requirements in §744.627.

Proposed amendment to §744.803 is being amended because several items are being deleted from §744.801 because they are already required to be posted, so this rule is being updated to clarify that a posted record must also be kept for at least three months from the date the record was created.

Proposed repeal of §744.903 is being deleted because it is redundant. The Director's Certificate is already required in §744.1037, and as an employee a Director is already required to receive operational and personnel policies in §744.901(6).

Proposed repeal of §744.905 is being deleted because the content of this rule is being incorporated into §744.801(4).

Proposed amendment to §744.909 clarifies that Licensing may photograph, copy, or scan an operation's records.

Proposed amendment to §744.1001 deletes the language in this rule that reminds an operation to notify Licensing when there is a change in directors because it is redundant. However, this information is being added to a Helpful Information box following the rule, which is located on the DFPS public website version of the minimum standards.

Proposed amendment to §744.1003 is for the purpose of clarifying the language of this rule because "multi-site operations" is defined, not "multiple operations; and deleting the phrase "under the same governing body" because this is already clarified in the definition.

Proposed amendment to §744.1015 deletes the notification that some qualifications for an operation or program director require periodic renewal to remain qualified, because this information is already clarified in §744.1051 and §744.1053. However, this information and the citations of the relevant rules regarding the renewal of an operation or program director's certificate are being added to the Helpful Information box following this rule, which is located on the DFPS public website version of the minimum standards.

Proposed amendment to §744.1017 clarifies that the operation must provide Licensing a written plan describing the oversight the program director will be providing the site director until the required education qualifications are completed, including the sharing of director responsibilities, if applicable.

Proposed repeal of §744.1019 is being deleted because it contains grandfather clauses that are no longer necessary.

Proposed amendment to §744.1023 corrects a vague pronoun use.

Proposed repeal of §744.1029 is being deleted and "Clock hours" is being incorporated into the definitions rule in §744.123 with some modifications for clarity and accuracy.

Proposed new §744.1029 reorganizes the placement of §744.1041, which is being deleted, for better readability and flow of the rules.

Proposed repeal of §744.1031 is being deleted because it is not accurate. The criteria that are required for trainers is located in §744.1319.

Proposed repeal of §744.1033 is being deleted and "CEUs" is being incorporated into the definitions rule at §744.123.

Proposed amendment to §744.1035 incorporates the content from §744.1039, which is being deleted; and the wording of the question and the answer is also being modified for ease in understanding the rule.

Proposed amendment to §744.1037 clarifies that a director must meet these additional qualifications in addition to the employee qualifications (and minimum qualifications of a caregiver, if applicable). Two paragraphs are also being deleted, because they are already required for all employees.

Proposed repeal of §744.1039 is being deleted and the content of this rule is being incorporated into §744.1035(c).

Proposed repeal of §744.1041 is repealed and the content of this rule is being incorporated into new proposed §744.1029.

Proposed amendment to §744.1051 clarifies the rule by making it specific to the operation directors, program directors, and site directors; and clarifying the language of the rule for better readability and ease in understanding.

Proposed amendment to §744.1053 clarifies the rule by making it specific to operation directors and program directors.

Proposed amendment to §744.1055 clarifies the rule by making it specific to operation directors and program directors; and clarifying the language of the rule for better readability and ease of understanding.

Proposed repeal of §744.1101 is being deleted and the content of this rule is being incorporated into the new definition for "employee" and the revamped definition for "caregiver" at §744.123.

Proposed amendment to §744.1103 deletes some of the wording in the introduction to this rule because it is inaccurate.

Proposed amendment to §744.1105: (1) updates the terminology related to caregivers; (2) incorporates the content from §744.1111 into §744.1105(2)(B)(i) to clarify a "high school equivalent", with non-substantive changes for better readability and ease of understanding; and (3) adds a "high school equivalent" for home schooling that adequately addresses basic competencies at §744.1105(2)(B)(ii).

Proposed amendment to §744.1107 clarifies that: (1) a person under the age of 18 who is hired must not be left alone with an individual child; (2) child-care-related career programs may also be approved by charter schools, the Texas Private School Accreditation Commission, or home schools that adequately addresses basic competencies; and (3) for a person under the age of 18 who attends a home-school that adequately addresses basic competencies and has graduated or not graduated, this person must complete the eight hours of pre-service training before being placed in a room with children.

Proposed repeal of §744.1111 is being deleted and the content of this rule is being incorporated into §744.1105(2)(B)(i).

Proposed amendment to §744.1203 clarifies the language of this rule by: (1) deleting "counted in the child/caregiver ratio" because this is the new definition of a caregiver and the language is no longer necessary; (2) changing "administrative and clerical functions" to "administrative and clerical duties", because "duties" is the term that is defined in §744.123; and (3) deleting and incorporating the examples after "janitorial duties" into the definition for "janitorial duties" in §744.123.

Proposed repeal of §744.1301 is being deleted and replaced with a new rule and table to: (1) clarify which training requirements are for employees and caregivers; and (2) delete the Director training requirements which are already noted at §744.1309 and §744.1311.

Proposed amendment to §744.1315 clarifies that first aid training can now be obtained through self-instructional training.

Proposed amendment to §744.1317 makes the use of "employee" consistent throughout the rule; and "owner" has been clarified in the definition of an "employee" in §744.123. An owner is an employee if the owner is ever on site at the operation or transports children.

Proposed amendment to §744.1319: (1) updates the title of the training registry; (2) clarifies that a Child Development Associate credential must be current; (3) deletes subsection (c) because it is already included at §744.1315(d); and (4) clarifies that subsection (d) applies to both instructor-led and self-instructional training, which came from §744.1327(c), which is being deleted.

Proposed amendment to §744.1321 clarifies that while Licensing does not approve training resources, training must comply with the criteria specified in §744.1319, required training topics, and documentation requirements.

Proposed amendment to §744.1325 simplifies and streamlines the requirement for counting training received by employees from another operation by deleting the requirement to adjust the annual training year for those employees.

Proposed repeal of §744.1327 is being deleted and the definitions for self-instructional and instructor-led training are being incorporated into the definitions rule at §744.123; and the content for subsection (c) is being incorporated into §744.1319(d).

Proposed repeal of §744.1401 is being deleted and being replaced by new proposed §744.1401. The new rule: (1) incorporates with substantial clarifications the content of §744.1401 and §744.1403, which are being deleted; and (2) clarifies that volunteers who only supplement ratios for field trips and water activities do not have to comply with minimum standards for employees or caregivers, but they do have to comply with the minimum standards in Subchapter E regarding ratios.

Proposed repeal of §744.1403 is being deleted and the content is being incorporated into new proposed §744.1401.

Proposed amendment to §744.2001: (1) clarifies that written activity plans are required for programs where children are anticipated to be in care for more than five consecutive hours in a day. The plans are not child specific; (2) broadens the cite for compliance with regular meal and snack time to include all of Subchapter J (Nutrition and Food Service), not just §744.2403; and (3) incorporate the definitions for "child-initiated activities" and "caregiver-initiated activities" from the current definitions rule because this is the only rule that discusses these two terms.

Proposed amendment to §744.2005: (1) makes this rule consistent with §744.2001 to clarify that written activity plans are required for programs where children are anticipated to be in care for more than five consecutive hours in a day. The plans are not child specific; (2) deletes subsection (d) and moves the requirement to post written activity plans to §744.401(5); and (3) deletes the subsection (e) requirement to keep the written activity plans for three months, because it is already required in §744.803(a).

Proposed repeal of §744.2101 is being deleted and the content of subsection (a) is being deleted and incorporated into §74.2103. However, subsection (b) regarding explaining the reason for the disciplinary measure is being deleted because no such requirement exists in Chapter 746 of this title and it is not necessary.

Proposed amendment to §744.2103 incorporates the content from §744.2101(a), which is being deleted.

Proposed amendment to §744.2105 clarifies that prohibited discipline includes placing a child in a dark room, whether the door is closed or not.

Proposed repeal of §744.2111 is being deleted and the content of: (1) subsection (a) is being incorporated into §744.501(7); and (2) subsection (b) is being deleted because it is already required by §744.503 and §744.901(6).

Proposed repeal of §744.2113 is being deleted because it and §744.2111 are very repetitive, and all of the requirements are already included in §744.503 and §744.901(6).

Proposed repeal of §744.2115 is being deleted because the requirement that parents be given a copy of any updated discipline and guidance policy is already required in §744.505. However, the wording of §744.505 is being modified for clarification.

Proposed amendment to §744.2207 shortens from one hour to 30 minutes the time for when a child that cannot sleep may participate in an alternative, quiet activity until the nap/rest time is over for other children.

Proposed amendment to §744.2211 clarifies that lowering the lighting in a room requires enough lighting that a person's eyes do not need to adjust for the person to be able to see upon entering the room.

Proposed repeal of §744.2305 is being deleted because it only references the subchapter regarding ratios and group sizes. Since it provides no additional information, it is not necessary.

Proposed amendment to §744.2409 deletes "meals" from subsection (d) because parents must not be providing meals for other children.

The amendment to §744.2411 corrects the inappropriate use of the pronoun "we" by substituting "the operation".

Proposed amendment to §744.2413 deletes the information relating to posting menus and keeping the menus because the posting is already required by §744.401(6) and §744.803. In addition, because of the deletion the question and the rule had to be modified to clarify the remaining issues regarding substituting and rotating menus.

Proposed amendment to §744.2501 changes the term "state or local sanitation official" to "local sanitation official" in order to be consistent with other language in the chapter.

Proposed amendment to §744.2505 clarifies the language of the rule for better readability and ease of understanding.

Proposed repeal of §744.2509 is being deleted and the definition for "sanitizing" is being incorporated into the new definition for "sanitize" in §744.123.

Proposed repeal of §744.2511 is being deleted and the definition for "disinfecting solution" is being incorporated into the new definition for "sanitize" in §744.123.

Proposed amendment to §744.2515 clarifies that employees must wash their hands after removing gloves; and clarifies the language of the rule for better readability and ease of understanding.

Proposed amendment to §744.2519 deletes the statement that pre-moistened towelettes, wipes, and waterless hand cleaners are not a substitute for running water. However, a statement will be added to the Helpful Information box after new proposed §744.2520 that states the use of hand sanitizers is not a substitute for hand washing in the group care setting. The Helpful Information box will be located on the DFPS public website version of minimum standards.

Proposed new §744.2520 clarifies that hand sanitizer may be used as a substitute for washing hands under certain conditions: (1) not used for visibly dirty hands; (2) stored out of the reach of children; (3) follow the labelling instructions; and (4) used only with adult supervision.

Proposed amendment to §744.2551 clarifies that a "sealed bag" means "in a tied, sealed or otherwise closed plastic bag", which also makes the language consistent with changes made in the Child Care Development Block Grant (CCDBG) rule packet.

Proposed amendment to §744.2571 updates the language of the rule by deleting the use of rectal temperatures and adding the use of tympanic (ear) temperatures; and also clarifies some of the language of the rule for better readability and ease of understanding.

Proposed amendment to §744.2573 deletes the statement that "you can access (the communicable disease) information from DSHS or Licensing" and more detailed information about where to access the information is being added to the Helpful Information box located on the DFPS public website version of minimum standards.

Proposed new §744.2576 clarifies that an ill child may return to the operation when: (1) the child is free of illness symptoms for 24 hours; or (2) there is a health-care professional's statement that the child no longer has the excludable disease or condition.

Proposed amendment to §744.2577: (1) deletes the term "critical" illness/injury and simplifies the rule to talk about an injury or illness that requires the immediate attention of a health-care professional. This is the only rule that discusses a "critical" injury/illness; (2) substitutes "health-care professional for "physician"; and (3) clarifies that even if a child must be taken to an emergency room, you must first ensure the supervision of the other children in the group.

Proposed amendment to §744.2601 requires televisions to be anchored, so they cannot tip over.

Proposed amendment to §744.2603 bans the use of e-cigarettes and any type of vapors.

Proposed amendment to §744.2607 adds commissioned security officers as persons who may carry a firearm on the premises of an operation; changes the colloquial term of "law enforcement official" to "peace officer", which is defined at §2.12, Code of Criminal Procedure; and changes "residence" to "home" for consistency throughout the chapter.

Proposed amendment to §744.2609 clarifies the language of the rule for better readability and ease of understanding; and applies the limitation on toys that explode or shoot to both the operation and on field trips.

Proposed amendment to §744.2651 clarifies that a topical ointment, such as insect repellant, is not a medication.

Proposed amendment to §744.2701 clarifies that the requirements for animals at operations also apply on a field trip.

Proposed amendment to §744.2905 simplifies the exemptions to the indoor activity space requirements.

Proposed amendment to §744.2907 clarifies that measurements for indoor activity space will be rounded "up" to the nearest inch; and incorporates the definition for "single-use areas" because it is not used in any other rule in this chapter.

Proposed amendment to §744.3003 deletes the last sentence in this rule because it only references the subchapter regarding Health Practices for further information. Since it provides no additional information, it is not necessary. However, the information is being added to a new Helpful Information box located on the DFPS public website version of minimum standards.

Proposed amendment to §744.3007 clarifies that toilets must be equipped with toilet paper.

Proposed amendment to §744.3051 deletes an outdated reference to coin operated pay phones.

Proposed amendment to §744.3101 clarifies that active play equipment must be used according to the manufacturer's instructions; and deletes the word "space" because it is incorrectly used in this rule.

Proposed amendment to §744.3107 modifies the wording of the rule to be consistent with the Chapter 746 sister rule (§746.4605).

Proposed repeal of §744.3109 is being deleted and replaced with a new rule that: (1) adds two new options for the maximum height allowed for the highest designated play surface to be consistent with the manufacturer's guidelines or the ASTM International standards; and (2) adds a chart for the third option (which is not new) for better readability and ease of understanding.

Proposed amendment to §744.3111 deletes outdated grandfather clauses; and modifies the language of the rule for consistency, better readability, and ease of understanding.

Proposed amendment to §744.3209 corrects a typographical error in the rule.

Proposed amendment to §744.3251 corrects a statement in the rule, because there is no minimum standard that addresses the "type" of loose materials or unitary surfacing that must be used in relation to the height of the highest designated play surface.

Proposed amendment to §744.3255 deletes an outdated grandfather clause.

Proposed amendment to §744.3351 clarifies that inflatables must be used according to manufacturer's instructions; and modifies the language of the rule for better readability and ease of understanding.

Proposed repeal of §744.3409 is being deleted because this clarification rule that a fence does not relieve caregivers of supervision requirements is already clear at §744.1203(4) and §744.1205.

Proposed amendment to §744.3413 clarifies that: (1) children must not be left alone with sprinkler equipment; and (2) the splash pad/sprinkler play area must be maintained according to manufacturer's instructions.

Proposed amendment to §744.3505 clarifies the language of the rule for better readability and ease of understanding.

Proposed amendment to §744.3561 clarifies the language of the rule for better readability and ease of understanding.

Proposed amendment to §744.3605 clarifies that the manufacturer's instructions for mounting a fire extinguisher must be followed.

Proposed amendments to §§744.3607, 744.3619, and 744.3757 modify the language of the rules for better readability and ease of understanding; and make the terminology regarding servicing, inspecting, and testing fire extinguishers and carbon monoxide detectors consistent throughout the chapter.

Proposed amendment to §744.3801 modifies the language of the rule for better readability and ease of understanding; and the issue of parental authorization for pick-up and drop-off locations is being deleted and incorporated with modifications into §744.605(8).

Proposed amendment to §744.3805 modifies the language of the rule for better readability and ease of understanding.

Proposed amendment to §744.3807 clarifies the term "child passenger safety seat system"; and restructures the rule for better readability and ease of understanding.

Proposed amendment to §744.3817 modifies the language of the rule for better readability and ease of understanding; and broadens the first-aid requirements to comply with all of Division 4 of Subchapter L instead of only §744.2753.

Proposed amendment to §744.3821 deletes an outdated reference to message pagers.

FISCAL NOTE

Lisa Subia, Chief Financial Officer of DFPS, has determined that for each of the first five years that the rules will be in effect there will not be costs or revenues to state or local government as a result of enforcing or administering the sections.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Subia has determined that the only anticipated adverse impact on small or micro businesses is as a result of the proposed rule change to §744.501. The proposed change will impact licensed operations that meet the definition of a small and micro-business that do not already have relevant operational policies in place. According to the DFPS FY 2015 Annual Report and Data Book as of August 31, 2015, there were 1,551 licensed School-Age and Before or After-School Programs (operations) in Texas.

Chapter 2006 of the Government Code defines a small business as one that is for-profit, independently owned, and has fewer than 100 employees or less than six million dollars in annual gross receipts. A small business that has no more than 20 employees is also defined as a micro-business. Based on a 2010 survey conducted by CCL, it is estimated that 55% (or 853) are for profit businesses. Of those 853 operations, it is estimated that 98% (or 836) have fewer than 100 employees. Of the 836 operations, it is estimated that 68% (or 568) have fewer than 20 employees. So it is estimated that 836 operations are small business, and 568 operations are micro-businesses.

Licensing staff developed the methodologies used to calculate the fiscal impact of these rules. The impacts were calculated using cost research conducted by staff and assumptions regarding child-care practices. The key assumptions and methodologies are described in detail below, as these underlie the individual impact calculations for the rule that is projected to have a fiscal impact.

For School-Age and Before or After-School Programs, the staff time required to comply with the standards will impact Directors. For use in this impact analysis, DFPS will use the following mean wages that were obtained from the Texas Workforce Commission's website for Occupational Wages based on 2015 estimates: For all Directors, DFPS is using a $25.57 per hour mean wage from the Occupational Title of Education Administrator, Preschool and Childcare Center.

Fiscal Impact for Proposed §744.501: This section adds two new operational policies that must be developed: suspension and expulsion of children; and procedures for providing and applying insect repellent and sunscreen. The fiscal impact to these operations results from staff time to develop policy regarding these two topics. It is anticipated, after discussing this issue with the temporary workgroup, that a Director, or curriculum developer that is similarly paid, will spend an average of one to three hours developing these two operational policies. Therefore, the approximate one-time cost for the development of these two operational policies is between $25.57 (1 hour X $25.57) and $76.71 (3 hours X $25.57).

The other recommended rule changes should not affect the cost of doing business; does not impose new requirements on any business; and does not require the purchase of any new equipment or any increased staff time in order to comply.

Regulatory Flexible Analysis: As previously noted, of the 1,554 School-Age and Before or After-School Programs, it is estimated that 837 of them are small business, and 569 of them are micro-businesses. The projected fiscal impact on small and micro-businesses for §744.501 is addressed in the foregoing section. DFPS did consider not requiring each of the two new operational policies, but ultimately decided that the one-time cost is appropriately small and merited the changes. These two new operational policies will ensure the health and safety of children and prevent the inappropriate removal of children from operations. There is no anticipated impact on technology as a result of the proposed rule change.

PUBLIC BENEFIT AND COST

Ms. Subia also has determined that for each of the first five years that the proposed sections will be in effect, the public benefit anticipated as a result of the rule change will be that (1) there will be clarification of the Minimum Standards for School-Age and Before or After-School Programs resulting in more compliance; (2) DFPS will be in compliance with HRC §42.042(b); and (3) there will be reduced risk to children. Other than the cost to an owner of an operation as noted in the small business and micro-business impact analysis, there is no anticipated economic cost to individual persons who are required to comply with the proposed sections.

TAKING IMPACT ASSESSMENT

Ms. Subia has determined that the proposed amendments, repeals, and new sections do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under §2007.043, Government Code.

PUBLIC COMMENT

Questions about the content of the proposal may be directed to Gerry Williams at (512) 438-5559 in DFPS's Licensing Division. Electronic comments may be submitted to *CCLRules@dfps.state.tx.us.* Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-553, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS

DIVISION 1. PURPOSE

40 TAC §744.101

STATUTORY AUTHORITY

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.101. What is the purpose of this chapter?

The purpose of this chapter is to set forth the minimum standards that apply to operations exclusively providing before and after-school care services as defined by the Human Resources Code (HRC) §42.002(20) and school-age program services as defined by the HRC §42.002(21) [~~HRC §42.002(22)~~].

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

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Trevor Woodruff
General Counsel
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SUBCHAPTER A. PURPOSE AND DEFINITIONS

40 TAC §§744.103, 744.105, 744.107, 744.109

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.103. What do certain pronouns mean in this chapter?

§744.105. What do certain words and terms mean in this chapter?

§744.107. What types of operations do these minimum standards apply to?

§744.109. Who is responsible for complying with these minimum standards?

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

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SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS

DIVISION 2. SCOPE

40 TAC §744.111, §744.113

The new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The new sections implement Human Resources Code §42.042.

§744.111. What types of operations do these minimum standards apply to?

The minimum standards in this chapter apply to:

(1) Day-care operations licensed to provide before and/or after-school care program services;

(2) Day-care operations licensed to provide school-age program services;

(3) Any unlicensed day-care operation that requires a license per Human Resources Code (HRC), Chapter 42, because the operation provides before and/or after-school program services; and

(4) Any unlicensed day-care operation that requires a license per HRC, Chapter 42, because the operation provides school-age program services.

§744.113. Who is responsible for complying with these minimum standards?

(a) For a licensed before or after-school program or school-age program, the permit holder must ensure compliance with all minimum standards in this chapter at all times, with the exception of those minimum standards identified for specific types of child-care programs or activities that the operation does not offer. For example, if we license the operation to offer a before and after-school program, the operation does not have to comply with minimum standards that apply to night-time-care programs; however, the operation must comply with all other minimum standards.

(b) For an unlicensed before or after-school program or school-age program that is subject to Licensing's regulation, the operation's director, owner, or person overseeing the operation or other controlling person who has the ability to influence or direct the operation's management, expenditures, or policies must ensure compliance with all minimum standards in this chapter at all times, with the exception of those minimum standards identified for specific types of child-care programs or activities that the unlicensed operation does not offer.

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

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DIVISION 3. DEFINITIONS

40 TAC §744.121, §744.123

The new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The new sections implements Human Resources Code §42.042.

§744.121. What do certain pronouns mean when used in this chapter?

The following pronouns and words have the following meanings when used in this chapter:

(1) I, my, you, and your--An applicant or permit holder, unless otherwise stated.

(2) We, us, our, and Licensing--The Licensing Division of the Texas Department of Family and Protective Services (DFPS).

§744.123. What do certain words and terms mean when used in this chapter?

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or another subchapter or unless the context clearly indicates otherwise. In addition, the following words and terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

(1) Activity space--An area or room used for children's activities, including areas separate from a group's classroom.

(2) Administrative and clerical duties--Duties that involve the administration of an operation, such as bookkeeping, enrolling children, answering the telephone, and collecting fees.

(3) Admission--The process of enrolling a child in an operation. The date of admission is the first day the child is physically present at the operation.

(4) Adult--A person 18 years old and older.

(5) Age-appropriate--Activities, equipment, materials, curriculum, and environment that are developmentally consistent with the chronological age of the child being served.

(6) Attendance--When referring to a child's attendance, the physical presence of a child at the operation on any given day or at any given time, as distinct from the child's enrollment in the operation.

(7) Before or After-school program--An operation that provides care before and after or before or after the customary school day and during school holidays, for at least two hours a day, three days a week, to children who attend pre-kindergarten through grade six.

(8) Caregiver--A person who is counted in the child/caregiver ratio, whose duties include the supervision, guidance, and protection of a child. As used in this chapter, a caregiver must meet the minimum education, work experience, and training qualifications required under Subchapter D of this chapter (relating to Personnel). A caregiver is usually an employee, but may also be a substitute, volunteer, or contractor (see Division 5 of Subchapter D (relating to Substitutes, Volunteers, and Contractors)).

(9) Certified Child-Care Professional Credential--A credential given by the National Early Childhood Program Accreditation to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(10) Certified lifeguard--A person who has been trained in life saving and water safety by a qualified instructor, from a recognized organization which awards a certificate upon successful completion of the training. The certificate is not required to use the term "lifeguard," but you must be able to document that the certificate represents the type of training described.

(11) CEUs (continuing education units)--A standard unit of measure for adult education and training activities. One CEU equals ten clock hours of participation in an organized, continuing-education experience, under responsible, qualified direction and instruction. Although a person may obtain a CEU in many of the same settings as clock hours, the CEU provider must meet the criteria established by the International Association for Continuing Education and Training to be able to offer the CEU.

(12) Child Development Associate Credential--A credential given by the Council for Professional Recognition to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(13) Clock hours--An actual hour of documented:

(A) Attendance at instructor-led training, such as seminars, workshops, conferences, early childhood classes, and other planned learning opportunities, provided by an individual/s as specified in §744.1319(a) of this title (relating to Must the training for my caregivers and the director meet certain criteria?); or

(B) Self-instructional training that was created by an individual/s as specified in §744.1319(a) and (b).

(14) Corporal punishment--The infliction of physical pain on a child as a means of controlling behavior. This includes spanking, hitting, slapping, or thumping a child.

(15) Days--Calendar days, unless otherwise stated.

(16) Employee--A person an operation employs full-time or part-time to work for wages, salary, or other compensation. Employees are all of the operation staff, including caregivers, kitchen staff, office staff, maintenance staff, the assistant director, all directors, and the owner, if the owner is ever on site at the operation or transports a child.

(17) Director--An adult you designate to have daily, on-site responsibility for your operation, including maintaining compliance with the minimum standards, rules, and laws. As this term is used in this chapter, a director may be an operation director, program director, or site director, unless the context clearly indicates otherwise.

(18) Enrollment--The list of names or number of children who have been admitted to attend an operation for any given period of time; the number of children enrolled in an operation may vary from the number of children in attendance on any given day.

(19) Entrap--A component or group of components on equipment that forms angles or openings that could trap a child's head by being too small to allow the child's body to pass through, or large enough for the child's body to pass through but too small to allow the child's head to pass through.

(20) Field trips--Activities conducted away from the operation.

(21) Food service--The preparation or serving of meals or snacks.

(22) Frequently--See the definition for "regularly or frequently present at an operation" at §745.601 of this title (relating to What words must I know to understand this subchapter?).

(23) Garbage--Waste food or items that when deteriorating cause offensive odors and attract rodents, insects, and other pests.

(24) Governing body--A group of persons or officers of a corporation or other type of business entity having ultimate authority and responsibility for the operation.

(25) Health check--A visual or physical assessment of a child to identify potential concerns about a child's health, including signs or symptoms of illness and injury, in response to changes in the child's behavior since the last date of attendance.

(26) Health-care professional--A licensed physician, licensed registered nurse with appropriate advanced practice authorization from the Texas Board of Nurse Examiners, a licensed vocational nurse (LVN), licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of the license. This does not include medical doctors or medical personnel not licensed to practice in the United States.

(27) Individual activities--Opportunities for the child to work independently or to be away from the group, but supervised.

(28) Inflatable--An amusement ride or device, consisting of air-filled structures designed for use by children, as specified by the manufacturer, which may include bouncing, climbing, sliding, or interactive play. They are made of flexible fabric, kept inflated by continuous air flow by one or more blowers, and rely upon air pressure to maintain their shape.

(29) Instructor-led training--Training characterized by the communication and interaction that takes place between the student and the instructor. The training must include an opportunity for the student to interact with the instructor to obtain clarifications and information beyond the scope of the training materials. For such an opportunity to exist, the instructor must communicate with the student in a timely fashion, including answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively interacting with students. Examples of this type of training include, classroom training, web-based on-line facilitated learning, video-conferencing, or other group learning experiences.

(30) Janitorial duties--Those duties that involve the cleaning and maintenance of the operation's building, rooms, furniture, etc. Cleaning and maintenance include such duties as cleansing carpets, washing cots, and sweeping, vacuuming, or mopping a restroom or a classroom. Sweeping up after an activity or mopping up a spill in a classroom that is immediately necessary for the children's safety is not considered a janitorial duty.

(31) Local sanitation official--A sanitation official designated by the city or county government.

(32) Multi-site operations--Two or more operations owned by the same person or entity, but the operations have separate permits. These operations may have centralized business functions, record keeping, and leadership.

(33) Natural environment--Settings that are natural or normal for all children of an age group without regard to ability or disability. For example, the primary natural group setting for a school-age child with a disability would be a play group, program, or whatever setting exists for school-age children without disabilities.

(34) Nighttime care--Care given on a regular or frequent basis to children who are starting or continuing their night sleep, or to children who spend the night or part of the night at the operation between the hours of 9:00 p.m. and 6:00 a.m.

(35) Operation--A person or entity offering a before or after-school program or school-age program that is subject to Licensing's regulation. An operation includes the building and the premises where the program is offered, any person involved in providing the program, and any equipment used in providing the program.

(36) Operation director--A director at your operation who is not supervised by a program director. An operation that has an operation director cannot have a program director or a site director.

(37) Owner--The sole proprietor, partnership, corporation, or other type of business entity who owns the operation.

(38) Permit holder--The owner of the operation that is granted the permit.

(39) Permit is no longer valid--For purposes of this chapter, a permit remains valid through the renewal process. A permit only becomes invalid when your:

(A) Operation voluntarily closes;

(B) Operation must close because of an enforcement action in Subchapter L of Chapter 745 (relating to Enforcement Actions);

(C) Permit expires according to §745.481 of this title (relating to When does my permit expire?); or

(D) Operation must close because its permit is automatically revoked according the Human Resources Code §§42.048(e), 42.052(j), or 42.054(f).

(40) Premises--Includes the operation, any lots on which the operation is located, any outside ground areas, any outside play areas, and the parking lot.

(41) Program--The services and activities provided by an operation.

(42) Program director--A director who oversees your program at multi-site operations and supervises a site director at each operation.

(43) Regular--On a recurring, scheduled basis.

(44) Regularly or frequently present at an operation--See §745.601 of this title (relating to What words must I know to understand this subchapter?).

(45) Safety belt--A lap belt and any shoulder straps included as original equipment on or added to a vehicle.

(46) Sanitize--The use of a product (usually a disinfecting solution) that is registered by the Environmental Protection Agency (EPA) which substantially reduces germs on inanimate objects to levels considered safe by public health requirements. Many bleach and hydrogen peroxide products are EPA-registered. You must follow the product's labelling instructions for sanitizing (paying attention to any instructions regarding contact time and toxicity on surfaces likely to be mouthed by children). For an EPA-registered sanitizing product or disinfecting solution that does not include labelling instructions for sanitizing (a bleach product, for example), you must follow these steps in order:

(A) Washing with water and soap;

(B) Rinsing with clear water;

(C) Soaking in or spraying on a disinfecting solution for at least two minutes. Rinsing with cool water only those items that children are likely to place in their mouths; and

(D) Allowing the surface or item to air-dry.

(47) School-age child--A child who is five years of age and older, and who will attend school at or away from the operation beginning in August or September of that year.

(48) School-age program--An operation that provides supervision and recreation, skills instruction, or skills training for at least two hours a day and three days a week to children who attend prekindergarten through grade six. A school-age program operates before or after the customary school day and may also operate during school holidays, the summer period, or any other time when school is not in session.

(49) Self-instructional training--Training designed to be used by one individual working alone and at the individual's own pace to complete the lessons or modules. Lessons or modules commonly include questions with clear right and wrong answers. Examples of this type of training include self-paced web-based training, written materials, or a combination of video or web-based training and written materials.

(50) Site director--A director who has on-site responsibility at a specific operation, but who is supervised by a program director.

(51) Special care needs--A child with special care needs is a child who has a chronic physical, developmental, behavioral, or emotional condition and who also requires assistance beyond that required by a child generally to perform tasks that are within the typical chronological range of development, including the movement of large and/or small muscles, learning, talking, communicating, self-help, social skills, emotional well-being, seeing, hearing, and breathing.

(52) State or local fire marshal--A fire official designated by the city, county, or state government.

(53) Universal precautions--An approach to infection control where all human blood and certain human bodily fluids are treated as if known to be infectious for HIV, HBV, and other blood-borne pathogens.

(54) Water activities--Related to the use of swimming pools, splashing/wading pools, sprinkler play, or other bodies of water.

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

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SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

DIVISION 1. PERMIT HOLDER RESPONSIBILITIES

40 TAC §744.201

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.201. What are my responsibilities as the permit holder?
You are responsible for the following:

(1) (No change.)

(2) Developing written personnel policies, including job descriptions, job responsibilities, and requirements;

(3) Making provisions for training that comply with Division 4, Subchapter D of this chapter (relating to Professional Development [~~Personnel~~]);

(4) - (5) (No change.)

(6) Ensuring all information related to background checks is kept confidential, as required by the Human Resources Code §40.005(d) and (e);

(7) Ensuring parents have the opportunity to visit the operation any time during your hours of operation to observe their child, program activities, the building, the premises [~~grounds~~], and the equipment without having to secure prior approval;

(8) Maintaining liability insurance, as required by the Human Resources Code[~~,~~] §42.049, if we license you to care for 13 or more children;

(9) Complying with the child-care licensing law found in Chapter 42 of the Human Resources Code, the applicable minimum standards, and other applicable rules in the Texas Administrative Code; [~~and~~]

(10) Reporting to DFPS any Department of Justice substantiated complaints related to Title III of the Americans [~~American~~] with Disabilities Act, which applies to commercial public accommodations; and [~~.~~]

(11) Ensuring the total number of children in care at the operation or away from the operation, such as during a field trip, never exceeds the licensed capacity of the operation.

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

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DIVISION 2. REQUIRED NOTIFICATIONS

40 TAC §§744.301, 744.303, 744.305

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.301. What changes regarding my operation must I notify Licensing about before making the change?

You must notify us in writing before:

(1) Changing the address or location of the operation;

(2) - (6) (No change.)

(7) Offering new services relating to minimum standards found in this chapter, such as nighttime care, transportation, or field trips;

(8) Planned closure of five consecutive days or more, during designated hours of operation, when the operation is not caring for children, with the exception of nationally recognized holidays; [~~or~~]

(9) Going out of business; or[~~.~~]

(10) There is a change in the ownership of an operation as specified in §745.437 of this title (relating to What is a change in ownership of an operation?).

§744.303. What changes must I notify Licensing of regarding the operation's designee, governing body, and directors [~~a director, or the program at my operation~~]?

You must notify us in writing no later than five days after a change is made regarding:

[~~(1) Sale or transfer of the operation's ownership (including but not limited to incorporation of an existing operation);~~]

(1) [~~(2)~~] The [~~governing body~~] designee of an operation that is not a sole proprietorship. The designee for a sole proprietorship is the sole proprietor;

(2) [~~(3)~~] The board chair for a corporate facility or other executive officer of the governing body;

(3) [~~(4)~~] The address of the operation's [~~governing body or its~~] designee or governing body; and

(4) [~~(5)~~] A director.

§744.305. What other situations require notification to Licensing?

(a) You must notify us as soon as possible, but no later than two days after:

(1) Any occurrence that renders all or part of your operation unsafe or unsanitary for a child[~~, for example loss of electricity or water, or weather related damage that prevents the safe use of the operation~~];

(2) - (6) (No change.)

(b) (No change.)

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

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DIVISION 3. REQUIRED POSTINGS

40 TAC §744.401, §744.405

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.401. What items must I post at my operation at all times?

You must post the following items:

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

(5) The activity plan for each group of children, if required by §744.2005 of this title (relating to Must caregivers have written activity plans?);

(6) [~~(5)~~] The daily menu, if applicable, including all snacks and meals prepared or served by the operation;

(7) [~~(6)~~] The Licensing *Parent Notification Poster;*

(8) [~~(7)~~] Telephone numbers specified in §744.405 of this title (relating to What telephone numbers must I post and where must I post them?);

(9) [~~(8)~~] A list of each child's food allergies that require an emergency plan, as specified in §744.2669 of this title (relating to When must I have a food allergy emergency plan for a child?); and

(10) [~~(9)~~] Any other Licensing notices with specific instructions to post the notice.

§744.405. What telephone numbers must I post and where must I post them?

(a) You must post the following telephone numbers:

(1) 911 or, if 911 is not available in your area, you must post the telephone numbers for:

(A) - (C) (No change.);

(2) (No change.)

(3) The Texas Abuse and Neglect Hotline (1-800-252-5400) [~~DFPS child abuse hotline~~];

(4) The local [~~Nearest~~] Licensing office telephone number [~~and address~~]; and

(5) The operation's telephone number, [~~operation~~] name, and address[~~, and telephone number~~].

(b) (No change.)

(c) If you use cellular phone service at your operation, you must ensure dialing 911 directs emergency personnel to the address or location of your operation [~~location~~].

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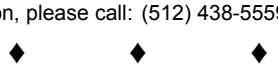

DIVISION 4. OPERATIONAL POLICIES

40 TAC §§744.501, 744.503, 744.505

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.501. What written operational policies must I have?

You must develop written operational policies and procedures that at a minimum address each of the following:

(1) (No change.)

(2) Procedures for the release of children;

(3) (No change.)

(4) Procedures for dispensing medication or a statement that medication is not dispensed [~~given~~];

(5) - (6) (No change.)

(7) Discipline and guidance that is consistent with Subchapter G of this title (relating to Discipline and Guidance). A copy of Subchapter G may be used for your discipline and guidance policy, unless you use disciplinary and training measures specific to a skills-based program, as specified in §744.2109 of this title (relating to May I use disciplinary measures that are fundamental to teaching a skill, talent, ability, expertise, or proficiency?); [~~practices;~~]

(8) Suspension and expulsion of children;

(9) [~~(8)~~] Meals and food service practices;

(10) [~~(9)~~] Immunization requirements for children, including tuberculosis screening and testing if required by your regional Texas Department of State Health Services or local health authority;

[~~(10) Tuberculin testing requirements;~~]

(11) - (15) (No change.)

(16) Procedures for providing and applying, as needed, insect repellant and sunscreen, including what types will be used, if applicable;

(17) [~~(16)~~] The procedures for parents to review and discuss with the director any questions or concerns about the policies and procedures of the operation;

(18) [~~(17)~~] The procedures for parents to visit the operation at any time during your hours of operation to observe their child, program activities, and the building, the premises [~~grounds~~], and equipment without having to secure prior approval;

(19) [~~(18)~~] The procedures for parents to participate in the operation's activities;

(20) [~~(19)~~] The procedures for parents to review a copy of [~~the minimum standards and~~] the operation's most recent Licensing inspection report and how the parent may access the minimum standards online;

(21) [~~(20)~~] Instructions on how a parent may contact the local Licensing office, Texas Abuse and Neglect Hotline [~~DFPS child abuse hotline~~], and DFPS website;

(22) [~~(21)~~] Emergency preparedness plan;

(23) [~~(22)~~] Procedures for conducting health checks, if applicable; and

(24) [~~(23)~~] Vaccine-preventable diseases for employees, unless your operation is in the home of the permit holder, the director, or a caregiver. The policy must address the requirements outlined in §744.2581 of this title (relating to What must a policy for protecting children from vaccine-preventable diseases include?).

§744.503. Must I provide parents with a copy of my operational policies?

Yes. On or before the date of admission, the parents [~~Parents~~] must sign a child-care [~~an~~] enrollment agreement or other similar documents, which must include [~~document that includes~~] at least the operational policies listed in this division [~~on or before the date of admission~~]. You must keep this signed document in the child's record or at least one for each family, if siblings are enrolled at the same time.

§744.505. What must I do when I change an operational policy or an item in the child-care enrollment agreement?

When you change an operational policy or your child-care enrollment agreement, you [~~You~~] must notify:

(1) Your employees of any changes; and

(2) The parents in writing of any changes [~~to your operational policies and enrollment agreement~~]. At least one copy of the updated operational policies or child-care enrollment agreement must be signed and dated for each family and kept [~~. You must keep the updated information~~] in the child's record.

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40 TAC §744.507

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.507. Must I provide a copy of my operational policies to my employees?

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

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SUBCHAPTER C. RECORD KEEPING

DIVISION 1. RECORDS OF CHILDREN

40 TAC §§744.603, 744.605, 744.613, 744.615, 744.623, 744.627

The amendments and new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendments and new sections implement Human Resources Code §42.042.

§744.603. What records must I have for children in my care and how long must I keep them?

(a) You must maintain the following records for each child enrolled in your operation:

(1) A child-care [~~An~~] enrollment agreement specified in §744.503 of this title (relating to Must I provide parents with a copy of my operational policies?);

(2) Admission information as specified in §744.605 of this title (relating to What admission information must I obtain for each child?);

(3) (No change.)

(4) Tuberculosis screening and [~~Tuberculin~~] testing information, if required by your regional Texas Department of State Health Services or local health authority [~~applicable~~];

(5) Licensing *Incident/Illness Report* form, if applicable;

(6) A daily tracking system for when a child's care begins and ends [~~Sign-in and sign-out tracking information~~] as specified in §744.627 of this title (relating to Must I have a system for signing children in and out of my care?);

(7) Medication administration records, if applicable; and

(8) A copy of any health-care professional recommendations or orders for providing specialized medical assistance to the child. In some instances, minimum standards allow for a deviation from a minimum standard with written documentation from a health-care professional. You must also maintain this written documentation.

(b) (No change.)

§744.605. What admission information must I obtain for each child?

You must obtain at least the following information before admitting a child to the operation:

(1) - (7) (No change.)

(8) Permission for transportation, if provided, including any authorized pick-up and drop-off locations;

(9) - (16) (No change.)

§744.613. What immunizations must a child [~~are children~~] in my care [~~required to~~] have?

(a) Each child enrolled or admitted to your operation must meet and continue to meet applicable immunization requirements specified by the Texas Department of State Health Services (DSHS). This requirement applies to all children in care through 14 years of age. [~~as specified in 25 TAC Chapter 97, Subchapter B (relating to Immunization Requirements in Texas Elementary and Secondary Schools and Institutions of Higher Education).~~]

(b) You must maintain current immunization records for each child in your care, including any immunization exemptions or exceptions.

(c) [(b)] All [Except as otherwise provided in this division, all] immunizations required for the child's age must be completed by the date of admission, unless:[.]

(1) The child is exempt or excepted from an immunization, and you verify the exemption or exception by the date of admission; or

(2) The child is homeless or in foster care and is provisionally admitted for up to 30 days because evidence of immunization is not available. You should immediately refer the child to an appropriate health-care professional to obtain the required immunizations. The DSHS rule at 25 TAC §97.66 (relating to Provisional Enrollment for Students) establishes the guidelines for a provisional enrollment.

§744.615. What exemptions or exceptions are there concerning immunization requirements?

(a) A child may be exempt from immunization requirements for a medical reason or reason of conscience, including a religious belief. To claim an exemption, the person applying for the child's admission must meet criteria specified by the Department of State Health Services (DSHS) rule at 25 TAC §97.62 (relating to Exclusions from Compliance).

(b) For some diseases, a child who previously had a disease and is accordingly naturally immune from it may qualify for an exception to the immunization requirements for the disease. To claim this exception, the person applying for the child's admission must meet the criteria specified by the DSHS rule at 25 TAC §97.65 (relating to Exceptions to Immunization Requirements).

§744.623. What documentation is acceptable for immunization records?

Acceptable documentation includes:

(1) A signed statement from the child's parent that the child's immunization record is current and on file at the pre-kindergarten or school that the child attends. The statement must be dated and include the name, address, and telephone number of the pre-kindergarten or school listed in the statement; [or]

(2) An official immunization record generated from a state or local health authority, such as a registry, a record received from school officials, including a record from another state, or the health passport for a child in the conservatorship of DFPS, so long as the records includes:

(A) The child's name and date of birth;

(B) The type of vaccine and number of doses; and

(C) The month, day, and year the child received each vaccination; or

(3) An official immunization record or photocopy, such as from a doctor's office, that includes:

(A) The child's name and date of birth;

(B) The type of vaccine and number of doses;

(C) The month, day, and year the child received each vaccination; and

(D) The signature (including a rubber stamp or electronic signature) of the health-care professional who administered the vaccine, or another health-care professional's documentation of the immunization as long as the name and address of the health-care professional that administered the vaccine is documented.

[(2) An official immunization record generated from a state or local health authority, such as a registry, or a record received from school officials including a record from another state, that includes the child's name and birth date; the number of doses and vaccine type; the month, day, and year the child received each vaccination; and the signature or stamp of the physician or other health-care professional who administered the vaccine.]

§744.627. Must I have a system for signing children in and out of my care?

(a) Yes. You must have a tracking system for [tracking] each child coming and going from your operation throughout the day. This tracking system must include the name of each child;[,] the date, time of arrival, and time of departure;[,] and the employee or parent's initials or other unique identifier [identification code].

(b) (No change.)

[(c) You must keep tracking information for the previous three months and make it available to Licensing for review upon request.]

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40 TAC §§744.615, 744.617, 744.619, 744.621

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.615. Are there exemptions for immunization requirements?

§744.617. Where can I find more information on immunizations?

§744.619. When must I have the child's immunization record on file?

§744.621. May I admit a child who is not current on immunizations?

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DIVISION 2. RECORDS OF ACCIDENTS AND INCIDENTS

40 TAC §744.703

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.703. Where can I get a copy of Licensing's Incident/Illness Report form?

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

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40 TAC §744.705

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.705. Must someone from my operation sign the Incident/Illness Report form?

Yes. After the caregiver completes the form, the [~~The~~] director of the operation or, if the director is not available, the person designated to be in charge of the operation must sign and date the completed report.

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DIVISION 3. RECORDS THAT MUST BE KEPT ON FILE AT THE OPERATION

40 TAC §744.801, §744.803

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.801. What records must I keep at my operation?

You must maintain and make the following records available for our review upon request, during your hours of operation. Paragraphs (13), (14), and (15) [~~(18), (19), and (20)~~] of this section are optional, but if provided, allow Licensing to avoid duplicating the evaluation of standards that have been evaluated by other state agencies within the past year:

(1) (No change.)

(2) Personnel and training records[~~, unless on file at a central administrative location~~];

(3) (No change.)

(4) Attendance records or time sheets listing all days and hours worked for each employee [~~employees~~];

[~~(5) Children's program activity plans for each age group in care for more than four hours per day;~~]

(5) [~~(6)~~] Verification of liability insurance or notice of unavailability, if applicable;

[~~(7) Proof of request for all background checks required by Chapter 745, Subchapter F of this title (relating to Background Checks);~~]

[~~(8) Daily menus for food prepared or served by the operation;~~]

(6) [~~(9)~~] Medication records, if applicable;

(7) [~~(10)~~] Playground maintenance checklists;

(8) [~~(11)~~] Pet vaccination records, if applicable;

(9) [~~(12)~~] Safety [~~Fire safety~~] documentation for emergency drills, fire extinguishers, and smoke detectors;

[~~(13) Most recent Licensing inspection report, letter, or notice requiring posting;~~]

(10) [~~(14)~~] Most recent fire inspection report, including any written approval from the fire marshal to provide care above or below ground level, if applicable;

(11) [~~(15)~~] Most recent sanitation inspection report, if applicable;

(12) [~~(16)~~] Most recent gas inspection report, if applicable;

(13) [~~(17)~~] Most recent Department of State Health Services' immunization compliance review form, if applicable;

(14) [~~(18)~~] Most recent Texas Department of Agriculture Child and Adult Care Food Program (CACFP) report, if applicable;

(15) [~~(19)~~] Most recent local workforce board Child-Care Services contractor inspection report, if applicable;

(16) [~~(20)~~] Record of pest extermination, if applicable; and

[~~(21) Written approval from the fire marshal to provide care above or below ground level, if applicable; and~~]

(17) [~~(22)~~] A daily tracking system for [~~System to track~~] when a child's care begins and ends as specified in §744.627 of this title (relating to Must I have a system for signing children in and out of my care?) [~~daily~~].

§744.803. How long must I keep [~~these~~] records at my operation?

(a) If you are required to post or keep a record in this chapter, you must keep the record at your operation for at least three months from the date the record was created unless otherwise stated. [~~You must keep records at the operation for at least three months from the date the record was created, unless otherwise stated in this chapter.~~]

(b) You must keep training records for each current director and caregivers [~~caregiver~~] for at least the current and last full training year.

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DIVISION 4. PERSONNEL RECORDS

40 TAC §744.903, §744.905

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.903. What additional personnel records must I maintain for a director?

§744.905. Must I maintain attendance records or record of hours worked on my employees?

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

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40 TAC §744.909

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.909. May Licensing access my personnel records?

Yes. Licensing staff must be given immediate access to all personnel records that document compliance with minimum standards. You must allow Licensing to photograph, copy, or scan [~~photocopy~~] these records if requested.

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

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SUBCHAPTER D. PERSONNEL

DIVISION 1. DIRECTOR

40 TAC §§744.1001, 744.1003, 744.1015, 744.1017, 744.1023, 744.1029, 744.1035, 744.1037, 744.1051, 744.1053, 744.1055

The amendments and new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendments and new sections implement Human Resources Code §42.042.

§744.1001. Am I required to have a director for my operation?

(a) You are required to designate an adult that has the daily, on-site responsibility for your operation, including maintaining compliance with the minimum standards and Licensing laws. [~~You must notify Licensing of changes in directors as specified in §744.303 of this title (relating to What changes must I notify Licensing of regarding the governing body, a director, or the program at my operation?).~~]

(b) There are three types of recognized directors in a before and after-school or school-age program:

(1) (No change.)

(2) A program director, who oversees your program at multi-site [~~multiple~~] operations and supervises a site director at each operation;

(3) (No change.)

(c) (No change.)

§744.1003. If I have multiple operations, must I designate a director for each operation?

(a) If you have multi-site [~~multiple~~] operations [~~under the same governing body~~], you must designate a director at each operation. However, a site director may share his responsibilities at an operation with a program director, provided the operation maintains substantial compliance with minimum standards and other relevant law.

(b) A program director may supervise no more than:

(1) Nine site directors at multi-site [~~multiple~~] before and after-school care programs; or [~~operated by the same governing body.~~]

(2) Five site directors at multi-site school-age [~~multiple school age~~] programs or at a combination of school-age [~~school age~~] programs and before and after-school programs [~~operated by the same governing body~~].

§744.1015. What qualifications must an operation director or a program director meet?

[~~(a)~~] Except as otherwise provided in this division, an operation director or program director must be at least 21 years of age, have a high school diploma or its equivalent, and meet one of the following combinations of education and experience:
Figure: 40 TAC §744.1015
[~~Figure: 40 TAC §744.1015(a)~~]

~~[(b) Options (4) and (6) in subsection (a) of this section require periodic renewal for the director to remain qualified.]~~

§744.1017. What qualifications must a site director meet?

(a) - (b) (No change.)

(c) A site director may complete the required education during the [~~his~~] first 90 days of employment, if:

(1) The site director completed at least half of the required education prior to beginning work [~~his current employment~~] as the site director; and

(2) You provide Licensing a written plan describing the oversight the program director will be providing the site director until the required education is completed. If applicable, the plan must include the sharing of director responsibilities as [~~The written plan~~] required in §744.1005(b) of this title (relating to What are the director's responsibilities?) [~~includes appropriate program director oversight until the required education is completed~~].

§744.1023. Can Licensing verify whether someone has sufficient experience?

Yes. To determine whether a person has sufficient experience to qualify as a director, we may, at our own discretion, verify the person's child-care [~~your~~] experience and substitute child-care experience via the Internet, telephone or mail contact with previous employer(s), or through our records.

§744.1029. What documentation must I provide to Licensing to show that my director has an acceptable child development and management education?

If requested by Licensing, you must provide original transcripts and supporting documentation, such as a credit course catalog description or a course syllabus or outline, so that Licensing may determine whether the course is recognized as child development or management.

§744.1035. May clock hours or CEUs (continuing education units) [~~(CEUs)~~] be substituted for any of the educational requirements [~~in any of the options specified~~] in this division?

(a) Clock [~~You may only substitute clock~~] hours or CEUs may only be substituted for the required credit hours in child development and management.

(b) [~~You may substitute~~] 50 clock hours or five CEUs may only be substituted for every [~~each~~] three college credit hours required in child development and/or management.

(c) The documentation to verify the clock hours or CEUs must be as specified in §744.1331 of this title (relating to What documentation must I provide to Licensing to verify that training requirements have been met?).

§744.1037. What additional [~~kind of~~] documentation must I submit to Licensing to show my director is qualified and when must I submit it?

(a) In addition to showing that your director meets the minimum qualifications for an employee (and minimum qualifications for a caregiver, if applicable), you [~~You~~] must submit the following for each director at your operation:

(1) (No change.)

~~[(2) A completed Licensing *Request for Criminal History and Central Registry Check* form or proof a background check request was made online;]~~

~~[(3) A notarized Licensing *Affidavit for Applicants for Employment* form;]~~

(2) [~~(4)~~] A completed Licensing *Governing Body/Director Designation* form; and

(3) [~~(5)~~] An original and current Licensing *Director's Certificate* form, or an original college transcript or original training certificates which verify the educational requirements; and complete dates, names, addresses, and telephone numbers which support the required experience. Original letters may be substituted for training certificates, provided they include the same information as specified in §744.1331 of this title (relating to What documentation must I provide to Licensing to verify that training requirements have been met?).

(b) You must submit the information to us:

(1) As part of a new application for a permit; or [~~and~~]

(2) Within five [~~ten~~] days of designating a new operation director, program director, or site director.

§744.1051. Will a [~~the~~] director's certificate expire?

(a) An operation [~~The~~] director's certificate or program director's certificate will expire [~~have an expiration date,~~] if the operation director or program director was qualified under [~~§744.1015(a)~~] options (4) or (6) of Figure: 40 TAC §744.1015 of this title (relating to What qualifications must an operation director or a program director meet?). Otherwise, an operation director's certificate and a program director's certificate [~~the Licensing *Director's Certificate*~~] will not expire.

(b) A site director's certificate will not expire.

§744.1053. How often must an expiring certificate be renewed?

If an operation director or program director qualifies under [~~you qualify under §744.1015(a),~~] options (4) or (6) of Figure: 40 TAC §744.1015 of this title (relating to What qualifications must an operation [~~the~~] director or program director meet?), the operation director or program director [~~you~~] must maintain the [~~your~~] credential according to the issuing organization's or educational institution's requirements. The director with the certificate [~~You~~] must submit to us a copy of a letter or other documentation confirming the credential is current before we can renew the [~~your~~] *Director's Certificate.*

§744.1055. What happens if my operation director's or program director's credential expires [~~I do not submit the documentation confirming the credential is current~~]?

We will give you a deadline for your operation director or program director to submit the required documentation or for you to designate another qualified director. If your operation director or program director allows the certificate to expire without submitting the required documentation, then your operation will [~~and~~] no longer meet the minimum standards [~~meets requirements~~] for that [~~a center~~] director position[~~, you violate minimum standards~~].

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

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40 TAC §§744.1019, 744.1029, 744.1031, 744.1033, 744.1039, 744.1041

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.1019. Are any directors exempt from the qualifications?

§744.1029. What are clock hours?

§744.1031. Must the trainer or provider of clock hours meet specific criteria?

§744.1033. What are CEUs?]

§744.1039. What documentation must I have to prove that the person received the clock hours or CEUs?

§744.1041. What documentation must I provide to Licensing to show that my director has acceptable child development and management education?

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DIVISION 2. EMPLOYEES AND CAREGIVERS

40 TAC §744.1101, §744.1111

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.1101. What is the difference between an employee and a caregiver?

§744.1111. What does Licensing mean by the term "high school equivalent"?

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

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40 TAC §§744.1103, 744.1105, 744.1107

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.1103. What minimum qualifications must each of my employees meet?

Each employee [~~who is regularly or frequently present while children are in care~~] must:

(1) (No change.)

(2) Have a current record of a tuberculosis examination (TB), showing the employee is [~~he is~~] free of contagious TB, if required by the Texas Department of State Health Services or local health authority;

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

§744.1105. What additional minimum qualifications must each of my caregivers meet?

Except as otherwise provided in this division, each caregiver [~~employee counted in the child/caregiver ratio~~] must comply with minimum standards for employees and must:

(1) (No change.)

(2) Have a:

(A) (No change.)

(B) High school equivalent, including documentation: [~~or~~]

(i) Of a program recognized by the Texas Education Agency or other public educational entity in another state, which offers similar training on reading, writing, and math skills taught at the

high school level, such as a General Educational Development (GED) certificate; or

(ii) That verifies home-schooling that adequately addressed basic competencies necessary for the person to obtain a high-school diploma or GED, including basic reading, writing, and math skills; or

(C) (No change.)

(3) (No change.)

§744.1107. Under what circumstances may I employ a person under the age of 18 or a person who does not have a high school diploma or equivalent as a caregiver?

(a) You may employ a 16 or 17-year-old who has a high school diploma or its equivalent and count the person in the child/caregiver ratio, provided that:

(1) You don't leave the person alone with sole responsibility for or in charge of an individual child, a group of children, or the operation [~~or a group of children~~];

(2) (No change.)

(3) The person has completed a child-care-related career program, which:

(A) The Texas Education Agency (including a charter school), the Texas Private School Accreditation Commission, other similar educational entity in another state, or federal agency approves; or

(B) A home-school approves, and the person completes the eight hours of pre-service training before being placed in a room with children. [~~the Texas Education Agency or another state or federal agency approves.~~]

(b) You may employ a 16-,17-, or 18-year- old who attends high school but has not graduated and count the person in the child/caregiver ratio, provided that:

(1) You do not leave the person alone with sole responsibility for or in charge of an individual child, a group of children, or the operation;

(2) The person works in the same room with and is supervised by a caregiver qualified under §744.1105 [~~of this title~~];

(3) The person is currently enrolled in or has completed a child-care-related career program, which: [~~that~~]

(A) The [~~the~~] Texas Education Agency (including a charter school), the Texas Private School Accreditation Commission, other similar educational entity in [~~or~~] another state, or federal agency approves; or [~~and~~]

(B) A home-school approves, and the person completes the eight hours of pre-service training before being placed in a room with children;

(4) The person is expected to obtain a high school diploma or equivalent.

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DIVISION 3. GENERAL RESPONSIBILITIES FOR PERSONNEL

40 TAC §744.1203

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.1203. What additional responsibilities do my caregivers [~~counted in the child/caregiver ratio~~] have?

In addition to the responsibilities for employees specified in this division, caregivers [~~counted in the child/caregiver ratio~~] must:

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

(6) Be free from activities not directly involving the teaching, care, and supervision of children, such as:

(A) Administrative and clerical duties [~~functions~~] that take the caregiver's attention away from the children;

(B) (No change.)

(C) Janitorial duties[~~, such as mopping, vacuuming, and cleaning restrooms. Sweeping up after an activity or mopping up spills may be necessary for the children's safety and are not considered janitorial duties~~]; and

(D) Personal use of electronic devices, such as cell phones, MP3 players, tablets, and video games;

(7) Interact [~~routinely~~] with children in a positive manner;

(8) - (11) (No change.)

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DIVISION 4. PROFESSIONAL DEVELOPMENT

40 TAC §744.1301, §744.1327

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.1301. What training must I ensure that my employees have?

§744.1327. What is self-instructional and instructor-led training?

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

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40 TAC §§744.1301, 744.1315, 744.1317, 744.1319, 744.1321, 744.1325

The amendments and new sections are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendments and new sections implement Human Resources Code §42.042.

§744.1301. What training must I ensure that my employees and caregivers have?

You must make sure that employees and caregivers have the training required in the following chart:
Figure: 40 TAC §744.1301

§744.1315. Who must have first-aid and CPR training?

(a) - (c) (No change.)

(d) CPR [~~and first-aid~~] training must not be obtained through self-instructional training.

§744.1317. What additional training must an employee [~~a person~~] have in order to transport a child in care?

(a) An employee [~~or owner~~] must complete two hours of annual training on transportation safety in order to transport a child whose chronological or developmental [~~development~~] age is younger than nine years old. This training is in addition to other required training hours.

(b) The employee [~~person~~] must obtain these two hours of transportation safety training prior to transporting children.

§744.1319. Must the training for my caregivers and the director meet certain criteria?

(a) Training may include clock hours or CEUs provided by:

(1) A training provider registered with the Texas Early Childhood Professional [~~Care and Education Career~~] Development System Training [~~System's Texas Trainer~~] Registry, maintained by the Texas Head Start State Collaboration Office;

(2) - (5) (No change.)

(6) A person who has at least two years of experience working in child development, a child development program, early childhood education, a childhood education program, or a Head Start or Early Head Start program and:

(A) Has a current [~~been awarded a~~] Child Development Associate (CDA) credential; or

(B) (No change.)

(b) (No change.)

[~~(c) Self-instructional training may not be used for CPR or first-aid certification.~~]

(c) [~~(d)~~] All training, including instructor-led and self-instructional training, must include:

(1) Specifically stated learning objectives;

(2) A curriculum, which includes experiential or applied activities;

(3) An evaluation/assessment tool to determine whether the person has obtained the information necessary to meet the stated objectives; and

(4) A certificate of successful completion from the training source.

§744.1321. Does Licensing approve training resources or trainers for training hours?

No. We do not approve or endorse training resources or trainers for training hours. But you must [~~You should, however,~~] ensure you and your employees receive [~~relevant~~] training that:

(1) Meets the criteria specified in §744.1319 of this title (relating to Must the training for my caregivers and the director meet certain criteria?);

(2) Is relevant to the [~~from reliable resources, in~~] topics specified in this division;[~~,~~] and

(3) The [~~that~~] participants receive original documentation of completion, as specified in this division.

§744.1325. If I hire a caregiver or a director that received training at another operation, may these hours count towards the annual training requirement at my operation?

If the caregiver or director is able to provide documentation of training, as specified in §744.1331 of this title (relating to What documentation must I provide to Licensing to verify that training requirements have been met?), obtained from another child day-care [~~child-day care~~] operation that we regulate within two months before coming to work for your operation, this training may apply toward the annual training requirement. [~~If you apply this training to the annual training requirement, you must adjust the annual training year due dates for this person accordingly.~~]

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DIVISION 5. VOLUNTEERS, SUBSTITUTES, AND PERSONS UNDER CONTRACT

40 TAC §744.1401, §744.1403

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.1401. With what minimum standards must substitutes comply?
§744.1403. With what minimum standards must volunteers or any person under contract with the operation comply?

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DIVISION 5. SUBSTITUTES, VOLUNTEERS, AND CONTRACTORS

40 TAC §744.1401

The new section is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The new section implements Human Resources Code §42.042.

§744.1401. What minimum standards must substitutes, volunteers, or persons under contract with my operation comply with?

(a) For purposes of this rule:

(1) Persons under contract with your operation are "contractors"; and

(2) It does not matter if a substitute, volunteer, or contractor is paid or unpaid.

(b) Substitutes not counted in the child/caregiver ratio must comply with minimum standards that apply to employees, except as otherwise provided in this division.

(c) Volunteers and contractors who are regularly or frequently present at the operation but not counted in the child/caregiver ratio must comply with minimum standards that apply to employees.

(d) Substitutes, volunteers, and contractors who are counted in the child/caregiver ratio must comply with minimum standards that apply to employees and caregivers, except as otherwise noted in subsection (e) of this section.

(e) Volunteers, including parents, who only supplement the ratios for field trips and water activities do not have to comply with the minimum standards that apply to employees and caregivers, but they do have to comply with the relevant minimum standards in Subchapter E of this chapter relating to (Child/Caregiver Ratios and Group Sizes).

(f) Substitutes, volunteers, and contractors who do not meet caregiver qualifications must never be left alone with children.

(g) All substitutes, volunteers (except for those volunteers noted in subsection (e) of this section), and contractors must complete orientation before beginning the relevant duties.

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SUBCHAPTER F. DEVELOPMENTAL ACTIVITIES AND EQUIPMENT

DIVISION 1. ACTIVITIES AND ACTIVITY PLANS

40 TAC §744.2001, §744.2005

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.2001. Must caregivers provide planned activities for the children in their care?

(a) (No change.)

(b) In addition, the following activities must be included for programs where children are anticipated to be [~~who are~~] in care five or more consecutive hours in a day:

(1) - (3) (No change.)

(4) Regular meal and snack times as specified in Subchapter J of this Chapter (relating to Nutrition and Food Service) [~~§744.2403 of this title (relating to How often must I feed children in my care?)~~];

(5) (No change.)

(6) Both:

(A) Child-initiated activities, which are activities that the child chooses on the child's own initiative and that foster the child's independence. Child-initiated activities require equipment, materials, and supplies to be within the reach of a child; and

(B) Caregiver-initiated activities, which are activities that are directed or chosen by the caregiver; [~~child-initiated and caregiver-initiated activities;~~]

(7) - (8) (No change.)

(c) (No change.)

§744.2005. Must caregivers have written activity plans?

(a) You must have a written activity plan for programs with children who you anticipate to be [~~who are~~] in care for five or more consecutive hours in a day. The plan must outline the daily routines and specific activities for each group and the plan must be followed by the caregiver(s) responsible for that group.

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

[~~(d) You must post the written activity plan for each group of children as specified in §744.403 of this title (relating to When and where must these items be posted?).~~]

[~~(e) You must keep a written activity plan at your operation for at least three months. You must make them available for review by Licensing and parents upon request during your hours of operation.~~]

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

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SUBCHAPTER G. DISCIPLINE AND GUIDANCE

40 TAC §§744.2101, 744.2111, 744.2113, 744.2115

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.2101. What discipline techniques may be used with children in care?
§744.2111. Must I have a written discipline and guidance policy?
§744.2113. Must I give a copy of my written discipline and guidance policy to parents and my employees?
§744.2115. How often must I update my written discipline and guidance policy?

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40 TAC §744.2103, §744.2105

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.2103. What methods of discipline and guidance may a caregiver use?

(a) Each disciplinary measure must:

(1) Be consistent with your policies and procedures;

(2) Not be physically or emotionally damaging to the child;

(3) Be appropriate to the child's age and level of understanding; and

(4) Be appropriate to the incident and severity of the behavior demonstrated.

(b) A caregiver may only use positive methods of discipline and guidance that encourage self-esteem, self-control, and self-direction, which include at least the following:

(1) Using praise and encouragement of good behavior instead of focusing only upon unacceptable behavior;

(2) Reminding a child of behavior expectations daily by using clear, positive statements;

(3) Redirecting behavior using positive statements; and

(4) Using brief supervised separation or time out from the group, when appropriate for the child's age and development, which is limited to no more than one minute per year of the child's age.

§744.2105. What types of discipline and guidance or punishment are prohibited?

There must be no harsh, cruel, or unusual treatment of any child. The following types of discipline and guidance are prohibited:

(1) - (7) (No change.)

(8) Placing a child in a locked or dark room, bathroom, or closet [~~with the door closed~~]; and

(9) (No change.)

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SUBCHAPTER H. NAPTIME

DIVISION 1. NAPTIME

40 TAC §744.2207, §744.2211

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.2207. Must I provide an alternative activity for those children who cannot sleep?

Yes. You must allow each child who is awake after resting or sleeping for 30 minutes [~~one hour~~] to participate in an alternative, quiet activity until the nap/rest time is over for the other children.

§744.2211. May I lower the lighting in [~~darken~~] the room while children are sleeping?

Yes. You may lower the lighting, provided there is adequate lighting to allow visual supervision of all children in the group at all times. Lighting in a room is adequate if a person's eyes do not need to adjust for the person to be able to see upon entering the room.

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SUBCHAPTER I. FIELD TRIPS

40 TAC §744.2305

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.2305. Must I have additional caregivers present to take children on a field trip?

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SUBCHAPTER J. NUTRITION AND FOOD SERVICE

40 TAC §§744.2409, 744.2411, 744.2413

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.2409. May parents provide meals and/or snacks for their children instead of my operation providing these?

(a) - (c) (No change.)

(d) You must ensure [~~meals and~~] snacks provided by a parent and shared with other children meet the needs of children who require special diets.

§744.2411. How should my operation meet the needs of children who require special diets or do not want to eat foods the operation serves [~~we serve~~]?

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

§744.2413. Can I make substitutions and/or rotate the [~~Must I post and maintain~~] daily menus?

Yes:[~~. When children are in care for five or more consecutive hours per day, you must:~~]

[~~(1) Post daily menus showing all meals and snacks prepared and served by the operation where parents and others can see them as specified in §744.403 of this title (relating to When and where must these items be posted?);~~]

(1) [~~(2)~~] [~~Keep a record of any substitutions made.~~] Substitutions [~~must be~~] of comparable food value may be made to the daily menu, but you must keep a record of any substitutions; and

[~~(3) Date menus and keep copies for review at least the previous three months; and~~]

(2) [~~(4)~~] You may [~~If you~~] rotate menus, but you must keep a record of which menu was used for each date.

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SUBCHAPTER K. HEALTH PRACTICES
DIVISION 1. ENVIRONMENTAL HEALTH

40 TAC §§744.2501, 744.2505, 744.2515, 744.2519, 744.2520

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendments and new section implement Human Resources Code §42.042.

§744.2501. Must my operation have an annual sanitation inspection?

(a) - (b) (No change.)

(c) If an inspection is not available from a local sanitation official, you must:

(1) Obtain documentation from a [~~state or~~] local sanitation official or county judge stating that an inspection is not available; and

(2) (No change.)

§744.2505. Do I have to make corrections called for in the report?

Yes, [~~If required,~~] you must comply with corrections, restrictions, or conditions specified by the inspector in the sanitation report, letter, or checklist.

§744.2515. When must employees wash their hands?

Employees must wash their hands:

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

(6) After handling or cleaning bodily [~~body~~] fluids, such as after tending sores and wiping noses, mouths, or bottoms[~~, and tending sores~~];

(7) - (9) (No change.)

(10) After eating, drinking, or smoking; [~~and~~]

(11) After using any cleaners or toxic chemicals; and[~~.~~]

(12) After removing gloves.

§744.2519. How must children and employees wash their hands?

Children and employees must wash their hands with soap and running water. [~~Pre-moistened towelettes or wipes and waterless hand cleaners are not a substitute for soap and running water.~~]

§744.2520. May I use hand sanitizer as a substitute for washing hands?

You may use hand sanitizers as a substitute for washing hands under the following conditions:

(1) You do not use hand sanitizers to wash hands that are visibly dirty or greasy or have chemicals on them, unless you are away from the classroom and soap and water are not available for hand washing;

(2) You store hand sanitizers out of the reach of children when not in use;

(3) You follow the labelling instructions for the appropriate amount to be used and for how long the hand sanitizer needs to remain on the skin surface to be effective; and

(4) Children have adult supervision when using hand sanitizers.

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

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40 TAC §744.2509, §744.2511

The repeals are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.2509. What does Licensing mean when it refers to "sanitizing"?
§744.2511. What is a disinfecting solution?

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

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DIVISION 2. TOILETING

40 TAC §744.2551

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commis-

sioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.2551. What steps must caregivers follow for assisting children with toileting?

Caregivers must:

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

(5) Place soiled [~~and wet~~] clothing in a tied, [~~individual~~] sealed, or otherwise closed plastic bag [~~bags~~].

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DIVISION 3. ILLNESS AND INJURY

40 TAC §§744.2571, 744.2573, 744.2576, 744.2577

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendments and new section implement Human Resources Code §42.042.

§744.2571. What type of illness would prohibit a child from attending the operation [~~being admitted for care~~]?

You must not allow an ill child to attend your operation [~~admit an ill child for care~~] if one or more of the following exists:

(1) The illness prevents the child from participating comfortably in the operation [~~program~~] activities, including outdoor play;

(2) (No change.)

(3) The child has one of the following[~~,~~] (unless a medical evaluation by a health-care professional indicates that you can include the child in your operation's [~~the program's~~] activities):

(A) An oral [~~Oral~~] temperature above 101 degrees that is [~~and~~] accompanied by behavior changes or other signs or symptoms of illness;

(B) A tympanic (ear) temperature above 100 degrees that is accompanied by behavior changes or other signs or symptoms of illness. [~~Rectal temperature above 102 degrees and accompanied by behavior changes or other signs or symptoms of illness~~];

(C) An axillary (armpit) [~~Armpit~~] temperature above 100 degrees that is [~~and~~] accompanied by behavior changes or other signs or symptoms of illness; or

(D) (No change.)

(4) (No change.)

§744.2573. What communicable diseases would exclude a child from attending my operation?

You must follow the communicable disease exclusions required for schools as defined by the Texas Department of State Health Services (DSHS) in 25 TAC §97.7 (relating to Diseases Requiring Exclusion from Schools). [~~You can access this information from the Department of State Health Services or Licensing staff.~~]

§744.2576. When may a child who was ill return to my operation?

A child who was ill may return to your operation when:

(1) The child is free of symptoms of illness for 24 hours; or

(2) You have obtained a health-care professional's statement that the child no longer has an excludable disease or condition.

§744.2577. How should caregivers respond to an [~~critical~~] illness or injury that requires the immediate attention of a health-care professional?

For an [~~If critical~~] illness or injury that requires the immediate attention of a health-care professional [~~physician~~], you must:

(1) Contact emergency medical services (or take the child to the nearest emergency room after you have ensured the supervision of other children in the group);

(2) - (4) (No change.)

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SUBCHAPTER L. SAFETY PRACTICES

DIVISION 1. SAFETY PRECAUTIONS

40 TAC §§744.2601, 744.2603, 744.2607, 744.2609

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.2601. What safety precautions must I take to protect children in my operation?

All areas accessible to a child must be free from hazards including, but not limited to, the following:

(1) - (6) (No change.)

(7) All storage chests, boxes, trunks, or similar items with hinged lids must be equipped with a lid support designed to hold the

lid open in any position, be equipped with ventilation holes, and must not have a latch that might close and trap a child inside; [~~and~~]

(8) All bodies of water such as pools, hot tubs, ponds, creeks, birdbaths, fountains, buckets, and rain barrels must be inaccessible to all children; and

(9) All televisions must be anchored, so they cannot tip over. A television may be anchored to a rolling cart, as long as it is anchored in a way that the cart will not tip over.

§744.2603. How can I ensure the safety of the children from other persons?

(a) - (c) (No change.)

(d) People must not smoke or use tobacco products, e-cigarettes, or any type of vaporizers at your [~~the~~] operation, on the premises, on the playground, in transportation vehicles, or during field trips.

§744.2607. Are firearms or other weapons allowed at my operation?

(a) Peace officers as listed in §2.12 of the Code of Criminal Procedure and security officers commissioned by the Texas Private Security Board [~~Law enforcement officials~~] who are trained and certified to carry a firearm on duty may have firearms and [~~or~~] ammunition on the premises of the operation.

(b) For all other persons, firearms, hunting knives, bows and arrows, and other weapons are prohibited on the premises of the operation, unless the operation is also your home [~~residence~~] and except as allowed under subsection (e) of this section.

(c) - (e) (No change.)

§744.2609. May I have [~~other~~] toys or other types of equipment that explode [~~explodes~~] or shoot [~~shoots~~] things?

No. Toys that explode or that shoot things, such as caps, BB guns, darts, or fireworks are prohibited as toys at the operation and on field trips [~~for children in both residential and non-residential locations~~]. Toys that explode or shoot things kept on the premises of an operation located in your home must remain in a locked cabinet inaccessible to any child during your hours of operation.

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DIVISION 2. MEDICATION AND MEDICAL ASSISTANCE

40 TAC §744.2651

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.2651. What does "medication" refer to in this division?

In this division, medication means:

(1) (No change.)

(2) A non-prescription medication, excluding topical ointments such as insect repellent and sunscreen.

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DIVISION 3. ANIMALS AT THE OPERATION

40 TAC §744.2701

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.2701. What steps must I take to have animals at my operation and/or on a field trip?

If you choose to have animals on the premises of your operation and/or on a field trip, you must:

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

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SUBCHAPTER M. PHYSICAL FACILITIES
DIVISION 1. INDOOR SPACE REQUIREMENTS

40 TAC §744.2905, §744.2907

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.2905. Do these indoor activity space requirements apply to my operation if it was licensed before September 1, 2010?

(a) Yes, the only exemption is for operations [~~Indoor activity space requirements for operations licensed before September 1, 2010, vary based on the following:~~]

[~~(1) Operations licensed as a day-care center before August 31, 1997, must have at least 30 square feet of indoor activity space for each child you are licensed to serve;~~]

[~~(2) Operations licensed as a day-care center or child-care center between August 31, 1997, and September 1, 2010, must have at least 30 square feet of indoor activity space for each child you are licensed to serve;~~]

[~~(3)~~] [~~Operations~~] licensed as kindergarten and nursery schools, or schools: grades kindergarten and above, before September 1, 2003. These operations[~~,~~] must have at least 20 square feet of indoor activity space for each child the operation is [~~you are~~] licensed to serve.[~~; and~~]

[~~(4) Operations licensed as a drop-in center or group day-care home before September 1, 2003, must have at least 30 square feet of indoor activity space for each child you are licensed to serve.~~]

(b) The exemption [~~exemptions~~] specified in subsection (a) of this section remains [~~remain~~] in effect until a permit issued prior to September 1, 2010, is no longer valid.

§744.2907. How does Licensing determine the indoor activity space?

(a) We determine indoor activity space by:

(1) (No change.)

(2) Rounding all measurements up to the nearest inch;

(3) Excluding single-use areas, which are areas not routinely used for children's activities, such as a bathroom, hallway, storage room, cooking area of a kitchen, swimming pool, and storage building[~~. See §744.105(42) of this title (relating to What do certain words and terms mean in this chapter?) for a definition of single-use areas~~]; and

(4) (No change.)

(b) (No change.)

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DIVISION 3. TOILETS AND SINKS

40 TAC §744.3003, §744.3007

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3003. Where must I locate the hand-washing sinks for children's use?

Hand-washing sinks must be inside the operation. Children must be able to safely and independently access the sink. Hand-washing sinks must be equipped with soap, running water, and single-use disposable towels or hot-air hand dryers. [~~Refer to Subchapter K of this chapter (relating to Health Practices) for further information on hand washing.~~]

§744.3007. Where must the toilets be located?

Toilets must be inside the operation and include toilet paper. Children must be able to safely and independently access the toilet. Toilets must be equipped for independent use by children and allow supervision by caregivers, as needed.

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DIVISION 4. TELEPHONE

40 TAC §744.3051

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3051. Must I have a telephone at my operation?

[~~(a)~~] Yes. You must have:

(1) A telephone at your operation with a listed telephone number; or

(2) Access to a telephone located in the same building for use in an emergency and where a person is available to:

(A) Receive incoming calls to the operation;

(B) Immediately transmit messages regarding children in care to operation caregivers; and

(C) Make outgoing calls for the operation as necessary.

[~~(b) The telephone must not be a coin-operated pay phone.~~]

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

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SUBCHAPTER N. INDOOR AND OUTDOOR ACTIVE PLAY SPACE AND EQUIPMENT DIVISION 1. MINIMUM SAFETY REQUIREMENTS

40 TAC §§744.3101, 744.3107, 744.3109, 744.3111

The amendments and new section are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment and new section implement Human Resources Code §42.042.

§744.3101. What minimum safety requirements must my active play equipment meet?

(a) Indoor and outdoor active play equipment used both at and away from the operation must be safe for the children as follows:

(1) (No change.)

(2) The design, scale, and location of the equipment must be used according to the manufacturer's instructions [~~appropriate for the body size and ability of the children using the equipment~~];

(3) - (10) (No change.)

(11) If you are licensed to provide only care in a public school facility operated by the local independent school district, you must inform parents in writing at the time they enroll their child if the active play equipment [~~or space~~] you plan to use at the public school facility does not meet Licensing standards specified in this subchapter. Otherwise, children must not be allowed to use equipment that does not meet Licensing standards.

(b) (No change.)

§744.3107. Are there additional equipment restrictions for children younger than five years of age?

(a) (No change.)

(b) In addition, children younger than four years of age must not be allowed to use the following pieces of equipment at or away from the operation:

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

(3) Vertical slide poles; [~~or~~]

(4) Over-head swinging rings; or

(5) Parallel [~~and parallel~~] bars.

(c) (No change.)

§744.3109. What is the maximum height allowed for the highest designated play surface?

(a) The maximum height allowed for the highest designated play surface on active play equipment designed to be used by children is:

(1) The height that is consistent with the manufacturer's guidelines;

(2) The height that is consistent with ASTM International standards; or

(3) As follows in Figure: 40 TAC §744.3109(a)(3):
Figure: 40 TAC §744.3109(a)(3)

(b) Equipment that is fundamental to the core development of a skill, talent, ability, expertise, or proficiency, such as parallel bars and trampolines used in gymnastics programs, may exceed the maximum height allowed if:

(1) The equipment is installed and used according to manufacturer's instructions;

(2) A child's use of the equipment is supervised by trained personnel;

(3) The safety practices employed by the operation and the risks associated with the use of each type of equipment are outlined in your policies and procedures; and

(4) Parents provide written consent before children use the equipment. Written consent must be kept on file at the operation in the child's record.

§744.3111. What is the maximum height allowed for the highest designated play surface if [~~Do the height requirements apply to~~] my operation [~~if it~~] was licensed before September 1, 2010?

(a) If you were licensed [~~after September 1, 2003, and~~] before September 1, 2010, [~~and unless you meet one of the conditions specified in subsection (b) of this section,~~] the maximum height allowed for the highest designated play surface on [~~of~~] active play equipment designed to be used by children [~~allowed~~] is:

(1) Six feet for [~~equipment designed to be used by~~] children younger than [~~under the age of~~] five years old; or

(2) Eight feet for [~~equipment designed to be used by~~] children [~~ages~~] five years old and older.

(b) If your [~~An operation licensed before September 1, 2010, must comply with the equipment height requirements specified in this division if the~~] operation re-designs the existing playground or adds new playground equipment, then as the changes are made you[~~. The permit holder~~] must meet equipment height requirements specified in §744.3109 of this title (relating to What is the maximum height allowed for the highest designated play surface?) [~~this division as the changes are made~~]. You must submit a written plan for compliance to us upon request.

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40 TAC §744.3109

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.3109. What is the maximum height of the highest designated play surface allowed?

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DIVISION 3. USE ZONES

40 TAC §744.3209

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3209. How do I measure the use zone for tire swings?

(a) (No change.)

(b) The use zone specified in [~~is~~] subsection (a) of this section must not overlap any other use zone.

(c) (No change.)

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DIVISION 4. SURFACING

40 TAC §744.3251, §744.3255

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3251. What type of surfacing must I have under my active play equipment?

(a) (No change.)

(b) The height of the highest designated play surface on the equipment will determine the [~~type and~~] depth of loose materials or the attenuation rating (thickness) of the unitary materials.

§744.3255. How should outdoor loose-fill surfacing materials be installed?

(a) If you use loose-fill surfacing materials in your outdoor active play space, you must install and maintain nine inches or more of uncompressed loose-fill material in the use zones. [~~However, if you were licensed before September 1, 2010, you only have to maintain at least six inches of loose-fill surfacing materials until September 1, 2015; after which date you must maintain at least nine inches of uncompressed loose-fill surfacing materials.~~]

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

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DIVISION 6. INFLATABLES

40 TAC §744.3351

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3351. May I use inflatable active play equipment?

You [~~Yes, you~~] may use inflatable equipment both at and away from your operation if you follow these guidelines [~~as long as~~]:

(1) You use enclosed [~~Enclosed~~] inflatables (such as bounce houses or moon walks) according to the manufacturer's instructions [~~are used by one child at a time~~];

(2) You use open [~~Open~~] inflatables (such as obstacle courses, slides, or games) [~~are used~~] according to the manufacturer's label and instructions for the user; and

(3) Inflatables that include water activity also comply with all applicable requirements in Subchapter O of this title (relating to Swimming Pools, [~~and~~] Wading/Splashing Pools, and Sprinkler Play).

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

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SUBCHAPTER O. SWIMMING POOLS AND WADING/SPLASHING POOLS

40 TAC §744.3409

The repeal is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The repeal implements Human Resources Code §42.042.

§744.3409. Does having a fence relieve me of the duty to supervise children's access to the pool?

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SUBCHAPTER O. SWIMMING POOLS, WADING/SPLASHING POOLS, AND SPRINKLER PLAY

40 TAC §744.3413

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3413. Are there specific safety requirements for sprinkler play?

(a) You must ensure that no child uses sprinkler equipment on or near a hard, slippery surface, such as a concrete driveway, sidewalk, or patio.

(b) You must not leave a child alone with the sprinkler equipment.

(c) You must store sprinkler equipment and water hoses out of the reach of children [~~children's reach~~] when not in use.

(d) You must maintain your splash pad/sprinkler play area according to manufacturer's instructions.

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SUBCHAPTER P. FIRE SAFETY AND EMERGENCY PRACTICES
DIVISION 1. FIRE INSPECTION

40 TAC §744.3505

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3505. Must I make all corrections specified in the fire-inspection report?

Yes, [~~If required,~~] you must comply with all corrections, restrictions, or conditions specified by the inspector in the fire inspection report, letter, or checklist.

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DIVISION 2. EMERGENCY PREPAREDNESS

40 TAC §744.3561

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3561. Must I have an emergency evacuation and relocation diagram?

(a) (No change.)

(b) You must post an emergency evacuation and relocation diagram in each room the children use. You must post the diagram [~~plan~~] near the entrance and/or exit of the room and where children and employees may easily view the diagram.

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

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DIVISION 3. FIRE EXTINGUISHING AND SMOKE DETECTION SYSTEMS

40 TAC §§744.3605, 744.3607, 744.3619

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3605. Where must I mount fire extinguishers?

You must mount the fire extinguisher on the wall by a hanger or bracket. The top of the extinguisher must be no higher than five feet above the floor and the bottom at least four inches above the floor or any other surface. If the state or local fire marshal or the manufacturer's instructions has different mounting instructions, you must [~~may~~] follow those instructions. The fire extinguisher must be readily available for immediate use by employees and caregivers.

§744.3607. How often must I inspect and service the fire extinguisher(s)?

(a) The director or designee must inspect fire extinguisher(s) monthly. The date of the inspection and the name of the director or designee who inspects the extinguisher(s) [~~employee~~] must be recorded and kept at the operation for review during your hours of operation.

(b) (No change.)

§744.3619. How often must the smoke detectors at my operation be tested?

The director or designee must test all smoke detectors monthly. The date of the test and the name of the director or designee [~~employee~~] who does the testing must be documented and kept at the operation for review during your hours of operation.

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DIVISION 6. CARBON MONOXIDE DETECTION SYSTEMS

40 TAC §744.3757

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3757. How often must I inspect and service the carbon monoxide detection system?

(a) If you use electric or battery-operated carbon monoxide detectors[, ~~you must~~]:

(1) The director or designee must install [~~Install~~] a new battery in each battery-operated detector at least annually;

(2) The director or designee must test [~~Test~~] all detectors monthly;

(3) The [~~Document the~~] date of each monthly test, date of each installation of new batteries, and the name of the director or designee [~~employee~~] who does the [~~each testing or~~] installment of new batteries and each testing must be recorded and kept[; ~~and~~]

[~~(4)~~] [~~Keep this documentation~~] at the operation for review during your hours of operation.

(b) (No change.)

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SUBCHAPTER Q. TRANSPORTATION

40 TAC §§744.3801, 744.3805, 744.3807, 744.3817, 744.3821

The amendments are proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The amendment implements Human Resources Code §42.042.

§744.3801. What types of transportation does Licensing regulate?

We regulate all [~~any~~] transportation provided by or for the operation to children in care, including [~~but not limited to~~], transportation between the home and the school, the [~~between~~] school and the operation, the operation and home, the operation or the school and field trip locations, or the operation or the school and other drop off locations[~~, authorized by the parent~~].

§744.3805. What safety precautions must I take when loading and unloading children from the vehicle?

You must take the following precautions when loading and unloading children from any vehicle, including any type of bus:

(1) (No change.)

(2) You must not allow a child to cross a street any time [~~unless the child is accompanied by an adult anytime~~] before a child enters [~~entering~~] or exits [~~after leaving~~] a vehicle, unless the child is accompanied by an adult;

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

§744.3807. What child passenger safety seat [~~restraint~~] system must I use when I transport children?

(a) You must use a child passenger safety seat system to restrain a child when transporting the child. The restraint system must meet the federal standards for crash-tested systems as set by the National Highway Traffic Safety Administration and must be properly secured in the vehicle according to manufacturer's instructions.

(b) [~~(a)~~] You must secure each child in a rear-facing convertible child safety seat, forward-facing child safety seat, child booster seat, safety vest, harness, or a safety belt, as appropriate to the child's age, height, and weight according to manufacturer's instructions for all vehicles specified in subsection (d) of this section, unless otherwise noted in this subchapter.

[~~(b) All child passenger safety restraint systems must meet federal standards for crash-tested restraint systems as set by the National Highway Traffic Safety Administration, and must be properly secured in the vehicle according to manufacturer's instructions.~~]

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

§744.3817. Must I carry specific information and equipment in vehicles used to transport children in my care?

(a) You must have the following in each vehicle you use to transport children:

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

(3) The operation's name and telephone number and the[~~,~~] director or permit holder's name. The information must be[~~, and operation telephone number~~] in the glove compartment or clearly visible inside the passenger compartment, or the operation's name and telephone number must be clearly visible on the outside of the vehicle;

(4) - (5) (No change.)

(6) A first-aid kit as specified in Division 4 of Subchapter L (relating to First-Aid Kits) [~~§744.2753 of this title (relating to What items must each first-aid kit contain?)~~].

(b) (No change.)

§744.3821. What communications device must I have in a vehicle used for transporting children?

You must have one of the following:

(1) A communications device such as a cellular phone[~~, message pager,~~] or two-way radio; or

(2) (No change.)

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